

RESEARCH ARTICLE

Sacrificing Religious Freedom in Europe: Why the Pan-European Courts Need Douglas Laycock

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doi:[10.1017/jlr.2026.10075](https://doi.org/10.1017/jlr.2026.10075)

Abstract

In *Employment Division v. Smith* (1990), the U.S. Supreme Court held that neutral and generally applicable laws would no longer receive strict scrutiny review. Many feared that *Smith* had severely truncated the protection of the First Amendment Free Exercise Clause. Three years later, however, in a controversial Santerian slaughtering case, Douglas Laycock persuaded a unanimous Supreme Court in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* to highlight an important limitation on the *Smith* neutrality standard. Both “masked as well as overt” government hostility, targeting, or discrimination against religion are constitutionally “suspect,” *Lukumi* made clear. Recent Supreme Court free exercise cases have emphasized this limitation. Over the past decade, the European Court of Human Rights and the Court of Justice of the European Union are replaying the same story that played out in the U.S. Supreme Court in the 1980s and 1990s and have gradually weakened their religious freedom provisions into a guarantee of government neutrality alone. In their most recent cases, these pan-European high courts have upheld blatantly discriminatory regulations of Muslim and Jewish ritual slaughtering, favoring animal welfare over religious freedom. These courts need to take a lesson from Laycock’s argument in *Lukumi* that neutrality requires states not to take sides for or against religion and not to uphold laws that have the mere pretense of neutrality while targeting the core practices of religious minorities.

Keywords: religious freedom; Douglas Laycock; First Amendment; Free Exercise; neutrality; discrimination; European Court of Human Rights; Court of Justice of the European Union; Santerian; Jewish and Muslim ritual slaughtering

Reclaiming American Religious Freedom from Neutrality

Douglas Laycock’s first U.S. Supreme Court case was a clean 9–0 win.¹ The case was *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993).² It featured a Santerian church that syncretized traditional Roman Catholic sacramental liturgies with ancient Yoruban rituals

¹ See 2 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: THE FREE EXERCISE CLAUSE 66–232 (2011) (collecting his briefs, arguments, and reflections on the case in the United Court of Appeals for the Eleventh Circuit and in the Supreme Court of the United States).

² 508 U.S. 520 (1993).

brought to colonial Cuba centuries before by enslaved West Africans.³ One of Santeria's central religious practices is the ritual sacrifice of birds, goats, sheep, or turtles during community celebrations of births and marriages, initiation of new members and priests, healing services, last rites, and annual religious feast days. These sacrifices, performed by Santerian priests, usually inside private homes or buildings, involve cutting the carotid arteries of live animals as they are restrained, and collecting their blood in jars as a sacrifice to the spirits called *orishas*. The slaughtered animals are usually cooked thereafter and eaten by church members, except during healing and death rituals, when the carcasses are discarded.⁴

In the Cuban emigré community in Florida, the Santerians were stigmatized, even though they were the third largest religion in Florida after Christianity and Judaism: "Santeria was seen as backward, as the religion of slaves and remained underground, first from fear of persecution, and later, from fear of discrimination and social stigma."⁵ But as their local numbers grew, the Santerians acquired land and sought permits to build a church, school, cultural center, and museum in Hialeah, a small city just north of Miami. Alarmed city officials ultimately passed four separate ordinances that had the intent and effect of prohibiting Santerian ritual slaughtering but without affecting any other secular or religious slaughtering or killing of animals, including very similar methods of Jewish kosher slaughtering.⁶

Before Laycock's involvement, the Santerian Church filed suit in federal district court claiming a violation of their First Amendment Free Exercise rights. It lost. The district court ruled that the ordinance did not "target" the Santerians and found "no proof of any discriminatory action."⁷ The laws, the court ruled, properly restricted slaughtering to areas zoned for slaughtering. They protected the public's health from unsanitary penning and cooking conditions. They shielded children from the emotional trauma of witnessing animal slaughter. And they spared the "animals from cruel and unnecessary killing."⁸ The Santerians sought to appeal.

This was not an easy case to appeal. Defending the religious right to perform bloody sacrifices of unstunned animals by inexperienced priests in front of men, women, and children, often in the marinating heat of south Florida—these were hardly sympathetic facts. For many observers, the practice was "grotesque" and "disgusting."⁹ Indeed, the religious liberty lawyer in line to argue the case on appeal was such "a strong supporter of animal rights" that he declined.¹⁰ Laycock was tapped to argue it instead. While no fan of ritual slaughtering or Santeria, he took on the case, because, in his words, no lawyer "who cared about religious liberty could acquiesce in the deliberate outlawing of a worship service."¹¹

The appeal was made even harder because the Supreme Court had in the interim dramatically weakened the First Amendment Free Exercise Clause. In *Employment Division v. Smith* (1990), the court rejected its own strict scrutiny free exercise test in place since 1963

³ See sources and discussion in Claudia Rauhut, *Santeria*, in *OXFORD HANDBOOK OF CARIBBEAN RELIGIONS* 71–88 (Michelle Gonzalez Moldonado ed., 2024); MIGUEL A. DE LA TORRE, *SANTERIA: THE BELIEFS AND RITUALS OF A GROWING RELIGION IN AMERICA* (2024).

⁴ See Rauhut, *supra* note 3; DE LA TORRE, *supra* note 3.

⁵ *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467, 1488 (1989).

⁶ See detailed procedural history in LAYCOCK, *supra* note 1, at 156–60.

⁷ *Church of Lukumi Babalu Aye*, 723 F. Supp. at 1488.

⁸ *Id.* at 1472–73, 1488.

⁹ LAYCOCK, *supra* note 1, at 137.

¹⁰ Melissa Castro Wyatt, *Professor Douglas Laycock Retiring as a "Giant" in Two Fields*, University of Virginia Law School (April 24, 2023), <https://www.law.virginia.edu/news/202304/professor-douglas-laycock-retiring-giant-two-fields>.

