

Transnational Nonestablishment

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ABSTRACT

Over the past decade, significant changes have occurred in the religious freedom jurisprudence of the European Court of Human Rights. The most recent indicators of change are the conflicting opinions displayed in the 2009 Chamber decision finding the mandatory posting of crucifixes in public school classrooms in Italy impermissible, and its subsequent reversal by the Grand Chamber in 2011. Taking a broader perspective, this Article argues that an emerging trend toward a transnational nonestablishment principle seems to be developing in contemporary Europe.

This Article first places the emerging principle into a larger multilevel religious policy framework, one of several such frameworks that also include the post-Reformation model as well as the U.S. Establishment Clause model. After surveying the development of nonestablishment principles in the United States, under the European Convention, in the law of the European Union, and in individual countries, this Article traces the contours of nonestablishment. In doing so, this Article illustrates that several useful comparisons can be made between the evolving understanding of nonestablishment in the United States and current developments in Europe. Some of these comparative insights—particularly in the public school context—may prove helpful in anticipating the likely future effects of an emerging transnational nonestablishment principle.

This Article then assesses possible implications of the emerging nonestablishment principle in Europe, both short-term and long-term, arguing that theories of convergence and subconstitutionalism best describe likely long-term effects. The discussion over disincorporation of the Establishment Clause and recent developments in recalibrating the scope of the Establishment Clause with respect to indirect funding of sectarian schools in the United States provide an opportunity to assess the reciprocal effects of multilevel nonestablishment. Finally, this Article turns to the question whether a shared transnational nonestablishment baseline is emerging, arguing that a nonestablishment baseline as a normative matter is necessary in western-style democratic systems.

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INTRODUCTION

Significant changes are underway in the law of religion-state relations in Europe. While debates surrounding headscarves continue to dominate the public discussion, several other noteworthy developments have occurred over the past decade. These developments seemed highly unlikely—if not outright unimaginable—in the not-too-distant past. Consider the 2009 European Court of Human Rights

(“ECtHR”) Chamber decision in *Lautsi v. Italy*,¹ finding the mandatory posting of crucifixes in public school classrooms impermissible, and its subsequent reversal in 2011 by the Grand Chamber.² The conflicting opinions in that case might well be indicators of a watershed moment in the law of religion-state relations, and may be a predictor of a more fundamental shift as Europe continues to grow ever more religiously diverse. Also consider these developments: Sweden, after more than 400 years, formally ended its Lutheran establishment in 2000; the strong ties between the Church of England and the state are gradually weakening; and the European Union (“EU”) decided against inclusion of a reference to God or Christianity in the Preamble to its draft constitutional document, now part of the Treaty of Lisbon. And these are only a few recent occurrences.

This Article focuses on one particularly intriguing, yet underexplored, emerging trend. Recent religious freedom cases decided by the ECtHR suggest that a trend toward a nonestablishment principle might be underway. The existence of a nonestablishment principle on the transnational level in a framework of multilevel religious policy is what this Article calls “transnational nonestablishment.” This Article makes the descriptive claim that there is a discernible emerging trend toward a transnational principle of nonestablishment under the regime of the European Convention on Human Rights (“ECHR”)³ and—to a more limited extent—the law of the EU, and it explores what this transnational nonestablishment principle might mean for national religion-state relations.

Recent efforts in the literature attempt to categorize systems of religion-state relations regionally and worldwide.⁴ But while classifying different national concepts into distinct categories can be helpful

1 *Lautsi v. Italy*, App. No. 30814/06, 50 Eur. H.R. Rep. 42, 1051–52 (2010).

2 *Lautsi v. Italy*, App. No. 30814/06, at *32 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Case Title” for “Lautsi”; then follow “Case of Lautsi and Others v. Italy” hyperlink).

3 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] (commonly known as the European Convention on Human Rights).

4 See, e.g., Winfried Brugger, *On the Relationship Between Structural Norms and Constitutional Rights in Church-State-Relations*, in RELIGION IN THE PUBLIC SPHERE: A COMPARATIVE ANALYSIS OF GERMAN, ISRAELI, AMERICAN AND INTERNATIONAL LAW 21, 31–48 (Winfried Brugger & Michael Karayanni eds., 2007); W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1, 15–25 (Johan D. van der Vyver & John Witte, Jr. eds., 1996); Gerhard Robbers, *State and Church in the European Union*, in STATE AND CHURCH IN THE EUROPEAN UNION 577, 578 (Gerhard Robbers ed., 2d ed. 2005).

in some respects, it tends to obstruct the view with regard to common trends. Current scholarship on theories of constitutional convergence has mentioned religious freedom in passing.⁵ Another strand of scholarship considers nonestablishment in individual countries.⁶ Some scholars have pointed out that an established church and liberal democracy are not mutually exclusive.⁷ Others assert that nonestablishment is not a necessary precondition for religious freedom.⁸ But while those themes tangentially concern the questions posed here, the transnational dimension of a potentially emerging nonestablishment principle remains underexplored.

If indeed the descriptive claim of an emerging transnational nonestablishment principle is accurate, what are its implications for the lower, national level of religious policy? In this context, “religious policy” is shorthand for the sum of all constitutional rules concerning the relationship between religion and the state; they might be nonestablishment-type provisions or free exercise-type provisions. Both have an ordering function as to the role of religion in a given society. Is Europe trending toward one or the other? In other words, is there really a trend toward nonestablishment or, rather, toward more individual religious freedom, without any intrinsic limit on the religious identity of the state? To what extent might insights from the United States be useful to answer this question? This Article tells the story of recent developments in Europe from the nonestablishment perspective. The understanding of nonestablishment at the outset should be relatively narrow. The state itself may not exclusively identify with only one set of beliefs—religious or nonreligious—as the basis for questions about ultimate truth. It may not communicate a single religious identity of the state itself.

⁵ See, e.g., David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1331, 1348 (2008); Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985, 992 (2009).

⁶ See, e.g., Donald L. Beschle, *Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada*, 4 U. PA. J. CONST. L. 451 (2002).

⁷ See, e.g., Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88 MARQ. L. REV. 867, 901–02, 904 (2005) (arguing that “America’s historical insistence on nonestablishment was not derived as fundamental to liberal democracy at the time of the founding,” and pointing out that nations like Germany and England are establishmentarian and liberal democracies at the same time).

⁸ See, e.g., Rex Ahdar & Ian Leigh, *Is Establishment Consistent with Religious Freedom?*, 49 MCGILL L.J. 635, 635 (2004); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 341 n.130 (1986) (suggesting that “an officially established, but completely liberal and tolerant, national religion” may not adversely affect religious free exercise).

This Article is divided into four Parts containing descriptive, analytical, predictive, and normative elements. Part I places the nonestablishment principle in the United States and the emerging nonestablishment principle in contemporary Europe into what seem to be structurally similar multilevel frameworks. In such frameworks of multilevel religious policy, as the discussion of the post-Reformation framework and the U.S. Establishment Clause⁹ model illustrate, the simultaneous coexistence of a nonestablishment principle on one (the “superconstitutional”) level and religious establishments on another (the “subconstitutional”) level is not new as a structural phenomenon.¹⁰ In the contemporary European context, the emerging nonestablishment principle on the level of the ECHR coexists with different models of religion-state relations on the national and subnational levels. This Part argues that the ECtHR implicitly locates a nonestablishment principle in its understanding of “democratic society” under the Convention and traces this phenomenon in recent caselaw. Developments on the EU and national levels normatively support the trend toward nonestablishment. Finally, this Part offers a cautionary note resulting from considerable differences in the institutional arrangements of the U.S. and the ECHR regimes.

Part II explores how useful a comparison with the constitutional law of religion-state relations in the United States might be in examining the likely effects of a higher-level nonestablishment principle on lower-level religious policy. The usefulness of this comparison depends on which areas map onto the substantive understanding of nonestablishment in the United States, which do not, and why. Only a decade ago, such an endeavor was arguably doomed to failure,¹¹ but the rapid developments in the ECtHR’s religious freedom jurisprudence have fundamentally changed the underlying premise of comparison. From a distance, some of the developments taking place in Europe now—especially with respect to the treatment of religion in public schools—look strikingly similar to past events in the United States. Although the historical patterns of development regarding the religious composition of the student population—as well as immigra-

⁹ U.S. CONST. amend. I, cl. 1.

¹⁰ I borrow this terminology of super- and subconstitutionalism from Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583 (2010), and extend it to include the ECHR.

¹¹ See CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 22 (2001) (asserting that notions of “neutrality” and the “wall of separation” in U.S. church-state jurisprudence “can only have a limited role in developing an understanding of what values are being protected” in the ECHR (internal quotation marks omitted)).

tion patterns in society at large—differ, the common thread in the United States and Europe is increasing religious pluralism of student bodies in public schools. By contrast, public funding of religious organizations remains considerably different in the United States and Europe.

Part III assesses the implications of the emerging transnational nonestablishment principle under the European Convention. It argues that the incorporation of the ECHR into national law as well as the deference given to the national level in ECtHR adjudication are relevant in the short term. A key feature of ECtHR jurisprudence in this respect is the “margin of appreciation” doctrine, which enables the court to defer to the national level on controversial issues where there is no European consensus. The doctrine’s rationale is that “in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policymaker should be given special weight.”¹² But the long-term impact is more adequately captured by theories of convergence and subconstitution-ism. Some scholars assert that convergence of the European conceptions of religion-state relations apparently includes a trend toward nonestablishment.¹³ This Part cautiously endorses this prediction, with some qualifications. The seemingly paradoxical situation created by the simultaneous existence of an emerging transnational nonestablishment principle and the existing established churches in contemporary Europe is likely to be of little consequence insofar as it does not hinder increasing religious pluralism or inclusion of various religious and nonreligious groups beyond the established religion.

¹² Dinah Shelton, *Subsidiarity and Human Rights Law*, 27 HUM. RTS. L.J. 4, 9 (2006).

¹³ See Gerhard Robbers, *Das Verhältnis von Staat und Kirche in rechtsvergleichender Sicht*, in DER STREIT UM DAS KREUZ IN DER SCHULE 59, 62 (Winfried Brugger & Stefan Huster eds., 1998) (stating that convergence in Europe displays a gradual withdrawal of the state in state-church systems and an increasing tendency of cooperation in separation models, indicating a move toward a common middle ground); Gerhard Robbers, *Community Law on Religion: Cases, Sources and Trends*, 8 EUR. J. CHURCH & STATE RES. 275, 276 (2001) [hereinafter Robbers, *Community Law on Religion*] (“All over the European Union there seems to be a growing trend to distinguish between state and faith communities while at the same time to develop friendly cooperation. . . . We are witnessing a process of convergence of the different systems, by means of outspoken reform or by changing interpretation.”); Robbers, *supra* note 4, at 579 (“Despite all the differences between the systems there does, however, seem to be a measure of convergence. . . . [T]here are clear moves towards the disestablishment of the established churches.”); Stefan Muckel, *Die Rechtsstellung der Kirchen und Religionsgemeinschaften nach dem Vertrag über eine Verfassung für Europa*, 58 DIE ÖFFENTLICHE VERWALTUNG [DÖV] 191, 197 (2005) (Ger.) (endorsing Robbers’s convergence thesis); see also Sophie C. van Bijsterveld, *Church and State in Western Europe and the United States: Principles and Perspectives*, 2000 BYU L. REV. 989, 990 (observing “a certain erosion of extremes” (internal quotation marks omitted)).

Part IV considers how nonestablishment in the United States has been reconceptualized in the recent past. Beyond the highly unlikely—yet much discussed—disincorporation of the Establishment Clause, this Part examines the partial removal of federal Establishment Clause constraints in the area of school aid. This discussion exposes the pressures toward nonestablishment that remain after the top layer of a multilevel religious framework (e.g., federal constraints) is partially eliminated. Finally, and most speculatively, this Part addresses whether the parallel structural regimes of nonestablishment in Europe and the United States have the potential to create a shared nonestablishment baseline. To be sure, this mild form of nonestablishment would be a far cry from the robust contemporary understanding of nonestablishment in the United States (with full application of the Establishment Clause against the states) and as interpreted by the U.S. Supreme Court. But there might be a normatively required transnational baseline of nonestablishment in religiously pluralistic, Western-style liberal democracies.

I. NONESTABLISHMENT IN MULTILEVEL RELIGIOUS POLICY FRAMEWORKS

From a U.S. constitutional law perspective, we are familiar with a vertical separation of powers when it comes to religion-state relations: the U.S. Constitution contains provisions against religious establishments and for religious free exercise in the First Amendment,¹⁴ and the states operate under this regime and their respective state constitutions governing state-level religious policy. But a vertical separation of powers in religion-state relations is not new. In post-Reformation Europe, the territories of the Holy Roman Empire established religions pursuant to each sovereign's choice, while the Empire itself remained neutral.¹⁵ Linking this post-Reformation framework to the constitutional structure of the United States, Professor Akhil Amar has characterized the Establishment Clause as “the American equivalent of the European Peace of Augsburg in 1555 and Treaty of Westphalia in 1648, which decreed that religious policy would be set locally rather than imperially.”¹⁶

¹⁴ U.S. CONST. amend. I.

¹⁵ See HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* 35–36 (2003); MALCOLM D. EVANS, *RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE* 45–46 (1997).

¹⁶ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 34 (1998).

Structurally, we can likewise identify different levels governing religion-state relations in contemporary Europe. The ECHR constitutes one level. The Member States of the EU—all of which are also parties to the ECHR—are subject to EU policies concerning religion. The European Court of Justice (“ECJ”) and other EU institutions have adopted the ECHR as the baseline for human rights protection.¹⁷ Each national state has its own religious policy; some are federally organized and have subunits with their own constitutional provisions on religion. Even in France, historically the paradigmatic example of a unitary state, some regions have distinct religious identities.¹⁸ All of the models of religion-state relations serve as examples of a multilevel structure permitting the existence of different concepts of religious policy, and all arguably feature a type of nonestablishment principle.

A. *Post-Reformation Europe*

The first example of a multilevel religious policy system is the European post-Reformation framework. The Empire, as the structurally superior organizational unit, remained denominationally neutral, while permitting its subordinate organizational units to establish the religion of the respective sovereign’s choice.¹⁹ The Peace of Augsburg (1555) addressed the constitutional crisis of the Empire that resulted from the split of Christianity by leaving the choice between Catholicism and Lutheranism as the established religion in each territory to its respective ruler.²⁰ Thus, the Empire’s neutrality was juxtaposed with the religious identity of each territory.²¹ This constitutional framework of coexistence endured after the Thirty Years’ War (1618–1648).²² The result was a multilevel structure that simultaneously permitted a religiously neutral policy on the level of the Empire and an established religion on the level of the individual states.²³ This

¹⁷ Consolidated Version of the Treaty on European Union art. 6, Sept. 5, 2008, 2008 O.J. (C 115) 19 [hereinafter TEU].

¹⁸ Robbers, *Community Law on Religion*, *supra* note 13, at 276 (“As French authors say, France counts seven different systems of state-church relations within itself: the laic Republic, the local law of the three eastern departments of Alsace-Moselle, the law of Guyana and the law of Mayotte and others.”).

¹⁹ See BERMAN, *supra* note 15, at 35–36; EVANS, *supra* note 15, at 45–46.

²⁰ BERMAN, *supra* note 15, at 50–51.

²¹ See *id.*; EVANS, *supra* note 15, at 46–47.

²² See *infra* notes 26–27.

²³ See AXEL FREIHERR VON CAMPENHAUSEN & HEINRICH DE WALL, STAATSKIRCHENRECHT 13 (4th ed. 2006) (explaining how this setup permitted, for the first time in European constitutional history, the coexistence of theologically mutually exclusive religions); GERHARD ROBBERS, RELIGION AND LAW IN GERMANY 38–39 (2010).

concept significantly differed from the historically later examples in that it did not guarantee religious freedom for dissenters.²⁴ The imperial constitutional norm of neutrality did not translate into protection of religious freedom in the territories. Rather, the humble roots of religious freedom may be found elsewhere in the Peace of Augsburg, in a provision stating that subjects who did not belong to the religion determined by the sovereign were permitted to leave the realm.²⁵

Likewise, the Westphalian Peace, ending the Thirty Years' War, affirmed the Empire's neutrality as well as the concept of denominational parity.²⁶ Again, the Empire took the arguably more modern approach of neutrality while the states maintained their religious identities.²⁷ On the territorial level, the regime of the Westphalian Peace did entrench the idea of a union of church and state by guaranteeing the setup of the Peace of Augsburg throughout Europe.²⁸ Thus, post-Reformation Europe provided the structural matrix for a multilevel religious policy model. The Empire's lack of identification with either denomination—equally permitting the existence of both—might be interpreted as an early form of nonestablishment.

B. *United States*

Historically, the federal nonestablishment provision coexisted with state establishments. Although there is some dispute in the academic literature about whether the Establishment Clause originally contained a substantive element of nonestablishment or whether it was solely concerned with circumscribing federal power and gained its substantive nonestablishment content later, substantive nonestablishment is now a central part of our understanding of the First Amendment.

²⁴ See BERMAN, *supra* note 15, at 51 (noting that the choice of religions in the territories was limited to either Roman Catholicism or Lutheranism; "Anabaptists, Calvinists, and adherents of other religious denominations were excluded"); EVANS, *supra* note 15, at 48.

²⁵ BERMAN, *supra* note 15, at 51; EVANS, *supra* note 15, at 48. Religious toleration was not achieved until the Westphalian Peace, which gave the nonestablished religions "the right to assemble and worship as well as the right to educate their children in their own faith." BERMAN, *supra* note 15, at 61–62 (noting, however, that this only applied to Lutherans, Calvinists, and Roman Catholics).

²⁶ BERMAN, *supra* note 15, at 61–62; CHRISTIAN WALTER, RELIGIONSVERFASSUNGSRECHT IN VERGLEICHENDER UND INTERNATIONALER PERSPEKTIVE 27 (2006) (explaining that the Empire's neutrality was secured by dividing the Imperial Diet (*Reichstag*) into two groups of equal power: *Corpus Catholicorum* and *Corpus Evangelicorum*; in religious questions, a unanimous solution had to be found).

²⁷ WALTER, *supra* note 26, at 27 (characterizing this as a kind of federal solution).

²⁸ BERMAN, *supra* note 15, at 61.

1. Federal Nonestablishment and State Establishments

Although many of their inhabitants left England specifically to escape oppression by the Anglican Church, several American colonies had religious establishments.²⁹ Religious policy varied regionally, but all colonies had some experience with established religion. The colonies of New England had local Puritan establishments (except in Rhode Island), and the Church of England was the established church in the southern states.³⁰ Dissenters did not enjoy free exercise protection.³¹ By the eighteenth century, the establishment of the Church of England turned Virginia into “the most intolerant of the colonies.”³² Other settlements featured partial establishments that left dissenters largely unaffected, such as New York and New Jersey,³³ or provided for diversity and tolerance despite an established church, such as in Georgia;³⁴ and others were expressly fashioned to be home to dissenters. But even those colonies had distinctive religious policies: Maryland was initially Catholic³⁵ (though after the Glorious Revolution, the Church of England was established³⁶), Rhode Island’s founder was a Massachusetts Bay Colony dissenter, Pennsylvania and Delaware were founded as safe havens for Quakers, and Carolina was created on the basis of “Enlightenment principles of toleration.”³⁷ All of this is to say that the colonies had substantial experience, one way or another, with religious establishments.

29 See 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 19 (2008); JAMES H. HUTSON, *CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES 15–16* (2008); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 *WM. & MARY L. REV.* 2105, 2112–15 (2003) [hereinafter McConnell, *Establishment*]; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 *HARV. L. REV.* 1409, 1421–22 (1990) [hereinafter McConnell, *Free Exercise*].

30 GREENAWALT, *supra* note 29, at 19; McConnell, *Establishment, supra* note 29, at 2115; see also HUTSON, *supra* note 29, at 17 (stating that the colonies were “different in significant ways, but all dedicated to the same ancient idea, . . . that the state must embrace the church and impose its truth, uniformly, wherever its writ ran”).

31 McConnell, *Free Exercise, supra* note 29, at 1422.

32 *Id.* at 1423; see also McConnell, *Establishment, supra* note 29, at 2116–20 (discussing the Virginia establishment).

33 HUTSON, *supra* note 29, at 30–33 (discussing New York and New Jersey); McConnell, *Establishment, supra* note 29, at 2129–30 (discussing New York); McConnell, *Free Exercise, supra* note 29, at 1424.

34 McConnell, *Establishment, supra* note 29, at 2129.

35 HUTSON, *supra* note 29, at 17–20.

36 *Id.* at 58.

37 McConnell, *Free Exercise, supra* note 29, at 1424–25 (noting that later, the Church of England was established in North and South Carolina).

Things changed somewhat with the American Revolution; at that time, there were established churches in nine out of thirteen colonies.³⁸ The apparently unpatriotic affiliation with the Crown led to the disestablishment of several Anglican establishments (perhaps most famously that of Virginia in 1785).³⁹ By contrast, New England establishments were regarded favorably due to “their association with the patriot cause.”⁴⁰ By 1789, seven states had some form of establishment,⁴¹ and “[n]o state constitution in 1789 had a clause forbidding establishment.”⁴² Massachusetts was the last state to disestablish in 1833.⁴³ State establishments thus coexisted with the federal nonestablishment provision. One avenue of explanation for the decision to leave religious policymaking to the states suggests that the drafters of the First Amendment lacked a coherent shared view of the proper relationship between religion and state; they did agree, however, that the individual states, rather than the federal government, would be the appropriate decisionmakers on this question.⁴⁴ In short, “the First Amendment did not disestablish anything.”⁴⁵

Indeed, the jurisdictional view of the Establishment Clause contends that it is purely a states’ rights provision. Perhaps most prominently, Professor Amar argues that “[t]he original establishment clause . . . is agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally.”⁴⁶ Amar’s reading suggests that “the original establishment clause was a home rule-local option provision mandating imperial

³⁸ McConnell, *Establishment*, *supra* note 29, at 2107.

