



Notre Dame Law Review

Volume 90 | Issue 1

Article 10

11-2014

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Recommended Citation

90 Notre Dame L. Rev. 419 (2014)

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LABOR IN FAITH: A COMPARATIVE ANALYSIS OF
HOSANNA-TABOR V. EEOC THROUGH THE
EUROPEAN COURT OF HUMAN RIGHTS'
RELIGIOUS EMPLOYER JURISPRUDENCE

Francesca M. Genova*

*Who so upon him selfe will take the skill
True Justice unto people to divide,
Had neede have mightie hands, for to fulfill
That, which he doth with righteous doome decide,
And for to maister wrong and puissant pride.*¹

INTRODUCTION

The United States Supreme Court and the European Court of Human Rights recently have decided cases about religious organizations' freedom to decide whom they employ, underscoring this question's vitality and complexity. Absent here are the cultural complications present in more contentious religious rulings. Some of Europe's oldest established religions have found their employment decisions scrutinized at the European Court of Human Rights (ECtHR or European Court).² In the United States, meanwhile, a

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1 EDMUND SPENSER, *THE FAERIE QUEENE*, bk. V, Canto IV, at 40 (Alfred B. Gough ed., Oxford Univ. Press 1932) (1590).

2 Granted, many of these established religions' practical influence has declined. While 73.4% of Spaniards considered themselves Catholic in 2012, only 13.6% claimed that they "practice their faith and attend services on Sunday and holy days." *Only 13 Percent of Spain's Catholics Say They Practice Faith*, CATHOLIC NEWS AGENCY (Jan. 13, 2012, 6:05 PM), <http://www.catholicnewsagency.com/news/only-13-percent-of-spains-catholics-say-they-practice-faith/>. In 2012, 5% of the population in the European Union mentioned religion as one of the most important values. EUROPEAN COMM'N, *STANDARD EUROBAROMETER 77: THE VALUES OF EUROPEANS 9* (Spring 2012), available at http://ec.europa.eu/public_opinion/archives/eb/eb77/eb77_value_en.pdf. The population of the European Union valued human rights (at 43%), respect for human life (at 43%), and peace (at 40%) as the most important personal values for the European Union. *Id.* Following behind at 28% was democracy, then at 23% individual freedom. *Id.* In this ranking, equality, solidar-

Lutheran school was the Supreme Court's subject.³ European Court cases have involved the Protestant and Catholic churches in Germany, known as the "big Churches,"⁴ and the Catholic Church in Spain, which brought Catholicism to the Americas.⁵ Only the Church of Jesus Christ of Latter-day Saints, with 38,992 members in Germany currently, is relatively new to its host country.⁶

ity, and tolerance occupied the middle fourth of values, while self-fulfillment, respect for other cultures, and religion were the bottom three values ranked, in order. *Id.* While the European Union and the Council of Europe, the organization associated with the European Court of Human Rights, are distinct entities, these statistics provide insight into the values that may animate the European Court of Human Rights, as it sees itself as a part of current European discourse.

In the United States, 27% of Catholics consider themselves "strong Catholics," while 54% of Protestants describe themselves as having a "strong" religious identity. *Strong Catholic Identity at a Four-Decade Low in U.S.*, PEW RESEARCH RELIGION & PUB. LIFE PROJECT (Mar. 13, 2013), <http://www.pewforum.org/2013/03/13/strong-catholic-identity-at-a-four-decade-low-in-us/>. For more information, including regarding church attendance and methodology of the survey, see *id.*

3 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

4 *Schüth v. Germany*, App. No. 1620/03, ¶ 30 (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100469>. The Catholic Church has about 24.9 million members in Germany, while the Protestant Church of Germany counts roughly 24.5 million members. The two churches in Germany employ more than one million people, particularly through charities: their two respective main charities, Caritas and Diakonie, employ respectively roughly 500,000 and 450,000 persons. *Id.* ¶ 31.

5 See Sharon M. Hannon, *Birth of a New World Religion*, PUB. BROAD. SERV., <http://web.archive.org/web/20140329131208/http://www.pbs.org/kcet/when-worlds-collide/essays/birth-of-a-new-world-religion.html> (last visited Sept. 23, 2014) (detailing the Spanish conversion of indigenous populations in the Americas). The internationally controversial issues of religious freedom in the European Court of Human Rights involve religions professed by migrant communities. Many issues have concerned legislation that largely affects Muslim practices, including the minaret ban in Switzerland and the head covering ban in France. A number of commentators have addressed these topics in detail. The religious employment cases deal with Christian denominations, oftentimes historically majority religions in their host countries; consequently, this Note's analysis can avoid delving into this complex area of jurisprudence. See Kathryn Boustead, *The French Headscarf Law Before the European Court of Human Rights*, 16 J. TRANSNAT'L L. & POL'Y 167 (2007) (detailing the prohibition of headscarves in France); Stefanie Walterick, *The Prohibition of Muslim Headscarves from French Public Schools and Controversies Surrounding the Hijab in the Western World*, 20 TEMP. INT'L & COMP. L.J. 251 (2006) (discussing the French secular ideal of *laïcité* and religious apparel restrictions in the United States); Urs Geiser, *Legal Move Against Minaret Ban Thrown Out*, SWISS BROAD. CORP. (July 8, 2011, 12:52 PM), http://www.swissinfo.ch/eng/politics/Legal_move_against_minaret_ban_thrown_out.html?cid=30640398 (reporting that the European Court declared the appeals against the minaret ban inadmissible because the applicants had not planned on building a minaret-bearing mosque in the near future).

6 *Facts and Statistics*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <http://www.mormonnewsroom.org/facts-and-statistics/country/germany/> (last visited Sept. 23, 2014).

While any analysis must respect differences in the two courts' structures, scopes, purposes, cultural sensibilities, and philosophical backgrounds,⁷ a comparison elucidates the strengths and potential weaknesses of American jurisprudence.⁸ Both courts are constitutional in nature: the Supreme Court interprets its Constitution, and the European Court of Human Rights largely treats its role in applying the European Convention on Human Rights⁹ (the European Convention or the Convention) as a constitutional one.¹⁰ Indeed, some have argued that the European Court has developed "an American-style body of constitutional law, comparable in its level of ambition."¹¹

The U.S. Constitution and the European Convention historically left religious freedom to the states.¹² The European Court previously gave states, which have diverse religious affiliations, broad deference for religious issues before adopting its current, stricter jurisprudence.¹³ In the United States' first 150 years under the Constitution, the states reserved power over relig-

7 Not least the way the Courts see themselves—the European Court refers to itself as “the conscience of Europe,” whereas some members of the Supreme Court often advocate that moral questions not specifically embodied in the Constitution should be left to the political branches. EUROPEAN COURT OF HUMAN RIGHTS, *THE CONSCIENCE OF EUROPE* (2010); Mark Schliebs, *Antonin Scalia Shoots from the Hip on ‘Undemocratic’ European Union*, *THE AUSTRALIAN* (Feb. 4, 2011, 12:00 AM), <http://www.theaustralian.com.au/business/legal-affairs/antonin-scalia-shoots-from-the-hip-on-undemocratic-european-union/story-e6frg97x-1225999732107> (quoting Justice Scalia as criticizing the ECtHR because “[i]t is a prescription for the elimination of democracy to establish a court that is to provide binding and authoritative answers” to “controversial topics on which domestic elections are won or lost”).

8 The inverse analysis is done for Europe: in the European Court of Human Rights' Grand Chamber appeal of *Fernández Martínez v. Spain*, a third party cites *Hosanna-Tabor v. Equal Opportunity Employment Commission* as an example of jurisprudence concerning religious communities' autonomy that the European Court of Human Rights should follow, highlighting the importance of this comparison. *Fernández Martínez v. Spain* [GC] (*Fernández Martínez I*), App. No. 56030/07, ¶ 101 (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145068>.

9 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *Convention*].

10 Alec Stone Sweet & Helen Keller, *The Reception of the ECHR in National Legal Order*, in *A EUROPE OF RIGHTS* 3, 7 (Helen Keller & Alec Stone Sweet eds., 2008).

11 MICHAEL D. GOLDBABER, *A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS* 1 (2007). Additionally, both may look to international jurisprudence in their own rulings, although the United States is more averse to using international law because of its “anti-democratic” nature. See MAGDALENA FOROWICZ, *THE RECEPTION OF INTERNATIONAL LAW IN THE EUROPEAN COURT OF HUMAN RIGHTS* (2010) (examining the use of international law in the ECtHR); Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 *MICH. J. INT'L L.* 1, 3 (1992) (detailing the use of international law in American jurisprudence).

12 Andrea Pin, *(European) Stars or (American) Stripes: Are the European Court of Human Rights' Neutrality and the Supreme Court's Wall of Separation One and the Same?*, 85 *ST. JOHN'S L. REV.* 627, 647 (2011).

13 *Id.* at 647. For example, the United Kingdom has an established church, Ireland mentions the Holy Trinity in its Constitution, Greece maintains the Orthodox Church as its official religion, and Norway officially is Lutheran. *Id.* at 639.

ious liberty determinations.¹⁴ Established religions existed in seven states at the time of the First Amendment's ratification and their vestiges remained into the 19th century.¹⁵ Only in 1947, twelve years before the European Court started operation, did the Supreme Court incorporate the Fourteenth Amendment Due Process Clause with the First Amendment religion clauses to unify these principles nationally.¹⁶

This Note uses the European Court of Human Rights' framework to analyze the Supreme Court's decision in *Hosanna-Tabor v. Equal Employment Opportunity Commission*, which recognizes a "ministerial exception" for religious organizations as a defense to certain employment claims.¹⁷ It argues that the unanimous Supreme Court in *Hosanna-Tabor* examines factors similar to those of its European counterpart, but protects religious liberties more robustly by avoiding some of the European Court's preoccupations.¹⁸ Yet, the European Court's assessment anticipates the difficulties of applying the "ministerial exception" in future cases.

Part I of this Note compares the European Court of Human Rights and the Supreme Court, focusing on the courts' preliminary interpretive principles, to contextualize the two courts' decisions. Part II analyzes four recent European Court cases involving religious organizations that terminate or fail to renew an employee's contract for violations of religious tenets. It enumerates seven factors used by the ECtHR in determining whether a national court adequately has balanced the rights of employees and religious employers.¹⁹ Four factors consider the religious employer: (1) the alignment of the religious employer's asserted value with the host country's laws and society, (2) the belief's centrality in the employer's religious system, (3) the importance of the individual's position to the religious institution's affairs and image, and (4) the reasonableness of the employer's concern that the employee's actions harmed its credibility.²⁰ Three factors address the employee: (1) the employee's awareness that his or her actions would upset his or her religious employer, (2) the employee's role in exposing his or her problematic conduct to the employer, and (3) the consequences of dismissal on the employee's career.²¹

Part III analyzes how the Supreme Court's jurisprudence in *Hosanna-Tabor v. EEOC* converges with and diverges from that of the European Court. It argues that the United States' lack of a right to work allows the Supreme

14 JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 110 (3d ed. 2011).

15 *Id.* at 57–58.

16 *Id.* at 110; EUROPEAN COURT OF HUMAN RIGHTS, THE COURT IN BRIEF 2, http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (last visited Sept. 23, 2014).

