

Rights as a Basis for the Religious Neutrality of the State: Lessons from Europe for American Defenders of Non-Establishment

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This article compares elements of the approach of the European Court of Human Rights ('ECTHR') and the United States Supreme Court ('USSC') to the issue of the separation of religion and state. It shows how the European experience of such issues can help to demonstrate which are the more compelling, and the less compelling justifications for such separation. It argues that, a comparison between key decisions of the European Court of Human Rights and the United States Supreme Court reveals rights-based justifications for strict separation of religion and state to be relatively weak. It argues that rights-based separation will not rule out non-oppressive forms of establishment of religion and place pressure on courts to enter into risky assessments of the compatibility of teachings of particular faiths with fundamental rights. This casts doubt on the theories advanced by several influential proponents of a maximalist reading of the separationist requirements of the First Amendment as well as explaining some of the problematic elements of Strasbourg jurisprudence such as the tendency of the Court to make pronouncements on the compatibility of Islam with human rights norms.

The European Court of Human Rights as a Useful Comparator

Separation of religion and state, by which I mean both the idea of secular politics (the need for law and policy to be justified by non-religious, "public" reasons) and symbolic neutrality (the need for the state to avoid appearing to endorse the truth claims of a particular faith) has been one of the most controversial issues in US constitutional law for a number of decades. The requirements of the 1st Amendment prohibition on the establishment of a religion has generated a large number of US Supreme Court judgments and an enormous volume of scholarship.¹ Pan-European Courts have only

¹ This scholarship includes a large number of books about the relationship between religion, state and law in general but which focus largely on the US Constitution. See MICHAEL W. MCCONNELL, JOHN H. TREMBLAY AND THOMAS C. BERG, *RELIGION AND THE CONSTITUTION*, (2011) (3rd ed.), MICHAEL S. ARIENS AND ROBERT A. DESTRO, *RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY* (2002) (2nd ed. 2002), JOHN T. NOONAN JR. AND EDWARD MCGLYNN GAFFNEY JR., *RELIGIOUS FREEDOM: HISTORY CASES AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT*, (2010) (3rd ed.), Micah J. Schwartzman, *What if Religion Is Not Special?* 79 U. CHI. L. REV. 1351 (2012).

become engaged on these issues in the last two decades. Although the status of religion within the legal order of the European Union has been controversial from time to time,² the Court of Justice in Luxembourg has dealt with these issues only indirectly.³ In contrast, the European Court of Human Rights has become an important centre of conflict on the key issues in this area. The Strasbourg Court has opined on the compatibility of theocratic politics with the Convention,⁴ the teaching of religion in state schools,⁵ the exclusion of religious symbols from particular contexts⁶ and, perhaps most famously, the presence of religious symbols in state schools⁷ (the Court has also issued a major decision on the relationship between freedom of conscience and anti-discrimination rules⁸ but that question is not the focus of this article). This caselaw has generated a substantial literature⁹ and has allowed the contours limits placed on the relationship between religion and the state by pan-European legal commitments, to become significantly clearer.

European and American courts approach the question of separation between religion and state in a context of definite differences but also of great similarities. The two legal systems broadly share the wider overall intellectual structure that characterises Western approaches to the role of religion in

² Ronan McCrea, *Religion as a Basis of Law and the Constitutional Order of the European Union*, COLUM. J. EUR. L. 16.1 (2009-2010), RONAN MCCREA, RELIGION AND THE PUBLIC ORDER OF THE EUROPEAN UNION (2010), JOSEPH H. H. WEILER UN'EUROPA CRISTIANA: UN SAGGIO ESPLORATIVA (2003), GEORGE WEIGEL THE CUBE AND THE CATHEDRAL; EUROPE, AMERICA AND POLITICS WITHOUT GOD (2005).

³ MCCREA, *supra* note 2 at chs. 3, 5 and 7.

⁴ *Refah Partisi v. Turkey* (2003) 37 EHRR 1.

⁵ *Folgerø v Norway* (2007) 46 EHRR 1147, *Grzelak v. Poland* (Application 7710/02, Judgment of 15 June 2010), *Hasan and Eylem Zengin v. Turkey*(Application 1448/04, Judgement of 9 October 2007).

⁶ *Şahin v Turkey* (2005) 41 EHRR 8, *Dahlab v Switzerland* (Application No 42393/98) 15 February 2001, *Dogru v France* (2009) 49 EHRR 8.

⁷ *Lautsi v Italy* (Grand Chamber) (2012) 54 EHRR 3.

⁸ *Eweida and Others v United Kingdom* (2013) 57 EHRR 8.

⁹ See for example, CAROLYN EVANS FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS, (2001), JEROEN TEMPERMAN (ED.) THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM (2012), Rex Ahdar and Ian Leigh, *Post Secularism and the European Court of Human Rights: Or How God Never Really Went Away*, Mod. L. Rev. 75: 1064-1098 (2012).

public life that assumes the existence of separate categories of religious” and political”.¹⁰ However, they also approach the judicial regulation of particular conflicts that arise in relation to issues such as symbolic endorsement of a faith by a state, or the need for laws to be justified by public reason from somewhat different starting points. These differences can, I suggest, be most instructive and can allow each system to obtain provide valuable clarification of the true principles underlying the separation of religion and state.

Indeed, while the fact that the European Court of Human Rights is an international court of limited remit may appear to weigh against recognising its jurisprudence as an informative comparator in relation to the US Supreme Court, which has greater democratic authority and a broader constitutional role, it is the limited nature of Strasbourg’s remit that allows it to provide insight into important issues in First Amendment caselaw. This is because the ECtHR’s concerns are limited to preventing the violation of fundamental rights. Although the Court has stated that democracy is the only system envisaged by the Convention and has noted the importance of pluralism and the idea of ‘democratic society’,¹¹ it does not have a mandate to set out or enforce desirable constitutional principles. Its only task is to rule on whether a particular action or legal arrangement on the part of a signatory state violates the rights set out in the Convention. As McCrea writes:

‘Certainly, the reasons given for [the Court’s] decision can be illuminating as to broad constitutional principles and may provide a degree of guidance to decision makers in other situations, but the fact remains that the ultimate decision is binary: violation or no violation [...] Strasbourg does not lay down rules about what ought to be, only what ought not to be’.¹²

Unlike the US Supreme Court (or indeed the Court of Justice of the European Union)¹³ the Strasbourg Court has no authority to develop broader constitutional norms that aim at the proper functioning of the legal and political system or that seek to promote particular notions of citizenship or society. Therefore, when the ECtHR addresses the relationship between religion, state and law it has limited

¹⁰ On the development of a category of “religion” as a phenomenon distinct from politics see, for example, KAREN ARMSTRONG *FIELDS OF BLOOD: RELIGION AND THE HISTORY OF VIOLENCE* (2014), MARK LILLA *THE STILLBORN GOD: RELIGION, POLITICS AND THE MODERN WEST* (2007), CHARLES TAYLOR, *A Secular Age* (2007).

¹¹ See *Refah Partisi v. Turkey* (2003) 37 EHRR 1 paras. 86-90 and *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 306 para. 114.

¹² Ronan McCrea, *Singing from the Same Hymn Sheet? What the Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination and the Secular State* 5 *Oxford Journal of Law and Religion* 183, 188 (2016).

