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CONFERENCE: LAÏCITÉ IN COMPARATIVE PERSPECTIVE

FOREWORD TO LAÏCITÉ IN COMPARATIVE
PERSPECTIVE

Mark L. Movsesian

CONFERENCE INTRODUCTION:
AMERICAN RELIGIOUS LIBERTY, FRENCH
LAÏCITÉ, AND THE VEIL

Douglas Laycock

*Introduced and Moderated by Michael A. Simons &
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|----------------------------------------------------------------|------------------------------------------------------------------------------|-----|
| FOREWORD TO LAÏCITÉ IN COMPARATIVE PERSPECTIVE | <i>Mark L. Mousesian</i> | 1 |
| CONFERENCE INTRODUCTION: | | |
| AMERICAN RELIGIOUS LIBERTY, FRENCH LAÏCITÉ, AND THE VEIL | <i>Douglas Laycock</i> | 21 |
| | <i>Introduced and Moderated by Michael A. Simons & Mark L. Mousesian</i> | |
| LAÏCITÉ IN FRANCE—CONTEMPORARY ISSUES PANEL DISCUSSION | | |
| | <i>Nathalie Caron</i> | 53 |
| | <i>Blandine Chelini-Pont</i> | |
| | <i>Rosemary C. Salomone</i> | |
| | <i>Emmanuel Tawil</i> | |
| | <i>Introduced and Moderated by Mark L. Mousesian</i> | |
| LAÏCITÉ IN COMPARATIVE PERSPECTIVE PANEL DISCUSSION | | |
| | <i>Nina J. Crimm</i> | 101 |
| | <i>Javier Martínez-Torrón</i> | |
| | <i>Elisabeth Zoller</i> | |
| | <i>Introduced and Moderated by Marc O. DeGirolami</i> | |

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CONFERENCE

LAÏCITÉ IN COMPARATIVE PERSPECTIVE

FOREWORD

MARK L. MOVSESIAN[†]

On June 11, 2010, the Center for Law and Religion at St. John's University School of Law held its inaugural event, an academic conference at the University's Paris campus. "Laïcité in Comparative Perspective" brought together scholars from the United States and Europe to explore the French concept of laïcité and compare it with models of church-state relations in other countries, particularly the United States. Participants included Douglas Laycock (University of Virginia), who offered the Conference Introduction; Nathalie Caron (Université Paris-Est Créteil); Blandine Chelini-Pont (Université Paul Cézanne Aix-Marseille); Nina Crimm (St. John's University); Marc DeGirolami (St. John's University); Javier Martínez-Torrón (Universidad Complutense); Mark Movsesian (St. John's University); Rosemary Salomone (St. John's University); Brett Scharffs (Brigham Young University); Michael Simons (St. John's University); Emmanuel Tawil (Université Panthéon-Assas (Paris II)), and Elisabeth Zoller (Université Panthéon-Assas (Paris II)).

The Center chose laïcité as the subject of its inaugural event for two reasons. First, studying laïcité allows the Center to contribute to an emerging and fruitful dialogue between American and European scholars. No longer content to focus solely on the domestic context, law-and-religion scholars increasingly consider foreign legal systems as well. This is a very positive development. Comparative work can illuminate aspects of one's own legal system—its history, aspirations, failures, and

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unstated assumptions—that one might otherwise fail to perceive. Because it is both so close to and so remote from American ideas about church-and-state—so familiar and so unfamiliar—laïcité offers a particularly good vehicle for comparison. American scholars can learn much about our conceptions of religion and religious freedom by considering the different versions that exist in the other Enlightenment Republic. And, in turn, French and European scholars can learn much about their own traditions by considering them in light of their American analogues.

Second, a conference on laïcité addresses issues that greatly concern the public at large. At this writing, both France and the United States are embroiled in controversies over the place of religion in national life. In France, the National Assembly is considering a proposal to ban the burqa—*le voile intégral*—in public places.¹ Although the Conseil d'État, France's highest administrative court, has expressed serious doubts about the legality of such a ban, the Sarkozy government is pushing ahead with the proposal, with widespread public support.² In the United States, the plan to build a mosque near Ground Zero has caused a heated debate between those who see the mosque as an admirable symbol of religious tolerance and those who perceive it as a triumphalist gesture calculated to cause offense. Although these particular controversies concern Islam, the place of religion in public life transcends any one creed. Both French and American society must determine how best to address the fact that religious commitments remain vital for millions of their citizens—a fact that would have confounded the secularization theorists of the last century, to say nothing of *philosophes* like Diderot and Voltaire.³

¹ On the proposed burqa ban, see Bruce Crumley, *France Moves Closer to Banning the Burqa*, TIME, Apr. 23, 2010, available at <http://www.time.com/time/world/article/0,8599,1983871,00.html>.

² On the Conseil's position in the French judicial system, see T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 455 n.151. For the English version of the Conseil's opinion on the proposed burqa ban, see CONSEIL D'ÉTAT, STUDY OF POSSIBLE LEGAL GROUNDS FOR BANNING THE FULL VEIL (Mar. 25, 2010) [hereinafter CONSEIL D'ÉTAT STUDY], available at http://www.conseil-etat.fr/cde/media/document/RAPPORT%20ETUDES/etude_voile_integral_anglais.pdf.

³ For a skeptical treatment of secularization theory, see, for example, GRACE DAVIE, *THE SOCIOLOGY OF RELIGION* 46–65 (2007).

The conference had three sessions: Laycock's Conference Introduction, titled "American Religious Liberty, French Laïcité, and the Veil,"⁴ and two consecutive panels, "Laïcité in France—Contemporary Issues"⁵ and "Laïcité in Comparative Perspective."⁶ We present here an edited transcript of the day's proceedings. We have maintained the informal, conversational tone of the transcript in order to give readers a proper sense of the event. Similarly, we have not required the usual number of footnotes from authors in an effort to capture the spontaneous nature of the interchange among the participants.

Three main themes emerge from the day's discussions. First, laïcité is a contestable concept that encompasses many discrete, and sometimes contradictory, notions. The word itself is not readily translated into English.⁷ Most authors settle for "secularism."⁸ But "secularism" does not capture laïcité's anti-clerical, even anti-religious, connotations. As Jeremy Gunn observes, the word emerged during periods of acute hostility between the French state and the Catholic Church.⁹ Laïcité historically was a militant concept, a polemic employed by actors who sought to suppress French Catholicism, particularly during the early decades of the Third Republic.¹⁰ Nowadays, this history is largely ignored or forgotten; many French apparently see laïcité as a neutral and irenic doctrine that unites their society.¹¹ But its origins as a fighting word occasionally resurface, as in the *laïcité de combat* that Nathalie Caron describes in her contribution.¹²

⁴ Douglas Laycock, *Conference Introduction: American Religious Liberty, French Laïcité, and the Veil*, 49 J. CATH. LEGAL STUD. 21 (2010) [hereinafter *Conference Introduction*].

⁵ *Laïcité in France—Contemporary Issues Panel Discussion*, 49 J. CATH. LEGAL STUD. 53 (2010).

⁶ *Laïcité in Comparative Perspective Panel Discussion*, 49 J. CATH. LEGAL STUD. 101 (2010).

⁷ See Elisabeth Zoller, *Laïcité in the United States or The Separation of Church and State in a Pluralist Society*, 13 IND. J. GLOBAL LEGAL STUD. 561, 561 (2006).

⁸ See Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 503, 504 (2006); see also JOHN R. BOWEN, WHY THE FRENCH DON'T LIKE HEADSCARVES 2 (2007) (noting that the word "can be translated as 'secularism'").

⁹ Gunn, *supra* note 2, at 432–42.

¹⁰ *Id.* at 439; see also BOWEN, *supra* note 8, at 12.

¹¹ See Gunn, *supra* note 2, at 428–29.

¹² See *Laïcité in France—Contemporary Issues Panel Discussion*, *supra* note 5, at 94–95 (remarks of Nathalie Caron); see also BOWEN, *supra* note 8, at 25.

One must distinguish between different categories of laïcité. There is, for example, legal laïcité—the principles that flow from legal texts.¹³ The most important texts are article 2 of the French Constitution of 1958, which declares France to be a “laïque” republic,¹⁴ and the 1905 Law on the Separation of Churches and the State.¹⁵ These texts do not actually define the term “laïcité,” however, and to an outsider there appear to be some serious inconsistencies.¹⁶ For example, the 1905 law provides that “the Republic does not recognize, finance, or subsidize any religious group.”¹⁷ Yet, as Laycock points out in his Introduction, the French government is much more entangled with religion than any government in the United States.¹⁸ For example, the French Interior Ministry has an office, the Bureau des Cultes, whose responsibility it is to formulate guidelines for deciding which entities can be “recognized officially as ‘religious associations.’”¹⁹ The Ministry consults with the Vatican on the appointment of Catholic clergy; in Alsace-Moselle, which for historical reasons lies outside the coverage of the 1905 law, the Ministry actually appoints Catholic bishops.²⁰ Moreover, despite the wording of the 1905 law, the French government grants significant subsidies to religion—much more than the United States Constitution would allow.²¹ For example, under an exception in the 1905 law, the government owns and pays for the

¹³ Cf. BOWEN, *supra* note 8, at 29 (discussing Olivier Roy’s assertion that laïcité should be understood as “the sum total of laws dealing with the relationship of the state to organized religions”).

¹⁴ T. Jeremy Gunn, *Religion and Law in France: Secularism, Separation, and State Intervention*, 57 DRAKE L. REV. 949, 954 n.31 (2009). In full, the English translation of article 2 reads: “France is an indivisible, secular [*laïc*], democratic, and social republic. It ensures the equality before the law of all of its citizens, without distinction as to origin, race, or religion. It respects all beliefs.” *Id.* at 953–54.

¹⁵ *Id.* at 954 & n.32. Many sources in English translate the phrase in the title of this act as “Separation of Church and State,” but a literal translation would use the plural. *Id.*

¹⁶ See BOWEN, *supra* note 8, at 29 (noting that legal texts nowhere define “laïcité”).

¹⁷ Gunn, *supra* note 14, at 955.

¹⁸ See *Conference Introduction*, *supra* note 4, at 29.

¹⁹ Gunn, *supra* note 14, at 960–61.

²⁰ *Id.* at 958, 960; see also *Laïcité in France—Contemporary Issues Panel Discussion*, *supra* note 5, at 87–88 (remarks of Emmanuel Tawil).

²¹ Cf. Nelson Tebbe, *Understanding Laïcité*, 23 J.L. & RELIGION 371, 372 (2008) (book review) (noting that “religious bodies receive far more government support in France than in the United States”).

maintenance of all religious buildings in existence as of that date, including the great medieval cathedrals and countless smaller churches, mostly Catholic, throughout France.²² Religious bodies may use these buildings only with government permission.²³ The government subsidizes private religious schools and pays for chaplains who serve in public schools.²⁴ It even finances religious programming on public television.²⁵

As I shall explain in a moment, these inconsistencies should be understood as the product of France's particular history. Whatever the reasons, though, it is clear that legal *laïcité* is a complicated thing. And legal *laïcité* must be distinguished from philosophical or political *laïcité*, from *laïcité* as a theory of religion's proper place in French society. For example, the Conseil d'État has concluded that as a legal matter, *laïcité* requires neither a blanket ban on students' wearing of religious insignia in public schools nor a blanket ban on the burqa in public places.²⁶ Nonetheless, the National Assembly adopted a ban on religious insignia in 2004 and seems likely to adopt a ban on the burqa now.²⁷ Even if legal *laïcité* does not command a particular outcome, political *laïcité* might.

Outsiders often assume that political *laïcité* means a rigid secularism, as the examples of the ban on religious insignia and proposed ban on the burqa suggest. But political *laïcité* turns out to be just as complicated and contested a concept as legal *laïcité*. To be sure, many French conceive of *laïcité* as strict secularism.²⁸ But not everyone: the strict secularists are opposed by those, like President Sarkozy, who advocate *laïcité positive*, or "open secularism,"²⁹ a gentler version of the doctrine that does not perceive religion as inherently dangerous to republican values—though it must be acknowledged that the Sarkozy government has put its weight behind the proposed burqa ban. A third group,

²² Gunn, *supra* note 14, at 956; *see also* BOWEN, *supra* note 8, at 27–28.

²³ Gunn, *supra* note 14, at 956.

²⁴ *See* BOWEN, *supra* note 8, at 27–28.

²⁵ *Id.* at 28.

²⁶ *See* Gunn, *supra* note 2, at 455–57 (discussing the Conseil's decisions regarding religious insignia in public schools).

²⁷ *See id.* at 462–63 (discussing adoption of the 2004 law).

²⁸ *See Laïcité in France—Contemporary Issues Panel Discussion*, *supra* note 5, at 54 (remarks of Nathalie Caron) (discussing *laïcité de combat*).

²⁹ *See* Fr. Evaldo Xavier Gomes, *Church-State Relations from a Catholic Perspective: General Considerations on Nicolas Sarkozy's New Concept of Laïcité Positive*, 48 J. CATH. LEGAL STUD. 201, 214–25 (2009).

the advocates of *laïcité en mouvement*, stands somewhere in between.³⁰ The key point is that political *laïcité*, like its legal counterpart, is up for grabs. As John Bowen observes, there has “never been agreement on the role religion should play in public life” in France, “only a series of debates, laws, and multiple efforts to assert claims over public space.”³¹

Second, both in France and in other countries, much of the debate about religion in public life centers on the public schools. This should not come as a surprise. Both pro- and anti-religionists view public schools as a crucial battleground for shaping future citizens; the stakes are very high.³² In France, in particular, the public schools traditionally have been seen as the vehicle for forging a common national identity that transcends religious difference and embraces the rationalist values of the Enlightenment.³³ Following Rousseau, public schools traditionally are supposed to free children from religious influence and promote the primacy of the state over the church and other “communalist” attachments.³⁴ Thus, when politicians like President Sarkozy compare public school teachers unfavorably to clergy and assert that the school teachers can never “replace” priests and pastors, secular-minded French take offense.³⁵ On the other hand, religious parents resist attempts by public schools to indoctrinate children in secular or even anti-religious worldviews, an issue that Javier Martínez-Torrón

³⁰ See *Laïcité in France—Contemporary Issues Panel Discussion*, *supra* note 5, at 54 (remarks of Nathalie Caron).

³¹ BOWEN, *supra* note 8, at 33.

³² *Laïcité in France—Contemporary Issues Panel Discussion*, *supra* note 5, at 68–83 (remarks of Rosemary Salomone).

³³ See BOWEN, *supra* note 8, at 24–25; see also *Laïcité in Comparative Perspective Panel Discussion*, *supra* note 6, at 130 (remarks of Elisabeth Zoller) (discussing Condorcet); *id.* at 134 (remarks of Nathalie Caron) (discussing Condorcet).

³⁴ See BOWEN, *supra* note 8, at 11–13, 24–25; John O. McGinnis, *The Enlightenment Case for Vouchers*, 57 N.Y.U. ANN. SURV. AM. L. 75, 85–86 (2000). The fact that France subsidizes private religious schools obviously stands in some tension with this ideal, a matter I discuss below.

³⁵ See *Laïcité in France—Contemporary Issues Panel Discussion*, *supra* note 5, at 59 (remarks of Nathalie Caron); *Laïcité in Comparative Perspective Panel Discussion*, *supra* note 6, at 130 n.37 (remarks of Elisabeth Zoller) (citing *Allocution de M. le Président de la République Française*, PRÉSIDENTE DE LA RÉPUBLIQUE, Dec. 20, 2007, <http://www.elysee.fr/president/les-actualites/discours/2007/allocution-de-m-le-president-de-la-republique.7012.html?search=Latran>).

addresses here in the Spanish context.³⁶ An obvious solution is for public schools to remain scrupulously neutral about religion. As Martínez-Torrón explains, however, neutrality is exceptionally difficult to achieve in practice.³⁷

Third, the discussions plainly reveal the importance of history. France and the United States share a commitment to religious liberty. Both have political regimes that date from the same period. Both are heirs of the Enlightenment. Both are secular states, in the sense that neither has an established religion. And yet, when one compares the ways in which religious liberty is instantiated in the two countries, one discovers significant differences. Practices that are entirely unremarkable in one would seem grossly out of place in the other. I have already mentioned some of these differences; the participants in this conference identify others as well. What explains this? If both countries share common founding principles, why do they apply them so differently?

The answer relates largely to different histories. Unlike France, the United States never had an *ancien régime*. There were religious establishments during the colonial period—and even afterwards, in some places—and a general Protestant ascendancy throughout much of American history.³⁸ But America never has had an entrenched clerical class to displace or a Gallican-style church to dismantle.³⁹ From the beginning, American society has been characterized by a religious pluralism and voluntarism that made such a class and church impossible. As a consequence, Americans traditionally have not seen religion as the enemy of liberty, a fact that astonished Tocqueville in the 1830s.⁴⁰ On the contrary, throughout history, many Americans have seen religion as constitutive of political liberty. Americans in the evangelical tradition have long maintained that

³⁶ *Conference Introduction*, *supra* note 4, at 46–47 (remarks of Javier Martínez-Torrón).

³⁷ *Id.*

³⁸ For an excellent history of religion in America, see generally GEORGE M. MARSDEN, *RELIGION AND AMERICAN CULTURE* (1990).

³⁹ See Russell Hittinger, *Introduction to Modern Catholicism*, in *THE TEACHINGS OF MODERN ROMAN CATHOLICISM: ON LAW, POLITICS, AND HUMAN NATURE* 1, 5–7 (John Witte Jr. & Frank Alexander eds., 2007) (discussing Gallicanism).

⁴⁰ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280–81 (Harvey C. Mansfield & Debra Winthrop eds., 2000). Indeed, Tocqueville wrote, “Americans so completely confuse Christianity and freedom in their minds that it is almost impossible to have them conceive of the one without the other.” *Id.*

Christianity itself requires a neutral state so that believers can make meaningful, voluntary commitments to God.⁴¹ This is not the only strain in American religious thought, of course, but it has been an important one.⁴² In short, government in America has never seen the church as an adversary it needs to vanquish. The epic nineteenth-century struggle between the “two Frances”—one Catholic and one Republican—has no American counterpart.⁴³

These historical differences help explain some of the incongruities the participants in this conference identify. For example, the fact that the 1905 law gives the French government title to church buildings and that religious groups can use these buildings only at the government’s discretion obviously reflects a desire to control, or at least monitor, the church—a desire born of mutual suspicion and hostility between state and church at the time of the law’s enactment. Likewise, the continuing participation of the government in the appointment of Catholic clergy can be seen as a control mechanism, as well as a continuation of Gallican traditions. The subsidies provided for the maintenance of church buildings, private religious education, chaplains, and the like, can be seen as practical compromises that allowed the two Frances to attain a *modus vivendi*. And the heightened sensitivity to public religious expression, even today, can be understood as the legacy of the traditional Republican wariness about the resurgence of the state’s traditional rival—what Nathalie Caron here calls *le retour offensif du religieux*.⁴⁴

Of course, not everyone agrees with this interpretation. In her analysis of the Conseil d’État’s recent opinion on the burqa, for example, Elisabeth Zoller questions whether laïcité continues

⁴¹ See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1442–43 (1990); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 381–83 (1996).

