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## Religion Lessons from Europe: Intolerant Secularism, Pluralistic Neutrality, and the U.S. Supreme Court

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# **RELIGION LESSONS FROM EUROPE: INTOLERANT SECULARISM, PLURALISTIC NEUTRALITY, AND THE U.S. SUPREME COURT**

**Antony Barone Kolenc\***

## ABSTRACT

Case law from the European Court of Human Rights demonstrates to the U.S. Supreme Court how a pluralistic neutrality principle can enrich the American society and harness the value of faith in the public sphere, while at the same time retaining the vigorous protection of individual religious rights. The unfortunate alternative to a jurisprudence built around pluralistic neutrality is the inevitability of intolerant secularism—an increasingly militant separation of religious ideals from the public life, leading ultimately to a repressive society that has no room in its government for religious citizens. The results of intolerant secularism are seen in a recent series of negative cases decided by the European Court, which illustrate how highly secularized nations can trample the fundamental rights of religious citizens for the sake of secular ideals. The Supreme Court can avoid this type of intolerance in the United States by distancing itself from the principle of strict neutrality that the Court often has repeated in its Establishment Clause cases. A better path for the Supreme Court is to emulate a series of positive cases from the European Court that demonstrate pluralistic values. These cases show the value that religion can bring to public life, and the ability of progressive

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nations to welcome religious diversity into the public square without harming individual rights. The net result of this shift in the Supreme Court's focus—without sacrificing the value and purpose of the Establishment Clause—would be to promote the cause of religious pluralism in the United States, and to enhance the dignity of the American people to live out their religious faith in the community insofar as they choose (or do not choose) to do.

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## I. INTRODUCTION

Post-Christian Europe—a secular, liberal society that is seen as increasingly faithless<sup>1</sup>—has a few lessons to teach the United States (“U.S.”) Supreme Court about the value of religion in modern society. Recent cases from the European Court of Human Rights (“European Court”) show that progressive, pluralistic nations can tolerate religion in the public sphere without doing violence to individual rights. Under the European case law, for instance, nations may spend tax dollars on church projects, display religious symbols in government buildings, and teach children about God in public schools. These types of European cases may be instructive in rethinking the U.S. Supreme Court’s Establishment Clause<sup>2</sup> jurisprudence to create a more pluralistic neutrality principle for the future.

Likewise, the European system demonstrates the dangers of an increasingly intolerant strain of secularism that tramples personal religious expression in the name of secular values. For instance, under recent secular-based rulings from the European Court, Muslim teachers cannot wear headscarves in Swiss public schools, Orthodox Jewish butchers cannot access slaughterhouses in France, Christian workers cannot claim conscience protection with regard to same-sex marriage in the United Kingdom, and Islamic women may not wear a

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<sup>1</sup> See *Christianity and Church Attendance: The Future of the World’s Most Popular Religion is African*, THE ECONOMIST (Dec. 25, 2015), <https://www.economist.com/news/international/21684679-march-christianity-future-worlds-most-popular-religion-african> (noting dismal statistics of church closings as “European priests and ministers are preaching to ever-emptier pews”); see also Justice Antonin Scalia, *Address at the 2007 Dinner at the Waldorf-Astoria*, ORD. MALTA AM. ASSOC. (Nov. 9, 2007), [https://orderofmaltaamerican.org/files/pages/0124-newsletter\\_hospitallers\\_17\\_justice\\_scalia.pdf](https://orderofmaltaamerican.org/files/pages/0124-newsletter_hospitallers_17_justice_scalia.pdf) (calling modern Europe “totally non-Christian”).

<sup>2</sup> U.S. CONST. amend. I, cls. 1-2. The first and second clauses of the First Amendment state: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” *Id.* The first portion of that sentence is known as the Establishment Clause; the remaining words are known as the Free Exercise Clause.

burqa in public in Belgium. These negative cases also can assist in adjusting the Supreme Court's religion jurisprudence so that intolerant secularism does not strangle religious liberty in the United States.

This Article argues that the Supreme Court can stay truer to constitutional principles by embracing a more moderate interpretation of the Establishment Clause—a pluralistic neutrality principle. Pluralism refers to “a state of society in which members of diverse . . . religious . . . groups maintain and develop their traditional culture . . . within the confines of a common civilization.”<sup>3</sup> In the context of the Establishment Clause, a more pluralistic neutrality principle would officially recognize the unique societal value of religion and would permit the diversity of the nation's faiths to enrich the public sphere. This Article also contends that the Supreme Court's modern interpretation of the Religion Clauses has embraced an unnecessarily strict model of neutrality, which is nurturing an intolerant secularism that harms religious freedom. These contentious topics have been debated at the Supreme Court and in the scholarly literature for decades. This Article's primary contribution to that debate is its emphasis on pluralism and its focus on European cases as a source of comparison and illumination.

Part II of this Article briefly sets forth two opening principles: (1) that religion cases from the European Court can be validly compared with the U.S. Supreme Court's religion jurisprudence, and (2) that religious freedom is critical in modern pluralistic societies. Part III argues that the Supreme Court's religion jurisprudence sometimes has embraced an overly strict form of neutrality, which naturally leads to the type of intolerant secularism seen in some European nations. Then, using recent cases from the European Court, Parts IV and V examine how the Supreme Court can avoid the European Court's acceptance of an intolerant secularism that has trampled religious freedoms in some European countries, while benefiting from a European-style pluralistic

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<sup>3</sup> *Pluralism*, MERRIAM-WEBSTER DICTIONARY (11th ed.), <https://www.merriam-webster.com/dictionary/pluralism> (last visited Aug. 25, 2017).

neutrality principle. This Article concludes that the Supreme Court should moderate its treatment of the Religion Clauses by adopting more pluralistic European sensibilities.

## II. OPENING PRINCIPLES: THE EUROPEAN COURT OF HUMAN RIGHTS AND RELIGIOUS FREEDOM

The cases decided by the United States Supreme Court and the European Court of Human Rights have been instrumental in both helping and hindering religious freedom in the United States and Europe. Part II examines why Europe is a good point of reference for the U.S. Supreme Court on this issue, and explores why religious freedom is worthy of protection as a key element in democratic societies.

### *A. The European Court of Human Rights*

Before delving into the subject matter of this Article, it is necessary to mention why comparing the case law of the U.S. Supreme Court and the European Court is a valid undertaking. Although some have questioned the propriety of the Supreme Court consulting foreign precedent,<sup>4</sup> the author of this Article has previously defended at length the validity of this practice in the area of religion and the European Court, when done within cautious limits.<sup>5</sup> In short, although cases from foreign jurisdictions are not

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<sup>4</sup> See Austen L. Parrish, Note, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2017 U. ILL. L. REV. 637 (2007); Harlan Grant Cohen, Note, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273 (2006).

<sup>5</sup> See Antony B. Kolenc, Note, *Putting Faith in Europe: Should the U.S. Supreme Court Learn from the European Court of Human Rights?*, 45 GA. J. INT'L L. & COMP. L. 1 (2016). In that article, the author presents a full explanation for why comparing the religion case law of the European Court and the U.S. Supreme Court is a valid endeavor. The author considers policy-based objections to the practice of citing foreign precedent, explores whether differences between the systems in the U.S. and Europe invalidate the comparison, and considers whether the subject matter of religion makes such comparisons futile. The author concludes that there is value in consulting the European Court's religion jurisprudence. *Id.*

binding on the Supreme Court, they may shed light on practices and problems that parallel those seen in the United States. As Justice Breyer has argued, cases that emanate from other developed democracies may “cast an empirical light on the consequences of different solutions to a common legal problem.”<sup>6</sup>

Considering the kinship of the United States and European nations, it makes sense to turn to Europe for a natural point of comparison. This is especially true of the European Court of Human Rights. Located in Strasbourg, France, the European Court provides a unique vantage point from which to view the religion issue.<sup>7</sup> It interprets the European Convention on Human Rights and Fundamental Freedoms (“ECHR”),<sup>8</sup> helping to guarantee freedom of religion across Europe. The primary source of religious freedom under the ECHR is Article 9, which states:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such

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<sup>6</sup> *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

<sup>7</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 20, 23(1), 26(1), 38, 41, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. The Court consists of one judge from each member-state of the Council of Europe, appointed to nine-year, non-renewable terms. It acts in single-judge decisions, three-judge committees, seven-judge Chambers, or a seventeen-judge Grand Chamber, and functions as both an appellate court and a trial court. *Id.*

<sup>8</sup> See generally ECHR, *supra* note 7. The ECHR—a human rights constitution—may be “the most important element in the protection of human rights in Europe.” Lord Goldsmith, *A Charter of Rights, Freedoms and Principles*, 38 COMMON MAR. L. REV. 1201, 1209 (2001).



limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>9</sup>

Article 9's approach to religion approximates much of the U.S. Supreme Court's Free Exercise Clause case law, which applies a mere rational basis scrutiny to neutral, generally applicable statutes that do not target religion.<sup>10</sup> This is similar to the European notion of affirming laws that are "necessary," such as those involving "public safety" and "public order, health or morals." Notably, Article 9 lacks an Establishment Clause; however, that does not nullify the comparisons with the Religion Clauses of the U.S. Constitution. Indeed, the European Court has developed a "neutrality principle" similar to—but more moderate than—that used by the U.S. Supreme Court in its Establishment Clause jurisprudence.<sup>11</sup> Moreover, even though it decides relatively few religion cases in its vast docket,<sup>12</sup> the European Court grapples with many of the same religion issues that confront the U.S. Supreme Court. In short, the points of similarity justify the comparison.

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<sup>9</sup> ECHR, *supra* note 7, art. 9.

<sup>10</sup> *Emp't Div. v. Smith*, 494 U.S. 872, 886 (1990).

<sup>11</sup> *See* Kolenc, *supra* note 5, at 23-24.

<sup>12</sup> From 1959 to 2009, the European Court noted 30 freedom of religion, thought, and conscience violations; however, "during that same forty-year period, the Court found some 4008 violations . . . concerning the fairness and length of proceedings." John Witte, Jr. & Nina-Louisa Arold, *Lift High the Cross?: Contrasting the New European and American Cases on Religious Symbols on Government Property*, 25 EMORY INT'L L. REV. 5, 14-15 (2011) (2d ed. Oxford Univ. Press 2010) (citing Pub. Relations Unit, *50 Years of Activity: The European Court of Human Rights – Some Facts and Figures* (2010), [http://www.echr.coe.int/Documents/Facts\\_Figures\\_1959\\_2009\\_ENG.pdf](http://www.echr.coe.int/Documents/Facts_Figures_1959_2009_ENG.pdf)); *see also* RUTH MACKENZIE, CESARE ROMANO & YUVAL SHANY WITH PHILIPPE SANDS, *THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* 35.

*B. The Unique Value of Religion and Religious Freedom*

Religion is unique among the fundamental human rights, holding a special position in Western Civilization, Europe, and the United States, in particular. Religious exercise is the nation's "first freedom," occupying a place of "preferential treatment" in the Constitution's Bill of Rights.<sup>13</sup> This noble lineage traditionally has earned religion the right to be treated with respect and protected by the state.

Various societal rationales support religion and religious freedom—most important, religion is valuable in its own right because it uniquely concerns "spiritual goods" and involves the individual's place in the universe in relation to a "divine or transcendent authority."<sup>14</sup> In other words, religion is worthy of protection for its own sake—it alone embraces the divine, spiritual dimension of humanity, catering to the universal principles that have animated human culture since the dawn of Man.<sup>15</sup> Because religion lays claim to the Divine, men and women throughout history have been willing to die for it in the face of worldly persecution. Some, no doubt, would add that people also have been willing to go to war in the name of religion; however, that fact only emphasizes why a pluralistic approach to religion and government is necessary to keep the peace in a free, democratic society.

Less religious rationales have also been put forth to support the value of religion and religious freedom: (1) a "*civic virtue rationale*" that sees religion as instilling "in citizens the moral values of traits of character necessary in a democratic social order;" (2) a "*personal autonomy rationale*" that emphasizes "the importance of religion to matters of personal choice and identity;" (3) a "*civil strife rationale*" that notes how religious freedom helps "curb the

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<sup>13</sup> *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring in the judgment).

<sup>14</sup> Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 218 (1991).

<sup>15</sup> See generally MIRCEA ELIADE, *THE SACRED AND THE PROFANE* (Willard Trask trans., Harcourt Brace Jovanovich 1987) (tracing the historical manifestations of the divine from primitive to modern times).

dissension and social conflict that issues of religion have historically provoked;” (4) a “*non-alienation rationale*” that finds in religious freedom a tool to help “citizens who adhere to minority religious faiths or to none at all . . . feel like full members of the political community;” and (5) a “*pluralism rationale*” that seeks a robust religious freedom to ensure “a diversity of faiths, thereby strengthening American pluralism.”<sup>16</sup>

Much has been written in the past century about the significance of religious freedom. For the purposes of this Article, three points are sufficient to highlight why religion is beneficial, desirable, and even necessary to the success of constitutional democracies.

First, with regard to the United States, the founding generation intended religion to play an important role in making the American experiment a success. This Article will not recount in detail the repeated arguments by the scholars and Supreme Court Justices who have set forth the historical case for religion’s accepted role in official government actions.<sup>17</sup> As a sampling of this historical sentiment, recall that John Adams famously declared that the Constitution would only be successful if it governed “a religious and moral people;”<sup>18</sup> the first Congress in 1789 believed that “religion, morality and knowledge” were “necessary to good government and the happiness of mankind;”<sup>19</sup> and, when it came time for the

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<sup>16</sup> Smith, *supra* note 14, at 197 (discussing the various theories and their scholarly underpinnings).

<sup>17</sup> See *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 885-912 (2005) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Zorach v. Clauson*, 343 U.S. 306 (1952).

<sup>18</sup> Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798) (on file with the National Archives).

<sup>19</sup> See Act to Provide for the Government of the Territory Northwest of the River Ohio, 1 Stat. 50-53 (July 21, 1789) (reenacting the Northwest Ordinance of 1787, which contained the quoted language in Article III of its text).

Founders to identify America's fundamental rights, freedom of religion topped the list—not freedom of conscience.<sup>20</sup> Moreover, to support ratification of the Constitution without a Bill of Rights, James Madison argued at the Virginia Convention that the pluralistic nature of society would protect religious freedom from government oppression.<sup>21</sup> As Justice Scalia stated: “Those who adopted our Constitution . . . believed that the public virtues inculcated by religion are a public good.”<sup>22</sup> Some contend, however, that the evidence is not conclusive on this point.<sup>23</sup>

Second, religion has provided civilization with a solid foundation for its most cherished human rights<sup>24</sup> and secular

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<sup>20</sup> See Antony B. Kolenc, *Not “For God and Country”*: *Atheist Military Chaplains and the Free Exercise Clause*, 48 U.S.F. L. REV. 395, 406-08 (2014) (discussing the Congressional debate about the drafting of the Religion Clauses).

<sup>21</sup> See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1479 (1990) (quoting Madison's argument that pluralism “arises from that multiplicity of sects which pervades America, and which is the best and only security for religious liberty in any society; for where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest”); see also 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330 (Jonathan Elliot ed., 2d ed. 1836).

<sup>22</sup> *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring in the judgment).

<sup>23</sup> See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 878–79 (2005) (cataloguing contrary historical evidence and arguing that “there was no common understanding about the limits of the establishment prohibition, and [Justice Scalia's] conclusion that its narrower view was the original understanding stretches the evidence beyond tensile capacity”).

<sup>24</sup> See J.H.H. Weiler, Note, *Freedom of Religion and Freedom From Religion: The European Model*, 65 ME. L. REV. 759, 767 (2013) (noting historian, Remy Brague's, finding that human rights “do not only derive from the Enlightenment, Neo-Kantianism, and the French Revolution,” but that they also have “always drawn” from religious sources).

values.<sup>25</sup> It was no accident that Thomas Jefferson referenced God when he wrote the Declaration of Independence, proclaiming: “All men are created equal and endowed by their Creator with certain inalienable rights.”<sup>26</sup> This appeal to a transcendent Creator highlights the transformational benefit that religion brings to the table in affirming human rights: “A transcendent source means that the rights apply to everyone, even those who seem most alien, and that society must take the utmost care when it treads close to these rights.”<sup>27</sup> Yet, some scholars today “define human rights and religion in adversarial terms,” eschewing the religious foundation of human rights and replacing it with purely secular bases.<sup>28</sup>

Third, accepting religion into the public arena as an appreciated contributor to policy, education, and civic discourse promotes democratic values. Far from ushering in theocracy, this openness to faith enhances pluralism and diversity.<sup>29</sup> For instance, the U.S. Supreme Court, while noting the “Christian foundations of the nation,” also recognized the nation’s “respect for freedom of

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<sup>25</sup> See Aaron R. Petty, Note, *Religion, Conscience, and Belief in the European Court of Human Rights*, 48 GEO. WASH. INT'L L. REV. 807, 816-17 (2016) (recounting the role of Christianity in developing human rights and secular values in Europe); Lori G. Beaman, Note, *Battles Over Symbols: The “Religion” of the Minority versus the “Culture” of the Majority*, 28 J. L. & RELIGION 67, 91-92 (2012-13) (noting the close connection between the religious and secular).

<sup>26</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>27</sup> Thomas C. Berg, *Can State-Sponsored Religious Symbols Promote Religious Liberty?*, 52 J. CATH. LEGAL STUD. 23, 30, 32 (2013) (noting that religious duty has value because it relates to an “authority above temporal rulers”).

<sup>28</sup> Zachary R. Calo, Note, *Pluralism, Secularism and the European Court of Human Rights*, 26 J.L. & RELIGION 261, 272-73 (2010-11) (arguing that religion has become an obstacle to human rights, and is no longer their source or solution).