³⁹ McConnell, *Free Exercise*, *supra* note 29, at 1436 (“[T]he Georgia Constitution of 1777, the South Carolina Constitution of 1778, the North Carolina Constitution of 1776, and the New York Constitution of 1777 (with reference to the four metropolitan counties that had an Anglican establishment) eliminated the special preferences and state support that had been given to the Church of England. South Carolina ‘established’ the Protestant religion but gave it no governmental support, while Georgia authorized the imposition of a tax for the support of the taxpayer’s ‘own profession.’ New York and North Carolina joined the ranks of states (Pennsylvania, New Jersey, Delaware, and Rhode Island) with no establishment.”).

⁴⁰ *Id.* at 1437; *see also* McConnell, *Establishment*, *supra* note 29, at 2124–26.

⁴¹ McConnell, *Free Exercise*, *supra* note 29, at 1437 (enumerating Connecticut, Massachusetts, New Hampshire, Vermont, Maryland, South Carolina, and Georgia).

⁴² GREENAWALT, *supra* note 29, at 23.

⁴³ McConnell, *Establishment*, *supra* note 29, at 2126.

⁴⁴ AMAR, *supra* note 16, at 246–47; McConnell, *Free Exercise*, *supra* note 29, at 1485 n.384; Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1705 (1992).

⁴⁵ McConnell, *Establishment*, *supra* note 29, at 2109.

⁴⁶ AMAR, *supra* note 16, at 34; *see also* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1091–92 (1995).

neutrality.”⁴⁷ Thus, the provision prohibited federally mandated disestablishment in the states.⁴⁸ But does the federal nonestablishment principle created by the Establishment Clause apply to the states by way of incorporation through the Fourteenth Amendment? As all of the Bill of Rights, the First Amendment originally applied only to the federal government.⁴⁹ Today, according to broad consensus, the Free Exercise Clause is properly incorporated against the states.⁵⁰ However, some—including Justice Thomas—have raised serious doubts about the incorporation of the Establishment Clause in *Everson v. Board of Education*⁵¹ in 1947.⁵² Notwithstanding that debate, *Everson* remains good law: “The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”⁵³

2. Substantive Nonestablishment

How we arrived here is subject to debate, but the existence of a substantive nonestablishment principle in the United States is generally assumed. To be sure, the nonestablishment principle as we know it today did not materialize overnight. At the time of its inception, as just discussed, the Establishment Clause at its core was arguably a federalism provision that concerned the structural framework of religious policy. Was it solely about federalism or did it also contain a substantive element of nonestablishment from the beginning? Some scholars argue that the Clause did have substantive content,⁵⁴ while others contend that it later gained substantive content during the “second adop-

⁴⁷ AMAR, *supra* note 16, at 246.

⁴⁸ *See id.* (stating that the Establishment Clause “simply mandated that the issue be decided state by state and that Congress keeps its hands off . . . the vexed question”).

⁴⁹ *E.g.*, *Barron v. Baltimore*, 32 U.S. 243, 247–48 (1833).

⁵⁰ *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause).

⁵¹ *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

⁵² *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 726–31 (2005) (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49–50 (2004) (Thomas, J., concurring in the judgment); *Zelman v. Simmons-Harris*, 536 U.S. 639, 677–80 (2002) (Thomas, J., concurring); AMAR, *supra* note 16, at 33; William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1193 (1990); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 372–73; Note, *supra* note 44, at 1700.

⁵³ *Everson*, 330 U.S. at 15.

⁵⁴ *See, e.g.*, STEVEN K. GREEN, *THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA* 67 (2010); Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 767 (2005).

tion of the Establishment Clause,” between the Founding and Reconstruction.⁵⁵ Perhaps the most difficult aspect that both views must grapple with is the initial effect—if not purpose—of respecting state establishments, protecting them from federally mandated disestablishment. If, in fact, the Establishment Clause was designed to affirmatively protect states’ rights, it would be illogical to apply the Clause in such a manner as to prohibit state establishments.⁵⁶ But respecting state establishments is not affirmatively protecting them, and, beyond that, the development of nonestablishment did not stop with the adoption of the Establishment Clause. By the time the Fourteenth Amendment was adopted, the meaning of the Establishment Clause between the Founding and Reconstruction had arguably shifted.⁵⁷ State establishments had ceased to exist.⁵⁸ Thus, “[w]ell before 1866, the substantive, antiestablishment aspect of the clause far exceeded any jurisdictional aspect in public perception.”⁵⁹ The core of the Establishment Clause was perceived to prescribe a posture of nonestablishment.⁶⁰ So, whether a substantive nonestablishment principle was a part of the Establishment Clause from the beginning or later evolved, it is now part of our understanding of the First Amendment.

Much of the development in the Establishment Clause area has been shaped by the underlying Protestant-Catholic conflict that was also the source of the dominant posture of separationism in the United States for much of the twentieth century.⁶¹ Part II examines those developments more closely. Suffice it to say at this point that the underlying forces that shaped religious policy in the United States are somewhat different than those in Europe; yet, the common trajectory was, and continues to be, increased religious pluralism on both sides of the Atlantic.⁶²

⁵⁵ See, e.g., Lash, *supra* note 46, at 1088–89.

⁵⁶ GREENAWALT, *supra* note 29, at 36; Lietzau, *supra* note 52, at 1206.

⁵⁷ See Lash, *supra* note 46, at 1099–100.

⁵⁸ GREENAWALT, *supra* note 29, at 36; Rupal M. Doshi, Note, *Nonincorporation of the Establishment Clause: Satisfying the Demands of Equality, Pluralism, and Originalism*, 98 GEO. L.J. 459, 467 (2010) (noting that disestablishment in the states occurred “without any direction from the U.S. Supreme Court”); see also Ginsburg & Posner, *supra* note 10, at 1622 (characterizing this process as imitation of the superconstitution by the subconstitutions).

⁵⁹ GREENAWALT, *supra* note 29, at 36.

⁶⁰ See Lash, *supra* note 46, at 1135.

⁶¹ See generally John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 281–82 (2002).

⁶² José Casanova, *Immigration and the New Religious Pluralism: A European Union-United States Comparison*, in SECULARISM, RELIGION AND MULTICULTURAL CITIZENSHIP 139, 147 (Geoffrey Brahm Levey & Tariq Modood eds., 2009) (comparing contemporary European anti-Muslim sentiment with prior developments in the United States and finding “[t]he parallels

C. *Contemporary Europe*

Under the ECHR, we may be observing an emerging trend toward nonestablishment. A number of recent ECtHR religious freedom decisions addressing the relationship between religion and the state in democratic societies seem to implicitly assume a nonestablishment principle. This trend is normatively supported by developments on the EU level and in individual European countries. The debates surrounding a reference to God or Christianity in the Preamble to the ultimately ill-fated Constitution for Europe offered a glimpse at the EU's own religious policy. By reaching a compromise that only referenced religion in general terms, the EU did not align itself with any one religion or denomination, thus displaying its commitment to nonestablishment on the supranational level. Moreover, ties between the state and the church were cut, or significantly loosened, in several countries with an established state church. This confluence of international, supranational, national, and subnational activity is indeed quite typical for transnational legal developments.

1. *Structural Features*

In contemporary Europe, there are widely diverging national policies of religion-state relations, ranging from marked secularism to established state churches and a variety of in-between models. Structurally, national religious policy exists under several shared legal regimes, including the ECHR and—for the twenty-seven Member States—the law of the EU. Moreover, within each national system, the vertical separation of powers differs; in this sense, there is a multilevel organizational structure permitting different concepts of religious policy between the national, supranational, and international systems.

The ECHR, an international treaty to which all Member States of the Council of Europe are parties, contains several provisions concerning religion.⁶³ The main provision on religious freedom is article 9, which reads like a classic provision protecting individual religious liberty.⁶⁴ The Convention itself does not contain an Establishment

with Protestant-Republican anti-Catholic nativism in mid-nineteenth century America . . . indeed striking”).

⁶³ ECHR arts. 9, 14, Nov. 4, 1950, 213 U.N.T.S. 221.

⁶⁴ *Id.* art. 9. Article 9 of the ECHR states:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Clause-type provision. Rather, the textual anchor of the emerging trend toward nonestablishment, as evidenced in recent ECtHR caselaw, apparently is located in the limitations clause of article 9(2).⁶⁵ The fact that the textual anchor for the trend toward nonestablishment is located in the limitations clause highlights the question whether the development primarily concerns increased individual religious liberty or indeed structural nonestablishment. Article 9(2) is a limitation on individual religious liberty enshrined in the first section of article 9.⁶⁶ But the caselaw seems to have developed its meaning beyond that.⁶⁷ By focusing on the type of democratic society envisioned by the Convention and in light of the court's emphasis on pluralism—allowing citizens of all faiths as well as nonreligious citizens to flourish in a democratic society—a limit to religious identification now seems to be imposed on the state as well.⁶⁸

National religious policy is further influenced by EU law. Initially a purely economic endeavor, the EU's origins lie in the 1957 Treaties of Rome.⁶⁹ Despite assertions that the EU did not consider human rights protection to be at the core of its mission, deferring instead to the regime of the ECHR,⁷⁰ the ECJ considered itself to be a guardian of human rights as early as the 1960s.⁷¹ Eventually, EU

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

Id. In addition, article 14 prohibits discrimination on the basis of religion. *Id.* art 14. Article 10 (freedom of expression) and article 11 (freedom of assembly) may play a role in this context as well. *Id.* arts. 10, 11. Further, article 2 of protocol 1 (right to education) may be relevant in cases involving religious instruction. Protocol for the Protection of Human Rights and Fundamental Freedoms, art. 2, Mar. 20, 1952, 213 U.N.T.S. 262.

⁶⁵ See *infra* notes 88–111 and accompanying text (discussing the evolution of the ECtHR's religious freedom jurisprudence).

⁶⁶ See generally Javier Martínez-Torrón, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, 19 EMORY INT'L L. REV. 587, 593 (2005) (explaining article 9 analysis); Brett G. Scharffs, *The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights: Legal, Moral, Political and Religious Perspectives*, 26 J.L. & RELIGION 249, 255–56 (2010–2011) (same).

⁶⁷ See Scharffs, *supra* note 66, at 256–58 (discussing caselaw).

⁶⁸ *Id.*

⁶⁹ See JOSEPHINE STEINER & LORNA WOODS, EU LAW 3–4 (10th ed. 2009).

⁷⁰ STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 48 (2006); CLARE OVEY & ROBIN WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 3 (4th ed. 2006).

⁷¹ See OVEY & WHITE, *supra* note 70, at 514–15; Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 111–12 (2003) (discussing early ECJ caselaw acknowledging the court's role in protecting human rights, including Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419, 9 C.M.L.R. 112 (1970); Case 11/70, *Internationale*

members were expected to be party to the Convention.⁷² The EU's commitment to human rights was symbolically reaffirmed when the Charter of Fundamental Rights of the European Union was solemnly proclaimed at Nice in 2001.⁷³ The Charter's fate was unresolved until the Treaty of Lisbon entered into effect on December 1, 2009; the Charter now has the status of a treaty.⁷⁴ The Charter includes a religious freedom provision in article 10, the text of which closely resembles article 9(1) of the ECHR.⁷⁵ The Treaty of Lisbon mentions religion as part of the primary law of the Union,⁷⁶ but the EU possesses no competence to provide an overall, EU-wide system of religion-state relations. Nonetheless, the EU does shape religious policy in the Member States.⁷⁷ Scholars have already identified several elements of EU law concerning religion, including religious freedom, neutrality, and tolerance on the part of the EU in religious and philosophical matters, and an obligation "to grant equal treatment to religious communities."⁷⁸ This claim of an EU law on religious policy, however, is qualified by the EU's obligation to respect the individual Member States' constitutional frameworks. The EU may not unilaterally impose its own religious policy on the Member States; this com-

Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1125, 9 C.M.L.R. 294; and Case 4/73, *Nold v. Comm'n*, 1974 E.C.R. 491).

⁷² Helen Keller & Alec Stone Sweet, *Assessing the Impact of the ECHR on National Legal Systems*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 677, 678 (Helen Keller & Alec Stone Sweet eds., 2008). In July 2010, official accession talks started between the European Commission and the Council of Europe. See Press Release, Council of Europe, Directorate of Communication (July 7, 2010), available at <http://wcd.coe.int/wcd/ViewDoc.jsp?id=1648889&Site=COE>. A stated goal of the Treaty of Lisbon—set forth in article 6(2) of the TEU—is accession of the EU to the ECHR. TEU, *supra* note 17, art. 6(2).

⁷³ The Charter was originally intended to be a part of Treaty Establishing a Constitution for Europe, which was rejected by the electorate in referendums in France and the Netherlands. The Treaty of Lisbon—ostensibly giving up the ambition to be a constitution—references the Charter. However, the United Kingdom and Poland have negotiated a protocol limiting the application of the Charter.

⁷⁴ TEU, *supra* note 17, art. 6(1).

⁷⁵ ECHR, *supra* note 3, art. 9(1).

⁷⁶ Article 10 of the Treaty on the Functioning of the European Union ("TFEU") prohibits discrimination on the basis of religion, and TFEU article 19(1) states that the Union may take action to combat such discrimination; TFEU article 17(1) states: "The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States." Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) art. 10, 17(1), 19(1), Mar. 30, 2010, 2010 O.J. (C 82) 53, 55–56 [hereinafter TFEU]; see also Ronan McCrea, *Religion as a Basis of Law in the Public Order of the European Union*, 16 COLUM. J. EUR. L. 81, 86 (2009).

⁷⁷ RONAN MCCREA, *RELIGION AND THE PUBLIC ORDER OF THE EUROPEAN UNION* 1–2 (2010); Gerhard Robbers, *Community Law on Religion*, *supra* note 13, at 276.

⁷⁸ Robbers, *supra* note 4, at 581.

mitment is enhanced by the principle of subsidiarity under article 5 of the Consolidated Version of the Treaty on European Union (“TEU”).⁷⁹ Thus, the EU must generally leave policy determinations on religion-state relations up to the Member States.⁸⁰ Again, this framework indicates a multilevel structure permitting different religious policies.

2. *The Gradual Emergence of Nonestablishment in the European Court of Human Rights*

Recent caselaw of the ECtHR substantiates the descriptive claim that a trend toward a nonestablishment principle appears to be underway in Europe. Although, to reiterate, the text of the Convention lacks a nonestablishment provision, the Parliamentary Assembly of the Council of Europe Recommendation 1804 (2007) on State, Religion, Secularity and Human Rights⁸¹ quite notably states: “The Assembly reaffirms that one of Europe’s shared values, transcending national differences, is the separation of church and state. This is a generally accepted principle that prevails in politics and institutions in democratic countries.”⁸² Indeed, the more recent caselaw of the ECtHR appears to implicitly assume a nonestablishment principle of sorts.⁸³ As indicated, the court textually anchors this principle in the “necessary in a democratic society” provision of article 9(2), which is the limitations clause of article 9.⁸⁴

Interestingly, the meaning of “democratic society” in this context is assumed to be apparent on its face. As one scholar asserts: “The

⁷⁹ *Id.* at 581–82; TEU art. 5, Sept. 5, 2008, 2008 O.J. (C 115) 19.

⁸⁰ Muckel, *supra* note 13, at 198.

⁸¹ Eur. Parl. Ass., *Recommendation 1804: State, Religion, Secularity and Human Rights* (2007).

⁸² *Id.* ¶ 4.

⁸³ *Cf.* Carolyn Evans & Christopher A. Thomas, *Church-State Relations in the European Court of Human Rights*, 2006 BYU L. REV. 699, 699 (claiming, more broadly, that “[t]he ECHR does . . . indirectly regulate the permissible forms of relationship between religious institutions and the state by reference to religious freedom”); WALTER, *supra* note 26, at 330 (similarly asserting in general terms that most recently, the ECtHR developed religious freedom into a structural principle); 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, 368 (2010–2011) (asserting that the ECtHR is taking an approach more focused on the role of the state); *see also* McCrea, *supra* note 76, at 95 (even more broadly asserting that “the statements of the [European] Commission, the rulings of the European Court of Human Rights, and E.U. Enlargement Policy have all indicated that failure to maintain limits on religious influence over law and politics is incompatible with membership in the [European] Union”).

⁸⁴ ECHR, *supra* note 3, art. 9.

sense of the expression 'democratic society' is sufficiently clear. It means, according to the doctrine of the ECtHR, a society based upon the guarantee of pluralism and upon the supremacy of law. In other words, a society whose legal and political values correspond to those inspiring the ECHR.⁸⁵ But the court seems to have a more specific relationship between religion and the state in mind as its model for a democratic society. The court does not use the terminology of "nonestablishment" in its decisions; rather, inquiries under the Convention are framed in terms of freedom of religion.⁸⁶ Nonetheless, this type of inquiry permits review of religion-state relations.⁸⁷ As already indicated, the ECtHR apparently has grafted onto the limitation of individual religious liberty a limitation on the states' religious identities. The following cases illustrate this development.

With the 1993 case *Kokkinakis v. Greece*,⁸⁸ the court began its religious freedom jurisprudence in earnest, articulating the value of religious freedom in a democratic society.⁸⁹ A tentative step toward nonestablishment might be identified in the religious oath case, *Buscarini v. San Marino*.⁹⁰ San Marino law required that members of parliament "swear on the Holy Gospels ever to be faithful and obey the Constitution of the Republic."⁹¹ Under the "necessary in a democratic society" inquiry, the court concluded that the oath requirement violates article 9 because "requiring the applicants to take the oath on the Gospels was tantamount to requiring two elected representatives of the people to swear allegiance to a particular religion."⁹² But "it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs."⁹³ Here, the court's reasoning is at least ambiguous. Conventionally

⁸⁵ Martínez-Torrón, *supra* note 66, at 598.

⁸⁶ Evans & Thomas, *supra* note 83, at 721 (contrasting "the religious freedom approach of the ECHR with the non-establishment approach taken by the United States Supreme Court").

⁸⁷ See *id.* at 700 (discussing mechanism of reviewing the relationship between religion and state in the absence of an establishment clause-type provision).

⁸⁸ *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) 4 (1993).

⁸⁹ *Id.* at 17 ("[F]reedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. . . . The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.").

⁹⁰ *Buscarini v. San Marino*, App. No. 24645/94 (Eur. Ct. H.R. Feb. 18, 1999), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "Case Title" for "Buscarini"; then follow "Case of Buscarini and Others v. San Marino" hyperlink).

⁹¹ *Id.* at *3.

⁹² *Id.* at *9.

⁹³ *Id.* (referencing the Commission Report).

read as prohibiting the religious oath requirement as a matter of individual religious liberty,⁹⁴ the decision might also be read as considering the parliamentarians' role as elected representatives in a religiously pluralistic society. Under this alternative reading from the perspective of the public officials' function in a democratic society, the focus would be on exercising a mandate to represent the differing religious views of constituents, thereby ensuring representation without prior religious commitments.

Subsequent decisions involving the “necessary in a democratic society” aspect of the limitations clause reveal a more pronounced nonestablishment element anchored in that provision. In *Refah Partisi (The Welfare Party) v. Turkey*,⁹⁵ the ECtHR found that religious establishments may be incompatible with the Convention's idea of democracy.⁹⁶ Though based on article 11's freedom of assembly and association,⁹⁷ the case has a strong religious connotation.⁹⁸ In 1998, the Turkish Welfare Party—at the time the strongest political party in Turkey and the party of the Prime Minister, Necmettin Erbakan—was dissolved by the Turkish Constitutional Court as a threat to the constitutional order.⁹⁹ The three reasons cited for the party ban were the intent of the party to (1) establish a system of legal pluralism in Turkey; (2) apply Sharia law to the Muslim community; and (3) resort to violence to further its goals.¹⁰⁰ In its “necessary in a democratic society” inquiry,¹⁰¹ the ECtHR assessed the role of “[d]emocracy and religion in the Convention system” and pointed to previous caselaw establishing a requirement of state neutrality in matters of religion.¹⁰² It found that the principles underlying the relationship between religion and the state were incompatible with the Welfare Party's goals of introducing Sharia law and a plurality of legal systems in Turkey.¹⁰³

⁹⁴ See Evans & Thomas, *supra* note 83, at 708 (“[T]he Court found that the law requiring the oaths was an unjustified interference with the religious freedom of the parliamentarians.”).

⁹⁵ *Refah Partisi (The Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 267.

⁹⁶ *Id.*

⁹⁷ *Id.* at 291.

⁹⁸ Cf. Evans & Thomas, *supra* note 83, at 709 (identifying this case as “[t]he case that has forced the Court to deal with issues of the appropriate relationship between churches and states in the most detail”).

⁹⁹ *Welfare Party*, 2003-II Eur. Ct. H.R. at 279.

¹⁰⁰ *Id.* at 309.

¹⁰¹ In this case, the inquiry was under article 11(2), which is parallel to that of article 9(2). ECHR, *supra* note 3.

¹⁰² *Welfare Party*, 2003-II Eur. Ct. H.R. at 301–02.

¹⁰³ *Id.* at 312. With respect to Sharia law, the Grand Chamber adopted the view of the Chamber that

[i]t is difficult to declare one's respect for democracy and human rights while at the

The court relied on the assessment of the Turkish Constitutional Court, which had pointed out the historical connection between a plurality of legal systems and Sharia law.¹⁰⁴ During the Ottoman Empire, Sharia law governed the relations among Muslims and between Muslims and other religious groups, making the plurality of legal systems necessary to govern legal relations among non-Muslims.¹⁰⁵ Though it did not express an opinion on the plurality of legal systems, the Grand Chamber found that “apply[ing] some of [S]haria’s private-law rules to a large part of the population in Turkey (namely Muslims)” is impermissible under the Convention.¹⁰⁶ The state may “prevent the application . . . of private-law rules of religious inspiration prejudicial to public order and the values of democracy for Convention purposes” because the introduction of Sharia law is contrary to the understanding of democracy under the Convention.¹⁰⁷ The Grand Chamber’s use of this language of state neutrality indicates a doctrinal development beyond individual religious freedom and in the direction of nonestablishment.

The emerging trend toward nonestablishment in ECtHR jurisprudence plays out in several other areas as well, particularly in cases concerning questions of state interference in religious matters, state recognition of religious groups, and the role of religion in the public schools. The ECtHR has decided in several cases that the state may not interfere with internal religious matters, such as leadership decisions,¹⁰⁸ or take a position on the legitimacy of religious beliefs.¹⁰⁹ In

same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.

