ISLAMIC TERRORISM: THE LEGAL IMPACT ON THE FREEDOM OF RELIGION IN THE UNITED STATES AND EUROPE

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ABSTRACT

This Article aims to compare the impact of Islamic terrorism after the September 11 attacks on the approaches of the United States and Europe to their laws governing freedom of religion — in particular, focusing on the rights of Muslims in these regions. Looking to a number of post-September 11 cases in the U.S. federal and state courts and the European Court of Human Rights, this Article argues that despite the limitations on Muslims' religious freedoms and the demonstrated favoritism towards existing religious majorities, the post-September 11 cases in the U.S. and in Europe have been largely consistent with the

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principles and holdings of pre-September 11 precedents. The consistent treatment of Muslims' religious rights post-September 11 may be attributed to a number of factors: the nature of the limitations, namely in exemption cases; the courts' renewed belief that a person's religion does not reflect disloyalty to the country in discrimination cases; the courts' recognition of its self-restraining role in policymaking regarding antiterrorism; or the European doctrine of the "margin of appreciation." Nevertheless, the antiterrorism approaches of the U.S. and EU seem to be more manifest in the policies governing immigration and national security. With the rise of Islamic terrorism, particularly with Al Qaeda and the Islamic State of Iraq and Syria ("ISIS"), security issues have become a priority for the U.S. and EU. The extent to which such antiterrorism policies have been ultra vires and have disproportionally affected Muslim citizens and immigrants is still under scrutiny.

Introduction

In June 2012, a group of Muslim Americans and Muslim organizations in New Jersey filed a lawsuit against the New York City Police Department, challenging its surveillance operations as discriminatory against Muslims, in violation of the First and Fourteenth Amendments.[1] The plaintiffs alleged that following the 9/11 attacks, the NYPD has used "a variety of methods to spy on Muslims," including "snap[ping] pictures, [taking] videos, and collect[ing] license plate numbers of [mosque] congregants" and using undercover cops to pose as members of Muslim groups.[2] The plaintiffs claimed that the program "targets Muslim entities and individuals in New Jersey for investigation solely because they are Muslim or believed to be Muslim" rather than "based upon evidence of wrongdoing."[3] In view of the program's aim and tactics, the plaintiffs also alleged that the program violated the Free Exercise and Establishment Clause, since the First Amendment demands strict governmental neutrality among religious sects.[4]

In February 2014, the District Court in New Jersey dismissed the case for lack of standing and for failure to state a claim, explaining that the plaintiffs failed to identify any cognizable "injury in fact" and that "[t]he more likely explanation for the surveillance was a desire to locate budding terrorist conspiracies" than a desire to discriminate, particularly

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[1] Hassan v. City of New York, No. 2:12-3401, 2014 WL 654604 (D.N.J. Feb. 20, 2014), *rev'd*, No. 14-1688, 2015 WL 5944454 (3d Cir. Oct. 13, 2015).

[2] *Id.* at 2.

[3] *Id.*

[4] *Id.* at 3.

since the "surveillance of the Muslim community began just after the attacks of September 11, 2001."[5]

However, in a lengthy order issued in October 2015, the U.S. Court of Appeals for the Third Circuit reversed and remanded the decision, stating that the Muslim plaintiffs' allegations clearly do "tell a story in which there is standing to complain and which present constitutional concerns that must be addressed and, if true, redressed."[6] On the issue of first impression, the Third Circuit held that religious-based classifications were subject to heightened scrutiny, and that the municipality's present justifications of "national security" and "safety concerns" were insufficient to overcome the violative presumption.[7]

On the First Amendment issue, the Third Circuit stated that the City waived its defense that overt hostility and prejudice were required to make out such claims, and the Court explained that courts have repeatedly rejected the notion that either the Free Exercise Clause or the Establishment Clause "is . . . confined to actions based on animus."[8]

The case described above, *Hassan v. City of New York*, is a seminal case not only because it is the first case ever brought on behalf of Muslim Americans and Muslim organizations challenging the NYPD's surveillance program,[9] but because it illustrates the dynamic legal approach of the United States to Islamic terrorism after 9/11 — an approach attempting to balance antiterrorism policies and freedom of religion.[10]

As an initial matter, "Islamic terrorism" is a highly politicized term that comes with a set of political-cultural assumptions and narratives.[11] It is obvious that the "use of the term discursively links the religion of Islam with terrorism."[12] The numerous terrorist attacks against the U.S. and several member states of the EU — namely September 11, which

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[5] *Id.* at 6 ("[T]he motive for the Program was not solely to discriminate against Muslims, but rather to find Muslim terrorists hiding among ordinary, law-abiding Muslims.").

[6] Hassan v. City of New York, No. 14-1688, 2015 WL 5933354, at *24 (3d Cir. Oct. 15, 2015).

[7] *Id.* at 20 ("[W]e cannot accept the City's invitation to dismiss Plaintiffs' Complaint based on its assurance that the Program is justified by national-security and public-safety concerns.").

[8] *Id.* at 23 (internal citation omitted).

[9] CENTER FOR CONSTITUTIONAL RIGHTS, *Active Cases: Hassan v. City of New York*, http://ccrjustice.org/home/what-we-do/our-cases/hassan-v-city-new-york (last visited Oct. 22, 2015).

[10] *See infra* Part I.

[11] For the use of the term "Islamic terrorism" in the political and academic discourse, see Richard Jackson, *Constructing Enemies: 'Islamic Terrorism' in Political and Academic Discourse*, 42 GOV'T & OPPOSITION 394, 395 (2007) (challenging the use of "Islamic Terrorism" to describe religious extremism as counterproductive).

[12] *Id.* at 402-07.

prompted the U.S.'s "war on terror,"[13] the 2004 Madrid train bombings,[14] the London train and bus bombings in 2005,[15] the *Charlie Hebdo* shooting[16] and the recent large-scale attacks in Paris in 2015[17]— only fuel the concerns regarding the correlation between the Islamic faith and terrorism.[18] Although the discourse on "Islamic terrorism," analyzing the effects of the label and offering alternative terms,[19] is considerable, in this Article, the term has a limited meaning. The term "Islamic terrorism" reflects the recent attacks by religious extremist organizations as published by news reports, and it is confined to the analysis of the different legal approaches after such attacks to balance antiterrorism policies and freedom of religion. As such, as legal systems continue to respond to acts of Islamic terrorism around the world,[20] it is worth comparing the approaches of the U.S. and the EU — two regions that share historical

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[13] *See A NATION CHALLENGED; President Bush's Address on Terrorism Before a Joint Meeting of Congress*, N.Y. TIMES (Sept. 21, 2001), http://www.nytimes.com/2001/09/21/us/nation-challenged-president-bush-s-address-terrorism-before-joint-meeting.html?pagewanted=1.

[14] *See* Elaine Sciolino, *Spain Struggles to Absorb Worst Terrorist Attack in its History*, N.Y. TIMES (Mar. 11, 2004), http://www.nytimes.com/2004/03/11/international/europe/11CND-TRAI.html?pagewanted=all.

[15] *See* Alan Cowell, *Subway and Bus Blasts in London Kill at Least 37*, N.Y. TIMES (July 7, 2005), http://www.nytimes.com/2005/07/08/world/europe/subwayandbusblastsinlondonkillatleast37.html.

[16] *See* Dan Bilefsky & Maïa de la Baume, *Terrorists Strike Charlie Hebdo Newspaper in Paris, Leaving 12 Dead*, N.Y. TIMES (Jan. 7, 2015), http://www.nytimes.com/2015/01/08/world/europe/charlie-hebdo-paris-shooting.html.

[17] *See* Adam Nossiter & Rick Gladstone, *Paris Attacks Kill More than 100, Police Say; Border Controls Tightened*, N.Y. TIMES (Nov. 13, 2015), http://www.nytimes.com/2015/11/14/world/europe/paris-shooting-attacks.html?_r=0.

[18] "[Since September 11th, there have been] more than 1700 incidents of harassment, discrimination, and violence against Arabs, Muslims, and those thought to resemble those groups." Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1201 (2003); *see also* W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, *in* 2 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1 (Johan D. van der Vyer & John Witte, Jr. eds., 1996).

[19] Jackson, *supra* note 11, at 426 (summarizing other views in this field).

[20] *See* Keith Bradsher, *Deadly Car Bombing Shakes Marriott Hotel in Jakarta*, INT'L N.Y. TIMES (Aug. 5, 2003), http://www.nytimes.com/2003/08/05/international/asia/05CND-INDO.html; *see also* Farah Samti & Carlotta Gall, *Tunisia Attack Kills at Least 39 at Beach Resort Hotel*, INT'L N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/world/africa/gunmen-attack-hotel-in-sousse-tunisia.html.

roots,[21] that similarly protect freedom of religion in their laws,[22] and that also have been targets of terrorist attacks.[23]

The question addressed here is: what is the legal impact of Islamic terrorism post-9/11 on the laws governing freedom of religion and on the rights of Muslims in the U.S. and the EU? This broad question can be unpacked: What are the standards for the protection of freedom of religion in the U.S. and in EU member states? Are there any differences between those two legal orders; if so, what are they, and what are their implications? What are the post-9/11 statuses of Muslims and their religious rights? Finally, has the recent rise of Islamic terrorism post-9/11 shifted the U.S. and EU away from legal precedents of previous decades?

In addressing the broad question, comparative methodology will be the driving force in the overall structure of the Article, using a "macro comparative" perspective[24] for the two legal institutions in the first half and a "micro comparative" perspective[25] for the specific issue of freedom of religion in the latter half. In doing so, the Article will first cover the legal infrastructures and mechanisms of protecting freedom of religion in the U.S. and EU, with a focus on the establishment clause jurisprudence. The Article will then focus on the scope of permissible limitations on religious freedoms and, by comparing analogous cases, will identify the differences in permissible limitations between the U.S. and Europe. Then, the Article will summarize some key post-9/11 free exercise cases and compare them to pre-9/11 cases, examining for any differences in how these recent attacks affected the decisions and consequently the rights of Muslims. The Article then offers a number of explanations for the courts' treatment of the post-9/11 cases. Lastly, the Article will briefly study areas of law that absorbed the governments' antiterrorism goals, namely the immigration and national security policies — areas where it seems that Muslim citizens or immigrants were affected.

Focusing on recent cases that attracted the interest of scholars and critics around the world, *Freeman v. State of Florida*[26] adjudicated before a

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[21] For more analysis on the western legal system, see MATHIAS SIEMS, COMPARATIVE LAW 68-70 (2014). However, it is commonly accepted that the taxonomy of legal systems and the criteria for grouping are generally contestable. *See* Craig M. Lawson, *The Family Affinities of Common-Law and Civil-Law Legal Systems*, 6 HASTINGS INT'L & COMP. L. REV. 85, 86 (1982).