⁴² For a helpful discussion of four perspectives that influenced the drafting of the Constitution’s religion clauses, see Witte, *supra* note 41, at 377–88. For an argument that contemporary American religion jurisprudence seeks to advance multiple, sometimes contradictory, values, see Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 16 (2004).

⁴³ See BOWEN, *supra* note 8, at 22–25, on the struggle between the “two Frances.” See also RENÉ RÉMOND, RELIGION AND SOCIETY IN MODERN EUROPE 57–59 (Antonia Nevill trans., 1999).

⁴⁴ *Laïcité in France—Contemporary Issues Panel Discussion*, *supra* note 5, at 93 (remarks of Nathalie Caron); see also BOWEN, *supra* note 8, at 25.

to play its formerly strong role in resolving legal controversies.⁴⁵ But this Foreword is not the place to settle the debate. The participants discuss it, and others, below. And I do not mean to suggest that incongruities are unique to France. Every legal system must live with its ironies; American church-and-state law has some of its own. The key point is that, in order to understand both French and American law with respect to religious liberty, one must consider not only formal legal texts and judicial decisions but the historical context in which these texts and decisions have effect. Especially in the area of law and religion, history and culture often explain much more than abstract legal doctrine.⁴⁶

It remains only to offer thanks: to the Law School for supporting this inaugural event, to the Paris campus for its hospitality, to the editors of the *Journal of Catholic Legal Studies* for their hard work, and to the participants for their very helpful contributions and the candid and congenial atmosphere that characterized the day's events.

BIOGRAPHICAL BACKGROUND ON PARTICIPANTS



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Nathalie Caron is the Co-Editor of the *Revue Française d'Etudes Américaines* and professor of American studies at the Université de Paris-Est Créteil. She is director of IMAGER, a research institute at UPEC on English-, German-, and Romance language-speaking cultures. She has published essays on Thomas Paine, the American Enlightenment, the new atheism movement in the U.S., as well as religion and its treatment in the

⁴⁵ See *Laïcité in Comparative Perspective Panel Discussion*, *supra* note 6, at 135 (remarks of Elisabeth Zoller).

⁴⁶ See JAVIER MARTÍNEZ-TORRÓN & W. COLE DURHAM, JR., RELIGION AND THE SECULAR STATE: NATIONAL REPORTS 55–56 (Javier Martínez-Torrón & W. Cole Durham, Jr. eds., 2010).

media. She is the author of *Thomas Paine contre l'imposture des prêtres* (1999) and more recently, with Naomi Wulf, of "Les Lumières américaines: continuités et renouveau" ("The American Enlightenment: Continuity and Change"), *Transatlantica* [En ligne], 2 | 2009. Her essay, "Laïcité and Secular Attitudes in France," based on a paper she gave in 2006 at a ISSSC conference on "Who is Secular?," was published in Barry A. Kosmin and Ariela Keysar, eds., *Secularism and Secularity: Contemporary International Perspectives*, 113–24 (2007). She is the co-editor of a forthcoming volume on religion in the Americas (Presses de l'Institut des Amériques).



Blandine Chelini-Pont

Senior lecturer in contemporary history and Ph.D. in Law at the University Paul Cézanne, Aix-en-Provence, France. She is head of the law and religion interdisciplinary research team on law in the media and in social change at the Université Paul Cézanne. Work 1: historical and contemporary relationships between law(s), politics and religion particularly in France and the United States (constitutional organization, legislation, jurisprudence, politics and public policy). Work 2: the implications of these issues in international relations (religious freedom, defamation, freedom of expression, proselytizing). Her current research focuses on the influence of American Catholic conservatism. Her next publication, "Rome and Washington from the Independence of the United States to the Cold War," will be available soon at Picard bookstores.



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Professor Crimm began her legal career in Washington, D.C., as law clerk for Judge Irene F. Scott, United States Tax Court; practiced in a Washington, D.C. law firm; and worked as Attorney-Advisor/Senior Attorney in the Office of the Chief Judge of the United States Tax Court. Since 1987, she has been a professor at St. John's School of Law, and she was a Visiting Professor of Law and Visiting Scholar in Residence at Arizona State University School of Law for several semesters in 2003 through 2005. Professor Crimm was the ATAX Research Fellow at the University of New South Wales in Sydney, Australia in 2001, and she was a recipient of a 2002–2003 research grant from the prestigious Washington D.C. nonpartisan, nonprofit organization, the American Tax Policy Institute.

Professor Crimm teaches a variety of tax courses in addition to a class on Nonprofit Organizations and a course on Global Philanthropy and U.S. Assistance: Legal, Policy, Political and Cultural Issues.

Professor Crimm is co-author of a book entitled *Politics, Taxes and the Pulpit: Provocative First Amendment Conflicts*, which is to be published by Oxford University Press in early fall, 2010. She is the author of *Tax Issues of Religious Organizations*, the newest edition of which was published in 2009 by the Bureau of National Affairs. Beginning spring, 2010, Professor Crimm writes a quarterly column, "The Quarterly Commentator," on a variety of nonprofit and tax issues for *The Exempt Organization Tax Review*. In addition, she has written numerous law review articles and has made many presentations about domestic and foreign policies and laws particularly relevant to cutting edge nonprofit organization issues.



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Professor DeGirolami's scholarship focuses on Law & Religion and Criminal Law. His papers have appeared or will be published in various law journals including *Legal Theory*, *Ohio State Journal of Criminal Law*, *Boston College Law Review*, *Alabama Law Review*, and *St. John's Law Review*, among others.



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He has been actively involved in religious liberty issues in the courts and legislatures, as well as in the law reviews. He is an experienced appellate litigator, including in the Supreme Court of the United States, and he has played a key role, in public and behind the scenes, in developing state and federal religious liberty legislation. He has represented clients across the religious and political spectrum: the Roman Catholic Archbishop of San Antonio, the National Association of Evangelicals, Hindus and Santerians, the American Civil Liberties Union, and parents objecting to school-sponsored prayers at football games. He received the 2009 National First Freedom Award from the Council on America's First Freedom.

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Mark L. Movsesian is Director of the Center for Law and Religion and the Frederick A. Whitney Professor of Contract Law at St. John's. His articles have appeared in the *Harvard Law Review*, *North Carolina Law Review*, *Washington & Lee Law Review*, the *American Journal of International Law*, the *Harvard International Law Journal*, the *Virginia Journal of International Law*, and many others. He has been a visiting professor at Notre Dame and Cardozo Law Schools and has delivered papers at numerous workshops in the United States and Europe. He graduated *summa cum laude* from Harvard College and *magna cum laude* from Harvard Law School, where he was an editor of

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Rosemary C. Salomone

Rosemary Salomone, the Kenneth Wang Professor of Law at St. John's School of Law, teaches constitutional law, administrative law, and a seminar on children and the law and has served in past years as Associate Academic Dean and Director of the Center for Law and Public Policy.

She has lectured internationally and published extensively on education law and policy and children's rights. In addition to her most recent book, *True American: Language, Identity, and the Education of Immigrant Children* (Harvard Univ. Press, 2010), she also is the author of *Same, Different, Equal: Rethinking Single-Sex Schooling* (Yale Univ. Press) (selected as an "Outstanding Academic Title for 2005" by *Choice Magazine*), *Visions of Schooling: Conscience, Community, and Common Education* (Yale Univ. Press), and *Equal Education Under Law: Legal Rights and Federal Policy in the Post "Brown" Era* (St. Martin's Press). She has been a recipient of numerous research and academic awards, including St. John's University's highest honor, the St. Vincent de Paul Teacher-Scholar Award; the University Outstanding Faculty Achievement Award; and grants from the National Science Foundation, the U.S. Department of Education, the Spencer Foundation, and Harvard University. She has held fellowships at Columbia University School of Law and at the Soros Foundation's Open Society Institute. Her

present research examines citizenship and schooling within the context of immigrant integration in the United States and Western Europe, particularly France.

Prior to St. John's, she was an Associate Professor at the Harvard Graduate School of Education, where she taught education law, school finance, and language policy and was a lecturer in Harvard's Institute for Educational Management. From 1985 to 1995, she was a member of the Board of Trustees of the State University of New York. She is a former chair of the section on Education Law of the Association of American Law Schools and of the Education and the Law Committee of the Association of the Bar of the City of New York, where she served on the Council on Children. She was elected to membership in the American Law Institute in 2008. She currently serves on the Advisory Boards of the National Coalition of Single-Sex Public Schools and of the Education Law Abstracting Journal.

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Professor Scharffs clerked for the Honorable David B. Sentelle on the U.S. Court of Appeals, D.C. Circuit, and worked as a legal assistant to the Honorable George H. Aldrich at the Iran-U.S. Claims Tribunal in The Hague. Before teaching at BYU, he worked as an attorney for the New York law firm, Sullivan & Cromwell. Before coming to BYU Law School, he taught at Yale University and the George Washington University Law School. He is currently serving as Chair of the Law and Religion section of the American Association of Law Schools.



Michael A. Simons

Michael A. Simons is Dean and John V. Brennan Professor of Law & Ethics at the St. John's School of Law.

Dean Simons graduated magna cum laude from the College of the Holy Cross in 1986 and magna cum laude from the Harvard Law School in 1989, where he was an editor of the *Harvard Law Review*.

Dean Simons joined the St. John's faculty in 1998 and was selected by the students as "Professor of the Year" in 2000. From 2005 through 2008, he served as Associate Dean for Faculty Scholarship. His own scholarship has focused on sentencing, prosecutorial decisionmaking, and punishment theory. His articles have appeared in the *New York University Law Review*, the *Vanderbilt Law Review*, the *George Mason Law Review*, the *Villanova Law Review*, the *St. John's Law Review*, *The Catholic Lawyer*, and the *Journal of Catholic Legal Studies*. He teaches in the areas of criminal law and evidence, and he has been a frequent lecturer to the bench and bar on both topics. He is also a Senior Fellow with the Vincentian Center for Church and Society.

After graduating law school, Dean Simons clerked for the Honorable Louis F. Oberdorfer of the United States District Court for the District of Columbia. He later served as a staff attorney for *The Washington Post*, as an associate at Stillman, Friedman & Shaw, and as an Assistant United States Attorney in the Southern District of New York.



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Emmanuel Tawil is an Associate Professor of Public Law in the Law School at the University of Paris II (Panthéon-Assas), where he teaches International Relations, Administrative Law, Constitutional Law, and Introduction to European Law. He joined the Law School of Paris II in 2007. Since 2010, he has also lectured at the School of Canon Law of the Catholic University in Paris. In France, he has taught Religious Freedom and Introduction to Canon Law at Université Paul Cézanne from 2003–2006. Abroad, he has taught and researched at Universiteit Antwerpen, Université Catholique de Louvain, and the University of California-Berkeley.

He served as an attorney for the diocesan tribunal of Arras-Cambrai between 2003–2007 and as defensor of the Bond at the diocesan tribunal of Strasbourg from 2001–2003.

He received a doctorate in Canon Law from the School of Theology in Strasbourg University in 2003, a post-doctoral diploma in Religious Studies from the School of Human Studies at Sorbonne in 2005, and a doctorate in Public Law from the Université Paul Cézanne in 2006.



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Elisabeth Zoller is Professor of Public Law in the Law School at the University of Paris II (Panthéon-Assas), where she is Director of the Center for American Law and Director of the Comparative Public Law Doctorate Program. She joined the Law School of Paris II in 1995, where she teaches Constitutional Law and Comparative Public Law. In France, she taught

International Law and Constitutional Law at the Universities of Angers and Nantes (1979–1983) and Strasbourg (1989–1994).

In the United States, Zoller was a visiting professor at Cornell University (1984), Rutgers University (1987–1988), and Tulane University (1994). Since 1996, she regularly visits the Mauer School of Law (Indiana University-Bloomington), where she teaches and researches in comparative constitutional law.

Zoller served as Counsel and Advocate for the Government of the United States of America before the International Court of Justice in the case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie (1998) and in the case concerning Avena and other Mexican nationals (2004).

**CONFERENCE INTRODUCTION:
AMERICAN RELIGIOUS LIBERTY, FRENCH
LAÏCITÉ, AND THE VEIL**

DOUGLAS LAYCOCK

EDITOR'S NOTE: Professor Douglas Laycock delivered the conference introduction at "Laïcité In Comparative Perspective." His introduction was preceded by brief comments from Dean Michael Simons and Professor Mark Movsesian.

SIMONS: I am the Dean at St. John's University School of Law. My role here this morning is simple, and that's to welcome everyone. So, welcome.

I do, though, want to do just a little bit more than that. This conference is the first event of St. John's new Center for Law and Religion, under the leadership of its Director, Mark L. Movsesian. The Center's goals are to examine the role of law in the relationship between religion and the state, to explore the concept of law in different religious traditions, and to promote St. John's Vincentian mission by encouraging an open dialogue on law and religion in the local, national, and international communities. And today's conference is very much the beginning of that dialogue.

As one of the largest Catholic universities in the United States, St. John's is well-positioned to undertake an examination of the relationship between law and religion. And as part of the Vincentian family, it is fitting that we begin that examination here in Paris. St. John's was founded in 1870 in New York City by the Vincentian fathers, also known as the Congregation of the Mission, or the Lazaristes, as I learned last night. From a small beginning with a couple dozen students, St. John's has grown to over 20,000

students on five different campuses all around the world. And yet the heart of St. John's is right here in Paris, where Saint Vincent lived and did his work. So we have in many ways come back to where we started, where Saint Vincent founded the Congregation of the Mission four hundred years ago, to examine questions that have persisted and have remained important during those four centuries.

Saint Vincent, of course, operated in a world in which there wasn't much separation of church and state. But at the time he was living and working, settlers were populating the United States, very much concerned about issues of religion and state. And, certainly from the Revolution onward, here in France, the relationship between religion and the state has been an important and complicated issue. So there's much for us to compare, much for us to discuss. I'm looking forward to today's discussions and I want to thank all of you for participating. So, thank you.

Mark?

MOVSESIAN: Thank you very much, Mike.

Of the United States and the United Kingdom, it is often observed that they are two countries "divided by a common language."¹ The United States and France may be said to be two countries divided by a common idea—that religion and the state should be, in some sense, separate. Religion should not have political authority and the state should not have religious authority. That basic idea is shared by both countries.

¹ The phrase was apparently coined by George Bernard Shaw. See CHRISTOPHER E. DAVIES, *DIVIDED BY A COMMON LANGUAGE: A GUIDE TO BRITISH AND AMERICAN ENGLISH* viii (Houghton Mifflin 2007) (1997) (attributing the phrase "England and America are two countries divided by a common language" to George Bernard Shaw).

Beyond that level of generality, though, some significant differences emerge. These differences can be explained in part by ideological and historical factors. Ideologically, the French system derives from the Continental Enlightenment, from the work of thinkers like Voltaire and Rousseau. The American system, by contrast, derives from a different Enlightenment tradition, the British Enlightenment, and from different thinkers, particularly John Locke. The two countries also have different histories. Unlike France, the United States did not have an *ancien régime* to supplant or a clerical party to overcome. So, there are important differences. There are similarities, too, of course. And what we'd like to do today is to begin exploring the differences and similarities in the way these two sister republics regard the separation of church and state.

Our first speaker is Douglas Laycock. Doug is the Yale Kamisar Collegiate Professor of Law at the University of Michigan and the Alice McKean Young Regents Chair in Law Emeritus at the University of Texas at Austin.² His is a name very familiar to anyone who works in law and religion. He has published many articles on religious liberty and other issues of constitutional law and has been actively involved in religious liberty issues in courts and in legislatures in the United States. He has famously litigated many cases, including before the Supreme Court of the United States. In 2009, Doug received the National First Freedom Award from the Council on America's First Freedom. I could go on much longer, but I don't want to take time from Doug. So, Doug, I'll hand it over to you.

² Since the conference was held, Doug has moved from the University of Michigan to the University of Virginia, where he is the Armistead M. Dobie Professor of Law.

LAYCOCK: Thank you, Mark. That was very kind. But you did steal my introduction. We are at least onto the same idea, whether or not it's the right idea, that France and the United States are two nations separated by common ideals.

I have studied the American law of religious liberty for thirty-five years and I think I know what I'm talking about. I studied *laïcité* very briefly, mostly from secondary sources, only in English. I *know* I don't know what I'm talking about. So all I can do is explain some of the American system and contrast it with the highlights of what I think I understand a little bit about the French system. And let me say how grateful I am to the French scholars who write in English about *laïcité* and to those of you who are making it possible today to hold this conference in English. I am always chagrined by my lack of language skills.

Liberty and equality are at the political heart of the American and French Revolutions and the American and French understandings of government. The French add fraternity. I don't think that is the key to how differently we understand liberty and equality.

With respect to religion, the language in the two legal systems is remarkably similar. Both countries explicitly guarantee the free exercise of religion.³ Both countries either prohibit or abolish

³ "The Republic ensures freedom of conscience. It guarantees the free exercise of religion subject to the sole restrictions enacted hereafter in the interest of public order." Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État [Law Concerning the Separation of the Churches and the State] art. 1 (enacted Dec. 9, 1905) (Fr.) [hereinafter Law of 1905], *translated at* www.concordatwatch.eu/showkb.php?org_id=867&kb_header_id=849&kb+id=1525. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. For further analysis of the Law of 1905 and other basic French legal provisions on church and state, see Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54 AM. J. COMP. L. 337, 339–40 (2006), and Alain Garay, Blandine Chélini-Pont, Emmanuel Tawil & Zarah Anseur, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in France*, 19 EMORY INT'L L. REV. 785, 786–97 (2005).

establishments of religion.⁴ Both countries speak of the separation of church and state, although that is not in either country's operative legal text. It is in the title of the 1905 statute in France and it is very common shorthand for the Religion Clauses in the American Constitution.

But that legal language has come to have very different meanings. It is not just that the Americans are more suspicious of the state, although that is no doubt part of it. It is partly, I assume, the absence of judicial review or anything like a real constitutional court in France, which limits the ways in which religious minorities can assert claims of right. But, more fundamentally, the legal language was written and it was interpreted in the face of very different histories and very different religious demographics.

With respect to relations between religion and the state, both modern France and the United States start with the memory of the wars of religion and a determination not to repeat that experience. From there, they take very different turns. Most obviously, it seems to me, the Church in France was on the wrong side of the Revolution, and it stayed on the wrong side through cycles of revolution and counterrevolution, through what some have called the War of the Two Frances,⁵ all through the nineteenth century.