<sup>29</sup> See Michael Scaperlanda, *Secular Not Secularist America*, 33 CAMPBELL L. REV. 569, 582 (2011) (“Those who claim that America is in danger of theocracy misperceive the nature of theocracy, disagree with the policy preferences of a certain set of Christians, or, more likely, both.”).

religious practice that extended to other faiths as well.”<sup>30</sup> This lesson of tolerance is true today even in those European nations with an established religion. For instance, many “deeply faithful” Europeans reject the idea of a hostile secular society and would “prefer to live in a country of pluralism that grants a more complete freedom of public behavior even if [they] belong to a minority and have to support the predominance of an established religion.”<sup>31</sup>

In sum, religion has served a valuable and unique role in society, which should make it an indispensable partner in good democratic government.

### III. THE NEUTRALITY PRINCIPLE AND INTOLERANT SECULARISM

Although religious exercise historically has held an honored place in the hierarchy of rights—“more important than most or perhaps all other human goods”<sup>32</sup>—religion around the world has come under increasing attack in the past century by an intolerant secularism. The Supreme Court has fueled this secularism in the United States through an inconsistent invocation of a strict neutrality principle in the Court’s Establishment Clause jurisprudence.

Neutrality is the touchstone of religion jurisprudence in both the U.S. Supreme Court and the European Court of Human Rights. Scholars have defined “neutrality” as “the quality or attitude of one who maintains a distance from parties in a conflict.”<sup>33</sup> But what does that term mean in the context of state neutrality toward religion? Does it require a stricter form of neutrality that removes all aspects of religion from the public square for fear of offending non-adherents, or does it allow for a more pluralistic neutrality principle that values

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<sup>30</sup> Berg, *supra* note 27, at 34 (citing *Holy Trinity Church v. United States*, 143 U.S. 457, 458-59 (1892)); *see also* McConnell, *supra* note 21, at 1421 (discussing the state of religious diversity at the nation’s founding).

<sup>31</sup> *See* Pierre-Henri Prélota, *The Lautsi Decision as Seen from (Christian) Europe*, 65 ME. L. REV. 783, 786 (2013); *see also* Berg, *supra* note 27, at 34.

<sup>32</sup> Smith, *supra* note 14, at 154-55.

<sup>33</sup> Rafael Palomino, Note, *Religion and Neutrality: Myth, Principle, and Meaning*, 2011 B.Y.U. L. REV. 657, 658 (2011).

the contributions of the spiritual as well as the secular goods in society?

Part III of this Article explores the concept of neutrality in the religion jurisprudence of the United States and Europe, and it discusses how strict neutrality between church and state will naturally lead to an intolerant form of secularism that harms religious liberty.

#### *A. The Neutrality Principle*

In 1947, the U.S. Supreme Court created the neutrality principle in *Everson v. Board of Education* (“*Everson*”), declaring for the first time that the Establishment Clause of the First Amendment requires that government at the federal and state level be “neutral in its relations with groups of religious believers and nonbelievers.”<sup>34</sup> Since that time, in the name of this neutrality principle, the Court has created an inconsistent mess that has left its “Establishment Clause jurisprudence in shambles.”<sup>35</sup> The Court’s confused case law in this area has increasingly separated religious faith from the public square, especially as the lower courts have applied those precedents. In the process, the Court has strayed from the Clause’s original meaning.<sup>36</sup>

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<sup>34</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

<sup>35</sup> *Utah High. Patrol Ass’n v. Am. Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from *denial of cert.*); see also Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT’L L. 1, 33-34 (2008); William P. Marshall, *The Lautsi Decision and the American Establishment Clause Experience: A Response to Professor Weiler*, 65 ME. L. REV. 769, 771 (2013).

<sup>36</sup> Some scholars see little modern value in ascertaining the original meaning of the Constitution. See Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 N.W. U.L. REV. 1097, 1103 (2006); Alexandra D. Furth, Note, *Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court’s Secularization Analysis*, 146 U. PA. L. REV. 579, 594 (1998); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1401 (2012). That debate exceeds the scope of this Article, which assumes the original meaning should play a part in determining the proper boundary of the Clause.

This modern separationist interpretation of the Establishment Clause ostensibly finds its roots in colonial-era thinkers, such as John Locke,<sup>37</sup> and Evangelical Christian leaders, such as Isaac Backus and Roger Williams.<sup>38</sup> But Locke was not a strict separationist—he favored both governmental encouragement and financial support of state religion.<sup>39</sup> And while a few in the founding generation may have preferred a more robust church-state separation,<sup>40</sup> even those voices would not recognize the world formed by today’s Establishment Clause.

Nor did the Founders subscribe to the idea of strict neutrality between religion and non-religion—meaning that the government must remain entirely distant from religion. Justice Joseph Story’s influential commentary on the U.S. Constitution reported that, at the time of the Clause’s adoption, “the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious

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<sup>37</sup> See Scaperlanda, *supra* note 29, at 570-71 (citing John Locke, *A Letter Concerning Toleration*, in *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 211, 226 (Ian Shapiro ed., 2003)) (“[T]he church itself is a thing absolutely separate and distinct from the commonwealth. The boundaries on both sides are fixed and immovable.”).

<sup>38</sup> These figures favored a separation “to strengthen religion, not marginalize it.” Marshall, *supra* note 35, at 778 (noting that Williams believed aid would “weaken churches by fostering their dependence upon government and subjecting them to ‘worldly corruptions’”); see also Scaperlanda, *supra* note 29, at 573 (noting Jefferson’s similar belief).

<sup>39</sup> McConnell, *supra* note 21, at 1433; see also Scaperlanda, *supra* note 29, at 571-72 (noting the Constitution rejected Locke’s “intolerance of Catholics, Muslims, and atheists . . . by stating that ‘no religious Test shall ever be required’”).

<sup>40</sup> George Mason, *Virginia Declaration of Rights*, in *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 1.1.3.15.d (“[I]t is contrary to the principles of reason and justice that any should be compelled to contribute to the maintenance of a church with which their consciences will not permit them to join.”); THOMAS PAINE, *COMMON SENSE: ADDRESSED TO THE INHABITANTS OF AMERICA* 36 (1792) (“Persecution is not an original feature in any religion; but it is always the strongly marked feature of all religions established by law.”).



worship.”<sup>41</sup> Most of the founding generation, including George Washington, John Adams, Thomas Jefferson, and James Madison, recognized that the nation’s liberty required that its government have some relation with religion in general.<sup>42</sup>

Further, some criticize the *Everson* Court’s decision to incorporate the Establishment Clause against the states, turning it into a vehicle for individual rights. They argue that the original purpose of the Clause was to protect states from federal intrusion, providing a “space of self-determination in the field of religious freedom.”<sup>43</sup> Thus, some states legitimately continued to have established state religions for decades after the Clause’s

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<sup>41</sup> JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1865, 1868 (1833) (noting that any state attempt to “hold all [religions] in utter indifference, would have created universal disapprobation”); *see also* Smith, *supra* note 14, at 150-66 (discussing the Framers’ religious justifications for government).

<sup>42</sup> *See* Scaperlanda, *supra* note 29, at 573; *see also* Andrea Pin, *(European) Stars or (American) Stripes: Are the European Court of Human Rights’ Neutrality and the Supreme Court’s Wall of Separation One and the Same?*, 85 ST. JOHN’S L. REV. 627, 633 (2011). As President, both Jefferson and Madison took actions to support a traditional understanding of the Clause. *See* Christine Leigh Heyrman, *The Separation of Church and State from the American Revolution to the Early Republic*, NAT’L. HUMAN. CTR., <http://nationalhumanitiescenter.org/tserve/eigheten/ekeyinfo/sepchust.htm> (last visited Feb. 9, 2016) (Jefferson approved Congressional chaplains, granted “financial aid to Protestant missions,” attended worship services in Congress, and “called upon Americans to join him in prayer.”); *see also* Thomas E. Buckley, S.J., *Thomas Jefferson and the Myth of Separation*, in RELIGION AND THE AMERICAN PRESIDENCY, 46-48 (Mark J. Rozell & Gleaves Whitney eds., 2017) (Jefferson permitting Marine Band to play in church, allowing religious groups to worship in federal buildings, and advocating for religion among the Native Americans); *see also* James Madison, Annual Prayer Day Proclamations, in THE SACRED RIGHTS OF CONSCIENCE 458-61 (Daniel L. Dreisbach & Mark David Hall ed., 2009) (collecting Madison’s annual prayer day proclamations).

<sup>43</sup> *See* Pin, *supra* note 42, at 628-29; *see also* Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 1-2 (2000). The limited scope of the Clause is evidenced by its rare invocation from the time of its ratification in 1791 until 1947. *See* Witte & Arold, *supra* note 12, at 31.

ratification.<sup>44</sup> Justice Clarence Thomas and others have noted that the *Everson* Court's decision to incorporate the Clause<sup>45</sup> was unreflective;<sup>46</sup> however, the Court does not seem ready to reverse course on that matter.

The Supreme Court's incorporation of the Clause opened the "floodgates of litigation"—nearly 70 cases under the Clause over the next 60 years, compared to only three cases in the prior 150 years.<sup>47</sup> This resulted in a cascade of policy-based judicial decisions that increasingly became disconnected from the Clause's original

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<sup>44</sup> See McConnell, *supra* note 21, at 1436-37; Rupal M. Doshi, Note, *Nonincorporation of the Establishment Clause: Satisfying the Demands of Equality, Pluralism, and Originalism*, 98 GEO. L.J. 459, 467 (2010) (citing Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U L. REV. 1385, 1458 (2004)) (noting that Maryland, South Carolina, Georgia, and some New England states maintained congregational establishments, with Massachusetts finally abandoning its establishment in 1833).

<sup>45</sup> The Court simply concluded that, because other parts of the First Amendment had been broadly incorporated against the states, and due to the "interrelation of these complementary [Religion] clauses," there was "every reason to give the same application and broad interpretation to the [Clause]." *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). The Court cited only to Thomas Jefferson's 1802 letter to the Danbury Baptists, describing the purpose of the Clause as erecting "a wall of separation between church and state." *Id.* at 16 (citing *Reynolds v. United States*, 98 U.S. 145 (1878)).

<sup>46</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring) (arguing the Clause should be "unincorporated"); Mary Ann Glendon, *Structural Free Exercise*, 90 MICH. L. REV. 477, 481 (1991) (noting "how little intellectual curiosity the members of the Court demonstrated in the challenge presented by the task of adapting, for application to the states, language that had long served to protect the states against the federal government"); see also Doshi, *supra* note 44, at 462 (citing ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 15 (1982), and MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 23-27 (1965)) (against incorporation).

<sup>47</sup> See Witte & Arold, *supra* note 12, at 31; see also Doshi, *supra* note 44, at 471 (citing *Cochran v. La. Bd. of Educ.*, 281 U.S. 370, 375 (1930) (upholding state purchase of nonreligious school books for students in parochial schools); *Quick Bear v. Leupp*, 210 U.S. 50, 82 (1908) (upholding payments to a Roman Catholic school on an Indian reservation); *Bradfield v. Roberts*, 175 U.S. 291, 299-300 (1899) (upholding congressional payments to benefit the poor at a religious District of Columbia hospital).

purpose. Indeed, the Clause has evolved to the point where noted scholars, such as Erwin Chemerinsky, can declare today without a hint of irony that the Clause “is about preventing the majority, through government power, from making members of other religions feel unwelcome”—a theory of non-alienation that was foreign to the Clause prior to 1980s.<sup>48</sup> Of course, the idea that a pluralistic culture should welcome people of all faiths rings true as a matter of social policy; but, as a rule of constitutional interpretation, it lacks roots.

The Court opened the door to more litigation when it concluded that the portion of the Clause that included the words, “respecting an establishment,” required a strict judicial eye to prevent even the slightest step in the direction of an establishment.<sup>49</sup> This slippery slope has led to judicial intrusion into even the slightest local decisions. Moreover, with no real moorings, the Court’s jurisprudence has drifted aimlessly among various tests—neutrality, *Lemon*, history and tradition, endorsement, coercion—resulting in a herky-jerky precedent that provides few principled tools for lower federal courts to determine when government action violates the Establishment Clause.<sup>50</sup> Predictably, confused lower courts have become hyper-vigilant in policing state actions that historically posed

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<sup>48</sup> Erwin Chemerinsky, *A Fixture on a Changing Court: Justice Stevens and the Establishment Clause*, 106 NW. U. L. REV. 587, 601-02 (2012); see also Claudia Haupt, *Active Symbols*, 55 B.C. L. REV. 821, 829 (2014) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)) (“[T]he harm against which the Establishment Clause is designed to protect is ‘send[ing] a message to nonadherents that they are outsiders, not full members of the political community.’”); but see Smith, *supra* note 14, at 210 (explaining that this rationale had “developed over the last decade” as “an effort to avoid the failings of the . . . civil strife rationale”).

<sup>49</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (“A given law might not establish a state religion, but nevertheless be one ‘respecting’ that end in the sense of being a step that could lead to such establishment.”).

<sup>50</sup> See Antony B. Kolenc, “*Mr. Scalia’s Neighborhood*”: *A Home for Minority Religions?*, 81 ST. JOHN’S L. REV. 819, 831-35 (2007) (discussing various theories under the Clause); see also Haupt, *supra* note 48, at 829 (discussing the “coercion” approach, which would “find a practice with ‘coercive impact’ unconstitutional”).

little danger to establishing an official religion.<sup>51</sup> The result has been the subversion of the democratic process<sup>52</sup> and a string of inconsistent rulings.<sup>53</sup> Remarkably, these flaws have not stopped this jurisprudence from influencing Europe.

The European Court of Human Rights has assimilated some of the Supreme Court's Establishment Clause jurisprudence, even though Article 9 of the European Convention on Human Rights and Fundamental Freedoms contains no limitation on established churches. In fact, key European nations—Denmark, Iceland, Norway, the United Kingdom, and others—continue to have

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<sup>51</sup> See *Selman v. Cobb Cty. Sch. Dist.*, 449 F.3d 1320 (11th Cir. 2006) (invalidating sticker on biology text that noted “evolution is a theory”); *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006) (removing crèche, but allowing Jewish and Muslim symbols); *Carpenter v. Dillon Elementary Sch. Dist.* 10, No. 04-35088, 2005 WL 2271720, at \*647 (9th Cir. 2005) (banning individual from giving secular message at school function because of known affiliation with Christianity); *Bannon v. Sch. Dist. of Palm Beach Cty.*, 387 F.3d 1208, 1211 (11th Cir. 2004) (upholding school's removal of religious symbols in student mural); *Fleming v. Jefferson Cty. Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002) (upholding school ban on religious text or symbols on painted tiles hung within Columbine High School to commemorate shooting victims); *Harris v. City of Zion*, 927 F.2d 1401, 1402 (7th Cir. 1991) (striking down two city emblems because they portrayed religious imagery); *Roberts v. Madigan*, 702 F. Supp. 1505, 1518 (D. Colo. 1989) (prohibiting teachers from being seen reading or possessing their own Bibles at school).

<sup>52</sup> See *Marshall*, *supra* note 35, at 775-76.

<sup>53</sup> Professor McConnell has compellingly demonstrated how this mess of Establishment Clause cases has made it “constitutional for a state to hire a Presbyterian minister to lead the legislature in daily prayers, but unconstitutional for a state to set aside a moment of silence in the schools for children to pray if they want to. It is unconstitutional for a state to require employers to accommodate their employees' work schedules to their sabbath observances, but constitutionally mandatory for a state to require employers to pay workers compensation when the resulting inconsistency between work and sabbath leads to discharge. It is constitutional for the government to give money to religiously-affiliated organizations to teach adolescents about proper sexual behavior, but not to teach them science or history. It is constitutional for the government to provide religious school pupils with books, but not with maps; with bus rides to religious schools, but not from school to a museum on a field trip; with cash to pay for state-mandated standardized tests, but not to pay for safety-related maintenance.” Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 134 (1992).

officially established religions. Still, the European Court has created and enforced a neutrality principle from the language within Article 9, and some scholars have argued that the European Court should go even further in mandating a stricter rule.<sup>54</sup> The major impediment to a strict neutrality principle in Europe is the “margin of appreciation” doctrine developed by the European Court. This is a principle of deference to sovereign member-states based on the concept of “subsidiarity,” which places primary responsibility for respecting the ECHR with the member-states and allows the European Court to intervene “only where the domestic authorities fail in that task.”<sup>55</sup> Under these principles, the European Court has accepted that no single model of church-state relations is “embedded in the European Convention.”<sup>56</sup> The net result of this policy is the European Court’s frequent deference to member-states and its tolerance of a variety of practices along the spectrum of policies: from strict neutrality in nations like France to established religions in countries like the United Kingdom.

The European Court’s development of a neutrality principle may be a blessing in disguise—a source of illumination for the U.S. Supreme Court, as this Article argues more fully below. Perhaps the European Court can repay the Supreme Court’s contributions to Europe in-kind, pointing the way to a more sensible interpretation of the U.S. Establishment Clause.

#### *B. Strict Neutrality and Intolerant Secularism*

Although the European Court has adopted a moderated version of the neutrality principle, the U.S. Supreme Court has sent mixed signals about the kind of neutrality the Establishment Clause

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<sup>54</sup> See generally Alicia Cebada Romero, *The European Court of Human Rights and Religion: Between Christian Neutrality and the Fear of Islam*, 11 N.Z. J. PUB. & INT’L L. 75 (2013).

<sup>55</sup> European Court of Human Rights [Eur. Ct. H.R.], *Interlaken Follow-Up: Principle of Subsidiarity - Note by the Jurisconsult*, at para. 2 (Aug. 7, 2010), [http://www.echr.coe.int/Documents/2010\\_Interlaken\\_Follow-up\\_ENG.pdf](http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf).