¹¹ LAYCOCK, *supra* note 1, at 137.

and held that hereafter laws that were “neutral and generally applicable” did not violate the free exercise rights of the parties, no matter how substantial a burden those laws imposed on their religion.¹² Only if the law was not neutral or not generally applicable was government required to satisfy strict scrutiny—showing that their law served a compelling state interest and was the least restrictive alternative for achieving that interest.¹³

Laycock and his litigation team had to prove both that the city ordinances were not neutral and that they could not survive strict scrutiny. The lack of neutrality was evident enough. Numerous Florida and Hialeah laws protected all other animal-killing by hunters, fishermen, farmers, bounty hunters, lab researchers, and pet owners, as well as by all commercial and Jewish slaughtering houses.¹⁴ But these city ordinances singled out the Santerians, based on suspect distinctions between ritual “sacrifice” that was forbidden, but ritual “slaughter” that was protected: “The legal difference is said to be that ritual slaughter is primarily for food, but ritual sacrifice is primarily for ritual and only secondarily for food. The factual difference is said to be that practitioners of ritual slaughter use a different knife stroke from practitioners of ritual sacrifice. The political difference is that ritual slaughter is conducted by Jews in Kosher slaughterhouses; ritual sacrifice is conducted by Santeria priests in private homes.”¹⁵ These were fabricated distinctions designed to make the ordinances appear neutral, Laycock argued. But they remained blatantly discriminatory “gerrymandered” ordinances and were narrowly tailored to discriminate only against Santerians, no other religious or secular group.¹⁶

Moreover, this discriminatory targeting of Santerian slaughter served no compelling governmental interest. The city had put on no evidence of actual public health hazards, no proof of actual harm to children, and no proof that the animals fared any worse in Santerian rituals than in all the other legally protected means of animal killing in Florida.¹⁷ Laycock concluded his brief with a flourish: “Hialeah has not made it a crime to kill animals. Rather, Hialeah has made it a crime to sacrifice animals to your God.... [T]he fundamental issue ... is whether religious animal sacrifice can be singled out for discriminatory prohibition. After surviving slavery and Communist totalitarianism, after seeking refuge in the nation founded for religious liberty, Santeria should not be compelled to remain underground, worshipping in secret like Christians in the catacombs. Hialeah has no compelling need to suppress this ancient faith.”¹⁸

The U.S. Court of Appeals for the Eleventh Circuit rejected this argument in a dismissive one-paragraph *per curiam* opinion.¹⁹ The court did not address any of the allegations or arguments. And it did not analyze the effect of the new *Smith* case that now governed the federal courts—intimating only that, as Hialeah had already won under the “arguably stricter standard” of free exercise scrutiny in place before *Smith*, it should win even more easily now.²⁰

Laycock and the litigation team successfully appealed this case to the Supreme Court. This was precisely the kind of deliberate targeting of religious minorities that he and other critics of the *Smith* case were warning about.²¹ Any legislature with skilled legal counsel

¹² 494 U.S. 872, 879 (1990).

¹³ *Id.* at 886–87.

¹⁴ LAYCOCK, *supra* note 1, at 133–34.

¹⁵ *Id.* at 134.

¹⁶ *Id.* at 139–43.

¹⁷ *Id.*

¹⁸ *Id.* at 147.

¹⁹ Church of Lukumi Babalu Aye, Inc., v. City of Hialeah, 936 F.2d 586 (1991) (*per curiam*).

²⁰ *Id.*

²¹ See detailed collection of testimony and advocacy against *Smith* and for case law and statutory reforms in 3 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY: RELIGIOUS FREEDOM RESTORATION ACTS, SAME-SEX MARRIAGE LEGISLATION, AND THE CULTURE WARS (2018).

could craft neutral statutory language that had the desired effect of substantially burdening the worship or other core exercise of an unpopular religion and thus driving it away.²² Indeed, the Supreme Court had already issued a trio of cases in the prior five years that used neutrality logic to uphold government intrusions on Native Americans' spiritual formation practices, ancient sacred burial sites, and arduous sacramental rituals.²³ Some religious freedom colleagues thus encouraged dropping the *Santeria* case, for fear that it might well exacerbate the problem of *Smith*, with the court's neutrality logic harming yet another religious minority at the cost of religious freedom for all.²⁴ But Laycock regarded this as a good case—featuring a city's blatant prejudicial targeting of the religious worship of an ancient beleaguered religious tradition—to have the court begin to “establish some outer limit to the damage done by *Smith*.”²⁵

In his petitioner's brief, and in his oral argument before the Supreme Court, Laycock argued that the city had betrayed ample animus toward the Santerians, crafting their laws “in a mob atmosphere”²⁶ filled with invective against this unpopular group. The ordinances rested on the city's own theological judgment that sacrificial killing of animals was no longer necessary because, as one speaker at the city council meeting on the ordinance put it, “Christ's sacrifice on the cross is good for all time and all people.”²⁷ Yet the city still allowed Jews to continue their kosher slaughtering. The stated justifications for prohibiting Santerian slaughtering alone—public health, children's welfare, animal cruelty, and zoning limitations—were “legitimate” concerns in the abstract, but were not proven “compelling interests” in this case. Laycock concluded: “[T]he fundamental question in this case is whether religious animal sacrifice can be singled out for discriminatory prohibition. The Court's cases are clear; the answer is no.”²⁸ And to drive home the dangers of this case, he warned: “*Smith* leaves precious little protection for the free exercise of religion. If this Court permits even that protection to be evaded by clever drafting and a mere pretense of neutrality, then it has indeed repealed the Free Exercise Clause.”²⁹

In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993), a unanimous Supreme Court accepted this argument and struck down the city ordinances as unconstitutional under the Free Exercise Clause. The court found that the new slaughtering laws transparently targeted Santerian believers and their slaughtering practices for special prohibitions, while allowing virtually identical conduct by other religious and secular groups to stand. This law was thus not “neutral and of general applicability,” Justice Kennedy concluded for the court.³⁰ While Kennedy had joined the *Smith* majority three years before, he now emphasized for a unanimous *Lukumi* court that the Free Exercise Clause was not toothless after *Smith*. It remains a “well understood” principle, he wrote, “that government may not enact laws that

²² LAYCOCK, *supra* note 1, at 156–90.

²³ *Bowen v. Roy*, 476 U.S. 693 (1996) (holding agency's use of social security number does not violate free exercise rights of a Native American who believes such use would impair his child's spirit); *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988) (holding construction of road through section of national forest regarded as sacred ground by three tribes does not violate Free Exercise Clause; American Indian Religious Freedom Act provides no cause of action); *Employment Division v. Smith*, 494 U.S. 872 (1990) (holding denial of unemployment compensation benefits to a Native American who was discharged for sacramental use of peyote, a proscribed narcotic, does not violate Free Exercise Clause).

²⁴ *Castro Wyatt*, *supra* note 10.

²⁵ LAYCOCK, *supra* note 1, at 154–55.

²⁶ *Id.* at 161.

²⁷ *Id.* at 168–69 (paraphrasing the speaker and citing Plaintiff's Exhibit 10 at 5, R8 at 81–82).

²⁸ *Id.* at 189.

²⁹ *Id.* at 175.