Id. But see *id.* at 320–21 (Kovler, J., concurring) (criticizing the court’s statements concerning the plurality of legal regimes and Sharia law).

¹⁰⁴ *Id.* at 312–13 (majority opinion).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (“Such a policy goes beyond the freedom of individuals to observe the precepts of their religion, for example by organising religious wedding ceremonies before or after a civil marriage (a common practice in Turkey) and according religious marriage the effect of a civil marriage. This [Welfare Party] policy falls outside the private sphere to which Turkish law confines religion and suffers from the same contradictions with the Convention system as the introduction of sharia.” (citation omitted)).

¹⁰⁷ *Id.*

¹⁰⁸ See *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) v. Bulgaria*, App. No. 412/03, 35677/07, 50 Eur. H.R. Rep. 3, 41 (2009) (reiterating requirement of state neutrality and impartiality, importance of pluralism in a democratic society, impermissibility of assessing the validity of a religious belief, and impropriety of forcing a divided religious community under a single, state-endorsed leadership); *Hasan v. Bulgaria*, 34 Eur. Ct. H.R. 55, 1372 (2000) (state may not intervene in internal disputes of religious organizations); *Serif v. Greece*,

this sense, noninterference signals nonestablishment if the state must abstain from controlling religion or being directly involved in setting or evaluating religious doctrine. Similarly, the court has demanded state neutrality and impartiality in the process of officially recognizing religious groups.¹¹⁰ Indeed, the court's recent shift toward evaluating the role of the state and its relationship to religion originated in this context.¹¹¹ Moreover, a recognized religious community may not be involved in determining recognition of another religious group under domestic law.¹¹²

Finally, cases from the public school context also illustrate the phenomenon of a rise of nonestablishment. The court articulated that dissenting views must be sufficiently taken into account, prohibiting the state from aligning itself with only one religious faith.¹¹³ One commentator observed that "perceptions of impartiality of the State in matters of religion or belief" play an increasingly important role in cases dealing with religious symbols in the public schools as part of an overall trend "from individual human rights to a concern for State neutrality in religion," also evident in cases concerning religious garb

31 Eur. Ct. H.R. 20, 573 (1999) (asserting that it is not the state's role in a democratic society "to ensure that religious communities remain or are brought under a unified leadership").

¹⁰⁹ *Manoussakis v. Greece*, 1996-IV Eur. Ct. H.R. 1346, 1365-66.

¹¹⁰ *See, e.g., Religionsgemeinschaft der Zeugen Jehovas v. Austria*, App. No. 40825/98, 48 Eur. H.R. Rep. 17, 444-46 (2009) (emphasizing requirement of state neutrality); *Verein der Freunde der Christengemeinschaft v. Austria*, App. No. 76581/01, at *10-12 (Eur. Ct. H.R. May 26, 2009), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "Case Title" for "Verein"; then follow "Case of Verien der Freunde der Christengemeinschaft and Others v. Austria" hyperlink) (finding that ten-year waiting period is impermissible for established religious groups known to authorities); *Church of Scientology Moscow v. Russia*, App. No. 18147/02, 46 Eur. H.R. Rep. 16, 318-27 (2008); *Moscow Branch of the Salvation Army v. Russia*, App. No. 72881/01, 44 Eur. H.R. Rep. 46, 926-35 (2007); *Metropolitan Church of Bessarabia v. Moldova*, 2001-XII Eur. Ct. H.R. 83, 113 (emphasizing state's duty of neutrality and impermissibility of determining legitimacy of religious belief, forcing a unified leadership on a religious group).

¹¹¹ *Evans*, *supra* note 83, at 369.

¹¹² *Metropolitan Church of Bessarabia*, 2001-XII Eur. Ct. H.R. at 113; *see also Pentidis v. Greece*, 1997-III Eur. Ct. H.R. 983, 995 (opinion of the Commission). In systems with an established state church, however, the state may interfere as a result of the position of the church as the established state church. *See EVANS*, *supra* note 11, at 84-86 (discussing permissible state control over state churches); *Evans & Thomas*, *supra* note 83, at 717-18 (discussing state control over established churches).

¹¹³ *See, e.g., Zengin v. Turkey*, App. No. 1448/04, 46 Eur. H.R. Rep. 44, 1079 (2008) (finding that religious instruction in Turkey did not meet the Convention's requirements); *Grzelak v. Poland*, App. No. 7710/02, at *22-26 (Eur. Ct. H.R. June 15, 2010), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "Case Title" for "Grzelak"; then follow "Case of Grzelak v. Poland" hyperlink) (finding that school must offer a substitute ethics class for student not attending religion class). *See infra* Part II.A for a detailed discussion.

in public schools.¹¹⁴ The emergence of a nonestablishment principle explains this shifting focus.

To be perfectly clear, these cases describe an emerging trend, not the end point of a development. Religious freedom jurisprudence in the ECtHR is still in its infancy. The court itself has not identified the principle of nonestablishment apparently underlying these decisions with such clarity. But the discussion so far should indicate that a development toward nonestablishment nonetheless is taking place and that the textual locus of this development can be identified as the inquiry under the “necessary in a democratic society” provision of the limitation clause in article 9(2). An additional limitation, it seems, is placed on the extent of the state’s religious identification. Yet, the nonlinear trajectory of ECtHR caselaw must also be acknowledged. Decisions concerning the permissibility of blasphemy laws, for instance, might be interpreted to undermine the descriptive claim of an emerging nonestablishment trend to some extent.¹¹⁵ And, of course, there is the recent Grand Chamber decision in *Lautsi v. Italy*,¹¹⁶ the Italian classroom crucifix case. Although the initial Chamber decision fits comfortably into the narrative of a rise of nonestablishment, the Grand Chamber decision seemingly does not. As discussed in more detail in Part II.A.2, the diverging outcomes in the Italian classroom crucifix case point toward disagreement within the ECtHR in its search for the right path to navigate religion-state relations in an increasingly diverse Europe.

As in the U.S. context, there are also underlying sociopolitical reasons for the rise of nonestablishment. As was demonstrated in Part I.A, the European development of religion-state relations was originally shaped by the unity of religion and state; after the Protestant Reformation, the parity of Catholicism and Protestantism became the focal point. In the more recent past, however, Europe has had to confront a changing religious composition of its citizenry. Muslim immigration, secularization, and increased diversity among religious

¹¹⁴ Evans, *supra* note 83, at 352–53.

¹¹⁵ See, e.g., *Wingrove v. United Kingdom*, 1996-V Eur. Ct. H.R. 1937, 1955–56 (noting “that the English law of blasphemy only extends to the Christian faith” and that the domestic courts had recognized “the anomaly of this state of affairs in a multid denominational society”); *Otto-Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) 6, 21–22 (1994) (finding Austrian blasphemy law compatible with the Convention).

¹¹⁶ *Lautsi v. Italy*, App. No. 30814/06, 50 Eur. H.R. Rep. 42 (2010), *rev’d*, App. No. 30814/06 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Case Title” for “Lautsi”; then follow “Case of Lautsi and Others v. Italy” hyperlink).

groups have raised the question whether the existing legal and political framework of religious policy is still adequate.

3. *European Union and National Developments*

Perhaps the most noteworthy development toward nonestablishment on the EU level occurred in connection with the Treaty Establishing a Constitution for Europe (“Constitutional Treaty”).¹¹⁷ Chaired by former French President Valéry Giscard d’Estaing, the Convention on the Future of the EU drafted the Constitutional Treaty.¹¹⁸ There was considerable debate whether a reference to God or the continent’s Christian heritage should be included in the document’s Preamble.¹¹⁹ The late Pope John Paul II spoke out repeatedly for including the Christian heritage; opponents included the French government and secularist groups.¹²⁰ The final version of the Preamble referenced “the cultural, religious and humanist inheritance of Europe” and did not explicitly mention God or Christianity.¹²¹ That text was maintained in the Treaty of Lisbon.¹²² This solution might be taken as evidence that, on the EU level, a nonestablishment consensus has developed out of the diverging views in the Member States.¹²³ The EU, by including a general reference to religion, has not aligned itself with a particular religious tradition, nor has it adopted a strictly secular stance that might have been implied by not mentioning religion at all.¹²⁴ In that sense, it did not establish any particular religion on the level of the EU, nor did it disestablish any Member State’s religion. Indeed, this is reflected in article 17(1) of the Treaty on the Functioning of the European Union, protecting the national religious policies in the Member States.¹²⁵ The EU’s position normatively supports the trend toward transnational nonestablishment.

¹¹⁷ Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C310) 3.

¹¹⁸ See McCrea, *supra* note 76, at 84.

¹¹⁹ See *id.* at 83–90 (summarizing the debates over religious references in the Preamble).

¹²⁰ *Id.* at 83–84.

¹²¹ *Id.* at 85.

¹²² Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 1, Dec. 17, 2007, 2007 O.J. (C 306) 1 (“Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.”).

¹²³ Cf. McCrea, *supra* note 76, at 85.

¹²⁴ *Id.* at 89 (“The Union has pointedly refused to associate itself explicitly with a particular religion.”).

¹²⁵ TFEU, *supra* note 76, art. 17(1); see also McCrea, *supra* note 76, at 86.

National developments in the area of religious policy do not suggest a dramatic shift toward nonestablishment, though it is quite remarkable that some historically close ties between religion and state have loosened significantly in the recent past. One example is the withdrawal of the state from the state church in Sweden.¹²⁶ Lutheranism had been Sweden's established religion since 1593.¹²⁷ Though citizens were permitted to leave the church for the purpose of "join[ing] another accepted church or denomination" from 1860 on,¹²⁸ and "[f]rom 1951 full religious freedom was granted to the Swedes,"¹²⁹ the established religion remained in place until the Church of Sweden was disestablished on January 1, 2000.¹³⁰ Though "often described as a separation of State and Church in Sweden,"¹³¹ important ties remained.¹³² Nonetheless, the momentous step, at least symbolically, of disestablishing a state religion after more than 400 years should not be underestimated.¹³³

Likewise, the strong links between the established church and the state in England have weakened.¹³⁴ The Queen's role in the appointment of bishops and archbishops has decreased, and the Prime Minister's continued participation in the process "is the subject of frequent criticism."¹³⁵ Moreover, Parliament continues to have "control over the exercise by the General Synod of its special powers of legislating on church matters."¹³⁶ Though Scotland continues to have an estab-

¹²⁶ Robbers, *supra* note 4, at 579.

¹²⁷ Lars Friedner, *State and Church in Sweden*, in *STATE AND CHURCH IN THE EUROPEAN UNION*, *supra* note 4, at 537, 538; see also E. Kenneth Stegeby, *An Analysis of the Impending Disestablishment of the Church of Sweden*, 1999 *BYU L. REV.* 703, 707–10 (providing a historical overview).

¹²⁸ Friedner, *supra* note 127, at 538.

¹²⁹ *Id.*; Albert, *supra* note 7, at 916.

¹³⁰ Friedner, *supra* note 127, at 539; see generally Stegeby, *supra* note 127.

¹³¹ Friedner, *supra* note 127, at 543.

¹³² *Id.* at 543–44; see also Albert, *supra* note 7, at 916.

¹³³ Cf. Albert, *supra* note 7, at 916 ("Swedish disestablishment came about as an evolution."); Stegeby, *supra* note 127, at 706 (arguing that disestablishment should be viewed as a substantial step in the process of completely separating the church and the state).

¹³⁴ See Judith D. Fischer & Chloë J. Wallace, *God and Caesar in the Twenty-First Century: What Recent Cases Say About Church-State Relations in England and the United States*, 18 *FLA. J. INT'L L.* 485, 486 (2006) ("[T]he Church of England remains established, but the degree of its connection to the state has diminished."); Robbers, *supra* note 4, at 579 (citing England as an example of states that are "mov[ing] towards the disestablishment of the established churches").

¹³⁵ David McClean, *State and Church in the United Kingdom*, in *STATE AND CHURCH IN THE EUROPEAN UNION*, *supra* note 4, at 553, 564; see also Peter Cumper & Peter Edge, *First Amongst Equals: The English State and the Anglican Church in the 21st Century?*, 83 *U. DET. MERCY L. REV.* 601, 617–22 (2006) (discussing the appointment and role of the bishops).

¹³⁶ McClean, *supra* note 135, at 563.

lished church, “the Church of Scotland Act [of] 1921 gives it such a high degree of autonomy as almost to separate Church and State.”¹³⁷

D. Institutional Arrangements

Before considering the substantive content of nonestablishment, significant institutional differences must be acknowledged. In the United States, a single nation state, the Supreme Court renders decisions binding on all states and on the federal government.¹³⁸ The Supremacy Clause of Article VI makes the vertical legal relationship in the United States relatively straightforward.¹³⁹ As the preceding discussion already suggests, the situation in Europe—especially with respect to the ECHR regime—is more complex.

The Council of Europe is an international organization with forty-seven individual nation state members whose “aim . . . is to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.”¹⁴⁰ The Council’s judicial body, the ECtHR, is an international court comprised of forty-seven judges, one from each member country.¹⁴¹ Member states and individuals may take judicial recourse to the ECtHR, claiming a violation of human rights under the Convention by a state party.¹⁴² Applications are initially reviewed by a three-judge committee;¹⁴³ determinations of inadmissibility must be unanimous.¹⁴⁴ Upon a determination of admissibility, merits decisions are routinely rendered by seven-member chambers, but may be relinquished to the seventeen-member Grand Chamber for the initial merits decision in particularly difficult cases¹⁴⁵ or referred to the Grand Chamber subsequent to the Chamber judgment, by request of a party

¹³⁷ *Id.* at 560.

¹³⁸ See U.S. CONST. art. VI, cl. 2.

¹³⁹ See *id.*

¹⁴⁰ Statute of the Council of Europe art. 1(a), May 5, 1949, 87 U.N.T.S. 1951.

¹⁴¹ ECHR, *supra* note 3, art. 20.

¹⁴² See *id.* arts. 33–34.

¹⁴³ *Id.* arts. 27–28. Until 1998, the European Commission on Human Rights screened claims for admissibility and adjudicated admissible claims in the first instance. Upon ratification of protocol 11, the Commission ceased to exist. See OVEY & WHITE, *supra* note 70, at 8–10 (discussing the “old” system of protection); *id.* at 472–92 (discussing ECtHR procedure); Scharffs, *supra* note 66, at 252 (providing an overview of ECtHR procedure).

¹⁴⁴ ECHR, *supra* note 3, art. 28. To be admissible, claimants must have exhausted local remedies and must file their claims within six months of the final national decision. See *id.* art. 35.

¹⁴⁵ See *id.* art. 30 (establishing that some cases might be referred to the Grand Chamber).

within three months of the initial Chamber judgment.¹⁴⁶ The court's judgments are binding on the states party to the dispute.¹⁴⁷ But the Convention does not demand that the court's judgments be made "executable within the domestic legal system."¹⁴⁸ Only in the Netherlands do the decisions of the ECtHR have the same effect as domestic judgments.¹⁴⁹ What effects the judgments of the ECtHR have in the states is entirely a question of national law.¹⁵⁰ Upon the court's determination that the Convention was violated, the violating party must end or avoid the violation and abstain from repeating it,¹⁵¹ though states generally may choose how to comply with an ECtHR judgment. Judgments do not create an obligation to implement *erga omnes*; they bind only the parties.¹⁵²

The Convention is "domesticated through . . . incorporation into national legal orders."¹⁵³ The Convention does not have direct effect in the states, but almost all Contracting States have implemented the ECHR into national law.¹⁵⁴ While the Convention has constitutional status in Austria and supraconstitutional status in the Netherlands, the national law of the majority of countries awards it either the status of an ordinary law or an intermediate status between an ordinary law and a constitutional law.¹⁵⁵ The Convention itself does not stipulate any particular way to incorporate it into national law.¹⁵⁶ Part III.A returns to the mechanism of domestic ECHR incorporation and the domestic effect of ECtHR judgments. Suffice it to say at this point that these profound differences between the institutional arrangements of the United States and contemporary Europe under the Con-

¹⁴⁶ *Id.* art. 43 (a five-judge panel of the Grand Chamber decides whether to accept the case; pursuant to article 43(2) of the ECHR it "shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance").

¹⁴⁷ *Id.* art. 46.

¹⁴⁸ 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).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 378; see also Hans-Jürgen Papier, *Execution and Effects of the Judgments of the European Court of Human Rights From the Perspective of German National Courts*, 27 *HUM. RTS. L.J.* 1, 2 (2006).

¹⁵¹ Ress, *supra* note 148, at 378.

¹⁵² *Id.*; see also Papier, *supra* note 150, at 1.

¹⁵³ Keller & Stone Sweet, *supra* note 72, at 682.

¹⁵⁴ The European Convention of Human Rights, COUNCIL EUR.: HUM. RTS. WEB, <http://www.humanrights.coe.int/intro/eng/GENERAL/ECHR.HTM> (last visited Feb. 19, 2012) (indicating that Ireland and Norway are exceptions).

¹⁵⁵ Ress, *supra* note 148, at 375-76.

¹⁵⁶ Keller & Stone Sweet, *supra* note 72, at 682.

vention caution against overemphasizing similarities of the two systems. Nonetheless, as shown, the legal issues and factual circumstances are similar enough to warrant the question whether something can be learned from past developments in the United States to anticipate future likely outcomes in Europe.

II. THE CONTOURS OF NONESTABLISHMENT

The manner in which the nonestablishment principle operates in various contexts determines whether—or to what extent—comparisons with U.S. Establishment Clause jurisprudence might be useful in anticipating the possible effects of an emerging nonestablishment principle under the European Convention. How well do current European developments map onto past developments in the United States? How does the substantive understanding of nonestablishment operate differently in the United States and Europe? How can similarities and differences be explained?

Increasing pluralism, among religious groups and between religious and nonreligious individuals, is a driving force with respect to religious policy in all systems under consideration here; the United States and the European countries—individually and collectively under the system of the ECHR—are similarly situated in that respect.¹⁵⁷ In the education context, it is important to recall that “[t]raditionally, organized education in the Western world was Church education.”¹⁵⁸ There is a roughly comparable underlying situation in the sense that traditional Christian hegemony (pan-Protestant in the United States and predominantly Christian, more or less evenly split between Catholic and Protestant, in Europe—except in Turkey and Albania¹⁵⁹) is challenged. The respective courts’ decisions arguably respond to the larger societal context.

The situation in Europe regarding religion and politics “is radically different from what it was ten years ago.”¹⁶⁰ Indeed, religious pluralism in Europe is now greater than at any time in history; the new pluralism is attributed in large part to immigration, particularly Muslim immigration.¹⁶¹ Political scientists have argued that a “re-politicization of religious disputes” has occurred, making religion a

¹⁵⁷ See Casanova, *supra* note 62, at 140.

¹⁵⁸ *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 213 (1948) (Frankfurter, J., concurring).

¹⁵⁹ See EVANS, *supra* note 11, at 21 (discussing the religious composition of ECHR states).

¹⁶⁰ STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, *THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES* vii (2d ed. 2009).

¹⁶¹ *Id.* at vii–viii; Casanova, *supra* note 62, at 142.

political factor again.¹⁶² As a result, the European landscape has “come to look more like the United States, where religion was and remains an important political variable.”¹⁶³ Although the United States and Europe took different routes to religious pluralism,¹⁶⁴ the contemporary situation is similar in that the challenges of religious pluralism in a democracy must be squared with the existing structural and substantive legal framework.

A. *Public Schools*

More recent ECtHR cases display heightened sensitivity to the position of minority students and the tensions that may arise from placing an increasingly diverse student population in a compulsory public school system.¹⁶⁵ Likewise, in the United States, the mid- to late-twentieth-century decisions on religion in the public schools played out against a historical backdrop of increasing religious pluralism.¹⁶⁶ In this regard, the circumstances in the European countries under the ECHR regime are similar to those of the United States.

The developments regarding religious instruction and school prayer display a general agreement that, given the pluralistic composition of the student body, compulsory religious activities are impermissible. But there is some disagreement on the remedy. In the United States, the solution has been to eliminate on-site religious instruction and school prayer (“shut-out model”), whereas in Europe the currently prevalent approach is to provide a mechanism to exempt students (“opt-out model”). As the following discussion demonstrates, this area maps onto prior developments in the United States particularly well because, prior to the Supreme Court’s mid-twentieth-century decisions on religious instruction and school prayer, the opt-out model was prominently discussed in state court cases.¹⁶⁷ Many of the considerations voiced during that period echo the contemporary debates in Europe.

How do the shut-out model and the opt-out model relate to the question whether there is a trend toward nonestablishment, or rather

¹⁶² MONSMA & SOPER, *supra* note 160, at viii.

¹⁶³ *Id.*

¹⁶⁴ See Casanova, *supra* note 62, at 139.

¹⁶⁵ In several recent cases in the education context, the ECtHR has completely reversed the Commission’s prior interpretation of the Convention. Cf. EVANS, *supra* note 11, at 88–96 (writing a decade ago about Commission cases).

¹⁶⁶ JOAN DELFATTORE, THE FOURTH R: CONFLICTS OVER RELIGION IN AMERICA’S PUBLIC SCHOOLS 52–66 (2004).

¹⁶⁷ See, e.g., *id.* at 52–66.

a trend toward more individual religious liberty? As a general matter, opt-outs do not necessarily address the religious identity of the state itself. A state may have a clearly defined religious identity yet allow opt-outs as a matter of individual religious freedom. But as the following discussion illustrates, the ECtHR appears to be pushing beyond opt-outs. Its insistence on ensuring state neutrality and pluralism in religious education, for example, addresses the permissible extent of the state's religious identity, not solely the individual's religious freedom.

1. *Religious Instruction and School Prayer*

Religious education is offered in all but three Convention states, close to evenly split between compulsory and noncompulsory religious education.¹⁶⁸ Almost all countries provide an opt-out mechanism.¹⁶⁹ The Convention does not generally prohibit disseminating "information or knowledge of a directly or indirectly religious or philosophical kind" in state schools, but the state must ensure teaching "in an objective, critical and pluralistic manner" where the state may not indoctrinate students.¹⁷⁰ Several recent cases illustrate the court's current emphasis on pluralism, displaying sensitivity to the particular situation of students.