[22] *See infra* Part I.

[23] *See supra* notes 13-17 and accompanying text.

[24] Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT'L L.J. 331, 378 (1998) ("[M]acrocomparison compares the institutions, principles, spirit and style of different legal systems, and the cognitive and procedural methods.").

[25] *Id.* ("[M]icrocomparison focuses [on] specific legal concepts and problems").

[26] Freeman v. Florida Dep't of Highway Safety & Motor Vehicles, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006).

Florida state court, and *S.A.S. v. France*[27] before the European Court of Human Rights ("ECtHR"), this Article argues that these post-9/11 decisions imposed limits on Muslims' religious freedoms. However, both of these cases are in accordance with pre-9/11 precedents, as these limitations were permissible. Similarly, although it seems that the holdings in the recent cases *Town of Greece v. Galloway*[28] and *Lautsi v. Italy*[29] demonstrate favoritism towards the existing religious majorities, both decisions are also in line with the precedents established before 9/11 in the U.S. and ECtHR jurisprudence.[30]

Thus, the repercussions of policies targeting Islamic terrorism were not absorbed through legal or judicial limitations on freedom of religion, but were perhaps instead absorbed in other areas of law, namely in immigration and national security, where the administrations have greater discretion and authority. As it will be argued below, both U.S. and European courts have consistently shown deference to the political branches of the government or to the national government of the member state to handle immigration policies and national security issues.

I. The Foundations: Freedom of Religion in the U.S. and EU

The concept of freedom of religion, though "the oldest of the internationally recognized human rights,"[31] was not fully realized until recently.[32] As one historian in the field noted: "[f]or several thousand years the history of religion was marked by religious intolerance and persecution."[33] This concept of religious freedom made its way into most of the world's constitutions, including those of the West, only after World War II.[34] In response to the tragedies of World War II, the repression of religious groups and the proliferation of new religions, jurists and theologians produced a number of theories of religious rights and human rights.[35] The movement to prohibit religious discrimination and to pro-

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[27] S.A.S. v. France, App. No. 43835/11, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-145466 (last visited Oct. 20, 2015).

[28] Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

[29] Lautsi v. Italy, App. No. 30814/06, 50 Eur. Ct. H.R. 42 (2011), http://hudoc.echr.coe.int/eng?i=001-104040.

[30] *See infra* Part II.

[31] *See* Durham, *supra* 18, at 1 ("As early as the Peace of Westphalia in 1648, the right to religious liberty was afforded international protection.") (internal citation omitted).

[32] *See* Brian Tierney, *Religious Rights: An Historical Perspective*, *in* 1 Religious Human Rights in Global Perspective: Religious Perspectives 17 (John Witte, Jr. & Johan D. van der Vyver eds., 1996) (internal citation omitted).

[33] *Id.*

[34] Durham, *supra* note 18, at 1-2.

[35] John Witte, Jr. *Introduction to* 1 Religious Human Rights in Global Perspective: Religious Perspectives 17 (John Witte, Jr. & Johan D. van der Vyver eds., 1996).

tect freedom of religion then became part of the broader "rights revolution" around the world.[36]

As it stands today, freedom of religion is a fundamental right connected with freedom of thought and freedom of expression, and its legal protection is incompatible with a separation between belief and action.[37] Even in 1948, this right was recognized by the General Assembly of the United Nations, which declared that: "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 teaching, practice, worship and observance."[38] Thus, over the past sixty years, the right to liberally manifest religious preferences has been cherished and developed to a great extent, especially in the western world.

The West, which generally refers to the United States and the European Union, share a number of key legal principles, in addition to freedom of religion, such as respect for human dignity, rule of law, and democracy.[39] In the context of religion in particular, several aspects are worth comparing to help explain their common goal of protecting religious freedoms: the legal infrastructures and mechanisms of protecting religious freedoms, the historical relationships between religion and state, and the religious demographics of the two regions.

As an initial matter, both the U.S. and EU expressly protect freedom of religion. The First Amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[40] From this wording, the two dimensions of religious liberty in the U.S. are, respectively, "free exercise" and "establishment."[41] For the EU, it is important to note that there are three sources of European human rights according to Article 6 of the Treaty on European Union[42] — the Charter of Fundamental Rights of the European Union ("Charter"), the European Convention on Human Rights ("ECHR"), and the General Principles of European Union's law. However, Article 9 of the ECHR, which provides that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom,

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[36] *Id.*

[37] *See* Jonatas E. M. Machado, *Freedom of Religion: A View from Europe*, 10 ROGER WILLIAMS U. L. REV. 451, 485 (2005).

[38] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 18 (Dec. 10, 1948).

[39] SIEMS, *supra* note 21, at 65.

[40] U.S. CONST. amend. I, cl 1-2.

[41] Durham, *supra* note 18, at 16.

[42] Article 6, Treaty of European Union. For a more detailed analysis of the sources of European Human Rights and their interaction, see ROBERT SCHUTZE, EUROPEAN CONSTITUTIONAL LAW 410 (2012).

either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance,"[43] is the common ground between the three sources of European human rights protection.[44]

These laws operate within larger legal infrastructures respectively. Notwithstanding the similar circumstances surrounding their enactments,[45] the Bill of Rights and the ECHR establish certain minimum standards of protections, including those that govern freedom of religion that the U.S. government and EU member states must uphold. These documents only set the floor, and member states in both legal orders have the ability to expand the level of protection beyond these minimum standards.[46]

Another similarity is that the Bill of Rights and the ECHR also may be suspended in the event of a national emergency. The U.S. Constitution provides Congress with the authority to suspend the right to relief from

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[43] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. For a detailed analysis on Article 9 of the ECHR, see Claudia E. Haupt, *Transnational Nonestablishment*, 80 GEO. WASH. L. REV. 991 (2012).

[44] The status of the ECHR in the EU system is not entirely clear. Although it is a binding document, as all EU member states have signed and ratified the treaty, the European Court of Justice (ECJ) has ruled that the draft agreement on the accession of the EU to the ECHR is not compatible with EU law. *See* Request for an Opinion pursuant to Article 218(11) TFEU, made on 4 July 2013 by the European Commission, 2014 E.C.R. 2/13. That said, it is noteworthy that the Charter in Article 10 repeats verbatim Article 9 of the ECHR and which became formally binding with the Lisbon Treaty on the EU and the Member States institutions when acting "within the scope of EU law." *See* Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 MAASTRICHT J. EUR. & COMP. L. 168, 168-69 (2013).

[45] In fact the U.S. Bill of Rights was adopted as a series of amendments to the original constitutional text. *See* CHARLES A. SHANOR, AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION 5 (2d ed. 2003). As the Bill of Rights was originally introduced, it was applicable to the federal government, not to the states. *See* Richard Albert, *The Constitutional Politics of the Establishment Clause*, 87 CHI.-KENT L. REV. 867, 874 n.45 (2012). With regards to the EU, the ECHR was not adopted into the EU legal order until 2000 through the Treaty of Nice, but this was more of a symbolic step, as all state members of the EU were signatories to the ECHR. *See generally* Elizabeth F. Defeis, *A Bill of Rights for the European Union*, 11 ILSA J. INT'L & COMP. L. 471 (2005). In 2009, the ECHR became formally binding in conjunction with the Lisbon Treaty for both "the EU institutions and the Member States when they act within the scope of EU law." de Búrca, *supra* note 44, at 169.

[46] For instance, the protection prescribed by the German Constitution regarding the Freedom of Religion in Article 4 is broader compared to the protection prescribed by the Article 9 of the ECHR. *See* Gerhard Robbers, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Germany*, 19 EMORY INT'L L. REV. 841, 845 (2005).

unlawful imprisonment in "cases of Rebellion or Invasion the public Safety may require it."[47] The ECHR grants this same authority to member states under Article 15, "[i]n time of war or other public emergency threatening the life of the nation."[48]

The mechanisms of enforcing the protections differ, however, particularly in light of the greater structural differences between the two polities. The U.S. is a "complete federation," with a centralized system, whereas the EU is a non-complete federation with a decentralized system.[49] In the U.S., control over enforcement is delegated to the Supreme Court, an institution established by the U.S. Constitution, and emergency powers are delegated to the federal government.[50] Thus, the framework for suspending provisions within the Bill of Rights is largely based on judge-made law.[51] And the Supreme Court's decisions are binding on all states and on the federal government.[52]

In the European Union, on the other hand, control over the ECHR and emergency powers is distributed equally among the member states, and depending on the nature of the violation, control is delegated either to the European Court of Justice or the ECtHR, a non-communitarian body.[53] The ECtHR is comprised of forty-seven judges, one from each member state.[54] The ECtHR has developed a framework for the protection of human rights, but the effects of its decisions depend on the member state's national law.[55] Though respondent states or parties in the case are bound to "respond to the different orders set out under the merits in the operative part of the judgment," member states by and large are not obligated to make the ECtHR judgments executable within their domes-

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[47] "[T]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

[48] "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." ECHR, *supra* note 43, art. 15.

[49] *See* Defeis, *supra* note 45, at 471-73.

[50] For a detailed analysis of the Judiciary Act of 1789, see Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departure from the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986).

[51] "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. For a notorious example, see Korematsu v. United States, 323 U.S. 214, 216 (1944).

[52] U.S. CONST. art. VI, cl. 2.

[53] *See* de Búrca, *supra* note 44, at 172.

[54] ECHR, *supra* note 43, art. 20.

[55] Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 TEX. INT'L L.J. 359, 374 (2005).

tic system.[56] Thus, the ECtHR framework entails a "multilevel structure" since the EU has "an obligation to respect individual member states' constitutional frameworks" and "must generally leave policy determinations on religion-state relations" up to them.[57]

Despite their different mechanisms and procedures, both the U.S. and EU are secular institutions.[58] The historical developments that led to each secularist state are vastly different, however. In Europe, the notion of a secularist nation-state first emerged from the Treaty of Westphalia, which provided that "the Sovereign could choose the religion of the State and impose it on his subjects where tolerance, when it existed at all, was justified for prudential and pragmatic reasons."[59] On the other hand, the separation of church and state in the U.S. came about as a result of its founding settler population, who "came [to the U.S.] from Europe to escape the bondage of laws which compelled them to support and attend government favored churches."[60] This history inspired the drafters of the Bill of Rights and shaped the Supreme Court's interpretation of the Establishment Clause provision, which prohibits the establishment of religion by the government.[61]

The theoretical implications of a secularist state on its efforts to protect freedom of religion are a bit unclear. In broad terms, secularism can allow a polity to dissociate from a specific religion and thus, promote and protect the free exercise of all religions.[62] But in other ways, it may also dampen the coexistence of the various religions, as it requires each religion to maintain self-restraint and respect for other religions.[63] Aggressive or mechanical insistence on separatism and secularism may push a system

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[56] *Id.*

[57] *See supra* note 43 and accompanying text; *see also* Haupt, *supra* note 43, at 1007-08 (stating that "recent case law of the ECtHR substantiates the descriptive claim that a trend toward a nonestablishment appears to be underway in Europe").