³⁰ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 530–32 (1993).

suppress religious belief or practice.”³¹ Even a law that is facially neutral may warrant strict judicial scrutiny because “[t]he Free Exercise Clause protects against government hostility which is masked as well as overt.”³² When the government burdens religious exercise while leaving untouched other, nonreligious activities of a similar nature and that implicate the same government interests, it is “not unreasonable to infer” that the challenged restrictions are “gratuitous” and therefore constitutionally suspect.³³ Here, the city could not put forward any compelling state interest to justify its non-neutral and non-generally applicable law, and the court thus struck it down.³⁴

It was Laycock’s argument that convinced the *Lukumi* court to highlight an important limitation on the *Smith* neutrality standard—a limitation that has grown in importance in the ensuing three decades of federal case law.³⁵ Both “masked as well as overt” government hostility, targeting, or discrimination against religion are constitutionally “suspect,”³⁶ *Lukumi* made clear. And those government actions will not survive Free Exercise scrutiny unless they serve a proven compelling government interest. That limitation was already buried in the sweeping language of the *Smith* case; Laycock convinced the *Lukumi* court to highlight and apply it.³⁷

Recent Supreme Court free exercise cases have emphasized this limitation. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), for example, the court upheld the free exercise claims of a local baker whom the state commissioners had targeted and then publicly criticized for his religious beliefs that kept him from baking a cake for a same-sex wedding celebration. Twenty-five years after *Lukumi*, Laycock’s amicus brief again argued that this was precisely the kind of governmental discrimination and hostility to religion that *Lukumi* forbids; Justice Kennedy, writing for the *Masterpiece* court, again agreed that the state had thereby engaged in unjustified betrayal of the baker’s free exercise rights.³⁸ In a trio of state-aid-to-education cases from 2017 to 2022, the Supreme Court held that denying religious schools and parents from state benefits made available to their secular counterparts violated the Free Exercise Clause. Now traditional federal and state establishment clause prohibitions on aid to religious education were not considered compelling enough to justify this discrimination against religion.³⁹ And in a flurry of free exercise cases challenging public health restrictions on religious worship during COVID-19, the majority of the court announced that it was now “the clear” rule that “government regulations are not

³¹ *Id.* at 523.

³² *Id.* at 534.

³³ *Id.* at 538–39.

³⁴ *Id.* at 542–47.

³⁵ See JOHN WITTE, JR., JOEL A. NICHOLS & RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 170–205 (5th ed. 2022); John Witte, Jr. & Eric Wang, *The New Fourth Era of American Religious Freedom*, 74 HASTINGS LAW JOURNAL 1813 (2023).

³⁶ *Lukumi*, 508 U.S. at 534–39.

³⁷ LAYCOCK, *supra* note 1, at 925–35.

³⁸ *Id.* at 901–35.

³⁹ *Trinity Lutheran Church of Columbus, Inc. v. Comer*, 582 U.S. 449 (2017) (holding state program that per se excludes churches and any church-controlled entity from an otherwise neutral and secular aid program of funding preschool playground refurbishment violates the Free Exercise Clause); *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020) (holding state constitution’s “no-aid-to-religion” provision improperly discriminated against religious schools and families who wanted to attend them, when that provision prevented tax credits from flowing to religious schools; strict scrutiny applies and the provision violates the Free Exercise Clause); *Carson v. Makin*, 596 U.S. 767 (2022) (holding state violated the Free Exercise Clause by discriminating against religious schools and parents who choose them in the operation of a private-school-funding program). But cf. *Oklahoma Statewide Charter School Board v. Drummond*, 605 U.S. 165 (2025) (An evenly split 4–4 case that left in place Oklahoma Supreme Court’s holding that the establishment clause forbids the state to support a Catholic virtual charter school.).

neutral and generally applicable ... whenever they treat *any* comparable secular activity more favorably than religious exercise.”⁴⁰

In the past thirty-five years, the First Amendment Free Exercise Clause “has gone from the brink of repeal to actually being over-enforced these days,” Laycock recently commented, referencing the COVID-19 related legal cases.⁴¹ Some of these cases are certainly troubling in their sometimes contorted reasoning and in their protections of religious services and later of religious anti-vaccination movements that may well have exacerbated the spread of COVID-19.⁴² Even so, in a day of growing vicious anti-Semitic, anti-Islamic, and anti-immigrant posturing and policy-making, a strong Free Exercise Clause consistently enforced against religious discrimination and hostility remains welcome.⁴³ Indeed, recent local and state bans on sharia,⁴⁴ new limitations on faith-based arbitration,⁴⁵ and new agitation to restrict kosher, halal, Santerian, and other religious slaughtering practices⁴⁶ are retesting the strength of the Free Exercise Clause and America’s commitment to religious liberty for all.

Sacrificing European Religious Freedom for Neutrality and New Moral Policies

Pan-European high courts today are replaying the same story that played out in the United States Supreme Court in the 1980s and 1990s. Over the past decade and more these pan-European courts have gradually weakened their religious freedom provisions into a guarantee of government neutrality alone. Several times, they have also given a wide “margin of appreciation”⁴⁷ for variant local state governments’ treatments of religion (akin to the effect of federalism in earlier American religious freedom cases). And in the past six years, these European courts have taken up religious freedom cases challenging purportedly neutral statutes about animal welfare that have targeted the religious slaughtering practices of unpopular religious minorities.

But here the trans-Atlantic parallels end. For, unlike the *Lukumi* court in the United States, the two pan-European high courts have had no Douglas Laycock to instruct them. And they have had no trouble upholding local anti-slaughtering legislation, despite the obvious hostility to Muslims and Jews that inspired them and despite the deliberate targeting of core

⁴⁰ *Tandon v. Newsom*, 593 U.S. 61, 62–65 (2021) (per curiam) (emphasis added).

⁴¹ Castro Wyatt, *supra* note 10.

⁴² See, e.g., Samuel L. Bray & Nathan S. Chapman, *An Evaluation of Religious Exemptions from COVID-19 Vaccine Requirements*, CANOPY FORUM (December 6, 2021) <https://canopyforum.org/2021/12/06/an-evaluation-of-religious-exemptions-from-covid-19-vaccine-requirements/>; Mark Storslee, *The COVID-19 Church-Closure Cases and the Free Exercise of Religion*, 37 JOURNAL OF LAW AND RELIGION 72 (2022).

⁴³ Nathan S. Chapman, *The Case for the Current Free Exercise Regime*, 108 IOWA LAW REVIEW 2115 (2023).

⁴⁴ See overviews in JOHN WITTE, JR., CHURCH, STATE, AND FAMILY: RECONCILING TRADITIONAL TEACHINGS AND MODERN LIBERTIES 300–35 (2019); John Witte, Jr. & Joel A. Nichols, *Who Governs the Family? Marriage as a New Test Case of Overlapping Jurisdictions*, 4 FAULKNER LAW REVIEW 321–49 (2013).

