REVIEW ESSAY

RELIGION AND THE EUROPEAN UNION: TWO EUROPEAN BOOKS AND COMPARATIVE REFLECTIONS FROM ACROSS THE ATLANTIC


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At first blush, one might wonder why the topic of law and religion in the European Union garners any interest, as the E.U. is an entity created primarily for commercial purposes. Compared to national traditions, it has a minimal amount of law dealing with religious organizations and is, on its face, seemingly little influenced by religious associations or beliefs. Religion in the E.U. system primarily appears in very mundane regulations, such as exemptions of mobile churches from E.U. requirements on vehicles.

So why look at religion and the European Union? Recent years have seen an increasing amount of scholarly interest in religion and the E.U., including two recent books, which I will address in this review essay. Religion, Politics and Law and in the European Union, edited by Lucian N. Leustean, a lecturer in politics and international relations at Aston University in Birmingham, UK, and John T.S. Madeley, Senior Lecturer in Government at the London School of Economics and Political Science, is a collection of essays by prominent European sociologists, historians, and lawyers addressing issues such as religious identity and the E.U., the role of religious leaders in the construction of

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the E.U., the regulation of religion in the E.U., and religious lobbies in the E.U. *Religion and the Public Order of the European Union* by Ronan McCrea, Lecturer at University College London, is a book-length treatment of questions of religious identity in the E.U. It was shortlisted for the Peter Birks Prizes for Outstanding Legal Scholarship in 2011 and is part of Oxford’s series “Studies in European Law.”

*Religion, Politics and Law in the European Union* is a collection of thirteen disparate essays addressing theoretical, historical and empirical questions about the role of religion in the political evolution of the European Union and how religious communities relate to its increasing power and influence. The book is divided into sections addressing issues of religious identity, the role of religious and political leaders in the construction of the Union, religion in E.U. law, and the role of religious lobbies. In its discussion of issues of religion and the politics and identity of the Union, the essays in Leustean’s book rely largely on more descriptive social science perspectives rather than legal analysis. The book has many interesting and helpful chapters. Its thematic variety, reflecting the fact that the chapters were based on conference papers, provides many interesting insights, but also means that the book provides less of an in-depth treatment of religion in the E.U. than a kaleidoscope of many individually interesting glimpses.

Ronan McCrea’s *Religion and the Public Order of the European Union*, on the other hand, has a single author and a strong, coherent approach. In fact, this is the first book-length argument that I am aware of addressing religion and law in the E.U. Other works, such as Norman Doe’s excellent new work, *Law and Religion in Europe: A Comparative Introduction*, contain only chapter-length discussions of religion and the E.U. system. Ronan McCrea reviews various aspects of the intersection of religion and that system, such as Europe’s religious inheritance, the normative influence of religion, the place of religion in the European commitment to fundamental rights, the regulation of religion, and competing cultural and humanist identities that counterbalance and limit religious influence on the E.U. McCrea’s essential argument is that religion is restricted in the public order of the E.U. as a result of a commitment to balancing religious, humanist and cultural influences. He sees this balanced approach “both as normatively desirable and as an element of European identity.” (4)

Both of these books demonstrate the sharply increased attention to religion issues in the European Union itself in recent years. In fact, as of 2005 it was still possible to title a work *State and Church in the European Union* (the second edition of Gerhard Robbers’ classic
comparative study) and yet have only a handful of pages addressing Union law itself, the rest focusing on how religion is addressed in individual member states. Why such increased interest in Union law and politics recently? In part, this stems from an understanding that the E.U. has moved from a commercial treaty body to an entity resembling more a modern regulatory state—including regulation of religion. The E.U. now shares responsibilities with member states for border controls, currency, human rights, financial policy, defense, and many of the other issues faced by modern states. The euro crisis, unless it ends up with some states leaving the Union or the Eurozone, seems likely to strengthen fiscal ties even further within the system. As the E.U. has begun to look more and more like a quasi-state, concerns about the role of religion have begun to multiply. Debates have arisen over whether E.U. policy should have some kind of moral and religious basis or a reference to God in its constitution. To the extent that it has some self-conception or identity beyond merely an economic space, what role should religion and Christianity in particular play? This discussion is particularly significant in debates over the possible accession of Turkey and objections that its Muslim majority is somehow not sufficiently “European.”