[58] *See* Rex J. Ahdar, *The Inevitability of Law and Religion: An Introduction*, *in* LAW AND RELIGION 1, 2 (Rex J. Ahdar ed., 2000) (contending western civilizations customarily draw sharp divide between religion and law, church and state).

[59] Machado, *supra* note 37, at 455.

[60] Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).

[61] *See id.* at 12-13.

[62] *See* Michel Rosenfeld, *Recasting Secularism as One Conception of the Good Among Many in a Post-Secular Constitutional Polity*, *in* CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL 79, 81 (Susanna Mancini & Michel Rosenfeld eds., 2014).

[63] There is no single definition of "secularism" and, as Rosenfeld accurately puts it, "'[s]ecularism' is an essentially contested concept." *Id.* For more details on the concept of secularism, see András Sajó, *Preliminaries to a Concept of Constitutional Secularism*, 6 INT'L J. CONST. L. 605, 609 (2008). For more thoughts on the relationship between the establishment clause and Congressional powers to protect freedom of religion, see Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70, 85 (2013).

towards inadvertent marginalization, insensitivity and possibly intentional persecution of religious groups.[64]

That said, scholars have argued under varying views of secularism.[65] Under a view of radical secularism, any connection between the polity and religion, either high or low ("earth") establishments,[66] constitutes a violation of the freedom of religion, as it infringes upon religious equality by promoting a particular belief of "secularism." Under a moderate view, a polity's connection with a particular faith does not infringe upon the freedom of religion to the extent that other means exist to safeguard the same freedom of religion, and other denominations and faiths are not blocked from their right to practice their faith.[67]

The interaction between a secularist state and its protection of religious freedoms seems to more clearly play out in the state's exercise of an establishment clause (or lack thereof). The main observation about the EU is the stark omission of an establishment clause in any legal text.[68] In fact, the EU is an amalgam of church–state systems; within this spectrum, there are radical or true secular member states, like France,[69] and also member states with *de jure* or *de facto* established churches like the United Kingdom and Greece.[70] Focusing on whether the existence of established churches would comport with the notion of freedom of religion, the court in *Darby v. Sweden*,[71] answered in the affirmative.

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[64] W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, *in* 2 RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 17-19 (Johan D. van der Vyer & John Witte, Jr. eds., 1996).

[65] For a summary of the differences between radical and moderate secularism, see Tariq Modood, *Moderate Secularism, Religion as Identity and Respect for Religion*, 81 POL. Q. 4, 4-5 (2010).

[66] For a closer analysis of the model of establishment between high and low, see David McClean, *The Changing Legal Framework of Establishment*, 7 ECC. L.J. 292 (2004); *see also* Wesley Carr, *A Developing Establishment*, 102 THEOLOGY 2, 5 (1999). Also for an analytical framework on the church-state system, see Durham, *supra* note 64, at 15-25.

[67] For an overview of divergent views on the establishment of a church and of a religion in American jurisprudence, see Richard Albert, *Religion in the New Republic*, 67 LA. L. REV. 1 (2006).

[68] In fact, the ECHR "presupposes existing national arrangements concerning religion and the law and contains no preference to any particular model of Church–state relationship." Sophie C. van Bijsterveld, *Religion*, *International Law and Policy in the Wider European Arena: New Dimensions and Developments*, *in* LAW AND RELIGION 163, 167 (Rex J. Ahdar ed., 2000); *see also,* Haupt, *supra* note 43, at 1004.

[69] *See* Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54 AM. J. COMP. L. 337 (2006); *see also* Durham, *supra* note 64, at 17.

[70] Custos, *supra* note 69, at 338.

[71] *See* Darby v. Sweden, App. No. 11581/85, 187 Eur. Ct. H.R. (ser. A) ¶¶ 61-76 (1990).

In *Darby*, the ECtHR held that a non-member of the established Swedish Lutheran Church was entitled to an exemption from a tax that supported the Church, to the extent that the tax supported religious activity rather than broadly charitable activity.[72] This decision in *Darby* clarified the *modus vivendi* of the existing establishment status of member states with the provision of Article 9 of the ECHR, specifically providing that:

> A State Church system cannot in itself be considered to violate Article 9 of the Convention. In fact, such a system exists in several Contracting States and existed there already when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to satisfy the requirements of Article 9, include specific safeguards for the individual's freedom of religion.[73]

Again, this position was explicitly reaffirmed in Article 51, entitled "Status of churches and non–religious organizations" of the "Draft Treaty Establishing a Constitution for Europe."[74]

In addition to the approval of religious-political systems in Europe, the existence of political parties with religious roots in the EU Parliament and in member states' parliaments is remarkable. In the EU Parliament, the European People's Party (EPP - ED) is a self-identified Christian Democrat Group;[75] in Germany and the Netherlands, there are respectively the Christian Democratic Union and Christian Social Union of Bavaria (CDU - CSU),[76] as well as the Christian Democratic Appeal (CDA).[77] That said, on the whole, the ECHR does not prohibit any state to associate with religion. What it does prohibit is the establishment of a

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[72] *Id.*

[73] *Id.* ¶ 45; ECHR, *supra* note 43, art. 9.

[74] "The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States." Treaty Establishing a Constitution for Europe art. I-52, Dec. 16, 2004, 2004 O.J. (C 310), http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_establishing_a_constitution_for_europe/treaty_establishing_a_constitution_for_europe_en.pdf.

[75] EUROPEAN PEOPLE'S PARTY, *Our History*, http://www.eppgroup.eu/history ("Founded as the Christian-Democratic Group on 23 June 1953 as a political fraction in the Common Assembly of the European Coal and Steel Community, our Group has always played a leading role in the construction of Europe.").

[76] CDU exists in all of Germany except Bavaria, CSU exists only in Bavaria. *See* Eve Hepburn, *The Neglected Nation: The CSU and the Territorial Cleavage in Bavarian Party Politics*, 17 GERMAN POLITICS 184, 189 (2008).

[77] In general, the dominant role of Christian Democratic parties was identified in five European countries: Germany, Netherlands, Austria, Belgium and Italy. For further analysis about the rise and the nature of these parties see generally STATHIS N. KALYVAS, THE RISE OF CHRISTIAN DEMOCRACY IN EUROPE (1996).

religion (or conversely, the establishment of secularism) that unreasonably inhibits the free exercise of a religion.[78]

While the EU allows for official church-state systems, the U.S. explicitly prohibits any official religious association under the Establishment Clause.[79] This clause limits state support of any religion.[80] In interpreting this clause, the Supreme Court explained in an early case, *Everson v. Board of Education*, that "the establishment of religion clause of the First Amendment means that neither a state nor the Federal government can set up a church, and neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[81]

In a subsequent case, *Committee for Public Education & Religious Liberty v. Nyquist*, the Supreme Court further explored the principle of state neutrality over religion, stating that "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."[82] Thus, the Establishment Clause draws a clear line between state and church, reflecting the Jeffersonian notion of the "wall of separation" between Church and State.[83] It is argued that the U.S. is classified as a regime that "may insist on separation of church and state, yet retain a posture of benevolent neutrality toward religion," an "accommodationist regime."[84] Alternatively, it is argued that the establishment clause may be characterized as a negative rule rather than a positive one — providing "freedom from" rather than a "right to religion."[85]

In practice, however, this line between church and state in the U.S. is quite blurred. In the actual case of *Everson v. Board of Education*, the Supreme Court did not strike down the New Jersey state bill, which indirectly benefited Catholic private schools by allowing taxpayers' money to be used to pay the bus fares of the Catholic school pupils, as a part of a general program under which the fares of pupils attending public and

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[78] Haupt argues that based on the ECtHR jurisprudence, a trend towards recorded transnational nonestablishment is still in progress. *Cf.* Haupt, *supra* note 43, at 1012.

[79] U.S. CONST. amend. I, cl. 1.

[80] Thomas C. Berg, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 EMORY INT'L L. REV. 1277 (2005).

[81] Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

[82] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973).

[83] *See* Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802), *in* 57 THE LIBR. OF CONGRESS INFO. BULL. 6 (June 1998), http://www.loc.gov/loc/lcib/9806/danpost.html (last visited Oct. 20, 2015). For an analysis of the separation of church and state as it manifests in the Netherlands, see Sophie C. van Bijsterveld, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the Netherlands*, 19 EMORY INT'L L. REV. 929 (2005).

[84] *See* Durham, *supra* note 64, at 21.

[85] *See* Johan D. van der Vyver, *Limitations of Freedom of Religion or Belief: International Law Perspectives*, 19 EMORY INT'L L. REV. 499, 508 (2005).

other schools were also paid.[86] Though the decision benefited the religious school, the Court reasoned that the New Jersey law had a secular legislative purpose and a primary effect that neither advanced nor inhibited religion.[87]

In another case, *Marsh v. Chambers*,[88] the Supreme Court upheld the Nebraska Legislature's practice of beginning each session with a prayer led by a State-paid chaplain. Relying heavily on historical evidence as proof of the framers' intent, the Court explained that the practice of opening sessions of Congress with prayer had continued without interruption for almost 200 years, ever since the First Congress drafted the First Amendment, and that a similar practice had been followed for more than a century in Nebraska and many other states.[89] Although disclaiming the use of historical evidence to a certain extent, the majority nevertheless relied on the First Congress' longstanding use of a chaplain as sufficient evidence to infer that the constitutional intent of the drafters was permissive of this particular religious association and that the Establishment Clause does not govern the practice commencing legislative sessions with a prayer.[90]

Moreover, considering the sheer number of Christians in each region, Christian tradition undoubtedly has had some influence in U.S. and EU governance; the majority of parliamentary members, government officials, and executive leaders identify as Christians.[91] Aside from the fact that Sundays hold a distinct status in the weekly calendar as a day off, as

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[86] *Everson*, 330 U.S. at 17.

[87] *See id.* (the program "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools"); *see also* Michael A. Rosenhouse, *Construction and Application of Establishment Clause of First Amendment—U.S. Supreme Court Cases*, 15 A.L.R. FED. 2D 573 (2006).

[88] 463 U.S. 783 (1983).

[89] *Id.* at 784.

[90] *See id.* at 793. ("To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.").