⁴⁵ See Michael J. Brody, *Faith-Based Family Law Arbitration in Secular Democracies: Is the End Near?*, in FAITH IN LAW, LAW IN FAITH: REFLECTING AND BUILDING ON THE WORK OF JOHN WITTE, JR. 590–614 (Rafael Domingo, Gary S. Hauk & Timothy P. Jackson eds., 2024).

⁴⁶ See, e.g., *Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009) (holding Texas city ordinance prohibiting the keeping of four-legged animals within town borders violates the Texas Religious Freedom Restoration Act because the ordinance prevents Santerian priest from performing animal sacrifice without a compelling government interest). See further reports, Anti-Defamation League, *Antisemitic Attitudes in America 2024* (Feb. 29, 2024) <https://www.adl.org/resources/report/antisemitic-attitudes-america-2024>; Islamophobia Legislative Database, Anti-Islamic Activities in the United States, 2012–2018, <https://belonging.berkeley.edu/islamophobia/islamophobia-legislative-database> (last visited February 22, 2025).

⁴⁷ The “margin of appreciation” judicial approach is set out in the leading case, *Handyside v. U.K.*, App. No. 5493/72, para. 47 (December 7, 1976), <https://hudoc.echr.coe.int/eng?i=001-57499>.

religious exercises hiding under the veneer of legislative neutrality or state discretion. Unlike the strong American reaction to the *Smith* neutrality case—producing a long series of federal and state religious freedom restoration acts and new test cases, many of the efforts spearheaded by Laycock⁴⁸—European governments and religious liberty advocates have been largely silent in response to these discriminatory religious slaughtering cases. These rulings give *carte blanche* to other European nations to use what Laycock called “clever drafting and a mere pretense of neutrality”⁴⁹ to ban not only ritual slaughtering but also other central religious practices of unpopular local religions—particularly Muslims, Jews, Jehovah’s Witnesses, and conservative Christians who have already fared poorly of late before both pan-European courts.⁵⁰ These new anti-slaughtering cases are underscoring the reality that Europe is sacrificing religious freedom in pursuit of other values.

Europe has two pan-national courts: the European Court of Human Rights sitting in Strasbourg (the ECtHR, or Strasbourg Court); and the Court of Justice of the European Union (the CJEU, or Luxembourg Court). The Strasbourg Court has jurisdiction over the forty-six European countries of the Council of Europe, with nearly 700 million people. It hears cases from parties claiming that their home state violated the 1950 European Convention on Human Rights (ECHR).

The ECHR’s most important religious freedom guarantee is article 9:

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

9.2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.⁵¹

The ECHR also protects religion under its general guarantees of privacy (article 8), freedom of expression (article 10), freedoms of assembly and association (article 11); and freedom from discrimination (article 14). Parties who invoke ECHR rights must first exhaust their domestic remedies at home before appealing to the Strasbourg Court. The court’s judgments against a member state, although diplomatically and politically influential, remain only self-enforced “soft law” and often only in the member state that was sued. Since its religious freedom case law began in 1993, however, the Strasbourg Court has issued more than 150 religious freedom cases on the merits—including, notably, a 2024 case on ritual slaughtering that emerged in response to an adverse ruling of the Luxembourg Court.⁵²

The Luxembourg Court has jurisdiction over a smaller group of twenty-seven members of the European Union. But its judgments—which are often issued in response to inquiries

⁴⁸ LAYCOCK, *supra* note 1.

⁴⁹ *Id.* at 175.

⁵⁰ John Witte, Jr. & Andrea Pin, *Faith in Strasbourg and Luxembourg: The Fresh Rise of Religious Freedom Litigation in the Pan-European Courts*, 70 EMORY LAW JOURNAL 587–661, 657 (2021); Andrea Pin and John Witte, Jr., *Meet the New Boss of Religious Freedom: The New Cases in the Court of Justice of the European Union*, 55 TEXAS INTERNATIONAL LAW REVIEW 223–68 (2020).

⁵¹ Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention of Human Rights].

⁵² *Executief van de Moslims van België and others v. Belgium*, App. nos. 16760/22, 16849/22, 16850/22 et al., Feb. 13, 2024, <https://hudoc.echr.coe.int/eng?i=002-14290>.

about EU law from member state courts—produce “hard law” that is automatically binding on all EU member states.⁵³ Until a decade ago, this court had no direct cases on religious freedom. But in late 2009, the European Union ratified a new Charter of Fundamental Rights, which includes protections for religious freedom (article 10) and religious diversity (article 22) as well as prohibitions on religious discrimination (article 21).⁵⁴ Since 2012, the Luxembourg Court has issued nearly a score of religious freedom cases, and rapidly counting.⁵⁵

Most of these religious freedom cases have had decidedly mixed results, with the Luxembourg Court repeatedly pressing a neutrality reading of its religious freedom guarantees. This court, too, has given a wide margin of appreciation to local member states in their treatment of religion,⁵⁶ and that interpretive principle is now enshrined in Protocol 15 to the ECHR.⁵⁷ In a trio of recent religious slaughtering cases from 2018 to 2020, the Luxembourg Court has demonstrated an especially narrow, weak, and troubling understanding of religious freedom. In all three cases, the court rejected the religious freedom and equality arguments against local regulations that targeted Muslim halal and Jewish kosher ritual slaughtering and subordinated them to new state concerns for animal welfare.

The case of *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others* (2018)⁵⁸ concerned a specific provision of a broader regulation on food production from animals.⁵⁹ EU laws have paid increasing attention to animal welfare, and now require that animals be slaughtered only after stunning them as a way of mitigating the animal’s stress, suffering, and pain.⁶⁰ However, because Muslim halal religious rules require that the animal be awake during slaughtering, EU law carves out an exception, allowing such religious ritual slaughtering so long as it is performed in licensed slaughterhouses.⁶¹ That latter requirement was at issue in this case.

The dispute started in the Flanders region of Belgium.⁶² On the few days of Eid Al-Adha (the Feast of the Sacrifice), a major Islamic holiday, Islamic ritual slaughtering normally peaks. Until 2015, the Flemish authorities had accommodated the extra demand for halal meat in preparation for the festival by licensing local temporary slaughterhouses for Islamic butchers. In 2015, however, the Flemish authorities announced that they would no longer issue approvals for temporary slaughterhouses, on the ground that such licenses violated EU rules on the structural and hygiene requirements for all slaughterhouses. Flemish Muslim communities sued in Belgian court, claiming that this new denial infringed upon their religious freedom to celebrate the feast properly. Under this new rule, they argued, the only way to meet the peak demand for halal meat would be to build a series of permanent

⁵³ Lady Hale, *Who Guards the Guardians? Closing Address to the London Public Law Project Conference 2013* (Oct. 14, 2013), <https://publiclawproject.org.uk/resources/who-guards-the-guardians/>.