17 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012). Who qualifies as a "minister" is an open issue for the Court. For an analysis of this issue, see *infra* Part III.

18 See *infra* Part III.

19 See *infra* Section II.B.

20 See *infra* subsection II.B.1.

21 See *infra* subsection II.B.2.

Court to defer more to religious organizations' decisions. The European Court decides cases with the background principle that an employee has a right to an occupation.²² The Supreme Court, however, more easily protects religious freedom because it does not recognize the countervailing right to work. Part III also argues that religious organizations' autonomy has become a part of the legal heritage of the United States. So, even an analysis regarding common beliefs similar to the European Court's and in line with *Employment Division v. Smith*²³ favors the "ministerial exception." The United States' refusal to decide which tenets are valuable to a religion also protects religious employers more broadly than does the European Court's analysis. Part IV concludes by affirming the benefits of *Hosanna-Tabor* as compared to the European Court of Human Rights' jurisprudence.

I. THE EUROPEAN COURT OF HUMAN RIGHTS AND THE SUPREME COURT

A. *Religious Freedom in the European Court of Human Rights' Jurisprudence Compared to American Jurisprudence*

Article 9 of the European Convention on Human Rights defines religious freedom under the heading, "[f]reedom of thought, conscience and religion."²⁴ Article 9 states: "[e]veryone 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."²⁵ As is common in international instruments, a qualifying provision stipulates that this freedom is "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."²⁶ Religious rights are not absolute. The ECtHR has stated that autonomy of religious communities "is indispensable for pluralism in a democratic society, and is at the heart of the protection afforded by Article 9," but religious freedom is an individual right that only extends to groups when combined with the freedom of association under Article 11.²⁷

Freedom of religion in the United States, meanwhile, is enshrined in the First Amendment of the Constitution: "Congress shall make no law respect-

22 Virginia Mantouvalou, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, 13 HUM. RTS. L. REV. 529, 536 (2013).

23 494 U.S. 872 (1990).

24 Convention, *supra* note 9, art. 9.

25 *Id.* art. 9, § 1.

26 *Id.* art. 9, § 2.

27 *Siebenhaar v. Germany*, App. No. 18136/02, ¶ 41 (Eur. Ct. H.R. 2011), translated in *Siebenhaar v. Germany – Chamber Judgment*, STRASBOURG CONSORTIUM, <http://www.strasbourgconsortium.org/common/document.view.php?docId=5201> (last visited Oct. 23, 2014).

ing an establishment of religion, or prohibiting the free exercise thereof.”²⁸ Additionally, many legislative acts in the United States protect religion to a greater extent than the courts have ruled that the Constitution does, and can preempt the need to decide a constitutional question. Congress and the executive oftentimes will create a religious exception when they recognize that a law or regulation needs one to retain its constitutionality or legality, desire to avoid an issue even where it may be constitutionally allowed, or want to provide a heightened level of protection in response to court decisions holding that the Constitution does not extend so broadly.²⁹

28 U.S. CONST. amend. I. For a historical account of these clauses from their conception until modern day, see WITTE & NICHOLS, *supra* note 14.

29 An example of such an administrative exemption concerns the much-discussed Department of Health and Human Services contraceptive mandate, which allows for “religious employer[s],” primarily understood to be “houses of worship,” to be exempted from providing contraception coverage in health insurance to their employees. Press Release, Administration Issues Final Rules on Contraception Coverage and Religious Organizations, U.S. DEP’T OF HEALTH & HUMAN SERVS. (June 28, 2013), <http://www.hhs.gov/news/press/2013pres/06/20130628a.html>.

Another example of legislative protection is the response to the Supreme Court’s decision in *Employment Division v. Smith*, in which the Court held that the ritual use of peyote could be outlawed criminally. 494 U.S. 872, 886 (1990). The Court reasoned that “generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest.” *Id.* at 886 n.3. Although the majority opinion claimed that it was in line with precedent, this decision was seen as “thr[owing] away decades of precedent and water[ing] down the religious liberty of all Americans.” Opinion, *Congress Defends Religious Freedom*, N.Y. TIMES, Oct. 25, 1993, <http://www.nytimes.com/1993/10/25/opinion/congress-defends-religious-freedom.html>. Indeed, many, including Justice O’Connor, believed that the Court was rejecting the previous rule that the government “justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.” *Smith*, 494 U.S. at 894 (O’Connor, J., concurring in the judgment). In response, Congress passed the Religious Freedom Restoration Act, enacted in 1993, which attempted to correct the perceived change and currently still governs federal action. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (2012) (RFRA). Its application to state law was declared unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Another example of a statutory protection is the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2012), implemented in 2000. Some commentators have expressed dissatisfaction at this solution, as it makes such protection statutory—susceptible to legislative change in the future—rather than constitutional. See W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism and the Transformative Dimension of Religious Institutions*, 1993 BYU L. REV. 421, 447 (stating, regarding the impending passage of RFRA, the concern that “prevailing on a statutory RFRA claim will not have the same symbolic significance that vindication of a constitutional claim has long carried” and that “as with any statute, there is a practical risk that particular protections may be eroded by subsequent legislative enactments”).

The European Court of Human Rights also has used *Smith’s* line of reasoning, including in two cases that upheld Greece’s requirement that secondary school students participate in a parade commemorating the start of war between Germany and Italy in the 1940s. Boustead, *supra* note 5, at 175–76. Critiques of this ECtHR policy echo one of the criticisms against *Employment Division v. Smith*: “by declaring neutral laws incapable of causing

B. *The European Court of Human Rights in Relation to the Supreme Court*

The European Court of Human Rights has been called “the single most important rights-protecting tribunal in the world.”³⁰ In the states parties to the Convention, which may be brought before the Court, “there is no aspect of national affairs which can be said to be without implications for one or other of the rights protected by the Convention, [thus] there is no matter of domestic law and policy which may not eventually reach the European Court.”³¹ Its judgments are binding on the states parties to the Convention, but require state implementation.³² While the Convention contains substantive rights, the European Court “has been reluctant to explicitly pronounce” that a national law’s substance violates the Convention; rather, it “confines itself to finding fault” in national courts’ “application or interpretation” of it, allowing countries broad latitude in determining the appropriate remedy.³³

Chambers of seven judges, which may decide admissibility, render judgment on the merits.³⁴ In certain circumstances, a Grand Chamber of seventeen judges, a limited appellate court, reviews cases de novo.³⁵ The European Court only accepts cases that have exhausted the remedies processes in their states, functioning more like a court of final appeal than an international tribunal.³⁶ State compliance rates are high, leading to the con-

interference [with religious belief], the [ECtHR] indirectly protects mainstream religions over minorities.” *Id.* at 176. While a comparison between the neutrality doctrines promulgated by the Supreme Court in *Smith* and the European Court of Human Rights would elucidate American jurisprudence, it is outside the scope of this Note, as the cases analyzed largely do not concern laws of general applicability that limit religion, but rather instances where religious deference may impinge employees’ rights. For an analysis of *Smith* in the context of religious garb like the subject of French prohibition, see Walterick, *supra* note 5, at 263–69.

30 Dia Anagnostou, *Untangling the Domestic Implementation of the European Court of Human Rights’ Judgments*, in *THE EUROPEAN COURT OF HUMAN RIGHTS* 1, 1 (Dia Anagnostou ed., 2013). For analyses of states’ application of ECtHR judgments, see *THE EUROPEAN COURT OF HUMAN RIGHTS*, *supra* (examining Germany, Italy, Romania, Austria, Bulgaria, Greece, Turkey, and the United Kingdom), and *A EUROPE OF RIGHTS*, *supra* note 10 (analyzing the reception process in Ireland, the United Kingdom, France, Germany, Sweden, Norway, the Netherlands, Belgium, Austria, Switzerland, Spain, Italy, Greece, Turkey, Poland, Slovakia, Russia, and Ukraine).

31 J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 9 (2d ed. 1993).

32 See COUNCIL OF EUROPE, *THE EUROPEAN COURT OF HUMAN RIGHTS IN FACTS AND FIGURES* 8 (2010).

33 Anagnostou, *supra* note 30, at 7.

34 Convention, *supra* note 9, arts. 26, 29.

35 *Id.* arts. 26, 30. These circumstances arise when cases “raise[] a serious question affecting the interpretation of the Convention or the Protocols thereto,” have judgments that may be inconsistent with prior judgments, or are given to the Grand Chamber by the Chamber before it has rendered the judgment. *Id.* art. 30.

36 Anagnostou, *supra* note 30, at 5.

clusion that the European Court is “as effective as . . . any domestic court.”³⁷ The Grand Chamber on appeal decided only one of the four cases analyzed, while Chambers alone decided the other three.

The European Court of Human Rights envisions itself as “the conscience of Europe.”³⁸ The European Court characterizes the Convention as a “living instrument which must be interpreted in the light of present-day conditions.”³⁹ Its interpretation allows the Convention to remain “a resolutely modern treaty that can adapt to contemporary social issues.”⁴⁰ The ECtHR holds that the provisions of the Convention “cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago.”⁴¹ A main concern is maintaining effectiveness and relevance.⁴² Thus, the ECtHR often will take a “top-down” approach to new interpretations of rights.⁴³ A state may have positive obligations to protect

37 Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Supranational Adjudication*, 107 YALE L.J. 273, 296 (1997) (quoting John H. Barton & Barry E. Carter, *The Uneven, but Growing, Role of International Law*, in *RETHINKING AMERICA’S SECURITY* 279, 287 (Graham Allison & Gregory F. Treverton eds., 1992)). Compliance does not imply cheerful acceptance, however. For example, a recent ECtHR decision releasing some Spanish prisoners was met with protests of 200,000 people, a warning from the chief justice of Spain’s highest court about the “social alarm” that the decision creates, and a statement by the Prime Minister of Spain that the decision is “unfair and wrong” but “the basic rule of the democratic system is that the rulings of courts must be respected.” Fiona Govan, *Spain Forced to Release Terrorists and Murderers by European Human Rights Ruling*, THE TELEGRAPH (Dec. 2, 2013, 9:20 PM), <http://www.telegraph.co.uk/news/worldnews/europe/spain/10489860/Spain-forced-to-release-terrorists-and-murderers-by-European-human-rights-ruling.html>.

38 EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 7.

39 *Loizidou v. Turkey* (Preliminary Objections), App. No. 15318/89, ¶ 71 (Eur. Ct. H.R. 1995), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57920>.

40 COUNCIL OF EUROPE, *supra* note 32, at 7.

41 *Loizidou*, App. No. 15318/89, ¶ 71. This tenet is one of the greatest differences between ECtHR and Supreme Court jurisprudence.

42 See *Goodwin v. United Kingdom*, App. No. 28957/95, ¶ 74 (Eur. Ct. H.R. 2002), <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-60596> (“It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.”).