Consider, for instance, a case involving Norway, where Lutheranism was the state religion and more than eighty-six percent of the population belonged to the state church.¹⁷¹ Lutheran religious instruction, with the possibility to obtain an exemption, historically was part of the public school curriculum.¹⁷² In the 1990s, religious instruction was redesigned to ensure exposure to multiple viewpoints.¹⁷³ Non-Lutheran parents successfully sued for complete exemption of their children from the redesigned class.¹⁷⁴ The ECtHR found a violation of the Convention based on three factors: the difficulty in identifying which parts of the lesson plans contravened the parents' religious beliefs, the necessary disclosure of personal religious information in substantiating the request for exemption, and the fact that exemption did not necessarily mean students were allowed to be physically absent.¹⁷⁵

¹⁶⁸ See *Zengin v. Turkey*, App. No. 1448/04, 46 Eur. H.R. Rep. 44, 1071-72 (2008).

¹⁶⁹ *Id.* at 1072.

¹⁷⁰ *Kjeldsen, Busk Madsen & Pedersen*, 23 Eur. Ct. H.R. (ser. A) at 26 (1976).

¹⁷¹ *Folgero v. Norway*, App. No. 1147, 46 Eur. H.R. Rep. 1147, 1180 (2007).

¹⁷² *Id.* at 1153.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1191-92.

¹⁷⁵ *Id.*

The ECtHR concluded that partially exempting students would still result in “a heavy burden” on parents fearing “undue exposure of their private life,” which would “likely . . . deter them from making such requests.”¹⁷⁶ The fact that parents could choose to send their children to private schools “could not dispense the State from its obligation to safeguard pluralism in State schools which are open to everyone.”¹⁷⁷ In this case, however, merely designing a more inclusive curriculum did not safeguard pluralism. Instead, a complete opt-out was required.

Religious instruction in Turkey, which focused on Sunni Islam, likewise did not meet the Convention’s requirements.¹⁷⁸ Because Alevism, which is particularly widespread in Turkey, played no prominent role in the curriculum, the ECtHR found the religious instruction offered to be insufficient.¹⁷⁹ It stated that when religion is offered as part of the curriculum, irrespective of an opt-out mechanism, “pupils’ parents may legitimately expect that the subject will be taught in such a way as to meet the criteria of objectivity and pluralism, and with respect for their religious or philosophical convictions.”¹⁸⁰ The ECtHR asserted that “in a democratic society, only pluralism in education can enable pupils to develop a critical mind with regard to religious matters in the context of freedom of thought, conscience and religion.”¹⁸¹ In this case, perhaps more than in the Norwegian case, the ECtHR’s insistence on pluralism, irrespective of an opt-out, indicates a move beyond more individual religious liberty.

In the case of a Polish student who did not receive a grade for “religion/ethics” because his school did not provide, despite his parents’ requests, a substitute course in ethics,¹⁸² the court found “unwarranted stigmatisation.”¹⁸³ It concluded that the state may not require disclosure of a religious belief or absence thereof, especially in the context of public education.¹⁸⁴ Because the school failed to offer a substitute class and thus was not able to grade the student in the subject of “religion/ethics,” the student was impermissibly forced to re-

¹⁷⁶ *Id.* at 1192.

¹⁷⁷ *Id.* at 1193.

¹⁷⁸ *Zengin v. Turkey*, App. No. 1448/04, 46 Eur. H.R. Rep. 44, 1079 (2008).

¹⁷⁹ *Id.* at 1078.

¹⁸⁰ *Id.* at 1079.

¹⁸¹ *Id.*

¹⁸² *Grzelak v. Poland*, App. No. 7710/02, at *2 (Eur. Ct. H.R. June 15, 2010), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Case Title” for “Grzelak”; then follow “Case of Grzelak v. Poland” hyperlink).

¹⁸³ *Id.* at *25.

¹⁸⁴ *Id.* at *22–23.

veal his lack of religious affiliation.¹⁸⁵ In the court's view, the missing grade would lead to the conclusion that the student had no religious affiliation, a conclusion the court considered particularly relevant "in . . . a country like Poland where the great majority of the population owe allegiance to one particular religion."¹⁸⁶

There is a shared notion that democratic values and citizenship are taught in the public schools, and that immigrants are best integrated into society by attending public schools. Public schools have been described as "perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people"¹⁸⁷ and a place where "the cultural foundations of society are principally handed down and renewed."¹⁸⁸ Although the public schools may still be considered the appropriate place to instill the values of citizenship, common religious values appear particularly ill-suited to form the basis for this endeavor. Take the English example, where "consensual religious values" are part of the curriculum.¹⁸⁹ Although schools are required "to include prayers and worship experiences of a 'broadly Christian character,'" many fail to do so, indicating that fair administration of the system is likely impossible in the face of increasing religious pluralism.¹⁹⁰ Indeed, "the growing religious diversity of public school students makes it more and more difficult to envision any religious exercise that would not favor some faiths and offend others."¹⁹¹ In short, there is no such thing as generic religious exercises suitable for public schools shared by Christians, non-Christians, and nonbelievers alike.

Different instruments are available to address problems potentially created by religious instruction in public schools. The two general alternatives are the opt-out model common in Europe and the

¹⁸⁵ See *id.* at *24.

¹⁸⁶ *Id.*

¹⁸⁷ *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring).

¹⁸⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 16, 1995, 93 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1 (1995) (Ger.), translated in 4 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT—FEDERAL CONSTITUTIONAL COURT—FEDERAL REPUBLIC OF GERMANY: THE LAW OF FREEDOM OF FAITH AND THE LAW OF THE CHURCHES 1960–2003, at 288 (Fed. Constitutional Court ed., D. Elliot et al. trans., 2007).

¹⁸⁹ Jessica Shepherd, *Schools Breaking Law by Not Teaching Religious Studies, Poll Finds*, GUARDIAN, June 23, 2011, <http://www.guardian.co.uk/education/2011/jun/24/schools-not-teaching-religious-studies>.

¹⁹⁰ MONSMA & SOPER, *supra* note 160, at 225–26; see also Shepherd, *supra* note 189 (citing poll finding that a quarter of state secondary schools in England do not teach religious studies, but suggesting as cause the focus on other subjects).

¹⁹¹ Jeffries & Ryan, *supra* note 61, at 283–84.

shut-out model adopted in the United States in the mid-twentieth century. The shut-out model was applied first with respect to on-site religious instruction,¹⁹² then in school prayer cases.¹⁹³ Historically, public education in the United States was decidedly Protestant.¹⁹⁴ Recall only Catholic opposition to devotional Bible readings from the King James Bible; indeed, desire to obtain an opt-out—substituting the Catholic Douay translation for the King James—is cited as one of the causes of the 1844 Philadelphia riots between Protestants and Catholics.¹⁹⁵ But not until the mid-twentieth century did the Supreme Court rule on the exclusion of religious elements from public schools. Until then, the constitutional permissibility of school prayer and religious instruction was a matter of state law. State courts did not treat the issue uniformly, but some scholars argue that “they suggested a trend toward rejecting government-enforced majoritarian religious exercises, at least in some parts of the country.”¹⁹⁶ Discussions of the opt-out model had become quite common in those decisions.¹⁹⁷ Indeed, the lower courts in the landmark case *Engel v. Vitale*¹⁹⁸ initially upheld the prayer, provided that an opt-out be made available.¹⁹⁹ Opt-out provisions were subsequently found insufficient both in the

¹⁹² See, e.g., *McCullum*, 333 U.S. at 212 (finding on-site religious instruction via the state’s “compulsory public school machinery” unconstitutional). But see *Zorach v. Clauson*, 343 U.S. 306, 314–15 (1952) (distinguishing *McCullum*, 333 U.S. 203, and permitting public schools to accommodate off-site religious instruction).

¹⁹³ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (holding school policy permitting prayer at football games unconstitutional even when prayers were led and initiated by students); *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (holding prayer at graduation ceremony unconstitutional when graduates who object were induced to conform); *Wallace v. Jaffree*, 472 U.S. 38, 60–61 (1985) (finding that Alabama law passed to return “voluntary prayer” to schools during a minute of silence constituted impermissible state endorsement of prayer as a favored practice); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (finding unconstitutional state requirement of daily Bible reading and recitation of the Lord’s Prayer in public schools); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (holding daily classroom prayer unconstitutional).

¹⁹⁴ *Jeffries & Ryan*, *supra* note 61, at 297 (characterizing public education as “unabashedly patriotic and unmistakably Protestant”).

¹⁹⁵ DELFATTORE, *supra* note 166, at 33–35.

¹⁹⁶ *Id.* at 5. But see GREENAWALT, *supra* note 29, at 104 (“Although before the mid-twentieth century, some state courts had held Bible reading to violate their state constitutions, in most cases the practice was upheld.”).

¹⁹⁷ See, e.g., *People ex rel. Vollmar v. Stanley*, 255 P. 610 (Colo. 1927); *People ex rel. Ring v. Bd. of Educ. of Dist. 24*, 92 N.E. 251 (Ill. 1910); *Pfeiffer v. Bd. of Educ.*, 77 N.W. 250, 257 (Mich. 1898); *State ex rel. Weiss v. Dist. Bd. of Sch.-Dist. No. 8 of Edgerton*, 44 N.W. 967, 975 (Wis. 1890).

¹⁹⁸ *Engel v. Vitale*, 191 N.Y.S.2d 453, 496 (Sup. Ct. 1959), *aff’d*, 206 N.Y.S.2d 183 (App. Div. 1960), *aff’d*, 176 N.E.2d 579 (N.Y. 1961), *rev’d*, 370 U.S. 421 (1962).

¹⁹⁹ *Id.*

context of on-site religious instruction²⁰⁰ as well as with respect to school prayer.²⁰¹ By contrast, with respect to the Pledge of Allegiance, the opt-out model still prevails,²⁰² even after the words “under God” were added.²⁰³ The logical—indeed, intended—consequence of opt-outs is to create outsiders; this was increasingly deemed problematic. In order to avoid the role of outcast, children will feel compelled to participate despite the availability of an opt-out.²⁰⁴

The German Federal Constitutional Court’s decision upholding school prayer with an opt-out, for example, acknowledged the danger of potentially creating outsiders and demanded that teachers ensure tolerance and respect among the students.²⁰⁵ But scholars rightly pointed out that such decisions place “a large burden on these children and their parents. Such children must choose between living in an atmosphere that goes against their religious beliefs and distinguishing themselves as being different from other students.”²⁰⁶ The ECtHR seems sensitive to the problems caused by the disclosure of religious dissent in the school setting. In the cases highlighted earlier in this Part, the ECtHR resolved the tension between religion and nonreligion by requiring that schools provide a nonreligious alternative to religious instruction. In doing so, the court emphasized the interest in pluralism. The ECtHR has acknowledged that compelled disclosure of one’s faith in order to obtain an exemption might be problematic.²⁰⁷

²⁰⁰ *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 209–12 (1948) (describing the features of the religious instruction program).

²⁰¹ *Lee v. Weisman*, 505 U.S. 577, 594–95 (1992) (“A school rule which excuses attendance [of graduation ceremony featuring prayer] is beside the point.”); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224–25 (1963) (“Nor are these required exercises mitigated by the fact that the individual students may absent themselves upon parental request”); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (“Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause”).

²⁰² See generally *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

²⁰³ See generally *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 2992 (2011).

²⁰⁴ See, e.g., *Lee*, 505 U.S. at 593–94 (discussing pressure to attend graduation ceremony featuring prayer); *Engel*, 370 U.S. at 431 (“[T]he indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”); *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring) (“[N]onconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.”).

²⁰⁵ BVerfG [Federal Constitutional Court] May 16, 1995, 93 BVerfGE 1 (1995) (Ger.), translated in 4 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT—FEDERAL CONSTITUTIONAL COURT—FEDERAL REPUBLIC OF GERMANY: THE LAW OF FREEDOM OF FAITH AND THE LAW OF THE CHURCHES 1960–2003, at 158 (Fed. Constitutional Court ed., D. Elliot et al. trans. 2007).

²⁰⁶ MONSMA & SOPER, *supra* note 160, at 226.

²⁰⁷ *Zengin v. Turkey*, App. No. 1448/04, 46 Eur. H.R. Rep. 44, 1080 (2008); see also Grzelak

Focusing on the state's role, the takeaway is that both the shut-out model and the opt-out model constitute attempts to enforce a nonestablishment baseline; the latter follows from the religious freedom provision even absent a nonestablishment provision. The courts' consideration of the state's role beyond providing an opt-out indicates a development that exceeds a focus on individual religious liberty.

2. *Religious Symbols*

Most recently, the ECtHR grappled with the issue of passive religious displays in public school classrooms in *Lautsi v. Italy*.²⁰⁸ A seven-judge Chamber of the ECtHR's Second Section ("Chamber") found the mandatory posting of crucifixes in Italian public schools impermissible,²⁰⁹ but the Grand Chamber reversed.²¹⁰ The Chamber stressed the central role of pluralism, particularly in education, as "essential for the preservation of the 'democratic society' as conceived by the Convention."²¹¹ It asserted that the state must ensure that students are taught "in an objective, critical and pluralistic manner."²¹² The parental rights under article 2 of protocol 1 prohibit subjecting students to indoctrination, and students' positive and negative religious freedom is protected by article 9 of the Convention.²¹³ Based on the tenets of state neutrality and impartiality in education, "neutrality should guarantee pluralism."²¹⁴ Consequently, the state may not "impos[e] beliefs, even indirectly, in places where persons are dependent on [the state] or in places where they are particularly vulnerable."²¹⁵ The Chamber identified schools as "a particularly sensitive area in which the compelling power of the State is imposed on minds" of stu-

v. Poland, App. No. 7710/02, at *22 (Eur. Ct. H.R. June 15, 2010), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "Case Title" for "Grzelak"; then follow "Case of Grzelak v. Poland" hyperlink) ("The Court reiterates that freedom to manifest one's religious beliefs comprises also a negative aspect, namely the right of individuals not to be required to reveal their faith or religious beliefs . . .").

²⁰⁸ *Lautsi v. Italy*, App. No. 30814/06, 50 Eur. H.R. Rep. 42, 1052 (2010), *rev'd*, App. No. 30814/06 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "Case Title" for "Lautsi"; then follow "Case of Lautsi and Others v. Italy" hyperlink).

²⁰⁹ *Id.*

²¹⁰ *Lautsi v. Italy*, App. No. 30814/06 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "Case Title" for "Lautsi"; then follow "Case of Lautsi and Others v. Italy" hyperlink).

²¹¹ *Lautsi*, 50 Eur. H.R. Rep. at 1062.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 1062–63.

dents unable to critically assess the state's message of religious preference or to distance themselves from it.²¹⁶

Applying these principles to the mandatory posting of crucifixes in public school classrooms, the Chamber focused on the situation of religious minority students in a largely Christian society.²¹⁷ Among various meanings attributable to the symbol, the Chamber found the crucifix to be predominantly religious; its display in public school “classrooms goes beyond the use of symbols in specific historical contexts.”²¹⁸ In the Chamber's assessment, “the crucifix may easily be interpreted by pupils of all ages as a religious sign, and they will feel that they have been brought up in a school environment marked by a particular religion.”²¹⁹ Those who share the religious affiliation denoted by the symbol may be encouraged by its presence, but those who do not—especially students belonging to minority religions—may find it “emotionally disturbing.”²²⁰ The Chamber stated that negative religious freedom “deserves special protection if it is the State which expresses a belief” in a context from which dissenting citizens cannot escape, or which they can only avoid “by making disproportionate efforts and acts of sacrifice.”²²¹ In view of the state's “duty to uphold confessional neutrality in public education,” displaying the crucifix cannot be reconciled with “the educational pluralism which is essential for the preservation of ‘democratic society’ within the Convention meaning of that term.”²²² Thus, the Chamber concluded that Italy violated its duties “to respect neutrality in the exercise of public authority, particularly in the field of education.”²²³

The Grand Chamber, by contrast, relied heavily on the “margin of appreciation” doctrine, pointing out that there was no consensus—neither among the Italian courts nor among the domestic courts throughout Europe—on the treatment of crosses or crucifixes in public school classrooms.²²⁴ The margin of appreciation doctrine provides that the ECtHR will defer to the national level on controversial mat-

²¹⁶ *Id.*

²¹⁷ *Id.* at 1063.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 1064.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ See *Lautsi v. Italy*, App. No. 30814/06, at *28–29 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Case Title” for “Lautsi”; then follow “Case of Lautsi and Others v. Italy” hyperlink).

ters where there is no European consensus.²²⁵ A “duty of neutrality and impartiality” follows from article 9, and assessing article 2 of protocol 1 in light of that provision, the Grand Chamber found that the states had an obligation to “ensur[e], neutrally and impartially, the exercise of various religions, faiths and beliefs.”²²⁶ The states must “help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups,” extending to “relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs.”²²⁷ Like the Chamber, the Grand Chamber found “that the crucifix is above all a religious symbol.”²²⁸ But unlike the Chamber, it did not ascribe to the crucifix any particular likely effects on students.²²⁹ And although it deemed “understandable” the petitioner’s assertion that the symbol communicates “a lack of respect on the State’s part for her right to ensure [her children’s] education and teaching in conformity with her own philosophical convictions,” this “subjective perception is not in itself sufficient to establish a breach of” the parental rights guaranteed by the protocol.²³⁰

The Italian government argued that the country’s history gave classroom crucifixes “not only a religious connotation but also an identity-linked one” and that “beyond its religious meaning, the crucifix symbolised the principles and values which formed the foundation of democracy and western civilisation, and that its presence in classrooms was justifiable on that account.”²³¹ Thus, classroom crucifixes are part of a tradition the state desires to uphold.²³² Responding to this argument, the Grand Chamber found that “the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State.”²³³ Acknowledging the “great diversity” among the European states in terms of “cultural and historical development,” the Grand Chamber nonetheless asserted that “the reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention

²²⁵ See *infra* Part III.A for a more detailed discussion.

²²⁶ *Lautsi v. Italy*, App. No. 30814/06, at *36 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Case Title” for “Lautsi”; then follow “Case of Lautsi and Others v. Italy” hyperlink).

²²⁷ *Id.*

²²⁸ *Id.* at *27.

²²⁹ *Id.* at *28.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

and its Protocols.”²³⁴ Emphasizing the states’ “margin of appreciation” with respect to school organization—including both curriculum and design of the school environment—the Grand Chamber stated its “duty in principle to respect the Contracting States’ decisions in these matters, including the place they accord to religion, provided that those decisions do not lead to a form of indoctrination.”²³⁵ In the Grand Chamber’s assessment, the lack of a European consensus on passive religious symbols in public schools supported the finding that such decisions should be left to the states.²³⁶

The Grand Chamber acknowledged that, given the unambiguously Christian message communicated by the symbol (irrespective of any conceivable additional meanings), mandatory crucifixes in public school classrooms give Christianity heightened visual exposure.²³⁷ But this visual exposure falls short of indoctrination.²³⁸ The Grand Chamber considered the “passive nature” of the crucifix an important feature; as such, the crucifix exerts less “influence on the pupils [than] . . . didactic speech or participation in religious activities.”²³⁹ It also distinguished the case from the teacher headscarf cases.²⁴⁰ Contextualizing “the effects of the greater visibility which the presence of the crucifix gives to Christianity in schools,” the Grand Chamber offered several observations.²⁴¹ First, the crucifixes are not accompanied by “compulsory teaching about Christianity.”²⁴² Second, non-Christian religious activities are permitted in Italian public schools.²⁴³ The Grand Chamber specifically cited the Italian government’s assertions that students were permitted “to wear Islamic headscarves or other

²³⁴ *Id.*

²³⁵ *Id.* at *28–29.

²³⁶ *Id.* at *29.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at *29–30 (asserting that the case involving a teacher wearing a headscarf “cannot serve as a basis in this case because the facts of the two cases are entirely different”). In the headscarf case, the teacher was prohibited

from wearing the Islamic headscarf while teaching, which was intended to protect the religious beliefs of the pupils and their parents and to apply the principle of denominational neutrality in schools enshrined in domestic law. After observing that the authorities had duly weighed the competing interests involved, the Court held, having regard above all to the tender age of the children for whom the applicant was responsible, that the authorities had not exceeded their margin of appreciation.

Id. Why this is “entirely different” from the crucifix situation, however, is not explained.

²⁴¹ *Id.* at *30.

²⁴² *Id.*

²⁴³ *Id.*

symbols or apparel having a religious connotation,” that “non-majority religious practices” could be accommodated, that “the beginning and end of Ramadan were ‘often celebrated’ in schools,” and that “optional religious education could be organised in schools for ‘all recognised religious creeds.’”²⁴⁴ The presence of crucifixes, moreover, did not cause intolerance or encourage teachers to proselytize.²⁴⁵ Finally, Ms. Lautsi remained free “to enlighten and advise her children, to exercise in their regard her natural functions as educator and to guide them on a path in line with her own philosophical convictions.”²⁴⁶ Thus, the Grand Chamber concluded that the Italian government acted permissibly within the margin of appreciation and violated neither the parental rights under the protocol nor religious freedom under the Convention.²⁴⁷

In contrast to religious instruction and prayer, the opt-out model is not available when mandatory passive religious symbols are displayed in public school classrooms. If the state may not align itself exclusively with one religious symbol, the choice of remedies is limited. The Chamber’s judgment fits comfortably within the line of cases suggesting that nonestablishment is an element of a democratic society under the Convention. The Chamber distinguished between a symbol displayed in a public school classroom pursuant to a state requirement and the religious activities of individuals.²⁴⁸ In determining whether there is a move toward increased individual religious liberty or toward nonestablishment, the crucial threshold issue is whether the religious message may be attributed to the state or an individual.²⁴⁹ One concurring opinion characterized the competing interests as “the right of parents to ensure their children’s education . . . in conformity with their own religious and philosophical convictions” versus “the right or interest of at least a very large segment of society to display religious symbols as a manifestation of religion or belief.”²⁵⁰ But it is the state—not society as a whole, a large segment of society, or some

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at *31.