Why were the French revolutionaries so secular and anticlerical? I don't think it was because France naturally came to religious doubt long before the rest of the Western world. Rather, I assume it was because of the Church's power, its abuses, and its support for the *ancien régime*, and

⁴ "The public establishments of religion are abolished, subject to the conditions stipulated in Article 3." Law of 1905, *supra* note 3, art. 2. "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

⁵ See JOHN R. BOWEN, WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE 23 (2007); Custos, *supra* note 3, at 350.

because Louis XIV had eliminated Protestantism as a viable path to dissent.⁶ So the path to dissent that remained was nonbelief.

In America, it was very different. The churches, plural, were mostly on the right side of the Revolution. There were some partial exceptions. The Anglican clergy had all sworn an ordination oath to support the King, and many of them went home to England.⁷ But most of the Anglican laity supported the Revolution, and those clergy who remained made their peace with it. The Quakers were reluctant because of their pacifism, not because of any particular loyalty to England. The rest—the Congregationalists, the Presbyterians, the Baptists, and the less numerous Lutherans, Roman Catholics, and German and Dutch Reformed—all supported the Revolution as enthusiastically as the population. These faiths mostly *were* the population. There were no significant numbers of secular or anticlerical revolutionaries in America; Thomas Jefferson was unusual in that regard. And most of the clergy of those denominations enthusiastically supported the Revolution.⁸

As that list makes clear, it is impossible to speak of “the Church” in America at the time of the Revolution or at any other time. There were many churches. And the number of churches was ever-growing, both from immigration and from a successive splintering of faiths. There were formally established churches in eight of the

⁶ Beginning in 1685, Louis XIV ended nearly a century of toleration, vigorously and effectively suppressing French Protestantism. See ROLAND H. BAINTON, *THE REFORMATION OF THE SIXTEENTH CENTURY* 172 (1952); ANDREW LOSSKY, *LOUIS XIV AND THE FRENCH MONARCHY* 217–28 (1994); Garay et al., *supra* note 3, at 817.

⁷ See SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 368 (2d ed. 2004); THOMAS E. BUCKLEY, S.J., *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787*, at 43 (1977); ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* 283 (Greenwood Press 1975) (1950).

⁸ See AHLSTROM, *supra* note 7, at 361–77; STOKES, *supra* note 7, at 274–85. On the important role of evangelical Christianity in fomenting and supporting the Revolution, see generally THOMAS S. KIDD, *GOD OF LIBERTY: A RELIGIOUS HISTORY OF THE AMERICAN REVOLUTION* 75–95 (2010).

thirteen original colonies and in Vermont, which became the fourteenth state in 1791.⁹ But they were *different* established churches: Anglicans in the South, Congregationalists in the North. And they were all in decline in the face of growing religious diversity. Few of the formal establishments survived the Revolution; none survived beyond 1833. And all were ended by peaceful political means, by votes in legislatures, by referendums, by simple atrophy. And maybe most important, the political demand for disestablishment came from other religions. It came from the evangelical Christians of the eighteenth century. The formally established Anglicans and Congregationalists each steadily declined in relative numbers until today, the two denominations combined are less than two percent of the population.¹⁰ They are no threat to anybody.

Another fact is very important but easily overlooked: the losers in the American Revolution *left*. Some eighty thousand Loyalists emigrated to England, Canada, or the West Indies.¹¹ They did not remain embittered in the United States. The population that remained after the Revolution was united—religiously diverse, but united in support of the new nation and in support of what the Revolution had achieved.

Those two histories and those two populations present very different challenges to a new government seeking to create a regime of religious liberty and separation of church and state. The French revolutionaries must have thought they faced one large and historically dominant Church, hostile to the Republic, and they concluded that

⁹ For an account of the American establishments and their disestablishment, see generally Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385.

¹⁰ BARRY A. KOSMIN & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY SUMMARY REPORT tbl.3, at 5 (2009), http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf.

¹¹ ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION 1763–1789*, at 549 (1982).

that Church had to be controlled. Maybe there was some other possible solution, maybe not, but the French solution was to control the Church.

They inherited from the *ancien régime* a tradition of substantial state control over the Church, the Gallican Church with a government role in the appointment of bishops and so forth.¹² But now the divide between government and church was much deeper; relations were much more hostile. Republicans could not feel safe until the Catholic Church was safely under control. But securing that control required compromises because Catholic believers remained very numerous in France. At least that's how it appears from the perspective of a very different history in America.

In America, there was no need to control the churches, because they effectively checked each other. In the battle to complete the disestablishment of the Anglicans in Virginia, which was the most fully and effectively established church, with a number of legal privileges, there is just the faintest suggestion of the later fight over the privileges of the Catholic Church in France. But at the national level, no church in the United States ever had enough power or enough numbers to threaten the liberty of any other. And so the way to protect religious liberty, the way to avoid any renewed threat of the wars of religion, was to let them all run free. James Madison, maybe the most influential of the Constitution's drafters, said that every relaxation of restrictions on religion had led to greater social peace and reduced religious conflict.¹³ Take off *all* the restrictions, let them compete with each other, let them all proselytize for members, let no church control the state and no organ of the state interfere with any church, and there would be religious

¹² See BOWEN, *supra* note 5, at 21–23; Garay et al., *supra* note 3, at 817–19.

¹³ James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 11 (1785), reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 69 (1947) (appendix to opinion of Rutledge, J., dissenting).

peace. Credibly promising the churches that the state would never interfere meant that the churches had no need to try to control the state in self-defense.

Those two historical starting points are very different, and they have led to radically different regimes of church/state relations. Things that are routine and wholly accepted in France would be unimaginable in the United States. And it is not that we in the United States agree on all these things. We in the United States are deeply, bitterly divided on some of these issues. And yet many of the French solutions are outside the range of that debate in the United States.

Let me briefly give you some examples.

In France, in the Ministry of the Interior, there is a Bureau Central des Cultes—a Central Ministry of Organized Religions.¹⁴ And that Ministry has persistently tried to organize a Council of Muslims to represent the Muslim population in its dealings with the government.¹⁵ To an outsider, it looks much like Napoleon organizing consistories of Protestants and Jews, so he could deal with them collectively the same way he dealt with the Catholic hierarchy collectively under the Concordat.¹⁶ Such a government office, such a government organization of a faith, such a negotiation, would all be unimaginable in the United States.

Of course American churches deal with the government. And their members can petition the legislature, like any other citizens. Religious participation in American politics is very high and always has been. And when churches engage in

¹⁴ BOWEN, *supra* note 5, at 16; T. Jeremy Gunn, *Religion and Law in France: Secularism, Separation, and State Intervention*, 57 *DRAKE L. REV.* 949, 960–61 (2009).

¹⁵ BOWEN, *supra* note 5, at 48–62.

¹⁶ Napoleon's arrangements are briefly described *id.* at 22–23. See also Michael Troper, *Sovereignty and Laïcité*, 30 *CARDOZO L. REV.* 2561, 2569 (2009).

activities that are otherwise regulated, they must deal with government offices or with the legal system. But a government office to address religions as religions—that’s hard for an American to comprehend.

The French law of 1905 says that the Republic “does not recognize . . . any religion.”¹⁷ But, in fact, the government does recognize the religions it considers legitimate, and it refuses to recognize those that it considers against public order. And it actually exercises this power to withhold recognition.¹⁸ I take it that organizing a cultural association as a legal entity is rather easy in France, but that organizing a religious association is a good bit more difficult.¹⁹

In America, there is generally no such distinction. For federal purposes and in most states, a church organizes itself like any other not-for-profit association.²⁰ To the extent that there is any difference, churches are *less* regulated. A church is automatically exempt from the federal income tax; it doesn’t have to go through the approval process for tax-exempt status that other nonprofits do.²¹ Contributions are automatically tax-deductible for the donors. Exemption from most state and local taxes is a matter of filling out a few forms and receiving an approval that is not discretionary. It is more a registration of tax-exemption than a real approval process. The burden is on the tax authorities to revoke the tax exemption if they find

¹⁷ Law of 1905, *supra* note 3, art. 2.

¹⁸ See BOWEN, *supra* note 5, at 18–19; Garay et al., *supra* note 3, at 800–03; Frederick Mark Gedicks, *Religious Exemptions, Formal Neutrality, and Laïcité*, 13 IND. J. GLOBAL LEGAL STUD. 473, 484, 491 (2006); Gunn, *supra* note 5, at 961.

¹⁹ See BOWEN, *supra* note 5, at 26, 42; Custos, *supra* note 3, at 350–51.

²⁰ The federal provision is 26 U.S.C. § 501(c)(3) (2006), which provides in one sentence for exemption from the federal income tax for any corporation or foundation “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals.” A separate provision provides for an income tax deduction for contributions to the same list of organizations. *Id.* § 170(c)(2)(B).

²¹ See *id.* § 508(c)(1)(A).

abuses or violations of the tax laws. It is not the burden of a new religion to prove its bona fides to the government. I don't know how much this difference between the two countries matters in practice, but the difference in starting assumptions appears to be substantial.

In France, the state owns most of the church buildings, because it confiscated them during the Revolution. And instead of giving them back, it lets the churches use them at state pleasure, and it pays for their maintenance, all as authorized by the Law of 1905,²² which broadly prohibits subsidies but has surprising exceptions.²³ And in the interest of equality, the Republic and municipalities find ways to subsidize the building of mosques, evading the 1905 law's ban on subsidizing religion.²⁴

Maybe these subsidies were essential. Maybe the Catholic Church in France in its current state could not possibly maintain all of the buildings it created over the centuries. Or maybe control of the places of worship is a giant government ring through the noses of all of the religions. Or maybe both. Certainly, the expenditures on maintenance are a subsidy.

²² See Law of 1905, *supra* note 3, pt. III (articles 12–17) (“Buildings for Religion”); see also BOWEN, *supra* note 5, at 26–28; Gunn, *supra* note 14, at 956; T. Jeremy Gunn, *French Secularism as Utopia and Myth*, 42 HOUS. L. REV. 81, 89 (2005); Troper, *supra* note 16, at 2569.

²³

The Republic does not recognize, remunerate or subsidize any religion. In consequence, starting on the 1st of January which follows the publication of this Law, all expenses concerning the practice of religion shall be abolished from the budgets of the State, Departments and municipal councils. However, expenses related to the services of the chaplaincy and intended to ensure the free exercise of religion in public establishments such as secondary schools, and primary schools, hospitals, asylums and prisons, may be included in these budgets.

Law of 1905, *supra* note 3, art. 2. And there is the large exception for government-owned places of worship in articles 12 through 17. American governments also fund chaplains in hospitals, asylums, prisons, and the military on the theory that persons in these institutions will often lack access to their own pastors. But a government-funded chaplain in primary or secondary schools is far outside the range of the American debate.

²⁴ BOWEN, *supra* note 5, at 36–43.

Every step of that process—the confiscations, the government ownership of places of worship, the expenditures on maintenance, and the subsidized construction of mosques—is outside the range of the American debate. The formally established churches in America kept their places of worship when they were disestablished, although the story is more complicated with respect to glebe lands—lands granted as endowment to support the Church of England.²⁵ Americans argue about government subsidies to religious schools and religious social service agencies, but not since the end of the formal establishments two-hundred years ago has anyone seriously suggested that the government might generally subsidize places of worship or the religious functions of churches. Even including church buildings in generally applicable programs of disaster relief has been controversial.

In France, the state substantially subsidizes most of the private religious schools on condition that they teach the national curriculum.²⁶ And I am told, anecdotally, that there is no enforcement of legal limitations on what those schools choose to teach about religion.²⁷ As you probably know, government subsidies of religious schools have been the subject of a long and bitter debate in the United States. It is now settled as a matter of federal constitutional law that governments are

²⁵ Glebe lands in Virginia were confiscated by the state on the theory that they had been paid for with money raised by taxation. See 1 STOKES, *supra* note 7, at 395–96. The Supreme Court of the United States held the act unconstitutional. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815). But this decision was not enforced in Virginia, and the Virginia Court of Appeals twice upheld the Act. *Selden v. Overseers of the Poor*, 38 Va. (11 Leigh) 127 (Va. 1840); *Turpin v. Lockett*, 10 Va. (6 Call) 113 (Va. 1804). No one sought review in the U.S. Supreme Court, and the Virginia court in *Selden* reported that the Protestant Episcopal Church—the new name for the former Church of England in the United States—had generally acquiesced in the loss of its glebe lands. 38 Va. at 132–33.

²⁶ See *Custos*, *supra* note 3, at 343, 357–58; *Gunn*, *supra* note 22, at 89–90; *Troper*, *supra* note 16, at 2569–70.

²⁷ This information is based on one student in one school in one year, and of course it may be unrepresentative. An American colleague who enrolled her child in a publicly funded Catholic school in France tells me that the child was taught that everyone other than Catholics would go to hell.

free to subsidize religious schools if the money is distributed neutrally based on the number of students at each school.²⁸ The law had long been the other way. The vote in the Supreme Court was 5–4. The dissenters were bitter. Those kinds of subsidies still violate state constitutions in some states.²⁹ Their constitutionality is unsettled as a matter of state law in most of the remaining states. And in the few states where those subsidies have been upheld, the political process has generally confined them to failing school districts in inner cities.³⁰ It has been politically impossible to enact any generally applicable program of government subsidies to religious schools. Aid to religious schools is very much within the range of the American debate, but the opposition remains fierce and the total of all such subsidies is trivial compared to what is paid in France.

The Republic no longer appoints bishops, but it apparently claims the right to do so, and I have read that it still consults with the Vatican on the appointment of Catholic clergy.³¹ Is that true? [French scholars nodding yes.] Again, unimaginable in the United States. American courts are so scrupulous to avoid interfering with the selection of clergy that clergy are unable to sue their employing churches for violations of the employment laws. That rule has its critics, and the Supreme Court has not yet reviewed it, but that is the law in every federal court of appeals.³²

As these examples indicate, the difference between France and the United States is not that France more strictly prohibits government aid to religion.

²⁸ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

²⁹ See *Bush v. Holmes*, 919 So. 2d 392, 405–13 (Fla. 2006); *Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1121–22 (Wash. 1989).

³⁰ See *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211–12 (Ohio 1999) (Cleveland only); *Jackson v. Benson*, 578 N.W.2d 602, 620–23 (Wis. 1998) (Milwaukee only).

³¹ See *Gunn*, *supra* note 14, at 960; *Troper*, *supra* note 16, at 2570.

³² See *Rweyemamu v. Cote*, 520 F.3d 198, 204–09 (2d Cir. 2008) (reviewing cases from every federal court of appeals with jurisdiction over employment suits); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–04 (3d Cir. 2006) (reviewing cases from nine different courts of appeals).

France provides much more government aid to religion. It is not that France more strictly separates church and state. France is far more entangled with the Church than any government in the United States. And I've not even mentioned the exceptional rules in Alsace-Moselle, where the Catholic, Protestant, and Jewish clergy are still employed and paid by the State.³³

So what is this *laïcité*, this secularism I keep reading about? With my American sensibilities and my thimbleful of knowledge about France, these practices partly appear to be compromises with a prior status quo and with a powerful Church that retained the support of millions of French men and women, and they partly appear to be mechanisms of state control, ways of keeping the Catholic Church dependent and subordinate to the state, of attempting to steer French Muslims in moderate directions, and in the name of equality, of applying similar rules to other faiths that are really no threat. State control of religion appears to be the primary goal; religious liberty within defined bounds appears to be an important but secondary goal—again, with all of the caveats about how little I know.

The American law of religious liberty has a whole other side that I have not yet mentioned—the law of free exercise of religion and freedom of speech and expression. The scholars who write in English about *laïcité* have said relatively little about those rights in France, and what they have said suggests a complex body of specific rules for specific situations, rules that defy easy generalization.³⁴ There is no large evangelical population in France, which makes these issues easier. But these rights seem to be rather limited from an American perspective. I gather that “proselytizing” is something of an epithet in France and subject to substantial legal restriction.³⁵ Proselytizing is an

³³ See Troper, *supra* note 16, at 2570.

³⁴ See Garay et al., *supra* note 3.

³⁵ *Id.* at 826–27; see also BOWEN, *supra* note 5, at 20.

irritant to many citizens in the United States, too. But legally, proselytizing is a constitutional right in the U.S.³⁶ I have read that Jehovah's Witnesses in France were fined for publishing religious tracts before being recognized as a religion.³⁷ Again, utterly unimaginable in the United States.

The 2004 law banning "religious signs" in public schools³⁸ can be analyzed in terms of the American law of free speech and free exercise. And I will do that in a few minutes. But it's hard to imagine even one of our more retrograde legislatures enacting something that in American terms is so obviously and so clumsily unconstitutional. If a state wanted to do it, there would be more clever ways to try to get away with it.

Even in France, the Conseil d'État did not think that laïcité required or permitted a ban on Muslim scarves in public schools.³⁹ Moreover, the 2004 law applies only to pupils, not to adults.⁴⁰ So adults can wear conspicuous religious signs in public schools. I have read that churches can appoint chaplains in public schools and that the Catholic Church does so—another practice that could not happen in America—and Catholic chaplains still wear their collars in the public schools even after the 2004 law.⁴¹ So it is not that laïcité bans religious signs in public schools. They show up regularly.

³⁶ See, e.g., *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002).

³⁷ Gunn, *supra* note 14, at 961.

³⁸ C. EDUC. art. L.141-5-1 (Fr.), available at http://www.legifrance.gouv.fr/affichCode.do?jsessionid=27EE7EB8B1055343A2BAE10E1AE09CAB.tpdjo15v_3?idSectionTA=LEGISCTA000006113579&cidTexte=LEGITEXT000005627819&dateTexte=20110108, translated in BOWEN, *supra* note 5, at 136.

³⁹ CE Ass., Nov. 2, 1989, No. 346,893, available at <http://www.conseil-etat.fr/cde/media/document//avis/346893.pdf>. For an English translation of a key passage, see BOWEN, *supra* note 5, at 86. See also Custos, *supra* note 3, at 361–63.

⁴⁰ The law applies only to *les élèves*, or pupils.

⁴¹ Gunn, *supra* note 14, at 959; Gunn, *supra* note 22, at 90.

What the law on religious signs most reminds me of in the American experience is our periodic bouts of immigrant bashing. And I say that with no disrespect. Each of our republics is run by humans. Each of us falls short of our ideals. And throughout American history, there has been a faction that feared that the latest immigrants would never assimilate and that they were ruining the country.⁴² Sometimes that faction is strong enough to enact punitive legislation. At the moment, most educated Americans are embarrassed by Arizona, but the Arizona legislation has strong public support in opinion polls.⁴³ Sometimes the anti-immigrant faction has been strong enough to substantially restrict immigration for decades at a time.

That faction has not often worked by overtly regulating the immigrants' religion, but it has occasionally tried. [Shortly after this conference met, there erupted a huge fight over a new Islamic cultural center to be located in lower Manhattan, a few blocks from the destroyed World Trade Center. This is the project labeled the ground-zero mosque by its opponents, although it would not be at ground zero and it apparently would not be a mosque. The resulting press attention led to revelations that there has been unsuccessful grass-roots opposition to building mosques in cities all around the country.⁴⁴]

⁴² See DAVID H. BENNETT, *THE PARTY OF FEAR* (1988).

