RELIGION, CONSCIENCE, AND BELIEF IN THE EUROPEAN COURT OF HUMAN RIGHTS

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Religions are not treated equally by the law; religion is not absent from the substance of the law.†

Europe is suffused with Christianity, or at least memories of its past influence.‡

INTRODUCTION

Historically, Europeans have not been especially kind to each other, especially when there are religious differences between them. Religion has been the cause of controversy and war in Europe for centuries.¹ The last hundred years alone have seen attempts at exterminating substantial parts of populations identified by their religious difference: Armenian Christians, Ashkenazi Jews, and Bosnian Muslims have all faced systemic state-sponsored violence. Indeed, some European states exist as the result of “violent conflicts that once had their origins in religious enmity.”² But the history of religion in Europe is not entirely gloomy. One result of religious bloodshed has been the growth of individual freedom

† Anthony Bradney, Faced by Faith, in FAITH in LAW: ESSAYS in LEGAL THEORY 89, 89 (Peter Oliver et al. eds., 2000).
‡ Andrew Higgins, A More Secular Europe, Divided by the Cross, N.Y. TIMES, June 18, 2013, at A1.
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and development of human rights. “[T]he charter myth of modern law . . . describes a progressive growth of freedom . . . following the European wars of religion that took place in the sixteenth and seventeenth centuries.”

Today, Europe’s relationship with religion remains complicated. In many states, religion plays an essential role in the formation of national identity. At the same time, however, “Europe has long been religiously and culturally diverse,” and this diversity prompts continuing debate over the proper role of religion in European integration. Especially since the 2001 terrorist attacks in the United States and Madrid, and the London attacks in 2004 and 2005, the topic of religion in Europe has only grown more divisive.

The Maastricht Treaty calls for European nations to “contribute to the flowering of the cultures of the member states . . . and at the same time bring [ ] the common cultural heritage to the fore.”

To what extent is that common cultural heritage the product of similar religious traditions? Some would consider Europe’s

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4. Cumper & Lewis, supra note 2, at 1 (internal quotation marks omitted).
5. See id. at 5; see also Brian Porter-Szūs, Faith and Fatherland: Catholicism, Modernity, and Poland 208 (2011) (“It goes without saying that Polish nationalism is inextricably linked with the Roman Catholic Church . . . .”).
7. Cumper & Lewis, supra note 2, at 5 (“[T]here exists a kaleidoscope of diversity on the status of religion in European societies . . . .”); Lucian N. Leustean & John T.S. Madeley, Introduction, in Religion, Politics and Law in the European Union 1, 1 (Lucian N. Leustean & John T.S. Madeley eds., 2010) (“[A] number of the most controversial issues associated with the ongoing project of European integration have indeed involved deep disagreement about the role of religion in politics and public life.”).
10. See Leustean & Madeley, supra note 7, at 1–2.
Christian roots to be a necessary element of European identity, shaping even secular or post-Christian society. The question, then, is how to resolve the tension between Europe’s Christian roots, its current diversity, and the ambition of liberal states to avoid discrimination in religious matters. More than half a century ago, the ratification of the European Convention on Human Rights (ECHR or Convention), Article 9 of which protects freedom of thought, conscience and religion, was a notable but incomplete step toward resolution. To move forward, we must now ask whether Europe “can attend to human rights claims arising from this cultural and religious diversity in more inclusive and egalitarian ways.”

This Article suggests that a more critical view toward the notion of “religion” under Article 9 of the ECHR by the European Court of Human Rights (ECtHR or Court) would take an important step toward achieving more inclusive human rights jurisprudence. “Religion” as a legal term of art is generally understood by judges to refer primarily to propositional belief, i.e., “belief in” something, and this understanding privileges Christianity (specifically Protestant Christianity, and to a lesser extent other confessional religions


Additionally, this dissonance can be seen in “[t]he quarrel over the exclusion of Christianity’s contribution to Europe’s heritage in the proposed European constitutional treaty [which] sparked much debate and commentary. A reference to Christianity was absent from the initial draft of the preamble, which claimed that modern European civilization’s values of freedom, equality of persons, reason, and the rule of law were derived from Europe’s classical heritage and the Enlightenment. European governments and the late Pope John Paul II raised voices of dissent and argued that this represented an attempt by ‘European intellectuals and European political leaders to airbrush fifteen hundred years of Christian history from Europe’s political memory’ and was tantamount to ‘an exercise in self-afflicted amnesia.’” See Paul E. Kerry, The Quarrel over the Religious Roots of European Identity in the European Constitution and the Nature of Historical Explanation: A Catholic Coign of Vantage, in THE RELIGIOUS ROOTS OF CONTEMPORARY EUROPEAN IDENTITY 168, 168 (Lucía Faltin & Melanie J. Wright eds., 2007).


13. Peroni, supra note 6, at 231. If nothing else, familiarity with the foundations of religious identity in Europe is required for informed discourse in confronting ideological extremism. See Faltin, supra note 9, at 2.
such as Islam) at the expense of others, such as Judaism and Hinduism,\textsuperscript{14} that place greater emphasis on community, practice, ethics, or ritual.\textsuperscript{15}

This Article suggests that the notion of “religion” as the term is used in Article 9, and as applied by the Court (and previously by the European Commission of Human Rights), is biased in favor of Christianity. As Timothy Macklem observes, “We are concerned here, not to know how the term religion \textit{is} used, whether in the world at large or in the legal community, but to know how the term religion \textit{should} be used, in the interpretation, the application, and the justification of a fundamental freedom.”\textsuperscript{16}

Part I of this Article begins by reviewing the position of religion in Europe and the special role of religion in the origin of the Westphalian system, the emergence of liberalism and, ultimately, modern human rights. Part II addresses the specific right at issue—of religion or belief under the ECHR. Part II also discusses the origin of the Convention, reviews the structure of the Court and Commission the Convention created, and takes account of the analytical approach applied in addressing claims arising under Article 9.

Part III suggests that Christian bias may be observed both in the terms of the Convention itself and in its application by the Court. Part III.A provides the text of the Convention and its \textit{traveaux préparatoires}. This Article suggests that, in addition to the overt religious statements of some of the participants in the drafting process, the final language used in the text of the Convention introduces inequality between religions based on the relative importance of belief by tacitly equating religion with “belief” and also with a similarly vague and belief-based notion of “conscience.”

Part III.B discusses how the Court has only exacerbated the problems in the convention. Part III.B.1 addresses the \textit{forum internum} and \textit{forum externum}, a historical theological dialectic the Commission repurposed as a legal doctrine. This Article suggests that the broad notion of “religion” evidenced by some of the Com-

\textsuperscript{14} I recognize the terms are anachronistic, but for present purposes they are sufficient to convey the meaning I intend.


\textsuperscript{16} Timothy Macklem, \textit{Reason and Religion}, in \textit{FAITH IN LAW: ESSAYS IN LEGAL THEORY} 69, 70 (Peter Oliver et al. eds., 2000).
mission’s decisions is seriously undermined by the Court’s focus on the *forum internum*. Part III.B.2 suggests that other general doctrines the Court follows, including the margin of appreciation, consensus, and subsidiarity, combine to make both a pan-European understanding of religion and judicial remedies for wronged individuals difficult to obtain. Part III.B.3 discusses difficulties in defining religion under Article 9.

Part IV steps outside of the European perspective to reflect on how the current ECHR system reflects a Western and primarily Christian understanding of religion and suggests that this understanding is in tension with the liberal human-rights objective of protecting freedom of religion. Both the modern Westphalian state and modern international law—including principles of religious freedom—were founded on the understanding that religion was primarily a private, internal matter of belief. The protection of freedom of religion by the state is therefore subject to, if not contingent on, the degree to which the religion in question resembles Protestant Christianity. Part V offers a brief conclusion.

I. Europe, the Westphalian State, and the Origin of Human Rights

A. Religion in Europe

A common Christian heritage is a unifying force in creating a supranational European identity. From an American perspective, “[i]n a continent divided by many languages, vast differences of culture and economic gaps . . . centuries of Christianity provide a rare element shared by all of the . . . members of the fractious union.”17 Indeed, Western Christianity as a *sine qua non* of European identity is long standing:

the first time medieval chroniclers described an event as ‘European’ was the victory of Christian Frankish forces over a Muslim army at Poitiers in 732 . . . with the crusades of the eleventh century, Western Christianity became synonymous with a European identity which defined itself against the Islamic and Byzantine Orthodox Christian civilizations to its south and east . . . .18

Even after the Reformation, when the continent was divided among Protestant, Catholic, and Orthodox communities, “this plu-

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18. Ronan McCrea, *Religion and the Public Order of the European Union* 18 (2010) (footnote omitted). This continues today, as “some prominent Christian Democrats . . . have objected that Turkey’s strong Islamic heritage prevents it from sharing core Christian values which they insist underlie the whole EU construction . . . .” Leustean & Madeley, *supra* note 7, at 9.
rality was contained within a shared horizon, defined by reference to the same sacred books . . . .”19 In more recent years, this common horizon has faded due to non-European immigration and the growth of individualism, both of which have reduced the ability of Christianity to act as a common point of reference for Europeans.20

On the side of individualism, or liberalism more generally, one can see that beginning at least with the 1973 Copenhagen Declaration on European Identity, “the ‘deepest aspirations’ of Europe’s people were presented in political, legal and philosophical terms without prejudice to cultural specificities,” which is to say, without express reference to a shared Christian heritage.21 Some have claimed that this “failure to acknowledge the historic debt can be traced directly to a ‘Christophobic’ mind-set which is all of a piece with the progressive marginalisation of religious influences in Europe’s public life.”22

But even as recognition for Christianity’s role in European identity and culture has been withdrawn, neither religion generally nor Christianity in particular have disappeared. Some states retain official links to particular denominations, and many continue to rely on churches to fill important roles in education and healthcare.23 Moreover, the incorporation of states that were formerly members of the Warsaw Pact has paired a post-Communist religious revival in the East with the increasingly secular states of Western Europe.24

19. Ferrari, supra note 6, at 149. “Of course, Jewish and Muslim communities have been living in Europe for a long time. The Jews, however, were faced quite early on with the alternative between assimilation or persecution (and they chose the first, without avoiding the second), and the Muslims were confined to a peripheral region of Europe after the Catholic ‘reconquista’ of Spain in the fifteenth century. As a consequence, religious plurality in Europe has been predominantly intra-Christian . . . .” Id.

20. Id. In addition, “[t]here is a widespread intolerance of Islam, a re-emergence of anti-semitism, and heavily majoritarian cultures, often hostile to minority faiths, all over.” Janis, supra note 1, at 76.


22. Id. at 2.

23. McCrea, supra note 18, at 17. At least a dozen European states have formally established a religion. Janis, supra note 1, at 80.

24. See Detlaf Pollack et al., Church and Religion in the Enlarged Europe: Analyses of the Social Significance of Religion in East and West, in THE SOCIAL SIGNIFICANCE OF RELIGION IN THE ENLARGED EUROPE: SECULARIZATION, INDIVIDUALIZATION AND PLURALIZATION 1, 1 (Detlaf Pollack et al. eds., 2012) (“The increase in the significance of religious factors for the explanation and interpretation of social, political, and international conflicts and changes also applies to Europe, which has changed greatly as a result of the collapse of state socialism and the re-entry of Eastern and Central European countries into European history. In particular, the increased status in Eastern Europe of national churches, religious movements, and ethnic conflicts within the religious sphere is obvious.”). See generally Lavinia
In short, while Europe is in need of cohesion and cooperation, religion has developed into “yet another source of discord.”

B. The State

Modern Western notions of religious liberty begin with the separation of political and religious authority. Some have claimed that the separation of church and state can be traced back to “Jesus’s admonition to ‘[r]ender . . . unto Caesar the things which be Caesar’s, and unto God the things which be God’s.’” More immediately, though, the role of religion as separate from and generally subordinate to the state stems from the Investiture Controversies of the eleventh and twelfth centuries, concerning the authority of lay rulers to appoint bishops and the Peace of Westphalia at the conclusion of the Thirty Years’ War in 1648. What emerged from these disputes were largely exclusive jurisdictional spheres for temporal and spiritual rulers, which separated Western Europe from the “Caesaro-Papism of the Eastern Orthodox Church” and from Islam, neither of which made the same differentiation.