²⁴⁸ *Lautsi v. Italy*, App. No. 30814/06, 50 Eur. H.R. Rep. 42, 1063–64 (2010) (contrasting “a preference manifested by the State in religious matters,” and “it is the State which expresses a belief”).

²⁴⁹ *Cf.* Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571, 593–97 (2011).

²⁵⁰ *Lautsi v. Italy*, App. No. 30814/06, at *34 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011) (Rozakis, J., concurring), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Case Title” for “Lautsi”; then follow “Case of Lautsi and Others v. Italy” hyperlink).

other private group, for that matter²⁵¹—ordering display of the crucifix. The *Lautsi* Grand Chamber dissent makes the point more clearly. In the case of a teacher wearing a headscarf, “the teacher in question may invoke her own freedom of religion, which must also be taken into account, and which the State must also respect. The public authorities cannot, however, invoke such a right.”²⁵² The state cannot claim individual religious liberty on its own behalf. And if the state’s posture toward religion must be neutral—as the Chamber and the Grand Chamber stated—a message attributable to the state cannot be one of identification with a particular religion. But such a focus on the state’s role led to criticism alleging that the Chamber failed to recognize the religious interests of individuals affirmatively seeking religious elements in education.²⁵³ This, some argued, might be interpreted as permitting that “a non-religious environment . . . critical about religious claims can be imposed upon the children of believers, but a religious environment may not be imposed on those of a non-religious disposition.”²⁵⁴ That argument, however, gives short shrift to the fact that it is the *state* aligning itself with only one religion and communicating its own religious identity.

Although the mandatory display of crucifixes cannot logically be evenhanded among religion and nonreligion, the Grand Chamber seemingly sought to achieve a semblance of evenhandedness by way of a religious quid pro quo. The permissive stance on headscarves and other religious symbols and activities, in the Grand Chamber’s view, apparently offset any potential danger of indoctrination by the crucifix. One concurring opinion suggested that headscarves and other religious symbols allowed in the public schools neutralize the message communicated by the crucifix.²⁵⁵ Another concurring opinion charac-

251 The concurring opinion of Judge Rozakis, joined by Judge Vajic, also speaks of “the right of society, as reflected in the authorities’ measure in maintaining crucifixes on the walls of State schools, to manifest their (majority) religious belief.” *Id.* at *35.

252 *Id.* at *51 (Malinverni, J., dissenting).

253 Evans, *supra* note 83, at 359 (“The Court’s focus on neutrality obscures the fact that religious rights may be at stake on both sides of such a controversy.”).

254 *Id.* at 360. This observation is reminiscent of Justice Stewart’s dissent in *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 312–13 (1963) (Stewart, J., dissenting).

255 *Lautsi v. Italy*, App. No. 30814/06, at *37 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011) (Rozakis, J., concurring), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Case Title” for “Lautsi”; then follow “Case of Lautsi and Others v. Italy” hyperlink) (“These elements, demonstrating a religious tolerance which is expressed through a liberal approach allowing all religions denominations to freely manifest their religious convictions in State schools, are, to my mind, a major factor in ‘neutralising’ the symbolic importance of the presence of the crucifix in State schools.”).

terized the mandatory display of the crucifix as “yet another . . . world view” in “a pluralist and religiously tolerant context.”²⁵⁶ But in addition to equating the display of religious symbols by individuals with the mandatory display of religious symbols by the state, the tolerance of other religious symbols is unresponsive to the petitioner’s claim. Ms. Lautsi wanted to raise her children according to secular principles,²⁵⁷ suggesting again that considerable challenges stem from conflicts between religion and nonreligion and not all cases fall in the category of Muslim immigrants challenging the predominantly Christian system, though one might be under that impression reading the Grand Chamber decision.²⁵⁸

The Grand Chamber and concurring opinions quite noticeably stressed the headscarf situation and Ramadan observance, apparently with a secularist’s challenge to the crucifix before them, but a Muslim’s challenge in mind.²⁵⁹ Moreover, several other religious exercises in Italian public schools are increasingly deemed problematic and would have to be somehow offset.²⁶⁰ Among the looming conflicts are the requirement that students declare at the beginning of the school year their intent to participate in Catholic religious instruction, the restriction of religion classes to six state-approved religious groups, and the fact that non-Catholic religious education is not publicly financed.²⁶¹ Although Catholicism predominates in Italy and—according to statistics cited in 2005—ninety percent of public school students attend Catholic religion classes, the regular weekly church attendance rate of students is assessed at less than thirty percent.²⁶² These numbers indicate a relatively low level of religiosity despite overwhelming affiliation with the Catholic Church, suggesting that overtly religious symbols and exercises will face increased opposition even in a society that is (still) relatively homogeneous as to religion.

With respect to the display of passive religious symbols, the most recent *Lautsi* decision has apparently halted—at least temporarily²⁶³—the development toward exclusion of such symbols.²⁶⁴ But the case

²⁵⁶ *Id.* at *46 (Power, J., concurring).

²⁵⁷ *Id.* at *18 (majority opinion).

²⁵⁸ *See id.* at *29–30.

²⁵⁹ *Id.*

²⁶⁰ Silvio Ferrari, *State and Church in Italy*, in *STATE AND CHURCH IN THE EUROPEAN UNION*, *supra* note 4, at 209, 218–19.

²⁶¹ *Id.*

²⁶² *Id.* at 209.

²⁶³ *See infra* Part III.B (discussing likely long-term developments).

²⁶⁴ *Lautsi v. Italy*, App. No. 30814/06, at *31 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011),

indicates that exclusively displaying only one religious symbol, especially if it is a symbol of the religious majority, while simultaneously prohibiting the display of minority religious symbols, would seem suspect even to the Grand Chamber.²⁶⁵ If it were not for Italy's permissive stance on headscarves and Ramadan celebrations, the case might have played out differently.²⁶⁶ But the Grand Chamber was able to avoid a definitive ruling on the permissibility of passive religious symbols in this case by deferring to the margin of appreciation.²⁶⁷ As the dissent stated: "[B]y relying mainly on the lack of any European consensus . . . the Grand Chamber has allowed itself to invoke the doctrine of the margin of appreciation."²⁶⁸ Although the Grand Chamber thus avoided establishing a rule on passive religious displays in public school classrooms, the foregoing discussion indicates that mandatory posting of crosses without any mediating factors would probably be impermissible. The two theoretically equally valid alternatives are the display of all religious symbols—which is impracticable—and the shut-out model. The shut-out model can either be applied in an absolute manner, never permitting religious symbols in public schools,²⁶⁹ or it can be calibrated by only removing the symbol(s) when students, parents, or teachers object.²⁷⁰ Yet, it is important to note that both the strict shut-out and the modified shut-out models constitute attempts to enforce a baseline of nonestablishment in the public schools. A close reading of the *Lautsi* decisions suggests that the trajectory likely points toward more agreement on the shut-out model when it comes to passive religious symbols in the future.²⁷¹

<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "Case Title" for "Lautsi"; then follow "Case of Lautsi and Others v. Italy" hyperlink).

²⁶⁵ *Id.* at *27–28, *30.

²⁶⁶ *Id.* at *30.

²⁶⁷ *Id.* at *29.

²⁶⁸ *Id.* at *47 (Malinverni, J., dissenting).

²⁶⁹ See, e.g., *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam).

²⁷⁰ Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] Apr. 21, 1999, 109 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERWGE] 40, 41 (1999) (Ger.) (Bavarian state law on mandatory posting of classroom crucifixes with opt-out provision).

²⁷¹ See *Lautsi v. Italy*, App. No. 30814/06, at *36 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "Case Title" for "Lautsi"; then follow "Case of Lautsi and Others v. Italy" hyperlink) (asserting that "there is admittedly an emerging trend towards prohibiting the display of religious symbols in public institutions").

3. *Religious Clothing*

The public debate in Europe is currently dominated by questions surrounding headscarves. With respect to the wearing of headscarves in public schools, parallels to the United States are few. Although religious garb statutes concerning teachers' religious clothing existed in the United States and were addressed by state courts in the past,²⁷² the issue never came before the Supreme Court, and the statutes are no longer on the books. But the headscarf issue pervades ECtHR caselaw, as already demonstrated in the *Lautsi* decision. In the public education context, the ECtHR has ruled on bans of headscarves worn by primary school teachers,²⁷³ secondary school students,²⁷⁴ and public university students.²⁷⁵ In all three cases, the ECtHR held that the state may prohibit women from wearing headscarves (and in all three cases, the women chose wearing their headscarves over remaining at the institutions).²⁷⁶

For purposes of this discussion, the attribution question already discussed in connection with the display of passive religious symbols seems most important. The interest in state neutrality and the asserted danger of proselytizing, in connection with the age of the students in a primary school setting,²⁷⁷ seem more salient in the case of a religious message from a teacher than from students. Although the teacher can invoke her own right to religious liberty, she is also a representative of the state in the realm of public education. The student, by contrast, does not have this dual role. Here, we see a parallel to the United States in terms of attribution; in the school prayer context, for instance, teacher-led prayer is distinct from student-initiated prayer.²⁷⁸ The German Federal Constitutional Court in its teacher headscarf case, for example, acknowledged the dual role of the

²⁷² See generally, e.g., *United States v. Bd. of Educ.*, 911 F.2d 882 (3d Cir. 1990); *Cooper v. Eugene Sch. Dist.*, 723 P.2d 298 (Or. 1986), *appeal dismissed for want of federal question*, 480 U.S. 942 (1987) (upholding prohibition on wearing religious clothing); *Hysong v. Sch. Dist.*, 30 A. 482 (Pa. 1894).

²⁷³ *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447.

²⁷⁴ *Dogru v. France*, App. No. 27058/05, 49 Eur. H.R. Rep. 8 (2008).

²⁷⁵ *Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173.

²⁷⁶ Carolyn Evans, *Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture*, 26 J.L. & RELIGION 321, 329 (2010–2011).

²⁷⁷ *Dahlab*, 2001-V Eur. Ct. H.R. at 459 (“[I]t should not be forgotten that teachers were important role models . . . especially when . . . the pupils were very young children attending compulsory primary school.”).

²⁷⁸ See Haupt, *supra* note 249, at 610–15 (discussing attribution questions in connection with school prayer).

teacher as an individual who can invoke her right to religious freedom and as a teacher representing the state.²⁷⁹

As the conflict between the predominantly Christian majority and the, in many countries, sizeable Muslim minority plays out primarily around the question of headscarves in the school context, an emerging nonestablishment principle may bring the question of attribution of the religious message into sharper relief. If it is true that the ECtHR in the headscarf cases now considers the general posture of (perceived) state neutrality rather than the individualized (suspected) effects on students,²⁸⁰ the key question in these cases ought to be whether the headscarf can be properly attributed to the state in the first place. In this respect, the Grand Chamber's attempt to distinguish *Lautsi*, the Italian crucifix case, from the teacher headscarf case was a missed opportunity to clarify the approach of the ECtHR.²⁸¹ From a nonestablishment perspective, prohibiting students from wearing headscarves seems difficult to justify because the message could not be attributable to the state. The question in such a case would solely concern the individual religious liberty of the students. But "the court has been reluctant to acknowledge that restricting the wearing of headscarves is an interference with religious freedom."²⁸²

Overall, ECtHR jurisprudence on the headscarf issue is characterized as somewhat unsophisticated and theoretically shaky.²⁸³ Scholars have criticized the ECtHR for insufficiently considering the

279 BVerfG [Federal Constitutional Court] Sept. 24, 2003, 108 BVerfGE 282 (2003) (Ger.), translated in 4 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT—FEDERAL CONSTITUTIONAL COURT—FEDERAL REPUBLIC OF GERMANY: THE LAW OF FREEDOM OF FAITH AND THE LAW OF THE CHURCHES 1960–2003, at 375, 384 (Fed. Constitutional Court ed., D. Elliot et al. trans. 2007) ("If a duty is imposed on the civil servant that, at school and in lessons, teachers may not outwardly show their affiliation to a religious community by observing dress rules with a religious basis, this duty encroaches upon the individual freedom of faith It confronts those affected with the choice either to exercise the public office . . . or obeying the religious requirements as to dress, which they regard as binding.").

280 Evans, *supra* note 83, at 355 ("In matters relating to religious symbolism in the public realm, the Court's understanding of the state, rather than the impact of its approach on the rights of the individuals in question, appears to have taken center stage.").

281 See *supra* notes 263–68 and accompanying text.

282 Evans, *supra* note 276, at 330. Evans further asserts that the court makes it considerably more difficult to successfully claim a right to wear a headscarf as a matter of religious freedom as compared to other religious freedom claims, and identifies in the headscarf cases "a much higher legal and evidential burden to overcome than the religious groups seeking registration." *Id.* at 332.

283 See *id.* at 339 ("In these complex cases, the Court needs a robust intellectual approach to assist it to fairly and appropriately balance out important competing interests. However, it has yet to develop such an approach and its failure is leading to an incoherent body of caselaw that does not give sufficient protection to religious freedom.").

underlying issues, especially with respect to the proselytizing effect on young students, the link between wearing a headscarf and expressions of gender inequality, and the state interest in curbing religious fundamentalism by prohibiting the wearing of headscarves.²⁸⁴ As it stands now, the court is faced with a more or less strong anti-Muslim bias in several countries. To be sure, the national courts have not necessarily been helpful in charting a clear path either. The German Federal Constitutional Court, for instance, deferred back to the legislative branch without reaching the underlying constitutional question when it decided that prohibiting headscarves for public school teachers must find its basis in a law passed by the state legislature.²⁸⁵ But that court did, consistent with the German Basic Law's strong religious freedom conception, clearly state that the Constitution protects the wearing of headscarves as a religious exercise.²⁸⁶

The main issue in the headscarf cases is primarily about recognizing the right to religious freedom of the wearer and its limits when the religious message—via the wearer's role as public school teacher or other public official—can be attributed to the state. Indeed, this is true for all forms of religious garb, not only headscarves. A robust understanding of religious freedom in this area is crucial as future challenges of headscarf or burqa bans in several European countries will likely be on the ECtHR's agenda.²⁸⁷ Importantly for this discussion, the narrative of Muslim immigration in Europe as a challenge to religion (particularly in the public schools), though reflexively plausible, is perhaps too simple. Outside of the headscarf context, the opposing parties in the school cases were not aligned as Muslims challenging Christian hegemony. This fuels the suspicion that the greater challenge of pluralism is not necessarily the tension among

²⁸⁴ See, e.g., *id.* at 331–32.

²⁸⁵ BVerfG [Federal Constitutional Court] Sept. 24, 2003, 108 BVerfGE 282 (2003) (Ger.), translated in 4 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT—FEDERAL CONSTITUTIONAL COURT—FEDERAL REPUBLIC OF GERMANY: THE LAW OF FREEDOM OF FAITH AND THE LAW OF THE CHURCHES 1960–2003, at 318, 375 (Fed. Constitutional Court ed., D. Elliot et al. trans. 2007).

²⁸⁶ *Id.* at 385 (“The wearing of a headscarf by the complainant at school as well as outside school is protected by the freedom of faith, which is guaranteed in article 4.1 and 4.2 of the Basic Law.”).

²⁸⁷ See, e.g., Evans, *supra* note 83, at 364–68 (discussing likely future ECtHR challenges to burqa bans); Steven Erlanger, *French Legislation Takes Effect Banning Full-Face Coverings*, N.Y. TIMES, Apr. 12, 2011, at A4; *Belgian Ban on Full Veils Comes into Force*, BBC NEWS EUR. (July 23, 2011), <http://www.bbc.co.uk/news/world-europe-14261921>.

different religious groups, but rather the tension between religion and nonreligion.²⁸⁸

B. Funding

Parallels between the United States and Europe in the area of funding religious groups are fewer than in the public school context. In Europe, direct and indirect funding, including funding favoring one religious group, is permissible.²⁸⁹ By contrast, the United States does not allow church taxes;²⁹⁰ indeed, the origins of the Virginia disestablishment lay in resistance to church taxes—taxes levied to support religious activities or institutions.²⁹¹ Recent developments in the United States focused on the question of direct versus indirect (beneficiary choice) funding. The Supreme Court decided in *Zelman v. Simmons-Harris*,²⁹² the Cleveland school voucher case, that “true private choice” may direct publicly provided tuition funds to religious education.²⁹³ But the comparative point to make is that in the area of financing religious groups, permissible practices in the United States remain much more restricted than in Europe.

1. Church Tax and Tax Exemptions

The ECHR regime permits direct funding of religious organizations and even allows disparate funding among religious groups; for example, the state may give significantly higher amounts to the established religion.²⁹⁴ States may delegate some secular functions to the established state church—for example, keeping birth and death records, maintaining cemeteries, and performing marriages—and the state may fund these activities.²⁹⁵ If secular functions are thus delegated to religious groups, the state may tax all citizens, not only mem-

²⁸⁸ Note that this mirrors observations made in the United States. Professors Lupu and Tuttle, for instance, likewise assert: “The religious wars in the United States in the early twenty-first century are not Protestant vs. Catholic, or Christian vs. Jew, or even the more plausible Islam vs. all others. They are instead the wars of the deeply religious against the forces of a relentlessly secular commercial culture.” Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 954–55 (2003).

²⁸⁹ Evans & Thomas, *supra* note 83, at 713.

²⁹⁰ *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

²⁹¹ *McConnell, Free Exercise*, *supra* note 29, at 1438–40.

²⁹² *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

²⁹³ *Id.* at 653.

²⁹⁴ EVANS, *supra* note 11, at 83; Evans & Thomas, *supra* note 83, at 713.

²⁹⁵ EVANS, *supra* note 11, at 82; Evans & Thomas, *supra* note 83, at 713.

bers, to support these functions.²⁹⁶ The state, however, may not tax nonadherents of a particular religion to support that group's religious activities.²⁹⁷ States may also collect taxes for a church, irrespective of its status as established state church, from members of the church.²⁹⁸ Permissible taxation schemes include adding on to the general taxation a share designated for the religious group the taxpayer belongs to²⁹⁹ as well as direct assessment of taxes by the respective church, with state support in enforcement.³⁰⁰ These church-tax systems require taxpayer disclosure of religious affiliation to the government, which is deemed permissible in this context in terms of religious freedom.³⁰¹ Church members continue to be taxed until they inform the government that they have formally left the church.³⁰² In short, coercive taxation with an opt-out is permissible.³⁰³

By contrast, the U.S. Supreme Court in *Everson* stated: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."³⁰⁴ The Virginia disestablishment and the core understanding of nonestablishment under the U.S. Constitution concern coercive direct government funding of religion. Madison's Memorial and Remonstrance against the Virginia assessment was set in this context; not least because of the role ascribed to the Virginia legacy in *Everson* did the antitaxation emphasis become the foundation of modern Establishment Clause jurisprudence.³⁰⁵ Thus, the situation with respect to taxation in the United States and in Europe is diametrically opposed.

²⁹⁶ Evans & Thomas, *supra* note 83, at 713.

²⁹⁷ *Id.*

²⁹⁸ *Gottesmann v. Switzerland*, App. No. 10616/83, 40 Eur. Comm'n H.R. Dec. & Rep. 284, 289 (1984); *E. & G.R. v. Austria*, App. No. 9781/82, 37 Eur. Comm'n H.R. Dec. & Rep. 42, 42 (1984).

²⁹⁹ Evans & Thomas, *supra* note 83, at 714.

³⁰⁰ EVANS, *supra* note 11, at 82.

³⁰¹ *Id.*

³⁰² *Gottesmann*, 40 Eur. Comm'n H.R. Dec. & Rep. at 289. By contrast, in the school context, the ECtHR has recently held that individuals cannot, consistent with article 9 of the ECHR, "be required to reveal their faith or religious beliefs." *Grzelak v. Poland*, App. No. 7710/02, at *22 (Eur. Ct. H.R. June 15, 2010), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search "Case Title" for "Grzelak"; then follow "Case of Grzelak v. Poland" hyperlink); see also *supra* note 168 and accompanying text.

³⁰³ See *Darby v. Sweden*, 187 Eur. Ct. H.R. (ser. A) at 20 (1990); *Gottesmann*, 40 Eur. Comm'n H.R. Dec. & Rep. at 289; *E. & G.R.*, 37 Eur. Comm'n H.R. Dec. & Rep. at 45.

³⁰⁴ *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

³⁰⁵ See generally *id.*

Relatedly, under the ECHR regime, tax exemptions for religious groups—even if disproportionate among various groups—are permissible.³⁰⁶ In *Iglesia Bautista “El Salvador” v. Spain*,³⁰⁷ a Protestant church sought the same property tax exemption that was granted to the Catholic Church, but the Commission held that because the tax exemption for the Catholic Church was based on an agreement between Spain and the Holy See, and the Protestant church had not entered into such an agreement with the Spanish state, it could not claim an exemption.³⁰⁸ Likewise, in the United States, religious groups may benefit from tax exemptions. Indeed, all states exempt churches and houses of worship from property taxes—most states pursuant to constitutional provisions in their state constitutions³⁰⁹—and the Supreme Court found this practice to be constitutionally sound.³¹⁰ But contrast the *Iglesia Bautista* case with Professor Kent Greenawalt’s example illustrating that “designating certain groups to receive exemptions while denying them to others that share the relevant characteristics would be unjust. Suppose that property tax exemptions were given only to Presbyterian churches and denied to all other religious groups. . . . [T]his is not acceptable.”³¹¹ It remains contested in the United States whether exemptions for religious and nonreligious non-profit groups must also be awarded equally.³¹² The parsonage exemption, permitting clerics not to count housing and allowance as income, is an example where this is not the case.³¹³ Additional permissible forms of tax exemptions for houses of worship include exemptions from income tax, federal unemployment, and social security taxes.³¹⁴ For individuals, income tax deductions for education (including tuition payments),³¹⁵ as well as tax deductions for contributions to religious entities, are permitted.³¹⁶ But notwithstanding these constitutionally permissible indirect avenues of benefiting religious groups through taxation, the overall scheme is decidedly different from the European system of church taxes and tax benefits. Recent ECtHR caselaw pro-

³⁰⁶ *Iglesia Bautista “El Salvador” v. Spain*, App. No. 8007/77, 72 Eur. Comm’n H.R. Dec. & Rep. 256 (1992).