⁵⁴ Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1.

⁵⁵ Witte & Pin, *supra* note 50, at 591.

⁵⁶ Kostantina Alexopoulou, *The Margin of Appreciation and the Freedom of Thought, Conscience, and Religion Under Article 9 of ECHR*, 11 OXFORD JOURNAL OF LAW AND RELIGION 220, 242–44 (2022).

⁵⁷ Protocol 15 of the European Convention on Human Rights: “Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.” Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, 2014, C.E.T.S. No. 213.

⁵⁸ Case C-426/16, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others v. Gewest*, ECLI:EUC:2018:335 (May 29, 2018).

⁵⁹ Council Regulation 1099/2009 of Sept. 24, 2009, on the Protection of Animals at the Time of Killing, 2009 O.J. (L 303) 1.

⁶⁰ Council Regulation 1099/2009, para. 1.

⁶¹ Council Regulation 1099/2009, art. 4, paras. 1, 4.

⁶² *Liga van Moskeeën*, 16–18.

slaughterhouses that would be of no use for the rest of the year.⁶³ The local judge asked the Luxembourg Court for a preliminary ruling whether the EU regulation on ritual slaughtering, as implemented by national legislation, violated article 9 of the ECHR, article 10 of the EU Charter, and other EU laws prohibiting religious discrimination.⁶⁴

The opinion of the advocate general (a critical guide for the Luxembourg Court) stipulated that “slaughtering of an animal without stunning on the occasion of the Islamic Feast of the Sacrifice is indeed a religious precept that benefits from the protection of religious freedom.”⁶⁵ But the EU’s general law on slaughtering, the opinion continued, was “perfectly neutral and applies to any party that organises slaughtering. Legislation that applies in a neutral manner, *with no connection to religious convictions*, cannot in principle be regarded as a limitation on freedom of religion.”⁶⁶ Such neutral laws do not target religious practices. EU laws have already carved out a religious freedom exception to accommodate religious ritual slaughtering. The main issue, the advocate general’s opinion concluded, is whether the requirement that such ritual slaughtering be performed only in approved slaughterhouses caused disproportionate damage to religious freedom.⁶⁷

The Luxembourg Court held that EU law had done enough “to ensure effective observance of the freedom of religion, in particular of practicing Muslims during the Feast of Sacrifice.”⁶⁸ Requiring that such ritual slaughtering must be performed in licensed slaughterhouses properly balanced the parties’ religious freedom interests with the EU’s interest in avoiding “excessive and unnecessary suffering of animals killed.”⁶⁹ The EU’s general slaughtering laws, and the Flemish application of them, thus did not violate any charter or convention rights, for they had been applied in as neutral and balanced a way as possible. The real challenge of the new regulation, the court noted, was not to the religious freedom of the local Muslim community. It was to the financial costs of setting up permanent slaughterhouses for only a few days of intense halal slaughtering. Those costs, however, could easily be met by renting out those facilities for the rest of the year.⁷⁰

The 2019 case of *Oeuvre d’assistance aux bêtes d’abattoirs*⁷¹ also involved Muslim halal slaughtering practices.⁷² EU law reserves the organic label for food that had been produced in accordance with high standards of animal welfare. Those standards included the requirement that all animals be stunned before they were slaughtered. The issue was whether halal meat could be labeled organic when permissible ritual slaughtering was performed without previous stunning, thus causing pain to the animals.⁷³ The court ruled that halal ritual slaughtering practices and organic food labeling were irreconcilable. The requirement that animals be stunned was meant to ensure that the animals avoid pain and suffering. Slaughtering without stunning was an exceptional regime. It was “authorised only by way

⁶³ *Id.* at 3, 16–19, 70, 100.

⁶⁴ Consolidated Version of the Treaty on the Functioning of the European Union, art. 13, 2012 O.J. (C 326/47), 8.

⁶⁵ Opinion of Advocate General Wahl, Case C-426-16, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others v. Gewest*, 2018 ECLI:EU:C:2017:926 (20 November 2017), para. 58.

⁶⁶ *Liga van Moskeeën*, 78 (emphasis added).

⁶⁷ *Id.* at 78, 113, 124.

⁶⁸ *Id.* at 56.

⁶⁹ *Id.* at 65.

⁷⁰ *Id.* at 56, 59, 65, 70, 77–78.

⁷¹ *Oeuvre d’assistance aux bêtes d’abattoirs v. Ministre de L’Agriculture et de l’Alimentation*, Case C-497/17, 2019 WL CELEX 62017CJ0497, judgment, para. 1, Grand Chamber (Feb. 26, 2019).

⁷² Commission Regulation 889/2008 of Sept. 5, 2008, Laying Down Detailed Rules for the Implementation of Regulation 834/2007, 2008 O.J. (L 250) 1 (EC), amended by Regulation 271/2010 of Mar. 24, 2010, 2010 O.J. (L 84) 19 (EU); Council Regulation 834/007 of June 28, 2007 on Organic Production and Labelling of Organic Products and Repealing Regulation 2092/91 (EEC), 2007 O.J. (L 189) 1 (EC).

⁷³ *Oeuvre d’assistance aux bêtes d’abattoirs*, 35.

of derogation in the European Union and solely in order to ensure observance of the freedom of religion,” but it was “insufficient to remove all of the animal’s pain, distress and suffering as effectively as slaughter with pre-stunning.”⁷⁴ Ritual slaughtering did not altogether meet the high requirements of animal welfare that were among the core goals of organic food production and the use of the organic label, the Luxembourg Court concluded. While norms of religious freedom were strong enough to allow an exemption from general slaughtering rules, they did not entitle a further exemption from organic food labeling rules.⁷⁵

The 2020 case of *Centraal Israëlitisch Consistorie van België and Others* upheld a more discriminatory limit on halal and kosher slaughtering that undercut both the EU’s statutory exemptions for religious freedom and the Luxembourg Court’s requirement that laws be religiously neutral.⁷⁶ The bans were introduced after Belgium had reformed its slaughtering laws to allow local regions to set more stringent slaughtering standards than EU or national standards. This case involved new laws passed in the Belgian regions of Flanders and Walloon. Those new laws now required Jewish and Muslim butchers, even in their own ritual slaughtering houses, to use a nonlethal form of stunning before cutting the animal’s throat and letting it bleed out fully. This form of reversible, nonlethal pre-stunning, Flemish scientific experts opined, would spare the animal the pain and suffering of having its throat cut but would ensure that the animal would regain consciousness before bleeding to death, as religious ritual laws required.