43 See *id.* The European Court, in standard language, stated:

While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond . . . to any evolving convergence

Id. Some European commentators and justices of domestic courts have criticized this top-down approach. See Anja Seibert-Fohr, *The Rise of Equality in International Law and its Pitfalls: Learning from Comparative Constitutional Law*, 35 BROOK. J. INT’L L. 1, 24–25 (2010) (arguing that international courts including the ECtHR “should not blithely interfere with, or substitute their analyses of socioeconomic legislation for, that of democratically elected legislators and competent constitutional adjudicators, particularly in disputes that have

human rights, rather than simply a negative duty to refrain from rights violations.⁴⁴

Rights-enumerating, “nonoriginalist” policies approach the Constitution in a similar way to how the European Court of Human Rights interprets the Convention.⁴⁵ Textual formalism or originalism, an understanding that the text of the Constitution has “an objective, stable, and discoverable historical meaning that can function as a fixed rule of decision,” arguably aligns less with the European Court’s jurisprudence.⁴⁶ This dialectic in American jurisprudence remains one of the hallmark differences between the Supreme Court and the ECtHR.

In the European Court, rights uniformity inherently is in tension with respect for the self-government of member states.⁴⁷ Of great importance is the principle of subsidiarity and its corollary, the margin of appreciation, which attempt to balance a unified application of human rights norms with the legitimate legal and cultural diversity of the parties to the Convention.⁴⁸ The “margin of appreciation” doctrine informs the amount of discretion that the ECtHR allows member states in the implementation of the Convention.⁴⁹ This doctrine is not well-defined, and often is applied flexibly.⁵⁰ Factors in determining the margin of appreciation include: (1) the seriousness of the

been carefully scrutinized by responsible domestic institutions”); Owen Bowcott, *Senior Judge: European Court of Human Rights Undermining Democratic Process*, THE GUARDIAN (Nov. 28, 2013, 3:37 PM), <http://www.theguardian.com/law/2013/nov/28/european-court-of-human-rights> (quoting U.K. Supreme Court Justice Lord Sumpton, claiming that the ECtHR may violate the Vienna Convention on the Law of Treaties of 1969 in its lack of deference to the original purpose of the Convention).

44 *Obst v. Germany*, App. No. 425/03, ¶¶ 40–42 (Eur. Ct. H.R. 2010), translated in *Obst v. Germany – Chamber Judgment*, STRASBOURG CONSORTIUM, <http://www.strasbourgconsortium.org/common/document.view.php?docId=5084> (last visited Oct. 23, 2014).

45 As an international organization created by treaty, the European Court of Human Rights interprets the Convention in light of its “object and purpose.” See Daniel Rietiker, *From Prevention to Facilitation? Suicide in the Jurisprudence of the ECtHR in the Light of the Recent Haas v. Switzerland Judgment*, 25 HARV. HUM. RTS. J. 85, 94 (2012) (stating that the “flexibility of the ‘object and purpose’ formula has allowed the Court to develop its own methods of interpretation”).

46 Frederick Mark Gedicks, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 EMORY INT’L L. REV. 1187, 1234 (2005).

47 Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT’L L. 95, 95 (2003).

48 See PATRICIA WIATER, *INTERCULTURAL DIALOGUE IN THE FRAMEWORK OF EUROPEAN HUMAN RIGHTS PROTECTION* (2010). Subsidiarity, a complex concept understood at minimum as “the principle that each social and political group should help smaller or more local ones accomplish their respective ends without . . . arrogating those tasks to itself,” is formally recognized in the European Union as a core principle and exists as a background justification for the “margin of appreciation” doctrine. Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L L. 38, 38 & n.1 (2003).

49 FOROWICZ, *supra* note 11, at 7.

50 *Id.*; Seibert-Fohr, *supra* note 43, at 35 (noting that this doctrine “ha[s] been criticized as lacking doctrinal coherence and predictability and leaving too much room for judicial value judgments”).

violation, (2) the domestic government's ability to evaluate the situation more effectively, (3) the right's importance, (4) the Convention's language and purpose, (5) the circumstances surrounding the case, (6) the type of interference alleged, and (7) broad policy considerations.⁵¹ The Court will acknowledge new violations of the Convention if it interprets the respondent state's laws to be different from the current European trends.⁵² Generally, if there is a broad consensus among member states, the European Court will hold countries unaligned with this consensus to a stricter standard, whereas if there is diversity, it will give countries more discretion.⁵³

II. EUROPEAN COURT OF HUMAN RIGHTS CASES INVOLVING RELIGIOUS ORGANIZATIONS AND THEIR EMPLOYEES

The European Convention on Human Rights enumerates two main rights at issue in the religious employment cases analyzed. Article 9 of the European Convention on Human Rights protects the “[f]reedom of thought, conscience and religion.”⁵⁴ It exists primarily with the individual. This individual freedom issues forth the subsidiary collective right.⁵⁵ Hence, for religious groups, Article 9 freedoms must be combined with associative freedoms

51 FOROWICZ, *supra* note 11, at 8.

52 See *Dudgeon v. United Kingdom*, App. No. 7525/76, ¶ 60 (Eur. Ct. H.R. 1981), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57473> (noting that “the great majority” of member states no longer criminalize homosexual acts in its decision to declare such criminalization a violation of the Convention); *Goodwin v. United Kingdom*, App. No. 28957/95, ¶¶ 84–85 (Eur. Ct. H.R. 2002), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60596> (holding that the United Kingdom's refusal to change the gender on a post-operative transsexual person's birth certificate violates the Convention, considering that there was an “emerging consensus within Contracting States” of providing legal recognition to gender reassignments).

53 FOROWICZ, *supra* note 11, at 8.

54 Convention, *supra* note 9, art. 9. The European Court of Human Rights uses roughly the same balancing test in each of its decisions concerning the rights of employers under Articles 9 and 11 against the rights of employees under Articles 8 and 9. See *supra* Section II.B. This Note does not detail *Lombardi Vallauri v. Italy*, which held that a Catholic university could not decline to renew a professor's contract for making statements deemed contrary to Church teaching. This is a result of the ECtHR's indication that Lombardi Vallauri was not given adequate notice of the statements that went against Catholic Church teaching, as distinguished from the cases analyzed. *Lombardi Vallauri v. Italy*, App. No. 39128/05 (Eur. Ct. H.R. 2009), translated in *Lombardi Vallauri v. Italy*, STRASBOURG CONSORTIUM, <http://www.strasbourgconsortium.org/common/document.view.php?docId=5423> (last visited Oct. 23, 2014). Another case not considered is *Sindicatul “Pastoral Cel Bun” v. Romania*, which addresses competing Article 11 claims—the unionization of religious employees, including priests, versus the rights of religious organizations—as this case balances two collective right claims. *Sindicatul “Pastoral Cel Bun” v. Romania* [GC], App. No. 2330/09 (Eur. Ct. H.R. 2013), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122763>. Here, the Romanian government could allow the Romanian Orthodox Church to reject its priests' unionization attempts. *Id.* ¶ 173.

55 Convention, *supra* note 9, arts. 9, 11; *Fernández Martínez v. Spain* [GC] (*Fernández Martínez I*), App. No. 56030/07, ¶ 127 (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145068>.

in Article 11; there is no enumerated “group right” to religious freedom. Only the manifestation of belief, not belief itself, may be limited by law as “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.”⁵⁶ *Siebenhaar v. Germany*, discussed below, involved an employee asserting an individual Article 9 right against her religious employer.⁵⁷

Against these Article 9 freedoms is the countervailing Article 8 right, “respect for private and family life.”⁵⁸ Employees often assert this right in cases concerning religious employers. The Court has recognized that “privacy” under Article 8 is a broad term that cannot be defined fully and encompasses physical and moral integrity, as well as at times physical and social identity—including the rights to “personal development,” “self-determination,” and development of “relationships with others.”⁵⁹ Article 8 also protects the “personal sphere” of one’s sexual identity, name, sexual orientation, and sexual life.⁶⁰ Article 8 claims against religious employers exist in the twin cases *Obst v. Germany*⁶¹ and *Schüth v. Germany*,⁶² decided the same day, and *Fernández Martínez v. Spain*,⁶³ with the Chamber judgment decided in 2012 and Grand Chamber judgment in 2014. In these cases, the European Court forms a coherent jurisprudence regarding religious employers’ freedoms as balanced against employees’ rights.

A. Cases

1. *Siebenhaar v. Germany*

In *Siebenhaar v. Germany*, the European Court considered an employee’s asserted Article 9 rights against a religious employer. Here, a Protestant church fired a kindergarten teacher for teaching outside of her job about a different denomination called the Universal Church, to which she had converted from Catholicism.⁶⁴ The Labour Court held that the Protestant church had the right to require that employees refrain from activities seem-

56 Convention, *supra* note 9, art. 9, § 2.

57 *Siebenhaar v. Germany*, App. No. 18136/02, ¶ 3 (Eur. Ct. H.R. 2011), *translated in* *Siebenhaar v. Germany – Chamber Judgment*, *supra* note 27.

58 Convention, *supra* note 9, arts. 8, 9.

59 *Obst v. Germany*, App. No. 425/03, ¶ 39 (Eur. Ct. H.R. 2010), *translated in* *Obst v. Germany – Chamber Judgment*, *supra* note 44.

60 *Id.* (citations omitted).

61 *Id.*

62 App. No. 1620/03 (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100469>.

63 *Fernández Martínez v. Spain* [GC] (*Fernández Martínez I*), App. No. 56030/07, (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145068>; *Fernández Martínez v. Spain* [Chamber] (*Fernández Martínez II*), App. No. 56030/07 (Eur. Ct. H.R. 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110916>.

64 *Siebenhaar v. Germany*, App. No. 18136/02, ¶¶ 9–12 (Eur. Ct. H.R. 2011), *translated in* *Siebenhaar v. Germany – Chamber Judgment*, *supra* note 27.

ingly incongruous with their loyalty to the religion.⁶⁵ The teacher's proclamation that she wanted to help the Universal Church become victorious throughout the world, the Labour Court held, expressed her view of its superiority over other churches.⁶⁶ The Labour Appeal Court, conversely, ruled in her favor, holding that her activities did not jeopardize the credibility of the Protestant church.⁶⁷ Later, the Federal Labour Court quashed the appeal, stating that the Protestant church had a reasonable concern that Siebenhaar's activities would affect her ability to teach, as the Universal Church advocated the proclamation of its teachings in kindergartens.⁶⁸ The Federal Constitutional Court did not accept her complaint, holding that the Federal Labour Court satisfactorily had balanced her rights against the right of the Protestant church.⁶⁹

The European Court analyzed the German Labour Courts' balancing test in holding that Germany did not violate Article 9 by allowing the church to dismiss Siebenhaar.⁷⁰ The Protestant church had a reasonable concern that her beliefs could affect her teaching; also, she was young enough and had worked at the school for such little time that the church could dismiss her.⁷¹ Under these circumstances, Germany could permit the Protestant church to dismiss the teacher without violating the Convention.

2. *Obst v. Germany*

In *Obst v. Germany*, the European Court balanced a religious employer's claims against the Article 8 right to respect for private and family life. *Obst*, a Mormon, worked as a public relations director for the Church of Jesus Christ of Latter-day Saints in Europe.⁷² His employment contract stipulated that employees whose jobs involved interacting with non-Mormons must adhere to increased obligations of behavior.⁷³ To receive help, he told a member of the Church that he had been unfaithful.⁷⁴ The Church, in turn, dismissed him.⁷⁵ The Labour Court held that his dismissal was disproportionate, since he had tried to repent.⁷⁶ The German Court of Appeals dismissed the appeal, although it acknowledged adultery's gravity for Mormons, reasoning that *Obst* had confessed his infidelity in order to remedy the situation.⁷⁷ The

65 *Id.* ¶ 14.