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 260–62.

³⁰⁹ See GREENAWALT, *supra* note 29, at 290.

³¹⁰ *Waltz v. Tax Comm’n*, 397 U.S. 664, 680 (1970).

³¹¹ GREENAWALT, *supra* note 29, at 281.

³¹² See *id.* at 291–92.

³¹³ See *id.* at 295–96 (further discussing competing views on permissibility).

³¹⁴ *Id.* at 279.

³¹⁵ *Mueller v. Allen*, 463 U.S. 388, 390–91 (1983).

³¹⁶ GREENAWALT, *supra* note 29, at 279.

vides no indication that a fundamental shift might occur in this area, despite the emergence of the nonestablishment principle in other contexts.

2. *Funding of Religious Social Welfare Organizations*

There is an extensive practice of involving religious organizations in providing social welfare services throughout Europe.³¹⁷ Because direct financing of religious organizations is permissible,³¹⁸ financing of religiously affiliated social welfare service providers is equally uncontroversial; legal challenges to such schemes are absent from ECtHR caselaw. This clearly differs from the situation in the United States. Joint involvement of religious groups and the state in the area of social welfare has deep roots in the United States. In a nineteenth-century case, the Supreme Court upheld the provision of congressional funding for constructing a Roman Catholic hospital building in Washington, D.C. against an Establishment Clause challenge.³¹⁹ Secular subsidiaries of religious groups, such as Catholic Charities or Lutheran Services, have long been recipients of federal money.³²⁰ In *Bowen v. Kendrick*,³²¹ the Supreme Court upheld the Adolescent Family Life Act³²² against an Establishment Clause challenge.³²³ Under the Act, religious groups were included in a larger group of grant recipients providing educational services on teenage sexuality and pregnancy.³²⁴ Chief Justice Rehnquist pointed out “that this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.”³²⁵ The Charitable Choice provisions of the Welfare Reform Act of 1996³²⁶ and President Bush’s Faith-Based Initiative, continued with some modifications by President Obama, have brought

³¹⁷ See generally MONSMA & SOPER, *supra* note 160 (providing an overview of the situation in Germany, the Netherlands, and England).

³¹⁸ See *id.*

³¹⁹ *Bradfield v. Roberts*, 175 U.S. 291, 298–300 (1899).

³²⁰ See Michele Estrin Gilman, “Charitable Choice” and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses, 55 VAND. L. REV. 799, 811 (2002).

³²¹ *Bowen v. Kendrick*, 487 U.S. 589 (1988).

³²² Adolescent Family Life Act, Pub. L. No. 97-35, 95 Stat. 578 (1981) (codified at 42 U.S.C. §§ 300z–300z-10 (2006)).

³²³ *Bowen*, 487 U.S. at 618.

³²⁴ *Id.* at 593–97.

³²⁵ *Id.* at 609.

³²⁶ Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Reform Act) of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified primarily in scattered sections of 42 U.S.C. (2006)).

the issue to the forefront of political and constitutional debate.³²⁷ A crucial point is that religious providers of secular services may not include religious exercises or proselytizing as part of the service they provide.³²⁸ Again, the situation in the United States and Europe remains decidedly different in this area.

3. *Funding of Religious Schools*

Funding of religious schools might be considered a subset of funding social welfare organizations, with education as the service provided. But funding of religious schools has been highly controversial; indeed, it “has given rise to far more Supreme Court cases than any other establishment issue.”³²⁹ As already indicated, education historically had religious roots. When the state entered the previously religious domain of education in the nineteenth century, conflicts arose with the Catholic Church³³⁰ and also with conservative Protestant groups, for example, in the Netherlands.³³¹ Different policy options are available that the constitutional law approach may reflect. The state may seek evenhanded funding among religions, or among religions and between religion and nonreligion. Unlike in the area of religious messages, the state can actually realize this option. Alternatively, the state may shut out religious entities from any kind of funding. Both options reflect a nonestablishment baseline: either everyone receives equal amounts of money, or nobody receives any money. Preferential funding, however, is not readily reconciled with the nonestablishment idea.

Under the ECHR regime, it is entirely up to the state whether to fund religious schools at all; the state is free to do so if it chooses.³³² Funding, moreover, does not have to be equally distributed among different religions or between religion and nonreligion.³³³ Indeed,

³²⁷ See generally Ira C. Lupu & Robert Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & POL. 539 (2002); Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1 (2005).

³²⁸ See, e.g., *Am. Civil Liberties Union of La. v. Foster*, No. Civ.A. 02-1440, 2002 WL 1733651 (E.D. La. July 24, 2002) (finding funding for strongly religious abstinence program to violate Establishment Clause).

³²⁹ GREENAWALT, *supra* note 29, at 385.

³³⁰ MONSMA & SOPER, *supra* note 160, at 136 (discussing Protestant opposition in the United Kingdom to the Education Act of 1870 on the basis that it would provide public aid to the Catholic Church); Jeffries & Ryan, *supra* note 61, at 279–80, 282 (discussing the United States).

³³¹ MONSMA & SOPER, *supra* note 160, at 222.

³³² See Evans & Thomas, *supra* note 83, at 714.

³³³ *Id.*

most European states do fund religious schools, and they may prefer some religious schools in their distribution of funds and exclude others.³³⁴ Yet, some countries provide equal funding of religious and state schools; one example is England.³³⁵ This is a particularly interesting feature in an established state church system in which one might have expected preferential treatment of Anglican schools; but both religious and nonreligious schools in England receive state funding.³³⁶ Thus, “the English model promotes equality between religious and nonreligious educational perspectives.”³³⁷ But, support for schools other than Jewish and Christian schools is a recent development.³³⁸ Interestingly, this pluralistic system of equal funding has made British Muslims strong advocates of the Church of England because the funding gives them a “common stake in the political system.”³³⁹

In the United States, the Supreme Court defined the boundaries of nonestablishment in the school context on the federal level in a series of cases in the mid- and late-twentieth century; these cases were not decided on a linear trajectory, and attracted criticism for their unpredictability.³⁴⁰ After *Mitchell v. Helms*³⁴¹—a case involving federal

³³⁴ *Id.*

³³⁵ MONSMA & SOPER, *supra* note 160, at 223 (citing the Netherlands as another example).

³³⁶ *Id.* at 149 (“The vast majority of religious schools get state funding under virtually the same conditions that apply to community schools, i.e., schools that are publicly funded but have no religious character.”).

³³⁷ *Id.* at 149 (further stating that “it raises controversial issues about which schools should receive state funding and under what conditions”).

³³⁸ *Id.* at 223.

³³⁹ *Id.* at 233 (“The pluralistic policy of aid to all religious schools and organizations gives them a common stake in the political system . . .”).

³⁴⁰ *Cf.* GREENAWALT, *supra* note 29, at 404–05 (“People can disagree strongly over where exactly the lines should be drawn, but under almost any approach, some distinctions between the allowed and the disallowed may look embarrassingly arbitrary.”). Earlier cases in the United States were fought over providing transportation (permissible), *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); salary supplements and other aid (impermissible), *Lemon v. Kurtzman*, 403 U.S. 602 (1971); textbooks (permissible), *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968); and other instructional materials (impermissible), *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973). Tax credits were also impermissible, *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973), but an income tax deduction for tuition payments was permissible, *Mueller v. Allen*, 465 U.S. 388 (1983). Providing remedial education to all school children—in public and private, including sectarian, schools—by state-employed teachers was at first found unconstitutional, *Aguilar v. Felton*, 473 U.S. 402 (1985), and then, upon reconsideration a little more than a decade later, constitutional, *Agostini v. Felton*, 521 U.S. 203 (1997). Also constitutional was the provision of a state-paid interpreter for a student with a hearing disability studying at a sectarian school. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

³⁴¹ *Mitchell v. Helms*, 530 U.S. 793 (2000).

funds for schools to acquire equipment for classroom use—was decided in 2000,³⁴² the Supreme Court no longer assumed that any aid to sectarian schools would be used to further religious school activities. Schools after *Mitchell* are no longer necessarily considered pervasively sectarian.³⁴³ In *Zelman v. Simmons-Harris*, families in the Cleveland school district who received vouchers were able to choose between public and private (including parochial) schools.³⁴⁴ Government aid, in this program, only reached parochial schools through private choice.³⁴⁵ From a federal Establishment Clause perspective, the result of permitting public tuition funds to be directed to religious education illustrates the effect of stripping away the top layer of the multilevel religious policy framework. As a result of *Zelman*, the federal Establishment Clause no longer restricts the use of funds in such a scheme.³⁴⁶ This illustrates the interaction of the highest level understanding of nonestablishment on the lower levels of the multilevel religious policy framework, perhaps the most important comparative insight. A problem in the indirect funding scheme created by school vouchers, however, is the scope of choice; a similar problem can be observed in various European countries where the choice among publicly financed religious schools may be limited. In England, for example, the first publicly funded Muslim primary school was established in 1997, but “[t]he overall number of Christian schools (7,000) dwarfs the seven publicly financed Islamic schools, thirty-six Jewish schools, and a handful of others.”³⁴⁷

III. IMPLICATIONS OF THE EMERGING TRANSNATIONAL NONESTABLISHMENT PRINCIPLE

This Part turns to the implications of the emerging transnational nonestablishment principle and assesses the potential significance of the phenomenon. As demonstrated thus far, the ECtHR’s evolving religious freedom jurisprudence appears to be implicitly developing a nonestablishment-type principle.³⁴⁸ To reiterate, this Article makes no claim regarding a final outcome; its argument is solely concerned with

³⁴² *Id.* at 801.

³⁴³ See Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 812–14 (2001) (discussing the impact of the *Mitchell* decision).

³⁴⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002).

³⁴⁵ See *id.*

³⁴⁶ See *id.* at 644.

³⁴⁷ MONSMA & SOPER, *supra* note 160, at 151.

³⁴⁸ See *supra* Part I.C.

an apparent trend in the ECtHR's still-nascent religious freedom jurisprudence. The following Sections assess the potential short-term and long-term implications of the emerging transnational nonestablishment principle. How would the principle translate into the national legal regimes? What, if anything, might happen to established churches in Europe in the future if a transnational nonestablishment principle more fully develops? At the center of this Part are the competing forces of localism and transnationalism, and the interactions between the national and the transnational. This Part argues that questions of incorporation of the ECHR regime into national law, the subsidiarity principle, and the doctrine of the margin of appreciation³⁴⁹ (with respect to currently existing national differences) are primarily relevant in the short term. But theories of convergence more likely provide an account of the long-term impact that transnational developments might have on national law. The resulting paradox created by currently existing established state churches on the national level and a developing transnational nonestablishment principle may be of relatively little long-term relevance. Historically entrenched, but not formally established, religious affiliations will likely present more resistance to the emerging transnational nonestablishment principle.

A. *Short-Term: Maintaining National Differences*

As scholars have emphasized: “[O]ne cannot understand how the Convention system actually functions without paying close attention to how that system interacts with, and impacts upon, national law.”³⁵⁰ Recall that the legal effect of the Convention is largely determined by national law.³⁵¹ Consider the German example. Although the Convention's rank is below that of the Basic Law, national courts must consider the Convention in interpreting the Basic Law.³⁵² This gives “the Convention and . . . [ECtHR] judgments . . . a constitutional-law dimension.”³⁵³ Individuals can challenge improper enforcement of Convention rights in German national courts by way of a constitu-

³⁴⁹ As discussed above, the margin of appreciation doctrine stipulates that the ECtHR will defer to the national level on controversial matters where there is no European consensus.

³⁵⁰ Alec Stone Sweet & Helen Keller, *The Reception of the ECHR in National Legal Orders*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 3, 26 (Helen Keller & Alec Stone Sweet eds., 2008).

³⁵¹ See *supra* notes 152–55 and accompanying text.

³⁵² Papier, *supra* note 150, at 2.

³⁵³ *Id.*

tional complaint.³⁵⁴ Thus, national constitutional jurisprudence is harmonized with the Convention,³⁵⁵ indicating that the actual importance of the Convention and ECtHR judgments is much greater than may be immediately apparent.

Technically, decisions of the ECtHR have only limited binding effect. To illustrate, suppose counterfactually that the Grand Chamber in *Lautsi* affirmed the Chamber's judgment that the mandatory posting of classroom crucifixes violates the Convention. Such a finding would not have resulted in a binding order to take down all public school classroom crucifixes in all Contracting States; mandatory crosses in Austrian public school classrooms, for instance, would have remained unaffected.³⁵⁶ Instead, the binding effect of the judgment would have demanded only that Italy take measures to remedy the violation.³⁵⁷ The crucifix at that particular school might have been removed. Another country's national courts might have taken notice of the Grand Chamber judgment pursuant to national law, whereas courts in a third country might not have.³⁵⁸ Yet, although this description of a formal constraint on the effect of judgments is technically accurate, it does not capture the true influence of ECtHR jurisprudence. If a nonestablishment principle is developing under the Convention, its impact goes beyond the parameters of implementation just described.

Consider also the margin of appreciation doctrine already mentioned in connection with the *Lautsi* Grand Chamber decision.³⁵⁹ Allowing for national differences within the Convention framework, the ECtHR uses the principle of subsidiarity and the doctrine of the margin of appreciation as tools to help preserve national identity while implementing the Convention.³⁶⁰ The principle of subsidiarity promotes the idea of self-governance of subordinate organizational units in a society;³⁶¹ an outgrowth is the judge-made doctrine of the margin

³⁵⁴ Keller & Stone Sweet, *supra* note 72, at 685.

³⁵⁵ Papier, *supra* note 150, at 2.

³⁵⁶ Austrian law requires "that in classrooms of public schools and of schools with public status in which religious instruction is a compulsory subject the school must exhibit a cross if the majority of the pupils belong to a Christian denomination." Richard Potz, *State and Church in Austria*, in STATE AND CHURCH IN THE EUROPEAN UNION, *supra* note 4, at 391, 404.

³⁵⁷ ECHR, *supra* note 3, art. 46(1) (requiring states to "abide by the final judgment of the Court in any case to which they are parties").

³⁵⁸ See, e.g., GREER, *supra* note 70, at 279–80 (discussing binding effect and influence of ECtHR decisions).

³⁵⁹ See *supra* notes 233–34 and accompanying text.

³⁶⁰ See Shelton, *supra* note 12, at 8.

³⁶¹ See *id.*

of appreciation.³⁶² Professor Mark Tushnet identifies two goals underlying the margin of appreciation doctrine: “(1) deference to local decision makers’ judgments of when local conditions vary widely enough to make variations in the definition and protection of treaty rights sensible on policy grounds and (2) respect for residual national sovereignty.”³⁶³ Notwithstanding significant criticism,³⁶⁴ the ECtHR frequently invokes the doctrine.³⁶⁵

The *Lautsi* Grand Chamber majority opinion illustrates how the court employs the margin of appreciation doctrine.³⁶⁶ Within the confines of the court’s understanding of “democratic society,” the margin of appreciation serves to respect the national decisions: those made by democratically legitimated national bodies.³⁶⁷ While an instrument like the margin of appreciation may be desirable, or even necessary, “to effectively apply a nominally universal norm across widely varying legal and cultural settings,”³⁶⁸ it plays a more important role in the short term than in the long term. Unlike in the United States system of federalism, where certain functions belong categorically in the federal realm and others belong to the states, deference to the national level under the margin of appreciation doctrine is a question of timing and degree. The court, in interpreting the Convention, “will typically survey the state of law and practice in the States, and sometimes beyond. Where it finds an emerging consensus on a new, higher standard of rights protection among States, it may move to consolidate this consensus, as a point of Convention law binding upon all members.”³⁶⁹ Where this is the case, the margin of appreciation will dimin-

³⁶² *Id.* at 9; see also VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 58 (2010) (offering a selection of descriptions of the margin of appreciation).

³⁶³ Tushnet, *supra* note 5, at 1001.

³⁶⁴ JACKSON, *supra* note 362, at 58, 60 (describing the basis of the doctrine as “somewhat indeterminate and undertheorized”).

³⁶⁵ *Id.* at 58 (“It has been applied and discussed in well over 700 cases, some involving quite controversial or difficult social issues.”).

³⁶⁶ *Lautsi v. Italy*, App. No. 30814/06, at *28–29 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Case Title” for “Lautsi”; then follow “Case of Lautsi and Others v. Italy” hyperlink).

³⁶⁷ See Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, 19 HUM. RTS. L.J. 1, 3 (1998) (explaining that the ECtHR decides “whether the choice of the national authorities (legislative, executive or judicial) . . . remained within the permissible spectrum”).

³⁶⁸ JACKSON, *supra* note 362, at 59.

³⁶⁹ Keller & Stone Sweet, *supra* note 72, at 3, 6.

ish.³⁷⁰ Indeed, “the theory of the margin of appreciation contemplates its gradual reduction over time.”³⁷¹

Consequently, views articulated in a *Lautsi* concurrence,³⁷² the dissent,³⁷³ and the Chamber decision itself³⁷⁴ suggest that the long-term developments may differ from the outcome reached in that case. The Grand Chamber started with the empirical observation that there was no consensus among states on the treatment of classroom crucifixes.³⁷⁵ According to the Grand Chamber: “In the great majority of member States of the Council of Europe the question of the presence of religious symbols in State schools is not governed by any specific regulations.”³⁷⁶ It noted that three countries prohibit religious symbols in schools; in one of these countries, the prohibition only applies to certain regions within the country.³⁷⁷ Five countries require religious symbols in classrooms, though two only in certain regions.³⁷⁸ The highest courts of six countries have addressed the issue.³⁷⁹ Italian national courts assertedly reached contradictory results.³⁸⁰ Framing the question in determining consensus is crucial. Which countries, which

³⁷⁰ Mahoney, *supra* note 367, at 5 (stating, with respect to the margin of appreciation, that “legislative consensus among the majority of States will usually, but not always, signal a reduced area of discretion for States that are out of line”).

³⁷¹ Tushnet, *supra* note 5, at 998 n.50.

³⁷² *Lautsi v. Italy*, App. No. 30814/06, at *36 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011) (Rozakis, J., concurring), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Case Title” for “Lautsi”; then follow “Case of Lautsi and Others v. Italy” hyperlink).

³⁷³ *Id.* at *47 (Malinverni, J., dissenting).

³⁷⁴ *Id.* at *13 (majority opinion).

³⁷⁵ *Id.* at *13–14.

³⁷⁶ *Id.* at *13.

³⁷⁷ *Id.* (naming “the former Yugoslav Republic of Macedonia, France (except in Alsace and the *département* of Moselle) and Georgia”).

³⁷⁸ *Id.* (naming “Italy[,] . . . Austria, certain administrative regions of Germany (*Länder*) and Switzerland (*communes*), and Poland”).

³⁷⁹ *Id.* at *13–14 (Swiss Federal Court finding mandatory posting of crucifix in primary school classroom impermissible under Swiss Federal Constitution; German Federal Constitutional Court finding mandatory classroom crucifixes unconstitutional under German Basic Law; Polish Constitutional Court finding noncompulsory ordinance of Minister of Education permitting public school classroom crucifixes constitutional; Spanish High Court of Justice of Castile and Leon holding that religious symbols should be removed if explicitly requested by student’s parent).

³⁸⁰ Compare *id.* at *7 (“[T]he *Consiglio di Stato* (Supreme Administrative Court) . . . confirmed that the presence of crucifixes in State-school classrooms . . . was compatible with the principle of secularism.”), with *id.* at *11 (“In a different case, the Court of Cassation had taken the contrary view to that of the *Consiglio di Stato* [in a case involving a crucifix in a polling station; that court] held that the presence of the crucifix infringed the principles of secularism and the impartiality of the State, and the principle of the freedom of conscience of those who did not accept any allegiance to that symbol.”). The Constitutional Court has not ruled on the issue. *Id.* at *28.

legislation, and which court decisions count? Most countries have no requirement for the mandatory posting of crosses in public school classrooms; three have explicit prohibitions; and no mandatory posting requirement has been upheld upon challenge.³⁸¹ Moreover, if the question is framed only in terms of mandatory posting of crucifixes in public school classrooms, there is no disagreement among the Italian courts because one case dealt with a crucifix at a polling station rather than a public school classroom.³⁸² Thus, the dissent questioned whether there could be any “definite conclusions regarding a European consensus.”³⁸³ Although the Grand Chamber invoked the margin of appreciation doctrine, the long-term developments are unlikely to be significantly influenced by its doing so. Tellingly, a concurrence clearly identified the trend against permitting passive religious symbols in classrooms.³⁸⁴

B. *Long-Term: Alignment of Religious Policy*

Neither the different incorporation mechanisms nor the permissibility of national differences under the margin of appreciation doctrine are likely to permanently obstruct further long-term alignment of religious policy under the Convention.³⁸⁵ Though religious policy is highly unlikely to become exactly the same throughout Europe, a degree of convergence is likely to align policies in the longer term. As the comparative constitutional law literature teaches us, convergence with respect to constitutional provisions can take various forms.³⁸⁶ A

³⁸¹ See *id.* at *48 (Malinverni, J., dissenting) (“[W]here they have been required to give a ruling on the issue, the European supreme or constitutional courts have always, without exception, given precedence to the principle of State denominational neutrality: the German Constitutional Court, the Swiss Federal Court, the Polish Constitutional Court and, in a slightly different context, the Italian Court of Cassation.”).

³⁸² See *supra* note 380.

³⁸³ *Lautsi v. Italy*, App. No. 30814/06, at *48 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011) (Malinverni, J., dissenting), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Case Title” for “Lautsi”; then follow “Case of Lautsi and Others v. Italy” hyperlink).

³⁸⁴ *Id.* at *36 (Rozakis, J., concurring).

³⁸⁵ Cf. Tushnet, *supra* note 5, at 998 (“Resistance . . . might be accommodated by adjusting transnational norms, through doctrines in the ‘margin of appreciation’ family, without eliminating entirely the pressures toward convergence.”).