¹³ *Ibid.*, 192-93.

capacities to deal with elements of this relationship that go beyond individual rights. As Judge Bonello pointed out in his concurring opinion in the Grand Chamber decision in *Lautsi v Italy*, the Convention has given the Court the remit to enforce freedom of religion and of conscience but has not empowered it to enforce either secularism or religious neutrality on states. He pointed out that:

‘Freedom of religion is *not* secularism. Freedom of religion is *not* the separation of church and state. Freedom of religion is *not* religious equidistance –all seductive notions, but of which no one has so far appointed this Court to be custodian. In Europe, secularism is an optional, freedom of religion is not’.¹⁴

Non rights-based reasons can be recognised only indirectly by the ECtHR in that, as is discussed below, signatory states may seek to justify restrictions on religious freedom (or other Convention rights) on the basis that the restriction in question seeks to protect important constitutional principles or goals arising from national legal orders which cover much wider ground than the ECHR, but this recognition, is a mechanism for the Court to accommodate the broader constitutional choices of Member States and does not permit the Court itself to develop and impose constitutional principles that go beyond the question of the protection of fundamental rights.

This incapacity is what makes the Strasbourg Court such a useful comparator. The extent to which individual rights claims can justify the relatively strict separation between religion and state (both in terms of a requirement that government actions be supported by secular or non-religious reasons and in terms of prohibition on symbolic state endorsement of a faith) that has been required by the US Supreme Court’s interpretation of the First Amendment is of considerable importance in academic debate and in the Court’s caselaw. As will be discussed below, the USSC has ruled that the state cannot symbolically endorse any particular faith but has been unclear about the degree to which this principle arises from need to protect individual rights or from broader, more pragmatically justified constitutional principles such as the risk of religious contestation for political power. This is mirrored in academic debates where scholars such as Ronald Dworkin¹⁵ Sager and Eisgruber¹⁶ and Martha Nussbaum¹⁷ have spoken of the sense of alienation, exclusion or inferiority that may be produced when individuals see state endorsement of a faith they do not share but it is not clear whether this sense of alienation or inferiority is itself a rights violation

¹⁴ *Lautsi v Italy* supra note 7, concurring opinion of Judge Bonello, para. 2.6.

¹⁵ RONALD DWORKIN RELIGION WITHOUT GOD (2013).

¹⁶ CHRISTOPHER EISGRUBER AND LAWRENCE SAGER RELIGIOUS FREEDOM AND THE CONSTITUTION (2007) at 52.

¹⁷ MARTHA NUSSBAUM POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE, (2013) at 5-7.

or whether it is problematic for other reasons. Indeed, as will be discussed below, other figures have pointedly questioned whether rights claims can provide adequate justification for the degree of separation between religion and state argued for by both Dworkin and Nussbaum.

Therefore, because it is restricted to dealing with rights issues, the ECtHR can be a particularly informative comparator for the USSC. The fact that the First Amendment of the US Constitution contains both an individual right to religious freedom and an abstract prohibition on establishment means that in cases where a form of state endorsement is found to violate the Constitution it may not be clear what role individual rights claims and abstract constitutional principles each played. The same will not be true of Strasbourg's religion-state jurisprudence where the Court is largely restricted to rights questions. Its caselaw shows more clearly than other courts what role rights do and do not play in cases on separation of religion and state.

Indeed, only a court with such a limited remit can provide this insight. National courts dealing with religious matters will face the same overlap between questions of rights and broader constitutional principles that faces the USSC. French courts will have to assess cases in the light of commitments to religious freedom alongside the 1905 law on secularism and cross cutting issues such as particular ideas of citizenship and national identity, similarly German courts will have to take into account both commitments to religious freedom and specific constitutional provisions on church state relations. Even in the UK where the Anglican Church is established in England and where there is no codified constitution, the courts have issued judgements on religion and its role in law and politics that speak of a form of substantive separation between religion and the legal and political order that has been justified in a leading judgement of the Court of Appeal on grounds that:

'We do not live in a society where all people share uniform religious beliefs. The precepts of any one religion –any belief system- cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens, and our constitution would be on the way to a theocracy.'¹⁸

Notably, this approach that also leaves unclear whether the status of being 'out in the cold' is itself a rights violation or whether it is problematic for some other reason such as the likelihood that such alienation would provoke intractable political conflict.

Of course, as it is an international court the ECtHR is likely to be more deferential to state choices than the court of a nation state such as the USSC. However, this article's focus is not on the intensity

¹⁸ *MacFarlane v Relate Avon Ltd.* [2010] EWCA Civ 880, Laws LJ. This statement has been repeated verbatim by the Court of Appeal in later cases.

of review applied but rather what work ideas of religious freedom and individual rights do and do not do when courts are faced with disputes relating to the degree of separation from religion that states are required to observe. Indeed, other international courts such as the Court of Justice of the European Union that have broader remits than the ECtHR will also approach matters of state religious neutrality in a way that requires them to take account of the broader constitutional norms of the political system of the EU meaning their decisions cannot provide the same degree of insight as to the role (and limits of the role) of rights in these debates as can the caselaw of the Strasbourg Court.

Textual Differences but Similar Approaches

In textual terms, there are clear differences between the ECHR and the United States Constitution. The First Amendment of the US Constitution covers both freedom of religion and the separation of church and state. The European Convention on Human Rights ('ECHR') has Article 9 guaranteeing freedom of thought, conscience and religion but does not have an article requiring separation of church and state, something that makes the justification for interventions to support the secular nature of the state more complicated.

Despite these textual differences, both systems require limits on religious influence over law and politics. The USSC has required 'valid secular reasons' if legislation is to be held to be valid as part of a broader commitment to avoiding the "entanglement" of religion and the state.¹⁹ The European Court of Human Rights has approvingly mentioned the concept of secularism as being in harmony with the ECHR.²⁰ However it has focused, in decisions such as *Refah Partisi v Turkey*²¹ (where it upheld the dissolution of a political party held to be seeking the establishment of a religiously-based legal order), on showing the danger to norms such as privacy, popular sovereignty and equality that the establishment of a non-secular legal or political order would bring (in this case an Islamic, Sharia-based order).

As will be shown below, the European approach is underpinned by concerns that certain forms of endorsement of religion by the state may be oppressive and that the legal enforcement of particular religious values may be undemocratic or inconsistent with particular human rights such as privacy or equality. The US approach has, at least until recently, differed in that it has also been concerned with

¹⁹ See for example, *Stone v Graham* 449 US 39 (1980).

²⁰ See *Refah Partisi v Turkey* (not 4 *supra*).

²¹ *Ibid*.

avoiding entanglement of religion and state irrespective of whether the entanglement in question could be seen as oppressive or not. There has been lively academic debate over whether the singling out of religious values alone for exclusion from acting as the basis of public policy is justifiable²² but the general approach of the majority in the USSC has (at least until recently) been to identify religious values *per se*, irrespective of their content as ineligible to act as the basis of law and policy and to see symbolic endorsement of a faith as problematic whether or not its overall effect is oppressive (see discussion below).

Separation of Religion and State under the ECHR

Cases on the issue of the religious neutrality of the state that have come before the Strasbourg Court have taken two forms. One has consisted of challenges to state practices or symbolic arrangements that depart from the principle of religious neutrality or separation of religion and state. The other has been made up of challenges to state actions that have as their aim the protection of the secular nature of state bodies or institutions (for example by prohibiting the wearing of religious symbols in state institutions).

(a) Strasbourg's Non-Establishment: What Kind of Separation between Religion and State Is Required by the ECHR?

The Court's record in the first category of cases, where an individual challenges symbolic arrangements in state contexts on the ground that they depart from the principle of separation of religion and state in a way that violates the Convention, is mixed. In *Buscarini v San Marino*,²³ the Court found a violation of Article 9 in the case of a challenge to the traditional oath required of those elected to the San Marinese parliament which required legislators to swear "on the Holy Gospels". The Court rejected arguments that this oath was merely a national tradition and found that forcing legislators to pronounce a religious oath amounted to a violation of their freedom of thought, conscience and religion.²⁴

²² See for example, Juergen Habermas, *Intolerance and Discrimination* (2003) 1(1) INT'L J. OF CONST. L. (I.CON) 2, Michael W. McConnell *The Problem of Singling Out Religion* 50 DEPAUL L. REV. 1 (2000), Abner S. Greene, 'The Political Balance of the Religion Clauses' 102 Yale Law Journal 1611 (1993), JOHN RAWLS, POLITICAL LIBERALISM (1993) and KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988). See also the judgment of Laws LJ in the English and Welsh Court of Appeal in *MacFarlane v RELATE Avon* [2010] EWCA Civ. 771.