[91] It is important to mention that among the members of the 114th Congress, 491 members out of 535 (91.2%) identify as Christians. *See Faith on the Hill: The Religious Affiliations of Members of Congress Pew Forum,* PEW RES. CTR. (Jan. 5, 2015), http://www.pewforum.org/2015/01/05/faith-on-the-hill/ (last visited Oct 20, 2015). Equivalent data does not exist for European Parliaments; in Europe, only three leaders identify as non-Christians. *See* QUARTZ, *These are the religious beliefs of Europe's leaders—including the atheists* (Jan. 28, 2015), http://qz.com/334402/these-are-the-religious-beliefs-of-europes-leaders-including-the-atheists/ (last visited Oct 20, 2015).

is required by the Christian tradition,[92] in the EU, Christianity remains the largest religion, with 72% of Europeans self-identifying as Christian.[93] Muslims account for 2% of the population; less than 1% identify as Jewish, Buddhist, or Hindu; Atheists account for 7% and Agnostics account for 16%.[94]

Likewise, in the U.S., the largest religion is Christianity.[95] 76% of American adults identify as Christians, 1.2% identify as Jewish, 0.5% as Buddhist, 0.6% as Muslim, and 15% as non-religious.[96] Clearly, a non-trivial percentage of the population in both regions freely practices a variety of religions and religious denominations, but the predominant religion among the population and in government remains to be Christianity in both regions.

From examining the two regions' legal structures and mechanisms, their establishment clause jurisprudence, and their religious populations, it is clear that neither the U.S. nor the EU consistently apply a particular separatist or secularist view in protecting the free exercise of religion. Nevertheless, courts in both legal orders seem to defer to the establishment or non-establishment of a religion, so long as this practice is in accordance with longstanding tradition, is not discriminatory, and does not limit the exercise of a different religion.[97]

II. The Scope of Permissible Limitations on Freedom of Religion Before September 11

While the protection of the freedom of religious expression is recognized by the U.S. Constitution and the ECHR, the constitutionalization of this freedom does not necessarily mean that religious expression receives absolute protection. As mentioned above, the U.S. government and EU member states are allowed to suspend the right to religious freedoms in certain circumstances.[98] There are two types of permissible limi-

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[92] Other religions have alternate days of observance, for instance, Judaism's day of observance begins at sundown on Friday and concludes on Saturday. *See* Jon Anson & Ofra Anson, *Death Rests a While: Holy Day and Sabbath Effects on Jewish Morality in Israel*, 52 Soc. Sci. & Med. 83, 95 (2001).

[93] More specifically, 48% identify as Catholic, 12% as Protestant, 8% as Christian Orthodox, and 4% as Other Christian. European Commission, Directorate Generate Institute, special Eurobarometer 393: Discrimination in the EU in 2012 113 (Nov. 2012), http://ec.europa.eu/public_opinion/archives/ebs/ebs_393_en.pdf.

[94] *Id.*

[95] Barry A. Kosmin & Ariela Keysar, American Religious Identification Survey (ARIS 2008): Summary Report 5 (Mar. 2008), http://b27.cc.trincoll.edu/weblogs/AmericanReligionSurvey-ARIS/reports/ARIS_Report_2008.pdf.

[96] *Id.*

[97] *See* ECHR, *supra* note 43, art. 9(1); *see also* U.S. Const. amend. I, cl 1-2.

[98] *See supra* Part I.

tations on religious freedoms in both regions: one is derived from the text of the Constitution and the EHCR, and the other is derived from caselaw.

A. *The U.S. Constitution and the Supreme Court*

In the U.S., the first limitation pertains to the scope of applicability of the First Amendment. According to the plain meaning of the Free Exercise Clause, freedom of religion regulates only the conduct of *governmental actors* in their interaction with private individuals, deemed a "vertical effect," and it does not regulate relations between private individuals, considered a "horizontal effect."[99] In other words, freedom of religion does not apply to private relations or to private actors. Nonetheless, this classification is not absolute because the distinction between private and public actors is not always easily identifiable.[100]

The second limitation on the freedom of religion derives from judicial review of government actions or laws.[101] Depending on the nature of the challenged action or law, whether or not it is "neutral" and generally applicable, a free exercise claim can trigger either strict scrutiny or rational basis review.[102] If the action or law is "neutral," that is, has a purpose that is something other than the infringement on or restriction of religious practices, then rational basis review applies.[103] Otherwise, and in the more likely case, strict scrutiny applies, and the burden of the action or law on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest.[104] Congress enacted the Religious Freedoms Restoration Act ("RFRA") in 1993, which codifies the strict scrutiny test for religious-based classifications for federal actions.[105] Thus, if a federal action or law

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[99] For an analysis concerning the vertical and horizontal effect of Constitutional rights, see generally Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387 (2003).

[100] *Id*. at 412.

[101] In U.S. jurisprudence, the judicial reviews of governmental actions encompass three different standards of review: strict scrutiny, intermediate scrutiny, and rational basis review. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (establishing the standard for strict scrutiny where governmental actions have violated an interest protected by the First Amendment).

[102] Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 163-65, 163 n.20 (3d Cir. 2002) (discussing Emp't Div. v. Smith, 494 U.S. 872 (1990)).

[103] *See* City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

[104] *Id.*

[105] 42 U.S.C.A. § 2000bb-1 (provides that the U.S. government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, unless it: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest).

imposes on a religious practice but is narrowly tailored to serve a compelling purpose, the limitation on religious freedoms is permissible.[106]

In practice, U.S. courts have been more deferential to federal governmental actions or laws that have burdened religious freedoms even before 9/11, upholding the majority of challenged laws and actions.[107] This practice especially holds true for state actions and laws, given the application of the lower rational basis test.[108]

On the federal level, as one empirical study examined over 4000 reported federal court opinions in the period from 1990 until 2003, there were seventy-three applications of strict scrutiny in published final rulings pertaining to religious liberty, and this category "had the highest survival rate of any area of law in which strict scrutiny applies: 59 percent, more than double the mean of the other doctrinal categories."[109] The study divided this category into two substantive types of religious liberty strict scrutiny cases: claims for exemptions from generally applicable laws, such as exemptions from tax payments or social security programs,[110] and claims that the law or action intentionally targets religious practices with discriminatory motive, such as prohibiting animal sacrifice practices, notwithstanding the business of slaughterhouses.[111]

One of the key findings was that the U.S. government was more likely to uphold a federal law or action that refused to grant an exemption on the basis of religion.[112] The study also offered a number of reasons that U.S. courts have been more lenient towards limitations on religious freedoms, particularly in exemption cases.[113] One major reason concerns the potential, overwhelming number of lawsuits demanding religious exemptions to every federal law that might inadvertently interfere with the great diversity of Americans' religious practices.[114] Because these exemption claims inherently are about the claimants' actual conduct of compliance

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[106] *Id.*

[107] Adam Winkler, *Fatal in Theory and Strict in Fact: An American Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 857-58 (2006).

[108] *See infra* Part III.B.

[109] Winkler, *supra* note 107, at 810, 858-62.

[110] *See, e.g.*, United States v. Lee, 455 U.S. 252, 261 (1982) (refusing to grant a religious exemption to social security participation).

[111] *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524-26 (1993).

[112] Winkler, *supra* note 107, at 858; *see, e.g.*, S. Ridge Baptist Church v. Indus. Comm'n, 911 F.2d 1203, 1208-11 (6th Cir. 1990) (refusing free exercise exemption for church from worker's compensation program); United States v. Bd. of Educ., 911 F.2d 882, 893 (3d Cir. 1990) (refusing to exempt school teacher from dress code requirement).

[113] Winkler, *supra* note 107, at 858.

[114] *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1481 (7th ed. 2004) (granting exemptions "would make compliance with the law optional for every person").

(such as, to pay taxes or social security), "the law must often intrude on that freedom."[115]

These worries do not seem to control the second category of religious claims, relating to discrimination cases since the challenged law or action often fails the strict scrutiny application in this latter context.[116] The reason for such fatal results stems from the longstanding principle that "a law targeting religious beliefs as such is never permissible."[117]

Even before 9/11, a federal court held that a police department's hygiene policy that prohibited wearing beards, except for medical reasons but not religious ones, was discriminatory against Muslims and thus violated the free exercise clause of the First Amendment.[118] The Third Circuit held that "allowing officers to wear beards for religious reasons would not create any more difficulty with regard to identifiability of officers or to their morale and *esprit de corps* than would allowing officers to wear beards for medical reasons."[119]

However, another empirical study of U.S. federal courts, between 1986 and 1995 — again before 9/11 — found "some evidence that adherents to Islam, apparently alone among the non-Christian religious faiths, may encounter greater resistance in pressing claims for religious accommodation in federal courts."[120] In a subsequent study between 1995 and 2005, the results showed that "[w]hile Muslim claimants accounted for 15.6% of free exercise claimants [during this period], they accounted for only 10.0% of successes."[121] The study further claimed that "holding all other variables constant, the predicted likelihood of success for non-Muslim claimants was approximately 38%, while the predicted probability for success for Muslim claimants was approximately 22%."[122] Therefore, based on these studies, it seems that Muslims' difficulty of succeeding in a religious claim persisted even before 9/11. The discussion on the possible

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[115] Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1500 (1999).

[116] Winkler, *supra* note 107, at 862.

[117] *Church of Lukumi Babalu Aye*, 508 U.S. at 533.

[118] Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999).

[119] *Id.*

[120] *See* Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004).

[121] *See* Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from Federal Courts*, 98 IOWA L. REV. 231, 235, 237 n.29 (2012) ("For the present study, we have expanded the data set to include the set of unpublished but digested opinions available on Westlaw. In addition to 1290 judicial participations from published decisions, our data set for Religious Free Exercise/Accommodation decisions includes 341 judicial participations from decisions that were digested by Westlaw but not published in the reporter system.").

[122] *Id.* at 236.

reasons for this is outside the scope of this Article; however, scholars have offered a number of explanations, one concerning the "Culture War" between various religious groups.[123]

Through its review, the U.S. Supreme Court has nevertheless come up with categorically permissible limitations on freedom of religion. For instance, it banned polygamy as a religious practice,[124] banned the use of peyote,[125] upheld the military regulation prohibiting the wearing of religious headgear,[126] and lowered the level of scrutiny on examining prison regulations.[127]

B. *The ECHR and the European Court of Human Rights*

Similar to the scope of the First Amendment, Article 9(2) of the ECHR prescribes three limitations. It provides that:

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.[128]

In addition to this provision, the ECtHR developed another mechanism, called the doctrine of the "margin of appreciation."[129] This doctrine is based on the Court's belief that national governments are often better suited than international judges to decide whether an interference is justified in light of a particular state's political and social context.[130]

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[123] *See id.* at 269-81 (discussing four possible theories, including the "Muslims Deserve to Lose" thesis, the "Islam Viewed as Dangerous" thesis, and current federal judges and their attitudes about Islam in America).

[124] Reynolds v. United States, 98 U.S. 145 (1878).