³⁸⁶ See JACKSON, *supra* note 362, at 42; see also Ginsburg & Posner, *supra* note 10, at 1620–23. According to Professor Jackson:

Convergence of constitutional rules may be simply an outcome, a fact that is produced, not from deliberate efforts to seek convergence or from deference to transnational norms, but from parallel responses to similar phenomena It may be partial, more notable in some areas and on some issues than others; it may result from economic pressures targeted at states, subnational entities, or business interests within a state to induce compliance with international norms. Convergence,

mechanism discussed by Professors Tom Ginsburg and Eric Posner involves “converge[nce] through weakening.”³⁸⁷ This process seems plausible in the ECHR context. Ginsburg and Posner start with the observation that “[m]any nation states have a two-tiered constitutional structure that establishes a superior state and a group of subordinate states that exercise overlapping control of a single population.”³⁸⁸ In this setup, they call the superior state’s constitution a “superconstitution” and the subordinate states’ constitutions “subconstitutions.”³⁸⁹ Several nation states fit this model. For purposes of this discussion, it is particularly relevant that, in the U.S. constitutional law context, this interaction of the federal constitutional level and the state constitutional level is what we commonly refer to as “federalism.”³⁹⁰ Further, the model can be applied in contemporary Europe because “[t]he integration of Europe has produced a quasi-federalist system. EU members have retained their constitutions even as they increasingly submit to a European government with its own constitution.”³⁹¹ Under their theory, “[w]hen states become substates, their direct role in the protection of rights should become weaker. Weakening of rights implies convergence because the distinctive rights systems of different states become less pronounced and important.”³⁹² Ginsburg and Posner hypothesize that “substate constitutional rules should converge—in the sense that they will become weaker and, in the end, merely duplicate superstate constitutional rules or (what is the same thing) go into desuetude.”³⁹³ Their scholarship has only be-

though, may also be a normative interpretive posture, working to conform national constitutional interpretation to international law or transnational legal consensus.

JACKSON, *supra* note 362, at 42.

³⁸⁷ Ginsburg & Posner, *supra* note 10, at 1621.

³⁸⁸ *Id.* at 1584.

³⁸⁹ *Id.*

³⁹⁰ *Id.* (“Americans understand subconstitutionalism as federalism.”).

³⁹¹ *Id.* Professors Ginsburg and Posner describe the EU “as a quasi-state . . . somewhere between an actual state and a confederation of states linked by treaties,” and suggest that “the . . . treaties . . . and subsequent judicial decisions that interpret those treaties . . . establish [] constitutional norms.” *Id.* at 1611. They also characterize the Treaty of Lisbon “as a quasi-constitutional document.” *Id.* at 1611 n.85.

³⁹² *Id.* at 1620.

³⁹³ *Id.* at 1596–97. This comports with Professor Tushnet’s assertion that, in federal systems, a key feature of the “postwar paradigm” is the relatively small degree of permitted departure of state from federal policy. Tushnet, *supra* note 5, at 986 n.3. According to Professor Tushnet:

[T]he postwar paradigm with respect to regulatory authority is that no governing entity can depart much from some standard set at a reasonably high level. So, for example, both subnational units exercising devolved power and national units have some, in my view, modest ‘margin of appreciation’ with respect to their regulatory

gun to consider the interaction of subnational and national constitutional, and—by including the EU—supranational quasi-constitutional norms, but has not yet discussed the role of international human rights regimes in relation to constitutional developments.³⁹⁴ But, it seems plausible that rights protection under the ECHR regime may produce similar results.

Structurally, as seen in Part I in the context of multilevel religious policy frameworks, the contemporary European model consists of the ECHR, EU law, and national religious policy.³⁹⁵ Substantively, Part I identified the emerging trend in the ECtHR's interpretation of "democratic society" and the nonestablishment posture on the level of EU law, as evidenced in the drafts of the Preamble and now in the Lisbon Treaty.³⁹⁶ In addition, there are national developments that would fit Professor Vicki Jackson's description of "parallel responses to similar phenomena";³⁹⁷ in this case, responses to increasing religious pluralism. The national courts' parallel responses to the posting of classroom crucifixes in Germany, Switzerland, Poland, and Spain are examples of this.³⁹⁸ As discussed earlier, individual states may be mandated to change their national legislation to conform to the Convention following an ECtHR judgment against them.³⁹⁹ This constitutes straightforward top-down pressure of a transnational adjudicatory body.⁴⁰⁰ Likewise, when national courts interpret the Convention, "the domestic court [normally] follows the jurisprudence of the Court by interpreting the Convention according to the current interpretation given by the Court."⁴⁰¹

Beyond implementing directly binding judgments or following ECtHR interpretation of the Convention itself, domestic courts within the jurisdiction of the ECtHR may be under pressure to follow its example; indeed, Professor Tushnet asserts that "[n]ational courts sub-

choices, but it is the modesty of the margin rather than its existence that is the important feature of the postwar paradigm.

Id.

³⁹⁴ Ginsburg & Posner, *supra* note 10, at 1627.

³⁹⁵ See *supra* Part I.C.1.

³⁹⁶ See *supra* Part I.C.2–3.

³⁹⁷ JACKSON, *supra* note 362, at 42.

³⁹⁸ See *supra* note 379.

³⁹⁹ See *supra* Part I.D.

⁴⁰⁰ See Tushnet, *supra* note 5, at 990 ("Top-down pressure also comes from transnational treaty bodies whose decisions have domestic constitutional implications, sometimes through the force of law and at other times through more diffuse mechanisms such as effects on reputation. Here the exemplary institution is the European Court of Human Rights (EC[t]HR).").

⁴⁰¹ Ress, *supra* note 148, at 378.

ject to review by these treaty bodies will almost inevitably mirror their jurisprudence” in order to avoid negative consequences.⁴⁰² As the German example illustrates, some countries’ courts are under an express obligation to consider ECtHR judgments in their national jurisprudence;⁴⁰³ however, other states’ national courts may also take notice absent such an obligation. Moreover, horizontal “peer pressure” can arise among individual states.⁴⁰⁴ Additionally, in federal systems, the federal unit can force its subunits into compliance through a domestic supremacy system.⁴⁰⁵ Resistance to this particular mechanism was at the heart of the German classroom crucifix case dissent in which three judges of the Federal Constitutional Court not only asserted that education is the exclusive competence of the state,⁴⁰⁶ but also emphasized the local custom of posting crosses in public places in the state of Bavaria.⁴⁰⁷ The effect of an emerging transnational nonestablishment principle, then, would be to limit the range of permissible models of religion-state relations; thus causing convergence by delineating the constitutional-religious policy choices of individual countries.

Can the scenario that lower-level constitutions will converge to the point of replicating a higher-level constitution be applied to the ECHR framework? Professors Ginsburg and Posner themselves extend their theory to EU law and tellingly, in the process of their discussion of “[t]he effect of subconstitutionalism on rights in Europe,” the ECHR plays an important role.⁴⁰⁸ They find that, with respect to rights conceptions in national constitutional regimes, the “impetus for change did *not* initially come from the EU or EU-related institutions.”⁴⁰⁹ Recounting the history of human rights protection in the EU already outlined earlier,⁴¹⁰ they conclude that “[t]he main impetus

⁴⁰² Tushnet, *supra* note 5, at 990 (enumerating as possible negative outcomes “reversal, embarrassment, and perhaps financial sanctions against the domestic government”).

⁴⁰³ *Id.*

⁴⁰⁴ *Cf.* Ginsburg & Posner, *supra* note 10, at 1621–22 (describing a similar mechanism of “states imitat[ing] the institutions of other states”); Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 *HUM. RTS. L.J.* 161, 162 (2002) (speaking of “peer pressure” as “the most likely way to ensure proper execution” of Convention judgments).

⁴⁰⁵ Ginsburg & Posner, *supra* note 10, at 1622.

⁴⁰⁶ BVerwG [Federal Administrative Court] Apr. 21, 1999, 109 BVerwGE 40, 291 (1999) (Ger.) (Seidl, Söllner, and Haas, JJ., dissenting).

⁴⁰⁷ *Id.* at 296 (“Moreover, the particular conditions in Bavaria must be taken as a starting point.”).

⁴⁰⁸ *See* Ginsburg & Posner, *supra* note 10, at 1614–15.

⁴⁰⁹ *Id.* at 1614.

⁴¹⁰ *See supra* Part I.C.

for the change lies” with the ECHR.⁴¹¹ Without making a claim as to how other human rights regimes influence constitutional development, and limited to the area of religious freedom, a tentative conclusion emerges. It is conceivable that the ECHR, a strong human rights regime,⁴¹² may exert long-term influence on the constitutions of the Contracting States similar to those Ginsburg and Posner ascribe to a “superconstitution.” The ECtHR has characterized the Convention as “‘a constitutional document’ of European public law.”⁴¹³ Others, likewise, are debating the “constitutionalization” of the ECHR regime;⁴¹⁴ arguably, “in the 21st century, the Convention and the Court perform functions that are comparable to those performed by national constitutions and national constitutional courts in Europe.”⁴¹⁵

Some scholars argue that conceptualizing the ECtHR as a constitutional court will lead to resistance on the part of national courts, resulting in reluctance on the part of national judiciaries to follow the ECtHR’s interpretations.⁴¹⁶ But, a prolonged posture of resistance is unlikely.⁴¹⁷ As one former ECtHR judge stated: “There are examples of a clear reluctance on the part of some states to follow the reasoning of the Court in the future, but in the long run all the states have accepted the Court’s jurisprudence.”⁴¹⁸ The ECtHR interpretation mechanism, gradually abandoning the margin of appreciation and

⁴¹¹ Ginsburg & Posner, *supra* note 10, at 1614.

⁴¹² The immediate caveat, of course, is that “[t]he European Convention on Human Rights is the most effective human rights regime in the world.” Stone Sweet & Keller, *supra* note 350, at 3.

⁴¹³ *Id.* at 7 (citing *Loizidou v. Turkey (Preliminary Objections)*, 20 Eur. H.R. Rep. 99, 117 (1995)).

⁴¹⁴ See, e.g., GREER, *supra* note 70, at 165–92 (discussing the ECHR’s constitutional mission).

⁴¹⁵ Stone Sweet & Keller, *supra* note 350, at 7.

⁴¹⁶ Janneke Gerards & Hanneke Senden, *The Structure of Fundamental Rights and the European Court of Human Rights*, 7 INT’L J. CONST. L. 619, 637 (2009) (“[T]he characterization of a supranational court as a constitutional court has an immediate, complicating effect on the dialogue with national constitutional courts. The ‘new’ constitutional court may be regarded as a rival court, and the natural reaction of the national constitutional court may be to resist any disputable judgments the newcomer hands down.”); see also Stone Sweet & Keller, *supra* note 350, at 17 (“Reception may also involve resistance to the Convention, as when officials seek to limit its domestic reach and scope.”).

⁴¹⁷ Tushnet, *supra* note 5, at 998 (discussing the difficulty governments will have in resisting globalization of domestic laws: “National governments will face constant pressure toward globalization of domestic constitutional law and will probably be able to resist that pressure only intermittently.”).

⁴¹⁸ Ress, *supra* note 148, at 374; see also Stone Sweet & Keller, *supra* note 350, at 7 (pointing out that “States have not mounted a campaign to roll back their commitments, or to curb the Court”).

leaving less room for national differences, supports convergence.⁴¹⁹ Thus, the long-term implications seem more defined by pressure, resulting in likely alignment, rather than the prolonged maintenance of pronounced national distinctions. Accession of the EU to the Convention as envisioned by article 6(2) of the TEU would make the analogy even more straightforward.⁴²⁰ The nonestablishment-establishment paradox would be resolved in the sense that it becomes virtually irrelevant whether a mild form of establishment exists in the individual states or whether there is a national constitutional norm of nonestablishment; the parameters of permissible establishment would then be set by the Convention.

C. *Beyond the Nonestablishment-Establishment Paradox*

Assuming that there is an emerging transnational nonestablishment principle, what might happen, for example, to the Church of England? Though some scholars argue that under the Convention a state church is untenable,⁴²¹ and the ECtHR, according to one of its judges, more recently appears to be taking “a stricter attitude . . . [with] respect to official or dominant church systems,”⁴²² the European Commission on Human Rights in *Darby v. Sweden*⁴²³ held that “[a] State Church system cannot in itself be considered to violate Article 9 of the Convention” if it “include[s] specific safeguards for the individual’s freedom of religion.”⁴²⁴ How can the apparent dichotomy between an emerging transnational nonestablishment principle on the one hand and the simultaneous existence of national established state

419 See Stone Sweet & Keller, *supra* note 350, at 18 (“Over time, the Court has progressively constructed Convention rights in ways that pressure national officials to adapt, or coordinate, the national legal systems with the ECHR.”).

420 See *supra* note 73.

421 Jónatas E.M. Machado, *Freedom of Religion: A View from Europe*, 10 ROGER WILLIAMS U. L. REV. 451, 529–30 (2005).

422 Françoise Tulkens, *The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism*, 30 CARDOZO L. REV. 2575, 2575, 2584 (2009). Beyond the scope of this discussion is the “elitist and antidemocratic” flip side to top-down convergence pressure as exercised by the ECtHR. See Tushnet, *supra* note 5, at 998. As Judge Tulkens wrote: “[T]he Court is trying to build ‘a consistent vision of religious freedom and of its implications for the relations between [S]tate and religions in a democratic society, valid across Europe.’” Tulkens, *supra* note 422, at 2578 (emphasis added) (quoting Julie Ringelheim, *Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?*, in LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS 283 (Lorenzo Zucca & Camil Ungureanu eds., 2012)). The driving force behind a nonestablishment principle throughout Europe, thus, is the court by way of its interpretation of “democratic society” under the Convention.

423 *Darby v. Sweden*, 187 Eur. Ct. H.R. (ser. A) (1990).

424 *Id.* at 17–18.

churches on the other hand be reconciled? Theoretically, established churches are probably the most difficult to reconcile with an emerging norm of nonestablishment. But in practice, the biggest challenge to nonestablishment does not necessarily arise in formally established state church systems. A greater challenge may arise in states featuring a historically relatively homogeneous society with an informally entrenched religious preference.

A comparison of England and Greece illustrates this point. With a view to the English establishment in particular, major changes seem unlikely. It is a mild form of establishment, and the Church of England appears to be committed to furthering religious pluralism.⁴²⁵ Indeed, “England does not have a constitutional protection for religious liberty but the nation’s practice is not far different from that of the United States, which does.”⁴²⁶ Greece does not have a formal establishment, but its ties with the Orthodox church are very close; the Greek Constitution identifies it as the “prevailing religion in Greece.”⁴²⁷ As the ECtHR stated in *Kokkinakis*: “[A]ccording to Greek conceptions, [the Christian Eastern Orthodox Church] represents *de jure* and *de facto* the religion of the State itself.”⁴²⁸ In nine cases, the ECtHR ruled against Greece in matters of religious freedom; in no cases did it find a violation of religious freedom by the United Kingdom.⁴²⁹ In fact, Greek violations account for just over twenty-five percent of all article 9 violations between 1959 and 2010, followed by Russia (five violations) and Bulgaria (four violations).⁴³⁰ None of these countries (Greece, Russia, or Bulgaria) have a formally established state church, but all have historically entrenched religious identities. In the *Lautsi* case, Greece, Russia, and Bulgaria, along with Armenia, Cyprus, Lithuania, Malta, and San Marino, intervened in the oral proceedings before the Grand Chamber, and their counsel, Professor Joseph Weiler, emphasized the European nations’ cultural heritage stemming from their Christian identity.⁴³¹

⁴²⁵ See MONSMA & SOPER, *supra* note 160, at 131–67.

⁴²⁶ *Id.* at 215.

⁴²⁷ 2008 SYNTAGMA [SYN.] [CONSTITUTION] 2 (Greece).

⁴²⁸ *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) 3, 12 (1993).

⁴²⁹ EUR. COURT OF HUMAN RIGHTS, VIOLATION BY ARTICLE AND COUNTRY 1959–2010, available at http://www.echr.coe.int/NR/rdonlyres/2B783BFF-39C9-455C-B7C7-F821056BF32A/0/Tableau_de_violations_19592010_ENG.pdf.

⁴³⁰ *Id.*

⁴³¹ See Editorial, *State and Nation; Church, Mosque and Synagogue—The Trailer*, 8 INT’L J. CONST. L. 157, 161–65 (2010) (Oral Pleading before Grand Chamber in *Lautsi v. Italy* on behalf of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, the Russian Federation, and San Marino).

Constitutional systems featuring an establishment-and-free-exercise dualism thus are not necessarily incompatible with the nonestablishment principle emerging in the ECtHR. Accordingly, mild forms of establishment are not necessarily at odds with religious freedom, whereas strict forms of establishment are. Indeed, the ECtHR took this position in the *Welfare Party* decision, finding Sharia law incompatible with the ECHR, and with religious freedom and pluralism.⁴³² The ECtHR thus places constraints on strong forms of religious establishment by infusing its understanding of democracy under the Convention with notions of pluralism and state neutrality.

IV. RECONCEPTUALIZING NONESTABLISHMENT

As seen in the previous discussion, if a superstate guarantees fundamental rights, their duplication by substates may not be necessary.⁴³³ A parallel observation might be made with respect to the emerging transnational nonestablishment principle that could, in the long term, diminish the role of national constitutional provisions governing religious policy. In the United States, by contrast, the reverse can be examined in two contexts: one hypothetical and one real. The hypothetical disincorporation of the Establishment Clause and recent developments in the area of school aid provide an opportunity to assess the reciprocal effects of “supernonestablishment” and “subnonestablishment.”

Together with the previous discussion, this Part raises the question whether there might be an identifiable emerging nonestablishment baseline. It may be too soon to tell, given the early stages of development under the ECtHR’s religious freedom jurisprudence, but speculatively, some general trends might be identified. Distinguishing between different policy areas, the closest to a nonestablishment baseline is probably identifiable in the context of religious instruction in public schools. The next likely candidate for a shared baseline is the area of passive religious symbols. In the funding context, a baseline requiring equal funding might conceivably develop at some point in the future, but given the current situation—the absence of ECtHR caselaw on this point indicating a move toward evenhandedness in distributing funding for religious organizations, let alone religion and nonreligion—that appears to be only a relatively remote possibility at this time. Finally, there might be an emerging structural baseline fol-

⁴³² See *supra* notes 103–07 and accompanying text.

⁴³³ Ginsburg & Posner, *supra* note 10, at 1599.

lowing from the need to balance transnational or national involvement and local interests in determining religious policy.

A. *Supernonestablishment and Subnonestablishment in the United States*

Under Ginsburg and Posner's theory, "U.S. state constitutions . . . form a paradigmatic example of the relationship between superstate and substate. U.S. state constitutions exhibit many of the features that we identify as subconstitutional."⁴³⁴ The subconstitutionalism argument as applied to the Establishment Clause is quite straightforward as long as we assume that Clause's incorporation against the states. No matter what the states consider the most appropriate religious policy, they are directly bound by the federal nonestablishment provision and the Supreme Court's interpretation of its scope. In this respect, "the stakes are lower with state constitutions than with the Federal Constitution."⁴³⁵ Supporting this thesis is the observation that "since the incorporation of the Establishment Clause, state courts adjudicating church-state disputes have tended to rely upon the First Amendment rather [than] their own constitutions."⁴³⁶ But as a result of the hypothetical disincorporation of the Establishment Clause or—to a much more limited extent—as a result of the Supreme Court's circumscribing the applicability of the federal Establishment Clause in the context of school aid, state constitutions may become less "subconstitutional," meaning that their relevance in relation to the Federal Constitution would increase.

As mentioned at the outset, the constitutional framework in the United States prior to incorporation of the Establishment Clause was similar to the framework currently developing in Europe, in that a superconstitutional nonestablishment provision coexisted with established churches in the states.⁴³⁷ A hypothetical constitutional framework, after disincorporation of the Establishment Clause in the United States, might be conceived as featuring a similar structural setup. Imagine the Supreme Court adopts Justice Thomas's view on incorporation of the Establishment Clause. As recently as 2010, he reiterated his position that incorporating the Establishment Clause through the Fourteenth Amendment was erroneous because it is a

⁴³⁴ Ginsburg & Posner, *supra* note 10, at 1602.

⁴³⁵ *Id.* at 1605.

⁴³⁶ Note, *supra* note 44, at 1716; see also Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 *FORDHAM L. REV.* 493, 496 (2003).

⁴³⁷ See, e.g., McConnell, *Establishment*, *supra* note 29, at 2109.

federalism provision rather than a right capable of incorporation.⁴³⁸ Inspired in part by Justice Thomas's position, scholars have speculated what a constitutional regime after disincorporation of the Establishment Clause might look like.⁴³⁹ The result of disincorporation would be a federal Establishment Clause on the national level prohibiting at the very least the creation of a national church, but leaving the states considerable flexibility to create religious policy.⁴⁴⁰ A more radical iteration of disincorporation might even permit state establishments from the perspective of the Federal Constitution.⁴⁴¹ Evaluations of the effects on religious freedom in this highly speculative scenario differ.⁴⁴² The interesting comparative point, however, is that pressure toward nonestablishment likely remains even after disincorporation.

The sources of this pressure are first the state constitutions determining the scope of nonestablishment in each state. When considering the hypothetical situation resulting after application of the federal Establishment Clause is stripped away from the states, one must bear in mind "that virtually every state has its own constitutional provision that replicates at least some Establishment Clause functions."⁴⁴³ Moreover, horizontal peer pressure remains. Finally, political and cul-

438 *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3084 n.20 (2010) (Thomas, J., concurring in part and concurring in the judgment) (identifying the Establishment Clause as one of several "Bill of Rights provisions prevent[ing] federal interference in state affairs [that] are not readily construed as protecting rights that belong to individuals"); see also *Cutter v. Wilkinson*, 544 U.S. 709, 726–31 (2005) (Thomas, J., concurring) (outlining view of Establishment Clause history); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment) ("The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, . . . it makes little sense to incorporate the Establishment Clause."); *Zelman v. Simmons-Harris*, 536 U.S. 639, 678–80 (2002) (Thomas, J., concurring) (discussing incorporation of Establishment Clause); *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) ("I have previously suggested that the Clause's text and history 'resis[t] incorporation' against the States.").