²³ *Buscarini v San Marino* (app 24645/94) ECHR 18 February 1999.

²⁴ *Ibid.* paragraphs 38 and 39.

Similarly in *Dimitras v Greece* it found a violation of Article 9 in respect of rules for giving testimony in criminal cases. The relevant legislation assumed as a default that witnesses were Greek Orthodox and, in the case of those who followed a religion unrecognised by the state or who had no religion, the individual in question was required to convince the court that they held such beliefs before being allowed to make a solemn affirmation instead of swearing on the Bible. Justifying its conclusion that these rules violated the Convention, the Court noted the presumption that witnesses were Orthodox and the fact that the option of making a solemn declaration instead of swearing on the Bible was not given to Greek Orthodox individuals who preferred that option. It particularly objected to the fact that witnesses were obliged to reveal their religion to judges and noted that, should a judge fail to be convinced by a witness' evidence that she was an atheist or member of a religion that forbids the taking of oaths, she would be forced to swear on the Bible.

Worries that entanglement between the state and a favoured faith could become oppressive is also seen in a series of cases related to the teaching of religion in state schools where the Court found violations of the Convention where a mandatory curriculum endorsed the truth claims of a particular faith or when opt out mechanisms tended to disfavour or place pressure on students from other faiths.²⁵ Importantly, absolute equal treatment of all religions was not required. In *Folgerø v. Norway*, for example, the Court did not object to the the fact that Christianity, Norway's dominant religion, received a disproportionately large amount of attention in the curriculum, but rather to the fact that the course appeared to present the teachings of Christianity as true.²⁶

Institutional entanglement between religion and state is the rule rather than the exception in Europe²⁷ and the Court has found that establishment of a particular religion as the official religion of the state does not per se violate the Convention.²⁸ However, it has found violations where close entanglement between a particular faith and the state reaches a point where it becomes oppressive of religious freedom and religious pluralism. A version of the kind of mild establishment' that Ahdar

²⁵ *Folgerø v. Norway* (Application 15472/02, Judgement of 29 June 2007, Grand Chamber), *Grzelak v. Poland* (Application 7710/02, Judgement of 15 June 2010), *Hasan and Eylem Zengin v. Turkey*(Application 1448/04, Judgement of 9 October 2007).

²⁶ *Ibid.*

²⁷ JOHN MADELEY AND ZSOLT ENYEDI (EDS.) CHURCH AND STATE IN CONTEMPORARY EUROPE: THE CHIMERA OF NEUTRALITY (2003).

²⁸ *Darby v Sweden* (1990) 13 EHRR 773.

and Leigh argue is compatible with religious freedom²⁹ was upheld by the Court in *Lautsi v Italy*. Here the Grand Chamber of the Court found that the presence of crucifixes in Italian state schools could not be said to violate the Convention as such crucifixes were merely passive symbols and, in the context of the Italian education system overall (which it found to be open to other faiths and where there was no indoctrination in favour of Catholicism), the overall effect of their presence was not oppressive.³⁰

On the other hand, the Court has also shown a general concern that excessively close entanglement between a particular faith and the state could reach a point where it becomes oppressive of institutional religious freedom and pluralism in general. In *Metropolitan Church of Bessarabia and Others v Moldova*³¹ the Court found a violation of Article 9 in circumstances where the Moldovan authorities had refused to recognise the applicant Church, arguing that it was in fact part of the officially recognised Metropolitan Church of Moldova which should be entrusted to resolve what was an internal disagreement within the Church. Although the ECtHR has been clear that absolute religious neutrality is not required by the Convention and states may recognise an official state religion, in this case it reiterated its repeatedly-stated view that when states seek to regulate religious activity they must act in an 'impartial and neutral' fashion³² and are precluded from assessing the legitimacy of religious beliefs.³³ The Court linked the protection of the autonomous existence of religious communities to the broader notion of 'preserving pluralism and democracy' and repeated its statement from the earlier case of *Hasan and Chaush v Bulgaria*³⁴ that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords".³⁵

²⁹ R Ahdar and I Leigh 'Is Establishment Consistent with Religious Freedom?' (2004) 49(3) McGill Law Journal 635-681.

³⁰ Note 7 *supra*. paragraphs 72-76.

³¹ (2002) 35 EHRR 306.

³² *Ibid.*, paragraph 116.

³³ *Ibid.*, paragraph 117.

³⁴ (2002) 34 EHRR 1339. In this case the Court also found a violation of Article 9 where the Bulgarian authorities had intervened in favour of one party to a dispute over the position of Chief Mufti in Bulgaria. The Court held that state action that forced religious groups to come together under a single leadership constituted a violation of Article 9 read in the light of Article 11 (freedom of association).

³⁵ Note 7 *supra.*, paragraph 118.

Faced with a refusal of the Moldovan authorities to register the applicant church and allegations of serious harassment of church members, the Court set out clear limits on the powers of the state to regulate religious life stating that Article 9 precluded:

‘State measures favouring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place itself, against its will, under a single leadership, would also constitute an infringement of the freedom of religion. In democratic societies the State does not need to take measures to ensure that religious communities remain or are brought under a unified leadership.’³⁶

The Court noted that under Moldovan law only recognised religions could be practised and that unrecognised religions could not obtain legal personality, engage clergy or sell religious items as well. It also noted serious allegations that those belonging to applicant church had been subject to intimidation and harassment and found that the lack of legal recognition had aggravated this situation.³⁷

We can therefore see the outlines of a framework within which the ECtHR approaches the relationship between religion and state. Strict religious neutrality is not required by the Convention. States may symbolically associate themselves with a particular faith or give a culturally-entrenched faith particular prominence in the education system provided the overall effect is not oppressive of religious freedom. As Leigh and Ahdar rightly observe, the test is oppression not neutrality.³⁸ The entanglement between religion and the state must be sufficiently intense so as to impose clear burdens on the free practise of religion in order for it to violate Article 9. The presence of a crucifix on the wall of a school may produce a sense of alienation but this will not violate the ECHR. The cases where a violation has been found have involved direct teaching of religious truth³⁹ or the forcing of individuals to either recite a religious oath or publically justify their faith to a public official. In cases such as *Hasan and Chaush* and the *Metropolitan Church of Bessarabia*, the Court explicitly linked religious autonomy to the broader value of pluralism, but the actual reason the violation of the Convention was held to have occurred was the direct state interference with the exercise of institutional religious autonomy. Certainly, in the Moldovan case, the strong links

³⁶ *Ibid.*, paragraph 117

³⁷ *Ibid.*, paragraph 129.

³⁸ Rex Ahdar and Ian Leigh, *Post Secularism and the European Court of Human Rights: Or How God Never Really Went Away*, Mod. L. Rev. 75: 1064-1098 (2012).

³⁹ *Folgerø* note 5 *supra*.

between the state and the rival to the applicant church lay behind the failure of the State to recognise the latter and its toleration of acts of harassment and intimidation. However, it was the non-recognition and acts of intimidation that constituted the violation, not the existence of official links between the Moldovan state and a particular faith that constituted the violation of Article 9.

