The EUROPEAN CONSERVATIVE

IS EU LAW MORE 'CONSERVATIVE' THAN AMERICAN LAW?

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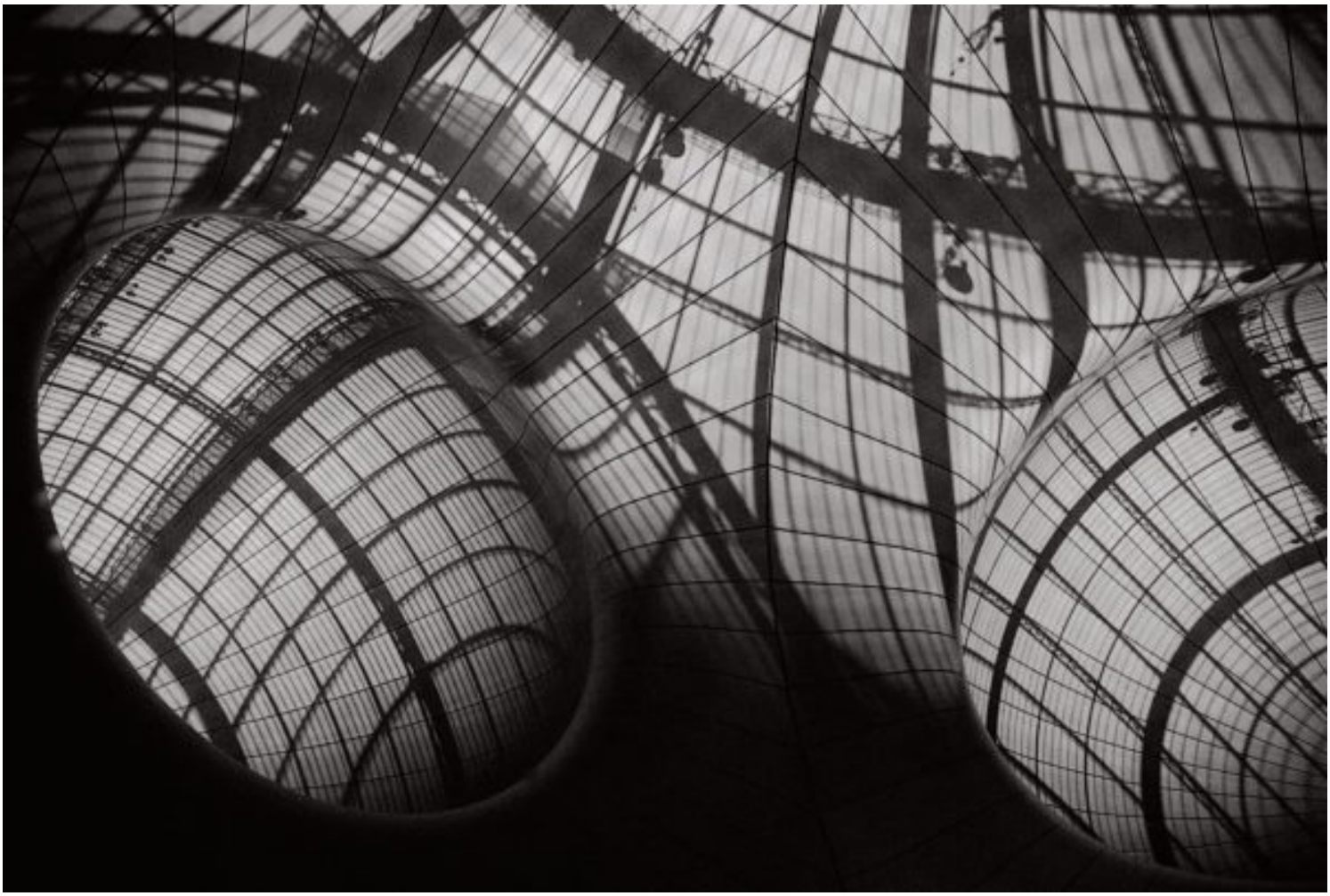

The authors argue that the high courts of the Council

# of Europe and the EU are actually more 'conservative' than the Supreme Court of the United States on almost every polarising topic today.

Category: COMMENTARY
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There seems to exist a widespread belief among Anglo-American conservatives that the European Union is a bastion of ultra-progressive politics; a benighted Soviet Union of Europe. Brexit was largely framed as a conservative revolt against the EU, even if the revolt in question seems doomed. The majority of Britons now endorse re-joining the EU, and the majority of Scots now demand independence. Does this Anglo-American conservative belief survive scrutiny?

The answer, to quote Margaret Thatcher, is: "No. No. No." In fact, the high courts of the Council of Europe and the EU—i.e. the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ)—are more 'conservative' than the Supreme Court of the United States on almost every polarising political topic, including immigration, abortion, gay marriage, racial affirmative action, gender politics, and religion.

The topic of **immigration** galvanised Brexiteers. The ECtHR is no stranger to dismissing complaints from migrants and asylum seekers. Two recent Grand Chamber judgments to that effect are *N.D. and N.T. v. Spain* (2020) and *M.N. and Others v. Belgium (2020).* *N.D. and N. T. v Spain* involved the dismissal of an appeal filed on behalf of mass migrants who crossed the Spanish border illegally, while *M. N. and Others v. Belgium* involved an unsuccessful petition on behalf of a Syrian family who were denied humanitarian visas by the Belgian government. Likewise, the ECJ has carefully calibrated immigration law in rulings such as *VW v Agence fédérale pour l'Accueil des demandeurs d'asile* (2021), dismissing a request to change the housing facilities of a foreign national. The executive

branch of the EU wants to ensure that migrants crossing the borders of Belarus are "safely returned to their country of origin."