439 See, e.g., Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 23–24 (2006); Ira C. Lupu, *Federalism and Faith Redux*, 33 HARV. J.L. & PUB. POL'Y 935, 937–42 (2010); Doshi, *supra* note 58, at 482–502; Kathryn Elizabeth Komp, Note, *Unincorporated, Unprotected: Religion in an Established State*, 58 VAND. L. REV. 301 (2005); Note, *supra* note 44, at 1714–19.

440 See Lupu, *supra* note 439, at 938.

441 Lupu & Tuttle, *supra* note 439, at 99–100 ("It deserves significant emphasis that no sitting Justice would accept this robust account of disincorporation."); Doshi, *supra* note 58, at 481; Note, *supra* note 44, at 1714.

442 See, e.g., Doshi, *supra* note 58, at 482–89 (arguing that other federal constitutional provisions—in particular the Free Exercise, Equal Protection, and Free Speech Clauses—will assume functions currently performed by the incorporated Establishment Clause).

443 Lupu, *supra* note 439, at 937; Note, *supra* note 44, at 1715.

tural forces remain after disincorporation.⁴⁴⁴ Thus, even after the removal of federal Establishment Clause restraints on the states, a residual effect of the Establishment Clause is likely to persist. Some of these effects are perhaps more the result of the political and cultural, rather than the constitutional, dimension of the nonestablishment principle.⁴⁴⁵ Nonestablishment, in other words, has become politically and culturally entrenched and has “produced constitutional norms that would be very difficult to erase from our culture even if the Establishment Clause were disincorporated tomorrow.”⁴⁴⁶ Despite the highly speculative nature of considering the hypothetical consequences of disincorporation, it appears somewhat certain that considerable pressure favoring nonestablishment, even absent a directly enforceable supernonestablishment provision, would likely remain.

Notwithstanding lively discussion in the literature, disincorporation of the Establishment Clause is exceedingly unlikely to occur in practice. But, as a result of the Supreme Court’s decision in *Zelman v. Simmons-Harris*, we have seen the partial removal of federal nonestablishment constraints on the states in the area of private choice funding of religious schools.⁴⁴⁷ If publicly provided tuition funds are directed to sectarian schools through true private choice, Establishment Clause limits do not apply.⁴⁴⁸ Post-*Zelman* school-choice policy developments will demonstrate the effect of stripping away the Establishment Clause constraint—the top layer—in one discrete policy area. If a superconstitutional nonestablishment provision displaces corresponding subconstitutional provisions, the subconstitutional provisions should spring back to life once pressure to conform to the superconstitutional nonestablishment norm is removed. That is what is happening in the area of school aid. But are the states’ religious policy choices in this area now unconstrained? Does the prior exist-

⁴⁴⁴ See, e.g., Lupu & Tuttle, *supra* note 439, at 100 (“The consequences [of disincorporation] are jarring and reveal the extent to which at least central principles of nonestablishment reach deep into our political culture.”).

⁴⁴⁵ See, e.g., Lupu, *supra* note 439, at 938 (“[T]he cultural and political clock cannot be turned backwards, even if the legal clock can be.”); cf. Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583 (2011) (discussing the distinction between the constitutional doctrine and the constitutional culture of nonestablishment).

⁴⁴⁶ Lupu, *supra* note 439, at 938; see also Lupu & Tuttle, *supra* note 439, at 65 (observing that no state “ha[s] made any explicit move to reestablish a strong, denomination-specific religious identity, and a move of that sort would likely be met with widespread political condemnation”).

⁴⁴⁷ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002).

⁴⁴⁸ *Id.*

tence of a supernonestablishment principle have any residual effect in the states? Is removal of the supernonestablishment provision a one-way incentive to be more permissive in allowing funding for religious schools, or can the states be more restrictive in their religious policies than previously demanded by the federal provision? And finally, what are the political implications once the legal framework is changed? Although legal scholars in the United States have addressed these questions in detail in the recent past, considering these questions more generally for present purposes helps to expose the forces still present when straightforward top-down pressure is entirely or partially eliminated.

Under Ginsburg and Posner's theoretical framework, the presence of a higher-level (e.g., federal) constitutional provision causes weakening of the corresponding lower-level (e.g., state) constitutional provision.⁴⁴⁹ Conversely, contraction of the higher-level provision enables expansion of the lower-level provisions.⁴⁵⁰ But examining this partial removal of the direct vertical nonestablishment provision also provides some insight into how the presence of a nonestablishment provision in some contexts affects its development in others. In the United States, the bifurcation of religious policy evidenced by the continued impermissibility of religious messages—especially in the public schools—and increased permissibility of funding religious social welfare organizations and religious schools is an important development of early-twenty-first-century Establishment Clause jurisprudence.⁴⁵¹ After *Zelman*, the prohibition on indirect funding of sectarian schools stemming from prior interpretation of the federal nonestablishment provision has been removed in that particular policy area.

As indicated in the disincorporation context, the immediate effect of removing the top nonestablishment layer in the multilevel religious policy framework is that religious policy is determined by the next level—in this case, the corresponding state constitutional provisions. Here, it is important to remember that many states constitutionally prohibit funding of religious education; indeed, these state provisions significantly predate federal involvement with religious funding of public schools in the mid-twentieth century.⁴⁵² State constitutional

449 Ginsburg & Posner, *supra* note 10, at 1586.

450 *Cf.* Duncan, *supra* note 436, at 495 (asserting that state constitutional provisions “are awakening now that the Supreme Court has relaxed federal constitutional barriers to public funding of religious activities”).

451 *See generally* Lupu, *supra* note 343.

452 Duncan, *supra* note 436, at 507; Jeffries & Ryan, *supra* note 61, at 305.

provisions—such as State Blaine Amendments which “have slumbered in state constitutions for over a century”⁴⁵³—may reflect a particular state’s own version of nonestablishment. For instance, after the U.S. Supreme Court decided in *Witters v. Washington Department of Services for the Blind*⁴⁵⁴ that the federal Establishment Clause does not prohibit using certain state funds for religious training,⁴⁵⁵ the Washington Supreme Court, on remand, decided that the state constitution did prohibit such use.⁴⁵⁶

Similarly, the permissibility, from the federal perspective, of funding religious schools by way of private choice in voucher programs after *Zelman* does not necessarily translate directly to the state level. In Florida, for example, a state appeals court found parts of the state’s school funding scheme to be unconstitutional under the state’s constitutional provision, stating that “[n]o revenue of the state . . . shall ever be taken from the public treasury directly or indirectly in aid . . . of any sectarian institution.”⁴⁵⁷ But in 2012, Florida voters will be asked to consider repealing this provision.⁴⁵⁸ The proposed new language would prohibit “deny[ing] to any individual or entity the benefits of any program, funding, or other support on the basis of religious identity or belief” unless required by the First Amendment to the U.S. Constitution.⁴⁵⁹ What if a state wants to be more restrictive, rather than more permissive, with respect to funding? The measure of acceptable restriction is provided by the Free Exercise Clause, and the case most closely considering that question was the Supreme Court’s 2004 decision in *Locke v. Davey*.⁴⁶⁰ The Court held that the state of Washington may, consistent with the Free Exercise Clause, exclude the study of devotional theology from a state-funded scholarship program.⁴⁶¹

⁴⁵³ Duncan, *supra* note 436, at 495.

⁴⁵⁴ *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986).

⁴⁵⁵ *Id.* at 489.

⁴⁵⁶ *Witters v. Wash. Comm’n for the Blind*, 771 P.2d 1119, 1121 (Wash. 1989).

⁴⁵⁷ *Bush v. Holmes*, 886 So. 2d 340, 343–44 (Fla. Dist. Ct. App. 2004) (en banc) (alteration in original) (quoting FLA. CONST. art. I, § 3) (holding that the Florida Opportunity Scholarship Program violates the “no aid” provision of art. I § 3 of the Florida Constitution), *aff’d on other grounds*, 919 So. 2d 392, 412–13 (Fla. 2006) (finding the program unconstitutional on other grounds and therefore not addressing the “no aid” provision).

⁴⁵⁸ Patricia Mazzei, *Lawmakers Allow Repeal of Religious Aid Ban to Go to 2012 Ballot*, MIAMI HERALD (May 6, 2011), <http://www.miamiherald.com/2011/05/06/2205172/lawmakers-allow-repeal-of-religious.html>.

⁴⁵⁹ H.R.J. Res. 1471, 113th Reg. Sess. (Fla. 2011).

⁴⁶⁰ *Locke v. Davey*, 540 U.S. 712, 718–19 (2004).

⁴⁶¹ *Id.* at 715. Chief Justice Rehnquist, writing for the Court, found that the state constitutional provision lacked the anti-Catholic animus associated with the history of the Blaine amend-

As alluded to earlier, nonestablishment in the United States is politically and culturally entrenched. In the school voucher context, for instance, we see political forces—not necessarily constitutional forces—opposing widespread implementation of school voucher programs (most prominently perhaps teacher unions).⁴⁶² The bifurcation of religious policy evidenced by the different treatment of religious messages in schools and school aid likewise is reflected in political activities.⁴⁶³ This shows that political forces will continue to define a baseline of nonestablishment. Although *Zelman* specifically concerned the area of school choice, the case has implications for other forms of funding. Indeed, developments in the area of school choice directed the entire policy area of funding away from the separationist model and toward a more permissive stance, from the vantage point of the federal Establishment Clause.⁴⁶⁴ But what was said with respect to state-based policy choices on school aid is also true for social welfare funding.⁴⁶⁵ The applicability of private choice beyond the education context reinforces the idea that indirect, private choice funding after *Zelman* is relatively more acceptable. The comparative point to make for present purposes is that notions of nonestablishment in one policy area may influence other policy areas, as discussed in the European context, just like notions of nonestablishment may linger after they have been removed from one particular policy area, as seen in the U.S. context.

B. *Toward a Nonestablishment Baseline?*

According to Professor Charles Taylor: “It is generally agreed that modern democracies have to be ‘secular.’”⁴⁶⁶ Whatever “secularism” might mean in its details, it requires in the first instance “some kind of separation of church and state,” meaning that “[t]he state can’t be officially linked to some religious confession, except in a ves-

ment that could arguably render such provisions constitutionally suspect. *Id.* at 723 n.7; see Lupu & Tuttle, *supra* note 288, at 967–71 (discussing the animus argument).

⁴⁶² See Jeffries & Ryan, *supra* note 61, at 358–65 (discussing the political alignment on school aid); Lupu & Tuttle, *supra* note 288, at 955–56; see also James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 *YALE L.J.* 2043, 2078–85 (2002).

⁴⁶³ Jeffries & Ryan, *supra* note 61, at 364–65.

⁴⁶⁴ See Lupu & Tuttle, *supra* note 288, at 919 (stating that with the *Zelman* decision, “the Supreme Court has opened the door for a wide range of relationships, once thought impermissible, between government and religious institutions”).

⁴⁶⁵ *Id.* at 982 (“[S]tate constitutions are likely to present many of the same impediments to inclusion of faith-based providers of social services as they do to the inclusion of religious schools.”).

⁴⁶⁶ Charles Taylor, *The Meaning of Secularism*, 12 *HEDGEHOG REV.* 23, 23 (2010).

tigial and largely symbolic sense, as in England or Scandinavia.”⁴⁶⁷ Accordingly, nonestablishment is a narrower concept than secularism, but it is a foundational part of it. Nonestablishment describes the posture of the state toward religion, requiring a distinction and certain distance between them.

As the discussion thus far has shown, there are structural parallels between the United States and contemporary Europe with respect to multilevel religious policy. Substantively, the common thread of religious pluralism has effectuated the rise of nonestablishment. What has been said about the United States is thus true for contemporary Europe as well: “As the area under governance grows larger, religious pluralism increases, and the structure of the polity becomes more complex, religion policies too are likely to develop multiple layers, inner tensions, and rich subtleties.”⁴⁶⁸ So might there be a developing shared nonestablishment baseline? And further, why look at the United States and Western Europe in seeking to identify a possible nonestablishment baseline? The historical ramifications of the Protestant Reformation have the strongest lasting influence here. Indeed, the separation of spheres into a worldly legal regime and a religious one is a distinctive feature of these countries.⁴⁶⁹ The fundamental split between law and religion is unique to Western Europe, and, by extension, the Americas, as a result of the Reformation. So if there indeed is an identifiable shared nonestablishment baseline, this is where we would most likely find it.

The focal point of the rise of nonestablishment in Europe is the ECtHR’s concept of a “democratic society” under the ECHR.⁴⁷⁰ The court has yet to provide a normative defense for its conception of religion-state relations “necessary in a democratic society.”⁴⁷¹ Its emphasis on pluralism thus far seems to be primarily an empirical observation. As a matter of fact, there are more diverse religious groups and nonreligious citizens.⁴⁷² In the *Lautsi* case, the dissent and first concurrence discuss the reality of a multicultural society.⁴⁷³ Plu-

⁴⁶⁷ *Id.*

⁴⁶⁸ Lupu & Tuttle, *supra* note 439, at 19.

⁴⁶⁹ See, e.g., Harold J. Berman, *Comparative Law and Religion*, in OXFORD HANDBOOK OF COMPARATIVE LAW 739, 746 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

⁴⁷⁰ ECHR, *supra* note 3, art. 9.

⁴⁷¹ *Id.*

⁴⁷² See Taylor, *supra* note 466, at 24–25.

⁴⁷³ *Lautsi v. Italy*, App. No. 30814/06, at *35 (Eur. Ct. H.R. Grand Chamber Mar. 18, 2011) (Rozakis, J., concurring), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Case Title” for “Lautsi”; then follow “Case of Lautsi and Others v. Italy” hyperlink) (“Most of us now live in multicultural, multi-ethnic societies within our national States, a feature which has

ralism in Europe will increase. Sooner or later, however, the ECtHR will have to take a closer look at pluralism in democratic societies and the normative value of a nonestablishment principle.

As a normative matter, nonestablishment certainly benefits western-style liberal democracies founded on democratic participation and citizenship. Popular sovereignty depends on the freedom of citizens and associations to form the basis of a pluralistic civil society. Every group must be able to compete for political influence and participate in determining a society's identity and goals and the means to achieve them.⁴⁷⁴ On the national level, the German Federal Constitutional Court, for instance, expressed in its headscarf decision the notion that the state must be "home of all its citizens."⁴⁷⁵ A nonestablishment baseline then emerges as a result of the nature of western liberal democratic societies themselves, premised on participation in self-governance.⁴⁷⁶ There are, however, differences in how this baseline is implemented in practice.⁴⁷⁷ Professor Taylor, for instance, argues that nations ought not to hold on to traditional models of religion-state relations, but rather should focus on the societal goals to be achieved.⁴⁷⁸

Moreover, a common concern arises from the multilevel structure of religious policy itself, making it necessary to balance superconstitutional involvement with subconstitutional interests—national in the case of contemporary Europe or state and local in the case of the United States. As the discussion of the margin of appreciation doctrine has shown,⁴⁷⁹ the exact balance is difficult to negotiate. Short of complete disincorporation of the Establishment Clause, scholars in the United States consider giving more leeway to the states to realize their own religious policy choices, though the avenues to reach that

become a common characteristic of those societies"); *id.* at *48 (Malinverni, J., dissenting) ("We now live in a multicultural society").

⁴⁷⁴ Taylor, *supra* note 466, at 23.

⁴⁷⁵ BVerfG [Federal Constitutional Court] Sept. 24, 2003, 108 BVerfGE 282 (2003) (Ger.), translated in 4 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT—FEDERAL CONSTITUTIONAL COURT—FEDERAL REPUBLIC OF GERMANY: THE LAW OF FREEDOM OF FAITH AND THE LAW OF THE CHURCHES 1960–2003, at 375, 386 (Fed. Constitutional Court ed., D. Elliot et al. trans. 2007).

⁴⁷⁶ See Taylor, *supra* note 466, at 29–33 (discussing the role of religious pluralism in modern democratic societies).

⁴⁷⁷ See *id.* at 28.

⁴⁷⁸ *Id.* at 28, 33. The goals Professor Taylor outlines "have in common that they are concerned with protecting people in their belonging and/or practice of whatever outlook they choose or find themselves in; treating people equally whatever their option; and giving them all a hearing." *Id.* at 25.

⁴⁷⁹ See *supra* Part III.A.

goal differ.⁴⁸⁰ In this context, an important factor to consider is where the relevant practices are. In the United States, there is federal involvement in the culturally relatively more coherent states; in Europe, there is much less supranational or international involvement in the religious policies of the relatively less culturally coherent nations.⁴⁸¹ But to the extent that nonestablishment supports religious pluralism—a shared goal in the United States and Europe—a framework of nonestablishment on the “superconstitutional” level with room for political negotiation on the “subconstitutional” level permits independent local religious policy choices, as long as they are within certain boundaries. Within those boundaries, the question of nonestablishment in its specifics then becomes a political, not a constitutional, question. This is the lesson from considering the United States. Even if constitutional nonestablishment on the federal level no longer restricts certain policy choices (e.g., school voucher programs), this does not mean that there will automatically be less nonestablishment. The same is true in Europe. Even if the permissible scope of cooperation or identification of the state and religion is limited, this does not mean that the range of available policy choices results in exactly the same, but rather that constitutionally permissible models will be limited in range. Politically, there will not necessarily be convergence within the permissible framework.⁴⁸² The ECtHR, similarly, will not likely declare the French model, for example, to be the only permissible model of religion-state relations. Rather, if recent developments are any indication, the court will likely focus on the values to be achieved—though, as mentioned, it has to articulate a more detailed normative position on pluralism in a democratic society. This indeed provides an opportunity to renegotiate, in transnational dialogue, the existing national models from the perspective of the goals to be achieved, and to consider “the (correct) response of the democratic state to diversity,” as Professor Taylor suggests.⁴⁸³

⁴⁸⁰ See Kyle Duncan, *Subsidiarity and Religious Establishments in the United States Constitution*, 52 VILL. L. REV. 67, 131–33 (2007); Lupu & Tuttle, *supra* note 439, at 63 n.233; Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1817 (2004).

⁴⁸¹ See *supra* Part III.A (discussing the margin of appreciation doctrine).

⁴⁸² Cf. Taylor, *supra* note 466, at 24 (“The problem . . . is that there is no . . . set of timeless principles that can be determined, at least in the detail they must be for a given political system, by pure reason alone, and situations differ very much and require different kinds of concrete realization of agreed general principles, so that some degree of working out is necessary in each situation.”).

⁴⁸³ *Id.* at 25.

CONCLUSION

“Transnational law represents a kind of hybrid between domestic and international law that can be downloaded, uploaded, or transplanted from one national system to another.”⁴⁸⁴ In contemporary Europe, we are in the middle of that process with respect to nonestablishment as an ordering principle of religion-state relations. The final outcome, of course, is unknown; the boundaries of state identification with religion will be subject to continuous negotiation. As is true for all transnational developments, there are many moving parts. The recent development of the ECtHR’s religious freedom “jurisprudence has been breathtaking, especially when viewed from the United States”;⁴⁸⁵ this is particularly true when considering that the first notable religious freedom case was only decided in 1993.⁴⁸⁶ Since then, as this Article demonstrates, a nonestablishment principle has begun to emerge in the ECtHR’s religious freedom jurisprudence.

At the very least, the development of a nonestablishment principle on one level and the existence of religious establishments on another is not, as a structural matter, a new phenomenon from a European or U.S. perspective. As this Article demonstrates, prior developments in the United States can provide some limited insight—depending on the specific area under consideration—into assessing likely future developments in Europe. In the context of public education, there are significant parallels between past developments in the United States and current developments in Europe, particularly with respect to religious instruction. In this area, a move from the opt-out model to a structural limitation on the religious identification of the state seems to be emerging. With respect to displaying passive religious symbols in public school classrooms, the Grand Chamber decision in *Lautsi v. Italy* has temporarily halted the development toward exclusion of such symbols, though the trend will likely continue long term. Finally, the area of funding of religious schools and social welfare services does not readily lend itself to comparison-based prediction of likely future developments in Europe.

A possibly developing nonestablishment baseline might result from the combination of free exercise protection and its existence in a pluralistic, democratic society. The immediate structural result would be a multilevel system of religious policy that permits variation at the

⁴⁸⁴ Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT’L L. REV. 745, 753 (2006).

⁴⁸⁵ Scharffs, *supra* note 66, at 249.

⁴⁸⁶ See *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) 4 (1993).

sublevel, but only within the confines of the superior level, which provides a general nonestablishment posture. The extent of the possibly forming substantive content of transnational nonestablishment is difficult to predict at this point; the substantive implications are just emerging in the ECHR context. Moreover, the Convention may be special in terms of its effect on national constitutional law as compared to other international human rights regimes, as well as in terms of the degree of entrenchment of religious freedom in the Contracting States. Assuming the goal of the Lisbon Treaty is achieved and the EU accedes to the ECHR regime, the intensity of influence might increase.

Whether the ECtHR will further develop the emerging nonestablishment principle in the direction of a freestanding requirement in democratic societies or as a proxy for individual liberty remains to be seen. As this discussion has shown, recent caselaw suggests that the former might be happening, though it is certainly too early to tell with sufficient confidence. But although it is unclear whether—and if so, at what pace—the court will move forward with a structural limitation, a tradition of structural limitations exists in several national systems, not only the paradigmatic secular regimes of France and Turkey but also, increasingly, in traditional cooperation systems such as Germany's.⁴⁸⁷ For the time being, what can be said with some confidence is that the ECtHR has apparently derived a structural limit on religious identification of the state itself from its interpretation of “democratic society.”

⁴⁸⁷ See BVerwG [Federal Administrative Court] Apr. 21, 1999, 109 BVerwGE 40 (1999) (Ger.); see also BVerfG [Federal Constitutional Court] Sept. 24, 2003, 108 BVerfGE 282 (2003) (Ger.), translated in 4 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT—FEDERAL CONSTITUTIONAL COURT—FEDERAL REPUBLIC OF GERMANY: THE LAW OF FREEDOM OF FAITH AND THE LAW OF THE CHURCHES 1960–2003, at 375 (Fed. Constitutional Court ed., D. Elliot et al. trans. 2007).