<sup>56</sup> Pin, *supra* note 42, at 640-41.

requires. The Supreme Court has flirted at times with a stricter form of neutrality, where the “government cannot utilize religion as a standard for action or inaction.”<sup>57</sup> The Court’s *dicta* in *Everson* first referenced this idea, noting that the state may not “aid one religion, aid all religions, or prefer one religion over another.”<sup>58</sup> The Court has come closest to practicing strict neutrality in its cases involving public schools and religious displays on government property, as detailed below. Still, strict separationists—those who desire a complete separation between church and state to be vigorously enforced by the courts—believe the Court has not gone far enough in applying a strict neutrality principle.<sup>59</sup>

The Supreme Court has not been consistent in applying strict neutrality in the hard cases,<sup>60</sup> yet its Establishment Clause jurisprudence treats the concept as black-letter law. The Court has stated that the “touchstone” of its Establishment Clause analysis “is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’”<sup>61</sup> To that, a frustrated Justice Scalia responded, “[H]ow can the Court possibly assert that . . . ? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society’s constant understanding of those

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<sup>57</sup> S. Kathleen Pepper, *The Strict Neutrality Principle: Workable Solution for First Amendment Challenges to Preservation Designation of Religious Landmarks?*, 15 WM. & MARY ENVTL. L. & POL’Y REV. 1, 3-4 (1991) (citing PHILIP B. KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT 112 (1962)).

<sup>58</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947).

<sup>59</sup> See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 688–89 (2002) (Souter, J., dissenting) (lamenting the Supreme Court’s continued loosening of its Establishment Clause jurisprudence, and noting that the Majority’s “espoused criteria of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism”).

<sup>60</sup> For instance, the Court has entirely ignored the neutrality principle in the context of legislative prayer. See *Town of Greece v. Galloway*, 134 U.S. 1811 (2014); *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>61</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005); see also J. Judd Owen, *The Struggle between “Religion and Nonreligion”: Jefferson, Backus, and the Dissonance of America’s Founding Principles*, 101(3) AM. POL. SCI. REV. 493, 493 (2007) (noting that this version of neutrality is an embrace of John Rawls’s doctrine of “political liberalism”).

words.”<sup>62</sup>

In reality, the consistent application of strict neutrality by the Supreme Court would lead to the victory of an intolerant secularism that could never be neutral toward religion. This is because strict neutrality fancies itself to be fair and impartial, but it is “fair” to a very great fault. It suffers from the same malady that Justice John Paul Stevens famously criticized in applying strict scrutiny review in equal protection cases: it cannot tell “the difference between a ‘No Trespassing’ sign and a welcome mat.”<sup>63</sup> In other words, strict neutrality cannot distinguish between the types of government interaction with religion that benefit society and the kind that pose a danger (to both religion and government). Thus, it would suppress all interaction.

Moreover, it is impossible for strict neutrality to be truly neutral toward religion. This can be demonstrated with a logical exercise. As defined earlier, “neutrality” is “the quality or attitude of one who maintains a distance from parties in a conflict.”<sup>64</sup> Thus, referees are neutrals because they can maintain distance between themselves and both sides on the playing field. To begin this exercise, the parties must be identified. One may be tempted to label the parties as “church” and “state,” recalling Thomas Jefferson’s famous (but problematic<sup>65</sup>) phraseology; however, if those are the two parties, then the state (as a neutral) must maintain a distance from itself (as a party), which is clearly not possible. The parties’ identities must be found elsewhere.

The Supreme Court itself has identified the parties involved

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<sup>62</sup> *McCreary County*, 545 U.S. at 889 (Scalia, J., dissenting).

<sup>63</sup> *Adarand Constrs. v. Pena*, 515 U.S. 200 (1995) (Stevens, J. dissenting) (arguing that strict scrutiny cannot discern between benign and invidious discrimination).

<sup>64</sup> Palomino, *supra* note 33, at 658.

<sup>65</sup> See Weiler, *supra*, note 24, at 760 (arguing the church-state dichotomy is “a creature of the French and American Revolutions, which . . . conflates State with Nation”). This language also adds tension between the Religion Clauses and “prevents development of a single test that would allow the two clauses to be read together harmoniously.” Pepper, *supra* note 57, at 6.

by stating that the touchstone of the Establishment Clause is neutrality between “religion and religion” and “religion and non-religion.” The first of these two scenarios is partly achievable in theory because it involves state neutrality between two religions. Here, the state might find strict neutrality because it can “maintain a distance” between itself and each religion, not preferring one over the other. For instance, the state as a neutral would not provide a program for Jews, to the exclusion of Catholics, because that action would align itself with Jews over Catholics. Even this first scenario raises problems, however, as illustrated by the debate between Justices Souter and Scalia about whether the state can acknowledge God in monotheistic terms.<sup>66</sup>

Much more problematic is the second scenario, involving strict state neutrality between religion (in general) and non-religion. If this simply means the state may not prefer religion over atheism, or *vice versa*, then perhaps this works just as well (or as poorly) as the first scenario’s theoretical construct. Except that, during the entire history of the nation, the state *has* aligned itself with religion by assuming the existence of a Creator who cares about the fate of the nation and who has endowed humankind with inalienable rights.<sup>67</sup> As the Court declared in *Zorach v. Clauson* (“*Zorach*”): “We are a religious people whose institutions presuppose a Supreme Being.”<sup>68</sup>

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<sup>66</sup> In the context of a Ten Commandments display, the Justices discussed whether it would be impossible for the state to maintain neutrality between monotheists and nonmonotheists when government “invokes God.” Compare *McCreary County*, 545 U.S. at 879-80 (criticizing Scalia for allegedly suggesting that “government should be free to approve the core beliefs of a favored religion over the tenets of others”), with *id.* at 899-900 (Scalia, J., dissenting) (noting the state can invoke “God”—a monotheistic concept—despite offending “nonmonotheists” because “governmental invocation of God is not an establishment”).

<sup>67</sup> Aleksandra Sandstrom, *God or the Divine is Referenced in Every State Constitution*, PEW RESEARCH CENTER (Aug. 17, 2017), <http://www.pewresearch.org/fact-tank/2017/08/17/god-or-the-divine-is-referenced-in-every-state-constitution/> (“God or the divine is mentioned at least once in each of the 50 state constitutions and nearly 200 times overall.”).

<sup>68</sup> *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).



The true problem with the second scenario, however, is that the Supreme Court does *not* view “non-religion” simply as atheism. Instead, the Court has conflated non-religion with the concept of “secularism,” which is defined as “the belief that religion should not play a role in government, education, or other public parts of society.”<sup>69</sup> The Court has taken the position that the state must not act in a way that intends to, or primarily does, benefit religion in general.<sup>70</sup> Under this test, the only permissible activity in the public sphere becomes secular activity, and the state’s *de facto* position becomes one of secularism. That being the case, how can a “secular” state logically maintain strict neutrality between the parties of religion and secularism? It cannot. The state can never maintain a distance from religion without aligning itself with secularism; nor can it maintain a distance from secularism without aligning itself with religion.<sup>71</sup>

Further, secularism cannot be neutral toward religion because it is an absolute-value, zero-sum system that requires religion to be kept private, out of the public square and the schools and the halls of power.<sup>72</sup> Secularism is not pluralistic,<sup>73</sup> nor can it embrace spiritual gods along with secular ones in public works; to the contrary, it sees

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<sup>69</sup> *Secularism*, MERRIAM-WEBSTER DICTIONARY (11th ed.), <https://www.merriam-webster.com/dictionary/secularism> (last visited Nov. 3, 2017).

<sup>70</sup> See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>71</sup> See *McConnell*, *supra* note 53, at 134 (noting that one side of the Supreme Court’s view accepts a “role for religion in public life [if] . . . religious institutions sacrificed their distinctively religious character.”).

<sup>72</sup> See Robin W. Lovin, *Religion and Political Pluralism*, 27 MISS. C. L. REV. 91, 104 (2007-08) (also noting that this is “a trivialization of religious life”).

<sup>73</sup> See generally John Breen, *Neutrality in Liberal Legal Theory and Catholic Social Thought*, 32 HARV. J.L. & PUB. POL’Y, 513 (2009) (challenging the idea of liberal neutrality); see also Owen, *supra* note 61, at 493 (questioning whether the Court’s position is “cogent” in asserting that “liberal principles” can be “neither religious or secular, but instead some third sort of thing—in Rawls’s term, simply ‘political’”); Marshall, *supra* note 35, at 777 (finding secularism to be “religiously-laden as it depends upon a particular view of the relationship between church and state that comports with the beliefs of some religions but not others”).

secular values as superior to religious ones.<sup>74</sup> If left unchecked, it becomes increasingly intolerant, with adherents of both majority and minority religions eventually marginalized by secular exclusivity and denied “access to certain occupations, charitable work, and other basic public goods, relegating diverse ways of life to an ever shrinking private realm.”<sup>75</sup> In the end, it leads to the “disintegration” of the individual.<sup>76</sup>

To illustrate, the next part will demonstrate how intolerant secularism has affected the religious rights of some Europeans through some of the worst cases to emerge from the European Court of Human Rights—negative lessons from Europe for the U.S. Supreme Court.

#### IV. NEGATIVE LESSONS FROM EUROPE: THE EUROPEAN COURT AND INTOLERANT SECULARISM

This Article has argued thus far that the consistent application of a strict neutrality principle under the Establishment Clause would lead to an intolerant secularism that would stifle religious expression in the United States. That result would be unfortunate, especially in light of the critical role that religion and religious freedom have played in the success of the American experiment as a constitutional republic. Further, this Article has suggested that the Supreme Court can take lessons from how the European Court of Human Rights has

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<sup>74</sup> See McConnell, *supra* note 53, at 191-92 (also finding irony in the claim that “liberal, democratic, nonsectarian positions have superior constitutional status to religious ones” because that claim itself is “illiberal (since it denies the people’s right to determine what will bring about the good life), undemocratic (since it conflicts with the democratic choices of the people), and sectarian (since it is based on a narrow point of view on religious issues)”; see also Lovin, *supra* note 72, at 94 (arguing that a normatively pluralistic society must show “mutual respect . . . [and] civility toward religious practices and observances, even from those who . . . are skeptical of the social value of all of them”).

<sup>75</sup> Scaperlanda, *supra* note 29, at 576-77.

<sup>76</sup> *Id.* at 575-79 (The secularist state “requires an unnatural separation of the self-identified religious person’s core from their public persona, causing a disintegration of the person. . . . [They] simply cannot think and act in a manner consistent with secularism’s demand that they act as if God did not exist.”).

adjudicated similar religious freedom issues. Not all of those lessons are positive, however, and some cases exist to assist the Supreme Court in avoiding the mistakes of the European Court.

Part IV of this Article first notes the varied church-state arrangements adopted by European nations, to include those with a form of intolerant secularism. It then discusses the European Court's difficult position attempting to referee disputes that pit secular values against religious ones, and it examines cases where the Court has failed to protect individual religious rights in the face of an unyielding secularism. Finally, this part suggests a few lessons that the Supreme Court can draw from those cases to avoid a similar problem in the United States.

*A. The European Court: Frustrated Referee of Neutrality*

The European Court is the protector of religious liberty within the Council of Europe, comprised of nations with varied governing structures and church-state relationships—some with long, distinguished histories. For instance, the United Kingdom's (sometimes-troubled) marriage of church and state has stood for centuries as a point of pride for the people of Great Britain, where “the many Catholics, Muslims and Jews, not to mention the majority of atheists and agnostics” are “equal citizens” who genuinely consider the Queen to be their own, even though she is also “the titular Head of the Church of England.”<sup>77</sup> But some European nations have taken the opposite approach, separating church from state to different degrees.

Recall that the European Court has determined that no single model of church-state relations is “embedded in the European Convention.”<sup>78</sup> In practical terms, this means that the 47 member-states that comprise the Council of Europe are generally free under the ECHR to structure their church-state relationships as they see

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<sup>77</sup> Weiler, *supra* note 24, at 764.

<sup>78</sup> Pin, *supra* note 42, at 640-41.

fit.<sup>79</sup> Some of those nations have tragic, bloodied histories where religion has factored into wars and genocides.<sup>80</sup> Thus, for some member-states, the idea of state neutrality toward religion is a concept with life-and-death ramifications. This reality has caused some nations to take a harder stance on the separation of church and state.

By working with these nations over time, the European Court has gathered valuable experience with the disparate approaches taken in the struggle for state neutrality toward religion. This neutrality often is connoted by the French term, “*laïcité*,” or the Spanish word, “*laicidad*”—both without direct English translation, but which refer to a form of religious neutrality, maybe even secularism.<sup>81</sup> France stands out as the paradigmatic nation that most values its strong secular government, evincing outright hostility toward religion in the public square.<sup>82</sup> Similarly, Turkey uses a strict form of *laicidad* “as a

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<sup>79</sup> “More important than separation of church and state, in the view of the European Court of Human Rights, is that the state provide religious freedom for all.” Melissa Curvino, Note, *Church-State Cooperation Does Not Violate a Guarantee of Religious Freedom: A Study of the 1978 Spanish Constitution and 1979 Concordat with the Catholic Church*, 27 EMORY INT’L L. REV. 509, 560 (2013) (recognizing the legitimacy of non-neutral “[s]tate actions that do not infringe on the right of citizens to worship freely”).

<sup>80</sup> See Petty, *supra* note 25, at 807-08 (noting more recent European “attempts at exterminating substantial parts of populations identified by their religious difference: Armenian Christians, Ashkenazi Jews, and Bosnian Muslims”).

<sup>81</sup> See Michel Troper, *Sovereignty and Laïcité*, 30 CARDOZO L. REV. 2561, 2563 (2009) (“*Laïcité* cannot be completely defined by the usual idea of an absence of influence of religion on the State or, as it is sometimes said, by a separation between State and religion. But it can also be characterized as an attitude of the State towards religion, decided unilaterally by the State.”).

<sup>82</sup> See Weiler, *supra* note 24, at 763-64 (France is “neutral as between different religious factions in the French public space. But it is not neutral in a broader political sense. . . . The only things that may not be displayed, independently of the contemporary color of voter preference, are a cross, a mezuzah, or a crescent.”); see also Rebecca E. Maret, *Left Hanging: The Crucifix in the Classroom and the Continuing Need for Reform in Italy*, 35 B.C. INT’L & COMP. L. REV. 603, 608-09 (2012) (noting that the French system ensures freedom of religion and preserves “a political body free from the influence of any one religious doctrine”).

breakwater against the rise of Islamic fundamentalism.”<sup>83</sup> Other nations, such as Spain and Italy, try to maintain neutrality while also respecting the place of religion in public life.<sup>84</sup> The Vatican also has advocated for a positive form of neutrality so that citizens may live out their faith “in the public sphere.”<sup>85</sup>

It is important to recognize that even member-states with established state religions (e.g., the United Kingdom) have taken strong measures in modern times to separate temporal from religious authority and to promote secular values.<sup>86</sup> Indeed, many nations with established religions go out of their way to encourage “neutrality” in public life, except where necessary to maintain their ceremonial establishments, which are more a part of their past culture than their present religious practice.<sup>87</sup> Thus, the mere existence of an established church does not necessarily reflect the level of secularism promoted by the nation’s civil government.

The European Court must resolve religion cases emerging from all these diverse church-state arrangements. As a result, the Court has become a referee of the disputes between the forces of secularism and those who desire religious participation in public life. The ability of the European Court to protect religious freedom has been partly frustrated, however, by its need to apply a wide “margin of appreciation” in these cases. This deference requires the Court to

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<sup>83</sup> Palomino, *supra* note 33, at 661-62.

<sup>84</sup> Frederick Mark Gedicks & Pasquale Annicchino, *Cross, Crucifix, Culture: An Approach to the Constitutional Meaning of Confessional Symbols*, 13 FIRST AMEND. L. REV. 71, 98-99 (2014) (discussing how Italian laicità differs from the French and American models).

<sup>85</sup> Palomino, *supra* note 33, at 662 (quoting Pope Benedict XVI’s advocacy for a ‘laicidad positiva’ in Italy).

<sup>86</sup> See Petty, *supra* note 25, at 813-15 (noting historical need to separate temporal and religious power in Europe).

<sup>87</sup> For instance, the United Kingdom, like much of Europe, has had steadily declining church attendance, according to surveys. See *Report of the Commission on Religion and Belief in British Public Life*, WOOLF INST. 89 (Dec. 7, 2015), <https://corablivingwithdifference.files.wordpress.com/2015/12/living-with-difference-community-diversity-and-the-common-good.pdf> (“The percentage of people who say they do not attend religious services rose from 49 per cent in 1990 to 56 per cent in 2010.”).

uphold a member-state's action unless it conflicts with the ECHR directly or with the European consensus on a particular issue of religious freedom.<sup>88</sup> The net result of this deferential policy is the Court's toleration of a variety of offending practices taken in the name of secularism.

Truth be told, part of the explanation for these poor results is that the European Court itself largely has embraced secular values, sometimes accepting the notion that religion is "more a problem . . . than a solution," and that religious pluralism can be sacrificed in "cases that challenge the predominance of this secular narrative."<sup>89</sup> This is especially the case in decisions where the "threat" of religion conflicts with secular values under the ECHR, which the European Court implies are "more important to the human rights agenda" than religious freedom.<sup>90</sup>

A sampling of cases in the next section demonstrates how intolerant secularism in Europe has trampled the rights of religious persons (often from minority religions) in the name of secular values. These cases stand as negative examples where the European Court's compromised and frustrated position has caused it to fail in its mission to protect religious liberty in Europe.

#### *B. Europe's Toleration of Intolerant Secularism*

This section will discuss four paradigmatic cases where the European Court has failed to protect religious liberty in the face of intolerant secularism. To understand the situation better, consider the steps taken by the European Court to adjudicate Article 9 claims under the ECHR:

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<sup>88</sup> European Court of Human Rights [Eur. Ct. H.R.], *Interlaken Follow-Up: Principle of Subsidiarity - Note by the Jurisconsult*, at para. 2 (Aug. 7, 2010), [http://www.echr.coe.int/Documents/2010\\_Interlaken\\_Follow-up\\_ENG.pdf](http://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf).