Once separated from the authority of temporal rulers, dissident religious views could be tolerated without threatening the political order. The Treaty of Münster (one of the constituent treaties of the Peace of Westphalia) guaranteed individuals “the free Exercise of their Religion, as well in publick Churches, at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours,

Stan & Diane Vancea, Secularism in Eastern Europe, in Making Sense of the Secular: Critical Perspectives from Europe to Asia 85, 85 (Ranjan Ghosh ed., 2013) (discussing the reasons for the resurgence of religion in post-Communist states).


27. See Smith, supra note 26, at 1873 (“[S]ystematic theorizing about the relation between church and state began in earnest with the so-called Investiture Controversy of the eleventh and twelfth centuries.”).

28. McCREA, supra note 18, at 18.

29. See Janis, supra note 1, at 76 (explaining that the Peace of Westphalia “tolled the bell both on the Catholic Church’s pretension to be the common faith of Western Europe . . . .”).
preaching the Word of God.” Adherents of non-established religions were permitted to assemble, worship, and educate their children in their own faith.

Tolerance of minority religions was a major turning point because previously, “minority faiths and religious dissenters [were thought to] pose[ ] a threat to the very existence of the state.” The shift of religion from public to private life, as in Grotius’s phrase etsi Deus non daretur, was meant to remove the political threat posed by dissenting religious views and put an end to the wars of religion that engulfed Europe in the 16th and 17th centuries.

But toleration is a far cry from full political equality. Under this conception of religious toleration, “[t]he state is far from neutral about religious doctrine and practice in general, but the strategy of toleration in which certain doctrines previously vilified as heretical are treated instead as not threatening to public order provided they remain in their proper place.” But the “proper place” was in private, in the spiritual life, in the minds of individual believers. It was not public, did not claim temporal power, and certainly did not endanger the religious justifications underpinning the legitimacy of temporal rulers. The development of the modern state therefore required religion to be redefined as belief—a private, individual matter beyond its purview. Although the banishment

33. See Ferrari, supra note 6, at 151.
34. Janis, supra note 1, at 78; see also Ungureanu, supra note 11, at 308 (“[W]ithin this constitutional framework, the state is not ‘purely’ neutral, but has a positive obligation to protect pluralism and enhance a culture of mutual tolerance, respect and dialogue amongst citizens.”).
36. See id.
37. See Talal Asad, Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam 205 (1993); see also Suzanne Last Stone, Conflicting Visions of Political Space, in Mapping the Legal Boundaries of Belonging: Religion and Multiculturalism from Israel to Canada 41, 41 (René Provost ed., 2014) (“Keeping religion and politics apart is an idea with a history, and that history is primarily a Christian one, rooted in the experience of European Christendom and made possible because Christians, virtually from the beginning, viewed church and state as conceptually separate entities, with different jurisdictions and powers, and even a different logic.”); Richard Moon, Christianity, Multiculturalism, and National Identity: A Canadian Comment on Lautsi and Others v. Italy, in The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public
of religion to the life of the mind made room for the modern state to claim a monopoly on temporal power, it did not entirely resolve one particular, critical issue: that religion may have undeniable public sphere ramifications.\(^{38}\)

C. Liberalism

Given that official pronouncements of religious toleration came into being in conjunction with the emergence of the modern liberal state from the authority of the church, religious liberty is both the oldest and most problematic human right.\(^{39}\) The loss of political authority for the church led to the spiritualization of religion.\(^{40}\) At the same time, official state toleration of dissenting beliefs required a theory of “religious liberty grounded in a complex (and unstable) notion of freedom of conscience.”\(^{41}\) Freedom of conscience itself grew out of Protestant theology that emphasized personal freedom in matters of thought and disdain for ceremony and ritual.\(^{42}\) Consequently, privatization of religion became (and remains) a feature of the liberal state.\(^{43}\) Accordingly:

the neutrality of the public sphere (whether national or supranational) and the scope of the right to religious freedom should be understood as culturally and historically contingent and neutral toward neither religion in general nor distinct religious traditions in particular.\(^{44}\)

Rather, there is a built-in bias toward Christianity, and in particular Protestant Christianity.

Religious liberty is not generally understood to be religiously biased, but rather, the state is assumed to be secular.\(^{45}\) However, 

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\(^{38}\) See Moon, \textit{supra} note 37, at 243.

\(^{39}\) See Janis, \textit{supra} note 1, at 75.

\(^{40}\) See Danchin, \textit{supra} note 8, at 670.

\(^{41}\) \textit{Id.}

\(^{42}\) \textit{Id.}


\(^{44}\) Danchin, \textit{supra} note 8, at 670; \textit{see id.}, at 708 (“[S]ecularism has historically entailed the regulation and reformation of religious beliefs, doctrines, and practices to yield a particular normative conception of religion (that is largely Protestant Christian in its contours).”); \textit{see also} Lourdes Peroni, \textit{Deconstructing “Legal” Religion in Strasbourg}, 3 \textit{Oxford J.L. \\& Religion} 235, 246 (2014).

by focusing on individual beliefs, religious liberty in the modern liberal European state assumes a particular type of religion.

D. The Rise of International Law and Human Rights

Human rights, another foundational element of contemporary European identity, has a clear religious heritage and sometimes even speaks in what could be heard as religious language. As Zachary Calo observes, “[t]he idea of human rights, particularly the underlying idea of human dignity, is replete with echoes of the sacred.”46 Like some religious doctrines, human rights are often understood as universal and inalienable, and apply without regard to particular political systems or cultures.47 Yet, much like the idea of religion itself,48 the idea of religious liberty as a human right has its own genealogy and particular context in which it originated.49 Since the Enlightenment, human rights have been established and initially recognized predominately in Western Europe and North America.50

The origin of this right is material to the content and theory of the rights themselves. Oliver Roy and Pasquale Annicchino suggest that the Christian origin of the idea of human rights is obvious:

[W]e can characterize this Christian anthropology through the following criteria: a human being is defined by an autonomous individual soul that is not under the control of the state or society, both entitled only to control the body; a ‘for interieur’ (inner core, heart of hearts) that can deliberate for itself, the sacred nature of the body as a template of the divine creation; the equal dignity (in God, not in society) of all human beings; and free will.51

Archbishop Rowan Williams adds that any inherent legal rights belonging to all people would “require[ ] both a certain valuation

51. Id. at 15; see also Calo, supra note 46, at 496 (“There were many intellectual sources that shaped the idea of human rights, but none were more foundational than Christianity.”); Danchin, supra note 43, at 262 (“International human rights law imagines an internal or personal sphere of ‘belief’ that is in some sense pre- or extra-social, political, and legal and hence absolutely ‘inviolable’ or ‘sovereign.’”).
of the human as such and a conviction that the human subject is always endowed with some degree of freedom over against any and every actual system of human social life. Both of these things are historically rooted in Christian theology . . . .”

But from the eighteenth century onward, European legal systems began to see themselves as “potentially universal,” pursuing the law of reason of the Enlightenment, unmoored from their Christian origins. The Christian foundations of the legal systems remained, of course, albeit silently. Even into the twentieth century, Christianity played the dominant role in forming and shaping international law. As a result, “mainstream accounts of human rights in international law are insensitive, and in some cases even blind, to the communal dimensions of goods such as religion.” One place in which the silent influence of Christianity is manifested is in Article 9 of the European Convention on Human Rights.

II. THE TREATY FRAMEWORK

A. The Council of Europe

The Council of Europe, founded in 1949, promotes cooperation among European countries in the areas of legal standards, human rights, democratic development, the rule of law, and advancement of culture. The Preamble to the Statute of the Council of Europe affirmed “the need for greater unity between like-minded European countries for the sake of economic and social progress . . . .” The Council of Europe exists entirely outside the European Union treaty framework (though all E.U. member states are also members of the CoE) and the E.U. has recognized the CoE’s role in enforcing human rights throughout Europe.

53. Faltin, supra note 9, at 8 n.18 (citing Joseph Ratzinger, Church, Ecumenism and Politics 224 (Robert Nowell trans., 1988)).
55. Id. at 460.
The CoE’s most lasting achievement has been the European Convention on Human Rights.\textsuperscript{60} Initially signed in 1950, the Convention was meant to add to the United Nations’ progress and objective of reinforcing and upholding the rights delineated in the “Universal Declaration of Human Rights.”\textsuperscript{61}

B. The Origin of Article 9

As the ECHR aimed to implement the rights identified in the Universal Declaration,\textsuperscript{62} it is appropriate to begin examination of Article 9 of the ECHR by reviewing its predecessor in the Universal Declaration, Article 18, the primary article dealing with freedom of religion.\textsuperscript{63} Article 18 reads as follows:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.\textsuperscript{64}

Article 18 is limited by Article 29(2), which provides the following:

[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations are as determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.\textsuperscript{65}

Article 18 of the Universal Declaration reflects a basic approach that religion or belief is essentially a matter of individual choice, to which everyone is entitled. This approach to freedom of religion has been followed in most other international and many regional human rights instruments, including the ECHR.\textsuperscript{66}


\textsuperscript{62} See Taylor, supra note 61, at 7 (citing the Preamble to the ECHR).

\textsuperscript{63} Evans, supra note 61, at 35.


\textsuperscript{65} Id. art. 29(2).

Indeed, the text of Article 9 of the ECHR follows Article 18 of the Universal Declaration almost verbatim.\textsuperscript{67} And like Article 18, “Article 9 recognizes the freedom of thought, conscience and religion, and enumerates the limitations that may be imposed on the manifestations of this freedom.”\textsuperscript{68}

Article 9 provides:

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

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.\textsuperscript{69}

Several observations may be made from the text of Article 9 alone. First, Article 9 contains “several overlapping terms” with “subtle distinctions.” The freedom to change one’s religion or belief is expressed differently than the substantive right of freedom of “thought, conscience and religion.” Article 9 provides a right to manifest one’s religion, but not to manifest one’s thought or conscience.\textsuperscript{70} Second, there is some recognition that religion is often a group enterprise, and Article 9 protects the right to manifest religion alone or with others.\textsuperscript{71} Third, to withstand judicial scrutiny, a state’s burden on religious freedom must be: (1) prescribed by law, (2) necessary in a democratic society, and (3) proportionate to the legitimate objective of the limitation.\textsuperscript{72}


\textsuperscript{68}. Martínez-Torrón, supra note 60, at 588. Although “[t]hree provisions of the ECHR deal with religion,” id. at 587, I will address only Article 9.

\textsuperscript{69}. Id. at 588 (quoting ECHR, supra note 12, art. 9). “[T]he limitations applicable to the freedom of thought, conscience and religion, as described in Article 9, are largely coincident with the limitations applicable to the freedoms protected by other Articles of the Convention, namely Articles 8, 10 and 11.” Id. at 589.

\textsuperscript{70}. See Rex Ahdar & Ian Leigh, RELIGIOUS FREEDOM IN THE LIBERAL STATE 140 (2d ed., 2013).

\textsuperscript{71}. Mark Freedland & Lucy Vickers, Religious Expression in the Workplace in the United Kingdom, 30 COMP. LAB. L. & POL’Y J. 597, 602 (2009).

\textsuperscript{72}. Martínez-Torrón, supra note 60, at 589–90. “With regard to freedom of religion or belief, the list of permissible aims is even narrower than with regard to other freedoms.” Id. at 590.
these overlapping concepts are given concrete meaning in individual cases is a task assigned to the Court.