⁴³ See *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (preliminarily enjoining enforcement of Arizona law that made immigration enforcement a local responsibility and made enforcement procedures far more burdensome on minority populations), *appeal pending*, No. 10-16645 (9th Cir., argued Nov. 1, 2010). Polling data is reported in Jennifer Steinhauer, *Arizona Law Reveals Split Within G.O.P.*, N.Y. TIMES, May 22, 2010, at A1.

⁴⁴ See Laurie Goodstein, *Across Nation, Mosque Projects Meet Opposition*, N.Y. TIMES, Aug. 8, 2010, at A1. This controversy grew into a furious round of full-throated Muslim bashing in the late summer of 2010. The episode then faded from the mainstream news almost as quickly as it arose, but the controversy lingers and its continuing effects remain to be seen. It is at least a reminder that a strong current of anti-Muslim feeling lurks just below the surface in the United States and that it could break out again.

In the mid-nineteenth century, the American Party, better known as the Know Nothings, proposed government inspection of convents. Some of the Know Nothings darkly hinted that any place with that many young women gathered must be engaged in prostitution.⁴⁵ The Know Nothings won state elections in nine states in the 1850s.⁴⁶ We Americans are in no position to feel smug when some other nation does something that looks foolish to us. But I have to say that to most Americans who spend time thinking about these issues, the 2004 law on religious signs does look foolish.

It is no surprise from an American perspective that the controversy over scarves centered at first on public schools. We Americans have fought over religion in the public schools since they were created—Protestant/Catholic conflict in the nineteenth and first half of the twentieth century, and religious/secular conflicts since the mid-twentieth century.⁴⁷ The fear is that the side that controls the schools will control the minds of the next generation. So each side thinks it has to control the schools.

But the French panic about scarves appears to have been different. It was not about the curriculum or religious exercises or anything to do with what the children would be taught. It was only about one item of religious clothing, and on the students, not on the faculty.

I gather that it is settled in France that government employees, including public school teachers, cannot do or say or wear anything that indicates a religious affiliation while they're on the

⁴⁵ See PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 215–16, 401 n.24 (2002) (reporting examples from the Know Nothing period and from later nativist groups).

⁴⁶ BENNETT, *supra* note 42, at 124.

⁴⁷ See, e.g., John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297–327 (2001).

job.⁴⁸ Again, it is generally different in the U.S. A few states—I think we are down to only two—still have what we call religious garb laws, which prohibit public school teachers from wearing religious clothing.⁴⁹ These laws were enacted in the late nineteenth and early twentieth centuries to prevent Catholic nuns from teaching in public schools. Scholars and activists in the field now generally view them as an embarrassing relic of anti-Catholicism. Oregon recently repealed its garb law.⁵⁰ The Justice Department under Presidents of both parties has attacked state garb laws as violating federal laws against religious discrimination in employment. And those federal laws apply to both public and private employment. They require employers to accommodate their employees' religious practice to the extent possible without undue hardship.⁵¹ Those laws are somewhat under-enforced, but they generally protect religious clothing in employment. A statute even protects “neat and conservative” religious items worn by military personnel in uniform.⁵²

I infer from what I have read that this sort of an exemption from rules—or “accommodations,” as we sometimes call them in the U.S.—is not required and often not even permitted in France.⁵³ Some writers imply that there can be no exception for members of a minority religion whose religious practices, however harmless, violate some law or regulation, however trivial.⁵⁴ There are treaty

⁴⁸ See BOWEN, *supra* note 5, at 14–15; Custos, *supra* note 3, at 368; Garay et al., *supra* note 3, at 796, 829–30; Patrick Weil, *Why the French Laïcité Is Liberal*, 30 CARDOZO L. REV. 2699, 2713 (2009).

⁴⁹ NEB. REV. STAT. § 79-898 (2010); 24 PA. CONS. STAT. § 11-1112 (2010).

⁵⁰ 2010 Or. Laws ch. 105 (H.B. 3686).

⁵¹ See 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1) (2006).

⁵² *Id.* § 774.

⁵³ See generally Garay et al., *supra* note 3.

⁵⁴ See BOWEN, *supra* note 5, at 17 (quoting the Chef du Bureau Central des Cultes—the Chief of the Ministry of Organized Religions).

obligations to protect religious practice,⁵⁵ but those obligations have been interpreted with great deference to governments.⁵⁶

A legal system with few or no religious exemptions is a harsh rule from an American perspective. The U.S. Supreme Court famously ruled twenty years ago, in a case called *Employment Division v. Smith*,⁵⁷ that the Constitution does not require that believers be exempted from laws that burden their religion. There were four dissents. The majority said that of course such exemptions are often a good idea. It's just that they should be enacted by legislatures rather than adjudicated by courts.⁵⁸ There were thousands of such legislatively enacted exemptions on the books.⁵⁹ And in response to the decision, Congress, state legislatures, and state courts responded with a wave of legislation and interpretation of state constitutions to restore a general right to exemptions for religiously motivated conduct, subject to government's ability to prove a compelling interest in applying a neutral law to a religious practice.⁶⁰

⁵⁵ EUR. CONSULT. ASS., *European Convention on Human Rights*, art. 9, Doc. No. 05 (Nov. 4, 1950); Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 18 (Dec. 16, 1966).

⁵⁶ See, e.g., *Holy Synod of the Bulgarian Orthodox Church v. Bulgaria*, 50 Eur. Ct. H.R. 3, 35 (2009) ("States enjoy a wide margin of appreciation in the particularly delicate area of their relations with religious communities."); *Dogru v. France*, 49 Eur. Ct. H.R. 8, 197 (2008) ("Where questions concerning the relationship between state and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance."); *Sahin v. Turkey*, 44 Eur. Ct. H.R. 5, 132 (2005) (same).

⁵⁷ 494 U.S. 872 (1990).

⁵⁸ *Id.* at 890.

⁵⁹ James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445–50 (1992).

⁶⁰ These laws and decisions are collected in Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 211–12 (2004). More recently, similar statutes have been enacted in Louisiana and Tennessee. 2010 LA. SESS. LAW SERV. Act 793 (West); TENN. CODE ANN. §4-1-107 (2010).

Those exemptions remain controversial in the U.S., especially with the bureaucrats charged with administering particular laws. The exemption laws are somewhat under-enforced. But the rule of *Employment Division v. Smith*, which was already far more generous to religious practices than my understanding of French law, has been supplanted by a still more generous body of law presumptively requiring exemptions for religious minorities in a majority of the states and with respect to the federal government.

But all of that is beside the point with respect to the French law of 2004 on religious signs in public schools. This was not some neutral law of general application that Muslim schoolgirls needed an exemption from. It is a law that singles out only “religious signs.” In its text, in its object or purpose, in its subjective motivation, the law targeted only religion. And the French government recognized that it was proposing to directly restrict a fundamental right. That is why it required a statute instead of an administrative directive.⁶¹

In the American system, this direct targeting of a fundamental right would make the law almost certainly unconstitutional. It is at best irrelevant that the law tried to be neutral among religions, that it bans yarmulkes and Sikh turbans and large crosses as well as Muslim scarves. What is fatal is that the law singles out religious practice. That violates the Free Exercise Clause even under *Employment Division v. Smith*.⁶² In theory, the law might be saved by showing that it serves a compelling governmental interest. But the claim of a compelling interest is very weak with respect to Muslim schoolgirls and nonexistent with respect to the other religious practices that were caught up in the effort to appear neutral.

⁶¹ See BOWEN, *supra* note 5, at 137–39.

⁶² This application of *Smith* is made explicit in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 n.14 (1992).

In America, the law would also violate the Free Speech Clause. Courts have resisted claims that items of clothing are a form of protected speech, and especially when those claims come from students. But in the 2004 law, the clothing is banned precisely because of the message it sends—because it manifests a religious affiliation. In the United States, a ban on conduct that conveys a particular set of messages is a viewpoint discriminatory ban on speech and unconstitutional absent the most extraordinary of government interests.⁶³

Student free speech is constitutionally protected in America,⁶⁴ but American schools have largely evaded that protection. They have figured out that with restrictive rules on the time, place, and manner of student speech, with often dubious claims to content neutrality, they can eliminate most of the student speech that disturbs them.⁶⁵ So an American school could ban all headgear, or it could require uniforms that omitted headgear, and in either case make no exception for Muslim scarves. Such a rule would not violate the federal Constitution. It might violate the new body of state law enacted in response to *Smith*, but those laws are relatively untested, so all of that is possible. But as far as I know, it hasn't happened. I'm not sure why not.

Certainly there is hostility to Muslims in some quarters in America. [Some Republicans ran on that hostility in the 2010 midterm elections, demagoguing the new Islamic cultural center planned for lower Manhattan.] There are thousands and thousands of separately elected local school boards making up their own rules in America. And some of them are run by officials who are unsophisticated, provincial, lacking

⁶³ See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990) (invalidating law against burning the flag).

⁶⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁶⁵ See, e.g., *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1055 (2010).

knowledge of other traditions—pick your adjective. But religious liberty is a political tradition as well as a body of law. So far, the Islamic cultural center in lower Manhattan is going forward without litigation, despite lopsided public opposition.⁶⁶ The press reports that in all the other local disputes around the country about the location of new mosques, an interfaith coalition has emerged to support the right to build the mosque and that this coalition has outnumbered the opponents.⁶⁷ There would be a similar political outcry in America if any American school board tried to ban headgear without allowing an exception for Muslim girls. And observant Muslims in the U.S. tend to concentrate in urban areas, and only in some of those. They haven't had to deal with the least sophisticated rural and small-town school boards.

We have had litigation in America over the full veil that covers all of the face except the eyes, but even then only in particularly sensitive contexts. There is a Florida case about driver's license photographs.⁶⁸ The driver's license is the primary identity document in the United States. There is a Michigan case and a rule of court about witnesses who wanted to testify with their face veiled.⁶⁹ But

⁶⁶ When I wrote the sentence in text, I meant that the sponsors of the Islamic cultural center had not had to sue the city to establish their right to build. But now there is litigation filed by private plaintiffs seeking to stop the project. The first suit was filed by Jay Sekulow of the American Center for Law and Justice, who claims to be an advocate for religious liberty but is revealed here as an advocate for one faith suppressing another. *Brown v. N.Y. City Landmarks Preservation Comm'n*, No. 110334-2010 (Sup. Ct. N.Y. Cnty. filed Aug. 4, 2010). The second was filed by Larry Klayman of Judicial Watch, a gadfly who has hounded both Democratic and Republican administrations. *Ferras v. Rauf*, No. 111970-2010 (Sup. Ct. N.Y. Cnty. filed Sep. 9, 2010). The theories in these lawsuits appear to be more political protest than plausible legal claims, although I say that without knowing much about New York landmarks law.

⁶⁷ Goodstein, *supra* note 44.

⁶⁸ *Freeman v. Dep't of Highway Safety & Motor Vehicles*, 924 So. 2d 48, 52–57 (Fla. Dist. Ct. App. 2006).

⁶⁹ MICH. R. EVID. 611(b) (2010). The background to this blandly worded rule, which was drafted entirely in response to a veiled Muslim woman who was denied the right to testify, is revealed in ADM File No. 2007-13, Amendment of Rule 611 of the Michigan Rules of Evidence (Aug. 25, 2009), *available at* <http://www.courts.michigan.gov/supremecourt/Resources/Administrative/2007-13-08->

I am aware of no legal or political moves to restrict any form of the scarf or veil more generally. France is in the process of banning by overwhelming votes any veil that covers the face—not just in schools, not just in sensitive contexts with countervailing interests, but in all public places.⁷⁰

There is a whole other issue, which I probably don't have time to discuss, about the American culture war over prayer in public schools and about government religious displays. But my sense there is that we are not so different from France. The rule against religious ceremonies in schools is holding firm,⁷¹ but the rule against religious displays by government is crumbling in America in response to conservative justices on the Supreme Court.⁷² I assume that in France, school-sponsored religious ceremonies in public schools would be unimaginable. The law bans religious signs on public buildings,⁷³ but there seem to be many exceptions, and Paris is filled with place names and monuments of the formerly established Church.

25-09-Order.pdf and reprinted as Comments of Justices to 2009 Amendment in MICHIGAN RULES OF COURT—STATE (2009).

⁷⁰ Steven Erlanger, *Parliament Moves France Closer to a Ban on Facial Veils*, N.Y. TIMES, July 14, 2010, at A6. The ban on veils has now been fully approved, with a judicially required exception for public places of worship. Steven Erlanger, *France: Full-Face Veil Ban Approved*, N.Y. TIMES, Oct. 8, 2010, at A8.

⁷¹ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301–13 (2000) (invalidating school-sponsored prayer at football games); *Lee v. Weisman*, 505 U.S. 577, 586–99 (1992) (invalidating school-sponsored prayer at graduations). Justice Kennedy was in the majority in both cases, so these holdings still appear to have five votes.

⁷² See *Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010) (dictum concerning cross on government property); *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1135–387 (2009) (dictum concerning religious displays); *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding government-sponsored Ten Commandments monument). *But see* *McCreary Cnty. v. Am. Civil Liberties Union*, 545 U.S. 844, 859–81 (2005) (striking down government-sponsored Ten Commandments displays erected with express religious motive). Justice Kennedy dissented in *McCreary County*, so it is doubtful that the holding could still command five votes.

⁷³ Law of 1905, *supra* note 3, art. 28.

So what to say from this whirlwind tour of American religious liberty and French laïcité? They have common origins, but they are by now like distant cousins who have lost contact. They barely resemble each other. The core right to believe is well protected in both systems. Beyond that, they differ substantially on almost every point. Religion is freer in America. It receives far more government support in France. The differences lie in history and culture. And compared to history and culture, the law is a relatively weak force. Law can influence culture, and I believe the American commitment to religious liberty has influenced American culture for the better,⁷⁴ but culture is surely a stronger force than law. The accepted terms—religious liberty, separation of church and state, laïcité—have no very precise meaning. They are, in part, symbols, and political factions can and do try to make those symbols stand for very different political agendas.

The American constitutional law of religious liberty has changed substantially in the last quarter century as the Supreme Court moved to the right. It appears to me that laïcité took a sudden lurch in 2004 when French society suddenly became alarmed about Muslim headscarves. We academics can try to reason things out from first principles, but in the real world, law is embroiled in politics and so in both our countries, law is much messier than any academic theory.

I hope I allowed some time for questions. I'm not quite sure when I started.

⁷⁴ Douglas Laycock, *Constitutional Theory Matters*, 65 TEX. L. REV. 767, 772 (1987).

MOVSESIAN: We do have time for questions. Perhaps one of our European colleagues would like to ask the first question.

CARON: Well, I have several questions. I'd like to make a lot of comments, but I will—

LAYCOCK: Yes, they don't have to all be questions.

CARON: —I have one comment, actually. It's not a question, if I may. It's about what you said about the 2004 law. You called it foolish, right? You said it's a foolish law.

LAYCOCK: I said, from an American perspective—

CARON: Yes, I know you did, from an American perspective.

LAYCOCK: And I said it in the context that we do plenty of equally foolish things.

CARON: Okay. Well, I mean, it's okay. No offense. I just wanted to say that I think you missed the point here. You missed the fact that *laïcité* is very much about schools. And it cannot be disconnected from education, because school is precisely where people should learn about *laïcité*, what it is to be a French citizen. Schools here play a very important role. So that's why we had that law. Condorcet, one of our Enlightenment philosophers, said that schools were the place of emancipation. Schools are the place where people learn about liberty, about liberty of expression, liberty of religion, et cetera, et cetera. So this is something that you should keep in mind, the strong component here that schools represent.

LAYCOCK: Yes, and we have that sense in the U.S. as well. And, plainly, public schools in both countries are institutions for transmitting values and for trying to shape the next generation. And, in part, the disagreement is about what are the means to be used. To what extent you do it by what you teach, and to what extent do you also do it by coercing student behavior? And has it worked? How many

girls took off the scarf: how many girls left and went to private schools? How many girls dropped out of school altogether? I don't know the answer to those questions.

CARON: The other thing that I wanted to say about this is that there was another issue which you did not mention—the role of women in society. I'm not saying that I'm for the law and that I want to defend this law. I changed my mind several times about the law. I mean, it was very hard for us to know what to think about it and we had lots of—and you can probably say the same—lots of debates with friends, and it was a hot topic, definitely. But the law had to do also with gender issues. The problem was that these women—not women—these young girls could not go to the gym. They couldn't go to the swimming pool with the rest of the class. And, well, that was a problem.

MOVSESIAN: Yes, Javier.

MARTÍNEZ-TORRÓN: I have a shorter remark about Nathalie's comment, so that you don't think that all Europeans think the same. Europeans are very diverse—

LAYCOCK: Of all the mistakes I might make, it would not have occurred to me to make that one.

MARTÍNEZ-TORRÓN: I have been following the French debate on religious symbols in public schools since the very beginning, actually since times prior to the 2004 law. And as Nathalie put it very, very interestingly, it's a very difficult issue to face. Very often we have our minds and our hearts divided on this issue, among other reasons because it is not an entirely clear issue—you may find arguments on both sides, very reasonable arguments, as well as very extremist arguments on both sides.

I found two aspects in your intervention that are worth commenting on. One is the idea that the educational setting is a way of transmitting to the

youth certain values of democracy, laïcité, freedom, et cetera. I'm not sure the right way to teach about freedom is to begin with a prohibition of an expression of religious freedom—indeed, this may be quite confusing for some people. The second issue is the implicit notion of state neutrality, that the state shouldn't take sides when dealing with religion or with philosophies of life. I am not sure that the right notion of neutrality implies no possibility of religious expression. I think it's much better that you can find within the school the same things that you find in society outside of the schools. Many people share this view. And I can speak from the Spanish perspective. We have recently begun to have these conflictive issues in a few Spanish schools, and the Spanish society is divided in this respect. On the one hand, many people think that some Muslim symbols may reflect unacceptable views about the submission of women, certain extremist views of Islam, et cetera. But at the same time, I would say that most Spaniards wouldn't understand why we should forbid something within a school that is not forbidden outside of a school. Neutrality actually means that we should have a reflection of real society within the walls of the schools.

MOVSESIAN: Nathalie?

CARON: Schools are sacred here. They are sacred places.

LAYCOCK: Sacred is an interesting word to describe them.