Thoughtful chapters by Jean-Paul Willaime, François Foret, Carin Laudrup, and Benoît Challand in Religion, Politics and Law in the European Union address the question of religious identity. François Foret suggests that debates over religion can be understood as part of “the general pattern of European participatory democracy, with questions on the selection and the representativity of interlocutors embodying civil society, on their precise influence upon decision-making and on their accountability.” (41) Religion, argues Foret, still has political effects in Europe, “not as an authority discourse rooted in the sacred but as a cultural raw material capable of being mobilised to sustain strategies to gain power or—more likely—recognition.” (32) Carin Laudrup connects the problem of lack of a strong E.U. identity with the nonexistence of a pan-European civil religion, and explores the possibility that national religious education could help promote a broader European identity. (45-57) Jean-Paul Willaime sees European identity as based in a form of secularism that recognizes freedom of conscience, thought and religion, equal duties and rights of all citizens, and autonomy of both the state and religions. (17-30) Benoît Challand argues that after the end of the Cold War, Europe has defined itself in connection with the “other” of Islam. He argues that instead, Europe should adopt a “cosmopolitan” approach to respecting “the rich diversity
which characterises its past, present and future.” (71) As these brief summaries of some chapters indicates, the Leustean book provides a wide array of interesting and thought-provoking arguments about how the Union’s relationship with religion can be characterized.

Ronan McCrea, in Religion and the Public Order of the European Union, also sees the question of identity as fundamental. He recognizes a religious E.U. identity stemming from “potentially mutually inconsistent” bases in individual choice and national cultural identity. (114) He maintains that religion is linked to identity, including individual choice, in a way that pluralizes religion and implicitly discounts claims to a monopoly of truth. Reliance on religion as identity, argues Ronan, connects religion at the E.U. level to national approaches, which entails accepting the dominance of particular religions in national cultural roles. He details the role of religion in fundamental rights obligations (largely the European Convention on Human Rights and European Court of Human Rights caselaw) and in Union legal norms (including anti-discrimination law and protections of national cultures), providing a sophisticated argument that these reflect a fundamental commitment to balance of religious, humanist, and cultural values. Religions which cannot reconcile themselves to these ideas of balance, including ideas of individual autonomy, “may struggle to achieve influence or even acceptance within such a framework.”(7)

From across the Atlantic, these debates and these books raise fascinating echoes from our own past. While the discussion continues as to whether the European Union is on the path of becoming a state, its roles are in many ways parallel to those of the limited federal government of the early United States. Independent states chose to unite to ensure free trade and the ability to compete with larger international rivals. Formation of a common defense and eventually a common currency were necessary adjuncts, but the individual states were still seen as the primary focus of loyalty, government, and power. In the E.U., a union-wide identity is still developing; as of 2012, only sixty-one percent of citizens in member countries reported feeling like they were citizens of the E.U., with slightly higher percentages among younger and more educated groups.¹

While the comparison is not exact, the similarities between the role of religion in the European Union and its role in the early, loosely united United States is striking and provides insights both on where we have

¹. European Comm’n, European Citizenship 21-22, STANDARD EUROBAROMETER 77 (Spring 2012).
come from and where the E.U. might be headed. In particular, I would suggest four points of comparison and one of divergence, which I will highlight, drawing on relevant parts of the books that I address in this review essay.

First and most obviously apparent is that, on its face, religion appears relatively insignificant to the endeavor at hand. The original United States were not and the European Union is not in the business of religion. Religion was not mentioned in the original founding treaties of the E.U., nor in the original U.S. Constitution, aside from the U.S. “no religious test” clause. When religion was eventually addressed in founding documents, both the U.S. and the E.U. offered general protections for religious liberty, but explicitly or implicitly left the business of involvement with religion to the states. In the U.S., however, the Religion Clauses were incorporated under the Fourteenth Amendment and thus apply to the states as well, as of the first half of the twentieth century.

Religion was not mentioned in the European Union’s founding treaties, but it appeared forty-five years later attached as the 1997 Treaty of Amsterdam’s Declaration 11, which can roughly be compared to the U.S. Establishment Clause. The Declaration states: “The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organizations.” Declaration 11 has served much the same function as the Establishment Clause did in the early U.S. structures in terms of keeping questions of religion out of the purview of union (or federal) regulation. The explicit equivalence between religious, philosophical and non-confessional organizations in the E.U. is an interesting reflection on the increasingly secular cultural milieu since the U.S. Constitution’s First Amendment was adopted. As I explore elsewhere, current attempts to deny the distinctiveness of religion largely ignore the values embodied in a long-running cultural and historical framework in which religions have functioned as sovereigns, understood as operating in significantly different ways from philosophical and non-confessional organizations. The increase in protections for philosophical and non-confessional relations between the

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3. See Elizabeth A. Clark, Religions as Sovereigns: Why Religion is “Special” (work in progress).
time of the drafting U.S. Constitution and the appearance of the E.U.’s Declaration 11 reflects an increase in cultural secularity and ignorance or rejection of religion’s unique values and nature.