[125] *Smith*, 494 U.S. at 872. Congress later overruled this case by passing the Religious Freedom Restoration Act of 1993. Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993). However, as mentioned, the Supreme Court in 1997 limited the scope of the Act only to Federal bodies. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

[126] Goldman v. Weinberger, 475 U.S. 503, 508 (1986).

[127] Turner v. Safley, 482 U.S. 78, 87 (1987).

[128] ECHR, *supra* note 43. For a more detailed analysis on this provision, see Gerhard van der Schyff & Adriaan Overbeeke, *Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans*, 7 EUR. CON. L. REV. 424 (2011).

[129] Handyside v. United Kingdom, App. No. 5494/72, 24 Eur. Ct. H.R. (ser. A) 737 (1976), http://hudoc.echr.coe.int/eng?i=001-57499 (case where ECHR developed the "margin of appreciation" doctrine); *see generally* George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705 (2006).

[130] For an overview of the genesis of and justifications for the margin of appreciation doctrine, and a critique of its application to the headscarf cases, see Raffaella Nigro, *The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic Veil*, 11 HUM. RTS. REV. 531 (2010).

Therefore, similar to the U.S.'s strict scrutiny review, the ECtHR's degree of deference to a national government — "the width of the margin" — depends on whether the challenged measure has a legitimate aim and is necessary in a democratic society.[131] Any limitation on the enumerated freedoms, and in particular against the freedom of religion by the member states, must also be proportionate, according to the constitutional principle of proportionality.[132] This principle requires that a measure restricting a fundamental freedom not burden that freedom any more than necessary to achieve its purpose.[133]

In Europe, *Kokkinakis v. Greece* was one of the key cases on the freedom of religion and its limits, as it was the first in Greece decided under ECHR Article 9(2).[134] In this case, Greek authorities convicted a Pentecostal Christian, a Jehovah's Witness, for proselytism.[135] In coming to its decision, the ECtHR emphasized the need to draw a line between "bearing Christian witness" and "improper proselytism," relying on a report by the World Council of Churches from 1956.[136] This Report stated that proselytism "is not compatible with respect for the freedom of thought, conscience and religion of others."[137]

As a result, the ECtHR evoked the third circumstance enumerated in Article 9(2), "the protection of the rights and freedoms of others," and held that "in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."[138]

Following this ruling, the balance between secularism and the freedom of religion was reaffirmed through the landmark decision of the ECtHR in *Arslan v. Turkey*.[139] In this case, the plaintiffs, who belonged to a religious group[140] in Turkey,[141] "[wore] the distinctive dress of their

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131 *Handyside*, App. No. 5494/72, ¶¶ 48-49.

132 Bijsterveld, *supra* note 83, at 958.

133 *Id.*

134 Kokkinakis v. Greece, App. No. 14307/88, 260 Eur. Ct. H.R. (ser. A) (1993), http://hudoc.echr.coe.int/eng?i=001-57827.

135 *See* Joel Thornton, "*A Sad Day" for Religious Freedom in Greece*, FINDING JUSTICE (Sept. 30, 2011), http://findingjustice.org/religious-freedom-in-greece.

136 *See* Kokkinakis v. Greece, App. No. 14307/88, 260 Eur. Ct. H.R. ¶ 21 (ser. A) (1993) (internal citation omitted).

137 *Id.*

138 *Id*. ¶ 13.

139 Press Release, Arslan v. Turkey, App. No. 41135/98, Eur. Ct. H.R. (2010), http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3042105-3359681 (last visited Mar. 9, 2015).

140 The particular religious group that attends mosques is "Aczimendi tarikatÿ." *Id.*

141 Despite the fact that Turkey is not an EU member state, and despite the fact that the vast majority of its population belong to the Muslim religion, the holding

group, which . . . was made up of a turban, 'salvar' (baggy 'harem' trousers), a tunic and a stick."[142] They were arrested and convicted of violating Turkish laws that prohibited headgear and religious attire from being worn in public other than for religious ceremonies.[143]

The ECtHR distinguished this case *Arslan*, which concerned punishment for wearing certain clothes in open public areas from other cases which dealt with "regulation[s] of the wearing of religious symbols in public *establishments*, where religious neutrality might take precedence over the right to manifest one's religion."[144] The Court held in *Arslan* that there was an interference with the right to manifest one's religion, in part because Turkey was unable to establish the necessity of this interference in a democratic society and was unable to show any evidence of the potential public threat of this religious group.[145]

Through its judicial review, the ECtHR has established a certain number of categorically permissible limitations like the U.S. Supreme Court. In another seminal case, *Dahlab v. Switzerland*,[146] ECtHR held that the measure prohibiting a Swiss teacher from wearing a headscarf in the classroom was "necessary in a democratic society,"[147] and considered it "in principle and proportionate to the stated aim of protecting the rights and freedoms of others, public order and public safety."[148] Here, in prohibiting the wearing of a headscarf, the Court took into consideration the fact that the teacher was a public sector employee, a "representative of the state," who had influence on the intellectual and emotional development of children.[149]

C. *Comparison of the U.S. and EU Limitations*

When comparing the limitations on the freedom of religion in the U.S. and EU, a couple of observations can be made. An overview of the existing analogous case law before 9/11 demonstrates that the respective scopes of limitations do not perfectly osculate — that is, the degree of scrutiny and the level of protection differ for each region.

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from the aforementioned case enshrines the balance between secularism and the freedom of religion, while the precedent pertaining to the ECHR Article 9 is in principle valid for any future case adjudicated before ECtHR unless it is overruled. *See supra* Part I.

142 Arslan v. Turkey, App. No. 41135/98, Eur. Ct. H.R. 1 (2010).

143 *See id.*

144 *Id.* (emphasis added).

145 *Id.*

146 Dahlab v. Switzerland, App. No. 42393/98, Eur. Ct. H.R. (2001), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22643 (last visited Mar. 9, 2015).

147 *Id.*

148 *Id.*

149 *Id.*

In the United States, any limitation on the freedom of religion — whether it is a claim concerning religious discrimination or exemption — made at the federal level must survive the strict scrutiny test, or at the state level, the rational basis test.[150] Whereas, the ECHR provides for a minimum standard of protection, relying on the three-prong analysis and the doctrine of the margin of appreciation.[151] The member states may nevertheless provide more stringent standards of protection.[152]

An illustration of the different approaches is found on the question of whether public officials must refrain from their religious preferences and practices over state neutrality. At the federal level in the U.S., such rule may not survive the strict scrutiny test, depending on the nature of the duty (whether it is truly an exemption claim or a discriminatory claim); while at the state level, given the holding of *City of Boerne v. Flores*,[153] which invalidated strict scrutiny for judicial review of state laws, such rule is more likely survive.

On the other hand, the ECtHR may deem such rule or duty as permissible given the low standard of protection, if this duty also does not trigger any of the three conditions under Article 9(2).[154] At the member state level, however, if the ECtHR defers to the state, the outcome may vary depending on the state. On one end, countries like Germany[155] may allow public officers to wear headscarves, and on the end, counties like Switzerland may impose restrictions.[156]

Courts on both sides of the Atlantic have not been consistent about determining the types of permissible limitations on the freedom of religion. But notwithstanding these dissimilarities, both the U.S. and EU not only have enacted laws and created legal mechanisms to enforce limitations but also have adjudicated on specific permissible limitations on the freedom of religion before 9/11.

III. Freedom of Religion After September 11: A Change of Direction?

Since September 11, Islamic terrorism seems to be on the rise all around the world.[157] The number of terrorist attacks each year has more

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[150] *See supra* Part II.A.

[151] *See supra* Part II.B.

[152] *See id.*

[153] 521 U.S. 507 (1997).

[154] *See supra* Part II.B.

[155] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 24, 2003, 2 BvR 1436/02, (Ger.), http://www.bverfg.de/entscheidungen/rs20030924_2bvr143602en.html.

[156] Dahlab v. Switzerland, App. No. 42393/98, Eur. Ct. H.R. (2001).

[157] Becky Evans, *Has the War on Terror failed? Number of terrorist attacks QUADRUPLE in decade after 9/11*, Daily Mail (Dec. 4, 2012), http://www.dailymail.co.uk/news/article-2242803/Has-War-Terror-failed-Number-terrorist-attacks-QUAD

than quadrupled in the past decade, according to The Global Terrorist Index, which stated that the number of attacks increased from 982 in 2002 to 4,564 in 2011.[158] Among these attacks included the Woolwich attack[159] and the assassination of the Dutch film director and critic of radical Islam Theo van Gohn.[160] More recently, over the past two years, the Islamic State in Iraq and Syria, or ISIS,[161] has emerged and caused a number of the deadliest attacks, engaging in the most brutal tactics, including the bombings of military camps in Iraq, the beheadings of Iraqi civilian hostages, including of a nine year old girl,[162] the beheadings of American journalists James Foley and Steven J. Sotloff, and releasing the recordings of these terrorist acts through the internet and social media.[163] Second to ISIS, in Nigeria, the Islamist sect known as Boko Haram, has carried out numerous acts of violence; the group abducted hundreds of school children in April 2014 and has killed more than 13,000 civilians over the past five years.[164]

This rise of Islamic terrorism is a major concern for legislators and policymakers around the world. Given the pressing need for antiterrorism policies, the question of how to balance this need and the religious rights of Muslims is pertinent. In examining this question, the analysis below is twofold: first, it will explore the recent case law on freedom of religion, and second, it will touch on other areas of law where such

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RUPLE-decade-9-11.html#ixzz3rJO0AO7n; *see also*, *Terrorist Attempts since 9/11,* CBS NEWS http://www.cbsnews.com/pictures/terror-attacks-attempts-since-9-11/4/ (listing over twenty-seven terrorist attempts).

158 Evans, *supra* note 157.

159 Two Britons of Nigerian descent, raised as Christians, who converted to Islam killed a British Army soldier in the name of their religion. *See* Gordon Rayner & Steven Swinford, *Woolwich Attack: Terrorist Proclaimed 'An Eye for An Eye' After Attack,* THE TELEGRAPH (May 22, 2013), http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/10073910/Woolwich-attack-terrorist-proclaimed-an-eye-for-an-eye-after-attack.html.

160 In November 2004, Mohammed Bouyeri, a Moroccan immigrant, assassinated Theo van Gogh in Amsterdam. *See Gunman Kills Dutch Film Director*, BBC NEWS (Nov. 2, 2004), http://news.bbc.co.uk/2/hi/europe/3974179.stm.

161 ISIS is a Sunni jihadist group based in the Middle East. *See* Patrick J. Lyons & Mona El-Naggar, *What to Call Iraq Fighters? Experts Vary On S's and L's*, N.Y. TIMES (June 19, 2014), http://www.nytimes.com/2014/06/19/world/middleeast/islamic-state-in-iraq-and-syria-or-islamic-state-in-iraq-and-the-levant.html?_r=0.