MOVSESIAN: If I may add something also, Nathalie, just on your point about public schools. American schools are also attempting to promote liberty and teach about liberty, but we might have a different conception of public liberty. As I understand it, the public schools in France have traditionally been involved with creating a common identity, a sort of common public space in which people interact with each other regardless of the differences they have. That might be somewhat different from a more American idea, which is well, yes, we all interact with each other in the public space, but we also

keep our communal identities. We think keeping that our communal identities is consistent with public liberty. I'll give you a chance to respond, but does anyone else want to—

LAYCOCK: I think there may also be different factual assumptions. It is very hard to get data on this, of course, but there may be different factual assumptions about how many of these girls are wearing the scarf because they want to, how many of these girls are being coerced, what other behaviors are associated with wearing the scarf, right? And so in America, I have law students wearing the scarf. I have highly successful law students who go off to join the litigation departments at big-time law firms, and they wear the scarf. This is a choice they make that does not interfere with their intellectual development. How typical is that? To what extent is the scarf really an indicator that life choices are being limited? I don't know. But very different assumptions about those kinds of questions seem to be at work in this debate.⁷⁵

MOVSESIAN: Would you—Blandine?

CHELINI-PONT: Yes, just one remark. The veil is forbidden only at public school, not in the universities or in the public space. It's really limited to the public school, when young people have not reached the age of majority.

CARON: Yeah, we're talking about a very small number.

CHELINI-PONT: Yes, it's—from a French perspective, it's a very limited decision that applies to the public school. That is very important. We have a lot of students, here in France, who wear the veil at universities, and there is no problem with that.

⁷⁵ Repeated studies by French sociologists are said to have found that most Muslim girls who wear the scarf do so voluntarily and to have found little evidence of coercion. These studies are collected in BOWEN, *supra* note 5, at 70–72, 256 n.7.

MOVSESIAN: I want to give Nathalie a chance to respond.

CARON: Well, quickly, I agree with you, but we must keep in mind that we're talking about a small number of students. And, as Blandine said, we're talking about public schools, and we're talking about young girls who are supposed to wear the veil. And not all Muslim girls, but only those who have reached puberty. So we're not even talking about all young girls. We're only talking about young, you know, young girls from about ten or maybe fourteen, up to about eighteen. And the other thing is, because Muslim girls can't wear the veil at school, that doesn't mean our children are not confronted with religious diversity. Outside of the school, Muslim girls do wear the veil. And then there are other religious signs and practices. For example, a lot of people here observe Ramadan. And our children see that. I mean, I'm talking about my own children. They saw other children keeping Ramadan.

MARTÍNEZ-TORRÓN: Well, that's exactly the point for me. If they find the veil outside of the school, and then they cannot wear it within the school, the subliminal message you are transmitting is that there is something wrong and intrinsically bad about the veil. The underlying idea is that we have to tolerate it outside the school because we cannot interfere, but not within the school. And I don't think this is right.

CARON: But there is something wrong with the veil. If you can't go to the swimming pool—

MARTÍNEZ-TORRÓN: Okay, that is your position, but many people have the opposite view. What is then the area of free choice with regard to religion? But, anyway, I think that we could be discussing the veil issue forever. I just wanted to make two short remarks on another comment made by Professor

Laycock. First, he was pointing out the different role of the state with regard to religion in America and in France. I would say the French approach extends to most European countries, at least continental European countries. And I would say that it has to do not exclusively with religion, but also with the very notion of the state and its interaction with society, which is different in Europe and in the U.S.

My second remark is that for many Europeans it would seem surprising, I would say, to hear that subsidizing religious private education is a way of subsidizing religion, because we tend to think that it is just a way of subsidizing families. Many families prefer private religious schools as the result of an educational choice—because they think that the education in private schools is better than in public schools. So, a parent may say: why should I pay twice for the education of my children, once with my taxes and once with a fee to the private school? For many people in Europe it is difficult to understand this strict American perspective, according to which not a single dollar of public money can be given to private schools.

LAYCOCK: We have that argument and that viewpoint in the U.S. also, with respect to schools. It mostly hasn't prevailed yet, at least politically, but it's a very substantial and longstanding argument. What's more surprising is the direct subsidy to the church itself, the maintenance of the church buildings. That's more surprising from an American perspective.

MOVSESIAN: I'm sorry, Emmanuel, do you—is it quick?

TAWIL: My remark is just that, in fact, we have definitions of separation and laïcité. We have definitions in the cases decided by the Conseil d'État. And it's absolutely clear that, for the Conseil d'État, laïcité just means religious freedom, neutrality, and pluralism. And the Conseil d'État also said that there is no prohibition for public funding to religion. This is very important—we have a

definition of laïcité, and we also have a definition of separation. Separation just means that we no longer have a system of *cultes reconnus*, which could be translated in English as “recognized religions.” The system of *cultes reconnus* was not a system of establishment. It was very different. It was a system of *service public*, something very, very linked with our situation in France. It just meant a kind of administration. Religions were like administrations. They were a part of the administration of the national body. And when we decided to have a system of separation, we decided not to have any more a system of *service public*. It just means that.

And it must also be said that the system of separation concerns only a part of France. It just concerns metropolitan France. That means France without Alsace-Moselle and without the *ultra-marine* territories. In fact, we have in France six different systems of law and religion. We have very different situations.

So, we have definitions of separation and laïcité, and it’s important to have that in mind. It’s absolutely clear. The problem is that most jurists in France don’t know what laïcité and separation mean. There are at most ten professors of law who understand what these terms mean. And it’s a problem.

MOVSESIAN: Thank you, Emmanuel. Doug, you want to respond?

LAYCOCK: Well, just very briefly. Of course, I did not mean that these terms have no content. But we each have our own image of them. If only ten professors understand the definition correctly, millions of other Frenchmen have some other image. My understanding is that the Conseil d’État said, in 1989, that laïcité does not require that we ban the

scarf. And the government and the Stasi Commission said, in 2004, yes, laïcité does require that we ban the scarf. That suggests that there is some ambiguity in the definition, right?

MOVSESIAN: Thank you.

LAÏCITÉ IN FRANCE—CONTEMPORARY ISSUES PANEL DISCUSSION

MOVSESIAN: We'll begin now our first panel, "Laïcité in France—Contemporary Issues." I am not going to read all the introductions—they would all be superlative—because I would like to save time for discussion. I'll just say the presenters are Nathalie Caron from Université Paris-Est Créteil; Blandine Chelini-Pont from Université Paul Cézanne Aix-Marseille; Rosemary Salomone from St. John's University; and Emmanuel Tawil from Université Panthéon Assas. I think the best thing is to wait until after all the participants have spoken; we will have a discussion after that.

Okay, so, first, Nathalie.

CARON: Well, thank you. Thank you very much, Mark. I actually have a title for this paper. I have called it, "Resisting the Return of the Religious:"—*retour offensif du religieux*, as we say here in France—"The Appeal to the Radical Enlightenment."

The French Republic rests on a secular ideal—Douglas told us about it—called laïcité, which is defined in the 1905 law. It is the result of a long historical process, which put an end to the domination of the Catholic Church. It's a value inherent in republicanism, which assures the equal treatment of all religions and protects freedom of religion and of conscience. Changing demographics and issues of pluralism have led to a heated debate over the meaning of laïcité over the past few years. As a result, questions about the place of religion in society have become increasingly urgent. And three major attitudes have emerged in the context of the debate.

Some people, in line with President Sarkozy, have advocated what has been called *laïcité ouverte*, or open laïcité. Another term for this concept is *laïcité positive*; this term reflects a concern with the free exercise of religion. Proponents of positive laïcité are tempted to revise the 1905 law. Other people favor what has been called *laïcité en mouvement*, laïcité in movement. These people are sensitive to social and religious changes—to the fact that Islam now is the second religion in France, for example—but they remain faithful to the history of the secular ideal. Finally, the most militant group, concerned with what they call the decline of laïcité, defend the French republican model by demonstrating the dangers of communalism and by calling for the strengthening of the 1905 law.¹

I will focus on this third category, the group of people who defend what has been called *laïcité de combat*. As an intellectual historian working on the Enlightenment, as well as on free thought and the skeptical tradition in the United States, I will offer a few remarks on the revival of interest in militant skepticism and atheism in France and the sources of their inspiration. I will use as a starting point a short piece published in *Le Monde Diplomatique*. In its February issue, *Le Monde Diplo*—as it is traditionally called—published a short piece called “Les Lumières au Secours du XXI^e Siècle,” in English, “The Enlightenment to the Rescue of the Twenty-First Century.”² The piece comments on the recent publication of three eighteenth-century Enlightenment writings which, in one way or another, have to do with religion. I’m speaking of *Le Philosophe Ignorant* (The Ignorant Philosopher) by Voltaire, published in

¹ I borrow and adapt Jean Baubérot’s labeling in *HISTOIRE DE LA LAÏCITÉ FRANÇAISE* 119 (Presses Universitaires de France 2000).

² Evelyne Pieiller, *Les Lumières au Secours du XXI^e Siècle*, *LE MONDE DIPLOMATIQUE*, Feb. 2010, at 24, available at <http://www.monde-diplomatique.fr/2010/02/PIEILLER/18811>.

1765;³ *Entretien d'un Philosophe avec Madame la Maréchale de **** (A Dialogue between a Philosopher—namely Diderot—and *Madame la Maréchale de ****, a devout Christian), published in 1771;⁴ and David Hume's *Dialogues Concerning Natural Religion*, published posthumously in 1779.⁵

Before I discuss this short piece, written by Evelyne Pieiller, I'd like to say a few general words about *Le Monde Diplo*. *Le Monde Diplo* is a secular, left-oriented, quality monthly with an international readership. It's translated into twenty-six different languages. It publishes in-depth articles on topics largely ignored by other media. Issues of laïcité are not paramount in *Le Monde Diplo*, which is more concerned with criticism of neo-liberalism and American imperialism. The journal's stance is "alter-globalist," in French, *altermondialiste*.

Le Monde Diplo is well-known for its unabated fight against what it calls *la pensée unique*. The term was coined by the former director Ignacio Ramonet in 1995; it is now a part of the French language. It refers to the unavoidable, dominant discourse, the seemingly only possible one, a discourse based on the principle that the economy prevails over politics. The argument is that the consequence of the domination of the market is the destruction of our capacity to think. According to Ramonet, the constant repetition of this catechism—he uses the word "catechism"—by all our politicians stifles all effort to think freely. Because our minds have been made insensitive, disasters such as unemployment, urban problems, corruption, the destruction of the planet—or in

³ VOLTAIRE, *LE PHILOSOPHE IGNORANT* (notes presented by Véronique Le Ru, Flammarion, 2009) (1765) (152 pages, €3.90).

⁴ DENIS DIDEROT, *ENTRETIEN D'UN PHILOSOPHE AVEC MADAME LA MARÉCHALE DE **** (notes presented by Jean-Claude Bourdin & Colas Dufflo, Flammarion, 2009) (1771) (106 pages, €3.50).

⁵ DAVID HUME, *DIALOGUES SUR LA RELIGION NATURELLE* (translated from English and editor notes by Magali Rigail, Gallimard, 2009) (1771) (240 pages, €5.60).

Ramonet's words, the return of racism, extremism, and religious fundamentalism—appear as hallucinations or mirages, as if these problems were unreal.⁶

Articles about the burqa, or the veil, are relatively rare in *Le Monde Diplo*. However, last April, Serge Halimi, the director of publications, published an editorial under the title, “Burqa- bla- bla.”⁷ And there was also a short letter by a reader, a Muslim, reacting to this editorial. Halimi's stance was clear: The burqa, like the minarets, are minor topics placed at the forefront of the media scene, with the complicity of the government, in order to hide France's more crucial problems. Consequently, more French people know about the three-hundred-and-something women wearing burqas in France and the four minarets in Switzerland, than they do about the public treasury's loss of €20 billion because of a technical error. In the editorial, Halimi does not say much about the burqa itself, his main point being to expose the political right's hypocrisy and lies. The fact that he did not say much about the burqa seems to imply that he considers—in a very French, secular way, if I may say so—that faith and religious practices are private matters. Nonetheless, when referring to the burqa, he did use the expression “*symbole obscurantiste*,” obscurantist symbol. And the writer of the letter—as I mentioned, a Muslim—reacted to this editorial and criticized the incapacity of the West to understand Muslim spirituality, emphasizing that the niqab—for some, a more appropriate word to refer to the type of veil that covers the entire face, except for a space for the eyes, that we occasionally see in France—is actually the result of a religious choice.

⁶ See *Qui Sommes-Nous? (Who Are We)*, LE MONDE DIPLOMATIQUE, <http://www.monde-diplomatique.fr/diplo/apropos/> (last visited Jan. 12, 2011); Ignacio Ramonet, *La Pensée Unique*, LE MONDE DIPLOMATIQUE, Jan. 1995, at 1, available at <http://www.monde-diplomatique.fr/1995/01/RAMONET/1144>.

⁷ Serge Halimi, *Burqa- bla- bla*, LE MONDE DIPLOMATIQUE, Apr. 2010, at 1, available at <http://www.monde-diplomatique.fr/2010/04/HALIMI/18990>.

Now, to get back to Pieiller's article, I find it particularly relevant that *Le Monde Diplo* published this short piece, with its hopeful reference to the Enlightenment and its underlying reference to Kant's 1783 definition of the Enlightenment, *sapere aude*: dare to use your own intelligence. And this example is actually one example among many others, which I selected because of *Le Monde Diplo*'s wide readership. The Enlightenment as an emancipating and secularizing movement is in fashion today in secular France.

The texts reviewed by Evelyne Pieiller, Voltaire's *Ignorant Philosopher*, and Diderot's and Hume's dialogues, are short. They were published just a few months ago by Flammarion and Gallimard in paperback editions, and they all cost less than €6. While the introductions are long and thorough and written by scholars, the texts are clearly aimed at the general public, including high school and college students, and more widely at people with little knowledge of Christian doctrine, people who may not know the theological meaning of a word as common as "confession."⁸

All three have to do with epistemology and with the search for truth. "How can we know?" they all ask. And this is what *Le Monde Diplo* is adamant about in its fight against the dominant discourse. The texts are not explicitly anti-religious, but they do question religion. Eighteenth-century Enlightenment philosophers are held up by *Le Monde Diplo* as essential references, crucial to our understanding and acceptance of difference, to our ability to live together, and to the development of our critical sense, *notre "sens critique,"* namely our ability to remain insightful critics.

The first idea conveyed in Pieiller's piece—and also in the eighteenth-century writings she recommends—is that respect for difference and

⁸ DIDEROT, *supra* note 4, at 39.

tolerance must not mean absence of criticism. “Insolent thought” is required, she says, “insolence” meaning “audacious,” “provocative.” And the second idea that she conveys is that only doubt—I’m not talking about atheism, but doubt, and probably also agnosticism—is the solution which will deliver us from prejudice and fanaticism. The choice of the philosophers is indeed relevant. While Diderot was a self identified atheist—“*l’homme qui ne croit rien*” (“the man who did not believe in anything”) in the words of his companion in the dialogue—Voltaire and Hume are more rightly defined as skeptics.⁹ Voltaire is a well-known figure among the French, among the youth in particular, his writings being on the syllabus for the *baccalauréat*, the exam taken at the end of high school. Voltaire is famous for his passionate defense of tolerance and his fight against religious fanaticism, which he called “*l’Infâme*.” He is usually described as a deist, or even a theist, in other words, someone who believed in a creator and assumed that the creator intervened in man’s affairs. Interestingly here in Le Ru’s introduction, he comes across as “a skeptic deist,” who experienced a growing skepticism as his life drew to a close and whose God may have been that of Spinoza.¹⁰

What struck me when I read Evelyne Pieiller’s article, and also the editorial on the burqa, was that here was another example of the way in which the Enlightenment, and more particularly what intellectual historians call the Radical Enlightenment, is used ideologically in France today. It is used to reactivate the need to think freely in a society threatened by the dominant discourse, which homogenizes thinking, and by relativism, which in the name of tolerance tends to put our minds to sleep. But there is a contradiction, or dilemma, one that is inherent in any form of promotion of freedom of expression. I had already seen this dilemma in eighteenth-

⁹ *Id.* at 38.

¹⁰ VOLTAIRE, *supra* note 3, at 16.

century Enlightenment champions of liberty such as Thomas Paine, whom I have studied. I'm speaking of the difficulty in reconciling a forceful criticism of a dominant discourse which tends to ignore differences and the confident insistence that doubt or free thought is superior to faith and that religion, in its institutionalized form or not, is necessarily obnoxious. To a certain extent, the criticism of the *pensée unique* may lead to the construction of another "pensée unique," one which is intolerant and adamantly anti-religious.

The article also reflects a need to react to what is perceived as a decline of laïcité. The Enlightenment is used in the article as a reminder of laïcité's origins and its true meaning. Simultaneously, the Enlightenment is summoned to express a form of resistance to what is called "*le retour offensif du religieux*," the forceful return of the religious. For Piessler, whose outlook is unmistakably secular, the forceful return of the religious can be seen in President Sarkozy's celebration of priests, as well as in encroachments on the liberty of expression in the name of respect for the Bible, and also more vaguely in signs of religious revivalism. Piessler's reference to Nicolas Sarkozy relates to a controversial speech the President made in the Lateran Palace in Rome, in which he said—I'm quoting the president of France—"The schoolteacher will never be able to replace the priest or the pastor."¹¹ This statement drew sharp criticism for contradicting the basic principle of laïcité, whose close links with education derive from the Enlightenment's appeal to reason and, as I said earlier today, the idea that schools are the vehicle for emancipation, universal progress, liberty, and equality.

¹¹ *Discours de Nicolas Sarkozy au Palais du Latran le 20 Décembre 2007*, LE MONDE, Dec. 21, 2007, available at http://www.lemonde.fr/politique/article/2007/12/21/discours-du-president-de-la-republique-dans-la-salle-de-la-signature-du-palais-du-latran_992170_823448.html.

What I have been describing here is echoed in a number of ways in the United States. That is somewhat paradoxical, given that, as we heard this morning, the United States and France are traditionally diametrically, and often artificially, opposed when it comes to religion, and given the American reluctance to refer to the Enlightenment paradigm in general. Nonetheless, in the United States, the Enlightenment is used ideologically by two major groups of people, though these groups don't appeal to the same Enlightenment writers. On the one hand, we have the neoconservatives, who use the Enlightenment a lot—but I'm not going to speak about them.¹² The other group is the secularists, most recently the New Atheists, for example, Sam Harris, Christopher Hitchens, Richard Dawkins, and others.

There is no doubt that similar controversies about the role of religion in society are in play on both sides of the Atlantic. And it is no coincidence that *The God Delusion*, by Richard Dawkins, as well as *God Is Not Great*, by Christopher Hitchens, recently appeared in French, along with the new editions of the books I mentioned earlier, and also other eighteenth-century writings.¹³ It is as if today, the French, citizens of one of the most secular nations in the world, were badly in need of inspiration and intellectual support for laïcité, to the point of looking for inspiration not only in the eighteenth century, but also in the United States. I find that interesting in terms of cultural transfers and of what it reveals of the effects of globalization, and also rather ironic. However, the paradox is partly explained by the fact that an author like Hitchens himself, who is British-born, draws from

¹² On the ideological uses of the Enlightenment in the United States, see Nathalie Caron & Naomi Wulf, *Les Lumières Américaines: Continuités et Renouveau*, TRANSATLANTICA (Feb. 2009), <http://transatlantica.revues.org/4566>.