In 2007, the E.U. incorporated and expanded the language of Declaration 11 into the Treaty of Lisbon. In addition to the first two points, taken from Declaration 11, the Treaty of Lisbon’s Article 17 added a third point, one which highlights cultural differences between Europe and the U.S.:

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations. 4

This support of official dialogue between the Union and churches and religious organizations explicitly recognizes the value of religious voices in the public square, which contrasts with the tone of some of the more rigidly secularist interpretations of the U.S. First Amendment. In contrast to Article 17’s imposition of a legal responsibility for religious dialogue, some secularist approaches understand the First Amendment as a protection from religion and see state endorsement and support in political or legal attempts to permit a religious voice in the public square or allow state engagement with religions.

A rough European Union equivalent to the Free Exercise Clause can be seen in the commitment to fundamental human rights, including religious freedom. Ronan McCrea does an excellent job of tracing the development of legal obligations in relation to human rights from the “general principles” of Community law pronounced by the European Court of Justice in the 1960s to the Joint Declaration on Fundamental Rights in 1977 and Article 6 of the Maastricht Treaty of 1992, in which the E.U. agreed to respect fundamental rights as guaranteed by the European Convention, including freedom of thought, conscience, and religion. (103-42) This guarantee was also a core part of the E.U.’s Charter of Fundamental Rights, which did not come into effect as part of E.U. law until 2009 under the Lisbon Treaty. Article 10 of the Charter states:

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

2. The right to conscientious objection is recognised in accordance with the national laws governing the exercise of this right.\(^5\)

Again, in contrast to the U.S. Free Exercise Clause, Article 10’s extension of protections to freedom of thought and conscience, in addition to religion, reflects the differences in time and place between the Charter and the U.S. Constitution.

A second interesting point of departure is that, despite the comparative absence of norms affecting religion in the founding of the United States and the European Union, religiously motivated individuals played surprisingly significant roles. Religious thought, while not reflected in the formal constitutive documents, shaped desires for unity and the cultural context that supported it. In the U.S., this was a widespread sense that America was a “city set on a hill” and that independence and nationhood were Providential gifts that required civil virtue to be sustained. Several interesting chapters in *Religion, Politics and Law in the European Union* make the argument that the “hidden history” of the E.U. reveals that it was fundamentally a project of Christian Democrats across Europe and sanctioned by the Vatican as an attempt to counter the Eastern Bloc, with its repression and marginalization of religion. (2) Chapters in Leustean and Madeley’s book address biographies of some of the key Christian Democratic leaders (109-24), rifts between French and Italian Christian Democratic leaders in the creation of the Union (93-108), papal thought on Europe and the E.U. (125-40), and how the Roman Catholics (and eventually other churches) monitored the Union from its early days (175-86).

Over time, however, in both the European Union and the United States, religious motivations and groundings for supporting a union have waned. François Foret’s chapter suggests that despite the Christian tradition’s role as “an important factor in the support of European integration,” religion “is no longer a constitutive force in Europe.” (37) Ronan McCrea suggests a more nuanced approach in

reconciling modernist impulses with historic protections of religion and religious life than often appears in the U.S. He argues that only religions that accept the fact that religion in the E.U. must be balanced with humanist and other cultural values will be permitted to flourish. (see, e.g., 4-8) Although religion can and does influence law and policy in the E.U., he asserts, especially in moral debates and in informing national cultural identities, this influence is counterbalanced by the relativization of religious arguments and the E.U.’s insistence on protecting key liberal principles, such as individual autonomy, from religious limitations. (52-53) It would be interesting to consider the possible sources of this European attempt to reconcile religious and secularist strands. Is it promoted by the relevant texts, which in the U.S. have a much more binary approach to protection of religion (i.e., religion is protected, while non-religion is not protected) than in Europe, where protections are explicitly afforded to philosophical organizations and non-religious associations, as well as second-generation human rights such as culture, autonomy, privacy, family life, and work? Or is this impulse of reconciliation influenced in some degree by the strong European traditions of state cooperation with religion and the institutionalization of religion as a social factor in an otherwise secular state?

From a U.S. perspective, the European levels of collaboration between church and state at the national level seem incongruous with its increased secularism, humanism, and liberal commitments to individual autonomy. From a comparative standpoint, the high European comfort level with permitting religion—at least as culture—in the public sphere challenges and is challenged by heightened concerns, particularly in the U.S., about non-discrimination among religions in the public sphere. Can states recognize the cultural role that religion and individual religious traditions play without discriminating among religions or between religion and unbelief? How can these be reconciled? The situation in the E.U. raises interesting possibilities for future comparative work.