66 *Id.*

67 *Id.* ¶ 15.

68 *Id.* ¶ 44.

69 *Id.* ¶ 19.

70 *Id.* ¶ 40.

71 *Id.* ¶ 44.

72 *Obst v. Germany*, App. No. 425/03, ¶ 7 (Eur. Ct. H.R. 2010), *translated in* *Obst v. Germany – Chamber Judgment*, *supra* note 44.

73 *Id.* ¶ 8.

74 *Id.* ¶ 9.

75 *Id.*

76 *Id.* ¶ 10.

77 *Id.* ¶ 11.

Federal Labour Court on appeal remanded the case because a religious organization has the right under the Weimar Constitution to manage its own affairs: while state labor law applied, the Church was entitled to require fidelity in order to preserve its own credibility.⁷⁸ The Federal Constitutional Court noted that it must balance competing interests of the individual and the church, giving special weight to the current legal order and churches' own understandings of their faiths.⁷⁹

The European Court of Human Rights then heard the case. In this venue, the applicant claimed that Germany had violated Article 8 in its decision, since he had not waived his right to privacy by signing the employment contract.⁸⁰ Germany, in its statement to the Court defending its position, stated that religious institutions do not possess an unlimited right to make employment decisions without state scrutiny;⁸¹ but in this case, the German courts properly had weighed competing factors, since the applicant knew fidelity's primacy in the Mormon faith.⁸²

In light of these considerations, the European Court held that the German courts had balanced properly Obst's Article 8 rights against those of the Mormon Church.⁸³ Approvingly, the Court cited the German courts' considerations: that fidelity aligned with the larger society's fundamental principles and is central to Mormonism, that the Church can act to maintain credibility, that Obst had a lifelong knowledge of his faith's requirements, that he had informed the Church of his infidelity himself, and that he had held an important position within the Church.⁸⁴ The Court sustained Germany's finding in favor of the Church.⁸⁵ Germany had not violated the Convention by allowing Obst's dismissal.

3. *Schüth v. Germany*

At the same time that the European Court of Human Rights released its opinion in *Obst v. Germany*, which allowed a church to fire an employee for his infidelity, the Court handed down its decision in *Schüth v. Germany* with the opposite result.⁸⁶ In *Schüth v. Germany*, the applicant was a choirmaster in a Catholic parish in Germany.⁸⁷ His employment contract required him "to discharge [his] professional duties and to fulfil and observe ecclesiastical obligations."⁸⁸ He left his wife and had an extramarital affair with another

78 *Id.* ¶ 13.

79 *Id.* ¶ 26.

80 *Id.* ¶ 32.

81 *Id.* ¶¶ 34–36.

82 *Id.* ¶ 36.

83 *Id.* ¶ 51.

84 *Id.* ¶¶ 47–51.

85 *Id.* ¶ 52.

86 App. No. 1620/03, ¶ 75 (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100469>.

87 *Id.* ¶ 7.

88 *Id.* ¶ 9.

woman, who was pregnant with his child.⁸⁹ The dean for the parish confronted Schüth after his children told people at their kindergarten that he was expecting another child.⁹⁰ Thirteen days later, the church dismissed Schüth for breaching his duty of loyalty under the church's basic regulations and accused him "not only of committing adultery but also of bigamy."⁹¹

To the employment tribunal, this dismissal was unjustified.⁹² Schüth "had not been bound by heightened duties of loyalty . . . did not perform pastoral or catechistic duties, did not have a canonical mandate . . . and was not a member of the managerial staff" as defined by the regulations.⁹³ The tribunal maintained that "father[ing] a child out of wedlock" was not serious enough to warrant dismissal without warning, especially after fourteen years' employment and without the prospect of easily finding comparable work as an organist.⁹⁴ Employment contracts encompassed both the freedom of contract and the protection of religious autonomy.⁹⁵ The Catholic Church, then, could base employment on a model of Christian service and require its Catholic employees to comply with religious principles.⁹⁶ Marriage in the Catholic Church is "indissoluble, perpetual[,] and exclusive."⁹⁷ As a sacrament, it is a fundamental part of the faith.⁹⁸ Yet, religious employers cannot require "excessive" loyalty, and religious principles must not contradict general principles of law, including "morality" and "public order."⁹⁹ The employment tribunal weighed the harm to the Church's credibility in retaining the employee against the damage to the employee if dismissed.¹⁰⁰ The Federal Constitutional Court did not grant a constitutional complaint, thus upholding the employment tribunal's decision that the dismissal was legal.¹⁰¹ Two months later, the applicant found employment as a part-time choirmaster at a Protestant church.¹⁰²

The applicant argued that the Catholic Church had violated his right to private and family life under Article 8 of the Convention at the European Court of Human Rights.¹⁰³ The German courts had failed to consider his interests, and unduly privileged churches.¹⁰⁴ No right exists, he argued, for churches to require that employees observe their precepts "outside of the

89 *Id.* ¶¶ 11–13.

90 *Id.* ¶ 12.

91 *Id.* ¶ 13.

92 *Id.* ¶ 16.

93 *Id.*

94 *Id.* ¶¶ 16–17.

95 *Id.* ¶ 20.

96 *Id.*

97 *Id.* ¶ 21.

98 *Id.*

99 *Id.* ¶ 22.

100 *Id.* ¶ 25.

101 *Id.* ¶ 27.

102 *Id.* ¶¶ 28, 48.

103 *Id.* ¶ 43.

104 *Id.* ¶ 46.

occupational sphere.”¹⁰⁵ His affair showed his own human frailty rather than the Church’s lack of credibility.¹⁰⁶ Against the claim he had a special “pastoral mission,” Schüth recognized the “particular role” of music in the liturgy, but contended that “each worshipper performed the liturgy with singing and prayers to the same degree as the organist.”¹⁰⁷ Furthermore, canon law was unreasonable to demand that “he would lead a life of abstinence until the end of his days.”¹⁰⁸ As in *Obst*, the German government acknowledged limitations on churches’ right of autonomy, but argued that the domestic courts’ decisions properly weighed concerns.¹⁰⁹ While dismissal was indeed the harshest penalty in German labor law, a preliminary warning was unnecessary in Schüth’s case because he “could not have been unaware” that his conduct would have been intolerable.¹¹⁰ In signing the contract of work, Schüth freely had limited his rights.¹¹¹

Here, the European Court of Human Rights found that Germany had violated Article 8. The German Government had a positive obligation to protect Schüth’s Article 8 rights.¹¹² The European Court noted, as in *Obst*, that fidelity was consistent with German principles of law.¹¹³ The employment tribunals, however, failed to consider Schüth’s “*de facto* family life or . . . the legal protection afforded to it.”¹¹⁴ They solely had examined his interest in keeping his job.¹¹⁵ As well, an employee in the German system cannot conceal information about his or her civil status.¹¹⁶ His employer would know about disloyalty even without “media coverage or public repercussions.”¹¹⁷

The European Court further criticized the Employment Appeal Tribunal. It should not have accepted at face value the centrality of music to the Church’s mission.¹¹⁸ Moreover, the balancing process is important when an individual right is asserted against a collective right.¹¹⁹ Signing an employment contract, while it will indeed limit one’s private life to an extent, “cannot be interpreted as a personal unequivocal undertaking to live a life of

105 *Id.*

106 *Id.*

107 *Id.* ¶ 47. The Catholic Diocese of Essen, where Schüth had worked, intervened as a third party, stating that music had a “special function” in the liturgy, closely related to the Church’s “proclamatory mission.” Thus, it argued, his employment should be a matter exclusively reserved for the Church. *Id.* ¶ 52.

108 *Id.* ¶ 48. He also remarked that he accepted the consequence of not being able to receive communion, but his dismissal was “excessively harsh.” *Id.*

109 *Id.* ¶¶ 50–51.

110 *Id.* ¶ 51.

111 *Id.*

112 *Id.* ¶ 55.

113 *Id.* ¶ 62.

114 *Id.* ¶ 67.

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.* ¶ 69.

119 *Id.*

abstinence in the event of separation or divorce.”¹²⁰ Last, “of particular importance,” the job market for organists mostly is limited to churches and the Protestant church’s rules only allowed hiring non-Protestants for part-time work.¹²¹ Schüth’s new part-time occupation could not replace his former position.¹²² These factors shifted the balance against the religious employer so that Germany’s upholding of Schüth’s dismissal violated the European Convention.

4. *Fernández Martínez v. Spain*

The most recent case involving the balancing of employees’ rights against religious employers is *Fernández Martínez v. Spain*, decided by the Grand Chamber. In this case, the applicant was ordained as a priest in 1961 and applied to the Vatican for dispensation from the obligation to be celibate in 1984.¹²³ He married in a civil ceremony the following year as he awaited dispensation.¹²⁴ He had five children and was employed teaching Catholic religion and ethics in a government-run secondary school under a contract renewable yearly.¹²⁵ Under an agreement between Spain and the Holy See in 1979, the bishop of the diocese would confirm the contract renewal yearly, binding the Ministry of Education to his decision.¹²⁶ In 1996, a newspaper article detailing the “Movement for Optional Celibacy” for priests included a photograph of Fernández Martínez with his wife and children at a gathering of the movement.¹²⁷ It included statements that members wanted the Catholic Church to change its celibacy requirement,¹²⁸ to become more “democratic rather than . . . theocratic” and to allow laypeople to elect priests and bishops.¹²⁹ The movement disagreed with the Church on divorce, abortion, sexuality, and contraception.¹³⁰

In 1997, the Church granted dispensation from celibacy, with the stipulation that it barred Fernández Martínez from teaching Catholicism in public institutions unless the bishop permitted it “according to his own prudent judgment . . . and provided that there [was] no scandal.”¹³¹ The school did not renew Fernández Martínez’s contract; about a month later, the Diocese declared that the publicity he received had breached his duty to avoid scan-

120 *Id.* ¶ 71.

121 *Id.* ¶ 73.

122 *Id.*

123 *Fernández Martínez v. Spain* [GC] (*Fernández Martínez I*), App. No. 56030/07, ¶ 13 (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145068>.

124 *Id.*

125 *Id.* ¶¶ 12–14.

126 *Id.* ¶ 14.

127 *Id.* ¶ 136.

128 *Id.* ¶ 15.

129 *Id.*

130 *Id.*

131 *Id.* ¶ 16.

dal, and the Church's authorities could not propose him as a candidate for the position for the next year.¹³²

The Employment Tribunal held that the Church had discriminated against Fernández Martínez because of his membership in the Movement for Optional Celibacy and marital status.¹³³ The appellate court decided in favor of the Ministry of Education against Fernández Martínez's claim, stating that Fernández Martínez's employment, based in Catholic doctrine and established in trust, falls between "pure ecclesiastical" work and "a skeleton employment relationship."¹³⁴ The Constitutional Court dismissed Fernández Martínez's subsequent appeal, noting that the Catholic Church under the Spanish Constitution has a "fundamental right to religious freedom in its collective or community dimension."¹³⁵

A Chamber of the ECtHR first heard the case before Fernández Martínez successfully appealed to the Grand Chamber. At this level, Fernández Martínez claimed a violation under Article 8 of the Convention. The Spanish government meanwhile stressed that the Spanish constitutional duty of neutrality requires Spain to permit the bishop to propose candidates for state employment based on religious and moral criteria.¹³⁶ The government maintained that "it would not be reasonable" when selecting individuals who had "freely applied" to a religious education post not to account for their religious beliefs.¹³⁷ It argued that neither domestic courts nor the European Court could challenge the Catholic Church's decision through a civil law analysis.¹³⁸ The applicant maintained, however, that his participation in the movement had not justified his dismissal: he claimed that he had not spoken out against Catholic dogma, "such as denying the existence of God, calling into question the divinity of Christ or the virginity of the Virgin Mary, or making disparaging remarks about the Pope."¹³⁹

The European Court's Chamber held that Spain did not violate Article 8.¹⁴⁰ Private life can include "professional activities"¹⁴¹: "professional life

132 Fernández Martínez v. Spain [Chamber] (*Fernández Martínez II*), App. No. 56030/07, ¶ 14 (Eur. Ct. H.R. 2012) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110916>.