C. The European Court and Commission of Human Rights

The interpretation and application of the Convention is reserved to the European Court of Human Rights in Strasbourg, France, which has jurisdiction over every Member State,73 and has been in operation since February 1959.74 The Convention, as applied by the Court has been described “as the most effective human rights regime in the world.”75

One reason for this level of prestige and success is that member states are permitted only partial and indirect control over the selection of judges.76 States present a list of candidates to the Parliamentary Assembly of the Council of Europe, which elects a judge from among the nominees.77 Once elected, judges benefit from other guarantees of independence from both their own govern-

73. Id. at 587.
75. Wojciech Sadurski, Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments, 9 HUM. RTS. L. REV. 397, 403 (2009) (quoting Alec Stone Sweet & Helen Keller, The Reception of the ECHR in National League Orders, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY 11, 11 (2008), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1088&context=fss_papers (internal quotation marks omitted)). “Generally speaking, the Court enjoys a high degree of prestige and support from national judicial institutions, the political branches of the CoE, as well as legal academia.” Id. “The European Court of Human Rights in Strasbourg . . is probably the court that enjoys most authority and prestige around the globe in the realm of human rights.

It is a well-deserved prestige. By and large, the Court has done a great job in the defence of human rights in Europe, both in general and in the particular case of freedom of religion and belief.” Javier Martínez-Torrón, The (Un)protection of Individual Religious Identity in the Strasbourg Case Law, 1 OXFORD J.L. & RELIGION 363, 365 (2012). In the sixty-five years since it was signed, the ECHR “has evolved into ‘the most effective transnational human rights institution on earth.’” Effie Fokas, Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence, 4 OXFORD J.L. & RELIGION 54, 55 (2015) (quoting W. Cole Durham & David Kirkham, Introduction, in ISLAM, EUROPE, AND EMERGING LEGAL ISSUES 1, 2 (W. Cole Durham et al. eds., 2012)).

76. See Sadurski, supra note 75, at 403.
ment and others. As a result, the Court has elements of a “genuinely independent supranational tribunal.”

Because of the Court’s independence and prestige, “[i]t has become fashionable to press the claim that the Court has become (or is becoming) a sort of ‘constitutional court’ for Europe.” In addition to binding the parties and all Contracting States, its decisions are increasingly developing “an authority of *erga omnes* nature, at least as far as the interpretive value of its judgments is concerned.” ECHR judgments are followed by judges in national courts, and judges and committee members of other human rights bodies. Wojciech Sadurski goes as far as suggesting that the Court has established itself as the “final and authoritative interpreter of the Convention.” With respect to freedom of religion, this reputation has developed over a comparatively short time.

Until 1998, a subordinate body, the European Commission for Human Rights served a screening function for the Court and disposed of many of the cases that came before it. But in Article 9 cases, the Commission resembled an impenetrable wall more than a screen. Indeed, until 1989, the Commission concluded “in almost all cases brought under Article 9 . . . that the facts at stake did not disclose any appearance of violation[,] applications, therefore, were deemed inadmissible and never reached the Court.”

Protocol 11 to the Convention, adopted in 1998, abolished the Commission and since then all cases have gone directly to the Court.

78. See Sadurski, *supra* note 75, at 403.
79. Id.
80. Id. at 398.
81. See George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705, 707–08 (2006) (“[A] Contracting State that breaches the ECHR has a duty under international law to abide by the final judgment of the Court and to award just compensation to the victim.”).
84. Id. “It has set standards of protection that have had an impact far beyond European borders.” Martínez-Torrón, *supra* note 75, at 363.
88. See Scharffs, *supra* note 74, at 253; Fokas, *supra* note 75, at 60 n.30 (“Until 1989, almost all cases brought under art. 9 were deemed inadmissible.”). One reason for the delay may be that the aim of the ECHR signatories was “solely to prevent the descent into dictatorship threatened by fascist revival or pro-Soviet coup.” Nicol, *supra* note 57, at 152.
In applying Article 9, the Court’s role is to define common standards on matters of freedom of religion across Europe. Any individual may bring a claim that a Member State has violated their human rights. However, the Court does not hear claims against individuals or corporate parties, nor does it review national law or the rulings of domestic courts applying national law. However, applicants must exhaust their claims through national courts, and must file a claim with the ECHR within six months of the national court’s disposition of their case.

Several commentators have claimed that Article 9 is “insufficiently and erratically protected in the courts.” Even a summary history of the adjudication of claims under Article 9 reflects the Court’s significant trepidation in deciding issues of religious free-

As Yannis Ktiskakis has argued, “the founders of the Strasbourg system were more concerned with constituting a political weapon of juxtaposition to the atheistic proposal of Communists than in moderating ’the peaceful coexistence of Christian states.’” Janis, supra note 1, at 92 (quoting Yannis Ktiskakis, The Protection of Forum Internum Under Article 9 of the ECHR, in The European Convention on Human Rights, A Living Instrument: Essays in Honour of Christos L. Rozakis 285, 286 (Dean Spielmann et al. eds., 2011)).


90. See Scharffs, supra note 74, at 250–51 (“Applications against Contracting Parties for human rights violations can be brought before the Court by other states, other parties, or individuals.”). “[I]ndividual access to the Court was rendered mandatory for all Contracting Parties only in 1998.” Sadurski, supra note 75, at 407. “The main concern of citizens who chose to ’go to Strasbourg’ to bring up issues for which they could not find a proper remedy in their home countries were no longer at the fringes of the rights enshrined in the Convention but right at its very core.” Id. at 408.

91. See Scharffs, supra note 74, at 252. “A traditional perception of the status and reach of the ECHR’s judgments was that the carried a purely individualised, specific implication. The Court was perceived as a kind of tribunal of last resort, whose role was limited to specific cases of rights violations after the exhaustion of all domestic remedies. According to this view, it did not fall on the Court to assess the validity of domestic laws themselves. Its policing role was strictly restricted to the consideration of acts and decisions rather than to the laws allegedly underlying the latter. However, this traditional perception was never completely accurate. Indeed drawing a sharp distinction between bad decisions and bad laws . . . is not very credible.” Sadurski, supra note 75, at 412.

In any event, to the extent that the Court ever was merely a “fine tuner” of national legal systems,” the accession of formerly Communist Eastern European states to the Council of Europe “radically transformed this situation.” Id. at 401. The Court “was compelled instead to adopt a role of policing the national systems in which serious violations of rights occurred or suffering from important systemic deficiencies as far as the [Council of Europe] standards of rights are concerned.” Id.

92. See Scharffs, supra note 74, at 252.

93. Alice Donald, Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for Optimism?, 2 Oxford J.L. & Religion 50, 51 (2013). “For the two decades after Kokkinakis, the Strasbourg Court has had very little success in charting a steady course for the interpretation and application of Article 9. It is a commonplace to remark that the court’s case law on religious freedom is inconsistent.” Janis, supra note 1, at 76.
dom. For decades, claims arising under Article 9 were invariably decided under other provisions of the Convention. The two most relevant cases prior to 1993, *Kjeldsen*, which concerned sex education, and *Campbell and Cosans*, which concerned corporal punishment in schools, were both decided under Article 2. Incredibly, for the first thirty-four years of its existence—from 1959 to 1993—the Court did not find a single violation of Article 9 by a Member State. For many years, Article 9 appeared to be defunct.

The last two decades have seen a small and generally cautious, but nonetheless active, growth in the Court’s Article 9 jurisprudence. Beginning with its decision in the *Kokkinakis* case addressing the right to proselytize, “the Court began an itinerary of decisions adopted in the light of Article 9 or in the light of other articles, but with a clear reference to religion.” Although its first judgments showed considerable caution, the Court has more recently appeared more confident in its handling of religious freedom claims. Carolyn Evans suggests that “in a relatively short period, the Court has been pushed to develop a jurisprudence of religious freedom to deal with increasingly complex and controversial cases.” The Court has dealt with this complexity and controversy, in part, by relying on a standardized analytical process.

This formulaic approach has been criticized for being “unsatisfying” and “somewhat mechanical.” First the Court asks whether the state has interfered with the applicant’s religion, thought, or conscience. If so, the Court asks whether that interference was prescribed by law. If the rule of law has been followed, the Court will inquire whether the state’s action was to pursue and pro-

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94. *See Martínez-Torrón*, supra note 75, at 364.
95. *Fokas*, supra note 75, at 60.
97. Martínez-Torrón, supra note 75, at 364.
98. *See Ringelheim, supra note 87, at 283–84.* Mark Weston Janis has observed that “[a]rticle 9 cases after *Kokkinakis* continue to play a relatively minor role in the jurisprudence of the court.” Janis, supra note 1, at 90. This overstates the matter. Article 9 cases occupy less than one percent of the court’s docket. In 2011, only five out of 1,157 total judgments rendered concerned Article 9. In 2013, only six out of 919. Janis, supra note 1, at 90; *see also* Ferrari, supra note 77, at 19 (“the case law concerning Article 9 is relatively small: about 100 decisions, spread over fifty years, is not a high number, especially when compared with the case law that regards other articles of the Convention.”).
100. *Scharffs, supra note 74, at 258.*
101. *Id.*
102. *Id.*
tect a legitimate aim under Article 9, and whether the limitation is necessary in a democratic society.\textsuperscript{103}

In analyzing the final step, necessity, the Court typically asks first whether the limitation is justified in principle, and second whether the limitation is proportionate to the legitimate aim pursued. It has been estimated that approximately 75 percent of Article 9 cases revolve around issues of proportionality.\textsuperscript{104} These inquiries form the basis of most Article 9 jurisprudence.\textsuperscript{105} Lourdes Peroni suggests, however, that “the Court’s track record is at best mixed” when it comes to applying the framework to actual controversies.\textsuperscript{106} As the Court has begun to hear more challenges under Article 9, and as the issues it has been asked to resolve have diversified, the limitations of the formulaic approach have been exposed.\textsuperscript{107} Carolyn Evans explains that “the conceptual foundations on which Article 9 case law is built are weak; and difficult cases are beginning to expose the cracks in the intellectual architecture of the Court’s religious freedom jurisprudence.”\textsuperscript{108} This is seen in two general trends. First, the Court appears to be more concerned with the role of the state in religious affairs than with the rights of individuals,\textsuperscript{109} and when it does address individual rights, its approach to protecting religion and beliefs have such that the law protects “has taken such a cautious approach to protecting the manifestation of religion or belief that the law has come to protect ‘only a very restrictive and conservative form of [private] religious life’ . . . that is lived behind closed doors rather than in public.”\textsuperscript{110}

It is this understanding of religion as essentially a private matter that is of primary concern, because “the Commission and Court

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\item[103] Id. at 258–59.
\item[104] Id. at 259.
\item[105] Id.
\item[107] See Evans, \textit{supra} note 96, at 321–22. In particular, “the intellectual framework that the Court has built around religious freedom cases is sufficient to deal with the relatively simple cases of refusal to treat like with like, but is insufficient to tackle the more complex cases where rights come into conflict and the religious claim is a right to be treated differently rather than identically.” \textit{Id.} at 339–40. Part of the difficulty may be the lack of a coherent vision of church-state relations across the continent, with different nations employing different models to varying degrees. \textit{See generally} Paul Cliteur, \textit{State and Religion Against the Backdrop of Religious Radicalism}, 10 Int’l. J. Const. L. 127, 127–52 (2012).
\item[108] Evans, \textit{supra} note 96, at 322.
\item[110] Donald, \textit{supra} note 93, at 51 (quoting Russell Sandberg, \textit{Law and Religion} 98 (2011)).
\end{footnotes}
have, at times, been accused of being unsympathetic to the claims of those from non-Christian traditions or religions without a long history in Europe.”

These accusations may flow from “assumptions about religion underlying the Court’s understanding of the scope and content of freedom of religion.” Specifically, there have been instances where “implicit assumptions about religion as a set of ‘theological propositions’ to which people adhere . . . surface in the Court’s freedom of religion reasoning.” In other words, “the Court has some problems in understanding the conceptions of religion which stress the elements of identity and practice over those of freely chosen belief.”