A consortium of Jewish and Muslim litigants brought suit in Belgian courts, arguing that these new regional slaughtering laws violated their religious freedom rights under EU law, articles 10, 21, and 22 of the EU Charter, and article 9 of the ECHR.⁷⁷ The new laws, the litigants argued, specially targeted and burdened their core religious rituals. They introduced a new secular requirement that violated ancient religious laws. They obstructed religious butchers from exercising their traditional faith and vocations. They deprived religious consumers from proper food in the niche market of kosher and halal meat. And these new regional laws discriminatorily targeted the slaughtering practices of small communities of Jews and Muslims in Belgium while leaving sundry hunters, fishers, farmers, and others to kill their captured animals without prior stunning. The claimants further warned that if this regulation, deliberately targeting the heart of an ancient religion’s core ritual life, could pass muster under EU laws and the EU Charter, even firmer measures against minority religious practices would likely follow in Belgium and in other EU lands.

Upon request for a preliminary ruling on EU law from the Belgian constitutional court, the Luxembourg Court upheld these new regulations. The court held that, as an EU member state, Belgium had power to issue “additional rules designed to ensure greater protection for animals,” even if those rules encroached on the EU’s stated policy of allowing religious ritual slaughtering without stunning.⁷⁸ The court recognized that Belgium’s added rule about stunning did impose “a limitation on the exercise of the right of Jewish and Muslim believers to the freedom to manifest their religion.”⁷⁹ But this limitation was “permissible,” the court argued. It was properly “prescribed by law,” not arbitrarily imposed. It required use of the

⁷⁴ *Id.* at 48.

⁷⁵ *Id.* at 17, 36, 45–52.

⁷⁶ *Centraal Israëlitisch Consistorie van België and Others*, Case C-336/19, ECLI:EU:C:2020:1031, judgment, para. 96, Grand Chamber (Dec. 17, 2020), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=235717&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=18489626>. See also Leah Hehemann, *Religious Slaughtering, A Stunning Matter: Centraal Israëlitisch Consistorie van België and Others*, 6 EUROPEAN PAPERS 111–19 (2022).

⁷⁷ Charter of Fundamental Rights of the European Union, *supra* note 54, articles 10, 21, 22; European Convention on Human Rights, *supra* note 51, article 9.

⁷⁸ *Centraal Israëlitisch Consistorie*, para. 48.

⁷⁹ *Id.* at para. 55.

“most up-to-date method of killing” animals humanely. It had a “legitimate objective of general interest ... to avoid all avoidable animal suffering.” This new rule, moreover, was “appropriate and necessary,” prescribing “the least onerous” way of harmonizing state interests in protecting animal welfare and the butchers’ interest in practicing their religious freedom.⁸⁰ Invoking article 9-related Strasbourg Court cases that had already upheld local state restrictions on the religious dress and diet of religious minorities, the Luxembourg Court now said that Belgium deserved “a wide margin of appreciation in deciding whether, and to what extent, a limitation of the right to manifest religion or beliefs is ‘necessary.’”⁸¹ Similarly, the court cited EU law that called for “a ‘certain flexibility’ and ‘a certain degree of subsidiarity’ to Member States” in how to balance EU laws and local standards of health, morality, and culture.⁸²

The Luxembourg Court made short work of the Jewish and Muslim litigants’ arguments that this new rule was both religiously discriminatory and disrespectful of religious diversity, in open violation of articles 21 and 22 of the EU Charter. The court argued that this was a regulation about slaughtering in licensed slaughtering houses, not about hunting, fishing, or licensed sports activities that are subject to their own relevant EU and local laws. Just because other areas of the law have different rules does not mean that the slaughtering laws in question are discriminatory. Moreover, said the court, hunting and fishing are recreational; they are not primarily about producing meats, hides, and other animal products sold to consumers.⁸³ Even if they were, it would be “meaningless” to require hunters and fishers to pursue only animals that were previously stunned.⁸⁴

After losing in Luxembourg, a group of Belgian Muslims and Jews sought relief from the Strasbourg Court, invoking the ECHR’s article 9 protections of religious freedom and article 14 prohibitions against religious discrimination. In *Executief van de Moslims van België and others v. Belgium* (2024), the Strasbourg Court rejected their arguments and found no violation.⁸⁵ Article 9.2 of the ECHR, the court noted, explicitly allows for state limitations on religious freedom for the protection of public order, health, or morals.⁸⁶ The list of limitations does not cover animal welfare,⁸⁷ but the ECHR has been interpreted as a “living instrument” whose meaning has grown with the evolution of European culture. At least in Belgium, public morality has gone beyond traditional concerns for human dignity and human rights to a “discernible, gradual, evolution towards greater protection of animal welfare”⁸⁸—a view that the court embraced for the first time with this judgment.⁸⁹ And it is

⁸⁰ *Id.* at para. 64.

⁸¹ *Id.* at para. 67.

⁸² *Id.* at para. 71.

⁸³ *Id.* at para. 91.

⁸⁴ *Id.* See further Joe Wills, *The Legal Regulation of Non-stun Slaughter: Balancing Religious Freedom, Non-discrimination and Animal Welfare*, 41 LIVERPOOL LAW REVIEW 145–71, 155 (2020).

⁸⁵ See good summary in Cathérine Van de Graaf & Harriet Ní Chinnéide, *Prohibition of Religious Slaughter in Executief van de Moslims van België and Others v. Belgium: Process-Based Review and a New Legitimate Aim*, STRASBOURG OBSERVERS, April 26, 2024, <https://biblio.ugent.be/publication/01JDHBR0AT9QY65DDQCSCCTCVH2>. See update in Harriet Ní Chinnéide & Cathérine Van de Graaf, *Animal Welfare v Religious Freedom: Reflecting on the ECtHR’s Decision in Executief van de Moslims van België and Others v Belgium*, 20 EUROPEAN CONSTITUTIONAL LAW REVIEW 678–98 (2024).

⁸⁶ *Executief van de Moslims van België and Others v. Belgium*, App. nos. 16760/22, 16849/22, 16850/22 et al., paragraph 2.

⁸⁷ Francesco Emanuele Celentano, *La morale pubblica quale deroga ai diritti umani in favore del benessere animale* [Public Morality as a Derogation from Human Rights in Favor of Animal Welfare], 2 DIRITTI UMANI E DIRITTO INTERNAZIONALE [HUMAN RIGHTS AND INTERNATIONAL LAW] 447, 449 (2024).

⁸⁸ Van de Graaf & Ní Chinnéide, *supra* note 85, at 2.

⁸⁹ Ludovic Benezech, *Dignity Beyond the Human Person, Issues, Risks, and Perspectives in HER Law*, 23 INTERNATIONAL AND COMPARATIVE LAW REVIEW 97, 102 (2023).

that evolved understanding of public morality that has led these regions to require this new form of reversible, nonlethal pre-stunning of animals that are slaughtered.