<sup>89</sup> Calo, *supra* note 28, at 268.

<sup>90</sup> Carolyn Evans, *Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture*, 26 J.L. & RELIGION 321, 341 (2010-11).

[T]he Court will assess: (1) whether there is interference with that right; (2) whether this interference was based on law; and (3) whether this interference was necessary in a democratic society. It is usually the third step, the balancing test by the Court, which is the focus of most cases. There the judges analyze whether the interference corresponds to a pressing social need, is proportionate to the aim pursued, and is justified by relevant and sufficient reasons.<sup>91</sup>

The third step of the Court's Article 9 analysis is also the place where the judges weigh the importance of the secular values at stake against the desire for religious expression. This is where the European Court sometimes falls short, undervaluing religion relative to secular beliefs. Indeed, when that Court has failed to protect religious pluralism, it has done so "where religion challenges Europe's secular identity in a manner that the Court deems threatening."<sup>92</sup>

The first two example cases involve France, to which the European Court regularly defers without questioning that country's "elevated position of secularism."<sup>93</sup> The "neutrality" of this secularism is intended in theory to result in the fair and even-handed treatment of religion by the state. In reality, however, the strict separation between church and state often places France at odds with its people on matters of religious practice—especially the wearing of

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<sup>91</sup> Witte and Arold, *supra* note 12, at 16.

<sup>92</sup> Calo, *supra* note 28, at 264 (citing to cases involving Muslim headscarves).

<sup>93</sup> *Id.* at 336 (discussing the Court's tendency to defer to the representations of longstanding members of the ECHR).

holy garb.<sup>94</sup> This results in conflict between French secular values and the religious practices of minority adherents who wish to live according to their rules of faith. As these cases demonstrate, the European Court appears to identify with the secular values of French culture, prizing them above the deeply held religious values of politically powerless individuals.

In *S.A.S. v. France* (“*S.A.S.*”), the most controversial case in this area, the European Court upheld a French ban on the wearing in public of any item that covers the face—a not-so-veiled attack on Islamic clothing, such as the burqa worn by some Muslim women.<sup>95</sup> The European Court first rejected France’s justification that the burqa ban protected women from symbols of gender oppression.<sup>96</sup> On this point, France was not helped by the fact that the applicant (a feminist Muslim woman) insisted she wore the burqa by choice, based on her own religious feelings at any given time.<sup>97</sup> This placed France in the odd position of arguing that it was promoting gender equality as a means of protecting women “from the exercise of their own fundamental rights and freedoms.”<sup>98</sup> The Court also found France’s asserted national security rationale to be weak, unlike in some other cases.<sup>99</sup> Instead, the European Court applied the margin of appreciation principle to uphold the ban on a much weaker legal

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<sup>94</sup> See, e.g., *Mann Singh v. France*, App. No. 24479/07, Eur. Ct. H.R. (2008) (finding a Sikh’s complaint “manifestly ill-founded” after he was denied a driver’s license due to his wearing of a turban in a photo, based on France’s interest in public safety and due to the increased risk of fraud and forgery of driving licenses).

<sup>95</sup> *S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H.R. at para. 163 (2014).

<sup>96</sup> See *id.* para. 119.

<sup>97</sup> *Id.* paras. 11-12.

<sup>98</sup> *Id.* para. 119.

<sup>99</sup> Compare *id.*, with *Ahmet Arslan & Others v. Turkey*, App. No. 41135/98, Eur. Ct. H.R. (2010) (The Court ruled against secular Turkey’s conviction of 127 Turks who violated an anti-terrorism law about “the wearing of headgear and . . . religious garments, in public other than for religious ceremonies.” Although the Court found a violation of Article 9, it noted that it would have “accepted, particularly given the importance of the principle of secularism for the democratic system in Turkey, that this interference pursued the legitimate aims of protection of public safety,” except Turkey never offered that justification in the case.).



theory based on society's secular values.

Specifically, the *S.A.S.* Court found that the ban protected “the rights and freedom of others” by furthering the secular good of “social communication”—a “principle of interaction between individuals” that was “essential for” pluralism, “tolerance and broadmindedness.”<sup>100</sup> In this sad irony, in the name of tolerance, the European Court accepted the intolerance of a diverse religious minority's desire to express its faith in public in a peaceful, non-threatening manner. The case—already a precedent for cases from Belgium<sup>101</sup> and Switzerland<sup>102</sup>—shows how difficult it is for a strict-neutrality system to be truly neutral toward religion, especially where secular values clash with religious ones and the state chooses sides against religion.

In a second French case—*Cha'are Shalom Ve Tsedek v. France* (“*Cha'are Shalom*”)—the European Court again upheld French values in rejecting a challenge from the applicant, an ultra-orthodox Jewish group.<sup>103</sup> To further its animal cruelty laws, France had denied the group a license to use a state-approved facility for the ritual slaughter of its own meat, in compliance with Jewish “glatt” kosher standards.<sup>104</sup> France had already licensed a much larger Jewish association to use the slaughterhouse, and it claimed that the nation's secular goal of minimizing animal cruelty would be

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<sup>100</sup> *S.A.S.*, App. No. 4385/11, para. 153.

<sup>101</sup> Similar Muslim veil laws were upheld in Belgium on the same secular principles as in *S.A.S. v. France*. See *Dakir v. Belgium*, App. No. 4619/12, Eur. Ct. H.R. (2017); see also *Belcacemi and Oussar v. Belgium*, App. No. 37798/13, Eur. Ct. H.R. (2017).

<sup>102</sup> See *Osmanoğlu & Kocabaş v. Switzerland*, App. No. 29086/12, Eur. Ct. H.R. (2017) (citing *S.A.S v. France*, App. No. 4385/11 Eur. Ct. H.R. (2014)) (finding no violation in a school's refusal to exempt Muslim girls from compulsory mixed swimming lessons, despite interference with religious freedom, due to margin of appreciation and secular aim of protecting foreigners from social exclusion).

<sup>103</sup> *Cha'are Shalom Ve Tsedek v. France*, 2000-VII Eur. Ct. H.R. at para. 88.

<sup>104</sup> *Id.* para 32 (“For meat to qualify as ‘glatt’, the slaughtered animal must not have any impurity, or in other words any trace of a previous illness, especially in the lungs.”).

furthered by avoiding “a proliferation of approved bodies” to conduct ritual slaughtering<sup>105</sup>—a position that, in reality, did not help even a single animal.<sup>106</sup> France insisted that the group either purchase its glatt meat from another country (Belgium), or obtain it from the already-licensed Jewish association, despite the group’s insistence that the association did not sufficiently comply with glatt standards to fulfill their deeply religious obligations.<sup>107</sup>

Perhaps the most disturbing aspect of the *Cha’are Shalom* case was that France ignored the group’s assessment of its own religious beliefs, finding instead that the group’s ritual slaughtering was “only religious in an accessory way.”<sup>108</sup> France also argued that the group’s religious beliefs included only the *eating* of the “glatt” meat, not necessarily the *slaughtering* of it.<sup>109</sup> Incredibly, the European Court fully approved this characterization of the group’s beliefs, noting that Article 9 did not “extend to the right to take part in person in the performance of ritual slaughter” where the applicant could obtain and eat the needed meat.<sup>110</sup> The Court’s value judgment about this religious slaughtering was improper because “only the religious community has the competence to define and to interpret its religious beliefs and their implications for its religious freedom.”<sup>111</sup> This case illustrates again that secularism cannot remain neutral toward religion where secular values clash with religious ones, even where, as here, France’s position would do little to further its goal of protecting animals from cruelty.

A similar disturbing result occurred in *Dahlab v. Switzerland*

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<sup>105</sup> *Id.* para. 69.

<sup>106</sup> The same number of animals would be slaughtered in the same slaughterhouse, whether done by the politically powerful Jewish association or the smaller orthodox applicant. No animals would be saved or treated less cruelly.

<sup>107</sup> *See id.* paras. 81-82.

<sup>108</sup> *Id.* para. 69.

<sup>109</sup> *Cha’are Shalom Ve Tsedek v. France*, 2000-VII Eur. Ct. H.R. at para. 64.

<sup>110</sup> *Id.* para. 82.

<sup>111</sup> Gerhard Robbers, *Church Autonomy in the European Court of Human Rights--Recent Developments in Germany*, 26 J.L. & RELIGION 306 (2010-11).

(“*Dahlab*”), where secular education regulations prevented a female teacher (a Swiss Catholic convert to Islam) from wearing an Islamic headscarf (hijab) while teaching students in a public school class, even where she had not discussed religion with the students.<sup>112</sup> A chamber of the European Court accepted Switzerland’s view that the hijab was a “powerful external symbol” of religion that might have a “proselytizing effect” on “the freedom of conscience and religion of very young children.”<sup>113</sup> Moreover, unlike in *S.A.S.*, both the Government and the European Court found the headscarf offensive to the secular value of “gender equality.”<sup>114</sup> Citing the margin of appreciation, the Court found the application inadmissible, and it affirmed that the Swiss could “protect the right of State school pupils to be taught in a context of denominational neutrality.”<sup>115</sup> The *Dahlab* case reveals that secular systems cannot tolerate a religious “good” (i.e., individual expression of faith) where it clashes with a secular “good” (i.e., the state’s view of “gender inequality”).<sup>116</sup> This unyielding “neutrality” is typical in secular systems.<sup>117</sup>

Finally, in the consolidated case of *Eweida and Others v. The United Kingdom* (“*Eweida*”), a chamber of the European Court upheld state action based on the U.K.’s highly secularized modern view of religious freedom.<sup>118</sup> In a case involving age-old moral beliefs about traditional marriage, two of the applicants were Christian employees who opposed same-sex partnerships on religious grounds, and whose consciences prevented them from

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<sup>112</sup> See generally *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. (2001).

<sup>113</sup> *Id.* at 450.

<sup>114</sup> *Id.* at 463 (finding the hijab to be “imposed on women” by the Quran and finding it “difficult to reconcile” its wearing with the “tolerance, respect for others and, above all, equality and non-discrimination” required in school).

<sup>115</sup> *Id.*

<sup>116</sup> *Evans*, *supra* note 90, at 331.

<sup>117</sup> See *Berg*, *supra* note 27, at 35 (“[N]ations that rest religious freedom on a highly secular rationale have been unsympathetic to the basic claims of citizens to manifest their belief in state schools in a non-coercive manner.”).

<sup>118</sup> *Eweida & Others v. The United Kingdom*, 2013-I Eur. Ct. H.R. (2013).

taking official actions that furthered such relationships. The first applicant—a Christian counselor at a privately owned relationship counseling group—was dismissed for “gross misconduct” under the company’s “equal opportunity” policy because he had referred same-sex relationship cases to his co-worker counselors.<sup>119</sup> Similarly, the second applicant had worked for the U.K. government as a marriage registrar.<sup>120</sup> After a policy change required her to register same-sex civil partnerships, she made informal arrangements with co-workers to do those registrations for her.<sup>121</sup> When two colleagues complained, her supervisors ordered her to perform the registrations.<sup>122</sup> Both of these employees’ attempts to accommodate their beliefs on the job led to their dismissal from employment.<sup>123</sup>

In its decision, the European Court cited the usual margin of appreciation rationale and sided with the U.K. in both cases, finding no consensus in Europe regarding the proper balance between conscience and accommodations regarding same-sex relationships.<sup>124</sup> The Court found that the state could place greater value in the secular “good” of affirming sexual orientation diversity rather than the religious “good” of following one’s conscience.<sup>125</sup> This once again demonstrates that secular values inevitably will marginalize religious ones, “relegating diverse ways of life to an ever-shrinking private realm.”<sup>126</sup> The illusion of neutrality is again dispelled.

In Part V, this Article argues that some European Court cases promote a pluralistic neutrality that the U.S. Supreme Court should emulate. Those cases will focus on the state’s right to acknowledge the value of religion in public life. In contrast, the cases discussed in this Part have involved direct state suppression of individual liberties.

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<sup>119</sup> *Id.* paras. 31-37.

<sup>120</sup> *Id.* para. 25.

<sup>121</sup> *Id.* para. 26.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* paras. 27-28, 37.

<sup>124</sup> *See Eweida & Others v. The United Kingdom*, 2013-I Eur. Ct. H.R. (2013). The Court did note, however, that “differences in treatment based on sexual orientation require particularly serious reasons by way of justification.” *Id.* para. 105.

<sup>125</sup> *Id.*

<sup>126</sup> Scaperlanda, *supra* note 29, at 576-77.

In each case, secularized nations denied the rights of citizens attempting to exercise their beliefs peacefully in public. Nor did the European Court—the frustrated referee of these values—protect those citizens from the arm of the secular state;<sup>127</sup> it instead affirmed secular goods over religious ones. These European decisions provide an opportunity for the U.S. Supreme Court to avoid the natural result of accepting an intolerant secularism, as discussed in the next section.

*C. Secularism Lessons for the U.S. Supreme Court*

What can the U.S. Supreme Court learn from the four negative European Court cases discussed in the prior section? First, it should recognize that embracing the French-style “neutrality” inevitably would lead to the suppression of religious expression in the United States. Second, the Supreme Court should realize that its jurisprudence interpreting the Religion Clauses has been heading in the same direction as Europe by embracing values that will lead to an intolerant secularism in America, if it does not alter that path. Finally, the Court should find that there is another way—a pluralistic neutrality principle—that can accommodate and affirm the good in religion while still respecting the rights and freedoms of people of all faiths, or no faith at all.

With regard to strict neutrality, the Supreme Court should take heed of the natural path of intolerant secularism discussed in Part III. As seen in the above European cases, that progression is especially true in a nation like France, where the strict separation of church and state is part of the fabric of that nation’s structure. France’s trajectory demonstrates that a truly secular state must sanitize the public space of religious activity; yet, as France is experiencing, that practice itself harms society because it is “profoundly disturbing” to the human condition to shut out “religiously grounded beliefs . . . in the public debate over the

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<sup>127</sup> See Petty, *supra* note 25, at 824 (noting the European Court is “more concerned with the role of the state in religious affairs than with the rights of individuals,” and it views religion as a private rather than public way of life).

issues,”<sup>128</sup> especially in light of the tradition of Western Civilization. Further, the Supreme Court should recognize that the French way is not the American way. The secular “model of the relationship between church and state” that was “spread across Europe by the armies of Napoleon, and reflected in the Constitution of France . . . is not, and never was, the model adopted by America.”<sup>129</sup> Indeed, that model cannot succeed easily in the United States, where society traditionally has been much less secular than in France.<sup>130</sup>

Second, the Supreme Court should see that the negative European case examples above are only a step away from being decided similarly under the Supreme Court’s own religion jurisprudence, which at times elevates secular values to the exclusion of religious liberty. This is partly due to the Court’s strict-neutrality Establishment Clause jurisprudence; however, it also relates to Free Exercise Clause cases after the Court’s controversial decision in *Employment Division v. Smith*.<sup>131</sup> In particular, Free Exercise Clause analysis now resembles the European Court’s Article 9 ECHR process by merely requiring that the state possess a rational reason for regulating neutral activity that impacts religion.<sup>132</sup> Thus, as in Europe, if the state provides a neutral justification for a rule—such as protecting public health, safety, or morals—and applies that rule in a generally applicable way, without targeting religion, then the U.S. Supreme Court is likely to uphold that law regardless of its impact on religion.

Indeed, the four negative European Court cases discussed above are not far-removed from those already decided under the U.S.

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<sup>128</sup> Scaperlanda, *supra* note 29, at 586.

<sup>129</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting); *see also* Prélota, *supra* note 31, at 787 (“The aim of separation in France is to protect the State—and the individuals—from religions; the aim of separation in America is to protect freedom of religions through a strict equality.”).

<sup>130</sup> *See* Smith, *supra* note 14, at 169-78 (disputing that the U.S. became more secularized among common people in the 20<sup>th</sup> Century, and suggesting this perception is due to the secularization of some of the elite class).

<sup>131</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 886 (1990); *see* Kolenc, *supra* note 50, at 840-42 (discussing the controversy surrounding *Smith*).

<sup>132</sup> *Id.*

Constitution. While the United States has not banned the wearing of a burqa in public, the U.S. military may ban religious garb while in uniform to enhance standardization.<sup>133</sup> While Jewish groups have not been prevented from slaughtering meat, U.S. states may ban peyote to further their war on drugs, even though peyote is a major part of sacred Native American sacraments.<sup>134</sup> While Muslim teachers may wear a hijab in class, school districts may force Christian teachers to keep their Bibles out of sight for fear of state endorsement of religion.<sup>135</sup> And, in the name of toleration, the state may penalize public servants and private businesspersons with religious principles when their moral consciences prevent them from supporting same-sex marriage ceremonies.<sup>136</sup>

The Supreme Court must come to see that the chaotic path its religion jurisprudence has taken, especially with regard to the Establishment Clause, is leading to the embrace of strict neutrality as a working principle, especially in the lower courts.<sup>137</sup> Justice Scalia warned of this danger in his dissent in *Locke v. Davey*, where he connected the trajectory of France with the Supreme Court's own

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<sup>133</sup> See *Goldman v. Weinberger*, 473 U.S. 503 (1986) (rejecting claim of an Air Force officer wishing to wear a Jewish yarmulke while in uniform; the Department of Defense later permitted this accommodation via regulation).

<sup>134</sup> See generally *Smith*, 494 U.S. 872 (using rational basis review in Free Exercise claims).

<sup>135</sup> See *Roberts v. Madigan*, 702 F. Supp. 1505, 1518 (D. Colo. 1989).