The very limited nature of degree of separation between religion and state imposed by the ECtHR underlines how the Strasbourg Court will always struggle to fulfil the role of constitutional court for Europe. As noted above, while constitutional courts are often charged with upholding fundamental rights, they also have jurisdiction to protect fundamental principles of the legal and political order, such as separation of religion and state, the justification for which may not be solely rights-based. Because the Court of Human Rights, in contrast, has jurisdiction over rights issues alone, it can promote or restrict principles such as separation of religion and state only insofar as they impact on the protection of the rights in the Convention. Thus, the lack of a non-establishment clause in the ECHR means that the Court will intervene only when the degree of identification between the state and a faith becomes a threat to fundamental rights. The ECHR's separation is a minimal one that can accommodate symbolic preference on the part of the state for a particular faith. Indeed, it is possible that, if the ruling religion's theology was sufficiently liberal, the Convention may even be able to accommodate a rights-friendly theocracy.

(b) Indirect Recognition of Non-Rights Based Reasons for Separation: Accommodating Constitutional Choices of Member States

The limits on ECtHR's ability to take account of non-rights based values and concerns are not absolute. The Strasbourg Court can indirectly rule on these matters in so far as Member States are entitled to rely on non-rights goals as grounds for justification for restriction of fundamental rights. To do so they must fit these goals into the text of the relevant Convention right which sets out permissible reasons to restrict the right in question. In relation to Article 9 (the most relevant article for our purposes), the relevant provision envisages that the right to freedom of religion can be restricted only 'in the interests of public safety, for the protection of public order, health or morals or the rights and freedoms of others'.⁴⁰ As will be discussed below, the narrow nature of these provisions poses problems for States who wish to rely on aims such as promotion of coexistence or political stability to justify restriction of religious expression in state contexts.

Nevertheless in cases, where individuals have challenged state actions that restrict fundamental rights in order to uphold the secular nature of state bodies or institutions, the Court has been

⁴⁰ European Convention on Human Rights, Article 9(2).

broadly sympathetic to state attempts to combat theocratic movements and to measures that restrict the ability of individuals to wear religious symbols in particular contexts to protect the religious neutrality of state institutions. In *Refah Partisi* the Court upheld the dissolution of an Islamist political party that had been dissolved by the Turkish state on the grounds that it was ‘a centre of activities contrary to the principle of secularism’.⁴¹ As the alleged breach of the Convention in this case arose out of the dissolution of a political party, the applicants in *Refah* actually brought their challenge under Article 11, the provision of the Convention that protects freedom of association. However, the grounds given by the Court for finding that a violation had not occurred were based on the threat the Court saw to Convention values from the theocratic political objectives attributed to the party so this case is highly relevant to the approach of the Strasbourg Court to the relationship between religion, state and law. In its judgement, the Grand Chamber of the Court stated that the dissolution of the party has a legitimate aim as secularism was ‘one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy’.⁴² *Refah Partisi*’s plan to introduce a religiously-based legal system was, it was held, ‘dangerous for the rights and freedoms guaranteed by the Convention.’⁴³ Finally, it is very notable that the Court made what proved to be very controversial findings about the nature of Sharia and its compatibility with the ECHR stating:

‘It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. ... In the Court’s view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.’⁴⁴

Similarly, the Court has been sympathetic to state measures that seek to preserve the religious neutrality of particular state institutions. This has included a consistent refusal to find any violation of the Convention arising from the French version of secularism under which the principle of state religious neutrality is seen as requiring the absence of religious symbols from state institutions

⁴¹ *Supra* note 4, paragraph 12.

⁴² *Ibid.* paragraph 93.

⁴³ *Ibid* paragraph 110.

⁴⁴ *Ibid* paragraph 123.

including those working for the state and in some cases such as state schools, users of state services. In the recent case of *Ebrahimian v France*⁴⁵ the Court upheld the dismissal of a woman working as a temporary social assistant in a public psychiatric hospital who had refused to remove her headscarf at work. The Court recalled its previous caselaw under which it had found that ‘safeguarding the principle of secularism constitutes an objective that is in conformity with the values underlying the Convention’⁴⁶ and that ‘States could invoke the principle of secularism and state neutrality to justify restrictions on the wearing of religious signs by civil servants.....it is their status as public agents that distinguishes them from ordinary citizens’⁴⁷ The ruling in *Ebrahimian* is indeed consistent with the Court’s previous approach. In *Dahlab v Switzerland*⁴⁸ it upheld a prohibition on a Muslim school teacher wearing her headscarf in class on the grounds that the state was entitled to require a policy of religious neutrality in its schools. In *Şahin v Turkey*⁴⁹ it also upheld a policy preventing the wearing of headscarves in Turkish universities on the grounds that other students may be pressurised into wearing such scarves if they were not generally banned. Notably, in both cases the Court again made highly controversial statements on the symbolic meaning of the headscarf, arguing in *Dahlab* that it was a symbol that it was ‘difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils’⁵⁰ a statement in noted without disapproval in *Şahin*.⁵¹ Strasbourg is therefore very accommodating of the choice of Member States who wish to uphold a thick version of secularism and to exclude religious symbols from state contexts. It has not, however, by any means required such as separationist approach from signatory states.

Reconciling the Promotion of Pragmatic Secularism with the Text of the Convention

⁴⁵ *Ebrahimian v France* [2015] ECHR 1041. The majority judgement is in French. The dissenting opinions are in English. All translations from French are my own.

⁴⁶ *Ibid.* paragraph 53.

⁴⁷ *Ibid.* paragraph 64.

⁴⁸ *Supra* note 6.

⁴⁹ *Ibid.*

⁵⁰ *Dahlab supra* note 6.

⁵¹ *Şahin, supra* note 6, paragraph 111.

As noted above, while the separation of religion and state required by the Strasbourg Court is one that relies solely on rights justifications, the same principle within national legal orders can be justified on a number of other grounds sourced from the overall constitutional order of the state some of which, such as the need to avoid religious contestation for political power, may not be solely rights-based. Not only has the Court generally found in favour of restrictions on fundamental rights that aim at upholding principles such as state neutrality or state secularism, it has explicitly stated that secularism (including its French and Turkish versions) is “compatible with the values underlying the Convention.”⁵² It noted in *Şahin* that it was necessary in societies where several religions to coexist to place restrictions on the expression of belief in some contexts in order to ensure coexistence and mutual respect.⁵³ Thus, it has seemed to recognise that its interpretation of the rights contained in the ECHR can take account of principles such as broader coexistence rather than only focusing on the protection of particular rights as a justification for a measure that may restrict a fundamental right. Indeed, Trispiotis has noted how the Court has on various occasions invoked the attainment of goals such as mutual respect, toleration and solidarity as valid reasons for states to restrict rights, including freedom of religion.⁵⁴ Such recognition of broader constitutional goals faces some textual difficulties. As noted above, the text of Article 9 envisages that the right to freedom of religion can be restricted only “in the interests of public safety, for the protection of public order, health or morals or the rights and freedoms of others”.⁵⁵ It can be difficult to see how broader constitutional principles that are not solely rights-based can be accommodated within this formulation. The idea that religious contestation for political power may prove particularly destabilising can perhaps be accommodated within the idea of “public order” but this involves stretching the term somewhat and the Court appears to have taken the approach of seeking to shoe-horn such principles into the idea of defending the rights of others. In recent cases such as *Şahin* and *Ebrahimian* the ECtHR has been willing to uphold restrictions on religious expression in cases in circumstances where, as dissenting judgements noted in each case, there was little concrete evidence of impact upon others.⁵⁶ Indeed the most recent ruling in this area in *Ebrahimian* has been

⁵² *Ebrahimian supra* note 45, paragraph 53, *Refah Partisi supra* note 4, paragraph 93.

⁵³ *Şahin, supra* note 6, paragraph 107.

⁵⁴ I Trispiotis, *Freedom of Religion, Equality and Discrimination in the European Convention on Human Rights* (PhD Thesis, University College London, 2016) 168-74.

⁵⁵ European Convention on Human Rights, Article 9(2).