133 *Id.* ¶ 15.

134 *Id.* ¶ 18.

135 *Id.* ¶ 27. Fernández Martínez petitioned for this opinion to be nullified, claiming that two of the judges on the court were known for their "affinities with the Catholic Church," and was denied. *Id.* ¶¶ 30–31.

136 *Id.* ¶ 61.

137 *Id.*

138 *Id.* ¶ 63. The Spanish government distinguished this instance from a Spanish Constitutional Court case holding that the non-renewal of a Catholic religious education teacher in a state secondary school—due to her civil marriage to a divorcee—had violated her rights to personal and family privacy because "unlike the applicant, the teacher in question had never made public her situation or campaigned in favour of divorce." *Id.* ¶ 67.

139 *Id.* ¶ 69.

140 *Id.* ¶ 89.

141 *Id.* ¶ 57 (citation omitted).

is part of the zone of interaction between a person and others which, even in a public context, may fall within the scope of ‘private life.’”¹⁴² The non-renewal of Fernández Martínez’s contract affected his ability to work professionally, which reverberated into his private life.¹⁴³ As part of a state-sponsored school system, the bishop could only propose qualified candidates and was required to respect fundamental rights.¹⁴⁴ The Chamber held that the “requirements of the principles of religious freedom and neutrality preclude it from carrying out any further examination of the necessity and proportionality of the non-renewal decision.”¹⁴⁵ It emphasized that the “special bond of trust” present in religious employment distinguishes it from standard legal relationships.¹⁴⁶ It also noted that the applicant received unemployment benefits and then worked at a museum until his retirement.¹⁴⁷

At the Grand Chamber, in a 9–8 *de novo* decision, the European Court again held that Spain had not violated Article 8 of the Convention.¹⁴⁸ Since religious organizations’ autonomy is equal to the individual right to family life, the European Court espouses a balancing test.¹⁴⁹ Fernández Martínez’s private, personal choices affected his professional life, and therefore Article 8 applied.¹⁵⁰ Unlike the Chamber, the Grand Chamber believed that Spain, as the employer, had interfered with Fernández Martínez’s right to respect for private life by enforcing the bishop’s decision.¹⁵¹ Yet, Fernández Martínez as a former seminary director would have known that “the public display of his militant stance on certain precepts of the Church would be at odds with the applicable provisions of canon law.”¹⁵²

The interference with his right had a “legitimate aim” of protecting the right of the Catholic Church’s autonomy regarding its selection of teachers.¹⁵³ The European Court recognized that religious organizations’ autonomy is “indispensable for pluralism in a democratic society [There is no] right of dissent within a religious community.”¹⁵⁴ A religious organization then can require a “degree of loyalty” from those working for them.¹⁵⁵ In this case, Fernández Martínez freely had accepted a heightened duty of loy-

142 *Id.* (citation omitted).

143 *Id.* ¶ 60.

144 *Id.* ¶ 81.

145 *Id.* ¶ 84.

146 *Id.* ¶ 85.

147 *Id.* ¶ 88.

148 *Fernández Martínez v. Spain* [GC] (*Fernández Martínez I*), App. No. 56030/07, ¶ 153 (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145068>.

149 *Id.* ¶ 123.

150 *Id.* ¶ 113.

151 *Id.* ¶ 115.

152 *Id.* ¶ 119.

153 *Id.* ¶ 122.

154 *Id.* ¶ 127–28.

155 *Id.* ¶ 131.

alty, which legally could limit his Article 8 rights to a degree.¹⁵⁶ His duty of loyalty also derived from his being a Catholic religion teacher.¹⁵⁷ His adolescent students lacked the maturity to distinguish his personal beliefs from Church teaching.¹⁵⁸ Whether or not he posed for the photograph in the article, Fernández Martínez had not objected to it.¹⁵⁹ The European Court even saw his dispensation from celibacy as a punishment for the newspaper article and still did not object to it.¹⁶⁰ Spain adequately had balanced Fernández Martínez's Article 8 rights with the Catholic Church's right to autonomy.

B. *Analysis of the European Court of Human Rights' Balancing Test*

The four cases of *Siebenhaar*, *Obst*, *Schüth*, and *Fernández Martínez* elucidate the European Court's factors in balancing religious communities' rights against those of their employees. While the margin of appreciation in these cases defers broadly to the judgments of state courts, the European Court utilizes a seven-factor balancing test. Four of the factors pertain to the religious institution, while the other three factors analyze the employee's rights. The four factors that scrutinize the religious institution are whether: (1) the institution's asserted value aligns with the host country's law and society, (2) the belief is central to the religious system, (3) the individual retained an important position within the religious institution's structure, and (4) the employee's action harms the credibility of the religious organization.¹⁶¹ The factors weighed with respect to the individual's interests include whether: (1) the individual had sufficient knowledge that his or her action would violate the religious institution's values, (2) the individual notified the religious organization of the violating act by his or her own actions, and (3) the church's removal of the individual had compromised the individual's future, reinforcing an implied right to work.¹⁶² As seen in *Fernández Martínez v. Spain*, though, the European Court may respect a country's policy of avoiding an examination of a religious organization's beliefs in its claim to neutrality to an extent.¹⁶³ These factors, while they "look to some degree like a proce-

156 *Id.* ¶ 135.

157 *Id.*

158 *Id.* ¶ 142.

159 *Id.* ¶ 136.

160 *Id.*

161 *Id.*; *Obst v. Germany*, App. No. 425/03 (Eur. Ct. H.R. 2010), translated in *Obst v. Germany – Chamber Judgment*, *supra* note 44; *Schüth v. Germany*, App. No. 1620/03 (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100469>.

162 *Fernández Martínez I*, App. No. 56030/07; *Siebenhaar v. Germany*, App. No. 18136/02, ¶ 41 (Eur. Ct. H.R. 2011), translated in *Siebenhaar v. Germany – Chamber Judgment*, *supra* note 27; *Obst*, App. No. 425/03; *Schüth*, App. No. 1620/03.

163 *Fernández Martínez I*, App. No. 56030/07, ¶ 149.

dural requirement . . . that courts take all relevant rights-related factors into account . . . are in reality a disguised form of substantive limitation.”¹⁶⁴

1. Factors Concerning the Religious Employer

a. The Alignment of Values with Law and Society

The European Court’s balancing test weighs a society’s law and values in deciding religious organizations’ employment issues. In *Obst*, the Court supported Germany’s decision that a contractual emphasis on fidelity does not interfere with German society.¹⁶⁵ In *Schüth*, the European Court also mentioned that fidelity was in line with German society.¹⁶⁶ This balancing mirrors that in *Dogru v. France*, in which the prohibition of headscarves in French elementary schools was “justified as a matter of principle and proportionate to the aim pursued.”¹⁶⁷ The European Court in *Siebenhaar* emphasized that the German government only needs to heed a religious organization’s belief insofar as it aligns with the basic principles of the German legal order.¹⁶⁸ Yet, the Court came to different results in *Obst* and *Schüth* because of other factors weighed. In *Fernández Martínez*, Spanish neutrality was considered a fundamental principle of law in itself.¹⁶⁹ Thus, the religious institution’s values asserted must comport with its host country’s law and society.

b. The Belief’s Centrality Within the Religious System

The state can evaluate the legitimacy of religious beliefs or their means of expression only in exceptional cases,¹⁷⁰ but governments can substantiate the gravity of violations of those beliefs within the religious organizations. The European Court sometimes even requires them to do so. In *Obst*, the ECtHR sanctioned the consideration that adultery was one of the gravest

164 Carolyn Evans & Anna Hood, *Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights*, 1 OXFORD J.L. & RELIGION 1, 22 (2012).

165 *Obst*, App. No. 425/03, ¶¶ 47–51.

166 *Schüth*, App. No. 1620/03, ¶ 62.

167 *Dogru v. France*, App. No. 27058/05, ¶ 77 (Eur. Ct. H.R. 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90039>. The *Dogru* case shows the difficulty of such a factor in balancing; while most members of European societies would agree that the prototypical hypothetical case of religious human sacrifice should be barred regardless of religious freedom interests, questions of religious freedom and cultural norms are far less settled with practices that are not as widely prohibited. The religious employment cases recently decided by the ECtHR involve Christian religions, but this factor could cause conflict if applied to religious acts that are viewed to be different from the norm.

168 *Siebenhaar v. Germany*, App. No. 18136/02, ¶ 43 (Eur. Ct. H.R. 2011), *translated in* *Siebenhaar v. Germany – Chamber Judgment*, *supra* note 27.

169 *Fernández Martínez v. Spain [GC] (Fernández Martínez I)*, App. No. 56030/07, ¶ 150 (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145068>.

170 *Siebenhaar*, App. No. 18136/02, ¶ 41.

offenses in the Mormon faith.¹⁷¹ Yet, in *Schüth* it disapproved of the German courts' prima facie acceptance of the Catholic Church's claim regarding the importance of Schüth's position.¹⁷² In *Fernández Martínez*'s Grand Chamber decision, even though Spain's neutrality disallows investigation into religiously grounded decisions, the Court approvingly noted that Spain still considered the nonrenewal in light of proportionality and constitutionality.¹⁷³ This investigation potentially allows courts to interpret substantive issues of faith.

c. The Importance of the Individual's Position Within the Religious Organization

An important factor is the employee's position of authority within the religious community.¹⁷⁴ The greater an employee publicly represents a religion, the more justified the dismissal. The European Court's Grand Chamber respected Spain's decision because *Fernández Martínez* was a priest and teacher of the Catholic faith.¹⁷⁵ The applicant in *Obst* worked as the director of public relations for Europe; he needed to be faithful to his wife because he represented the Church of Jesus Christ of Latter-day Saints.¹⁷⁶ In *Siebenhaar*, the applicant's termination was acceptable because of her public presence and her interaction with the parents of her kindergarten class.¹⁷⁷ Distinguished from *Fernández Martínez*, the European Court doubted a choirmaster's importance to the Catholic faith; the German courts should not have rendered a decision "without having regard to the nature of the post in ques-

171 *Obst*, App. No. 425/03, ¶¶ 47–48.

172 *Schüth*, App. No. 1620/03, ¶ 66.

173 *Fernández Martínez I*, App. No. 56030/07, ¶¶ 149–51.

174 *Id.* ¶ 131.