<sup>136</sup> See *Craig v. Masterpiece Cakeshop*, 370 P.3d 272 (Colo. Ct. App. 2015) (affirming cease and desist order and monetary penalties against Colorado bakery that refused to bake a wedding cake for a same-sex marriage), *cert. granted*, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Com'n*, 137 U.S. 2290 (Jun. 26, 2017); see also *Miller v. Davis*, 123 F. Supp. 3d 924 (E.D. Ky. 2015) (granting injunction against public official who refused to issue marriage licenses due to religious objections; clerk jailed for contempt of court during process).

<sup>137</sup> See *Dillon Elementary Sch. Dist. 10, No. 04-35088*, 2005 WL 2271720, at \*647 (9th Cir. 2005) (banning individual from giving secular message at school function because of known affiliation with Christianity); *Bannon v. Sch. Dist. of Palm Beach Cty.*, 387 F.3d 1208, 1211 (11th Cir. 2004) (upholding school's removal of religious symbols in student mural); *Fleming v. Jefferson Cty. Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002) (upholding school ban on religious text or symbols on painted tiles hung within Columbine High School to commemorate shooting victims).

jurisprudence that allowed unequal treatment toward religion:

[R]ecall that France has proposed banning religious attire from schools, invoking interests in secularism no less benign than those the Court embraces today. . . . When the public's freedom of conscience is invoked to justify denial of equal treatment, benevolent motives shade into indifference and ultimately into repression. Having accepted the justification in this case, the Court is less well equipped to fend it off in the future.<sup>138</sup>

Finally, the Supreme Court should look for a new direction to avoid the victory of intolerant secularism. To accomplish this, however, it must re-evaluate its religion cases—especially with regard to the Establishment Clause—and recognize that the banner of strict neutrality has backfired. There must be another way: perhaps a Europe-inspired path based on a more pluralistic type of neutrality. That is the focus of the remainder of this Article.

#### V. POSITIVE LESSONS FROM EUROPE: THE CASE FOR PLURALISTIC NEUTRALITY

Part IV discussed why the European Court of Human Rights (“European Court”) is not always effective in protecting religious liberty, especially when secular and religious values clash. When the European Court *has* succeeded in protecting religion, however, the key has been its appreciation for “normative religious pluralism”—a recognition that religious diversity can be “a positive force in social life,” which can give “moral and spiritual depth to civic discourse.”<sup>139</sup> A similar respect for pluralism can help the U.S.

<sup>138</sup> *Locke v. Davey*, 540 U.S. 712, 734 (2004) (Scalia, J., dissenting) (protesting the Court’s decision upholding a program in Washington State that excluded only theology degrees from generally available scholarship funding).

<sup>139</sup> Lovin, *supra* note 72, at 91.



Supreme Court moderate its view of the Religion Clauses to avoid intolerant secularism and promote free exercise of religion.

In Part V, this Article first contends that religious pluralism can serve as a unifying constitutional principle to protect religious freedom in both the European and American systems. It then marshals cases from the European Court to illustrate how progressive modern societies can respect the diversity of faith among their people while not excluding religion from the public square. It does this by comparing these European cases with the approach adopted by the U.S. Supreme Court in its religion jurisprudence, especially in the areas of public aid to religion and public acknowledgment of religion, including the topics of religious symbols, prayer, and education. Although much more can and should be said on these topics as scholarly debate continues in the future, this Part offers some initial insights on these European lessons.

#### *A. Pluralism as a Unifying Constitutional Principle*

The European Court “repeatedly speaks of pluralism as the *sine qua non* of a democratic order, the full and proper expression of liberal freedom.”<sup>140</sup> This is consistent with the work of those scholars who have argued that the ideal of religious pluralism can serve as a future model to protect religious freedom around the globe.<sup>141</sup> Positive cases from the European Court show how a robust human rights system based on pluralism can succeed in progressive

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<sup>140</sup> Calo, *supra* note 28, at 261-62.

<sup>141</sup> For instance, Professor Peter Danchin has argued that “value pluralism” could be a model used in international law to protect religious freedom through “a plurality of collective subjects asserting claims of right.” Danchin, *supra* note 35, at 15. He makes the case that governments around the world should use “public measures to promote or protect the religious or cultural beliefs and identities of specific majority and minority groups,” resulting in the state providing “the same sort of rights to minorities that are taken for granted by the majority.” *Id.*

societies—even in nations that join church with state.<sup>142</sup> Therefore, the U.S. Supreme Court should look to Europe for inspiration to reform its approach to the Religion Clauses: that is, to develop a better, more pluralistic neutrality principle.

Over the past sixty years, the European Court has created its own version of the neutrality principle as it has “evolved”<sup>143</sup> the rights contained in the European Convention on Human Rights and Fundamental Freedoms. While the U.S. Supreme Court’s religion cases may have influenced Europe on this front—after all, the text of the ECHR contains no semblance of an establishment clause—the European Court’s neutrality principle developed along much more moderate lines than those embraced by the Supreme Court.<sup>144</sup> This is mostly because the European Court views pluralism as the “cornerstone of a human rights regime”—a value that fosters “liberal goods such as respect for diversity and toleration,” and “nourishes the health of democratic life.”<sup>145</sup> But why should Europe’s view of pluralism be stronger than in America?

Even more so than Europe, the United States historically has been at the forefront of protecting religious liberty. The First Amendment made the free exercise of religion the nation’s first

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<sup>142</sup> See Curvino, *supra* note 79, at 512-13 (arguing that “a movement toward the establishment of one religion does not necessarily infringe upon the religious freedom of another,” and citing Spain to demonstrate how state “cooperation with religious denominations is a good thing because it helps them use their religious freedom more effectively”).

<sup>143</sup> Kanstantsin Dzehtsiarou & Conor O’Mahony, *Evolutionary Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court*, 44 COLUM. HUM. RTS. L. REV. 309, 315-16 (2013) (“[I]n spite of its acceptance on a judicial level, evolutionary interpretation of the ECHR remains susceptible to many of the same academic criticisms that have been leveled at its use in relation to the U.S. Constitution.”).

<sup>144</sup> It is unlikely the European Court will ever assimilate a French-style secularism into its more moderate neutrality principle because France’s version of secularism is “less appealing to—indeed, is opposed by—nations that have an interest in preserving a national identity steeped in religious historical tradition.” Maret, *supra* note 82, at 608-09.

<sup>145</sup> Calo, *supra* note 28, at 263 (Religious pluralism “is not one democratic virtue among many. It is the cornerstone of a human rights regime and the norm by which other norms are to be assessed.”).

“protected class” from government discrimination. Moreover, from the beginning, the First Amendment viewed religion as something special—specifically protecting it, while rejecting a proposed broader protection for all rights of conscience.<sup>146</sup> Europe, on the other hand, offered the ECHR’s protections to both religious and non-religious practices of conscience.<sup>147</sup> Even prior to passage of the Bill of Rights, the U.S. Constitution went out of its way to protect freedom of religion by stating that “no religious test shall ever be required as a qualification to any office or public trust under the United States.”<sup>148</sup>

Nor is pluralism a new concept in the United States, which, at the time of the ratification of the Constitution, “had already experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world.”<sup>149</sup> Protestants of all varieties, Catholics, Jews, and others lived side-by-side, fighting for common causes. The Constitution’s “religious-test” prohibition was itself a victory for religious diversity because it ensured “a much richer and deeper pluralism” by “welcoming into the cacophony of political and civil life the religious voices” of many faiths, “alongside their Protestant brothers and sisters.”<sup>150</sup> The Framers lived in a world that recognized religious diversity and that understood the need to keep the state neutral toward religion’s many represented

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<sup>146</sup> The Framers excluded conscience rights from protection under the Religion Clauses by rejecting a version of the First Amendment that would have protected more than just religion. See Kolenc, *supra* note 20, at 406-07.

<sup>147</sup> See Statute of the Council of Europe pmbl., May 5, 1949, 87 U.N.T.S. 103, 104 (1951); MACKENZIE, *supra* note 12, at 329-30 (outlining the “[f]reedom of thought, conscience and religion”); see also ECHR, *supra* note 7, art 10. The ECHR also expressly protects against violations of related rights, such as freedom of expression, freedom from discrimination, and freedom of parents to educate their children on religious matters. See ECHR, *supra* note 7, arts. 14, 26, and Protocol 1, art. 2.

<sup>148</sup> U.S. CONST. art. VI, § 3.

<sup>149</sup> McConnell, *supra* note 21, at 1421.

<sup>150</sup> Scaperlanda, *supra* note 29, at 571-72.

views,<sup>151</sup> while at the same time accepting the importance of religion (in general) in public life—a pluralistic neutrality.

In short, history makes clear that the concept of pluralistic neutrality is not a novel theory. It undoubtedly shares common ground with the position of “accommodationists,”<sup>152</sup> “non-preferentialists,”<sup>153</sup> and those who advocate for a “legal coercion test.”<sup>154</sup> All three of those theories stem from a similar desire to define neutrality so that it ensures the “impartiality of the state with regard to all religions, but not a distancing from religion [in general].”<sup>155</sup> Further, those theories all reject the Supreme Court’s on-again, off-again relationship with strict neutrality, recognizing that a state that accepts religion in the public sphere will further religious freedom by embracing a “constructive process of exchange and critique within faiths, between faiths, and between religious and

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<sup>151</sup> In *Reynolds v. United States*, 98 U.S. 145, 164 (1878), the Court first invoked Thomas Jefferson’s language about “a wall of separation between church and state,” from his 1802 letter to the Danbury Baptists. Yet, even in that context, the Court clearly did not intend that as an embrace of strict neutrality because the Court also accepted James Madison’s monotheistic use of the term “religion,” which he described as “the duty we owe the Creator.” *Id.* at 163 (quoting Madison’s “*Memorial and Remonstrance*,” Semple’s Virginia Baptists, Appendix).

<sup>152</sup> Danchin, *supra* note 35, at 34 (arguing that U.S. “value pluralism” uses a Judeo-Christian “accommodationist approach that takes into account not only the role of religion generally, but also the role of the religion of the majority in particular, in the public life and history of the nation and its institutions of government”).

<sup>153</sup> See generally Douglas Laycock, “*Nonpreferential*” *Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 878 (1987) (rejecting non-preferentialism as inconsistent with the Founders’ debates about the Religion Clauses, finding that “the Framers . . . believed that nonpreferential aid would establish religion”).

<sup>154</sup> Those who advocate for such a test view the Establishment Clause as primarily directed toward prohibiting the “coercion of religious orthodoxy and of financial support by force of law and threat of penalty.” *Elk Grove Unified Sch. Dist.*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring) (quoting L. LEVY, *THE ESTABLISHMENT CLAUSE* 4 (1986)). This is similar to the “actual coercion” test advocated by Justice Scalia in *Lee v. Weisman*, 505 U.S. 577, 577 (1992) (Scalia, J., dissenting).

<sup>155</sup> Palomino, *supra* note 33, at 678-79.

non-religious traditions of thought.”<sup>156</sup>

Whereas intolerant secularism takes sides against religion, requiring “the religious person to leave her deepest self and most profound commitments at home as a price for admission to the public square,”<sup>157</sup> pluralistic neutrality is inclusive. A truly pluralistic approach to neutrality welcomes both secular and religious ideas. It works not “to associate religious pluralism in human rights with a creeping theocratic impulse;” but, instead, to draw “religion into a conversation about the moral structure of modernity.”<sup>158</sup> In a democratic and pluralistic society, where the government “mirror[s] the culture as a whole,” natural notions of neutrality should “lead to a broadly inclusive public sphere, in which the public is presented a wide variety of perspectives, religious ones included.”<sup>159</sup> Such a society also makes accommodations for religion because “[w]ithout respect for the differences of religious communities from general secular behavior, pluralism would be an empty word.”<sup>160</sup>

As the rest of this Article illustrates, pluralistic neutrality is a theory that the European Court has put into practice in several key cases. And while that Court has sometimes failed to live up to its pluralistic rhetoric,<sup>161</sup> a survey of some positive European Court cases can provide important lessons for the U.S. Supreme Court. More specifically, those cases can point the way to a better path—

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<sup>156</sup> Calo, *supra* note 28, at 277.

<sup>157</sup> Scaperlanda, *supra* note 29, at 586.

<sup>158</sup> Calo, *supra* note 28, at 278 (noting also that “no single tradition, religious or secular, is to monopolize political discourse over the meaning of shared public goods”); *see also* Scaperlanda, *supra* note 29, at 587 (“The middle way between theocracy and secularocracy consists of a secular state influenced profoundly and organically by the deeply pluralistic culture that surrounds it and supports it.”).

<sup>159</sup> McConnell, *supra* note 53, at 193; *see also* Scaperlanda, *supra* note 29, at 586 (“True, thick, robust, and unafraid pluralism welcomes the whole of every person into the public debate.”).

<sup>160</sup> Robbers, *supra* note 111, at 281, 306.

<sup>161</sup> Evans, *supra* note 90, at 342 (The Court still has “substantial work” to do “in creating a robust concept of pluralism and applying it in a meaningful way. . . . The Court is too ready to move to the limits of pluralism without serious engagement with what a pluralistic society would look like . . .”).

one that interprets the Constitution's Religion Clauses in a more moderate fashion, with a neutrality principle that both enhances religious pluralism and affirms religion in general.

*B. Pluralistic Neutrality and Public Aid to Religion*

Regarding the issue of public funding for religious organizations, the U.S. Supreme Court already has begun to learn from Europe, within the undeniable strictures that the Establishment Clause places on the use of taxpayer dollars. This is an area where the modern Supreme Court has rejected an overly strict version of the neutrality principle, and recently has settled on a more pluralistic, commonsense approach that allows for public funding of religion as part of neutral, generally available programs. Yet, despite positive developments in this area over the past three decades, there is room in the Supreme Court's jurisprudence for further growth.

*1. Undeniable Limits on Lessons from Europe*

The European Convention on Human Rights and Fundamental Freedoms ("ECHR") contains no establishment clause; moreover, several of its member-states continue to fund official state religions. In contrast, the Framers undoubtedly intended the Establishment Clause to place limits on the funding of religion in the United States. As Justice Scalia explained: "[B]y 1790 the term 'establishment' had acquired an additional meaning—'financial support of religion generally, by public taxation'—that reflected the development of 'general or multiple' establishments, not limited to a single church."<sup>162</sup> Thus, the U.S. Supreme Court has reached broad consensus on the idea that the Establishment Clause (at least) forbids the state from expending "significant amounts of tax money to serve

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<sup>162</sup> Lee v. Weisman, 505 U.S. 577, 640-42 (1992) (Scalia, J., dissenting) (citation omitted).

the cause of one religious faith.”<sup>163</sup> Due to this crucial difference between the two systems, there always will be a constitutional ceiling on how far the Supreme Court can go in allowing European-style, direct funding of religion.

For instance, *Ásatrúarfélagid v. Iceland* (“*Iceland*”) involved the National Church of Iceland, which the state supported through a tax system that distributed “parish tithes” to one’s home parish and provided the national church additional funds for its duties, salaries, and obligations required under law.<sup>164</sup> A minority religious group, which honored the ancient Norse gods, filed a complaint seeking a comparable additional tithe for its own support.<sup>165</sup> Notably, the group did not challenge the legitimacy of the parish tax system, instead agreeing that “[b]y providing registered religious associations with parish charges, based on income tax of individual citizens, the State of Iceland is actively protecting the members’ rights to practise their religion.”<sup>166</sup> The European Court ultimately found the group’s application to be inadmissible as “manifestly ill-founded” because Iceland had provided a reasonable explanation for its need to pay extra tithe money to its national church.<sup>167</sup> A similar result occurred in a more recent German tax case.<sup>168</sup>

The *Iceland* case offers a key lesson for the U.S. Supreme Court: the Norse religious group—though it was a minority religion

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<sup>163</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 660, 664 (1989) (Kennedy, J., concurring in part and dissenting in part); *see also* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 840 (1995) (“The apprehensions of our predecessors involved the levying of taxes upon the public for the sole and exclusive purpose of establishing and supporting specific sects.”).

<sup>164</sup> *Ásatrúarfélagid v. Iceland*, App. No. 22897/08, Eur. Ct. H.R. (2012).

<sup>165</sup> *See id.*

<sup>166</sup> *Id.* para. 130.

<sup>167</sup> *See generally id.*

<sup>168</sup> *See Klein & Others v. Germany*, App. Nos. 10138/11, 16687/11, 25359/11, & 28919/11, Eur. Ct. H.R. (2017) (finding no violation of Art. 9 by law that permitted state involvement in levying special fees/taxes on church members).

in a nation with an established church—recognized that Iceland’s tax system benefited society by enhancing religious pluralism. Despite this insight, however, there can be no doubt that the Establishment Clause would act as a ceiling on this type of tax system in the United States, even under pluralistic neutrality. Iceland directly supports a specific sect with taxpayer funds—a practice that strikes at the core of the Establishment Clause. Some lessons from Europe rightly will dead-end at un-crossable barriers in the U.S. system.

## 2. Public Aid and the Supreme Court’s European Excursion

Over the past thirty years, the U.S. Supreme Court’s religion cases have inched ever closer to the European Court’s model of accepting public aid for religion. From the beginning of the Supreme Court’s modern religion jurisprudence, the Justices have struggled to figure out how far the Establishment Clause should go in banning public funding of religion. Even in *Everson*, the Court approved a program that allowed New Jersey to expend tax dollars on bus fares for Catholic students.<sup>169</sup> While acknowledging that the tax funds would encourage some families to send their children to religious schools, Justice Hugo Black’s majority opinion explained in *dicta* why the state could use tax dollars to benefit religion in many common funding programs:

Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But . . . the First

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<sup>169</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1, 17-18 (1947).