⁵⁶ See the partially dissenting opinion of Judge O’Leary in *Ebrahimian*, note 45 *supra*. and the dissenting opinion of Judge Tulkens in *Şahin*, note 6 *supra*.

criticised for failing to be fully frank about the reality that, in finding in favour of the French State, the Court effectively gave scope to states to pursue (through the principle of strict secularism) goals such as 'peaceful coexistence' that were not directly aimed at protecting the rights of others while at the same time claiming that the action of the French authorities was one which aimed at defending the rights of others.⁵⁷

To summarise, the Strasbourg Court's approach to cases relating to the relationship between religion, state and law is heavily affected by its rights-focus. This is seen when it is required to assess the compatibility of policies adopted by states, such as France or Turkey, that pursue (or pursued) a thick version of secularism that may aim to achieve goals that are not only rights-focused. Even though the Court has given wide latitude to states in such cases it has only been able to do so by stretching the concept of the protection of the rights of others. This rights focus, coupled with the fact that the text of the Convention provides limited scope for restricting rights on the basis of abstract constitutional principles means that the Court has had to shoe-horn the defence of abstract secularism into the concept of the protection of the rights and freedoms of others as in (*Ebrahimian and Sahin*) or has had to identify threats to rights in the challenges to secularist norms mounted by those who seek a more assertive or visible religious presence in politics or state contexts (*Dahlab, Refah Partisi*). However, this identification of threats leads the Court into highly problematic territory to which I now turn.

Rights-Focus and Assessment of the Substance of Religious Beliefs

As it has felt it necessary to seek justification for secularist state measures in rights terms, and as it can only intervene to require limits on state identification with a particular faith when such identification can be shown to be oppressive of fundamental rights, the Strasbourg Court has been led into offering assessments of the degree to which the beliefs or claims of particular faiths (usually Islam) are or are not compatible with fundamental rights.

This has meant that the Court has often been drawn into assessments of whether particular religious beliefs can be seen as compatible with values such as gender equality, democracy, privacy, human dignity etc. We see therefore that when it sought to justify the decision of the Turkish authorities to dissolve an Islamist political party in *Refah Partisi v Turkey*, the Court found it necessary to identify a threat to the rights of others in the political programme of the party in question. This led the Grand Chamber to argue (controversially) that sharia law is incompatible with democracy by virtue of its

⁵⁷ Ronan McCrea, *Secularism before the Strasbourg Court: Abstract Constitutional Principles as a Basis for Limiting Rights* 74(6) Mod.L. Rev. 79(4) 691, 700.

immutable nature and because it may violate human rights such as the prohibition of inhuman and degrading treatment (due to the criminal punishments it envisages), privacy rights (due to its regulation of the private and intimate sphere) and equality (due to its rules relating to the treatment of women).⁵⁸ In a similar vein, in *Dahlab v Switzerland*⁵⁹ and *Şahin v Turkey*⁶⁰ the Court made reference, as noted above, to the headscarf being a symbol that was hard to reconcile with gender equality. Such assessment of the substance of particular religious beliefs is highly dangerous territory for a court to enter into and, unsurprisingly, it has brought criticism (most often in relation to stereotyping of Islam and Sharia).⁶¹

The statements of the Court in cases such as *Refah Partisi*, *Dahlab* and *Şahin* have been heavily criticised on grounds that they essentialise Islam and Sharia and that they attribute a single meaning to the headscarf when it may be worn for a variety of reasons.⁶² It is also true that European institutions more generally may be guilty of adopting an un-justifiably uncritical assumption that adherents to Christian faiths accept the secular nature of the 'rules of the game' while subjecting Muslims to more rigorous testing of their secular bona fides.⁶³

However, the correctness of the court's analysis of Islam in these cases and the degree to which such statements can be problematic in the light of undoubted societal discrimination against Muslims in Europe, are important questions but they are not the focus of this paper. What is significant for our purposes is to think why the Court has entered into assessment of the substance of religious beliefs which so many courts studiously avoid and which its own Article 9 jurisprudence counsels against (the Court has repeatedly said in Article 9 cases that it is impermissible for the state to 'assess the legitimacy of religious beliefs').⁶⁴ While the Court is not assessing religious legitimacy or truth in these cases, it is offering particular interpretations of the beliefs of a faith (as task secular courts are

⁵⁸ [2003] ECHR 87, paragraph 123.

⁵⁹ *Supra*. note 6.

⁶⁰ *Ibid*.

⁶¹ See for example Carolyn Evans, *The Islamic Scarf in the European Court of Human Rights* (2006) 7 Melb. J. of Int. Law 52.

⁶² DOMINIC MCGOLDRICK, HUMAN RIGHTS AND RELIGION - THE ISLAMIC HEADSCARF DEBATE IN EUROPE, (2006).

⁶³ MCCREA, note 2 *supra* at ch. 6.

⁶⁴ See for instance, the statement in *Refah Partisi v Turkey* (*supra* note 4) at paragraph 91.

poorly equipped to carry out) and assessing whether such interpretations conform to human rights norms. The Strasbourg Court's dangerous forays into assessment of the compatibility of particular religious beliefs comes, I suggest, from the fact that, unlike the US Supreme Court, it is interpreting a text that lacks a non-establishment clause and that provides limited grounds for justifying state restrictions of fundamental rights largely on grounds other than the protection of other fundamental rights.

Summary: The Features of A Rights-Based Justification of Separation

These cases show us what separation which draws its justification from the need to protect fundamental rights and which has a limited capacity to draw justification from broader non-rights based goals looks like. Being very restricted in its ability to draw on broader constitutional principles, the ECtHR's version of separation is characterised by a very limited mandatory degree of separation (it precludes only oppressive entanglement) and pressure to engage in controversial assessments of the substance of religious beliefs in order to verify whether the religion in question may represent a threat to fundamental rights if given a significant public role.

The rights-centred approach of Strasbourg, as noted above, makes the ECtHR's jurisprudence a valuable tool for those interested in the question of what role rights can and cannot play in the justification of the principle of separation of religion and state. Denied the possibility of directly drawing on broader constitutional principles and goals in the way a national constitutional court could do, the Strasbourg Court can impose on States only the degree of separation required to prevent entanglement of state and religion from taking rather extreme forms that are actually oppressive of religious freedom. Even when it can take indirect account of such broader principles (in cases where States plead broader goals as justifications for policies restricting religious expression in particular contexts), the limited recognition of abstract or pragmatic political goals such as coexistence as valid grounds to restrict religious freedom in the text of Article 9 means that the Court has been drawn into seeking to identify threats to fundamental rights from particular faiths.

By providing a 'laboratory conditions' where issues of separation of religion and state can be examined through a fundamental rights lense with other broader constitutional principles largely excluded, the Strasbourg caselaw shows particularly clearly what work rights do and do not do in this area as well as the potential problems of according rights questions too much importance in our analysis of these issues as they arise in national legal orders that are not subject to the jurisdictional and textual limits of the ECtHR.

This is an important issue for US constitutional law. The First Amendment contains both a fundamental rights element (free exercise of religion) and an abstract constitutional principle (non-establishment) and the degree to which the latter relies on the former for its justification has not always been clear. In addition, some leading proponents of reading the First Amendment as imposing a stringent obligation of religious neutrality on the state have argued for this position on the basis that entanglement of religion and state violates fundamental rights, a position which the outcome of the fundamental rights focused rulings of the Strasbourg Court renders questionable.

US Approach: Entanglement v Right to Equal Treatment or Not to Feel Alienated

There has been an enormous volume of jurisprudence and scholarship in relation to the requirements and underlying rationale of the non-establishment clause of the First Amendment.⁶⁵ My purpose is to focus on one element of these debates, the use of rights as a justification for such separation and the negative consequences of such use for those who advocate maximal state neutrality in relation to religion. The first thing to note is that that US Supreme Court has, in general, mandated a far greater degree of separation than the ECtHR. It has held that states should not appear to symbolically endorse any particular faith and has, until recently at least, not required that a symbolic endorsement appear to be oppressive for it to be unconstitutional. It has also strengthened adherence to the principle that a distinction ought to be maintained between religion and law by requiring that legislation be justified by valid secular reasons as part of its overall view that the First Amendment precludes excessive “entanglement” of religion and state.