¹³ RICHARD DAWKINS, *THE GOD DELUSION* (2006); CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* (2009). The books appeared in French under the titles *POUR EN FINIR AVEC DIEU* (translated from English by Marie-France Desjeux Perrin 2009) (2006) and *DIEU N'EST PAS GRAND: COMMENT LA RELIGION EMPOISONNE TOUT* (translated from English by Anna Nessun, Belfond 2009) (2007), respectively.

the Radical Enlightenment. So, it's no wonder that the publisher who had Hitchens translated into French thought that the book would find a readership here.

President Sarkozy's approach to laïcité—his tendency to infuse various speeches with “God talk,” the way he introduces religion into the public sphere—disturbs many French people. This, as well as the rise of religious extremism, has renewed old debates, which date back to the eighteenth and even seventeenth-century. Since Voltaire, Diderot, and Hume's times, or Thomas Paine's, the dispute over skepticism has endured, and its scope, of course, has expanded. New religious demographics, increasing diversity in Western Europe, as in the United States, have brought Islam and other faith traditions into the debate. And the scrutiny of the errors of religion now includes references to international terrorism, new religious movements, child abuse, the threat to women's reproductive and sexual rights, and creationism, among other issues. Through all of this, Enlightenment reasoning and rhetoric have persisted, with emphasis on the critical fight against the alliance of politics and religion, and the fundamental epistemological Hobbesian question, how can we know anything about God? The *Monde Diplo* piece demonstrates this once again.

Thank you.

MOVSESIAN: Blandine?

CHELINI-PONT: My paper discusses the debate on the constitutional foundations of the full veil ban in France. On March 30, 2010, the French Council of State, rendering an advisory opinion in response to a question by the government, expressed serious doubt, for the second time since the Fall, on the possibility of an absolute and general ban on women wearing in public garments that cover the face entirely—burqa—or almost entirely—eyes visible, niqab—known in France as the “full veil.” The Council proposed measures for specific

administrative places and services, leaving aside public streets in general. In explaining its position, the Council stated that an absolute and generalized ban had no indisputable legal foundation, either from a French constitutional point of view or from a conventional European perspective. Notwithstanding the opinion of the Council, however, the government decided to present a bill banning the full veil to the National Assembly. Notably, the government cut short discussion of other legislative proposals on the full veil, especially a more debatable proposal by deputy Jean-François Copé, titled a “Bill to Prohibit Concealing One’s Face in Public Areas.” The members of the Assembly unanimously adopted, before the first vote on the law scheduled for July 13th, a *Résolution* intending to ban the full veil in public places. This *Résolution* had only a declarative strength, but it clearly explains the French context and the civil values which underlie the ban.

Given the strong consensus in favor of the ban on the part of political parties and the French public, it is more than likely that this law will pass. Putting aside for the moment the justified criticisms by Socialists of the political manipulation of this issue by the presidential majority, and the fears of “Islamalgam” (the confusing of Islam with radicalization) expressed by leaders of the French Council of the Muslim Religion, the law would be very simple. In two articles, it would prohibit wearing a full veil on national territory under penalty of a €150 fine and/or a course on citizenship, and punish anyone who forced a woman to wear a full veil by “violence, threat, abuse of power or authority,” by imposing a €15,000 fine and one year’s imprisonment.¹⁴ Prime Minister François Fillon stated that he would take

¹⁴ Projet de Loi No. 2520 (Assemblée Nationale), Interdisant la Dissimulation du Visage dans l’Espace Public (Draft Bill Forbidding Hidden Face in Public Space) (2010), available at <http://www.assemblee-nationale.fr/13/pdf/projets/pl2520.pdf>.

the legal risk, despite the Council of State's warning, on behalf of the Republic's values of living together in society and the dignity of women.

This morning, I will give you a few arguments against and for the ban.

I will begin with arguments against the constitutionality of the proposed law. The first argument is, in my opinion, the weakest, in the French context. It is that this law will contravene religious freedom, which includes the right to dress according to one's conviction. As I say, this argument is a fairly weak one, in French context. In France, like elsewhere, there are few situations in which religious freedom can be successfully invoked when it conflicts with other democratically-established rights or laws. For example, we cannot invoke religion to justify polygamy, which is absolutely forbidden for French citizens and residents alike. Ditto for female genital excision.

To say that covering one's face completely concerns religious freedom is countered by the fact that this garment could be seen as violating other rights (including the right to dignity) and by the fact that Muslims themselves are not unanimous about the religious nature of such a garment. Religious freedom is not an absolute in France, as you know, except in the "internal forum": freedom of conscience, for example. In the "external forum," religious freedom is qualified. For example, the state may place serious limits on praying in the streets, as well as proselytizing.

The notion of freedom of religion as a reason to allow women to cover their faces in public is denounced by numerous experts in our country. For example, Dounia Bouzar, an anthropologist who studies the radical Muslim community, says that the full veil is in fact a manifestation of the pathological and sectarian backgrounds of radicals, who cause great harm to Muslims themselves. Dalil Boubakeur, rector of the Grand Mosque of

Paris, says the full veil is not at all Muslim, an idea confirmed by the rector of the Al-Azhar Mosque in Cairo. Even from a conventional legal perspective, if judges were to address claims that a law banning the full veil denied religious freedom, they would have a lot of latitude, given previous case law, to argue that religious freedom isn't "pure" or sufficient to prevent a ban, especially since the garment is worn only by women inside radical groups, whose political views may be anti-democratic.

The second, and stronger, argument against the law is that a general and absolute ban is disproportionate, particularly if it's enforced on the basis of public order. Public order in a democracy must be limited to the strict requirements of security, safety, and public health. In order to be justified, restrictions on the free movement of people, because of clothes that hide their identity, must be based on a compelling interest in safety. Given the nonviolent, and seemingly nonaggressive, nature of people who wear this garment, who are just walking in the streets, the public order argument for an absolute and general ban seems disproportionate. The position of the Council of State is consistent with its earlier opinion in the case of the simple headscarf in French schools, which the Council rendered in 1989. The Council felt that the simple headscarf was compatible with the secular nature of public schools and that a ban would be disproportionate. If girls did not disturb classes and did not aggressively proselytize, they could indeed wear headscarves, without undermining the secular nature of the public school.

Now, I will address arguments in favor of the ban's constitutionality. First, in the French context, I believe, "public order" is not only about safety, tranquility, and health of people in the streets. In English, there is an interesting term to translate the French term "public order"—"law and order." On this understanding, the term "public order" demonstrates, in a certain way, the spirit of the

law that prevails in a country. “Public order” represents a balance between the mores of a given population and the values upheld by their constitution. In this balance, the street is an area where peoples’ attitudes express their common values. These values are principally human dignity, shown by respect for others in one’s expression and attitude, and equal treatment of persons, which means no segregation in public areas on the basis of age, sex, physical state, and disability.

In this regard, it’s very interesting to understand that the French prohibit nudity in the streets. On French territory, it is forbidden to walk naked anywhere where people are likely to meet. This rule is no longer based on public decency, but on respect for others. Morality as a component of public order has evolved into a concern for human dignity. Another example is the Council of State’s 1995 decision concerning “dwarf tossing.” The city of Morsang sur Orge had prohibited a business from producing a show in which customers threw dwarfs like pinballs with the intent to entertain. Even though the dwarfs, employed by the company, claimed to consent to this “job,” the Council forbade the practice on the grounds that it was detrimental to human dignity, stating that “human dignity is a component of public order.”¹⁵

Public order, in these examples, means the values of the Republic in a (shared) common space. In this sense, the absolute ban of the full veil is proportionate to its purpose. The act of covering one’s self entirely, like dwarf tossing, is a serious infringement on the principles and values of the French Constitution and the European Convention of Human Rights: equality, nondiscrimination, and dignity. What does a full veil communicate, in fact? It communicates the exclusion of women from the view of any passersby, whoever they may be. This practice concerns only women; it is a

¹⁵ CE Sect., Morsang-sur-Orge, Oct. 27, 1995, Rec. Lebon 372 (Fr.), available at http://www.lexinter.net/JPTXT2/arret_commune_de_morsang_sur_orge.htm.

distinctive and exclusive sign pertaining only to women. It symbolizes, really, the inequality of women. Inequality comes from the fact that women must wear a garment that hides them from the view of others because only the men in their family have the right to see them, in the privacy of their home. Wearing the full veil contributes, in a way, to eliminating the possibility of mixed sexes in public and denotes the subordination of a woman to the men in her family.

Another point: In public areas, even a minimal notion of equality—the least of the least—requires that people see and be seen, face to face. Just as one does not exhibit one's genitals, one does not cover one's face. In segregationist states, whites and blacks were separated because whites didn't want to see blacks in the same places where they were—schools, buses, universities, hospitals. Blacks were hidden from the presence of whites. Where human equality is a constitutional principle, we don't hide from the view of others. Hiding one's face breaks the minimal social pact that guides a community of citizens. What of this pact can be shared if the female half of humanity excludes herself, or is excluded, by a garment that conceals her from the eyes of others?

Finally, the major discrimination this garment symbolizes can be compared to the segregation among social classes in the *ancien régime* or, in a much more dramatic comparison, the segregation of Jews in Nazi streets, recognizable by their yellow star. Discrimination by specific clothing could be included in the criminal offence of discrimination according to the yet existing provisions of this offence upon the principle of equality.¹⁶

¹⁶ Article 225-1 of French Penal Code describes what could enter into the criteria of a discrimination:

Discrimination comprises any distinction applied between natural persons because of their origin, sex, family situation, physical appearance or patronymic, state of health, handicap, genetical characteristics, sexual

My last point relates to the principle of human dignity. Human dignity is not defined in French law or in the European Convention. Yet it is the foundation of our whole legal system. The absence of a definition is symbolic, in that the concept is so broad and rich that it carries with it centuries of ethical maturing. Violating someone's dignity invariably means acting in a humiliating manner, by degrading him or her, or by being cruel. But this does not exhaust the concept of dignity. The concept also implies recognizing another person as a social being. It implies acknowledging others. In this sense, the full veil is a deeply humiliating garment which makes women invisible, devoid of a social or a human identity. A person's dignity has multiple interests, ranging from corporal integrity to the recognition of social integrity. Dignity has two dimensions—a built-in, static one and a dynamic one, "situated" within a context. And in the context of a public place, in a country claiming to put human dignity at the top of its hierarchy of values, hiding the face of a human being for reasons of religious modesty, or submission in relationships on religious grounds, is truly unworthy.

That which is removed from view under the full veil—apart from the woman herself, who is considered solely on her sexual dimension and in the most trivial sense of the term—is the face of the person who wears the veil. In the anonymity of the veil, the woman is reduced to one thing only. One cannot justify hiding one's face even out of modesty. There is nothing indecent about a bare face; a face is not a body, nor the genital parts of a body that cause raw sexual desire. As a result, there have never been face garments, either in our civilization or in Muslim civilization. The full veil

morals or orientation, age, political opinions, unions activities, or their membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion.

C. PÉN. art. 225-1 (Fr.), *translation at French Penal Code, Equal Rights Trust* (Oct. 12, 2005), *available at* <http://www.equalrightstrust.org/view-subdocument/index.htm?id=67>.

is a tribal custom that has no great legacy in terms of civilization; it was imported by proponents of radical Islam. It is exactly what it symbolizes, which is why it appears to me that it is possible to defend the ban on French territory according to an interpretation of our core principles.

I thank you.

MOVSESIAN: Next is Rosemary Salomone from St. John's.

SALOMONE: Good morning. One of the advantages of not going first in a roundtable like this is that you have all of the benefit of the discussion and the ideas that have come before you. One of the disadvantages is that you fear repetition. And so, what I'm going to do, is pull back a bit from Blandine and the more extreme case of the full veil and go back to the wearing of the veil in schools and the 2004 ban—looking at it somewhat humbly, as a person who is not an expert in *laïcité*, but who knows a lot about schooling, and talking to the French from an American perspective. And, again, I say, I do that rather humbly, because our views are so colored by our own history, as Doug Laycock said earlier this morning, and by our political foundations.

In recent years, considerable scholarly and media attention has focused on the 2004 French law prohibiting the wearing of religious symbols in public schools. As the world watched this drama unfold, with Americans in particular casting a critical eye, it became clear that there was more here at stake than simply the right of Muslim girls to wear a headscarf to school. What the Americans and others encountered, but could not fully comprehend, was the French concept of *laïcité*, a comprehensive ideal whose purpose is to symbolize, promote, and preserve the French Republic's founding principles of liberty, equality, and fraternity. Of much broader scope than its common English translation as "secularism," *laïcité* encompasses a universalist view of

citizenship in which religious and other particularistic distinctions like language and ethnicity are relegated to the private sphere.

As the controversy over the veil has demonstrated, public education, with its mission to create “good” citizens in the interests of the state, can easily become a battlefield for resolving the tensions inherent in such an all-encompassing concept. *Laïcité scolaire*, a remnant of the French Revolution and the struggle to end the Catholic Church’s control over schooling, now demands a broad exclusion of religion from state schools. In contemporary France, the concept has met its most direct challenge in the growing Muslim population and the group’s mixed success in conforming to the French assimilationist project and blending into the mainstream. While some among the French call for a more multicultural interpretation promoting minority cultural interests, others cling to tradition-laden rationales preserving the integrity of the nation-state, its values, and its fixed identity.

Viewed in this light, underlying the debate over the wearing of the Islamic veil in schools are several interrelated issues, all tied to laïcité, that I would like to briefly explore: France’s historically restrictive position on religion in public life; its attitudes toward immigrant integration and cultural pluralism with the perceived dangers of *communautarisme* (communalism), and the mission of state-run schools to produce French *citoyens* (citizens). But first, we need to examine the events that led up to the law’s adoption.

In October 1989, the principal of a public junior high school in Creil, near Paris, expelled three Muslims students for refusing to remove their headscarves. The issue gained national attention as it was likely to resurface elsewhere. President Mitterand’s wife publicly spoke out in favor of the girls. The Minister of Education, Lionel Jospin, declared similar support in the National Assembly, that he looked toward a solution in Creil based on

“dialogue between school administrators and parents.” Some intellectuals on the left, including feminists, accused Jospin of following an “appeasement policy” in lieu of completely banning the wearing of headscarves in the schools.¹⁷ Others on the left did not support the wearing of headscarves but opposed “exclusion.” They feared the consequences of keeping girls out of school as feeding “fundamentalist” interests.¹⁸

Pressured by division in his own party, Jospin sent the matter to the *Conseil d’Etat* (Council of State), the final appeals court for school cases. It should be noted here that the Council has no remedial authority to enforce its rulings and decisions can be overturned by legislation. Within a few days, the government launched an advisory group on integration of immigrants. This group later became the High Council on Integration.

In November, the Council of State, citing the French Constitution and the European Convention on Human Rights (article 9 protects freedom of conscience and religion), ruled that wearing a headscarf was not incompatible with laïcité. But it also included a number of “hedges,” prohibiting the wearing of symbols that would “constitute an act of pressure, provocation, proselytism or propaganda or undermine the dignity or the freedom of the individual or other members of the educational community.”¹⁹

The opinion did not put the matter to rest. Intense media attention fueled the continuing debate. Over the next ten years, according to a survey of six French newspapers, a total of over 1,100

¹⁷ AHMET T. KURU, SECULARISM AND STATE POLICIES TOWARD RELIGION: THE UNITED STATES, FRANCE, AND TURKEY 103 (2009).

¹⁸ JOHN R. BOWEN, WHY THE FRENCH DON’T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE 85 (2007).

¹⁹ CE Ass., Nov. 2, 1989, No. 346,893, available at <http://www.conseil-etat.fr/cde/media/document//avis/346893.pdf>. For an English translation, see Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUSTON L. REV. 1, 12 n. 32 (2006).

articles on the headscarf appeared. The controversy also carried over into French courtrooms.²⁰ The Counsel of State overturned the vast majority of expulsion cases that came before it, clearing weighing on the side of the girls. Nonetheless, in September 1994, education minister François Bayrou issued a directive that required principals to ban “all ostentatious” signs from schools. Although 2,000 girls ignored the prohibition and continued to wear the veil, by the end of the school year only 115 had faced expulsion.²¹

To round out the picture, a sense of the surrounding geo-politics proves helpful. Between 1989 and 1994, Algeria had become the site of rising violence linked to Islamic terrorism. In the mid-1990s, bombs exploded in Paris and Lyon. The media increasingly linked the continued fighting in Algeria as well as local violence to the headscarf controversy. Reporting on the veil in the schools ratcheted up in 2001 after the 9/11 terrorist attacks in the United States. Against that background, in the fall of 2003, the expulsion of two girls (the Lévy sisters) from a high school in Aubervilliers, a northeast suburb of Paris, once again triggered a media blitz.

In the meantime, in July 2003 President Jacques Chirac appointed a twenty-member Commission on laïcité, popularly known as the Stasi Commission. Although the Commission’s official mandate was quite broad, it had a more focused goal in mind: to devise a model of *laïcité scolaire* that could bring final resolution to the headscarf crisis. To that end, it studied the matter for six months, holding more than 120 hearings. In December of that year, Chirac told a group of secondary school students in Tunis that wearing the voile is “a kind of aggression that is difficult for the French to

²⁰ KURU, *supra* note 17, at 104.

²¹ Cynthia DeBula Baines, Note, *L'affaire des Foulards—Discrimination, or the Price of a Secular Public Education System?*, 29 VAND. J. TRANSNAT'L L. 303, 307 (1996).

accept.”²² Six days later, the Stasi Commission issued its detailed seventy-eight-page defense of *laïcité*, covering a number of issues but explicitly recommending that “ostensible signs” such as large Christian crosses, Jewish kippas, and Sikh turbans, be prohibited from public schools.²³ The common understanding was that the primary target of the law was Islamic headscarves.

The position was clear. The state’s interest in maintaining neutrality of the public school trumped the rights claims of the individual students. Neutrality was the only road toward true liberty, equality, and fraternity. In the Commission’s view, the headscarf embodied and perpetuated communalist values, biases, identities, and behaviors specific to Islamic culture. Within the school, it became a vehicle for “violence” eroding “individual liberties.” It prevented the “transmission” of certain necessary intellectual tools, such as a “critical spirit,” “personal autonomy,” and a tolerance for difference. More critically, it challenged the school’s central mission to preserve “public order” and to “safeguard” the Republic’s “principles and values.” It weakened the state’s control over the development of its citizens and ceded control to parents, whom the Commission considered the source of the child’s religious commitments. Removing the scarves from school would allow the students to function as neutral citizens of France, unencumbered by the intellectual and physical constraints of their communities. Students would be able to view each other as common citizens in spite of the real differences between them.²⁴

Following public protests and heated debate, the National Assembly followed the Commission’s recommendations and passed the legislation by a

²² BOWEN, *supra* note 18, at 127.