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.<sup>170</sup>

The Court's *dicta* in *Everson* recognized, at least in theory, a less-strict neutrality principle that could tolerate spending tax funds on religion through generally available, neutral government programs. In the following decades, however, the Court struck down numerous such aid programs, most notably in *Lemon v. Kurtzman*, where the Court erected its controversial three-pronged test to determine when state action violates the Establishment Clause.<sup>171</sup> During this period, the Court struck down several publicly funded programs<sup>172</sup> while upholding a few expenditures that conferred merely "'indirect,' 'remote,' or 'incidental' benefit[s] upon religious institutions,"<sup>173</sup> or that posed little threat to the principles of the

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<sup>170</sup> *Id.*

<sup>171</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (striking programs funding teachers for religious schools). The *Lemon* test requires laws to meet three requirements: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612 (citations omitted).

<sup>172</sup> See *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 393 (1985) (striking community education program), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997); *Meek v. Pittenger*, 421 U.S. 349 (1975) (striking funds for guidance counseling, speech, and hearing services); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973) (striking a program for maintenance and repair costs); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973) (striking funds for teacher-prepared tests).

<sup>173</sup> *Sch. Dist. of City of Grand Rapids*, 473 U.S. at 393.

Establishment Clause.<sup>174</sup>

Starting in the 1980s, however, personnel changes on the Supreme Court led to the creation of a new conservative majority, which began to embrace a more European-style pluralistic neutrality principle around public aid to religion. The Court began upholding far-reaching benefit programs that resulted in generally available tax funds flowing to religious institutions,<sup>175</sup> culminating in the approval of a school voucher program in *Zelman v. Simmons-Harris*.<sup>176</sup> With Justice Neil Gorsuch filling the seat of the late Justice Antonin Scalia, this flexible approach has continued, as shown by the Court's most recent decision in this area.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer* (“*Comer*”), the Court— in a solid 7 to 2 decision— reaffirmed that the Constitution does not prevent states from giving direct tax funds

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<sup>174</sup> See *Walz v. Tax Com. of City of N.Y.*, 397 U.S. 664, 669 (1970) (upholding religious property tax exemption, noting room in the Religion Clauses “for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference”). This “benevolent neutrality” was referenced by the Court only three other times, most recently in 1994, and on two of those occasions, the Court cited it only while striking down a tax program that aided religion. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994) (striking city accommodation for Jewish group); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 327 (1987) (upholding religious exemption to Title VII of the Civil Rights Act); *Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. at 792 (striking financial aid grants to religion).

<sup>175</sup> See *Mitchell v. Helms*, 530 U.S. 793 (2000) (upholding program that allowed religious schools to borrow “secular” educational materials and equipment); see also *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (upholding tax funds to print student group's religious magazine); see also *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (upholding tax funds for sign-language interpreter at religious school); see also *Witters v. Wash. Dept. of Servs. for Blind*, 474 U.S. 481 (1986) (upholding blind student's subsidy at religious school); see also *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding state tax deductions for religious educational expenses).

<sup>176</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding Cleveland's school voucher program for needy students, even though the tax funds were used overwhelmingly by parents for tuition at private religious schools).

to churches as part of a neutral, generally available public benefit.<sup>177</sup> Indeed, the Court accepted as settled law under the Establishment Clause that Missouri could provide direct public funding to a religious preschool to build a playground for children, even though a church fully owned that school.<sup>178</sup> More significantly, the *Comer* Court took a revolutionary step forward by concluding that the Free Exercise Clause *required* the state to provide those direct funds to religion, as long as the church qualified for the money under neutral criteria set forth under the program.<sup>179</sup>

As the Supreme Court has moved toward a more pluralistic neutrality in this area, the example of Europe has not been lost on individual Supreme Court Justices. Some Justices have noted the success of government aid to religion in such diverse European church-state models as the United Kingdom and France. Indeed, this is an area where Justices Breyer and Scalia—great minds on both ends of the ideological spectrum—have debated and found common ground. Breyer, whose dissent in *Zelman* decried the constitutional validity of school vouchers, indicated during one such debate that he had become “uncertain” about the validity of his *Zelman* dissent because “in France they subsidize a religious school and it isn’t the end of the earth. And the same thing is true in Britain, [and] other countries.”<sup>180</sup> Remarkably, Justice Scalia—who vehemently opposed the practice of U.S. judges consulting foreign case law—agreed that it would be appropriate to look to Europe “to show that if

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<sup>177</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (Gorsuch, J., concurring in part).

<sup>178</sup> None of the seven Justices who voted in favor of the church indicated any concern with the constitutionality of providing the public funds under the Establishment Clause. Instead, the Court noted: “The parties agree that the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program.” *Id.* at 2019.

<sup>179</sup> *See id.* at 2021 (finding that “disqualifying [a church] from a public benefit solely because of their religious character . . . imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny”).

<sup>180</sup> *Full Written Transcript of Scalia-Breyer Debate on Foreign Law*, FEDERAL NEWS SERVICE (Jan. 13, 2005), <http://www.freerepublic.com/focus/news/1352357/posts> (referencing *Zelman v. Simmons-Harris*, 536 U.S. 639, 717-29 (2002) (Breyer, J., dissenting)).

the Court adopts this particular view, the sky will not fall. You know, if we got much more latitudinarian about our approach to the Establishment Clause, things won't be so bad. . . . It's useful for that."<sup>181</sup>

In fact, the Supreme Court still has room for growth in moving closer to Europe without violating the strictures of the Establishment Clause, as Justice Gorsuch intimated in his concurring opinion in *Comer*. He took issue with the Court's apparent openness to "the possibility [that] a useful distinction might be drawn between laws that discriminate on the basis of religious *status* and religious *use*."<sup>182</sup> Gorsuch argued that the Establishment Clause would allow—and that the Free Exercise Clause would require—the state to distribute neutral funds to a church even if the money would be spent furthering a religious mission.<sup>183</sup> He asked:

Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs . . . . Neither do I see why the First Amendment's Free Exercise Clause should care. After all, that Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status).<sup>184</sup>

This position would break the prevailing notion in some circles that the Establishment Clause requires the state to ensure that religious groups spend public funds solely on secular uses. Gorsuch would not care how the church spent the money; he would focus only on whether the state distributed generally available funds using neutral criteria.

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<sup>181</sup> *Id.*

<sup>182</sup> *Comer*, 137 S. Ct. at 2025 (Gorsuch, J., concurring in part).

<sup>183</sup> *Id.* at 2025-26.

<sup>184</sup> *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025-26 (2017) (Gorsuch, J., concurring in part).

Justice Gorsuch is correct. If a neutral state program neither establishes a state religion nor takes a step in that direction, why should the Establishment Clause care if some religious causes are the collateral beneficiaries of those generally available funds? The model of Europe demonstrates that, under the right conditions, individual religious liberty can thrive even where the state funds an established religion. Dispensing generally available, neutral funds to a church would neither violate the Establishment Clause nor threaten individual religious freedom, regardless of how the church spends that money. To the contrary, the fair distribution of those funds would further the cause of diversity by not punishing groups simply because of their religious affiliation. In other words, it would affirm the principle of pluralistic neutrality.

*C. Pluralistic Neutrality and Public Displays of Religious Symbols*

Unlike with public aid to religion, the Supreme Court has not found consensus yet on the proper level of neutrality to apply where the state acknowledges religion with a symbolic display. This is an area of fertile ground, where the European Court's approach can be instructive. First, this section briefly addresses the status of religious displays under case law in the United States. It then engages in a full discussion of the European Court's *Lautsi v. Italy* case, which illustrates on several levels the problems and potential solutions for dealing with religious symbolism under a pluralistic neutrality approach.

*1. The U.S. Supreme Court's Approach*<sup>185</sup>

As a result of the Supreme Court's display cases, religious symbols that retain their sacred meaning are being systematically

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<sup>185</sup> A full treatment of this complex topic cannot hope to be accomplished in this short space. Thus, this section seeks only to sum up the current U.S. situation and focus on points of comparison for useful lessons from Europe.

purged from the U.S. public square, especially by the lower courts.<sup>186</sup> In contrast, the European Court recognizes—just barely, perhaps<sup>187</sup>—what U.S. courts seem to have forgotten: that “inculturation”<sup>188</sup> of religion has enriched society throughout history, and that removing religion from culture does violence to society’s identity.<sup>189</sup> Recently, with a more conservative majority on the Supreme Court, some scholars believe the Court is now “moving in similar directions” as the European Court in this area.<sup>190</sup> The Supreme Court, however, is yet to embrace a truly pluralistic neutrality approach on this issue.

The first two prongs of the Supreme Court’s controversial *Lemon* test are largely responsible for the removal of religious symbols from publicly owned lands and buildings in the United

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<sup>186</sup> See *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145 (10th Cir. 2010), *cert. denied*, *Utah High. Patrol Ass’n v. Am. Atheists, Inc.*, 565 U.S. 994 (2011) (removing memorial cross for troopers); *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006) (removing crèche); *Bannon v. Sch. Dist. of Palm Beach Cty.*, 387 F.3d 1208 (11th Cir. 2004) (removing symbols in mural); *Fleming v. Jefferson Cty. Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002) (removing symbols on school tiles); *Harris v. City of Zion, Lake Cty., Ill.*, 927 F.2d 1401 (7th Cir. 1991) (removing city emblems); see generally Amanda Reid, *Private Memorials on Public Space: Roadside Crosses at the Intersection of the Free Speech Clause and the Establishment Clause*, 92 NEB. L. REV. 124 (2013) (discussing state of case law).

<sup>187</sup> Without doubt, the European Court has struggled to maintain Europe’s connection to its past and to prevent secularism from negating its “inherited cultural and moral identity,” which causes it to “become a civilization ‘that does not understand itself.’” Calo, *supra* note 28, at 269 (internal quotation marks omitted).

<sup>188</sup> Gedicks & Annicchino, *supra* note 84, at 86-87.

<sup>189</sup> See Danchin, *supra* note 35, at 13 (noting that “the culture and historical traditions of national groups have been shaped, to varying degrees, by particular religious traditions”).

<sup>190</sup> Katie A. Croghan, *Lautsi and Salazar: Are Religious Symbols Legitimate in the Public Square?*, 41 GA. J. INT’L & COMP. L. 507, 510 (2013); see also Witte & Arold, *supra* note 12, at 52 (listing six teachings that they believe the U.S. Supreme Court holds in common with the European Court in this area); see generally Marie Elizabeth Roper, *Secular Crosses and the Neutrality of Secularism: Reflections on the Demands of Neutrality and its Consequences for Religious Symbols—The European Court of Human Rights in Lautsi and the U.S. Supreme Court in Salazar*, 45 VAND. J. TRANSNAT’L L. 841 (2012) (comparing the *Lautsi* case with the *Salazar* case).

States.<sup>191</sup> The first prong of that test requires that a state has “secular legislative purpose” when displaying a religious symbol on government property.<sup>192</sup> Using this prong, the Court has found Establishment Clause violations when officials sought to generally recognize or promote religion through a symbolic display, such as a monument to the Ten Commandments.<sup>193</sup>

The test’s second prong requires that a display’s “principal or primary effect must be one that neither advances nor inhibits religion.”<sup>194</sup> This prong does not take into account a religious display that may actually have a secular purpose. Under this version of neutrality, the Court will still strike down a display if it has the primary effect of advancing religion, such as displaying a crèche that recognizes “Christmas in a way that has the effect of endorsing a patently Christian message: *Glory to God for the birth of Jesus Christ.*”<sup>195</sup> Due to this prong, it is no longer possible for the state truly to acknowledge the core of any religious event, no matter how valuable the community finds it, and no matter how many centuries the state has acknowledged it ceremonially.<sup>196</sup>

Thus, under the modern Supreme Court’s display cases, the only permissible way for the state to acknowledge a religious event or doctrine is to sanitize its religious aspects, morphing it into a primarily secular thing—such as making Christmas mostly about

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<sup>191</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>192</sup> *Id.* at 612.

<sup>193</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (removing 10 Commandments from courthouse due to purpose prong); *Stone v. Graham*, 449 U.S. 39, 40–41 (1980) (removing display from public schools despite the legislature’s belief there could be a “secular application” of the 10 Commandments due to its place “as the fundamental legal code of Western Civilization and the Common Law” of the U.S.).

<sup>194</sup> *Lemon*, 403 U.S. at 612.

<sup>195</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 601 (1989).

<sup>196</sup> *Lynch v. Donnelly*, 465 U.S. 668, 674-75 (1984) (The Supreme Court has recognized the “unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789. . . . Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers.”).

trees, gifts, snowmen, and red-nosed reindeer.<sup>197</sup> No doubt, under this test a religious display will survive judicial scrutiny, but only if it is stripped of its core religious meaning. Far from pluralism, this type of jurisprudence only furthers the current trend toward “the violence of uniformity.”<sup>198</sup> A far better approach would be to adopt Justice Scalia’s position that the mere “acknowledgement of the Creator” or “[i]nvoication of God” by the state “is not an establishment” of religion.<sup>199</sup>

To a lesser degree than in the United States, the European Court has also struggled with the issue of symbolic religious displays. The key case in this area is *Lautsi & Others v. Italy*, which journeyed through three distinct phases—the first in the Italian courts, the second in a lower Chamber of the European Court, and the third in that Court’s Grand Chamber.<sup>200</sup> These phases illustrate the struggle over religious symbols and the distinct choices that courts face on this matter.

## 2. *The Lautsi Case in Italy: The De-Meaning of Religious Symbols*

The *Lautsi* case stemmed from an 1860 royal edict that predated the unification of Italy (but which was continued by governments throughout later stages of Italian history), requiring that the crucifix—a Christian (primarily Catholic) symbol that displays the body of Jesus Christ hanging on the cross—be hung in Italian

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<sup>197</sup> See generally *id.* (permitting the display of a crèche among secular symbols).

<sup>198</sup> Calo, *supra* note 28, at 277 (noting also the “impoverishment” of marginalizing “particularistic commitments”).

<sup>199</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 899–900 (2005) (Scalia, J., dissenting) (arguing also that his position would not marginalize non-monotheistic religious adherents because they would still be “entirely protected by the Free Exercise Clause, and by those aspects of the Establishment Clause that do not relate to government acknowledgment of the Creator”).

<sup>200</sup> Phase I consisted of rulings by the Italian national courts. Phase II resulted in *Lautsi & Others v. Italy*, 2009-II Eur. Ct. H.R. (“*Lautsi I*”), a decision by a chamber of the European Court. This chamber ruling was overturned by the Grand Chamber in Phase III in *Lautsi & Others v. Italy*, App. No. 30814/06, Eur. Ct. H.R. (2011) (“*Lautsi II*”).



state-run classrooms.<sup>201</sup> In 2002, Soile Lautsi and her husband challenged the practice of displaying the crucifix, arguing that they intended to raise their two teenage boys in accordance with the principle of secularism, and that the presence of the crucifix in the boys' state-run school was contrary to that practice.<sup>202</sup>

Italy historically had set up Catholicism as the only religion of the state; however, a 1985 Concordat with the Vatican had changed that practice, essentially turning Italy into a pluralist secular state.<sup>203</sup> According to the Italian courts, "the principle of secularism was derived from the [Italian] Constitution . . . [and] implied not that the State should be indifferent to religions but that it should guarantee the protection of the freedom of religion in a context of confessional and cultural pluralism."<sup>204</sup> After considering the case of the Lautsi family, Italy affirmed the right of the state to hang crucifixes in state-run classrooms.<sup>205</sup> This decision was challenged by Ms. Lautsi at the European Court of Human Rights, in *Lautsi I* and *II*.

Prior to Ms. Lautsi's appeal to the European Court, the national courts gave the victory to the state by turning the crucifix into a symbol of Italian civilization.<sup>206</sup> The highest administrative court reasoned that the crucifix "was compatible with the principle of secularism" because it:

[S]ymbolised the religious origin of values (tolerance, mutual respect, valorisation of the person, affirmation of one's rights, consideration for one's freedom, the autonomy of one's moral conscience vis-à-vis authority, human

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<sup>201</sup> *Lautsi & Others v. Italy*, App. No. 30814/06, Eur. Ct. H.R. at para. 17 (2011).

<sup>202</sup> *Id.* paras. 10-12.

<sup>203</sup> *Id.* para. 22.

<sup>204</sup> *Id.* para. 23.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* para. 16.

solidarity and the refusal of any form of discrimination) which characterised Italian civilisation. In that sense, when displayed in classrooms, the crucifix could fulfil—even in a “secular” perspective distinct from the religious perspective to which it specifically referred—a highly educational symbolic function.<sup>207</sup>

Thus, to justify the crucifix, the courts “devalue[d] its religious significance and, indirectly, endorse[d] the principle that a symbol can be displayed in a public institution only if the symbol has no religious character.”<sup>208</sup> They transformed a religious symbol into a secular civic symbol.

This reasoning is similar to a strain of the Establishment Clause argument in the United States that would allow the state to promote only a hybrid kind of “civil religion”—a “thin, nationalistic deism believed necessary, and constitutionally permissible, for public ceremony and for the expression of patriotism,” which is “regarded by most Americans to be a . . . bastard relation.”<sup>209</sup> While perhaps well-intentioned, this theory is counter-productive in a society that truly values pluralistic neutrality. The “transformative” process of “desacralizing” religious symbols and “reconstructing” them so that they “belong[] to everybody”<sup>210</sup> actually harms the cause of religious pluralism because it “dilute[s] the authentic testimony of religions and believers who are already estranged from Western culture.”<sup>211</sup>

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<sup>207</sup> *Id.*

<sup>208</sup> Silvio Ferrari, *State-Supported Display of Religious Symbols in the Public Space*, 52 J. CATH. LEGAL STUD. 7, 16-17 (2013).

<sup>209</sup> Winnifred Fallers Sullivan, *Why Are We Talking About Civil Religion Now: Comments on “Civil Religion in Italy: A ‘Mission Impossible’?”* by Alessandro Ferrari, 41 GEO. WASH. INT’L L. REV. 877, 879 (2010); see also Alessandro Ferrari, *Civil Religion in Italy: A “Mission Impossible”?*, 41 GEO. WASH. INT’L L. REV. 839, 839-40 (2010) (noting civil religion’s attempt to reconcile rules of democracy with “warm contributions of all religions to social cohesion”).