In some respects, this is not surprising. The text of the Convention itself favors such an interpretation, and this is exacerbated by several of the Court’s judge-made doctrines. But such an outcome is not inevitable. The Court’s case law “both rejects the strictures of the ECHR text in favour of a teleological emphasis on effectiveness, and also treats the ECHR as a living instrument, the interpretation of which it can update in response to changing social conditions.” The question is effectiveness in what respect, and for whom? The Court can revisit its jurisprudence, but will it?

III. THE INHERENT BIAS OF ARTICLE 9

A. DIFFICULTIES INTERNAL TO THE CONVENTION

1. The Process of Adoption

The Court has held that Articles 31–34 of the Vienna Convention on the Law of Treaties, as customary international law, govern interpretation of the Convention. Under those provisions, it is permissible to review the travaux préparatoires in determining the meaning of the Convention text. In addition, because Article 9 was based largely in part upon Article 18 of the Universal Declaration of Human Rights (and because Article 9 was agreed to essentially without debate), it is instructive to evaluate the history of the Uni-

111. McCrea, supra note 18, at 126–27 (quoting Evans, supra note 61, at 125)).
112. Peroni, supra note 106, at 665.
114. Ferrari, supra note 77, at 33.
115. See infra Part III.A.2.
116. See id.
117. Nicol, supra note 57, at 152.
universal Declaration “for any light that it can shed on the appropriate interpretation of the Convention.” Unfortunately, as a general matter, the *travaux préparatoires* are “neither complete nor particularly revealing.” However, they do reflect that many delegates expressly linked Christianity and human rights, and understood the protection of human rights as a Christian duty.

With respect to the Convention itself, not all of the bodies that had input into the drafting kept minutes and, of those that did, not all of the minutes have been published. But the available evidence reveals that the drafters rejected a proposal that would have expressly protected “freedom of religious practice” in favor of a more limited protection “of thought, conscience and religion.” This was “presumably aimed at recognizing the importance of religious belief (as compared to practice) . . . .”

2. The Convention Text

Apart from the intent of the drafters in rejecting express protection for religious practice, or any religious motivations the framers of the Declaration may have had, the text of Article 9 presents difficulties on its own terms. Article 31(1) of the Vienna Convention on the Law of Treaties provides that treaties should be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context.” This is not much of a guide, but it does seem clear that “thought and conscience” must be distinct in

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119. Evans, *supra* note 61, at 34; see also Janis, *supra* note 1, at 78 (“The wording of Article 9 in the 1950 ECHR was immediately drawn from Article 18 of the United Nations’ 1949 Universal Declaration of Human Rights.”); Evans, *supra* note 61, at 36–37 (“The United Nations continued to develop the right to freedom of religion and belief in a number of other international instruments, most notably Article 18 of the International Covenant on Civil and Political Rights and the more detailed Declaration on Religious Intolerance and Discrimination.”).

120. Evans, *supra* note 61, at 38.

121. See id. at 39.

122. Id. at 38.


124. Evans, *supra* note 61, at 40. But see Carolyn Evans, *supra* note 113, at 195–96. (quoting Evans, *supra* note 61, at 40), http://digitool.library.mcgill.ca/R/?func=DBinjump-full&object_id=110715&local_base=GEN01-MCG02 (“Perhaps the most that can be said in regards to the drafting of Article 9(1) is that delegates considered the issue of freedom of religion to be of great importance and that they accepted that the Universal Declaration provided an appropriate model for it protection.”).

some way from “religion or belief,” given the obligation to protect freedom of thought and conscience, but not their manifestation.\cite{126}

The extent of “belief” is also unclear. On its face, it need not be a belief based in a religion or any other group, and “the Court has explicitly recognized that the protection of the Convention extends to ‘free-thinkers’ and ‘the unconcerned.’”\cite{127} Alternatively, “belief” may be a subset of “thought” or “conscience” or both, the manifestation of which is protected,\cite{128} although it remains to be decided how protected “belief” could be distinguished from a more general, unprotected “thought.”\cite{129}

Rather than the differences between these terms, however, the more subtle problem lies in the similarities between many of them. The principal difficulty stems from the phrase “religion or belief.” Although this phrase in particular appears to have gained currency in international law,\cite{130} and despite its initial appearance of extending the protection offered to include views such as atheism and agnosticism,\cite{131} the phrase “religion or belief” implicitly limits “religion” to mean something akin to “belief.” The maxim *noscitur a sociis*—which holds that a legal term of art may be understood in reference to the surrounding terms, so that it is understood to be of the same kind as its companions—is à propos.\cite{132} Put differently,

\begin{itemize}
\item[126.] Evans, *supra* note 61, at 52.
\item[127.] Id. at 58.
\item[128.] See id. at 53 (“Another, more minor, difficulty in the wording of Article 9 is the introduction of the world ‘belief’ in the second part of Article 9(1). It seems to cover conveniently groups such as atheists and agnostics . . . . Yet, if this is correct, the exclusion of belief from the first part of Article 9 seems to suggest the strange outcome that an atheist has the right to manifest his or her belief . . . but his or her right to hold this belief is not protected. Probably the best way around this apparent anomaly would be to assume that beliefs are a subset of the broader category of thought and conscience.”).
\item[129.] Id. at 64 (“[T]he term belief has increased the conceptual confusion in this area and the approach that the Commission has taken to the cases has only magnified this confusion.”).
\item[130.] See Organization for Security and Co-operation in Europe, *Guidelines for Review of Legislation Pertaining to Religion or Belief* 8 (Sept. 28, 2004), http://www.osce.org/odihr/13993?download=true (“International standards do not speak of religion in an isolated sense, but of ‘religion or belief.’ The ‘belief’ aspect typically pertains to deeply held conscientious beliefs that are fundamental about the human condition and the world. Thus, atheism and agnosticism, for example, are generally held to be entitled to the same protection as religious beliefs.”).
\item[131.] See Evans, *supra* note 113, at 385 (“If the term ‘or belief’ is added, perhaps we think of atheism or agnosticism. Yet the question about what links these diverse beliefs and ways of life together, so that we recognise them as ‘religions’, is far less clear.”); Evans, *supra* note 61, at 64 (“The addition of the term ‘or belief’ to religion in Article 9 of the Convention may clarify some issues (particularly whether atheists are entitled to the protection of religious freedom).”).
\item[132.] See Yates v. United States, 135 S. Ct. 1074, 1085 (2014).
\end{itemize}
“[w]ords . . . are liable to be affected by other words with which they are associated.”\(^\text{133}\) Essentially, the drafters set up “religion” and “belief” as two of a kind.

This also is not entirely surprising, as the drafters presumed that “the content of religious freedom was not controversial, at least in Europe.”\(^\text{134}\) And religion in Europe was obviously centered around Christianity, which was (and is) premised on belief. Even today, the U.N. Special Rapporteur on Religious Freedom apparently understands religion in this limited sense,\(^\text{135}\) and international instruments continue to focus on “belief,” employing it as an umbrella term for both (theistic) religion and other beliefs unconcerned with the existence (or nonexistence) of supernatural entities.\(^\text{136}\)

Beyond this, the primacy of belief over practice in Strasbourg “is represented overtly in language that orders the belief/practice dualism hierarchically.”\(^\text{137}\) The limitations in Article 9(2) apply only to the manifestation; the right to believe is absolute.\(^\text{138}\) And the Court has explained that Article 9 exists primarily to protect religion and belief and that protection of manifestation of religion and belief is secondary.\(^\text{139}\) But it is “hard to imagine how exactly a state may interfere with people’s religious beliefs if not by forcing some form of action upon them.”\(^\text{140}\)

3. The Challenge of “Conscience”

The word “conscience,” which the Convention groups with both “religion” and “belief,” presents additional difficulties. Religion as conscience has dominated most of modern discourse on the subject.\(^\text{141}\) But “[w]hen we reverently invoke ‘conscience,’ ‘freedom of conscience’ or the ‘sanctity of conscience’ . . . do we have any idea what we are talking about? Or are we just exploiting a venerable

\(^{133}\) Black’s Law Dictionary 1160–61 (9th ed. 2009).

\(^{134}\) Evans, supra note 113, at 388.

\(^{135}\) See Heiner Bielefeldt, Freedom of Religion or Belief—A Human Right Under Pressure, 1 Oxford J.L. & Religion 15, 17 (2012) (“[R]espect is due for the underlying ability of human beings to have and develop deep convictions in the first place.”) (emphasis in original).

\(^{136}\) See, e.g., Leustean & Madeley, supra note 7, at 5 (discussing “Non-Confessional Organizations” in Declaration 11 to the Treaty of Amsterdam as parallel to churches).

\(^{137}\) Peroni, supra note 44, at 237.

\(^{138}\) See Martínez-Torrón, supra note 60, at 590.

\(^{139}\) See Peroni, supra note 44, at 241–42; McCrea, supra note 18, at 122–23.

\(^{140}\) Peroni, supra note 44, at 252.

\(^{141}\) See Nomi Maya Stolzenberg, Theses on Secularism, 47 San Diego L. Rev. 1041, 1041 (2010).
theme for rhetorical purposes without any clear sense of what ‘conscience’ is or why it matters.”  

Historically, conscience has meant different things at different times to different people. In Aquinas’ day, conscience meant moral judgments; in the American founding era, it primarily referred to individual religious liberty. Even today, there are multiple differing conceptions of “conscience,” as well as disagreement on the extent to which conscience encompasses secular beliefs.

Given this lack of uniform understanding about the relationship between religion and conscience, legal scholars have not reached a consensus on whether conscience should be accorded the legal exemptions granted to religion. Steven D. Smith argues that “the commitment to special legal treatment for religion derives from a two-realm world view in which religion—meaning the church, and later the conscience—was understood to inhabit a separate jurisdiction that was in some respects outside the governance of the state.” He suggests that special legal treatment for conscience “‘began as an argument that government must ensure a free response by the individual called distinctively by the Divine within . . . .’”

Today, freedom of conscience has expanded well beyond its original function in facilitating religious introspection, and has become “more widespread and commonplace—perhaps even platitudeous—in our public rhetoric.” Indeed, Smith suggests that “if we look closely at the modern invocations of conscience we will find uncertainty, confusion, and perhaps even a kind of degradation.” Conscience now “‘has come to mean very little beyond the notion of personal existential decision-making . . . .’”

145. See Stolzenberg, supra note 141, at 1043.
147. Smith, supra note 26, at 1883.
149. Id. at 358.
150. Id.
151. Id. at 326 (quoting Failinger, supra note 148, at 94).
But any conception of religion as conscience has at base an assumption that religion is basically about belief.\footnote{152} And this assumption emerged from Christian theology.\footnote{153} Locke, for example, held that freedom of conscience was a necessary corollary to the Christian conception of salvation because salvation could only be attained by freely held beliefs. “This liberty of conscience favored members of protestant groups that stressed individual responsibility and authority on spiritual matters.”\footnote{154} So there is good reason to think that religion as conscience, by privileging belief over practice, runs the risk of inadvertently defining out religions that do not depend on the primacy of belief.\footnote{155}

That is not to say that protecting conscience is necessarily a bad idea:

As a practical matter, liberty of conscience may advance democratic deliberation. It eliminates some disputes over moral differences that might otherwise monopolize the public life of a pluralistic society . . . . Protecting liberty of conscience also limits the government’s pretensions to absolute moral authority. Liberty of conscience enables nonconformist moral thought that undermines moral tyranny.\footnote{156} Additionally, conscience-based exemptions from generally applicable laws may facilitate public dialogue on contested issues, which may result in better or more widely accepted public policy on novel or moral questions.\footnote{157}

But one difficulty is in the evaluation of claims to legal exemptions. “Even if claimants are sincere, other persons are hard put to assess what they mean if they say, ‘This is a fundamental conviction of mine.’”\footnote{158} “Any such claim must rely on assumptions about political theory, about morality, and perhaps even about theology, but these are rarely stated. ‘Conscience’ has been something of a black box.”\footnote{159} Additionally, “conscience can generate exorbitant demands: ‘Both good and evil can emanate from conscience: the feeding of the poor, perhaps, but also the purification of the caucasian race.’”\footnote{160}

\begin{itemize}
\item \footnote{152} Stolzenberg, supra note 141, at 1043.
\item \footnote{153} See Chapman, supra note 146, at 1480.
\item \footnote{154} Id. at 1465.
\item \footnote{155} See Stolzenberg, supra note 141, at 1065.
\item \footnote{156} Chapman, supra note 146, at 1499.
\item \footnote{157} See id. at 1500.
\item \footnote{158} Greenawalt, supra note 144, at 906.
\item \footnote{159} Koppelman, supra note 143, at 216.
\item \footnote{160} Id. at 221 (quoting Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1269 (1994)).
\end{itemize}
Another difficulty is that understanding religion as conscience would not protect all religiously motivated conduct. One prominent justification for protecting conscience is that where it conflicts with the law, a person cannot obey the law without surrendering his own identity. But Koppelman suggests that this places too much emphasis on duty given that “most people engage in religious practice out of habit, adherence to custom, a need to cope with misfortune, injustice, temptation and guilt, curiosity about a religious truth, a desire to feel connected to God, or happy religious enthusiasm rather than a sense of obligation or fear of divine punishment.” In a collective setting, conscience fails to explain some religiously-motivated practical concerns, such as the need to expand a church building, or to dismiss a religious-school teacher that failed to abide by church rules. “So conscience . . . fails to fit the cases in which most people want to accommodate religion.” It is both over-inclusive in that it may reach beliefs that have nothing to do with religion and under-inclusive in failing to offer to protection to many religiously motivated actions.