It is impossible to exhaustively compare, in this article, the canons of American and European immigration law. Note, however, that the relative and real numbers of illegal immigrants in the EU is much lower: less than 1% of the population in Europe compared to 3-4% of the population in America. This is despite the fact that no European nation risks losing its native majority via immigration, while White Americans are expected to constitute less than half of the population by 2050.

What about **gay marriage** and **abortion**, issues that are so near and dear to social and religious conservatives? Under American law, abortion on demand has been permitted for decades as per *Roe v. Wade (1973)*, and gay marriage is also legal on a federal scale, as per *Obergefell v. Hodges (2015)*. The ECtHR, however, refused to impose a supranational mandate on gay marriage in *Schalk and Kopf v. Austria (2010)* and rejected the argument that abortion on demand is an inalienable human right, in a Grand Chamber ruling, *ABC v. Ireland (2010)*.

With respect to **gender politics**, it is no secret that feminist discourse dominates the identitarian Left, bringing non-feminists closer to the conservative end of the political spectrum. The high courts of Europe are remarkably protective of men's rights. The Strasbourg court, the ECtHR, has delivered many such verdicts previously, such as refusing to grant a single mother sole custody in a Grand Chamber judgement, *X v. Latvia (2013).* Perhaps the most famous ruling of this kind is *Markin v. Russia (2012),* which involved protracted legal warfare between Russia and Europe to protect the rights of Russian fathers. A more recent ruling in the same vein is *Uzbyakov v. Russia (2020),* involving the rights of a biological father who was denied paternity rights. According to a 2008 paper, "most challenges [before the Strasbourg court] in relation to sex discrimination have been brought by men."

The ECtHR also discourages abuse of the judicial system by offering modest damages to victims of **sexual discrimination** and **harassment**. Compared to Title VII and Title IX

verdicts and settlements in the U.S. that cost taxpayers millions of dollars, ECtHR offers damages that are generally in the range of tens of thousands of euros. For instance, it granted a posthumous judgement of €50,000 to a woman murdered by her husband, in *Civek v. Turkey (2016)*. A reasonable person can argue that this supranational legal shield is the reason why the #MeToo movement has failed to penetrate into continental Europe.

As for the Luxembourg court, the ECJ, it has issued landmark rulings that, *exempli gratia*, censure discrimination against men by striking down insurance policies that charge men more in *Association Belge des Consommateurs Test-Achats ASBL v. Conseil des ministres (2011)*, and by condemning Poland for lowering the retirement age of women (and women only) in *European Commission v. Poland (2019)*. The EU has also developed robust jurisprudence for the rights of prisoners, the majority of whom are male; and prohibited the death penalty, with the overwhelming majority of executees being male.

The EU is also routinely characterized as a **secular** project. This is true to a great extent, but the high courts of Europe are arguably more sympathetic towards Christian principles than are American courts. The ECtHR refused to outlaw blasphemy laws that protected the religious sentiments of Christians in rulings such as *Otto-Preminger-Institut v. Austria* (1994), leaving in place an Austrian law that allowed the confiscation of offensive material—in contrast to American verdicts like *Joseph Burstyn, Inc. v Wilson* (1952), which struck down a blasphemy law in New York. The Strasbourg court upheld a Turkish ban on the Islamic headscarf in *Leyla Sahin v. Turkey* (2005), while the U.S. Supreme Court decreed such bans unconstitutional in *EEOC v. Abercrombie & Fitch* (2015). The ECtHR is also aggressively protective of the rights of Christian minorities in rulings like *Cyprus v. Turkey (2001)* and *Patriarcat Œcuménique c. Turquie (2008)*. And finally, the ECtHR was dismissive of attempts to remove references to God from the presidential oath of Ireland, in *Shortall and Others v. Ireland (2021)*.

It is difficult to think of a topic where American law is more conservative than European law. While the U.S. Supreme Court repeatedly upheld racial affirmative action in rulings like *Grutter v. Bollinger (2003),* there is no right to racial affirmative action under EU law. As explained in a 2011 article in the *Law and Politics* journal, "the positive action

programs in the EU are referred exclusively for women," i.e., not racial minorities. And while affirmative action for women does exist under EU law, it is arguably narrower in scope, given ECJ's *Kalanke v. Freie Hansestadt Bremen (1995)* ruling. *Kalanke* prohibits employers from automatically giving priority to women, even in fields where there are fewer women than men.

Moreover, European law prohibits viewpoint discrimination and upholds freedom of speech, as evinced by rulings such as the ECtHR's *Redfearne v. the United Kingdom (2012)*, which rebuked the dismissal of a white nationalist and reinstated him to his former position.

None of this is intended to dismiss the valid concerns of today's sovereigntists but rather to foster greater understanding between European and Anglo-American conservatives. In the meantime, The United Kingdom's departure from the EU and the Council of Europe is likely to weaken protections for conservatives in general and male rights in particular. Illegal immigration to the UK is set to increase after Brexit. Therefore, it would be wrong to characterise the UK's quasi-exit from the jurisdiction of the Strasbourg Court as escaping "wokery" and "cancel culture."