In the famous *Lemon* decision⁶⁶ the Court held that the First Amendment precluded the government from either advancing or hindering religion and rendered unconstitutional any measures involving excessive “entanglement” between government and religion. It justified this conclusion on the basis that political division along religious lines risked fragmentation and divisiveness and was one of the evils the First Amendment sought to prevent. Notably, this is a justification that relies not on showing violation of the rights of any individual but on a principle about how best to share a single set of political institutions in a religiously-diverse society. The “Lemon Test” has proved controversial but the view that separation draws much of its justification from pragmatic or prudential views on

⁶⁵ Some recent notable examples include Micah Schwartzmann, *What if Religion Is Not Special?* 79 U. CHI. L. REV. 1351 (2012). Sager and CHRISTOPHER L. EISGRUBER AND LAWRENCE G. SAGER RELIGIOUS FREEDOM AND THE CONSTITUTION (2010).

⁶⁶ *Lemon v Kurtzman* 403 U.S. 602 (1971).

the consequences of religious politics and not just from issues of individual rights can be seen at various stages through the years, notably in the concurring opinion of O'Connor J in *McCreary County v ACLU* where she invoked the conflict caused by failure to separate religion and state elsewhere in the world to justify restrictions on symbolic endorsement of religion by the state. She stated:

'At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish.[...] Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?'⁶⁷

On this view, failing to maintain separation of religion and state risks political instability and possibly violence. Characterising the aim of separation of religion and state in this way means it is unnecessary to investigate whether the religion alleged to have been endorsed by the state has beliefs that are or are not compatible with fundamental rights as it is the erosion of the boundary between religion and state per se, rather than (as in *Refah*) any rights-limiting ambitions of any particular faith that is problematic for the Court.

Focusing on the danger of religious politics rather than rights violations allows the Court to find even relatively trivial instances of state endorsement unconstitutional. In *Stone v Graham*⁶⁸ the Court found unconstitutional a Kentucky statute mandating the display of the Ten Commandments in public schools on the ground that it lacked a valid secular purpose. The Court made it clear that it was irrelevant that the presence of the commandments was not accompanied by obligations to participate in prayer or other religious activities, noting that 'it is no defence to urge that the religious practices here may be relatively minor encroachments on the First Amendment.'⁶⁹ In *Allegheny County v Greater Pittsburgh ACLU* Blackmun J noted that the test was "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices."⁷⁰ In these cases the court found that displays of religious symbols could be

⁶⁷ *McCreary County v ACLU* 545 US 833 (2005).

⁶⁸ *Stone v. Graham* 449 U.S. 39 (1980).

⁶⁹ *Ibid.*

unconstitutional if they were seen as endorsement of a religions by the state without needing to investigate whether such endorsement was oppressive of the religious freedom of others.

The Court has stressed that the test is not a rigid or absolute one and was willing to uphold a municipal nativity scene in *Lynch v Donnelly* on the grounds that, ‘whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental’ and that the authorities had ‘a secular purpose for including the crèche (...) [had] not impermissibly advanced religion, and (...) [did] not create excessive entanglement between religion and government.’⁷¹ But, even on occasions when religiously-specific displays have been upheld, this was justified the basis of a framework of analysis that saw non-establishment as having a justification relating to avoiding entanglement of religion and state that was, by itself, sufficient to trigger a finding of unconstitutionality without it being necessary to consider whether the non-establishment in question was in some way oppressive of fundamental rights such as religious freedom. On this approach, symbolic governmental endorsement of a religion that was oppressive of the religious freedom of others would certainly be unconstitutional, but non-oppressive endorsement would also be unconstitutional as it would ‘entangle’ religion and state and could lead to conflict between faiths for control of the governmental institutions which could engage in such endorsement. Such a view of the justification of the underlying justification of the First Amendment is contrast to the approach of the ECtHR in cases such as *Lautsi* where an oppressive effect of the symbolic endorsement had to be shown.

It should be noted that different judges and sometimes the same judge,⁷² have, at different times, offered differing justifications for an interpretation of the First Amendment that requires a maximal degree of state neutrality. There have been many critics who have argued that the whole approach of requiring neutrality is, in the US context, ahistorical and wrong in principle.⁷³ However, for my purposes I would like to focus not on those who oppose the idea of maximal state neutrality but on those who have argued in favour of separation on the basis of fundamental rights rather than non-rights based principles such as the imprudence of permitting religiously-based contestation for

⁷⁰ *Allegheny County v Greater Pittsburgh ACLU*, 492 U.S. 573 (1989)

⁷¹ *Lynch v Donnelly* 465 U.S. 668, Judgment of Burger CJ.

⁷² The approach of O’Connor J in *Lynch v Donnelly* (*ibid*) focused more on the sense of alienation that symbolic state endorsement of religion would cause in contrast to her invocation of the instability that may be caused by religious contestation for state power in *Allegheny County* (*ibid*).

⁷³ See, for example, the dissent of Scalia J in *McCreary County*, note 67 *supra*.

political power. I want to do so in order to show that rights-based arguments in favour of separation are flawed and ultimately undermine the cause of separation.

Rights-Based Defences of Non-Establishment

The idea that separation can be justified on the basis of an individual right has surfaced both in the caselaw and in leading academic defences of separation. In the same opinion in which she cited the dangers of political instability and violence in finding the display of the Ten Commandments in a courthouse was unconstitutional (*McCreary County*) O'Connor J went on to link the idea of separation to individual rights and religious freedom saying:

'When we enforce these restrictions, we do so for the same reason that guided the Framers—respect for religion's special role in society. Our Founders conceived of a Republic receptive to voluntary religious expression, and provided for the possibility of judicial intervention when government action threatens or impedes such expression. Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices. When the government associates one set of religious beliefs with the state and identifies non-adherents as outsiders, it encroaches upon the individual's decision about whether and how to worship'.⁷⁴

It may be that some degree of separation is required both by the pragmatic aim of avoiding intractable political conflict and the aim of protecting freedom of religion. However, as the ECtHR jurisprudence shows, very different levels of separation will be required by each aim. Remember that in *McCreary County* the governmental action which O'Connor J found unconstitutional was the display of the Ten Commandments in a courthouse. This may cause non-Christians to feel like outsiders but it is difficult to see how it would meaningfully interfere with their "decision about how and whether to worship" anymore than Government endorsement of the goal of a clean environment affects the ability of an individual to hold views or organize campaigns that reject the idea of government regulation of industry. Indeed, given the significant legal protection for freedom of religion that exists in the United States,⁷⁵ the likelihood that an individual would be forced to change her beliefs because of the display of such a sign in a courthouse must be even lower.

O'Connor J's concern about citizens feeling themselves to be religious outsiders (which appears to have much in common with Laws LJ's worries, in the British context, about people being "less than

⁷⁴ note 67 *supra*. opinion of O'Connor J.

⁷⁵ Most notably the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993).

full citizens” or being “left out in the cold”) is also seen in her opinion in *Lynch v Donnelly* where she argued that symbolic endorsement is unconstitutional on the basis that “sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community”.⁷⁶ One can also see Blackmun J’s statement in *Allegheny County* as sourcing the duty of neutrality in an individual right not to have the state express “disapproval” of one’s religious choices.