B. Problems of Application and Doctrine

In addition to the problems inherent in Article 9, the Court has added to difficulties in its application through judicial doctrines. Parlaying sixteenth-century theology into legal jargon, the forum internum/forum externum divide artificially splits religion into constituent components, privileging belief over other modes of religiosity. The margin of appreciation, a doctrine of deference to judgments of individual states, and the related doctrine of consensus, which is seen as a prerequisite to announcing Europe-wide legal rules, together diminish uniformity and render judgments concerning the ECHR in one state that are difficult to enforce in another. Finally, the Court’s general avoidance of Article 9 altogether (and its rote analysis when it has addressed it) has resulted in what could be a substantially richer jurisprudence failing to reach its potential.

161. See id. at 216.
162. Id. at 222.
163. Id. at 222–23.
164. See id. at 223; see also Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694 (2012) (concerning application of church rules to parochial school teacher); City of Boerne v. Flores, 521 U.S. 507 (1997) (concerning application of historic preservation ordinances to churches).
165. Koppleman, supra note 143, at 223.
166. See id. at 223–24.
1. Judicial Focus on the Forum Internum

“It is almost inconceivable to consider freedom of religion or belief without coming across at least one reference to forum internum and forum externum.”167 The forum internum is the freedom to believe, to choose one’s beliefs, and to change one’s beliefs.168 The forum externum is essentially the freedom to act in accordance with those beliefs: to “manifest” them in teaching, worship, observance, or practice,169 often with one’s family or co-religionists.170

The dichotomy between the forum internum and forum externum was first introduced in the Councils of Trent (1545 and 1563),171 and originally a part of Latin canon law.172 In the last century, the two forums were implicitly included in the Universal Declaration of Human Rights and ECHR narrative and have been expressly referenced in other international human rights instruments and in case law from the ECtHR and national courts.173

As the Court has made clear, “[t]he internal dimension of religious freedom is absolute, while the external dimension is by its very nature relative. Indeed, Article 9(2) clearly states that the limitations specified therein may be applied only to the ‘[f]reedom to manifest one’s religion or beliefs.’”174 In short, “[t]he Court has construed freedom of religion in terms of a binary opposition

168. Martínez-Torrón, supra note 60, at 590.
169. Evans, supra note 66, at 8.
171. Petkoff, supra note 167, at 183.  “[I]t is interesting to consider why a concept developed by medieval canon law has been adopted by one of the most powerful International Human Rights enforcement systems . . . .” Id. at 198.
172. See id. at 184–85.
173. Martínez-Torrón, supra note 60, at 590 (quoting ECHR, supra note 12, art. 9(2)). See also Ringleheim, supra note 87, at 285 (emphasizing “the distinction drawn in Article 9 between two aspects of religious freedom: whereas its internal dimension, namely the right to have or change religion or belief, cannot be subject to any limitation whatsoever, its external aspect, that is, ‘the 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’ may be restricted in some circumstances, under the conditions set forth in the second paragraph of Article 9.”). In addition, “the forum internum is a narrower concept than the commonly understood meaning of the term ‘private sphere.’ It encompasses the internal sphere of personal thought, conscience, or belief and not those external spheres, even if nonstate and therefore technically ‘private,’ such as places of worship, the school, or the family, where religious belief may be communicated or acted upon.” Danchin, supra note 43, at 261.
between belief and practice,”175 that protects primarily an individual right to privately adhere to religious beliefs.176

The difficulty is that dividing religiosity between the forum internum and forum externum presents the question in a biased, historically contingent way without justifying that choice. It “is not religiously neutral” but instead depends upon a priori assumptions about “the ordinary forms of religious practice and the proper scope of political action.”177 In its interpretation of Article 9, the Court has emphasized the forum internum at the expense of the forum externum.178 This results in an “oppositional and hierarchical relationship” between them.179 Peter Danchin explains that:

[i]n the conditions of the modern state, religion is thus imagined as having two dimensions: insofar as religion involves actual manifestations of belief and actions in the world, it is subject to regulation and control by the public (political and legal) spheres; insofar as it involves matters of conscience, it is imagined as occupying—in a state of inviolable freedom—the private sphere of personal belief, sentiment, and identity.180

It is not clear from the case law whether this polarity is consciously intended, or merely the result of assumptions about the nature of religion in general. In any event, neither the Commission nor the Court has ever justified this approach, or even acknowledged that it may not be the best—or the only—way to understand religion in a legal context.

As Javier Martínez-Torrón sardonically notes, the Court’s binary and hierarchical understanding of religion could be improved considerably.181 It erects an artificial boundary without a sufficient justification for the choice in privileging belief over practice, or recognizing that the two are mutually dependent and cannot be neatly separated from each other.182

175. Peroni, supra note 44, at 236.
176. See McGrea, supra note 18, at 103; see also Ringleheim, supra note 87, at 293 (“Underlying the Court’s case law is the idea that religion is primarily an inward feeling; a matter of individual conscience.”) (internal quotation marks omitted); Martínez-Torrón, supra note 75, at 365 (“Freedom of thought, conscience and religion, as all fundamental rights, is primarily an individual right but also has a very significant and visible collective dimension.”).
177. Moon, supra note 37, at 256.
178. See Evans, supra note 113, at 396.
179. Peroni, supra note 6, at 233.
181. See Martínez-Torrón, supra note 75, at 370.
In his analysis of law and literature, James Boyd White distinguished between characters—believable, full, and complex—and caricatures, which reduce subjects to exaggerations, labels, and single roles.\textsuperscript{183} The law, he writes, is a literature of caricature.\textsuperscript{184} The dubious proposition that all religions can be neatly packaged into the \textit{forum internum} and \textit{forum externum} may be a prime example.\textsuperscript{185}

2. The Difficulties with Doctrine: Margin of Appreciation, Subsidiarity and Consensus

Although not tied directly to Article 9 in the same way as the \textit{forum externum} and \textit{forum internum}, the Court’s general doctrines of margin of appreciation, subsidiarity, and consensus also play a significant role in how the Court is able to shape its Article 9 jurisprudence.

The margin of appreciation plays a role in the Court’s jurisprudence that is at the same time complex\textsuperscript{186} and a common-sense response to the Court’s supranational nature.\textsuperscript{187} Because of its position as a reviewing court removed from democratic deliberations and without authority to review national laws, the Court will often prefer to defer to states on controversial or complex questions.\textsuperscript{188} This approach provides:

the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention.\textsuperscript{189}

\begin{footnotesize}
\begin{enumerate}
\item Id. (citing White, supra note 183, at 114).
\item See Caylee Hong & René Provost, \textit{Let Us Compare Mythologies}, in \textit{Mapping the Legal Boundaries of Belonging: Religion and Multiculturalism from Israel to Canada} 1, 2 (René Provost ed., 2014) (“Lawyers, for whom the erection of such intellectual scaffoldings presents a largely irresistible urge, may be more at risk than most of falling prey to this illusion of coherence in the process of creating and interpreting legal norms meant to regulate diversity in our societies.”).
\item Evans, supra note 96, at 332.
\item Evans, supra note 96, at 332.
\item R. St. J. MacDonald, \textit{The Margin of Appreciation}, in \textit{The European System for the Protection of Human Rights} 83, 123 (R. St. J. MacDonald et al. eds., 1993); \textit{see also} Lettas, supra note 81, at 720–21 (“Many commentators view the margin of appreciation as a feature of a supranational judicial system, designed to balance the sovereignty of the Contracting States with the need to secure protection of the rights embodied in the Convention . . . . It is the idea that the Court’s power to review decisions taken by domestic
The margins doctrine was initially deployed in order to permit each state to respond to security issues in its own way, where each state’s sovereign powers are at their apex.\textsuperscript{190} Over time, the theory expanded from national security to include regulation of a wide variety of potentially harmful activities including, for example, racist speech.\textsuperscript{191} Today, however, the doctrine has expanded well beyond security issues to include issues as varied as protection of natural resources and restrictions on speech to protect public morals.\textsuperscript{192} The justification for the doctrine has shifted to reflect its reach as well. Rather than grating states a measure of deference in dealing with exigent circumstances or regulating harmful conduct, the doctrine is now premised on the allocation of power in the supranational system and the desire of individual states to maintain their individuality.\textsuperscript{193}

One aspect of the doctrine is that the Court should defer to national authorities because it is the creation of an international agreement among national authorities.\textsuperscript{194} Under this aspect, “the role of national decision-making bodies has to be given special consideration and domestic authorities should enjoy a large margin of appreciation.”\textsuperscript{195} At the same time, all member states must observe European-wide standards.\textsuperscript{196} The margins doctrine aims to resolve some of the tension between the need to respect the democratic process within states and the need for all states to meet the same minimum standards.\textsuperscript{197}

\textsuperscript{190.} See Benvenisti, supra note 83, at 845; see also Gregory H. Fox & Georg Nolte, Intolerant Democracies, 36 Harv. Int’l L.J. 1, 48 (1995) (noting the doctrine “is particularly generous with regard to actions which domestic authorities regard as critical to the prevention of disorder or crime.”).

\textsuperscript{191.} See Benvenisti, supra note 83, at 845–46.

\textsuperscript{192.} Id. at 846.

\textsuperscript{193.} See id.

\textsuperscript{194.} Letsas, supra note 81, at 706.

\textsuperscript{195.} Tulkens, supra note 89, at 2577–78.

\textsuperscript{196.} See Fokas, supra note 75, at 58.