<sup>210</sup> Beaman, *supra* note 25, at 80.

<sup>211</sup> See Gedicks & Annicchino, *supra* note 84, at 139.

3. *The Lautsi Case at the Lower Chamber: Intolerant Secularism at Work*

When the *Lautsi* case finally arrived at the European Court, one of its lower chambers considered whether the display of a crucifix in state-run classrooms violates the ECHR.<sup>212</sup> The lower Chamber rejected Italy's suggestion to consider the crucifix as a neutral and secular symbol in the classroom. The Court agreed that "the symbol of the crucifix" has a number of meanings, but it concluded that "the religious meaning was predominant."<sup>213</sup> The Chamber viewed the crucifix as a "powerful external symbol" of Catholicism—much like the prohibited Islamic headscarf in the Swiss *Dahlab* case<sup>214</sup>—that may be "emotionally disturbing for pupils of non-Christian religions or those who professed no religion."<sup>215</sup>

In this light, the lower Chamber found a violation of both the right of education and the freedom of religion, because the judges could not see how displaying a religious symbol "could serve the educational pluralism which is essential for the preservation of 'democratic society' within the Convention meaning of that term."<sup>216</sup> The Chamber reasoned that "the compulsory display of a symbol of a particular faith in the exercise of public authority" violated the rights of parents and students and was "incompatible with the state's duty to respect neutrality in the exercise of public authority, particularly in the field of education."<sup>217</sup>

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<sup>212</sup> In addition to claiming a violation of freedom of religion (ECHR, Art. 9), *Lautsi* also raised her challenge to the crucifix under a principle of non-discrimination (ECHR, Art. 14) and the right of parents to "ensure such education and teaching in conformity with their own religious and philosophical convictions" (ECHR, Prot. 1, Art. 2). The chamber resolved the issue using the right to education and freedom of religion. *Lautsi & Others v. Italy*, 2009-II Eur. Ct. H.R. at para. 79.

<sup>213</sup> *Id.* para. 51.

<sup>214</sup> See *supra* notes 112-117 & accompanying text (discussing the *Dahlab* case).

<sup>215</sup> *Lautsi & Others*, 2009-II Eur. Ct. H.R. at paras. 54-55.

<sup>216</sup> *Id.* para. 56.

<sup>217</sup> *Id.* para. 57.

The *Lautsi I* ruling in the lower Chamber was a partial victory for intolerant secularism. Moreover, the Chamber's reasoning was compatible with the U.S. Supreme Court's approach under the Establishment Clause,<sup>218</sup> despite the lack of a similar clause in the ECHR. Negative reaction to the *Lautsi I* ruling was immediate, especially by the "sizeable number of European countries and people that support displays of religious affiliation in public spaces" because they view their religious symbols "to be a part of their cultural heritage."<sup>219</sup> Nor were Europeans the only people who noted this relationship between the crucifix, history, and culture.<sup>220</sup>

The lower Chamber's decision was problematic on several fronts. First, the judges did not appreciate the diversity of church-state models in Europe, failing to distinguish the lighter Italian form of secularism from French *laïcité*.<sup>221</sup> The Chamber's position would have forced all European nations "to follow the French secular

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<sup>218</sup> See *Van Orden v. Perry*, 545 U.S. 677 (2005) (permitting the Commandments on the lawn of the Texas State Capitol among 17 memorials and 21 historical markers); see also *Lynch v. Donnelly*, 465 U.S. 668 (1984) (permitting a crèche among secular symbols, including a Christmas tree and snowmen).

<sup>219</sup> William L. Saunders, *Does Neutrality Equal Secularism? The European Court of Human Rights Decides Lautsi v. Italy*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GRPS. 170, 173 (2011); see also Maret, *supra* note 82, at 606–07 (noting that Europe was historically "marked by a distinctly Christian identity . . . [that] 'served as a medium of cultural cohesion for groups otherwise separated by language and ethnic traditions'").

<sup>220</sup> Legislators in Québec, Canada, unanimously rejected the recommendations of a report to remove a crucifix in the "Blue Room" of the National Assembly. Then-premier Jean Charest explained: "The Church has played an important role in Québec's history and the crucifix is the symbol of that history." Beaman, *supra* note 25, at 73.

<sup>221</sup> Gedicks & Annicchino, *supra* note 84, at 98–99 (noting that Italian *laicità* "emerged in the wake of the 1984 Villa Madam Accords between Italy and the Holy See, which transformed Italy from a confessional to a secular state but expressly recognized Catholicism as part of Italy's 'historical heritage'").

model, and suppress all signs of religious identity as non-neutral.”<sup>222</sup> This would not have been a victory for pluralism, but intolerant secularism. Second, the lower Chamber “appeared to assert a preference for symbols segregated from their religious background over those symbols whose religious theme could not be so removed.”<sup>223</sup> This policy would have exerted pressure on member-states to drain religious meaning from their future symbols. Finally, as the Grand Chamber would later recognize, the lower Chamber’s reasoning did not appreciate the distinction between active and passive religious symbols.<sup>224</sup>

#### 4. *The Lautsi Case at the Grand Chamber: A Pluralistic Neutrality Approach*

After the outcry against the *Lautsi I* ruling, the Grand Chamber of the European Court took up the case and reversed. While some saw the reversal “as a capitulation of the European court to Christian European lobbies,”<sup>225</sup> or as a blow to minority religions,<sup>226</sup> it is better viewed as a victory against a form of secularism that cannot tolerate religious symbolism in public culture.

In reversing, the Grand Chamber found “no European

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<sup>222</sup> Prélota, *supra* note 31, at 787. As the Grand Chamber found in *Lautsi II*, this would have been a problem in many member-states in the Council of Europe, seeing as some required such symbols in public schools—such as Italy, Austria, Poland, and parts of Germany and Switzerland—while others allowed the practice in their public schools, like Spain, Greece, Ireland, Malta, San Marino, and Romania). See *Lautsi & Others v. Italy*, App. No. 30814/06, Eur. Ct. H.R. at para. 27 (2011).

<sup>223</sup> Croghan, *supra* note 193, at 524.

<sup>224</sup> See generally Rob Lamb, *When Human Rights Have Gone Too Far: Religious Tradition and Equality in Lautsi v. Italy*, 36 N.C. J. INT’L L. & COM. REG. 751, 766-67 (2011) (criticizing the *Lautsi I* Court’s conclusions on the crucifix as a passive symbol of persecution and disrespect).

<sup>225</sup> Prélota, *supra* note 31, at 784.

<sup>226</sup> See Maret, *supra* note 82, at 610-11 (arguing that *Lautsi II* “perpetuate[s] the marginalization of minority religions in Italy” and “excludes individuals and groups whose historical, religious, or cultural traditions are different from those recognized by the State”); see also Romero, *supra* note 54, at 84–94 (criticizing *Lautsi II* for being untrue to the neutrality principle).

consensus on the question of the presence of religious symbols in State schools,” due to the diversity of church-state models present throughout Europe.<sup>227</sup> The Grand Chamber acknowledged, however, that the ECHR required the European Court to “safeguard the possibility of pluralism in education” by requiring the state to convey information about religion in the school curriculum “in an objective, critical and pluralistic manner . . . free of any proselytism . . . [or] indoctrination that might be considered as not respecting parents’ religious and philosophical convictions.”<sup>228</sup> The Grand Chamber also agreed with the lower Chamber that “the crucifix is above all a religious symbol,” noting that “whether the crucifix is charged with any other meaning beyond its religious symbolism is not decisive at this stage of the [C]ourt’s reasoning.”<sup>229</sup>

In light of the lack of European consensus and the Court’s need to give a wide margin of appreciation to member-state policies on matters involving religion, the Grand Chamber ruled in favor of Italy and the hanging of the crucifixes. The Court found that the lower Chamber had not sufficiently weighed the State’s interest in the context of the religious culture of the State, where Catholicism had played a crucial historical role in binding together the unified nation of Italy—“a country without a common language and without a widespread culture capable of founding civic engagement.”<sup>230</sup> Recognizing the unique place of the crucifix in a historical Italian-Catholic culture,<sup>231</sup> the Grand Chamber concluded that the Italian display of crucifixes was not a violation of the ECHR, in light of the wide margin of appreciation due to the nation.

The next section of this Article extracts from the Grand Chamber’s decision in *Lautsi II* three key considerations that can be transferred to the U.S. Supreme Court’s Establishment Clause jurisprudence to apply a more pluralistic neutrality principle in

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<sup>227</sup> *Lautsi & Others v. Italy*, App. No. 30814/06, Eur. Ct. H.R. at para. 70 (2011).

<sup>228</sup> *Id.* para. 62.

<sup>229</sup> *Id.* para. 66.

<sup>230</sup> Ferrari, *supra* note 209, at 841-42.

<sup>231</sup> *Id.* at 854-55 (noting the crucifix might act as a symbol of an “exclusive national ‘ethnos’ founded on its religion”).

religious display cases.

*5. Three Pluralistic Neutrality Considerations for the Supreme Court*

If the Supreme Court continues to insist on viewing religious display cases under the Establishment Clause,<sup>232</sup> then the Grand Chamber's analysis in *Lautsi II* can help the Supreme Court review those cases in a way that respects establishment limits while also taking into account a principle of pluralistic neutrality. Three considerations of the Grand Chamber are of particular import: (1) whether the environment where the symbol is displayed respects individual religious liberties; (2) whether the symbol relates to the cultural identity of the community; and (3) whether the symbol is active or passive.

First, the Grand Chamber looked to the environment in which the state displayed the symbol to determine whether it might offend individual rights.<sup>233</sup> This is a key consideration because if a state receives the latitude to promote religious symbols in the public square, then it must be careful to guarantee the absolute individual rights of religious minorities. In *Lautsi II*, the Grand Chamber approved Italy's school environment for six reasons: (1) the crucifixes were not paired with "compulsory teaching about Christianity;" (2) Italy did not forbid its students from wearing religious apparel, such as "Islamic headscarves or other symbols"; (3) "alternative arrangements" were available for minority practices; (4) minority religious holidays were "often celebrated" in school; (5) "optional religious education" for other faiths "could be organized in schools;" and (6) officials were tolerant of minority religions and non-believers.<sup>234</sup> A similarly appropriate environment is present in the United States, due to the robust free-exercise protections for minority religions present at all levels of government and in the

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<sup>232</sup> See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 899-900 (2005) (Scalia, J., dissenting) (arguing that the Clause was not intended to apply to mere "governmental invocation[s] of God").

<sup>233</sup> *Lautsi & Others v. Italy*, App. No. 30814/06, Eur. Ct. H.R. at para. 74 (2011).

<sup>234</sup> *Id.* para. 74.

courts.

Second, the Grand Chamber considered whether the religious symbol related to the cultural identity of the community.<sup>235</sup> This is a point that U.S. Supreme Court Justices have certainly made for decades about religion and culture in the United States, although some scholars remain skeptical that religious symbols can be part of a “cultural marketplace” with “everyone able to participate on an equal footing.”<sup>236</sup> In the case of the crucifix in Italy, the Grand Chamber noted the “great diversity” between European nations “in the sphere of cultural and historical development.”<sup>237</sup> Applying a wide margin of appreciation, the Court deferred to Italy’s view that, “the presence of crucifixes in State classrooms, being the result of Italy’s historical development, a fact which gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition which they considered it important to perpetuate.”<sup>238</sup>

The U.S. Supreme Court should emulate this deference when considering the place of the symbols in the community that erected the religious display, just as it considered the history and tradition of a practice when upholding legislative prayer.<sup>239</sup> Justice Breyer’s “legal judgment” theory in *Van Orden v. Perry* did something of this sort by focusing on the long history of the Ten Commandments monument erected at the Texas State Capitol.<sup>240</sup> Further, as Professor Michael McConnell has argued, in a truly pluralistic culture, symbols will not be oppressive:

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<sup>235</sup> *Id.* paras. 67-70.

<sup>236</sup> Beaman, *supra* note 25, at 90 (arguing that, in this cultural space, “there is no evidence” that “[h]istorical privilege and power sedimentations” will disappear, “leaving a space in which ideas are debated and exchanged freely”).

<sup>237</sup> *Lautsi & Others v. Italy*, App. No. 30814/06, Eur. Ct. H.R. at para. 68 (2011).

<sup>238</sup> *Id.* para. 67.

<sup>239</sup> See *Marsh v. Chambers*, 463 U.S. 783 (1983); see also *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

<sup>240</sup> *Van Orden v. Perry*, 545 U.S. 677, 700-02 (2005) (Breyer, J., concurring in judgment).



If a city displays many different cultural symbols during the course of the year, a nativity scene at Christmas or a menorah at Hannukah is likely to be perceived as an expression of pluralism rather than as an exercise in Christian or Jewish triumphalism. If the curriculum is genuinely diverse, exposing children to religious ideas will not have the effect of indoctrination. . . . The same is true of the public culture: opt-out rights should be freely accorded, but the general norm should be one of openness, diversity, and pluralism.<sup>241</sup>

Third, the Grand Chamber looked at whether the religious symbol was “passive” (as opposed to “active” presumably).<sup>242</sup> In other words, the Court was interested in the level of proselytizing furthered by the religious symbol. The Court disagreed with the lower Chamber’s comparison of the crucifix in *Lautsi* to the Islamic headscarf in *Dahlab*, noting that “a crucifix on a wall is an essentially passive symbol [that] . . . cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities.”<sup>243</sup> This Article previously criticized the *Dahlab* case as a negative example of intolerant secularism.<sup>244</sup> The Grand Chamber’s attempt to distinguish it here does not ring true—a headscarf is essentially a passive display placed upon a person; thus, it should have been equally allowed in the Swiss classrooms. While a teacher’s proselytizing words might be active, her passive headscarf is not.

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<sup>241</sup> McConnell, *supra* note 53, at 193.

<sup>242</sup> *Lautsi & Others v. Italy*, App. No. 30814/06, Eur. Ct. H.R. at para. 72 (2011).

<sup>243</sup> *Id.* The Grand Chamber viewed the facts of *Dahlab* as too different to be a relevant point of reference in the *Lautsi* case. *Id.* para. 73.

<sup>244</sup> See *supra* notes 112-117 & accompanying text (criticizing the *Dahlab* case).

Of the three factors considered by the Grand Chamber, this one comes with the most cautionary warning before being adopted by the U.S. Supreme Court. Not all scholars agree that a passive/active distinction is valid when it comes to religious symbols.<sup>245</sup> Moreover, this third factor could be problematic in the same way that the Supreme Court's current Establishment Clause cases seek to determine how an "objective observer" might view a religious display<sup>246</sup>—a practice fraught with peril, as Justice Scalia pointed out.<sup>247</sup> Still, perhaps this factor could serve well as a replacement to the objective observer analysis because it takes into consideration the depth of proselytization that might occur due to the presence of a publicly supported religious display. Depending on the context, this factor might even weigh against an "active" monument such as the Ten Commandments, which the Supreme Court has concluded might "induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."<sup>248</sup>

#### *D. Pluralistic Neutrality and Other Acknowledgments of Religion*

As with the acknowledgment of religious symbols, the U.S. Supreme Court also struggled for consistency in cases involving

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<sup>245</sup> Beaman, *supra* note 25, at 88 ("Although passivity does not necessarily equate to 'no meaning,' the implication of the court's conclusion in *Lautsi II* is that such a passive symbol does not equal indoctrination or teaching. The work of Riis and Woodhead would suggest otherwise.")

<sup>246</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) ("The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act.")

<sup>247</sup> *See also id.* at 901 (Scalia, J., dissenting) ("[I]t is an odd jurisprudence that bases the unconstitutionality of a government practice that does not actually advance religion on the hopes of the government that it would do so. But that oddity pales in comparison to the one invited by today's analysis: the legitimacy of a government action with a wholly secular effect would turn on the misperception of an imaginary observer that the government officials behind the action had the intent to advance religion.") (citation omitted).

<sup>248</sup> *Stone v. Graham*, 449 U.S. 39, 42 (1980) (striking down Ten Commandments in a school environment); *but see id.* at 45 (Rehnquist, J., dissenting) (arguing that the Commandments had "secular significance" and should be allowed to be placed before students "with an appropriate statement of the document's secular import").

prayer, or religious expression, and public education. While the Court has taken a remarkably pluralistic approach to legislative prayer, it has towed a stricter line in other areas. In the wake of this confused religious jurisprudence, lower U.S. courts often have adopted strict neutrality as their default position, to the detriment of religious liberty, history, and tradition. This section examines European Court cases involving religious expression and religious education that may provide insights for the Supreme Court.

### *1. Public Prayer and Religious Expression*

The U.S. Supreme Court has spoken with conflicting voices about prayer and religious expression by public officials and state-run organizations. On the one hand, the Court—candidly admitting that its usual Establishment Clause tests are unsuited for dealing with legislative prayer—has developed a deferential “history and tradition” test that takes into account whether the Framers viewed a public religious practice as merely “a benign acknowledgment of religion’s role in society.”<sup>249</sup> The Court has concluded that:

The inclusion of a brief, ceremonial prayer as part of a larger exercise . . . is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs.<sup>250</sup>

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<sup>249</sup> *Town of Greece v. Galloway*, 134 U.S. 1811, 1819 (2014) (applying the history and tradition test to approve expressly sectarian prayers prior to city council meetings, if given by members of the community).

<sup>250</sup> *Id.* at 1827-28.

On the other hand, the Court has applied a non-deferential test in public schools to strike down prayers that boast a similar lineage in history and tradition.<sup>251</sup> Thus, the Court has viewed a school's authorization of a rabbi's short, non-denominational graduation prayer as the equivalent of a "state-created orthodoxy [or a] state-sponsored religious exercise that puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."<sup>252</sup> In this area, the Court has embraced strict neutrality.