175 *Id.* ¶ 135. Stijn Smet maintained that the *Fernández Martínez* Chamber decision created a "ministerial exception" as seen in the U.S. Supreme Court's decision in *Hosanna-Tabor v. EEOC*. Stijn Smet, *Fernández Martínez v. Spain: Towards a 'Ministerial Exception' for Europe?*, STRASBOURG OBSERVERS (May 24, 2012), <http://strasbourgoobservers.com/2012/05/24/fernandez-martinez-v-spain-towards-a-ministerial-exception-in-europe/>. Smet believed that the ECtHR in the Chamber decision "appear[ed] to have abandoned its tried and tested formula of *ad hoc* balancing between the collective dimension of freedom of religion and individual human rights, established in *Obst v. Germany*, *Schüth v. Germany*, and *Siebenhaar v. Germany*." *Id.* He saw the Grand Chamber decision as scaling back the "ministerial exception" of the Chamber opinion. Stijn Smet, *Fernández Martínez v. Spain: The Grand Chamber Putting the Brakes on the 'Ministerial Exception' for Europe?*, STRASBOURG OBSERVERS (June 23, 2014), <http://strasbourgoobservers.com/2014/06/23/fernandez-martinez-v-spain-the-grand-chamber-putting-the-breaks-on-the-ministerial-exception-for-europe/>. While the Grand Chamber opinion clearly maintains a balancing test, it does indicate a sphere of autonomy over teachers and priests similar to *Hosanna-Tabor's*. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012), is discussed *infra* Part III.

176 *Obst*, App. No. 425/03, ¶ 50.

177 *Siebenhaar v. Germany*, App. No. 18136/02, ¶ 46 (Eur. Ct. H.R. 2011), translated in *Siebenhaar v. Germany – Chamber Judgment*, *supra* note 27.

tion and without properly balancing the interests involved.”¹⁷⁸ An employee’s role in the employer’s mission remains an important factor in the rights-balancing between religious employers and employees.

d. The Harm to the Religious Employer Caused by the Employee

Closely linked with the third factor, the final employer-centric factor is the religious organization’s reasonableness in believing that the employee’s action could undermine its credibility. The Protestant church could require loyalty to maintain its credibility.¹⁷⁹ The loyalty imposed on Obst, because of his position within the Church in dialoguing with non-Mormons, sufficiently was demonstrated to be necessary to preserve the credibility of the Mormon Church.¹⁸⁰ The European Court remained doubtful of Schüth’s influence in undermining the credibility of the Catholic Church because of his choir work’s minor presence.¹⁸¹ In *Fernández Martínez*’s Grand Chamber decision, the ECtHR held that “[t]he existence of a discrepancy between the ideas that have to be taught and the teacher’s personal beliefs may raise an issue of credibility if the teacher actively and publicly campaigns against the ideas in question.”¹⁸² Credibility is thus a factor for the European Court.

2. Factors Concerning the Employee

a. The Individual’s Knowledge of Transgression

Concerning individual rights, the European Court considers whether the employee would sufficiently know that his or her actions would upset his or her religious employer.¹⁸³ Siebenhaar’s employment contract barred her from participating in organizations with objectives inconsistent with the Protestant church’s mission.¹⁸⁴ She had violated the contract. A contract need not enumerate these requirements, however. Obst, a lifelong Mormon, should have known the meaning of the phrase “high moral standard” to which he assented in his employment contract.¹⁸⁵ The married priest in *Fernández Martínez v. Spain* knew that his actions “placed him in a situation of

178 *Schüth v. Germany*, App. No. 1620/03, ¶ 69 (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100469>.

179 *Siebenhaar*, App. No. 18136/02, ¶ 46.

180 *Obst*, App. No. 425/03, ¶ 51.

181 *Schüth*, App. No. 1620/03, ¶¶ 66–69.

182 *Fernández Martínez v. Spain* [GC] (*Fernández Martínez I*), App. No. 56030/07, ¶ 137 (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145068>.

183 A case that shows the necessity of this knowledge for the ECtHR is *Lombardi Vallauri v. Italy*, in which the European Court held it unacceptable that the Catholic University of the Sacred Heart failed to renew a professor’s teaching position because some of his positions were “clearly opposed to Catholic doctrine” without telling him which positions they were. *Lombardi Vallauri v. Italy*, App. No. 39128/05, ¶ 48 (Eur. Ct. H.R. 2009), *translated in Lombardi Vallauri v. Italy*, *supra* note 54.

184 *Siebenhaar*, App. No. 18136/02, ¶ 44.

185 *Obst*, App. No. 425/03, ¶ 50.

precariousness”; the Court noted favorably that the Catholic Church had “shown tolerance” in allowing him to teach while married for six years before the publicity.¹⁸⁶

Even so, this factor has limits. In *Schüth*, the European Court, while recognizing that a church may demand loyalty, stated that certain employees are not “clericalised” and do not acquire “a special ecclesiastical status which subsumes the employee and dominates his entire private life”; therefore, “the applicant’s signature on the contract cannot be interpreted as a personal unequivocal undertaking to live a life of abstinence in the event of separation or divorce.”¹⁸⁷ Although the ECtHR weighs the employee’s knowledge, it also considers how reasonable it believes the request to be.

b. The Employee’s Role in Exposing the Problem

The European Court also balances whether the applicant made known his or her situation. Although an anonymous tip informed the church of Siebenhaar’s situation, she had been listed on the Universal Church’s registration form for classes on “higher spiritual learning.”¹⁸⁸ Obst had informed members of his church of his affair.¹⁸⁹ Schüth, conversely, had not notified the church of his situation, but rather his young children had exposed it.¹⁹⁰ He could not hide his divorce or the birth of his out-of-wedlock child even without public exposure.¹⁹¹ The publication of an article concerning Fernández Martínez’s status as a married priest and participation in the Movement for Optional Celibacy, rather than his status itself, was the subject of the ECtHR’s analysis.¹⁹² If one publicizes his or her private life, the European Court is more likely to rule in favor of the religious employer.

c. The Negative Consequences of Dismissal on the Employee’s Future Career

Although the Convention declines to protect an enumerated right to work, the European Court will uphold aspects of the right to work.¹⁹³ The ECtHR will examine how an employee’s termination affects his or her private

186 *Fernández Martínez I*, App. No. 56030/07, ¶ 146.

187 *Schüth v. Germany*, App. No. 1620/03, ¶¶ 70–71 (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100469>.

188 *Siebenhaar*, App. No. 18136/02, ¶¶ 11, 44.

189 *Obst*, App. No. 425/03, ¶ 47.

190 *Schüth*, App. No. 1620/03, ¶¶ 12, 67.

191 *Id.* ¶ 67.

192 *Fernández Martínez v. Spain [GC] (Fernández Martínez I)*, App. No. 56030/07, ¶ 146 (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145068>.

193 See Rory O’Connell, *The Right to Work in the ECHR*, 2 EUR. HUM. RTS. L. REV. 176, 176 (2012). The Convention does, however, protect the right to unionize under Article 11, “[f]reedom of assembly and association,” which states that “[e]veryone has the right to . . . join trade unions,” and the “[p]rohibition of slavery and forced labour” under Article 4. Convention, *supra* note 9, arts. 4, 11.

life, presuming that an applicant has a right to be employed.¹⁹⁴ Siebenhaar was young and had been employed by the school for a relatively short time.¹⁹⁵ Her dismissal, then, failed to violate her implied right to work. Similarly, the harm resulting from Obst's dismissal was limited because of his age and length of service.¹⁹⁶

Schüth, conversely, could not easily find work in his field, as churches monopolize the employment of choirmasters and the Protestant church required that full time employees be Protestant.¹⁹⁷ Given the harm to Schüth's occupation, the German government failed to adequately balance the church's liberty of religion against his Article 8 rights.¹⁹⁸ Although the Convention fails to enumerate explicitly a right to work, the ECtHR considers the effect of a career change on other aspects of life.

Yet, while the Chamber in *Fernández Martínez* mentioned that Fernández Martínez was able to find work at a museum after collecting unemployment,¹⁹⁹ the Grand Chamber did not consider this factor. Instead, it noted that while ecclesiastical employees will have difficulties finding other jobs, the bishop had stated that Fernández Martínez would receive unemployment benefits.²⁰⁰ This consideration was enough for the ECtHR. It went so far as to state that "a less restrictive measure for the applicant would certainly not have had the same effectiveness in terms of preserving the credibility of the Church," since Fernández Martínez knew his actions were "completely in opposition to the Church's precepts."²⁰¹ Since Fernández Martínez held an important position and violated central beliefs, he justifiably could be dismissed. The European Court will allow for harm to the employee's future career following dismissal if the other factors greatly support the religious organization even as it protects an implied right to work.

194 *Fernández Martínez I*, App. No. 56030/07, ¶ 144.

195 *Siebenhaar v. Germany*, App. No. 18136/02, ¶ 44 (Eur. Ct. H.R. 2011), *translated in* *Siebenhaar v. Germany – Chamber Judgment*, *supra* note 27.

196 *Obst v. Germany*, App. No. 425/03, ¶ 48 (Eur. Ct. H.R. 2010), *translated in* *Obst v. Germany – Chamber Judgment*, *supra* note 44.

197 *Schüth v. Germany*, App. No. 1620/03, ¶ 73 (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100469>.

198 *Id.* ¶ 75.

199 *Fernández Martínez v. Spain [Chamber] (Fernández Martínez II)*, App. No. 56030/07, ¶ 88 (Eur. Ct. H.R. 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110916>.

200 *Fernández Martínez v. Spain [GC] (Fernández Martínez I)*, App. No. 56030/07, ¶ 145 (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145068>.

201 *Id.* ¶ 146.

III. APPLYING THE EUROPEAN COURT OF HUMAN RIGHTS' FRAMEWORK TO RELIGIOUS RIGHTS IN THE UNITED STATES

A. *Freedom of Religious Organizations Generally*

Religious organizations' freedom from government intervention is a group right in American jurisprudence and can be seen as a third category of the First Amendment.²⁰² It arises from the Free Exercise and Establishment Clauses and traces a rich lineage from the nation's founding.²⁰³ Religious institutions in the United States have the constitutional right to define themselves as legal entities, although this right is poorly defined.²⁰⁴ In the context of religious property disputes, this status has promulgated, at different times, doctrines of equal treatment to similar organizations,²⁰⁵ deference on matters of religious doctrine,²⁰⁶ and government neutrality.²⁰⁷ These principles exist within the employment context to a degree as well. Religious organizations retain rights in their own bodies. Yet, these group rights largely are undefined, leading to sources of conflict in the area of employment.²⁰⁸

At times, the Supreme Court has refused to adjudicate claims about religious positions.²⁰⁹ In *Gonzalez v. Roman Catholic Archbishop of Manila*, the Court accepted that canon law was controlling on a claim and refused to adjudicate it.²¹⁰ In *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America*, American members of the Russian Orthodox Church wanted to appoint their own Archbishop, fearing the Soviet Union's influence over the church.²¹¹ A New York law recognized the American branch as the rightful body of the church.²¹² The Supreme Court struck down this law, acknowledging "[f]reedom to select the clergy, where no improper methods of choice are proven."²¹³ In *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, the Supreme Court reversed an Illinois decision that had invalidated the Serbian Orthodox Church's proceedings for being "arbitrary" by violating its own internal policies,²¹⁴ but the Supreme Court held that the Illinois Supreme Court violated the First and Fourteenth Amendments in its decision.²¹⁵ Generally, the Supreme Court attempts not to interfere with internal decisions of religious organizations. The U.S. gov-

202 WITTE & NICHOLS, *supra* note 14, at 241.

203 *Id.*

204 *Id.* at 244.