\textsuperscript{197.} See id. Until quite recently, both the subsidiarity principle and the margin of appreciation were established only in the Court’s case law. “But as of 2013 both formally entered the ECHR with the introduction of Protocol 15 that inserts a reference to the principle of subsidiarity and the doctrine of the margin of appreciation into the Convention’s preamble pending ratification by contracting states.” Id. at 60. However, subsidiarity was adopted as Community policy not long after “Pope John XXIII issued his 1961 encyclical Mater et Magistra.” Leustean & Madeley, supra note 7, at 3.
This structural use of the margin of appreciation is supported by the doctrines of subsidiarity and consensus.\textsuperscript{198} Subsidiarity refers to the secondary role of the ECHR in protecting human rights, with national authorities having primary responsibility for implementing the Convention’s protections.\textsuperscript{199} The states retain primary responsibility for ensuring that they observe the rights of individuals protected under the Convention.\textsuperscript{200} Although not applicable to all members of the CoE, the Maastricht Treaty provides in Article 1 that decisions should be taken as closely as possible to the citizen, while “Article 2 then asserts the principle by name: ‘The objectives of the Union shall be achieved as provided in this Treaty . . . while respecting the principle of subsidiarity.’”\textsuperscript{201}

In addition, to placing primary responsibility for ensuring Convention rights in the hands of national authorities, the Court has concluded that it “must defer to the national authorities whenever they are ‘better placed’ than an international judge to decide on human rights issues raised by the applicant’s complaint.”\textsuperscript{202} In other words, “national authorities are not only the first ones to deal with complaints regarding the Convention rights and provide remedies, but also the ones who have . . . more legitimacy . . . to decide on human rights issues.”\textsuperscript{203} The paradox of subsidiarity is that it simultaneously limits state power and justifies it; it limits supranational intervention, yet demands it. The doctrine recognizes the superior ability and legitimacy of national authorities to provide remedies to aggrieved individuals, but acknowledges that the state, too, can cause individuals harm.\textsuperscript{204}

The Court has deferred to national authorities under the margins doctrine in two broad categories of cases. The first is where there is a lack of consensus among Member States on the existence or application of the asserted right.\textsuperscript{205} Consensus is therefore inversely related to the margin of appreciation as follows:

\begin{itemize}
\item \textsuperscript{198} Letsas, \textit{supra} note 81, at 706.
\item \textsuperscript{199} \textit{See id.} at 722.
\item \textsuperscript{200} \textit{See id.} at 721; \textit{see also} Fokas, \textit{supra} note 75, at 58 (“each contracting state is, in the first place, responsible for securing the rights and freedoms protected by the Convention.”).
\item \textsuperscript{202} Letsas, \textit{supra} note 81, at 721.
\item \textsuperscript{203} \textit{Id.} at 722.
\item \textsuperscript{204} \textit{See} Carozza, \textit{supra} note 201, at 44.
\item \textsuperscript{205} Letsas, \textit{supra} note 81, at 722.
\end{itemize}
the less the court is able to identify a European-wide consensus on the treatment of a particular issue, the wider the margins the court is prepared to grant to the national institutions. Minority values, hardly reflected in national politics, are the main losers in this approach.\textsuperscript{206}

Secondly, the Court will defer to national authorities where they are better placed to decide on sensitive issues.\textsuperscript{207} With respect to the extent of the margin of appreciation:

some aims are more susceptible to an objective analysis than others; a bigger objectivity calls for a lesser discretion on the part of national authorities. Second, the nature of the activities subjected to limitation; when they concern strictly an individual’s private life—and not so much the community—the State’s margin of appreciation lessens while the ECTHR’s power of control increases, and, at the same time, “particularly serious reasons” are required to consider that a State interference has been legitimate.\textsuperscript{208}

The margin of appreciation tends to be particularly wide in religious freedom cases.\textsuperscript{209} This should not be surprising. “The large discretion [the Court] often grants to national authorities on [religion] cases is symptomatic of its difficulty in dealing with them.”\textsuperscript{210} Especially given that some do not accept the Court’s counter-majoritarian role in reviewing national policies,\textsuperscript{211} the doctrine allows the European Court to consider “local sensibilities”\textsuperscript{212} and “provides an exit for the Court from certain culturally and politically sensitive issues.”\textsuperscript{213}

Although the doctrine provides some flexibility to states in interpreting religious rights and freedoms in accordance with national

\begin{footnotes}
\item[206.] Benvenisti, supra note 83, at 851 (footnote omitted).
\item[207.] See Letsas, supra note 81, at 723; see also id. at 706 (noting the substantive element of the margin doctrine “is to address the relationship between individual freedoms and collective goals”).
\item[208.] Martínez-Torrón, supra note 60, at 601 (footnotes omitted).
\item[209.] Fokas, supra note 75, at 58; see also Evans, supra note 61, at 143 (“While in theory there is no difference between the margin of appreciation in relation to particular Articles, State respondents in Article 9 cases tend to be given a wider margin of appreciation.”). Specifically, “[t]he ‘margin of appreciation’ has paradigmatically figured in judgments concerning the limitation clauses; the doctrine is being used in particular where the Convention enables a balancing of interests by the Member state, notably under Articles 8–11 . . . which contain in the second paragraph the ‘necessary in a democratic society’ clause.” Zoethout, supra note 187, at 418.
\item[210.] Fokas, supra note 75, at 58 (quoting Ringelheim, supra note 87, at 306) (alterations in original).
\item[211.] See Zoethout, supra note 187, at 421.
\item[212.] Cumper & Lewis, supra note 2, at 15.
\item[213.] Fokas, supra note 75, at 58.
\end{footnotes}
norms, its application is not without difficulty. To begin, some question whether the doctrine undercuts the universality of the rights protected by the Court to an unacceptable degree. Additionally, many claim that the Court relies on the doctrine inconsistently, and that the degree to which the Court will defer to national institutions is unpredictable. Functionally, application of the doctrine “especially when coupled with the consensus rationale, essentially reverts difficult policy questions back to national institutions, in complete disregard of their weaknesses.”

More problematically, “the doctrine is inappropriate when conflicts between majorities and minorities are examined.” In addition to leaving unanswered many of the big questions about the justification for accommodating religious belief as a general matter, the doctrine burdens minorities in particular, including religious minorities, in important ways. Eyal Benvenisti explains that:

> a wide margin of appreciation is appropriate with respect to policies that affect the general population equally, such as restrictions on hate speech (which are aimed at protecting domestic minorities), or statutes of limitations for actions in tort. On the other hand, no margin is called for when the political rights of members of minority groups are curtailed through, for example, restrictions on speech or on association, when their educational opportunities are restricted by the State, or when the allocation of resources creates differential effects on the majority and the minority. Acquiescing to the margin of appreciation in the latter cases assists the majorities in burdening politically powerless minorities.

He continues, noting that the consensus doctrine similarly:

> puts quite a heavy burden on the advocates of the promotion of individual and minority rights who must spread their resources

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214. *Id.*
215. See Benvenisti, *supra* note 83, at 843 (“These universal aspirations are, to a large extent, compromised by the doctrine of margin of appreciation.”); *id.* at 844 (“Margin of appreciation, with its principled recognition of moral relativism, is at odds with the concept of the universality of human rights.”).
216. See Fokas, *supra* note 75, at 55 (noting the “variable ‘margin of appreciation’ it allows individual states on religious issues, particularly when concerning Islam.”); Letsas, *supra* note 81, at 705 (“Most commentators complain about the lack of a uniform or coherent application of the margin of appreciation doctrine in the case law of the European Court of Human Rights.”); Benvenisti, *supra* note 83, at 844 (“Inconsistent applications in seemingly similar cases due to different margins allowed by the court might raise concerns about judicial double standards.”).
218. *Id.* at 847.
among the diverse national institutions in their efforts to promote human rights. . . . Such a policy cannot be said to promote human rights, especially not minority rights.\textsuperscript{221}

As Carla Zoethout notes, protection of minority rights requires the Court to develop “a form of review which makes it possible to act as a countermajoritarian institution and set a European standard, without infringing state sovereignty.”\textsuperscript{222}

3. Defining Religion (or Not)

a. The Problem of Definition

When the Court does address Article 9 head-on, it must face, as an initial matter, a question of definition or classification. How it answers that questions will profoundly impact the extent to which religious liberty is protected.\textsuperscript{223} As a starting point, no regional or international human rights instrument defines religion or belief, and there is no generally agreed-upon definition under international law.\textsuperscript{224} Nor is there any standard definition of “religion” under E.U. law.\textsuperscript{225} Whether and how religion ought to be defined for legal purposes are “increasingly contested and divisive questions.”\textsuperscript{226} Yet because religion is more complex than the subject of other rights, the difficulty in demarcating the scope of protection is greater.\textsuperscript{227} This difficulty is perhaps even more acute in the legal field that in others.\textsuperscript{228}

The use of the word “religion,” and its antecedents in other languages dates back to the Romans, but its meaning has shifted con-

\textsuperscript{221} Id. at 853.
\textsuperscript{222} Zoethout, supra note 187, at 413.
\textsuperscript{224} T. Jeremy Gunn, The Complexity of Religion and the Definition of “Religion” in International Law, 16 Harv. Hum. Rts. J. 189, 189–90 (2003); see also Danchin, supra note 8, at 675–76 (“[N]one of the major international and regional human rights instruments define the term ‘religion.’”); Arthur L. Greil & David G. Bromley, Introduction, in Defining Religion: Investigating the Boundaries Between the Sacred and Secular 3 (Arthur L. Greil & David G. Bromley eds., 2003) (“[I]t is probably safe to venture the proposition that no consensus has yet been reached with regard to this subject.”); Evans, supra note 61, at 51 (“No human rights treaty, including the Convention, has ever defined religion or belief.”).
\textsuperscript{226} Danchin, supra note 49, at 456.
\textsuperscript{227} Gunn, supra note 224, at 190.
\textsuperscript{228} See id. at 191 (“While academics have the luxury of debating whether the term ‘religion’ is hopelessly ambiguous, judges and lawyers often do not.”).
siderably since it first came into use. \(^{229}\) "Religio" in Roman times referred primarily to the monastic life (as "Religious" still does within the Roman Catholic Church, as seen in the division between the "religious" clergy who belong to orders, and "secular" diocesan clergy, who do not). \(^{230}\) More generally, it could denote "those matters having to do with God or gods" and human devotion to them; it was "singular and not plural." \(^{231}\) Today, however, religion is regarded as a reified "thing" that exists in the world and "in the West is understood as both a personal judgment about what is true and right . . . and a group identity that is deeply rooted." \(^{232}\) As such, there is a general assumption that religion is capable of definition.

But with respect to Article 9, there is no general agreement on what religion means. \(^{233}\) This not surprising; defining religion as a legal term of art, whether under Article 9 or another provision, is no simple task. Eisgruber and Sager explain this difficulty as follows:

The problem goes something like this: in order to protect religious liberty we have to define what religion is, and once we are in the business of saying that some beliefs, commitments, and projects are entitled to special treatment as 'religious' while others are not, we are creating a sphere of orthodoxy of exactly the sort that any plausible understanding of religious liberty should deplore. \(^{234}\)

Moreover, "any attempt to define the scope and content of the right to religious liberty will necessarily involve assumptions about the underlying nature of religion itself." \(^{235}\) Legal definitions may incorporate attitudes and assumptions that reflect cultural attitudes about religion generally or toward individual religions specifically.

Rather than viewing religion as an entity, it is better to speak of it as "a 'category of discourse,' whose precise meaning and implications are continually being negotiated in the course of social inter-


\[^{231}\] Beyer, supra note 229, at 166.

\[^{232}\] Moon, supra note 37, at 258.

\[^{233}\] Evans, supra note 61, at 51.


\[^{235}\] Danchin, supra note 8, at 676.
action.”236 Defining religion at the practical level involves a large number of actors in various contexts and has significant consequences. The complexity of the task can be easily seen in the legal context.237 The Court has addressed the definitional issue in a unique way, by beginning with a broad, inclusive definition, but then differentiating between religious beliefs qua beliefs, on the one hand, which are inviolable, and manifestations of belief on the other, which are entitled to far less protection.238 The underlying problem is that this approach is not neutral between religions.

First, the Court has responded to the problem of defining religion by adopting a broad approach to what counts as a religion for purposes of the second sentence of Article 9(1).239 For example, the Court assumed that the Church of Scientology was entitled to protection under Article 9 without discussing the issues that have appeared in national courts.240 Similarly, the Court has accepted pacifism as a “belief” entitled to protection under Article 9, even apart from any religious context.241

But the Court has been far less accommodating in its protection of religion as it is actually lived. It has paired an accommodating view of what counts as religion or belief with a very restrictive view


237. See Greil & Bromley, supra note 224, at 3.

238. Evans, supra note 113, at 389–90 (“The basic approach of the Commission has been to define religion or belief liberally and inclusively. It has rarely been determined that something that is alleged to be a religion or belief does not fall within the protection of the Convention.”); id. at 392 (“[T]he tendency of the Court and Commission at the definition stage of Article 9 cases has been to adopt a philosophy of inclusiveness.”).