162 Mujib Mashal, *Protest in Kabul for More Security After Seven Hostages Are Beheaded*, N.Y. TIMES (Nov. 11, 2015), http://www.nytimes.com/2015/11/12/world/asia/afghanistan-protest-taliban-isis-hazara.html.

163 For over 1300 articles on ISIS, see N.Y. TIMES, *Islamic State in Iraq and Syria* http://topics.nytimes.com/top/reference/timestopics/organizations/i/isis/index.html (last visited Nov. 14, 2015).

164 Boko Haram, which translates to "Western education is forbidden," is a militant Islamist movement based in Nigeria. *See* LUCKY E. ASUELIME & OJOCHENEMI J. DAVID, BOKO HARAM: THE SOCIO-ECONOMIC DRIVERS 1-3 (2015).

antiterrorism goals may have spilled over, such as in immigration and national security.

This analysis will show that both EU member states and the U.S. reacted to the rise of Islamic terrorism in similar ways, but the repercussions of their reactions are most pronounced in the areas of immigration and national security. Remarkably, both of these areas are privileged territories of the executive, as it is broadly claimed that governments enjoy deference on their policies in these areas.

A. *The European Union's Response*

The attacks of 9/11 and the subsequent terrorist acts, including the most recent Paris attacks in 2015, have caused an intense stir in Europe, igniting political debates about terrorism, multiculturalism, Islam, and more specifically, the practice of Islamic headscarves and burqas.[165] The trend across Europe immediately after 9/11 appeared to be greater restriction on particular religious expressions and attire.

In France, a ban on Muslim headscarves and other "conspicuous" religious symbols at state primary and secondary schools was introduced in 2004.[166] More recently, the French Parliament also banned the wearing of the Islamic full, head-and-body veil in public places, colloquially known as the "burqa ban," in 2010.[167] Belgium enacted a similar veil ban in 2011, which "prohibit[ed] the wearing of any clothing entirely or substantially concealing the face" and included criminal sanctions.[168] In Italy, public wearing of the *niqab* was also banned, making it an offense

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[165] Anass Bendrif & Matthew Haney, *The Politicization of the Headscarf in the Netherlands*, *in* 6 HUMANITY IN ACTION: REPORTS OF THE 2004 FELLOWS IN DENMARK, GERMANY, AND THE NETHERLANDS 68, 70 (Katharine Gricevich ed., 2004).

[166] Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laicite, le port de signes ou de tenues manifestant une appurtenance religieuse dans les ecoles, colleges, et lycees publics [Law 2004-228], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 15, p.5190. For more details, see Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54 AM. J. COMP. L. 337, 339 (2006). In 2004, the French Republic passed a law banning all conspicuous religious symbols in French public primary and secondary schools, which in practice targeted Muslims. *Id.* at 339 n.4.

[167] The 2010 French law legalized "prohibiting the concealment of one's face in public places." Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010; *see also* Kim Willsher, *France's Burqa Ban Upheld By Human Rights Court,* THE GUARDIAN (July 14, 2014), *http://www.theguardian.com/world/2014/jul/01/france-burqa-ban-upheld-human-rights-court.*

[168] Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage [Law Forbidding the Wearing of Any Clothing Covering

to hide in public.[169] In Germany, after the decision of its Federal Constitutional Court, it introduced law empowering the authorities to make such a prohibition,"[170] and six states have outlawed public school teachers from wearing headscarves.[171]

However, this trend of bans has not influenced every EU member state. In Britain, the right of a Muslim pupil to wear a *jilbab* in a State school was vindicated by the British judges.[172] Additionally, Spain[173] and the Netherlands[174] dismissed proposals for similar nationwide bans.

France is of particular interest not only because France has the largest number of Muslims in Western Europe but also because it was the first European country to ban the full-face Islamic veil in public places,[175] resulting in some of the most influential cases on religious freedoms for Muslims in Europe. In France, the Islamic headscarf ban in secondary schools was challenged before the ECtHR in 2008 in *Dogru v. France*, where the ECtHR held that there was no violation of Article 9, reasoning that the law was justified as a matter of principle, and the restriction had been proportionate to the aim pursued.[176]

Subsequently, the 2010 French legislation banning burqa wear in public spaces was also challenged before the ECtHR in *S.A.S. v. France*.[177] On

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the Face Completely or in a Significant Manner] of June 1, 2011, MONITEUR BELGE [M.B.] [OFFICIAL GAZETTE OF BELGIUM], July 13, 2011, 41, 743.

169 Elizabeth Bryant, *Muslim Veils Prompt Bans Across Europe; Clash of Cultures Spurs Rancor*, WASH. TIMES, Oct. 23, 2006 at A01.

170 Robbers, *supra* note 46, at 866.

171 *Id.*

172 SB v. Governors of Denbigh High Sch., [2005] 1 W.L.R. 3372; [2005] 2 All E.R. 396.

173 In July 2010, Spain's lower chamber of parliament rejected a bill to ban the wearing of face-covering garments in public. At the regional level, the Catalan Parliament rejected two motions aiming to introduce a face veil ban in public spaces presented by the Popular Party on July 1, 2010 in the Plenary, and on April 5, 2011, in the Commission on Welfare and Immigration. *See*, *Choice and Prejudice: Discrimination Against Muslims in Europe*, AMNESTY INTERNATIONAL 98 n.282 (Oct. 10, 2012), http://www.amnesty.org/en/library/asset/EUR01/001/2012/en/85bd6054-5273-4765-9385-59e58078678e/eur010012012en.pdf.

174 The Dutch Government in 2007 and 2010 announced the introduction of a face-covering ban. Such a bill was introduced in Parliament in early 2012. Yet, after the fall of the cabinet, the new coalition announced in its agreement only a set of functional face-covering bans (in the context of education, health care, and public transportation, as well as for access to government buildings), rather than a general ban. *See* BRUGGEN SLAAN, REGEERAKKOORD (2012), http:// www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2012/10/29/regeerakkoord/regeerakkoord.pdf.

175 *Islamic Veil Across Europe*, BBC (July 1, 2014), http://www.bbc.com/news/world-europe-13038095.

176 Dogru v. France, App. No. 27058/05, 49 Eur. H.R. Rep. 8 (2008).

177 S.A.S. v. France, App. No. 43835/11, Eur. Ct. H.R. (2014).

July 1, 2014, the Court released its groundbreaking decision,[178] holding that the French law was in proportion to the state interest of maintaining conditions that allow multiple religions to live together.[179] The Court emphasized that the French government sought to protect and support the principles of interaction between individuals in society, tolerance and broadmindedness, all of which are required for a democratic society.[180] However, the Court qualified their analysis by suggesting that the recent insurgence of Muslim immigrants into France in the past fifteen years may have prompted France's National Assembly's initial report on the veil-wearing community, which in turn, led to the enactment of the country's veil ban.[181]

Although the ECtHR deferred to the French government in both decisions, these cases seem to show divergent trajectories from cases before 9/11. Regarding headscarves, *Dogru* was in accordance with the earlier 1998 ruling of *Dahlab v. Switzerland*, which upheld the ban of Islamic headscarves on teachers.[182] On the other hand, the more recent case *S.A.S.* contradicts the decision established by the pre-9/11 case *Arslan v. Turkey*, where the ECtHR held that state secularism may not impose a burden on religious expression, in particular on religious attire in public places.[183] Although many believed that the European Court might have followed *Arslan* in deciding *S.A.S*,[184] the *Arslan* Court did leave open the possibility that sufficient factual evidence could support a general ban, though it did not go so far as describing what kind of evidence would be enough.[185]

The combination of these two distinct decisions leads to two interpretations. According to the first interpretation, *S.A.S.* overrules *Arslan* and now allows for the general restriction on wearing religious or ceremonial clothing in public places. Alternatively, according to the second interpretation, *Arslan* remains good law because *S.A.S.* is a limited exception to the rule, with regional application. Specifically, this exception would only

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178 *Id.*

179 *Id*. ¶ 58.

180 *Id.*

181 *Id.* ¶¶ 15-16.

182 *See* Dahlab v. Switzerland, App. No. 42393/98, Eur. Ct. H.R. (2001).

183 *See* Arslan v. Turkey, App. No. 41135/98, Eur. Ct. H.R. (2010).

184 *See* Sally Pei, Comment, *Unveiling Inequality: Burqa Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights*, 122 YALE L.J. 1089 (2013); *see also* Eva Brems, Symposium Article, *Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings,* 22 J.L. & POL'Y 517 (2014) ("If the European Court of Human Rights takes empirical reality seriously, it cannot uphold the bans.").

185 *See* Brems, *supra* note 184, at 517; Pei, *supra* note 184, at 1090. *See also* Malcolm D. Evans, *From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression Before the European Court of Human Rights*, 26 J.L. & RELIGION 345, 367-68 (2011).

apply in France and Belgium due to the special nature of the legal order pertaining to the *Laïcit* doctrine[186] and only if the religious dress fully covers the face.

A thorough reading of the *S.A.S.* decision reveals that the ECtHR's intent was not to overrule *Arslan*. The Court explicitly limited the scope of the limitation to religious apparel that conceals the face.[187] In particular, it noted that:

> [W]hile it is true that the scope of the ban is broad, because all places accessible to the public are concerned (except for places of worship), the Law of 11 October 2010 does not affect the freedom to wear in public any garment or item of clothing – with or without a religious connotation – which does not have the effect of concealing the face.[188]

Moreover, the ECtHR recognized the exceptional nature of France's relationship between secularism and religious expression.[189]

Thus, the different outcome of *S.A.S.* can be largely attributed to the European Court's state-by-state approach under the margin of appreciation doctrine. As stated earlier, the ECtHR's decisions are binding only on the states that are party to the dispute, since the ECHR does not require that the court's judgments be made "executable within the domestic legal order."[190] Having said that, the ECtHR continues to leave open the issue of the blanket ban of the full-face veil in public places as a categorically permissible limitation under Article 9 of the ECHR.

The European Court's state-by-state approach is also apparent in cases concerning majority religions, as in the recent case of *Lautsi v. Italy*.[191] In

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[186] According to this doctrine, religious expression is a private matter, while in public such expression might be subject to restrictions. *See* T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. Rev. 419 (2004). However, *Laïcité* is criticized because its application, in fact, reinforces Catholicism. *See* Susana Mancini & Michel Rosenfeld, *Unveiling the Limits of Tolerance: Comparing the Treatment of Majority and Minority Religious Symbols in the Public Sphere*, *in* Law, State and Religion in the New Europe: Debates and Dilemmas, 160, 190 (Lorenzo Zucca & Camil Ungureanu eds., 2012).

[187] S.A.S. v. France, App. No. 43835/11, Eur. Ct. H.R. (2014).