This individual and rights-focused approach has been strengthened by the academic works of leading American constitutional theorists who favour separation of religion and state. Dworkin’s recent work argues for separation of religion and state on the basis of a general right to ethical independence held by all individuals and by the duty of the state to treat all its citizens with equal concern and respect.⁷⁷ For Dworkin, symbolic endorsement of a faith by the state fails to demonstrate equal concern and respect towards citizens who do not share that faith. Other leading pro-separation such as Sager and Eisgruber (who characterise establishment of a faith as creating classes of outsiders and as involving disparagement of those who do not share that faith)⁷⁸ and Nussbaum⁷⁹ have similarly sought to justify prohibitions on any symbolic endorsement of a faith by the state on grounds of the potential hurt feelings or sense of exclusion that an individual of a minority faith may feel if they see symbolic association of the state with a particular faith.

Though such an approach appears to mandate maximal symbolic neutrality, it ultimately undermines the case for such neutrality the separation of church and state by locating its justification in a rights claim that is weak. As Laborde has pointed out, hurt feelings or a sense that the state does not share one’s values are inevitable parts of democratic life.⁸⁰ Indeed, those who believe in rigid gender roles, racial inequality, dictatorship, parliamentary government or pacifism will all feel alienated by the US constitution or the symbols of the US government. Nussbaum’s assertion that ‘the careful neutrality that a liberal state should observe in matters of religious and comprehensive doctrine does not extend to the fundamentals of its own conception’⁸¹ does not answer the question of why such

⁷⁶ *Lynch v. Donnelly*, 465 US 688.

⁷⁷ Note 15 *supra*.

⁷⁸ Note 16 *supra*.at 52.

⁷⁹ Note 17 *supra*.at 5-7.

⁸⁰ Cecile Laborde, *Equal Liberty, Nonestablishment and Religious Freedom*, *LEGAL THEORY* 2014 1 at 21-22.

⁸¹ *Supra* note 79 at 7.

fundamentals may not be religious in nature when religious norms may be liberal and when non-religious fundamentals may be as deeply felt and may produce equal levels of alienation from those who do not share them. Nagel (amongst others) argues that,⁸² ‘disagreements about justice are just as fierce disputes and intractable as disagreements about religion’. Indeed, the world provides many examples of instances where other forms of cleavage, such as language in Belgium or national identity in Northern Ireland, have been sufficiently deep and intractable that the political system requires that such disputes be parked and that state institutions remain “neutral” on these divides.

More importantly for our purposes, none of these theorists shown why there should be a right to have the state avoid expressing disagreement with your religious (or other beliefs) or why expression on the part of a state of religious belief amounts to a violation of a right to equality (or any other recognised fundamental right). States embrace a range of beliefs and values such as gender equality, racial equality, rejection of monarchy or freedom of religion that may be alienating to some who hold different views. There is no recognised human right not to feel alienated, not to hear particular kinds of arguments in political life or not to see particular symbols in state contexts. As the result in *Lautsi* showed, to rise to the level of actual threats to fundamental rights, symbolic links on the part of the state to a particular faith need to be sufficiently intense to become oppressive of a recognised right such as freedom of religion or parental autonomy in relation to the upbringing of children.

The dangers in a rights-focused approach for those who favour separation is seen in the recent case of *Town of Greece v Galloway*.⁸³ In this case, Kennedy J, writing for the majority, articulated a test for regulating prayer in state contexts that moves closer to the focus on oppression seen in *Lautsi*, *Dimitras* and *Buscarini* and away from the idea of avoiding any (even slight) entanglement. In my view this is not the correct approach but is a logical conclusion of the growth in the academic and judicial focus on non-establishment as a matter of rights. In this case the majority upheld the practice of opening meetings of the town council with a sectarian prayer (in practice almost always Christian). Kennedy J adopted an approach that identified the test for constitutionality as one focused on ‘impermissible coercion’. He argued that ‘legislative bodies do not engage in impermissible coercion by merely exposing constituents to prayer they would rather not hear and in which they need not participate’. Only if the prayers ‘denigrate nonbelievers or religious minorities,

⁸² Thomas Nagel, *Right and Wrong: The Writings of John Rawls* in THOMAS NAGEL, CONCEALMENT AND EXPOSURE AND OTHER ESSAYS (2002) at 84.

⁸³ 572 US ___(2014)

threaten damnation, or preach conversion' or if the prayer giver were chosen in a discriminatory way, might they become unconstitutional.⁸⁴

Although this approach was heavily criticised by advocates of separation, if the main justification for the religious neutrality of the State is to protect individual rights, then Kennedy J is correct. There is no fundamental individual right under the US Constitution not to be confronted in public life with statements or symbols with which one disagrees. Once coercion that might impinge on a protected right such as free speech or freedom of religion is not shown, no fundamental rights have been violated by a brief voluntary prayer, therefore such prayer is constitutional. By making individual rights central to debate on the requirement of the religious neutrality of the separationists such as Dworkin and Nussbaum have moved the legal argument onto a terrain which is highly unfavourable to their goals. This is where the European example is particularly instructive. If *Town of Greece* were a European case, say taken by an individual against Orthodox prayers before a municipal meeting in the country of Greece, the applicant would lose. The similarity of Kennedy J's analysis to that of the ECtHR Grand Chamber in *Lautsi* is striking. The Strasbourg Court upheld the presence of the 'passive symbol' of the crucifix in classrooms noting that it was not accompanied by proselytism or denigration of other faiths⁸⁵ just as Kennedy J had noted the absence of proselytising or denigration of minority faiths in *Town of Greece*. Strasbourg was right to approach the decision in *Lautsi* on the basis that it is a court whose mission is to protect rights. As it interprets a charter that lacks a non-establishment clause, the ECtHR found that it could reject claims based on non-oppressive symbolic endorsement of a faith by the state. However, the same is not true of the United States where the Constitution has a broader remit than fundamental rights protection and where there is an explicit non-establishment clause. Kennedy J is wrong in the US for the reasons that he would have been right in Europe. His judgement in *Town of Greece* and the rights-focused arguments of Dworkin, Nussbaum and others seek to use ideas of rights to justify what is best justified on grounds other than rights.

The Weakness Rights as Justifications for the Secular Nature of the State

Rights, therefore provide limited support to the fundamental pillars of the secular state: the requirements that laws be justified by secular public reasons and that the state not endorse any particular faith. Laborde's critique of Dworkin is correct in suggesting that there is no fundamental right to not to have the state express disagreement with your views or not to hear particular

⁸⁴ *Ibid.* at 15.

⁸⁵ *Supra* note 7, paragraphs 71-74.

arguments in political debate. Fundamental rights only come in when the degree of identification by the state with a faith becomes oppressive of rights that are recognised such as freedom of thought, conscience and religion. As Ahdar and Leigh rightly argue⁸⁶ and as the caselaw of the ECtHR suggests, whether or not it is fair or desirable, mild establishment of a particular faith is compatible with religious liberty. This is not to say that the ‘wall of separation’ should be torn down. As sectarian strife in Syria, Iraq and elsewhere shows, there may be very strong, non-rights based reasons for such a wall. Most of these reasons rely on the idea that religion is disruptive of political cooperation to a greater degree than other forms of cleavage. For those who hold this view (which has been disputed by figures such as Armstrong and Cavanaugh),⁸⁷ if politics are religiously-influenced or if a faith has the prospect of using the state to promote its interests political cooperation and the assent of minorities to majority decisions are likely to be imperilled. Accordingly, religion should be kept separate from politics and the state to avoid intractable political division, and the instability and violence it may bring.⁸⁸

We therefore come back to prudential or pragmatic justifications for separation. Justifications that draw on the historical development of the idea of secular politics which, as Mark Lilla’s great work *The Stillborn God* shows,⁸⁹ a reaction to the destructiveness of religious contestation for political power. This approach has some support in the work of Rawls in that he also acknowledged that separation began as a modus vivendi to limit the conflict caused by religious contestation for political power (though he suggested, less convincingly to my mind, that it had developed into an ethical principle that it is illegitimate for the state to legislatively promote particular conceptions of the good).⁹⁰ Maximal separation in the West therefore can also be justified not by rights claims but by the fact that predominant forms of religion in Western states combine a number of factors that make religion particularly destabilising politically. In other words, because religion is identity as well as

⁸⁶ Note 29 *supra*.