With “no clear consensus” among other EU member states on the issue of animal welfare, Belgium deserved a wide “margin of appreciation,” leading the Luxembourg Court to “exercise restraint in its review of the conventionality of a choice made democratically within the society in question.”⁹⁰ The court further narrowed the scope of its review when it emphasized that the limitation on religious freedom after scrutiny had been thoroughly investigated through the political and the judicial process.⁹¹ After all, the Belgian authorities had consulted at length with religious leaders, veterinarians, scientific experts, animal protection associations, and more, and had sought in “as neutral a way as possible” to balance “the competing interests of animal welfare and freedom of religion.”⁹² And the court adduced the decisions of both the Belgian courts and the Luxembourg Court, stating that they had offered well-reasoned opinions in judging that these new slaughtering laws were necessary to protect animal welfare and there was no less restrictive means to achieve that end than requiring reversible stunning for religious slaughtering. Given the careful legislative process and the thorough adjudication of these slaughtering rules and religious freedom claims by these other courts, the Strasbourg Court saw no independent reason to judge otherwise and considered the prohibition of religious slaughtering without stunning a legitimate and proportionate measure.⁹³ While the laws made compliance with kosher and halal rules more difficult for Jews and Muslims in Flanders and Walloon, the court recognized, these parties could still import properly slaughtered meat from other countries, or indeed from the Bruxelles-Capitale region in Belgium that did not have these new slaughtering rules.⁹⁴

The Strasbourg Court also quickly disposed of the parties’ hastily added claim of religious discrimination under article 14. Religious slaughterers were governed by different regimes than were hunters, fishermen, or farmers. “It was not for the Court to rule on the compatibility of hunting and fishing with animal welfare, a matter which went beyond the scope of the present case.”⁹⁵ And while there may be small differences between kosher and halal slaughtering practices and therefore different impacts from the new regulations, the mere fact that the dietary precepts were of a “different nature was not sufficient to conclude that Jewish and Muslim believers were in relevantly different situations in relation to the impugned measure with regard to religious freedom.”⁹⁶

These four cases, while narrow in their immediate reach, signal trouble for European religious freedom. The *Liga van Moskeeën* court stated clearly that, in principle, neutral laws do not infringe upon religious freedom, whatever their impact on religious practices. In its words, “the obligation to use an approved slaughterhouse ... applies in a general and neutral manner to any party that organises slaughtering of animals and applies irrespective of any connection with a particular religion and thereby concerns in a non-discriminatory manner all producers of meat in the European Union.”⁹⁷ This approach sees legislative neutrality as

⁹⁰ *Executief van de Moslims*, para. 105.

⁹¹ Van de Graaf & Ní Chinnéide, *supra* note 85, at 690; Patricia Popelier, *Procedural Rationality Review after Animal Defenders International: A Constructively Critical Approach*, 15 *EUROPEAN CONSTITUTIONAL LAW REVIEW* 272, 272 (2019).

⁹² *Executief van de Moslims*, para. 80.

⁹³ *Id.* at para. 103.

⁹⁴ See also Sein DeVriendt & Carla M. Zoethout, *Animal Welfare and the Evolution of Public Morality—Requirement to Stun Animals Prior to Ritual Slaughter Is Convention-Proof*, *EJIL: TALK! BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW* (April 26, 2024), <https://www.ejiltalk.org/animal-welfare-and-the-evolution-of-public-morality-requirement-to-stun-animals-prior-to-ritual-slaughter-is-convention-proof/>.

⁹⁵ *Executief van de Moslims*, para. 146.

⁹⁶ *Id.* at para. 151.

⁹⁷ *Liga van Moskeeën*, 61.

the ideal solution for dealing with the religious and values pluralism of European society. While facially neutral rules do not explicitly target religion, in application such neutral laws can impose a substantial burden on religious practices, particularly those of minority or disfavored religions that sometimes need exceptions and exemptions from neutral laws to practice their faith. The *Liga van Moskeeën* court pushed this concern aside: facial neutrality was considered to be good enough.

Centraal Israëltisch Consistorie and *Executief van de Moslims van België* are even more worrisome because they uphold local laws that specifically and discriminatorily target a central religious practice of ritual slaughtering that EU law had earlier accommodated on grounds of religious freedom.⁹⁸ The Luxembourg Court elevated animal welfare above religious freedom,⁹⁹ and the Strasbourg Court judged the thorough legislative process in producing the laws to be evenhanded enough in balancing the interests at stake. But the new Belgian laws clearly discriminate against the religious slaughtering practices of Muslims and Jews,¹⁰⁰ while ignoring sportsmen, fishermen, or private farmers who can kill their catches or animals without stunning.¹⁰¹ It is certainly true that Belgium's animal welfare policies have to date been directed to the protection of farmed animals not wildlife, which undercuts one of the litigants' discrimination arguments.¹⁰² But the Strasbourg Court simply allowed the selective new majoritarian concern for domestic animal welfare to override a religious freedom right enshrined in the ECHR.¹⁰³ It repudiated *religious* methods of killing animals for food, while accepting *recreational* killing of animals for sport. It ignored the evidence that religious practices also incorporate concerns about animal well-being, notably Jewish prohibitions on hunting as an inhumane and pain-inducing practice.¹⁰⁴ The court ruled simply that a general law, crafted by a legislative majority,¹⁰⁵ that requires prior stunning of an animal by slaughtering is, by definition, a neutral law, with Jews and Muslims treated like everyone else.¹⁰⁶

Both the Luxembourg and Strasbourg courts made no effort to investigate whether the new slaughtering rules in fact reflect the most advanced science as Belgium asserts, or to listen to how and why these new rules intrude on religious ritual practice. The courts made no mention of other Belgian government restrictions against Muslim headscarves and its decades-long vendetta against "dangerous sects."¹⁰⁷ Religious freedom, religious equality, and religious diversity are all fundamental rights and values explicitly protected by the ECHR and EU Charter. Animal rights and animal welfare are not mentioned in either of them. But these last two cases use neutrality logic and an ample margin of appreciation for local

⁹⁸ Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, 2009 OJ (L 303) art. 4.

⁹⁹ Van de Graaf & Ní Chinnéide, *supra* note 85, at 679.

¹⁰⁰ *Id.* at 683.

¹⁰¹ *Id.* at 684; Michela Maria Dimuccio et. al, *Religious Slaughter and Supranational Jurisprudence in the Context of Animal Welfare Science*, 13 LAWS, no. 6, 2024, at 11.

¹⁰² Van de Graaf & Ní Chinnéide, *supra* note 85, at 696.