[188] *Id.* at 151.

[189] *Id.* at 58. This is particularly true as there is little common ground amongst the Member States of the Council of Europe (*see* mutatis mutandis, X, Y & Z v. United Kingdom, App. No. 21830/93, 2 Eur. Ct. H.R. 1 (1997)) as to the question of the wearing of the full-face veil in public. The Court thus observes that, contrary to the submission of one of the third-party interveners (*see id.* ¶ 105) there is no European consensus against a ban. Admittedly, from a strictly normative standpoint, France is very much in a minority position in Europe.

[190] *See* Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 Tex. Int'l L.J. 359, 374 (2005).

[191] Lautsi v. Italy, App. No. 30814/06, 50 Eur. Ct. H.R. 42 (2011). The roots of this state-by-state approach can be seen in Folgerø v. Norway. "In view of the place

Lautsi, Italian courts found that crucifixes posted in public school classrooms signified the Christian roots of liberal democracy rather than Roman Catholicism; subsequently, the ECtHR held under the margin-of-appreciation doctrine that this practice did not violate the Convention or threaten related principles of religious pluralism or freedom because the crucifix was a mere "passive" symbol that exerted no effect on non-Catholic students without other evidence of religious coercion.[192]

This case illustrates the compatibility of low establishment practices of the member states — namely, the display of crucifixes in classrooms of state schools — with the principle of state neutrality over religion, which in essence waters down the strict application of the principles of secularism and neutrality over any religion. For the most part, the European Court accepted the argument of the Italian government that crucifixes in classrooms are a "national particularity" according to Italy's historical development,[193] while also explicitly stating that "the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State."[194]

B. *The United States' Response*

In the U.S. legal order, it is alleged that because of the terrorist attacks, "America's tolerance toward Muslims and Islam has come into question."[195] This allegation is brought to life in the case of *Freeman v. State of Florida*.[196] In *Freeman,* the plaintiff, a Muslim female, brought a religious claim against the Florida Department of Highway Safety and Motor Vehicles, alleging that the Department violated Florida's Religious Freedom Restoration Act of 1998[197] by ordering her to have her photo retaken for a driver's license after the first was taken with her wearing a veil. The trial court found that the state had a compelling interest to

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occupied by Christianity in the national history and tradition of the respondent State, this must be regarded as falling within the respondent State's margin of appreciation in planning and setting the curriculum." *See* Folgerø & Others v. Norway, No. 15472/02, Eur. Ct. H.R. 1 (2007).

[192] *See* Lautsi v. Italy, App. No. 30814/06, 50 Eur. Ct. H.R. 42, ¶¶ 70, 72 (2011); *see also* Frederick Mark Gedicks & Pasquale Annicchino, *Cross, Crucifix, Culture: An Approach to the Constitutional Meaning of Confessional Symbols*, 13 FIRST AMEND. L. REV. 71 (2014).

[193] Lautsi v. Italy, App. No. 30814/06, 50 Eur. Ct. H.R. 42 (2011).

[194] *Id.* ¶ 28.

[195] Patrick T. Currier, Freeman v. State of Florida: *Compelling State Interests and the Free Exercise of Religion in Post-September 11th Court*, 53 CATH. U. L. REV. 913, 913 (2004) (quoting Mohamed Nimer, *Muslims in America after 9-11*, 7 J. ISLAMIC & CULTURE 1, n.4 (2002)).

[196] Freeman v. Florida Dep't of Highway Safety & Motor Vehicles, 924 So.2d 48, 51-52 (Fla. Dist. Ct. App. 2006).

[197] Religious Freedom Restoration Act of 1998, Fla. Stat. Ann. §§ 761.01-.05 (West 1997 & Supp. 2002).

order Freeman to retake her driver's license picture to protect the public from criminal activities and security threats and reasoned that "having access to photo image identification [was] essential to promote that interest."[198] The Florida Court of Appeals affirmed this decision by concluding that the full-face photo requirement did not substantially burden Freeman's free exercise of religion[199] and that her equal protection claim was without merit.[200]

Some scholars[201] perceived the decision in *Freeman* as a departure from the precedent set in an earlier pre-9/11 case that similarly concerned a state's photo requirement for licenses, *Quaring v. Peterson*.[202] In *Quaring*, plaintiff's refusal to have her photograph taken was based on her religious convictions, which disallowed "any graven image or likeness,"[203] a literal interpretation of the Second Commandment of the Bible. The Eighth Circuit held that Nebraska's requirement of having a color photograph for the license unconstitutionally burdened Peterson's free exercise of her sincerely held beliefs, and that permitting Peterson to receive a license without a photo was a reasonable accommodation of religion and did not violate the establishment clause.[204]

To some scholars, this departure was considered a counteraction to the 9/11 attacks.[205] The Florida court in *Freeman* also expressly acknowledged the issue of national security, stating that in the past twenty-five years, the country has seen "new threats to public safety, including both foreign and domestic terrorism" and thus this movement required that Freeman's religious freedom be subordinated to the "safety and security of others."[206] As a direct response to Freeman's claim that she was singled out because of 9/11, the court said that it "would rule the same way for anyone — Christian, Jew, Buddhist, Atheist."[207] The Florida court also pointed out that the state's requirement of a permanent file photo of every license holder, as part of the driver and vehicle identification database, had been under development before 9/11.[208]

However, comparing *Freeman* with *Quaring* reveals an important distinction between the two. In *Quaring*, the Court did not recognize the state's compelling interest because unlike Florida law, the statute of

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198 *Freeman*, 924 So. 2d at 52.

199 *Id.*

200 *Id.* at 57.

201 *See* Robert A. Kahn, *The Headscarf as Threat: A Comparison of German and US Legal Discourses*, 40 VAND. J. TRANSNAT'L L. 417, 435 (2007); *see also* Currier, *supra* note 195, at 918.

202 Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984).

203 *Id.* at 1123.

204 *Id.*

205 *See* Kahn, *supra* note 201, at 435; *see also* Currier, *supra* note 195, at 918.

206 *Freeman*, 924 So.2d, at 58.

207 *Id.*

208 *Id.*

Nebraska had already "exempt[ed] numerous motorists from having a personal photograph on their license.[209] In addition, the photograph requirement infringed substantially on the religious freedom of Quaring since her faith expressly prohibited any use of graven images.[210] Moreover, a careful analysis shows that the decision in *Freeman* consistently applied the lower, "substantially burden" requirement test,[211] as the strict scrutiny test was not applicable to state law cases.[212]

A recent U.S. Supreme Court case, *Holt v. Hobbs*,[213] illustrates the application of strict scrutiny for religious claims in a way that was consistent with the pre-9/11 case *Fraternal Order of Police Newark,*[214] in New Jersey mentioned above. Like the New Jersey case, in *Holt v. Hobbs*, the Court found that an Arkansas prison's grooming policy that prohibited inmates from growing a beard substantially burdened the plaintiff's Islamic beliefs.[215] Though the analysis centered on the Religious Land Use and Institutionalized Persons Act of 2003 (RLUIP), which differs from the Free Exercise Clause analysis,[216] the Supreme Court agreed with the prison's compelling interests of stopping the flow of contraband concealed in beards and facilitating prisoner identification,[217] but the Court ultimately concluded that the prison failed to show its policy was the least restrictive means of furthering either of the asserted compelling interests.[218]

The low establishment standard was nevertheless set quite recently with the U.S. Supreme Court case *Town of Greece v. Galloway*.[219] The Supreme Court held, in a 5-4 decision, that the state of New York may permit chaplains to open each legislative session with a prayer as this practice did not violate the establishment clause.[220] For the majority, Justice Kennedy wrote that "[l]egislative bodies do not engage in impermis-

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[209] *Quaring*, 728 F.2d at 1126. Likewise for the decision of the Supreme Court of Indiana, see Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., 380 N.E.2d 1225 (Ind. 1978).

[210] *Quaring*, 728 F.2d at 1126.

[211] Warner v. City of Boca Raton, 887 So.2d 1023 (Fla. 2004).

[212] *Flores*, 521 U.S. at 532.

[213] 135 S. Ct. 853 (2015).

[214] Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999).

[215] *Holt*, 135 S. Ct. at 853-54.

[216] *Id.* at 862-63 (unlike normal Free Exercise Clause analysis, available alternative means of practicing religion are *not* relevant considerations under RLUIPA's substantial burden inquiry; RLUIPA protects a religious practice even if that practice is not compelled by religious belief; (not limited to religious practices shared by all members of a religious sect).

[217] *Id.* at 863-64.

[218] *Id.* at 864-65.

[219] Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

[220] *Id.*

sible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate."[221] Justice Kagan, for the minority, described the practice rather compellingly: "So month in and month out for over a decade, prayers steeped in only one faith, addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits."[222] She argued, "[i]n my view, that practice does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government."[223]

Despite the sound arguments expressed by the minority of the Supreme Court, the precedent of *Galloway* does not depart from the principles established in the earlier *Marsh* case involving the Nebraskan legislature and its practice of beginning each session with a prayer.[224] However, it is remarkable that the logic of the majority's opinion, noting the importance of preexisting religious practices and establishments, resembles the logic of the Commission's Report of the ECHR in *Darby v. Sweden,* which stated that a state-church system cannot in itself be considered a violation of Article 9 of the Convention.[225]

C. *Possible Explanations for the Same Direction*

The analysis above shows that the standards of protection pertaining to freedom of religion were not significantly affected by the post-9/11 regimes. There are a number of possible explanations for this consistent treatment, some of which are articulated in the recent order reversing the dismissal in *Hassan v. City of New York*.[226]

Perhaps American judges are now more mindful of the history of wrongly-decided cases, particularly those governing fundamental rights. As the Third Circuit described in *Hassan*, "[w]hat occurs here in one guise is not new. We have been down similar roads before, [an example being with] Jewish-Americans during the Red Scare."[227] The Court pointedly stated, "[w]e are left to wonder why we cannot see with foresight what we see so clearly with hindsight — that '[l]oyalty is a matter of the heart and mind[,] not race, creed, or color.'"[228] More broadly, on the issue of the correlation between religion and terrorism, the Court stated that "to infer that examples of individual disloyalty prove group disloy-

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[221] *Id.* at 1827.

[222] *Id.* at 1842 (Kagan, J., dissenting).

[223] *Id.*

[224] Marsh v. Chambers, 463 U.S. 783 (1983).

[225] *See* Darby v. Sweden, App. No. 11581/85, 187 Eur. Ct. H.R. (ser. A) ¶ 45 (1990).

[226] Hassan v. City of New York, No. 14-1688, 2015 WL 5933354, at *2 (3d Cir. Oct. 15, 2015).

[227] *Id.* (citing *Ex parte* Mitsuye Endo, 323 U.S. 283, 302 (1944)).