²³ ROBERT O'BRIEN, THE STASI REPORT: THE REPORT OF THE COMMITTEE OF REFLECTION ON THE APPLICATION OF THE PRINCIPLE OF SECULARITY IN THE REPUBLIC 55 (2005).

²⁴ *Id.* at 52–54.

margin of 494 to 36, with 31 abstentions. The first article of the law stated, “In public primary, secondary, and high schools, the wearing of signs or dress with which the students manifest ostentatiously a religious affiliation is prohibited.”²⁵ Despite the largely negative response outside of France, the law received wide support among French politicians, government officials, and academics across the French political spectrum, including feminist groups, a majority of teachers, and forty-two percent of French Muslims.²⁶

The Ministry of Education subsequently issued an order forbidding signs and clothing that could be “immediately recognized for a religious affiliation.” By American constitutional standards of due process and fairness in government decisionmaking, the order’s vague terminology was striking. What is “immediately recognizable?” What is “religious affiliation?” Must the veil be religiously motivated? Some Muslim girls might wear the veil as a sign of independence from their parents, or as a symbol of their maturity, or as protection from sexual harassment in their communities. In the end, Christian, but not Muslim, girls could wear headscarves to school. Jewish, but not Sikh, boys could wear turbans while Sikh boys could wear the equivalent of a kippa or skullcap. And who would determine the religious affiliation of each student? Would this not undermine the Republican ideal of erasing religious differences in the school? Where would laïcité as state “neutrality” toward religion come in?

In 2004–2005, the first year of the law’s operation, some students wore bandanas to circumvent the prohibition. The Minister of Education drew the

²⁵ C. EDUC. art. L.141-5-1 (Fr.), available at http://www.legifrance.gouv.fr/affichCode.do;jsessionid=27EE7EB8B1055343A2BAE10E1AE09CAB.tpdjo15v_3?idSctionTA=LEGISCTA000006113579&cidTexte=LEGITEXT000005627819&dateTexte=20110108, translated in BOWEN, *supra* note 18, at 136.

²⁶ Gey, *supra* note 19, at 13.

line between an “ordinary bandana” and one that converted into a “*foulard islamique*,” that is, one “worn for a full day, worn every day of the week, covering the hair entirely.”²⁷ During that year, 47 Muslim students were expelled, 533 agreed to remove their headscarves, 67 transferred to another country for schooling, 26 studied at home, 100 over the age of sixteen withdrew from school entirely.²⁸

One has to wonder what really was behind the banning of the veil. Was it an attempt to control the growing Muslim population? That suggestion seems unlikely as only a small number of Muslim female students were wearing headscarves. Was it intended to counter the disaffection of Muslim young people and growing Islamic fundamentalism? In that case, directly addressing poverty, unemployment, and unequal educational opportunities would have gotten to the root of the fundamentalist problem more effectively. Was it simply a general expression of anti-immigrant feelings, or concerns over the subjugation of women? To some extent these factors were at play, but they also exist in countries like the United States, the Netherlands, and Germany. Yet none of these had prohibited students from wearing headscarves in schools.²⁹ Again, several related factors, all tied to *laïcité*, distinguish France from these other countries.

The French Constitution identifies the state as “secular.” Article 2 states: “France is an indivisible, secular, democratic, and social Republic.”³⁰ And so, secularism is an intrinsic part of the state’s “identity” and not merely a “functional legal principle” defining the relationship between the state and religion. In contrast, in the United States, the First Amendment to the Constitution simply states:

²⁷ KURU, *supra* note 17, at 107–08.

²⁸ *Id.* at 108.

²⁹ *Id.* at 105.

³⁰ 1958 CONST. 2 (Fr.).

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”³¹ Both clauses require, at a minimum, “state neutrality” toward religion and in some cases, accommodation. The Amendment is part of the Bill of Rights, suggesting that secularism in the United States is a matter of “individual rights” and not a “comprehensive doctrine” that defines the “good life.”³²

In France, the approach to church-state relations, culminating in the 1905 law separating church and state, dates back to the French Revolution. It was the reality of an “*ancien regime*” built on the “alliance of monarchy and hegemonic religion” that led to anti-clerical feelings and hostilities among the Republicans. By way of contrast, at the time the United States built its secular state, the country was relatively new and not weighed down by an *ancien regime*. There also was a comfortable diversity among Christian religions. And so secular and religious elites reached an “overlapping consensus” on church-state separation at the national level though the dominant assumption was one of mainstream Protestantism.³³ The new nation adopted and subsequently maintained certain symbolic forms of Christianity as aspects of what is now considered “civil religion”: “In God We Trust” on coins; the invocation, “God save the United States and this honorable Court,” as the Justices of the Supreme Court enter the Courtroom for oral argument.³⁴ Within the context of their use, they have been “secularized,” or so the argument goes. In any case, contrary to France, they indicate a positive view toward religion.

³¹ U.S. CONST. amend. I.

³² KURU, *supra* note 17, at 12–13.

³³ *Id.* at 14.

³⁴ *Id.* at 9.

In classrooms across the United States, students recite the Pledge of Allegiance including the words, “one nation, under God.”³⁵ And though those words have been challenged in court as violating church/state separation, the Supreme Court has yet to strike them down on constitutional grounds and is not likely to do so. The state cannot prohibit religious symbols overall or target those of a specific religion. Students are allowed to display such symbols as a matter of religious expression. In France, the state has targeted religious attire to exclude students without a practical justification like public safety or health.³⁶ And while both countries prohibit organized prayer in public schools, the rationales differ. For the French, it would contravene the principle of *laïcité*. In the United States, the concern is “psychological coercion” over students who do not share the beliefs of the majority.³⁷ The fear is not that religious expression itself is harmful to the speakers or more abstractly to the nation, as in France, but that state sponsorship, especially in the school setting, is harmful to others who feel forced to publicly act against the dictates of their own conscience. As the French philosopher Régis Debray has stated, in a somewhat exaggerated way:

Above the nation, in France, there is humanity. Above the society, in America, there is God. The President in Paris takes an oath on the constitution voted by the people from the world, and in Washington, on the Bible, which came from the heavens. . . . [He] end[s] his discourse to the strain of “God Bless America” and [is] photographed in front of the starred flag.³⁸

The stresses and strains of immigration, particularly from former French colonies, further complicate the debate over Islamic headscarves. A

³⁵ *Id.* at 8.

³⁶ *Id.* at 236.

³⁷ *Id.* at 9; see *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

³⁸ KURU, *supra* note 17, at 13.

large Muslim population has entered the country dating from the 1960s—guest workers, Algerians who had supported the French in the Algerian War, and others from an area in North Africa known as the Maghreb. Family reunification policies subsequently changed the political calculus. Immigrants became concerned not only with political and economic rights as workers, but with cultural and religious needs. There are now an estimated five million Muslims in France. Many of them are second or third generation and hold French citizenship. The French have taken a strong assimilatory position toward immigrants. Yet as they have learned, civic incorporation does not necessarily lead to social or political integration. Violent unrest and public expressions of disenfranchisement among Muslim youth have brought the reality of immigrant lives to the world's attention in recent years. Their economic and social marginalization also has led to fears of religious extremism, which the increasingly common wearing of the veil has come to symbolize.

That is not to suggest that immigration is a new phenomenon to France. Over the past several centuries, France has uneventfully absorbed newcomers, many from within Europe, looking for a better life. In the twentieth century, France became a haven for refugees and exiles—Italian anti-Fascists, Spanish Republicans, and Jews fleeing the Nazis. These newcomers, however, mainly practiced within the Judeo-Christian religious tradition and therefore posed no visible threat to mainstream French values and lifestyles. The same can be said for the dominant group of Spanish-speaking immigrants, mainly Christian, in the United States, where Muslims and other religious believers form only a small percentage of the immigrant population. Moreover, the immigrant experience, together with religious and cultural diversity, are very much part of the American consciousness. It is largely who we are or how we perceive ourselves. That is not the case for the French.

Combined with religion and immigration, a third factor drives the headscarf controversy, that is, the role that state schools play in indoctrinating the young to create a shared sense of identity and national solidarity. State-run universal schooling historically has been the mechanism through which nation-states transform children into citizens and develop a common understanding of the rights and responsibilities attached to that status. Certainly that is the way the United States has viewed compulsory schooling since the beginnings of the common school in the mid-1800s. While key figures in the public school movement, like Horace Mann, feared traditional revealed religion as dangerous and socially divisive, they struck what they saw as a nonsectarian compromise grounded in what they, like the nation's Founders, considered a core of widely accepted truths, though in reality again based on mainstream Protestantism.

For the French, however, "citizen" is more than a political class that specifies the individual's duties to the state. Fundamentally attached to the universal, it is a comprehensive category of identity—one that embraces attitudes regarding class, culture, and language, as well as values. This resolve, that all French citizens have a single identity, has profoundly influenced French schooling. The school is not simply a place for transmitting Republican ideals and commitments. It is the very embodiment of those ideals and commitments, wrapped up in a totalistic theory of republican citizenship, of which *laïcité* is an integral part. The school is what fundamentally makes the French people "French."

And while the concept of equality undergirds educational policy in France, it operates in a very different way from the American notion. Article 1 of the French Constitution guarantees equality before the law for all citizens without distinctions of origin, race, or religion. The French system of schooling views private backgrounds as inhibiting equality, effectively turning the American

argument for multiculturalism and diversity on its head. The French distrust religious as well as ethnic characteristics as divisive and anti-egalitarian. Unlike the United States, they consider diversity to be a threat to social cohesion rather than a key part of citizenship. In contrast to the elaborate system of data gathering established by the United States government, French law prohibits identifying citizens on the basis of national origin, race, or religion, though critics argue that egalitarianism too often becomes a pretext for inflexibility and a “cover for ignoring inequalities.”³⁹

France has rejected multiculturalism as an educational model. For the French, the values and social capital associated with civil society are superior to those existing within ethnic or religious cultures. Rather than refuse rights, the French reject the very concept of defining any groups to avoid fragmenting or destabilizing the French population. For the French, equality is an abstract ideal of “sameness.” The only way to achieve civic equality is to leave cultural and religious differences at the schoolhouse door. Though French schools promote “intercultural education,” it is solely within the context of European values with no attention to cultural, religious, or ethnic diversity. In the United States, equality is viewed primarily in terms of opportunity. It also has incorporated the concept of “difference,” for example, in educating children with disabilities or students whose home language is not English. In France, *égalité des chances* (equality of opportunities) only recently has begun to gain some support in public discussion on school reform, especially as applied to disadvantaged minorities. Yet as the rancorous debate over admissions to the elite universities has shown, the concept is highly contested in a society that prides itself on being a meritocracy.

³⁹ Stéphanie Giry, *France and Its Muslims*, 85 FOREIGN AFFAIRS 103 (Sept./Oct. 2006).

Implicit in the mission of French public schooling is the task of liberating the mind of the student. The French school serves as an emancipating intellectual space, governed by reason rather than ideology, where students can freely explore new ideas. It is a sanctuary from the larger society, what Jacques Chirac affirmed in a major 2003 speech on religion in the public space, as a *sanctuaire républicain* (republican sanctuary). It also emancipates the student from his or her particular community—whether defined by religion, social class, language, or ethnicity. In a sense it frees the student from his or her parents. The student is thus able to see beyond his or her particularities and adopt a worldview common to all French citizens.

The education system in the United States more affirmatively engages the student with the rest of society. It also is less overtly suspicious of parents, especially when it comes to values formation, though the law is reluctant to accommodate particular religious values, for example, requests for opting out of reading programs based on religious beliefs. In the United States, education also is highly decentralized in contrast to the centralized French system. And so American courts commonly defer to majority values at the local level in setting curricular matters. That fact in itself promotes a certain amount of diversity from community to community and state to state.

Looking at the mission of French schooling in this light, it is understandable why the French state would look to remove the influence of religion from education. Wearing a headscarf challenges the goals of French civil culture. It symbolizes both refusal to adopt a neutral position and making a choice according to religious convictions. Yet France seems to stand alone even among its European neighbors on this count. In British schools, headscarves are accepted as part of the multicultural concept of British society. In the Netherlands, religious signs are interpreted as a matter of personal choice, in effect treating

religious issues in public schools in a way that reflects a secularized tradition. Again, in the United States, such signs are permitted under an anti-discrimination jurisprudence as a matter of religious expression protected under the First Amendment Free Speech Clause so long as they do not contravene countervailing interests of the state, such as protecting the health or safety of other students.

So how can the French move forward on these contentious questions, and particularly, the wearing of the headscarf? Some religious practices in public schools pose a challenge to secular understandings of religion in the public sphere, though the wearing of the Islamic veil pales in comparison to the more extreme, and now internationally debated, practice of wearing the full burqa. Yet France need not abandon its historical commitment to church/state separation in order to reach a more politically workable solution to the problem. A less aggressive and more pluralistic reading of laïcité might be consistent with both French history and with the successful integration of Muslims. The state need not suppress individual religious practice to promote neutrality. Allowing Muslims to practice their faith within certain reasonable parameters—no proselytizing, concerns for public safety and health, et cetera—would send a message that the state is not hostile to Islam. On the other hand, the currently strict reading of laïcité arguably impedes the integration of Muslims. It breeds hostility among them toward French culture and society, propelling already “disaffected segregated communities,” and particularly young people, further into the welcoming embrace of “radical Islamicists.”⁴⁰

⁴⁰ J. Christopher Soper & Joel S. Fetzer, *Practicing Their Faith: Muslims and the State in Britain and France*, 12 PUB. POL'Y RES. 234, 237 (Dec. 2005–Feb. 2006).

The banning of the Islamic headscarf from public schools seems both counterproductive and counterintuitive in other related ways. Some of the arguments advanced by the Stasi Commission, in fact, seem highly debatable and even faulty when viewed in light of today's demographics. Though the headscarf represents certain beliefs, it is not the primary source of them. Banning the veil does not guarantee that students will interact more peacefully with each other, nor does it promise to foster "fraternity" within the public school. On the other hand, permitting students to wear the scarf in school might regularize religious differences and encourage tolerance and mutual respect. Affirmatively engaging "difference," rather than denying it, might promote a deeper sense of community among students, equipping them with the psychological resources to live comfortably with diversity in the wider society.

Nor does removing the veil assure that a Muslim student would feel more at ease in biology class or participate more actively in sports. While the Stasi Commission discussed the scarf in terms of female submission and religious fanaticism, interviews with scarved girls have revealed its role in identity formation and social integration. Using threats of punishment or expulsion to force students to modify their behavior may further provoke them to withdraw from the school and retreat into their isolated communities. As experience has shown, some students have left the public system for private Muslim schools. Others have remained uneducated. In this way, Muslim females have been denied exposure to a broader range of views beyond those of their religious community, in effect undermining the very purposes of French universal schooling. The ban consequently denies females gender equality, ironically in the name of protecting such equality, by limiting their educational opportunities. As a member of the French Parliament remarked following the tragic car burnings and fires in housing projects in the autumn of 2004, "We've combined the failure of our

integration model with the worst effects of ghettoization, without the social ladder for people to climb.”⁴¹

These demographic shifts have generated challenging questions for the French to ponder: What is “authentic French culture?” Who is “truly French?” And in a resolutely secular country, can one be both French and Muslim? Those questions became highly volatile in the recent French debate over “national identity,” an ill-conceived project of the Sarkozy Administration. They also are exceedingly difficult for Americans to comprehend from the perspective of a nation that is not so resolutely secular and that has come to accept cultural and religious pluralism as a fundamental aspect of national identity. Yet they are the very questions that lie behind the French controversy over the veil. One can rightly conclude that a first step toward resolving this dilemma and maintaining social stability is for the French to collectively reframe laïcité to meet the modern-day demands of an unquestionably diverse and fractured society.

And I’ll close there.

MOVSESIAN: Next is Emmanuel Tawil.

TAWIL: Thank you very much. Rosemary just said that the United States is a new country. In my opinion, the huge difference between France and the United States is that France is not a new country. It’s not a new country.

My subject this morning is the set of agreements between France and the Holy See. I have decided on this subject for many reasons. One important reason is that although these agreements are an

⁴¹ ROSEMARY C. SALOMONE, *TRUE AMERICAN: LANGUAGE, IDENTITY, AND THE EDUCATION OF IMMIGRANT CHILDREN* 204 (2010) (quoting Manuel Valls, member of the French parliament and mayor of Ivry, a suburb south of Paris); see Craig S. Smith, *France Has an Underclass, but Its Roots Are Still Shallow*, N.Y. TIMES, Nov. 6, 2005, at 3.

important element of French laïcité, they are absolutely unknown to Americans and even French jurists.

Article 17 of the Treaty on the Functioning of the European Union provides for an open and transparent dialogue with religions.⁴² Conventional cooperation with religion is a part of this dialogue. Such cooperation exists in many countries in the European Union—for instance, in Italy, in Spain, in Portugal, in Germany, in Luxembourg, in Poland, in Hungary, in Croatia, in most of the member states of the European Union. When such cooperation exists, it's usually available not only to the dominant religion of a country, but also to religious minorities. In France, for example, there is cooperation with all of the major religions.

But France has entered into conventions only with the Holy See. And yet, as I have said, almost no jurists know about the twenty agreements, more or less, that exist between France and the Holy See. The only thing French jurists know about the subject is that the Concordat of 1801 is still in force in Alsace-Moselle, for historical reasons. And even if they know that the Concordat is still in force, French scholars have absolutely no idea what its provisions are.

The relationship between France and the Holy See is very ancient. Since Pepin le Bref established the papal state in the eighth century, France has been present in Italy, especially in Rome. During most of the *ancien régime*, important aspects of the status of the Church of France were controlled by an agreement called the Concordat of Bologna. This concordat regularized the cooperation between the King and the Pope on the appointment of bishops in France. It gave the King the right to nominate bishops, *nominare* in Latin, and the Pope to provide for the appointment of bishops,

⁴² Treaty of the Functioning of the European Union, art. 17, May 9, 2008, 2008 O.J. (C 115) 47.

instituare in Latin. During the Revolution, the Constituent Assembly decided that it had the sovereign power to completely reorganize the Church in France; the Pope disagreed with this decision, of course. In November 1789, the Assembly nationalized the clergy and church property; in 1790, the Assembly adopted a bill called the Civil Constitution of the Clergy, which displaced the Concordat of Bologna. After adoption of the Civil Constitution of the Clergy, the Pope annulled the elections of bishops in France and forbade priests from accepting the new dispensation. As a result, until 1801, the French clergy was divided in two parts, those who accepted the Civil Constitution of the Clergy and those who refused.