¹⁰³ *Id.* at 697.

¹⁰⁴ *Id.*

¹⁰⁵ Celentano, *supra* note 87, at 465.

¹⁰⁶ *Executief van de Moslims*, para. 148.

¹⁰⁷ See Henri de Cordes, *L'État belge face aux dérives sectaires* [*The Belgian State in the Face of Sectarian Excesses*], 1908 COURRIER HEBDOMADAIRE DU CRISP 5, 22 (2006). See further U.S. Department of State, Office of International Religious Freedom, 2019 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: BELGIUM (2019), <https://www.state.gov/reports/2019-report-on-international-religiousfreedom/belgium/>; U.S. Department of State, Office of International Religious Freedom, BELGIUM 2021 INTERNATIONAL RELIGIOUS FREEDOM REPORT (2021), <https://www.state.gov/wp-content/uploads/2022/04/BELGIUM-2021-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf>.

political and legal processes and majority decisions to allow animal rights to trump religious freedom.

Conclusions

Douglas Laycock taught scholars and jurists about the dangers of reducing religious freedom to a mere guarantee of facial neutrality and leaving the protection of religious freedom in the hands of local legislatures. The U.S. Supreme Court adopted this local neutrality approach in the 1990 free exercise case of *Employment Division v. Smith*. The case held that a neutral and generally applicable law is not a violation of the right to free exercise of religion, no matter how great a burden that law casts on a particular religion or religious practice. The *Smith* case itself deprived a Native American from receiving an unemployment benefit that other religious minorities had received in four prior cases. The *Smith* court's neutrality approach allowed local legislatures to turn on religious minorities, targeting their ritual slaughtering, religious diet, dress, grooming, and other practices that were deemed eccentric and unwelcome in their local communities. Congress and many states responded by passing religious freedom restoration acts and other statutes that provided stronger statutory protections and remedies for religious minorities—including Muslim prisoners¹⁰⁸ and a Brazilian church that used sacramental *hoasca* tea contrary to federal drug laws.¹⁰⁹

In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993), the Supreme Court stepped in and struck down a new local slaughtering law that was similarly pitched as a neutral law protecting safety, hygiene, and animal welfare, but in fact aimed at a core religious ritual of a minority community of Santerians. As Laycock's brief and argument in the *Lukumi* case highlighted, the *Smith* Court had made clear that laws that are not neutral and/or not generally applicable can be justified only if they serve a compelling state interest and follow the least restrictive alternative of achieving that interest. That requirement provides a judicial safety net for religious freedom against bald prejudice, just as statutes have provided a stronger legislative safety net for religious minorities. Recent free exercise cases—even those that counterpose religious freedom with so-called evolved public understandings of sexual liberty and public health—have nonetheless protected religious freedom.

We hope that both the Luxembourg and Strasbourg Courts will take lessons from this American experience—even as we hope that U.S. courts will stand tall with the rising tide of xenophobia against religious and cultural minorities and the new triumphant calls of Christian nationalism. Religious freedom for all is a precious gift of God to protect, not a prerogative of one political party or religious group to brandish. The notion of neutrality, which has now become “the golden thread in religious freedom and discrimination decisions,”¹¹⁰ has given *carte blanche* to Belgium and other nations to use what Laycock called “clever drafting and a mere pretense of neutrality”¹¹¹ to burden unpopular local religions and drive them away. And they ignore the reality that these slaughtering cases will likely produce further local legislative intrusions on religious freedom, including what is already under discussion: banning the importation, possession, and consumption of all non-

¹⁰⁸ See, e.g., *Holt v. Hobbs*, 574 U.S. 352 (2015) (holding state prison grooming policy restricting beard length violated the Religious Land Use and Institutional Persons Act [RLUIPA] where prisoner had sincerely-held beliefs and Department failed to show either that policy furthered a compelling interest or was the least restrictive means to satisfy the state's identification requirement).

¹⁰⁹ *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (holding federal government failed to prove a compelling interest, as required by RFRA, in regulating *hoasca* as a Schedule I narcotic against religious group's need to use it for sacramental purposes).

¹¹⁰ Myriam Hunter-Henin, *Religious Freedom at Europe's Highest Courts: Shifting Strategies*, 11 OXFORD JOURNAL OF LAW AND RELIGION 23, 23 (2022).

¹¹¹ LAYCOCK, *supra* note 1, at 175.

organic meat that has not been raised and slaughtered in accordance with the latest standards of reversible, nonlethal pre-stunning of animals. And from there, other core but unpopular religious teachings and practices might well become vulnerable to neutral regulations and restrictions: circumcision, proselytism, religious dress, noisy worship services, countercultural religious education, faith-based legal systems, and more.

Properly understood, the idea of neutrality requires states not to take sides for or against religion when they enact their policies. But these new local bans on ritual slaughtering do take sides—indeed, they privilege animal welfare over religious freedom. Properly understood, religious freedom guarantees should protect small religious minorities from “the tyranny of the legislative majority.”¹¹² But the voices of these small Muslim and Jewish groups are seldom heard in European parliaments, far less heeded. With the European courts, too, turning their backs on these religious minorities, European religious freedom is in trouble. As did the United States in 1990, so Europe today needs Douglas Laycock.

Acknowledgments and Citation Guide. *This article draws on our earlier work: Andrea Pin and John Witte, Jr., Slaughtering Religious Freedom at the Court of Justice of the European Union, CANOPY FORUM (February 16, 2021), <https://canopyforum.org/2021/02/16/slaughtering-religious-freedom-at-the-court-of-justice-of-the-european-union/>; John Witte, Jr., and Andrea Pin, Faith in Strasbourg and Luxembourg: The Fresh Rise of Religious Freedom Litigation in the Pan-European Courts, 70 EMORY LAW JOURNAL 587 (2021); and Andrea Pin and John Witte, Jr., Meet the New Boss of Religious Freedom: The New Cases of the Court of Justice of the European Union, 55 TEXAS INTERNATIONAL LAW JOURNAL (2020) 223. We have no competing interests to declare. This article is cited following the Bluebook, 22nd edition.*

¹¹² James Madison, *Letter to Thomas Jefferson (October 17, 1788)*, in 5 THE WRITINGS OF JAMES MADISON, at 272 (Gaillard Hunt ed., 1904). Madison warned that “the tyranny of the legislative majority,” can “narrow” and “invade” “the rights of Conscience in particular.” “Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.” *Id.*

Cite this article: Witte, John, and Andrea Pin. 2026. “Sacrificing Religious Freedom in Europe: Why the Pan-European Courts Need Douglas Laycock.” *Journal of Law and Religion* 1–15. <https://doi.org/10.1017/jlr.2026.10075>