[228] *Id.*

alty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights."[229]

Or perhaps judges realize that their job is strictly judicial — that judges "can apply only law, and must abide by the Constitution, or [they] cease to be civil courts and become instruments of [police] policy."[230] Perhaps, alluding to the "political question doctrine,"[231] judges may have realized that they are not the appropriate players to influence or enact antiterrorism policies in the U.S.

In the same way, the ECtHR may have been using the margin of appreciation doctrine, to defer to the European national governments, particularly for such salient issues as religious freedoms and antiterrorism policies. The institutional position of the courts in society, based on their longstanding processes, allows judges to approach the cases unaffected by political pressure or public sentiment, and to deal with cases based on the longstanding values of the law. As the analysis below will show, the reaction of both legal orders was most pronounced in areas of law where the executive branch traditionally holds more discretion, namely in national security and immigration.

IV. Repercussions in National Security and Immigration Policy

Undoubtedly, the terrorist attacks of 9/11 and the events that followed in Europe accelerated the adoption of stricter antiterrorism legislation in Europe and in the United States,[232] as the correlation between Islamic terrorism and immigration was brought to the surface.[233] Indirectly, concerns regarding freedom of religion are raised in these new national security and immigration policies. Of particular concern are new laws enacted through European immigration policies that make it easier to

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[229] *Id.* (quoting Korematsu v. United States, 323 U.S. 214, 247 (Murphy, J., dissenting)).

[230] *Id.*

[231] *See generally* Jill I. Goldenziel, *Veiled Political Questions: Islamic Dress, Constitutionalism, and the Ascendance of Courts*, 61 Am. J. Comp. L. 1 (2013); *see also* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237, 240 (2002) ("Underlying the political question doctrine and this constitutional design is the recognition that the political branches possess institutional characteristics that make them superior to the judiciary in deciding certain constitutional questions.").

[232] *See* Javier Jordan & Luisa Boix, *Al Qaeda and Western Islam*, 16 Terrorism & Pol. Violence 1, 5 (2004).

[233] *See* Robert S. Leiken & Steven Brooke, *The Quantitative Analysis of Terrorism and Immigration: An Initial Exploration*, 18 Terrorism & Pol. Violence 503 (2006).

monitor or deport foreigners, especially Muslim immigrants, even if the authorities have not accused them of any terrorist offense.

As Kim Lane Scheppele accurately remarked, although the EU had lacked a comprehensive framework and thus must rely on the member states for enforcement, after 2001, it adopted a common policy of coordination and cooperation between police and intelligence services.[234] It also implemented the pan-European arrest warrant, and it advanced judicial cooperation as it adopted a Framework Decision on Combating Terrorism.[235] In addition, the framework on family reunification was amended in 2003, in effect making it more restrictive.[236]

In several EU countries, anti-terrorism legislation and new immigration laws were passed, and concerns emerged regarding the compatibility of the enumerated measures with human rights principles, especially the principle of freedom of religion.[237] One example is the enactment of the British law, the Racial and Religious Hatred Act in 2006, which was primarily aimed to "send a signal that Muslim communities were not to be victimized."[238]

However, this Act evidently interfered with the freedom of religious speech as it criminalized the incitement of religious hatred speech;[239] thus its enactment only succeeded after numerous attempts and revisions.[240] In addition, the UK Parliament passed the Anti-Terrorism, Crime and Security Act in 2001,[241] which was characterized as "draconian" legislation.[242] This was particularly true in relation to Section 23 that, although temporary, provided for the indefinite detention of non-nationals suspected of terrorism[243] and Section 94 that provided for the power of the

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[234] Kim Lane Scheppele, *Other People's Patriot Acts: Europe's Response to September 11*, 50 LOY. L. REV. 89, 95 (2004).

[235] *Id.*

[236] *See* Council Directive 2003/86/EC on the Right to Family Reunification, 2003 O.J. (L 251) 12.

[237] Vania Patane, *Recent Italian Efforts to Respond to Terrorism at the Legislative Level*, 4 J. INT. J. ITALIAN E. 1166, 1168 (2006).

[238] Clive Walker, *Clamping Down on Terrorism in the United Kingdom*, 4 J. INT'L CRIM. JUST. 1137, 1140 (2006).

[239] *See* Racial and Religious Hatred Act, 2006, c. 1, §§ 29A & 29B (U.K.).

[240] For more details, see Nasar Meer, *The Politics of Voluntary and Involuntary Identities: Are Muslims In Britain An Ethnic, Racial or Religious Minority?*, 42 PATTERNS OF PREJUDICE 61 (2008).

[241] Anti-Terrorism, Crime and Security Act, 2001, c. 27 (U.K.).

[242] Adam Tomkins, *Legislating Against Terror: The Anti-Terrorism, Crime and Security Act 2001*, 2002 PUB. L. 205 (2002).

[243] Anti-terrorism, Crime and Security Act, 2001, c. 27, § 23. Remarkably, the UK Supreme Court — House of Lords at that time — held that the indefinite detention of non-national is incompatible with the ECHR. *See* A & Others v. Sec'y of State for Home Dep't [2004] UKHL 56.

police to remove disguises that prevent the identification of any person.[244]

On the other hand, in the U.S., the fact that the counterterrorism measures involved the monitoring of religious speech raised several concerns.[245] This kind of measure has engendered First Amendment freedom of speech problems, which are indirectly related to freedom of religion, given that the distinction between religious speech and religious belief is very narrow.[246] Pertaining to U.S. immigration law, allegations have been made that Muslim immigrants are being discriminated against, based on the fact that the judiciary, according to the plenary doctrine, defers to the political branches of the government on immigration issues.[247] By mid-2002, the U.S. Department of Justice also required certain immigrants from Muslim and Arab countries to be fingerprinted and photographed, a policy that raised additional concerns of discrimination.[248]

Currently, the ongoing case of *Hassan v. City of New York*[249] is highly relevant to this discussion. The question again before the district court is whether the surveillance project undertaken by the police department was discriminatory and infringed upon Muslims, solely on the basis of their religion.[250] To what extent such policies targeted Muslims remains to be proved. What is certain at this moment, however, is that the changes in the laws and the political processes governing national security and immigration partly resulted from the courts' deferment to the executive branches to address the evident rise of Islamic terrorism in both regions.

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[244] Anti-terrorism, Crime and Security Act, 2001, c. 27, §§ 94-95. According to Scheppele, this provision targeted "Islamic scarves, the hijab, or other forms of dress that devout Muslim women wear." *See* Scheppele, *supra* note 234, at 132.

[245] RICHARD A. POSNER, NOT A SUICIDE PACT 11 (2006).

[246] The ECtHR has stated numerous times that while religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to "manifest [one's] religion" alone and in private or in community with others, in public and within the circle of those whose faith one shares. *See* Kokkinakis v. Greece, App. No. 14307/88, 260 Eur. Ct. H.R. (ser. A) ¶ 31 (1993). Also the same court has stressed that Article 9 of the Convention lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. *See* Kalaç v. Turkey, App. No. 20704/92, 27 Eur. H.R. Rep. 552, ¶ 27 (1997).

[247] Regarding the plenary doctrine, see Ozan O. Varol, *Substantive Due Process, Plenary Power Doctrine, and Minimum Contacts: Arguments for Overcoming the Obstacle of Asserting Personal Jurisdiction over Terrorists under the Anti-Terrorism Act*, 92 IOWA L. REV. 297, 320 (2006); *see also* Kif Augustine-Adams, *The Plenary Doctrine after September 11*, 38 U.C. DAVIS L. REV. 701 (2004).

[248] Augustine-Adams, *supra* note 247, at 702.

[249] Hassan v. City of New York, No. 14-1688, 2015 WL 5933354, at *2 (3d Cir. Oct. 15, 2015).

[250] *Id.*

Conclusion

Although there are clear differences in the legal structures and mechanisms of the U.S. and EU, the two regions share a number of important characteristics. Both expressly protect freedom of religion in their laws but limit the scope of the protection in the instance of a national emergency. While the U.S. has a clear establishment clause, which favors neutrality over an established religion or religious practice, the EU, with its allowance of state-church systems, still manages to protect other religious minorities. Both regions also allow for a number of permissible limitations on religious freedom, but the applicability of these categorical limitations varies for the U.S. and for the EU, with its numerous member states.

Nevertheless, as Islamic terrorism continues to rise in and around the Western world, both regions have responded to the matter of religious freedom in similar ways. Undoubtedly, after the numerous terrorist attacks after 9/11, the issue of freedom of religion has readily engendered controversies in both academic and policymaking discourses. An analysis of post-9/11 cases in the U.S. and EU, however, shows that the level of protection and the degree of permissible limitations on religious freedoms have remained consistent with the pre-9/11 precedents. The ECtHR decisions that permitted France's veil and burqa bans were treated the same before and after 9/11, as both relied on the margin of appreciation doctrine and the three prong analysis under Article 9. Moreover, the applicability of these post-9/11 cases is clearly limited to France and its unique domestic legal order.

In the U.S., the state court's decision regarding the photo identification of a Muslim veiled driver is in accordance with the lower, rational basis review for state neutral actions and laws. Furthermore, the cases in the U.S. and EU that demonstrate low establishment, in that they allowed for Christian symbols in Italian schools or prayers before state legislative assemblies, do not depart from the existing legal precedents that deferred to member-state's policymaking decision and that agreed with historical practices, respectively.

Thus, the legal rights and the religious freedoms of Muslims in the U.S. and EU have not effectively changed in this respect since 9/11. Although there have been some limitations, they are consistent with past permissible restrictions. The reasons behind prior treatment of Muslims is beyond this Article's scope. As discussed above, the courts' consistent treatment of Muslims' religious rights may be attributed to the courts' continued belief that a person's religion does not reflect disloyalty to the country, based on past lessons of religious discrimination cases. Or it may be due to the courts' recognition of its role in policymaking in light of the plenary doctrine or the ECtHR and its margin of appreciation doctrine. The European doctrine, in particular, has allowed the Court to defer to national governments for important policy and domestic matters.

However, it seems that the areas of immigration and national security have absorbed the repercussions of the regions' reactions to Islamic terrorism, which in effect may have restricted Muslims' rights in these areas. It is clear that national security has become the top priority for both the U.S. and EU legal orders after 9/11; both have enacted more stringent and aggressive immigration policies and surveillance programs. To what extent such policies and programs have been *ultra vires* and have disproportionally affected Muslim citizens and immigrants living in the U.S. and Europe is still open to debate.

While religious discrimination claims may still be stronger and may more likely prevail over free exercise claims for Muslims, at least in the United States, the *Hassan v. City of New York* will perhaps shed more light on how far the U.S. will go to protect Muslims Americans' freedom of religion, almost two decades after 9/11.