205 *See id.* at 245–47 (discussing the early church property cases that led to the elaboration of this doctrine).

206 *See id.* at 247–51 (detailing the formation of this doctrine).

207 *See id.* at 251–53 (elaborating on the functions of this doctrine).

208 *Id.* at 253.

209 *Id.* at 254.

210 280 U.S. 1, 17–18 (1929).

211 344 U.S. 94, 96–97 (1952).

212 *Id.* at 97.

213 *Id.* at 116.

214 426 U.S. 696, 698 (1976).

215 *Id.*

ernment could violate the Establishment Clause if it evaluates the beliefs of religious communities, and statutory protections also can preempt constitutional questions regarding religious employers.²¹⁶ Thus, the Supreme Court in some religious employer cases may not need to address constitutional concerns.

While the Supreme Court allows religious institutions broad leeway in decisionmaking, one of the issues that pervade First Amendment jurisprudence, as seen in *Hosanna-Tabor*, is a lack of definition for what constitutes a “religious” organization.²¹⁷ The Court has in the past protected religiously affiliated organizations. In *National Labor Relations Board v. Catholic Bishop of Chicago*, for instance, the Supreme Court denied jurisdiction of the National Labor Relations Board (NLRB) over an issue involving Catholic schools’ non-unionization of teachers.²¹⁸ In its decision, it denied the distinction made by the NLRB between organizations that are “completely religious, [and] just religiously associated.”²¹⁹ If Congress’s statute were construed as allowing NLRB’s jurisdiction, the law would be unconstitutional.²²⁰ This issue remains in *Hosanna-Tabor*, discussed below.

B. *Hosanna-Tabor v. EEOC*

1. Description of the Case

The Supreme Court’s recent decision *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* nationally recognized the First Amendment’s long-held “ministerial exception” to employment discrimination cases.²²¹

Hosanna-Tabor Evangelical Lutheran Church and School (*Hosanna-Tabor*) offers a “Christ-centered education.”²²² Teachers are either “called”

216 See *supra* note 29 for examples of statutory exemptions. One of the most important statutory religious exemptions arises from Title VII, section 702 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C. (2012)). Title VII in part prevents discrimination in employment because of “[an] individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2 (2012). Section 702 creates an exemption for “religious corporation[s], association[s], educational institution[s], or societ[ies], with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities.” 42 U.S.C. § 2000e-1. Without this provision, a religious employer would be inhibited from selecting employees without state interference, thus placing Title VII “at the risk of violating the First Amendment.” Evans & Hood, *supra* note 164, at 4.

217 For a detailed analysis of the “elephant in the room” of *Hosanna-Tabor*, the lack of definition of the term “religious,” and the circuit split dealing with the issue in the light of the rise of new forms of faith groups, see Brian M. Murray, *The Elephant in Hosanna-Tabor*, 10 GEO. J.L. & PUB. POL’Y 493 (2012).

218 440 U.S. 490, 493, 507 (1979).

219 *Id.* at 493 (internal quotation marks omitted).

220 See *id.* at 507.

221 132 S. Ct. 694, 705 (2012).

222 *Id.* at 699 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 582 F. Supp. 2d 881, 884 (E.D. Mich. 2008)) (internal quotation marks omitted).

or “lay.”²²³ Hosanna-Tabor understands “called” teachers to have a God-given vocation, and requires them to meet additional requirements to receive the title “Minister of Religion, Commissioned.”²²⁴ The school could only revoke a “call” by a supermajority vote and for cause.²²⁵ This stipulation contrasts the lay teachers’ employment terms, which require neither religious training nor even sharing the faith.²²⁶ The respondent, Perich, taught a variety of subjects concurrently, including religion, until narcolepsy required her to take a disability leave.²²⁷ Perich attempted to regain her position with her doctor’s permission, but the school notified her that a lay teacher had filled it.²²⁸ Administrators were concerned about her availability, and so the congregation offered her a “peaceful release from her call,” by which they would pay a portion of her health insurance premiums in exchange for her resignation.²²⁹ Perich refused to resign, producing the doctor’s note that confirmed her ability to work.²³⁰ The board emphasized that it had no position for her and urged her to reconsider, but she declined.²³¹

Perich came to school on the first day that she was medically cleared to work and refused to leave until given documentation noting that she had returned.²³² The school principal called her that afternoon and informed her that she likely would be fired, to which she responded that she had consulted an attorney and would assert her legal rights.²³³ The congregation voted to rescind her call because of her “insubordination and disruptive behavior,” citing her threat of legal action, and sent her a termination letter.²³⁴ In turn, she filed a charge with the Equal Employment Opportunity Commission alleging a violation of the Americans with Disabilities Act (ADA).²³⁵

The district court granted Hosanna-Tabor summary judgment on the “ministerial exception,” holding that Perich was a minister and had been fired for violating the church’s tenet that “Christians should resolve their disputes internally.”²³⁶ The court of appeals recognized the “ministerial exception,” but claimed that it did not apply because her “duties as a called teacher were identical to her duties as a lay teacher.”²³⁷

223 *Id.*

224 *Id.*

225 *Id.*

226 *Id.*

227 *Id.* at 700.

228 *Id.*

229 *Id.* (internal quotation marks omitted).

230 *Id.*

231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.* at 701.

236 *Id.*

237 *Id.*

All nine Justices of the Supreme Court ruled in favor of *Hosanna-Tabor*, elucidating the “ministerial exception” for the first time at the national level. The Court explained that the First Amendment necessitates the freedom “of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission,” without inquiry into the reasons for dismissal.²³⁸ In its opinion, the Court held that the “ministerial exception” finds its existence within both the Free Exercise and Establishment Clauses of the First Amendment.²³⁹ The unanimous opinion noted that “[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important,” but the First Amendment has struck the balance of these rights.²⁴⁰ The “ministerial exception” is part of the Constitution, in contrast to legislative religious exceptions that arise out of “benevolent neutrality” toward religion.²⁴¹

2. An Analysis of *Hosanna-Tabor* Through the Seven-Factor Test of the European Court

As examined in Part II, the European Court’s rights-balancing, while allowing religious organizations some autonomy, uses a seven-factor test. Similarly, the “ministerial exception” is not a jurisdictional bar that would prevent the case from being adjudicated, but instead an “affirmative defense to an otherwise cognizable claim.”²⁴² Therefore, the Supreme Court also can weigh a number of considerations in its decision. Analyzing the unanimous Supreme Court decision in *Hosanna-Tabor* by the European Court’s factors illuminates the American understanding of religious freedom. This analysis displays the benefits of the Supreme Court’s approach in *Hosanna-Tabor* in protecting the rights of religious employers.

That the Supreme Court does not analyze some of the European Court factors partially elucidates why American jurisprudence defers more to religious employers’ decisions. The Supreme Court in *Hosanna-Tabor* did not consider the three employee-centered factors that the European Court analyzes. The first two factors, sufficient knowledge that one’s action violates the

238 *Id.* at 710.

239 *Id.* at 702. The Court noted that, in other situations, these two clauses could be in tension with one another. *Id.*

240 *Id.* at 710.

241 *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970). A religious exemption to the criminality of smoking peyote falls under this category of constitutionally unprotected religious expression that may be legislatively protected under *Employment Divison v. Smith*, 494 U.S. 872, 890 (1990) (“Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.”). In response to *Smith*, Congress passed a number of laws to protect freedoms unrecognized constitutionally after this ruling, such as the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (2012), which governs federal action after its application to state law was declared unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2012).

242 *Hosanna-Tabor*, 132 S. Ct. at 709 n.4.

religious organization's standards and an employee's publication of his or her private life, were inapplicable in this case because it involved disability discrimination. The absence of these two factors highlights the breadth of the "ministerial exception." It could apply even in cases in which there may be no employee culpability—although *Hosanna-Tabor's* admittedly narrow holding leaves the possibility that American courts may determine culpability between religious employers and their employees in future cases. The Court "express[es] no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."²⁴³

Fundamentally, the absence of a right to work in American jurisprudence eliminates the European Court's third employee-centric factor: how the dismissal affects the employee's career. In the United States, a religious organization can fire an employee for violating religious standards.²⁴⁴ Without a right to work, courts can more greatly protect the rights of religious employers. No equal employment right exists to balance against religious employers' rights. Although the Supreme Court recognizes that "[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important," it acknowledges that "the First Amendment has struck the balance" for it.²⁴⁵ The absence of a countervailing right to work restrains the Supreme Court from engaging in the same balancing test as the European Court.

While the ECtHR in its rights-balancing will determine a belief's importance to the religious organization, the Supreme Court explicitly refuses to address it.²⁴⁶ The European Court allows a limited freedom to decline to renew an employment contract, but only for judicially verified, important religious violations. The Supreme Court has emphasized, conversely, that "[t]he purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister . . . is the

243 *Id.* at 710.

244 Evans & Hood, *supra* note 164, at 7. Lower courts in the United States, however, have held that religious employers can fire women for premarital sex if contrary to its religious tenets, but "cannot fire women for being pregnant out of wedlock. The rationale behind this distinction is that a prohibition on premarital sex can be applied to both men and women equally but a prohibition on premarital pregnancy can only be applied to women and thus constitutes sex discrimination." *Id.* (footnote omitted).

245 *Hosanna-Tabor*, 132 S. Ct. at 710.

246 Even the dissent in the 9–8 decision of *Fernández Martínez v. Spain* highlights the different approaches of the two courts. To support its argument against the state's deference to the church's decision, the dissent asserts that the European Court should not investigate religious claims. *Fernández Martínez v. Spain* [GC] (*Fernández Martínez I*), App. No. 56030/07, ¶¶ 24, 30, 36 (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145068> (Spielmann, Sajo, Karakas, Lemmens, Jaderblom, Vehabovic, Dedov, and Saiz-Arnaiz, JJ., dissenting). Meanwhile, the Supreme Court's unanimous refusal to examine religious claims serves the very purpose of deferring to a religious institution's decision.

church's alone."²⁴⁷ The European Court criticized the German courts for accepting *prima facie* the Catholic Church's claim that a choirmaster was important enough to fire for personal transgressions.²⁴⁸ Instead, domestic courts, it asserted, must "conduct[] an in-depth examination" of a case in balancing rights, including considering the centrality of a belief.²⁴⁹ Indeed, the ECtHR's *Fernández Martínez* opinion contained eight canons of the Catholic Church's canon law.²⁵⁰ In the Supreme Court's jurisprudence, alternately, claims based on religious transgressions are acceptable, no matter how unimportant a secular court may consider it. Religious organizations may "establish their own rules and regulations for internal discipline and government, and . . . create tribunals for adjudicating disputes over these matters."²⁵¹ The decisions of these tribunals are binding on civil courts.²⁵²

Indeed, Justice Thomas's concurrence called for deference to a religious organization by quoting *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*: "[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. . . . [A]n organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission."²⁵³ The Supreme Court declines to consider where the belief ranks in importance for a religious organization because of religious organizations' right to noninterference regarding their own doctrines.