A third intriguing point of comparison between the United States and the European Union is the effect of unification on the role of states’ religious traditions. While both of their constitutive documents seem clearly intended to let states retain their own relationships, including ones that privilege dominant religions, in the U.S. at least, unification has ultimately resulted in the loss of power for state-level dominant religious groups. Pressures for equality and unity eventually led to disestablishment of established religions and
federal oversight over state relationships with religions. While it is too early to say for the E.U., these comparisons raise the interesting question of whether such pressures will eventually result in the disestablishment and loss of power of dominant state religions. As Ronan McCrea suggests, the E.U.’s commitment to religious freedom and fundamental rights “affect not merely the role of religion in its own public order, but can also call into question the established structures and relationships that constitute part of the role of religion in the public orders of individual Member States.” (115)

Comparison of the treatment of religion in the United States and European Union also suggests a fourth point of possible commonality around the protection of religious minorities. Unification of the states in the U.S. has ultimately proved to increase protections for minorities. At an early stage, individual state norms on religion were controlling and minorities, if dissatisfied with the norms of a state, only had the freedom of exit through the protection of free movement of peoples among the states. This is roughly where the E.U. could be said to be at this point. In the U.S., over time and in large part because of national pressures for uniformity, equality and liberty, protections for minorities have increased. Most recently, some of these protections, such as the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA), result from the fact that in a larger, more diverse country, more groups see themselves as minorities and join together to push for broad protections of religious freedom.

It is interesting to consider how increasing growth in the European Union’s jurisprudence and identity could also lead to increased protections for minorities. Martin Steven, who addresses the question of religious lobbies in Religion, Politics and Law and in the European Union, suggests that “a pattern is developing within the EU, which one could cautiously compare with the situation in the USA, eclipsing the older European model of a group of homogeneous nation-states where one official religion or church is dominant in each autonomous territory.” (184) Instead, he argues, churches’ interests at the E.U. level are beginning to coalesce and “Brussels is increasingly providing a focus for churches to lobby decision-makers for their own ends, becoming one interest group among many, albeit one with potentially substantial influence.” (184)

Finally, an interesting point of divergence between the treatment of religion in the United States and the European Union is the existence of treaty commitments to freedom of religion, thought, and
belief among Union Member States that are distinct from the E.U. and have a separate enforcement system. E.U. countries (as well as some non-E.U. countries, including Russia and Turkey) are signatories to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is enforced by “politically binding” decisions of the European Court of Human Rights. In many ways, the European Convention and European Court have played a key role in protecting fundamental rights in Europe, akin to that played by the Bill of Rights and U.S. Supreme Court in the United States. The European Convention has already had an impact on the E.U.—the E.U.’s protections of freedom of thought, conscience, and religion in Article 10 of the Charter of Fundamental Rights are modeled on those of Article 9 of the European Convention. In addition, the E.U. committed itself in the Treaty of Lisbon to accede, or become party to, the European Convention. The thought is that this will help increase commitment to human rights and consistency between the Union and its Member States, which are all party to the European Convention.

It is interesting to consider what impact, if any, it will have on the treatment of religion in the E.U., since the ultimate protection of human rights and religious freedom in the Union will be primarily embodied in a non-E.U. institution with distinct political controls. Accession negotiations have been under way since May 2010 between the Union and the Council of Europe (which is responsible for the Court of Human Rights and implementation of the European Convention), but the details are still not clear. At this point, the president of the European Court of Human Rights and the European Court of Justice have proposed a flexible procedure, whereby the Court of Justice would have first right to review a Union law challenged before the Court of Human Rights, but the Union will still be subject to judges not selected through or accountable to the Union. Indeed, some of the Court of Human Rights justices do not even come from Union Member States. This will be an interesting

9. Id.
issue to watch further.

The issues surrounding religion and the European Union will only continue to grow—I anticipate many more works on the subject in coming years. Both *Religion, Politics and Law in the European Union* and *Religion and the Public Order of the European Union* make significant and distinct contributions, and are a promising beginning to serious treatments of religion and the E.U. McCrea’s *Religion and the Public Order of the European Union* is the better introduction for those seeking a thorough overview of religion in the E.U. system, while Leustean and Madeley’s *Religion, Politics and Law in the European Union* is more of a resource for those with some knowledge of the E.U. system and the issues it faces. As European scholarship on this topic expands, it will also be interesting to see if more Americans will take up the challenges of using comparative perspectives to analyze law and religion in the U.S. and E.U.