⁸⁷ KAREN ARMSTRONG, *FIELDS OF BLOOD: RELIGION AND THE HISTORY OF VIOLENCE* (2014), WILLIAM T. CAVANAUGH, *THE MYTH OF RELIGIOUS VIOLENCE: SECULAR IDEOLOGY AND THE ROOTS OF MODERN CONFLICT* (2009).

⁸⁸ Those with liberal views on matters such as gender and sexuality may also wish to prevent religious politics in order to impede the ability of religious conservatives from enshrining restrictive or discriminatory norms in law but such a justification cannot serve as a basis for secularism as it appeals only to those who hold substantive liberal views in the first place.

⁸⁹ MARK LILLA, *THE STILLBORN GOD: RELIGION, POLITICS AND THE MODERN WEST* (2007).

⁹⁰ JOHN RAWLS *THEORY OF JUSTICE* (1971).

belief, because such identity is usually fixed, because it often seeks to regulate all areas of life and because its reasoning is often relatively inaccessible to those outside the faith, it is particularly politically destabilising in a way in which other forms of identity or belief that lack this combination of factors are not.⁹¹

Viewed in this way, trivial instances of state endorsement of a faith in a school are not problematic because they violate the rights of students or parents but because they risk competition amongst religious groups to control the education system in order to use it to promote their faith. Similarly, using religious arguments in law-making is problematic not because the majorities cannot force people to take or refrain from particular actions (this happens regularly for non-religious reasons). Instead it is to be avoided because it undermines the ethic of citizenship, represents a failure to internalize the legitimacy and permanence of religious difference and undermines the idea of the law-making arena as a place where we make an effort to transcend religious differences thus undermining the incentives for political minorities to accept the legislative verdicts of a religious majority. Allowing a particular faith to play a symbolic or other role in state bodies, in other words, undermines the ability of such institutions to institutionalise cooperation amongst a population of diverse religious views and identities. Indeed, many who favour granting religion a broad social role reject the idea of state establishment of faith on the basis that connection to the state risks sapping the vitality or imperilling the religious freedom of the faith so established.⁹² A full defense of such principles would require a monograph so it is not my intention to set out the full case in favour of separation here but rather to show that such non-rights justifications exist and that they do not suffer from the inherent inability to control minor violations of state neutrality that apply to rights-based justifications.

⁹¹ Cecile Laborde provides a useful disaggregation of reasons that religious politics may be in tension with the liberal state in her forthcoming work *LIBERALISM'S RELIGION* (forthcoming, Harvard University Press). It should also be noted that there may be individual forms of religion that lack the destabilising characteristics that motivate the decision to seek to separate religion from politics and the state. However, the mechanism chosen to allow such separation to coexist with continued religious belief amongst the citizenry depends on a refusal to look at the content of religious beliefs in determining their admissibility as reasons justifying legal or political acts but focusing only on the fact that the relevant beliefs fall within the category of religion. Such an approach permits the cognitive dissonance that permits individuals, for example to vote in favour of legal toleration of that which may be religiously forbidden without abandoning their religious identity. Full treatment of this argument and the question of the definition of religion are beyond the scope of this paper.

⁹² R Stark and LR Iannaccone, 'A supply-side reinterpretation of the "secularization" of Europe' (1994) 33(3) *Journal for the Scientific Study of Religion* 230.

Conclusion

The jurisprudence of a rights court such as the ECtHR which deals with issues of freedom of religion and the separation of religion and state in the absence of a non-establishment clause can provide a useful perspective for the USSC on the true goals underpinning the non-establishment part of the First Amendment. This lesson is that rights-based justifications for non-establishment are weak and ultimately (as in *Town of Greece*) undermine the principle of non-establishment.

One of the valuable features of US jurisprudence (no doubt linked to presence of a non-establishment clause) is the absence of judicial opining on the compatibility of the substance of the beliefs of particular religious traditions with liberal democracy. The ECtHR has been right to see that religion taking over the state can be oppressive and to state that secularism is a principle which is in line with the democratic and liberal values of the ECHR. Post-*Lautsi*, it is also clear that the Court recognises that, given its narrow, rights-focused mandate, mild non-oppressive forms of establishment, whether or not they are desirable (or wise in a diversifying religious context) are not for the Court to disturb.

At the same time, the Strasbourg Court must develop tools to allow its rights-focused approach to take adequate account of the non-rights based but legitimate reasons which may underpin restrictions on religious expression in particular contexts in order to preserve the religious neutrality of the state. Moreover, it needs to do so in ways that avoid the kind of pronouncements on the substantive beliefs of particular faiths that were seen in *Refah, Shahin* and *Dahlab*. Therefore rather than identifying the Islamic headscarf as hard to reconcile with gender equality as it did in *Dahlab*, it could restrict itself to noting that a desire to have a school system characterised by religious neutrality is legitimate. There are some positive signs in this regard. In *SAS v France* (which, it should be noted, related to an extreme religious symbol in social life rather than the relationship between religion and the state) the Court managed to avoid attributing particular meanings to the Islamic face-veil and instead upheld the French prohibition on the public wearing of such garments on the basis that the State had the power 'secure the conditions whereby individuals can live together in their diversity'.⁹³ The decision in *Ebrahimian v France* was also notable for its lack of any statements by the judges attributing particular meanings to the headscarf. The *Ebrahimian* judgment also appeared give scope to states to pursue policies such as French-style state secularism whose aims are not solely rights based but also seek to promote coexistence and political stability by setting

⁹³ [2014] ECHR 695, paragraph 141.

down rules that aim to allow a religiously-diverse population to share a single set of state institutions.⁹⁴

In both *SAS* and *Ebrahimian* the majority decision was criticised by the dissenting judges on the basis that recognising abstract principles risked allowing restriction of religious freedom on grounds that are overly vague⁹⁵ and in *Ebrahimian* the court appears not to have been fully upfront about the fact that it was in fact allowing abstract principles to restrict fundamental rights. Other critics have rightly noted the danger for minority rights of allowing fundamental rights to be restricted on grounds other than protecting rights and freedoms.⁹⁶ The dissenting judges are right that the majority's reading of this term is strained. However, it is necessary to consider whether any other approach is possible.⁹⁷ Whether the approach of the French authorities in this case was or was not proportionate, our life together is about more than the rights that we hold against each other and, as noted above, there are important principles that underpin liberal democratic life that are very imperfectly translated into rights terms. There are non-rights factors that rights-protecting courts must be free to take into account. Advocates of strict separation in the US would do well to take note of the European experience. Unlike those who litigate on the basis of the European Convention on Human Rights, US lawyers have in their Constitution a document whose interpretation can go beyond issues of rights and may therefore provide a much sounder basis for judicial protection of maximal state neutrality than the rights-based arguments that have been so prominent in recent times.

⁹⁴ It should be noted that other states pursue the same goals by different means which are less restrictive of religious expression in state contexts.

⁹⁵ See joint partly dissenting opinion of Judges Nussberger and Jäderblom note 93 *supra*.

⁹⁶ See Eva Brems *SAS v France as Problematic Precedent*, STRASBOURG OBSERVERS (Blog), 9 July 2014 (available at: <http://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/#more-2495> last accessed 2 June 2015).

⁹⁷ See Ronan McCrea, *The French ban on public face-veiling: enlarging the margin of appreciation*, EU LAW ANALYSIS (Blog) (available at <http://eulawanalysis.blogspot.it/2014/07/the-french-ban-on-public-face-veiling.html>, 2 July 2014, last accessed 2 June 2015).