Some of the European Court's factors play a role in American jurisprudence. One factor the European Court weighs—the importance of a member's position to the religious organization—drives the "ministerial exception." The "ministerial exception is not limited to the head of a religious congregation."²⁵⁴ In *Hosanna-Tabor*, the Supreme Court, however, was "reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister."²⁵⁵ The Court declined to list any generalized factors, but considered that the congregation "held Perich out as a minister," giving her a distinct role.²⁵⁶ The congregation prayed that God would "'bless' [her] ministrations."²⁵⁷ She needed religious training, special qualifications, and an

247 *Hosanna-Tabor*, 132 S. Ct. at 709.

248 *Schüth v. Germany*, App. No. 1620/03, ¶ 69 (Eur. Ct. H.R. 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100469>.

249 *Fernández Martínez I*, App. No. 56030/07, ¶ 132.

250 *Id.* ¶ 58.

251 *Hosanna-Tabor*, 132 S. Ct. at 705 (internal quotation marks omitted).

252 *Id.*

253 *Id.* at 711 (Thomas, J., concurring) (quoting *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987)) (internal quotation marks omitted).

254 *Id.* at 707 (majority opinion).

255 *Id.*

256 *Id.*

257 *Id.* (alteration in original).

official commission by the congregation, a process that spanned six years.²⁵⁸ On her tax return, Perich accepted a housing allowance for employees working “in the exercise of the ministry.”²⁵⁹ Finally, she performed “important religious functions” for the congregation in addition to teaching.²⁶⁰ Therefore, the Court determined that she was a minister. This opinion may have influenced the ECtHR Grand Chamber in *Fernández Martínez*, as the Chamber’s case stressed that Fernández Martínez was a “secularised priest,”²⁶¹ thus driving the distinction, whereas the Grand Chamber noted a religion teacher has a “crucial function requiring special allegiance.”²⁶²

The majority opinion in *Hosanna-Tabor* “use[d] church, religious group, and religious institution interchangeably”²⁶³ and attempted to avoid “adopt[ing] a rigid formula for deciding when an employee qualifies as a minister.”²⁶⁴ It restricted its analysis to the case’s facts. The prudent course may be to define minister on a case-by-case basis, rather than to form a standard definition. Further, the Court may have concern that definitions of “minister” would impede the free exercise of nonstandard religions and violate the Establishment Clause. Its analysis could give preferential legal status to traditional, most likely Christian, understandings of religion. As Brian Murray notes, Justice Thomas’s concurrence recognized that the question of “who is a minister” entails acknowledging “which institutions can have ministers.”²⁶⁵

The concurrences highlight this concern—who qualifies as a minister—that the majority opinion is wary of addressing. The joint concurrence by Justices Alito and Kagan also noted that the term “minister” is insufficient given the United States’ growing religious diversity: “[t]he term ‘minister’ is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews,

258 *Id.*

259 *Id.* at 708 (internal quotation marks omitted).

260 *Id.*

261 *Fernández Martínez v. Spain* [Chamber] (*Fernández Martínez II*), App. No. 56030/07, ¶ 83 (Eur. Ct. H.R. 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110916>.

262 *Fernández Martínez v. Spain* [GC] (*Fernández Martínez I*), App. No. 56030/07, ¶ 135 (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145068>.

263 Murray, *supra* note 217, at 502. Justice Thomas, citing *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, stated that

[j]udicial attempts to fashion a civil definition of “minister” through a bright-line test or multi-factor analysis risk disadvantaging those religious groups [that] . . . are outside of the “mainstream” or [that are] unpalatable to some. Moreover, uncertainty about whether its ministerial designation will be rejected, and a corresponding fear of liability, may cause a religious group to conform its beliefs and practices . . . to the prevailing secular understanding.

Hosanna-Tabor, 132 S. Ct. at 711 (Thomas, J., concurring).

264 *Hosanna-Tabor*, 132 S. Ct. at 707.

265 Murray, *supra* note 217, at 500 (internal quotation marks omitted).

Muslims, Hindus, or Buddhists.”²⁶⁶ This functional approach, however, increases the risk that courts will investigate what constitutes religion. The two courts may converge more on this issue in light of the June 2014 Grand Chamber decision in *Fernández Martínez v. Spain*.

Unlike the ECtHR, Justice Thomas would “defer to a religious organization’s good-faith understanding of who qualifies as its minister,” as “[a] religious organization’s right to choose its ministers would be hollow . . . if secular courts could second-guess the organization’s sincere determination”; there could be no “bright-line test or multi-factor analysis,” which would force a religious group to “conform its beliefs and practices regarding ‘ministers’ to the prevailing secular understanding.”²⁶⁷ Justices Alito and Kagan in their concurrence called for a functional test applying to anyone who “leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”²⁶⁸ This unresolved tension could lead to an analysis similar to the European Court’s regarding whether one’s employment falls under the exception.

The Supreme Court, along with its European counterpart, also considered whether the religious organization’s action comports with generally established legal principles. It retraced the United States’ history of religious freedom to establish that religious organizations’ unrestricted choice of ministers has been a fundamental legal norm from the country’s early years.²⁶⁹ Since the legal heritage of the United States includes religious organizations’ autonomy over minister selection, it is an established part of law and society. It is a longstanding legal principle. No need exists to investigate whether a religious organization’s religious claim for firing a minister is a pretext.²⁷⁰

Hence, this “ministerial exception” exists concurrently with *Employment Division v. Smith*, which holds that “generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest.”²⁷¹ In *Smith*, the Court upheld a general prohibition on peyote that inhibited its ritual use.²⁷² The Court in *Hosanna-Tabor* stated that the “ADA’s prohibition on retaliation . . . is a valid and neutral law of general applicability.”²⁷³ Yet, “*Smith* involved government regulation of only outward physical acts” while *Hosanna-Tabor*, “in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself.”²⁷⁴ The ADA still retains legitimacy and may be asserted against religious employers in other suits, and religious employers may still be sued under

266 *Hosanna-Tabor*, 132 S. Ct. at 711 (Alito & Kagan, JJ., concurring).

267 *Id.* at 710–11 (Thomas, J., concurring).

268 *Id.* at 712 (Alito & Kagan, JJ., concurring).

269 *Id.* at 702–03 (majority opinion).

270 *Id.* at 709.

271 494 U.S. 872, 886 n.3 (1990).

272 *Id.*

273 *Hosanna-Tabor*, 132 S. Ct. at 707.

274 *Id.*

other laws of general applicability.²⁷⁵ Because the “ministerial exception” finds its basis in the Constitution and as a general principle of law, it can exist concurrently with *Smith*. The constitutionally based “ministerial exception” prevails over the statutory nondiscrimination right; other decisions may still weigh other legal principles against the religious organizations’ rights along a *Smith* test.

Finally, this comparison shows that the United States’ culture accepts certain religious norms. In *Fernández Martínez v. Spain*, the European Court refused to examine whether the priest’s actions caused his dismissal, potentially an Article 8 violation, as he had been able to maintain his teaching position although it was well-known that he was a “married priest.”²⁷⁶ Only publication caused concern.²⁷⁷ The European Court declined to comment on whether the Catholic Church could refuse to renew the contract of a married priest who had not willfully exposed his lifestyle: there is not an easy answer to this question for the European Court. The unanimity of the Justices in *Hosanna-Tabor* shows this common culture regarding religious employers’ rights.²⁷⁸ Both parties in oral argument “conceded that a Roman Catholic priest who is dismissed for getting married could not sue the church and claim that his dismissal was actually based on a ground forbidden by the federal antidiscrimination laws.”²⁷⁹ Yet, “[t]he Roman Catholic Church’s insistence on clerical celibacy may be much better known than the Lutheran Church’s doctrine of internal dispute resolution, but popular familiarity with a religious doctrine cannot be the determinative factor.”²⁸⁰ In the United States, clerical celibacy is uncontroversial as a value upon which a religious organization may insist. The more difficult issues for both jurisdictions, then, arise in cases where religions are outside of the cultural norm.

CONCLUSION

The European Court of Human Rights’ factor test highlights the supremacy of religious rights in the United States as seen in *Hosanna-Tabor v. EEOC*. Only four of the European Court’s seven factors consider the religious employer. These factors—religious tenets’ harmony with law and soci-

275 See *id.* at 710 (“Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits . . .”).

276 *Fernández Martínez v. Spain* [GC] (*Fernández Martínez I*), App. No. 56030/07, ¶ 146 (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145068>; *Fernández Martínez v. Spain* [Chamber] (*Fernández Martínez II*), App. No. 56030/07, ¶ 83 (Eur. Ct. H.R. 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110916>.

277 *Fernández Martínez I*, App. No. 56030/07, ¶ 146.

278 This unanimity underscores one of the differences between American jurisprudence and that of the European Court. The ECtHR Grand Chamber decision in *Fernández Martínez v. Spain* was narrow, with nine judges asserting that there was no violation of the European Convention and eight judges admonishing that *Fernández Martínez*’s rights had been violated. *Id.* ¶ 155.

279 *Hosanna-Tabor*, 132 S. Ct. at 715–16 (Alito & Kagan, JJ., concurring).

280 *Id.* at 716.

ety, the asserted belief's centrality to the religious system, the importance of the employee's position to the organization, and the organization's potential credibility loss in retaining the employee—have varying degrees of relevance within the American system.

Religious employers' freedom to choose their ministers has been so fundamental from the United States' inception that it is a general principle of law. This fundamentality brings the "ministerial exception" outside of the purview of *Smith* limitations. As demonstrated in Part II, the European system will allow countries to respect the religious decisions of religious organizations. Hence a modified "ministerial exception" can be a fundamental aspect of law and society for a state. It can account for tradition within a domestic system. Yet, the European Court weighs this fundamental principle of law in relation to a number of other considerations.

Unlike the European Court, the Supreme Court purposely does not analyze a belief's centrality to a religious system because such an analysis would violate the Establishment and Free Exercise Clauses of the First Amendment. The United States recognizes that such a determination would undermine religious autonomy. The Supreme Court understands the vitality of religious institutions broadly. The European Court does not. In deference to religious institutions, the American constitutional system does not assess the institutions' credibility damage. The European system may require religious organizations to prove that an employee damages their mission, harms the credibility of their tenets, or exposes them to claims of hypocrisy. The American system, however, defers to a religious institution's choice of its own ministers. Religious organizations retain autonomy over difficult governance questions arguably best left to their own discretion.

In the case of employees who lack formal religious titles, the European Court will analyze how important the job is to the faith. One of its major concerns is how much the employee interacts with the general public. This factor may count in U.S. decisions. All nine Supreme Court Justices recognized the "ministerial exception," but the majority opinion in *Hosanna-Tabor* refused to analyze what it entails beyond the facts of the case itself. The two concurrences proposed different inquiries, from deferential treatment to a functional analysis. Courts may need to decide which method best protects both religious employers and individual rights.

The Supreme Court, while placing limits on some aspects of freedom of religion, understands the freedom of religious employers in a robust way. The "ministerial exception" allows for a rigorous religious freedom that is not shared in the European system. The European Court's balancing test, while retaining some use in an American context, requires a degree of probing into the religious sphere. While there are still unresolved tensions in American religious employment jurisprudence, the "ministerial exception" recognizes religious freedom as a fundamental right and gives broad deference to religious organizations' authority over delicate issues of leadership.