239. Evans, supra note 109, at 295. However, “[a]lthough the Court has been relatively liberal in its definition of religion, its insistence that its views, rather than those of the applicants, should decide what is required by the relevant religion has meant that . . . there is a risk that the Court ‘will single out for protection religious rites and practices with which the members of the Court are familiar and feel comfortable.’” McCrea, supra note 18, at 126 (quoting Evans, supra note 61, at 125).


of what religion- or belief-based conduct is in fact protected.\textsuperscript{242} This approach to how religion is substantively protected “subtly prefers some conceptions of religion to others.”\textsuperscript{243}

Specifically, the way in which the Court protects religion under Article 9 privileges individual private thought over other modes of expressing religiosity.\textsuperscript{244} Therefore, as William Arnal explains:

\begin{quote}
\textsl{[O]ur definitions of religion, especially insofar as they assume a privatized and cognitive character behind religion (as in religious belief), simply reflect (and assume as normative) the West’s distinctive historical feature of the secularized state. Religion, precisely, is not social, not coercive, is individual, is belief-oriented, and so on, because in our day and age there are certain apparently free-standing cultural institutions, such as the Church, which are excluded from the political state.}\textsuperscript{245}
\end{quote}

Additionally, the Court has held that “‘religious freedom is primarily a matter of individual conscience’ though one that implies a right to some manifestation.”\textsuperscript{246} The problem is that giving primacy to individual conscience and belief affects the scope of the freedom itself.\textsuperscript{247} This norm “appears to be a Protestant, belief-centered conception of religion” that favors “internal and disembodied forms of religion over external and embodied ones.”\textsuperscript{248} And while the Court has not attempted to define religion comprehensively—assuming such a definition is possible\textsuperscript{249}—its case law is shot-through with the assumption that religion is primarily a matter of belief.\textsuperscript{250}

Finally, lurking behind the definitional question are issues of diversity, toleration, and cultural identity. Apart from the difficulties in defining religion generally, and the special hardships involved in defining it for legal purposes, it may be that the Court’s uneasiness with Article 9 as a whole “reflects a deep-seated European uneasiness about how far to tolerate religious diversity.”\textsuperscript{251}

\begin{footnotes}
\item[242] Evans, supra note 61, at 66.
\item[243] Evans, supra note 113, at 392.
\item[244] See Evans, supra note 61, at 72.
\item[247] Id. at 394.
\item[248] Peroni, supra note 6, at 233.
\item[249] Petty, Accommodating “Religion,” supra note 15.
\item[250] Peroni, supra note 44, at 236.
\item[251] Janis, supra note 1, at 76. In addition, the following statement:
\begin{quote}
There is always a danger in attempting to apply a concept as complex and controversial as religious freedom, that those charged with applying it will simply draw on their own experiences or notions of ‘common sense’ and thus give deference
\end{quote}
\end{footnotes}
Veit Bader has found that among European states, domestic courts in France, Belgium, Italy, and Portugal face challenges in defining religion in light of increased religious diversity. The Strasbourg court has therefore avoided addressing Article 9 when it finds such avoidance to be expedient.

b. Avoiding the Issue

Legal judgments and commentaries on freedom of religion often omit discussion of the definitional issue. Because Article 9 was almost completely the domain of the Commission for many years, defining religion under that provision was largely left to the Commission as well. Both the Commission and, later, the Court opted for a broad definition and have avoided identifying any particular criteria. Only very rarely did the Commission conclude that something alleged to be a religion or belief for purposes of Article 9 did not fall within its ambit.

The Court’s reticence in offering a definition of religion under Article 9 is understandable. A workable legal definition would have to be specific enough to provide practical guidance on inclusion and exclusion criteria, while at the same time accounting for the wide diversity of religious belief and practice and distinguishing religious behaviors that could also be classified as cultural, philosophical, or otherwise non-religious. Striking such a balance is nearly impossible. The inability to account for religion and only religion in a single practical definition may explain why other international human rights bodies have avoided rigid definitions.

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252. See Veit Bader, Religion and the Myths of Secularization and Separation, RELIGARE WORKING PAPER No. 8, 1, 3 n.1 (2011).
253. Gunn, supra note 224, at 190–91.
254. EVANS, supra note 61, at 53.
255. See id. at 55.
256. Adhar & Leigh, supra note 70, at 152 (“It is a frequent criticism of the jurisprudence on Article 9 of the European Convention that it has failed almost entirely to confront the issue of defining religion.”); Peter Cumper, The Rights of Religious Minorities: The Legal Regulation of New Religious Movements, in MINORITY RIGHTS IN THE “NEW” EUROPE 165, 173 (Peter Cumper & Steven Wheatley eds., 1999). But see Freedland & Vickers, supra note 71, at 601 (noting the “ECHR suggests that beliefs must have sufficient ‘cogency, seriousness, cohesion and importance’ to warrant protection.”) (quoting Campbell & Cosans v. The United Kingdom, App. No. 7511/76, 4 Eur. H.R. Rep. 293 (1982)).
257. EVANS, supra note 61, at 54; see also id. at 56 (“Often the Commission tried to simply ignore the issue by dealing with controversial cases on different grounds.”).
258. Cumper, supra note 256, at 173.
259. See id.
The Court has gone further than simply avoiding the definitional question; it has avoided addressing Article 9 entirely. The ECtHR developed its jurisprudence of the permissible limitations on rights in the context of Articles 8, 10, and 11, because Article 9 cases, until 1993, were nearly all deemed inadmissible by the Commission. By the time the Court began addressing substantive questions under Article 9, there was already a mature jurisprudence concerning limitations on other related freedoms, such as expression, assembly, association, privacy, and family life. The Court found it easier to dispose of many cases arising in a religious context on these other grounds because of the extant case law on addressing those provisions.

In the last fifteen years or so, the Court has changed course and has begun “engaging seriously” with Article 9. However, there remain a “wide variety of conceptions as to what this freedom entails.” The Court is now in the process of developing a theory of how Article 9 protects religion and belief. But the Court still must overcome a variety of structural and doctrinal hurdles if it wishes to develop case law that is both coherent and equitable.

IV. European Political Theology: Religious Liberty as a Westphalian Paradox

European societies have assumed that being modern and secular requires the privatization of religion. As Robert Yelle has said, “we inhabit a particular political theology . . . .” “[W]hat we call ‘secular law’ has been shaped by Christian soteriology and supersessionism” which separated “spiritual religion” from both “ceremonial religion” and civil law. The result of this separation is that human rights law concerning freedom of religion is biased toward “religions” that are mainly about belief—those “which are essentially voluntarist, private and individualist—one might say

260. Martínez-Torrón, supra note 60, at 594.
261. Id.
262. See id.
263. Scharffs, supra note 74, at 249.
264. EVANS, supra note 61, at 18.
265. Fokas, supra note 75, at 55 (noting the jurisprudence of the ECHR reflects the “extreme state of flux currently characterizing the place of religion in the European sphere, both at the European and national level.”).
266. Casanova, supra note 45, at 26.
268. Id.
pietistic—rather than communitarian in organisational orientation.”

Yelle continues:

Indeed, Christianity arguably created a separation between the religion and political domains with its distinctions between the ‘Two Kingdoms (Cities, Swords)’ and, even earlier, between Christian ‘grace’ and Jewish ‘law.’ The original version of the ‘Great Separation’ was the founding narrative of Christianity, which, according to Saint Paul, effected a fundamental break with its own Jewish past. Following Christ’s redemptive sacrifice on the Cross, the laws that prescribed sacrifice and other rituals were ineffective as a means of salvation and were abrogated. Religion was no longer a matter of law, but of grace; no longer of the flesh, but of spirit.

This understanding of religion is privatized and ultimately Christian “‘because . . . it emphasizes the priority of belief as a state of mind rather than as constituting activity in the world.’” “Religion” came to refer to internal spiritual discipline. And while ritual continued to play an important part in the early church, further “interiorization of religion following the Reformation . . . made belief the measure of what religion is understood to be.”

Today, the understanding of religion as primarily a matter of belief has been received as part of the patrimony of Western—and specifically European Protestant—civilization.

But this is hardly the only way that one can understand religion. It need not be principally spiritual, and “there is nothing ‘natural’ or ‘universal’ in describing religion as fundamentally a matter of belief.” Indeed, this understanding of religion is not necessarily applicable outside of its own Western milieu. In fact, “[m]any non-Western traditions . . . cannot conceive of, nor accept, a system of rights that excludes religion. Religion is for these traditions inextricably integrated into every facet of life.” For those who see themselves as “‘born into’ some religious group rather than relig-

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269. Evans, supra note 109, at 313.
270. Yelle, supra note 3, at 24 (footnotes omitted).
271. Danchin, supra note 8, at 676–77 (quoting ASAD, supra note 37, at 47); see also Stone, supra note 37, at 42 (“Western liberalism’s very definition of religion as being about belief and not custom or law has a distinctly Protestant cast that does not suit religions such as Judaism or Islam.”).
273. Peroni, supra note 44, at 249 (internal quotation marks omitted).
274. See id. at 248–49.
275. Id. at 249.
iously ‘born again[,]’” religion is not a matter of voluntary assent.\textsuperscript{277} These are “collectivistic religions that are ‘public in character and defin[e] people’s group identity.’”\textsuperscript{278}

These religious traditions that place a greater emphasis on the religious community than on individual members also tend to raise greater challenges the state’s ordering of society than do traditions in which individual believers take precedence.\textsuperscript{279} Accordingly, “[a]ny non-Christian or non-Western religion, such as Islam, which deviates from this notion of religion as private belief and subjective experience thus faces a double charge: not only is it a threat to the secular political order, but it is also not religion in its true, modern form.”\textsuperscript{280} It should therefore be no surprise “that Western Christianity has found it easier to cohabit plural liberal democracies than some other forms of religious traditions.”\textsuperscript{281} Christianity fits the \textit{forum internum} left to it by the state, and the state defines religion as generalizations based on Christianity.\textsuperscript{282} Western secularism:

can live comfortably with liberal, Protestantized, individualized, and privatized religions but has no resources to cope with religions that mandate greater public or political presence or have a strong communal orientation. This group-insensitivity of secularism makes it virtually impossible for it to accommodate community-specific rights and therefore to protect the rights of religious minorities. . . . Moreover, it presupposes a Christian civilisation that is easily forgotten because, over time, it has silently slid into the background. Christianity allows this self-limitation, and much of the world innocently mistakes this rather cunning self-denial for its disappearance. But if this is so, this

\begin{itemize}
\item \textsuperscript{277} Ferrari, \textit{supra} note 182, at 368 (quoting \textsc{Slava Jakelic}, \textsc{Collectivistic Religions: Religions, Choice, and Identity in Late Modernity} 1 (2010)); see also Russell T. McCutcheon, \textit{The Category “Religion” and the Politics of Tolerance}, in \textsc{Defining Religion: Investigating the Boundaries Between the Sacred and Secular} 139, 144 (Arthur L. Greil & David G. Bromley eds., 2003) (quoting \textsc{Madan Sarup}, \textsc{Identity, Culture, and the Postmodern World} 3 (Tasneem Raja ed., 1996) (“‘[F]or members of many ethnic-minority groups, their religion is an aspect of their culture, a valuable support in a hostile environment.’’)); Evans, \textit{supra} note 111, at 396 (“For some religious minority groups, their ability to retain a distinctive lifestyle may be essential to the survival of a community that is supportive of their beliefs.”).
\item \textsuperscript{278} Ferrari, \textit{supra} note 182, at 368 (quoting \textsc{Jakelic, supra} note 277, at 2).
\item \textsuperscript{279} Evans, \textit{supra} note 109, at 314.
\item \textsuperscript{280} Danchin, \textit{supra} note 8, at 689.
\item \textsuperscript{281} Evans, \textit{supra} note 109, at 314.
\item \textsuperscript{282} See Peroni, \textit{supra} note 44, at 236 (“[T]he Court has valorized disembodied, autonomous, and private forms of religiously identified with mainstream Protestantism, while sideling embodied, habitual, and public forms.”); \textit{id.} at 244 (“[A]spects of applicants’ practices that the Court has tended to de-emphasize include those that cannot be neatly separated from daily actions or everyday life . . . . [M]anifestations outside the domains of home, family and places of worship are of secondary importance.”) (internal quotation marks omitted).
\end{itemize}
‘inherently dogmatic’ secularism cannot coexist innocently with other religions.\textsuperscript{283}