In contrast, the European Court has never decided a case involving the propriety of prayer by a public official or prayer at official events. The ECHR does not have an Establishment Clause and does not contemplate that mere prayer by a state actor or in a public ceremony could violate individual human rights. Article 9 of the ECHR guarantees the "[f]reedom to manifest one's religion or beliefs"<sup>253</sup>—it does not limit the manifestation of those beliefs by state officials. This focus promotes true pluralism, which accepts the religious identity of all people and does not repress the expression of that identity, even by its public officials. Indeed, "official religious expression may bolster religious freedom by affirming, if only symbolically, that religious beliefs are relevant to public life: that the public square is not naked of religion, and that religious arguments are part of the pattern of debate in a pluralistic society."<sup>254</sup>

While the issue of legislative or school prayer does not find its complement in the European Court's jurisprudence, that Court has provided guidance in other areas involving religious expression and the actions of public officials. Specifically, the European Court has decided several cases where the state has impaired religious expression or association—a situation much more likely to result in establishing a state religion than a few words spoken by a graduation speaker merely acknowledging the importance of faith in life's

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<sup>251</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (striking down student-initiated prayer before football game); see *Lee v. Weisman*, 505 U.S. 577, 577 (1992) (striking down non-denominational graduation prayer).

<sup>252</sup> *Lee*, 505 U.S. at 592.

<sup>253</sup> ECHR, *supra* note 7, art. 9.

<sup>254</sup> Berg, *supra* note 27, at 35.

special moments. A few case comparisons should illustrate three key points.

First, public officials have the absolute right to religious belief and expression—a right not open to regulation by the state or its courts. In *Buscarini and Others v. San Marino*, the Grand Chamber of the European Court rejected a policy in San Marino—a tiny microstate located within the boundaries of Italy—that forced newly elected members of parliament to swear a religious oath “on the Holy Gospels,” as required since 1909.<sup>255</sup> The European Court found that San Marino had violated Article 9 because the oath policy was “tantamount to requiring two elected representatives of the people to swear allegiance to a particular religion.”<sup>256</sup> In this case, without the benefit of an Establishment Clause, the European Court applied a pluralistic neutrality rationale to reach essentially the same result as the U.S. Supreme Court in *Torcaso v. Watkins*, where the Justices rightly rejected Maryland’s requirement that its political officials affirm belief in God in order to serve public office.<sup>257</sup> In both cases, the state improperly used its power to coerce public officials into accepting a state-approved creed. The lesson of these decisions is that the state cannot force its officials to forfeit their religious rights simply because they have chosen to become public servants.

Second, while public officials may believe and pray as they wish, their beliefs cannot translate into actions that impair the religious rights of others. For instance, in *Hasan and Chaush v. Bulgaria*, the government replaced Hasan—the “Chief Mufti” of the Bulgarian Muslim Community—with a candidate who had previously held the post, and then the state refused to register the religious group led by Hasan.<sup>258</sup> Rejecting Bulgaria’s claim that its

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<sup>255</sup> *Buscarini v. San Marino*, 1991-I Eur. Ct. H.R. As in *Lautsi*, the state attempted to win by draining any religious meaning from the oath. The Court, however, rejected San Marino’s argument that the oath had “lost its original religious character.” *Id.* para. 32.

<sup>256</sup> *Id.* para. 34.

<sup>257</sup> *Torcaso v. Watkins*, 367 U.S. 488 (1961).

<sup>258</sup> *Hasan v. Bulgaria*, App. No. 30985/96, Eur. Ct. H.R. (2000).

actions were merely “of a declarative nature” to help bring unity to the religious community, the Court found an Article 9 violation.<sup>259</sup> Similarly, in *Metropolitan Church of Bessarabia and Others v. Moldova*, government officials refused to recognize what they believed to be a “schismatic” Orthodox Christian sect that would not reconcile with a larger, state-recognized Orthodox Church.<sup>260</sup> The European Court concluded that these actions violated Article 9, finding the officials had improperly assessed “the legitimacy of religious beliefs.”<sup>261</sup> Both of these cases are consistent with the U.S. Supreme Court’s ruling in *Presbyterian Church v. Hull Church*, which nullified a Georgia law that required a jury in a church property dispute to decide which side of the dispute was more faithful to the religion’s tenets.<sup>262</sup> Other cases could also illustrate this comparison.<sup>263</sup>

Third, public officials may not allow their personal religious beliefs to stand in the way of accommodating others in the exercise of their religion. The classic example of this principle in the United States is the case of *Sherbert v. Verner*, where the Free Exercise Clause required a state to give unemployment benefits to a Seventh Day Adventist who was fired for refusing to work on her Sabbath

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<sup>259</sup> *Id.* para. 82.

<sup>260</sup> *Metro. Church of Bessarabia v. Moldova*, 2001-XII Eur. Ct. H.R.

<sup>261</sup> *Id.* para. 123. The violation occurred in a concededly difficult environment—Moldova had recently emerged from the Soviet Union and this dispute may have been a proxy clash between Russia and Romania. *Id.* para. 111.

<sup>262</sup> *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969). The Court found that “First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.” *Id.* at 449.

<sup>263</sup> *Compare Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) (1993) (finding a violation when public officials prosecuted a Jehovah’s Witness for proselytizing in an attempt to protect the Greek Orthodox majority religion), *with Cantwell v. Connecticut*, 310 U.S. 296 (1940) (striking down a state statute that required licenses for those soliciting for religious purposes), *and Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 150 (2002) (striking down an ordinance that required door-to-door religious advocates to obtain a permit).

day.<sup>264</sup> In that case, it did not matter whether state unemployment officials accepted the legitimacy of the woman's refusal to work based on her religion; the Supreme Court prohibited those officials from treating her refusal as "good cause" for dismissal.<sup>265</sup>

Likewise, in the consolidated case of *Eweida and Others v. The United Kingdom*, the European Court held that state officials must at times accommodate certain religious practices, such as the wearing of a Christian cross.<sup>266</sup> Nadia Eweida was an employee of British Airways—a private airline operating in the United Kingdom (U.K.)—who, as a Christian, wished to wear a cross necklace outside her uniform.<sup>267</sup> Her co-applicant, Shirley Chaplin, was a Christian nurse working at a U.K. state hospital who was ordered to take off her cross necklace when the hospital mandated new uniforms with a V-neck.<sup>268</sup> Although Eweida worked for a private employer, the European Court found that Article 9 included in it a "positive obligation" on public officials to "sufficiently secure" individual religious rights.<sup>269</sup> In Eweida's case, British Airways had changed its policy based on public opinion and had not presented a strong enough reason to prevent the cross display, especially where the company had already accommodated other religious symbols, such as Islamic headscarves.<sup>270</sup> In Chaplin's case, however, the cross posed a safety hazard in the hospital environment—a much stronger reason for this rule.<sup>271</sup> In accord with the European Court's wide margin of appreciation, it found that the U.K. officials were best positioned to determine safety policies on a hospital ward.<sup>272</sup>

In sum, a more pluralistic neutrality principle would permit

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<sup>264</sup> See *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>265</sup> *Id.*

<sup>266</sup> See *Eweida and Others v. The United Kingdom*, 2013-I Eur. Ct. H.R.

<sup>267</sup> *Id.* paras. 9-12.

<sup>268</sup> *Id.* paras. 18-20.

<sup>269</sup> *Id.* paras. 84, 90.

<sup>270</sup> *Id.* paras. 9, 94.

<sup>271</sup> *Id.* para. 99.

<sup>272</sup> See *Eweida and Others v. The United Kingdom*, 2013-I Eur. Ct. H.R. at paras. 99-100.

public officials and offices to acknowledge religion with prayer and other religious expression, within reason. This would not violate the Establishment Clause either—as the legislative prayer cases demonstrate—especially outside the context of the public schools. “The Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of non-sectarian prayer in public events demonstrates, they understood that ‘[s]peech is not coercive; the listener may do as he likes.’”<sup>273</sup> The Supreme Court should follow Europe’s lead in focusing on the *actions* of public officials, while permitting maximum flexibility in their religious expression.

## 2. Religion and Public Education

The role of religion in public education is the final topic to consider in this Article. As discussed in the prior section, the Supreme Court continues to turn a harsh eye toward school-sponsored prayer. In fact, the Court typically applies its strictest neutrality in cases involving religion in elementary or secondary public education. This repeatedly has been the case in the post-*Everson* Establishment Clause era, with the Court finding it unconstitutional for schools to pray before class,<sup>274</sup> to read from the Bible,<sup>275</sup> to prohibit instruction on evolution,<sup>276</sup> to teach creation science,<sup>277</sup> to display the Ten Commandments,<sup>278</sup> and to pray at

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<sup>273</sup> Lee v. Weisman, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting) (quoting American Jewish Congress v. Chicago, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting)).

<sup>274</sup> See Wallace v. Jaffree, 472 U.S. 38 (1985) (no moment of silence intended for voluntary prayer); see also Engel v. Vitale, 370 U.S. 421 (1962) (no state-composed school prayers).

<sup>275</sup> Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (no starting school day with a Bible reading).

<sup>276</sup> See Epperson v. Arkansas, 393 U.S. 97 (1968) (no law prohibiting the teaching of evolution).

<sup>277</sup> See Edwards v. Aguillard, 482 U.S. 578 (1987) (no law requiring the teaching of creation science).

<sup>278</sup> See Stone v. Graham, 449 U.S. 39, 42 (1980) (no law requiring display of Ten Commandments).



school events.<sup>279</sup> In fact, the Court has approved religious-related practices only where schools have blatantly discriminated against religion-based clubs<sup>280</sup> or where they have authorized students time during the school day to receive private religious instruction off-campus, as in *Zorach v. Clauson*.<sup>281</sup>

Not surprisingly, the European Court's jurisprudence is more tolerant of public religious education—concerned mostly that the state conduct classes in a pluralistic manner with respect for the beliefs of students and parents. This makes sense: if religion is good for society, then the state should be able to encourage morality, pluralism, and religious practice through its education system, as publicly run schools did for centuries in the United States until the Supreme Court ended the practice in the 1960s. Just as important, however, is the corollary principle that students should have the right to opt out of religious education, if they so desire.

The Supreme Court can gain insight from European Court cases in this area, and should realize that its Establishment Clause jurisprudence has room for moderation by applying a more pluralistic neutrality principle. For instance, in *Folgerø and Others v. Norway*, the Grand Chamber of the European Court considered the validity of a Christian public education class, in a nation where the Evangelical Lutheran Church is the state-established religion.<sup>282</sup> Norway had always offered a Christianity class in its public schools; however, in the 1990s it made that class more pluralistic, encouraging open-mindedness.<sup>283</sup> As a result, Norway tightened its requirements on when a student could be exempt from participating in that class. Specifically, parents must now provide a note

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<sup>279</sup> See *Lee v. William*, 505 U.S. 577 (no graduation prayer by guest speaker); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (no student-led prayer prior to football game).

<sup>280</sup> See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (requiring fair treatment of school clubs).

<sup>281</sup> See *Zorach v. Clauson*, 343 U.S. 306 (1952) (permitting release off-campus for religious instruction); *McCullum v. Bd. of Educ.*, 333 U.S. 203 (1948) (forbidding release to on-campus classrooms for religious instruction).

<sup>282</sup> *Folgerø and Others v. Norway*, 2007-III, Eur. Ct. H.R.

<sup>283</sup> *Id.* paras. 9, 15.

explaining in detail why their student needed the exemption.<sup>284</sup> Some parents complained, however, that the exemption requirements were improper and onerous.<sup>285</sup>

In its judgment against Norway, the European Court affirmed the right of nations to teach religion in their public schools, subject to student exemption.<sup>286</sup> The Court applauded Norway's attempt to transform a purely religious class into one that better stressed pluralistic principles.<sup>287</sup> The Court agreed, at least in theory, that the state could more strictly enforce attendance at a truly objective pluralistic class.<sup>288</sup> It faulted Norway's class, however, for not presenting Christianity in a sufficiently objective manner, and for containing blatantly religious activities, such as prayer.<sup>289</sup> Thus, Norway's exemption criteria was too strict, in light of the class' religious content.<sup>290</sup> The Court believed that the stricter note requirement improperly obligated parents to reveal potentially intimate details about their private lives, and it worried that the state might still deny exemptions.<sup>291</sup> The Grand Chamber concluded that the ECHR required Norway to grant full exemptions to every student who objected to the class, without resort to an onerous exemption process.<sup>292</sup> The Court decided related issues in cases from Poland<sup>293</sup>

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<sup>284</sup> *Id.* para. 25.

<sup>285</sup> *Id.* paras. 51-52.

<sup>286</sup> *Id.* para. 84.

<sup>287</sup> *Id.* paras. 88, 102.

<sup>288</sup> *Folgerø and Others v. Norway*, 2007-III, Eur. Ct. H.R. at para. 89.

<sup>289</sup> *Id.* paras. 90-95.

<sup>290</sup> *Id.* paras. 97-99.

<sup>291</sup> *Id.* para. 100.

<sup>292</sup> *Id.* para. 102.

<sup>293</sup> *See Grzelak v. Poland*, 2010-IV Eur. Ct. H.R. In this case, non-religious students who opted out of a religious class in the Polish public schools received no grade on their report card for that class. The European Court found that this placed a black mark on these students' records that Poland must correct by offering an alternative ethics class; by taking the class off all transcripts; or by assigning the students a harmless grade in it. *Id.*

and Turkey.<sup>294</sup>

The Supreme Court should learn from these European decisions that religion can play a role in public education and that progressive nations can respect individual rights while providing religious courses to achieve valid societal interests. The Supreme Court in *Zorach* saw the benefit to society in permitting religious education during public school hours, although the Court did require that all religion classes be conducted off-campus by private teachers.<sup>295</sup> Further, the Court has stated that the Bible “may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”<sup>296</sup> This analysis is not too far removed from the European Court’s cases in this area. While the Establishment Clause might not permit the state to expend significant tax dollars on a doctrinal religion course, surely a more pluralistic neutrality principle would allow the Court to rethink much of its public school precedents.

Why not allow schools to encourage willing students to pray during the school day and at school events? A society that values pluralism should not teach students that prayer is a dangerous practice to be avoided in public at all costs. And what harm can come from allowing schools to present alternative theories to evolution, if done in a clinical and non-proselytizing manner? Pluralistic societies should not shelter students from theories on the origin of life solely because they find their genesis in the Book of Genesis, or in a philosophy that recognizes an Intelligent Designer.

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<sup>294</sup> See *Mansur Yalçın and Others v. Turkey*, 2014-II Eur. Ct. H.R. In this case, members of the Alevi Islamic sect complained about Turkey’s religious education class, which was required for all Muslims, but exemptable for Jews and Christians. They claimed the course was steeped in Sunni Islamic doctrine, which was offensive to the Alevi. The European Court found that Turkey did not provide sufficient exemptions, and that almost all European states provided some sort of “exemption mechanism, giving the opportunity to take substitute material or leaving them free to register for a religion course.” *Id.* para. 76.

<sup>295</sup> *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

<sup>296</sup> *Stone v. Graham*, 449 U.S. 39, 42 (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)).

Finally, why not encourage students to read from scriptural works as a source of inspiration or reflection? Pluralism should be as willing to expose students to the works of Jesus and Mohammed, as it is to encourage them with the wisdom of Ghandi or Maya Angelou. In short, if the Supreme Court were to adopt a more pluralistic neutrality principle, it would see that its modern Establishment Clause jurisprudence in this area has been unnecessarily strict and ultimately harmful to the values of pluralism.

## VI. CONCLUSION

Traditionally, religion has brought great benefits to society by developing culture and morals, and by providing a common source of unity to diverse peoples. Although the influence of religion is waning in Europe, the mark of faith on that continent's history and culture has given its courts a unique perspective that can benefit the U.S. Supreme Court in its quest to interpret the Religion Clauses of the First Amendment. Case law from the European Court of Human Rights demonstrates to the Supreme Court how a pluralistic neutrality principle can enrich the American society and harness the value of faith in the public sphere, while at the same time retaining the vigorous protection of individual religious rights.

The unfortunate alternative to a jurisprudence built around pluralistic neutrality is the inevitability of intolerant secularism—an increasingly militant separation of religious ideals from the public life, leading ultimately to a repressive society that has no room in its government for religious citizens. Under that regime, adherents of both majority and minority religions suffer for the cause of secular values. The results of intolerant secularism are seen in a recent series of negative cases decided by the European Court of Human Rights, which largely are a product of the deference the Court must give to secular nations under its margin of appreciation doctrine. These cases illustrate how highly secularized nations can trample the fundamental rights of religious citizens for the sake of secular ideals—preventing these peace-loving citizens from dressing in religious garb, engaging in age-old sacrificial rituals, and following their consciences. The Supreme Court can avoid this type of intolerance in the United States by distancing itself from the principle

of strict neutrality that the Court often has repeated in its Establishment Clause cases.

A better path for the Supreme Court is to emulate a series of positive cases from the European Court of Human Rights that demonstrate pluralistic values. These cases show the value that religion can bring to public life, and the ability of progressive nations to welcome religious diversity into the public square without harming individual rights. If the Supreme Court embraces this European-style principle of pluralistic neutrality, it can continue down its current path with regard to public aid to religion through generally available, neutral funding programs. More significantly, accepting pluralistic neutrality will result in a moderation of the Supreme Court's religious display cases, allowing the state to promote meaningful symbols that are part of the community's identity and sense of culture. Similarly, a pluralistic neutrality principle will strengthen the benefits of other public acknowledgments of religion—such as prayer by public officials and religious values in public education.

The net result of this shift in the Supreme Court's focus—without sacrificing the value and purpose of the Establishment Clause—would be to promote the cause of religious pluralism in the United States and to enhance the dignity of the American people to live out their religious faith in the community insofar as they choose to do. This can only be done, however, if the Supreme Court reforms its view of the Religion Clauses and learns a few lessons from its European brethren about the blessings of a more pluralistic principle of neutrality.