But, like religion, neither secularism nor religion is a universal category: both need to be contextualized, as they are the products of different and particular histories and cultures. “Once applied to Europe, this conclusion means that European secularism is the outcome of European history, in which Christianity has played a central role.”\textsuperscript{284} Once contextualized, the Christian origins of European secularism come into focus, disrupting its claim of neutrality in a secular public sphere. “[T]his sphere is an exclusionary space where some selected religions feel at home while others are left out in the cold.”\textsuperscript{285}

Paradoxically, European secularism “remains intrinsically and inevitably Christian—to be fair to non-Christian religions.”\textsuperscript{286} José Casanova suggests the following:

Rather than recognizing the “really existing” religious and secular pluralisms and the multiple European modernities, the dominant discourses in Europe prefer to hold on to the idea of a single secular modernity, emerging out of the Enlightenment. Only secular neutrality is supposed to guarantee liberal tolerance and pluralist multicultural recognition in an expanded European Union. Thus, the secularist paradox, that in the name of freedom, individual autonomy, tolerance, and cultural pluralism, religious people—Christian, Jewish, and Muslim—are being asked to keep their religious beliefs, identities, and norms “private” so that they do not disturb the project of a modern, secular, enlightened Europe.\textsuperscript{287}

But as \textit{JFS} revealed, this is not really possible.\textsuperscript{288} Secular modernity guarantees religious freedom only by the privatization of religion.\textsuperscript{289} The space that the modern state has left to religion is shaped like Christianity, and when other religions do not fit, they

\begin{itemize}
\item \textsuperscript{283} Rajeev Bhargava, \textit{Rehabilitating Secularism, in Rethinking Secularism} 92, 101 (Craig Calhoun et al. eds., 2011) (footnote omitted).
\item \textsuperscript{284} Ferrari, \textit{supra} note 182, at 360.
\item \textsuperscript{285} \textit{Id.} at 361–62.
\item \textsuperscript{286} \textit{Id.} at 361; \textit{see also} \textit{id.} at 362 (“[T]he liberal model of toleration results from an internal Christian dynamic of secularization, which reproduces theological principles in secular guise.”) (internal quotation marks omitted).
\item \textsuperscript{287} José Casanova, \textit{Religion, European Secular Identities, and European Integration, in Religion in an Expanding Europe} 65, 66–67 (Timothy A. Byrnes & Peter J. Katzenstein eds., 2006).
\item \textsuperscript{288} See generally Petty, “Faith, However Defined,” \textit{supra} note 15, at 150 (commenting on \textit{JFS} court’s conception of religion, religious belief, and religious membership as resulting from a “Christian bias”); Ferrari, \textit{supra} note 182, at 359 (noting Western secularism “penalises non-Christian religions in particular.”).
\item \textsuperscript{289} Casanova, \textit{supra} note 287, at 66–67; \textit{see also} Yelle, \textit{supra} note 3, at 35.
\end{itemize}
are not treated equally: “the claim of religious neutrality, on the basis of which secularism asserted the authority to adjudicate the limits of the various religions, especially vis-à-vis the secular, stands revealed as myth.”

In a nominally post-Christian Europe, there is little to be gained by failing to acknowledge that the current legal understanding of religion “is nothing but an imposition of secular liberalism’s Christian cultural heritage on non-Christian religions whose basic terms of reference are entirely different.” Werner Menski suggests that “[w]e seem to be violating principles of equality in questionable efforts to force unequals to . . . become like us.” Such questionable efforts are evident, though perhaps not obvious, in the text of the Convention and in the Court’s dichotomy between belief and practice.

Despite the right to manifest one’s religion, the Court has placed a higher value on protection of religious belief over religious practice. And “[i]n the Strasbourg representational discourse, the relationship between the two terms appears unidirectional: belief is imagined as pre-existing and practice as its subsequent manifestation. . . . this suggests that there is an actual belief lying beneath practice that comes first.” But this need not be the case. “[N]either practice nor belief is foundational, as the two are mutually dependent.” The problem with the Court’s methodology “is that any assertion of universal authority in the form of ‘free-standing’ reason . . . tacitly subsumes majoritarian cultural norms . . . into the meaning and scope of Article 9.” In the end, the Court has interpreted the Convention in a manner that recognizes vary-

290. Yelle, supra note 3, at 35.
291. Stone, supra note 37, at 41–42.
293. McCrea, supra note 18, at 122.
294. Peroni, supra note 44, at 255.
295. Id. at 256; see also Adam B. Seligman et al., Ritual and Its Consequences: An Essay on the Limits of Sincerity 106–07 (2008) (discussing ritual and belief as mutually reinforcing).
296. Danchin, supra note 8, at 745. Also, the following:

Of course, the collective culture within which individual religious freedom is asserted is inevitably influenced by cultural norms to which particular faiths have disproportionately contributed. Therefore, the protection of private religious freedom may allow adherents to culturally entrenched religious a greater degree of freedom to adhere to their faith in public situations, not because the Court accords them a more extensive right to religious freedom, but because there is no clash between the collective norms and structures of the society in which they live and the requirements of their faith. McCrea, supra note 18, at 104.
ing degrees of religious freedom for different religions.\footnote{McCrea, supra note 18, at 105.} Finally, as Lourdes Peroni suggests:

moving towards a more inclusive European Human Rights Convention Law may require reaching and challenging deep-rooted assumptions and conceptions underpinning the Court’s legal reasoning. In particular, the move may involve rethinking those assumptions and conceptions, which all too often pass for natural and universal, but which in fact benefit some and disadvantage others.\footnote{Peroni, supra note 6, at 234; see also Martínez-Torrón, supra note 75, at 365 ("Among the improvable aspects of its case law is the protection of individual religious or moral identity, especially when it is expressed in particular actions in ordinary life, beyond traditional expressions of religiosity such as rites or preaching.").}

Recent events and demographic trends suggest that religious diversity in Europe is accelerating.\footnote{Sinisa Zrinscak, Re-Thinking Religious Diversity: Diversities and Governance of Diversities in “Post Societies,” in Religious Pluralism: Framing Religious Diversity in the Contemporary World 115, 115 (Giuseppe Giordan & Enzo Pace eds., 2014).} If European law is to keep pace with its residents, there must be a critical review of how European law understands religion. To be successful, the ECHR must recognize the internal, private, and individualistic focus it has received as part of the European Christian heritage and give more credence to the external, public, and collective aspects of religious practice that it has, until now, treated as a secondary concern at best.

V. Conclusion

Nearly a millennium after the Henry IV set out on his journey to Canossa, the contentious relationship between religion and the state continues to evolve in Europe.\footnote{Ungureanu, supra note 11, at 307.} European states test “different models of democracy, law and religion,”\footnote{Menski, supra note 292, at 1.} alongside varying degrees of secularization. In the twenty-first century, just as in the eleventh, “states not only cannot avoid considering religion, but have an interest in doing so” particularly given Europe’s global presence and “increasingly multicultural environment.”\footnote{See Pollack et al., supra note 24, at 1. On the significance of Canossa, see, e.g., Frederick Mark Gedicks, True Lies: Conossa as Myth, 21 J. Contemp. Legal Issues 133, 133–34 (2013); Richard Schragger & Micah Schwartzman, Against Religious Institutionalism, 99 Va. L. Rev. 917, 933–34 (2013); Smith, supra note 26, at 1869–70.}

But despite this multiculturalism and asserted liberalty, “Christianity continues to shape significant aspects of both the state and state law. This is an embarrassment for liberal theories of rights
and their assumption of state neutrality.”\textsuperscript{303} It is also, to a significant extent, inevitable. The understanding of religion that underlies the state’s claim to neutrality, and perhaps even the Westphalian system itself, is predicated on the privatization of religion and the transfer of jurisdiction over temporal matters to the state.\textsuperscript{304} Redefining religion as something broader than propositional belief calls into question the state’s neutrality and to a certain (though now extremely limited) extent the \textit{raison d’être} of the state itself.

The European Court of Human Rights is in a position to address these challenges, but until it begins to “challeng[e] its own assumptions and look[ ] at the consequences of its approach,” the Court is unlikely to move toward a more neutral understanding of religion under Article 9.\textsuperscript{305} Focusing on belief in considering issues of religion is not “necessarily wrong or useless. It is merely culturally dependent on 1700 years of Christian history, so ingrained as to be invisible.”\textsuperscript{306} This is where the Court can do better. Religious liberty is best measured by the extent of freedom accorded to the groups who least fit the religious mold of the society in which they live.\textsuperscript{307} Where the Court’s understanding of religion comes in to play, too little freedom is given for individuals to manifest their

\begin{itemize}
  \item \textsuperscript{303} Danchin, supra note 8, at 670–71.
  \item \textsuperscript{304} See Leora Batnitzky, How Judaism Became a Religion 47–48 (2011); Yelle, supra note 3, at 35.
  \item \textsuperscript{305} Evans, supra note 113, at 396–97.
  \item \textsuperscript{307} Beaman, supra note 223, at 216. For example, Joseph Dan suggests that:

  The political consequences of the mis-use of the term ‘religion’ are most obvious today concerning the image of ‘fundamentalist’ Islam in the West. If Islam is a ‘religion,’ it should be confined to individual spiritual life, and not try to become the Law of the Land of modern countries and see everything outside of itself as evil, and to be fought against as a dangerous cultural and political enemy. Yet this is exactly the meaning of Islam since its beginnings; it never recognized a culture outside of itself (except as subordinated, tolerated minorities which are denied full political rights). Islam was always a political entity, and the expectation that it will conform to the Christian definition of ‘religion’ is the result of the process of the attempt to universalize the concept of religion in its particular meaning in Christianity. Joseph Dan, Jewish Studies and European Terminology: Religion, Law and Ethics, in \textit{Jewish Studies in a New Europe: Proceedings of the Fifth Congress of Jewish Studies in Copenhagen 1994 Under the Auspices of the European Association for Jewish Studies} xxiii, xxviii n.9. (Ulf Haxen et al. eds., 1998).

The issue is not unique to Islam, however, “but about other faith groups, including Orthodox Judaism; and indeed it spells over into some of the questions that have surfaced . . . about the right of religious believers in general to opt out of certain legal provisions . . . .” Williams, supra note 52, at 263; see also Petty, “Faith, However Defined,” supra note 15, at 150.
\end{itemize}
religion. As noted above, it is difficult to think of how a state could interfere with religious practice in any other way.\footnote{Peroni, supra note 44, at 252.}

Freedom of religion in Europe is developing in a way that may not ultimately lead to the realization of the goals to which the Convention originally aspired.\footnote{See Evans, supra note 109, at 291.} Cutting through many centuries’ worth of accretions of common understandings built on (what was until very recently) a common religious heritage may require re-evaluating the terms of the Convention itself. But if true neutrality is to be achieved, the phrase “religion and belief” must be banished from the legal lexicon. Religion is so much more.\footnote{See Maleiha Malik, The “Other” Citizens: Religion in a Multicultural Europe, in Law, State and Religion in the New Europe: Debates and Dilemmas 93, 95–96 (Lorenzo Zucca & Camil Ungureanu eds., 2012).}