Immediately after Bonaparte became First Consul in 1799, he tried to resolve the division of the Church in France. The Pope and Bonaparte eventually agreed on the Concordat of 1801. The most important part of the Concordat concerned the appointment of bishops. Under the Concordat, the French head of state, like the King before, had the right to nominate the bishop, to whom the pope has to give the "*institutio canonica*"—"institution canonique," in the French version of the text. The Concordat of 1801 provided the basis of French ecclesiastical law for more than a century, until 1905, when the French Parliament violated the Concordat by enacting the law on separation.

The French government enacted the law of separation just after breaking diplomatic relations with the Holy See, in 1904. After the First World War, however, the French government felt it necessary to reestablish diplomatic relations. Given political realities, in fact, it was absolutely impossible for the French government not to reestablish diplomatic relations. The French government had to face many issues. First, after its victory in the First World War, France regained sovereignty over the three departments of Alsace and Moselle. From 1871 to 1918, these three departments had been under German rule, and the

German Imperial Government had maintained the Concordat, and ecclesiastical law, in force. As a condition of regaining sovereignty, the French government had to agree to maintain the Concordat and ecclesiastical law in force. And, in order to do so, it was absolutely necessary for France to have diplomatic relations with the Holy See.

There were, in addition, two other reasons for reestablishing diplomatic relations with the Holy See. First, France's policy in the Middle East, especially regarding the protection of Catholics, required it to establish relations. Second, diplomatic relations were necessary to resolve problems that had been caused by Pope Pius X's refusal to accept the 1905 law of separation.

Thus, in 1921, diplomatic relations were formally reestablished. And, in 1924, by an exchange of letters, the French government and the Holy See agreed on a draft status for Catholic dioceses and associations; this agreement remains the basis of the status of the Church in France today. Since 1924, there has been no major change, even though at the end of the Fourth Republic the Socialist government greatly desired a new Concordat with the Holy See. (You know, the word "socialist" in France does not mean the same thing as the word "socialist" in the U.S.) In fact, a draft concordat was written, and if Socialist governments had continued to rule France at the end of the Fourth Republic, we would have today a new, general concordat with the Holy See, one that would have covered all of France.

So, we have diplomatic relations with the Holy See, and we also have some international agreements, which are still in force. The main difficulty for scholars is determining the number of these agreements. I myself am a specialist on this question, but I have yet to determine conclusively how many agreements exist. In my best judgment, I believe one can say that we have nineteen agreements currently in force with the Holy See. I

won't give you the list, because it would be boring, but I would like to discuss some elements of the rules that these agreements provide.

Some rules concern the status of the Catholic Church in France. Let me first address the situation in metropolitan France—excluding Alsace-Moselle, which I will discuss in a moment. In 1921, when diplomatic relations were reestablished, the Holy See recognized that the French government would have a right to present objections to the appointment of particular bishops in France. This rule continues in force today. The government and the Holy See also agreed on the status of Catholic dioceses and associations. As I said, this status was agreed, in draft, in an exchange of letters in 1924; this exchange is considered as an international agreement by both parties. The French government and the Holy See have also agreed that dioceses and associations are entitled to collect funds for the Pontifical Mission Societies. This is a very recent and very important agreement between France and the Holy See, published in the *Journal Officiel*.

In 2008, the parties adopted an agreement on the recognition of diplomas granted by Catholic universities in France. As you know, Catholic universities are private; their diplomas were not recognized by the state before this agreement. But the Holy See is a participant in the so-called “Bologna process,” which attempts to harmonize standards in order to make university diplomas compatible across Europe. It is thus logical for the State to recognize diplomas in theology, canon law, and philosophy. This is logical and, from the point of view of the Bologna process, it poses absolutely no problem, no contradiction. If there is any problem at all, it's only because we are not sure that the agreement was ratified according to the correct procedures. The substance of this agreement is absolutely not in contradiction with laïcité, as laïcité is defined by the Conseil d'État. There is absolutely no problem on that question; the only possible problem relates to procedure.

Another topic I would like to discuss is the status of the Catholic Church in Alsace-Moselle. As you know, the Catholic bishops of Strasbourg and Metz, and their coadjutors, are appointed according to the Concordat of 1801. Under the Concordat, the president of the Republic appoints the bishop by decree; the Pope, in turn, gives the bishop the *institutio canonica*. As a result of this system, the French President is the last remaining head of state entitled to appoint a Catholic bishop. And this practice presents absolutely no problem for French laïcité. Whenever the government appoints a bishop, the decree is submitted to the Conseil d'État—and the Conseil d'État always says that it's okay, that there is no problem. There is also an agreement concerning the schools of theology of Strasbourg and Metz. Because they are part of the public universities of Strasbourg and Metz, these are public schools of theology. And canonical recognition of the diplomas of these schools is provided by agreement. Finally, in Alsace-Moselle, there are provisions concerning prayers by the Church for the French government. Under these provisions, the Church offers prayers for the French government once a year.

The French government also has privileges with respect to the Catholic Church outside France. Perhaps you know that France traditionally has a special right to protect Catholics in the Middle East. The French government continues to possess this right—actually, it's an obligation. And that's why our diplomats in the Middle East continue to receive liturgical honors during the Mass. For example, the General Consul of France in Jerusalem receives liturgical honors almost thirty times a year. This practice continues. And it presents absolutely no problem with respect to laïcité.

The French government also has some privileges in Rome. For example, the French government continues to own some churches and palaces in Rome. The status of some of these buildings is provided by international agreement. This is

especially the case for the church and the monastery of Trinita dei Monti, and also for the Church of San Claudio dei Borgognoni, in Rome, which are owned by the French government, but entrusted to the Holy See for use exclusively by Catholic congregations. Last Tuesday, for example, there was a Mass at San Claudio dei Borgognoni, and as usual, the French ambassador received liturgical honors. It was the same the week before, at Saint Peter's, for the Mass of Saint Petronilla, who is the patron of France in Rome. And I must confess that I was very proud—very, very proud—as a French person and as a Catholic, to see my ambassador honored during the Mass. I was very proud, because it means that my country continues to be important for the Holy See. And that's very important, not only for me, but also for the French government, which continues to insist on its relationship with the Holy See.

Thank you so much.

MOVSESIAN: Thank you. I'm sure we have a number of questions. I'll keep the queue. And this gentleman wants to go first. Okay, Marc DeGirolami.

DEGIROLAMI: Thank you, Mark. I have a question for Blandine. And I—it's a nice question, no worries. I hope you'll forgive a little bit of wind-up, because I think it might help in the formulation of the question.

So, as you were speaking, I was reminded of a mid-twentieth century debate in Anglo-American jurisprudence, between H.L.A. Hart, who was one of the most prominent expositors of legal positivism, and Lord Patrick Devlin, who is famous as a so-called legal moralist. Devlin's position was that it's the state's role to enforce and protect a kind of common morality, a fairly muscular common morality. Now, Devlin's phrase for this, or Devlin has come to be known for the phrase, you know, "public decency," "public order." And Hart, by contrast, took a position following John Stuart Mill. These are all recapitulations of older debates,

of course. But, following Mill, Hart took the position that the state really had a fairly minimalist role to play, that there was a sort of a baseline, common morality that it needed to help to enforce, but, beyond that, it really ought to keep clear.

Now, the subject of that particular debate was the criminalization of homosexuality, and over time it has become clear that Hart won. Hart won the debate, and Devlin has been triumphantly consigned to the dustbin of traditionalist conservative retrogression. But as you were talking, it struck me that this may be a kind of return of Lord Devlin. The kinds of arguments that you were making in favor of state intervention—a very well developed and thick conception of public order, “law and order”—strikes me as Devlinite and conservative, a traditionally conservative argument for the protection of morality. So, I was wondering whether you see it that way, whether you see differences, how you would react to that thought?

CHELINI-PONT: From my point of view, a minimalist position means that, if ever there is a public morality—well, who is responsible for it? Society, of course, but who in society? The churches, some groups against others? So, for me, a minimalist position on the state, in the European tradition, means that you let the groups in society compete for the moral and collective conscience. For me, the conservative position is the second one more than the first.

DEGIROLAMI: And it's the state that ought to be responsible for public morality?

CHELINI-PONT: It's more natural for us to see the state as the warrant of our society. In the French conception, there's not a strong separation between the state and society, I think.

MOVSESIAN: Thank you. Nina Crimm?

CRIMM: Yes, my question is for Emmanuel. You spoke very forcefully and convincingly about the rules regarding the relation between the state and the Catholic Church, very much on a legal basis. And you used the words, there's "absolutely no problem" with respect to laïcité. I'm wondering whether, as a law professor, you could speak to whether, on a philosophical level, not a legal level, there is any disharmony that you see with respect to laïcité.

TAWIL: It's not my business to consider things on a philosophical level. I am just a jurist and a canonist. So, I am not interested in a philosophical level. From a legal point of view, there's absolutely no problem with laïcité. And my job is to deal with that. It's not to try to determine if there is any kind of contradiction on a philosophical level. I don't know why I would have to determine if there is a contradiction on a philosophical level—why not on a theological level? From that point of view, what is the difference between the philosophical and the theological level?

MOVSESIAN: If I might comment on that answer, there might be a difference in how Americans and Europeans understand the role of law professors. For American law professors, it would not be unusual to think of issues on a philosophical, as well as a legal, level. I wonder whether that difference in the understanding of the role of the jurist may be reflected in the last exchange.

Mike Simons?

SIMONS: This is challenging, because I have a question for each of the speakers, I think, but I'll pick one.

Rosemary, in your presentation, you talked about the possibility that the approach to headscarves in schools, or, perhaps, the full veil in society, is preventing Muslims from becoming more fully integrated into French society. Do you see that as similar to, or different from, the push and pull in the United States between public schools and Catholics in the last century? Catholics actually

left and established their own system of parochial schools. They eventually became fully integrated into society, but not probably for many decades. Do you see something similar happening in France?

SALOMONE: I—first looking at the French situation, I think there is a danger of isolating these groups, by denying them this accommodation within the public school setting. And what happened as a result of the ban itself is that some—and there are some numbers, I don't know how valid they are—a certain number of girls just went to other countries to be educated. A certain number of girls went to Muslim schools. A certain number of girls just left school entirely and were uneducated. And I feel that, really, this whole notion of promoting gender equality, contained within the ban itself, was turned on its head, because, in the interest of promoting gender equality, they were ultimately denying these girls equal educational opportunity.

But getting back to your question, those same arguments have surrounded public schools—that, ultimately, the event that triggered the Catholic school movement in the United States was the funding issue. When the funding was denied to them, they went off. We could only look at that in hindsight, now, and determine that it really didn't isolate them in terms of values—that Catholic schools pretty much adhered to the curriculum of the public schools, and maintained the same standards as the public schools.

It's difficult to foresee what would happen with the Muslim situation. Are—and this is contestable—are Muslim values so far different from the mainstream that you really are going to isolate these communities even further, and particularly the more radical fringe elements of those communities, or ultimately will they take a path that's similar to American Catholics at that time? Because, from the perspective of mainstream American Protestants, at that point, Catholics were pretty frightening as well.

MOVSESIAN: Brett?

SCHARFFS: Well, I'll exercise slightly less restraint than Michael and ask a couple of questions, but I'll try to keep them short. For Blandine, I was really struck by your argument that religious freedom is the weakest of the arguments in favor of protecting the veil—

CHELINI-PONT: In French context, I think.

SCHARFFS: —in the French context. And you talked about “public order” as a basis for a limitation of religious freedom. And it seemed, as has been noted, quite a broad conception of public order. You used phrases like “spirit of the laws” and “values of the constitution.” My question is, I wonder whether there's a translation issue here. Because, from an Anglo-American perspective, we tend to think of “public order” as requiring quite a high level of need before it justifies a limitation on freedom, whereas in French we have the notion of *ordre publique*, which seems to be much closer to what you were describing. So, my question is, are you defending something closer to *ordre publique*, or do you think the concept of public order is really so broad that it justifies a broad set of limitations?

My question for Nathalie—Nathalie, you've written on the distinction between secularism and secularity. And you talked about the hard-line defenders of laïcité. And my question is whether this form of secularism is a thick, substantive ideology that is itself deeply illiberal, in the classical sense of liberalism, and whether it's subject to becoming its own brand of fundamentalism, which is I think something that observers from outside France wonder and fear.

And, finally, for Emmanuel—laïcité is often translated as “separation.” It's clear that's an inadequate translation. Should we translate it instead as “entanglement?” That came up in a suggestion that Douglas made earlier.

CHELINI-PONT: “Public order” is not defined. It is not defined in our system, nor in the European system. I defend no particular aspect or side, but, as a jurist, one can—as a judge, especially—one can take a broad view of the concept and integrate within it concepts other than the traditional ones, like security and tranquility and peace in the streets. So, that’s what I wanted to explain. I think we can really enlarge this notion of “public order” to cover the protection of common values. I am sure it’s possible for judges in our system to interpret it that way and also in the European Court of Human Rights.

MOVSESIAN: Nathalie, did you wish to respond?

CARON: Yes, thank you. Well, yes, I am aware of what you’re talking about, the fact that—if I understood your question—the fact that hard-line defenders of *laïcité*, the people I mentioned, those who defend *laïcité de combat*, might be called, in turn, fundamentalists. This is what you are talking about, right? I know that in the United States, people like Hitchens and Harris have been called fundamentalists, and some Christians have even said that they are more fundamentalist than the fundamentalists that they criticize. But I think that it’s irrelevant to talk about fundamentalism to refer to these people. First, because, historically, the word refers to a movement which emerged in the late nineteenth century in the U.S. as a response to the success of Protestant liberalism and emphasized the inerrancy of the Bible. Then, if one accepts to use the word in a broad sense, it’s true that certain people are somewhat intolerant of religion and want to keep religion private. And one of the main differences that I see between the U.S. and France—and this has not been discussed much yet—is the fact that we have a different view of the role and place of religion in the public sphere. In the U.S., you accept much more than we do here the actual presence of religion in the public arena—although here we have lots of churches, churches all over the place, as you know—indeed, we heard church bells here a moment ago. So,

religion is here. However, we have a problem with the visibility of religion, its public presence, that you don't have in the U.S. I'm not saying that it's better or worse, but we have to distinguish between several levels.

I agree with you that, in some cases, those hard-line defenders of laïcité are what you might call areligious, or anti-religious, and that there is a problem here. And I don't share that kind of approach, but this is my personal point of view. But they're not all like that. And I'm not sure that the people I talked about—I mean, the people of *Le Monde Diplo*—are in that category. I would not call them anti-religious. What I see is a dilemma or a contradiction. It's kind of difficult to reconcile some of their positions. They say, "you have to be critical, you have to keep your mind working," and defend free-thinking, doubt, and skepticism—and, again, they're not all atheists. In France, only about fifteen percent of the population is atheist. But, anyway, it's hard to reconcile saying that skepticism is better than Christianity, but at the same time that everybody is free to believe whatever they want. So, I see a dilemma, more than fundamentalism. "Fundamentalist" would not be the right way to put it.

MOVSESIAN: Emmanuel?

TAWIL: Laïcité does not mean separation. It's absolutely clear. Laïcité just means what the Conseil d'État says it means: religious freedom, neutrality, and pluralism. Laïcité does not prohibit any kind of public funding to religion. It's clear. So, from a juridical point of view, laïcité is not separation. And the law of separation, which is in force for just a part of French territory, is not implied by the constitutional principle of laïcité. This is very clear to me and very clear also to the Conseil d'État, and it should be clear to French jurists, even if they don't know the cases decided by the Conseil d'État. The problem is more the ignorance of most of my

colleagues in France, rather than what is said by the Conseil d'État, because the Conseil d'État is really clear.

I just want to add something. The reason I decided to present, as my topic, the agreements between France and the Holy See, was that I wanted to shock you. I wanted to make you understand that the veil is not the only question which the French system presents. I wanted you to understand that our system is very, very, very different from the image you may have of it—

SIMONS: And, Emmanuel, can I just ask a factual question? What did you mean by “liturgical honors?”

TAWIL: For example, getting censed by the priest. Also, in Jerusalem, the French general consul may kiss the Gospel after the reading of the Gospel during the Mass.

SIMONS: And a layperson would do that?

TAWIL: Yes, because he is a representative of France.

MOVSESIAN: Okay, I have several people who want to speak. Let's have Doug, and then Nathalie, and then Blandine.

LAYCOCK: Marc DeGirolami did a nice bit of political jujitsu by saying that banning the veil is like these conservative, reactionary regulators of morals in England and America. But, of course, there were conservative and reactionary regulators of morals when conservatives and reactionaries were dominant. Now, as the left is winning on some of these issues, of course the left is doing exactly the same thing. The current controversy in America that most reminds me of the veil is this case the Supreme Court is about to decide, *Christian Legal Society v. Martinez*, where the Hastings Law School says that if you're a student association and you have an actual statement of faith that you make people adhere to, you cannot be a recognized student organization. And the whole American

educational establishment is lined up in support of that. I think the educational establishment is going to lose.⁴³ But the point is, the left is doing the same thing in America that is going on here, trying to restrict religious expression in public institutions.

I also have a factual question [addressing Professor Tawil], if you know without having to go through your whole list. How many of these nineteen treaties apply to the bulk of France? How many are only about Alsace-Moselle?

TAWIL: Three.

LAYCOCK: Three for the whole country?

TAWIL: No, three for Alsace-Moselle and—

LAYCOCK: Oh, sixteen for the whole country?

TAWIL: Yeah.

LAYCOCK: Wow.

TAWIL: Just three for Alsace-Moselle. Most of the agreements concern the appointment of bishops and the French establishments in Rome.

MOVSESIAN: Okay, Nathalie, and then Blandine.

CARON: It's a comment for Emmanuel. You said that the 2008 agreement between France and the Vatican recognizing diplomas delivered by Catholic universities—Emmanuel said that some of his colleagues didn't know much about it, but, I mean, that's the case of most French people. We don't know the details of the agreements between France and the Vatican, right? You agree with that?

⁴³ Predictions are dangerous things; the educational establishment won, and the religious students lost. See *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2984–95 (2010).

TAWIL: Uh-huh.⁴⁴

CARON: Okay. So, we have different interpretations of what *laïcité* means. But this agreement, well, we heard about it, especially in the universities. And we were not pleased about it when we did. That agreement created a stir in public universities, because we heard that Sarkozy had talked to the Pope and they had decided, just between the two of them, that the diplomas delivered by Catholic universities would be officially recognized, hence challenging the monopoly of the State on the granting of diplomas.⁴⁵ But it seems that the Minister of Higher Education had not been consulted. I don't know what happened, really. How about that? You said it's not a problem. Isn't it a problem?

TAWIL: When you say that the Minister had not been consulted—in fact, I don't know if she had been consulted, because I am not a member of her staff. But I have very, very serious doubts about that, because there were drafts presented to many scholars, and I have very serious doubts about the fact that the Minister had not been consulted before.⁴⁶

MOVSESIAN: We're already over time, so one more comment. Blandine?

⁴⁴ This agreement was promulgated in Loi 2009-427 du 16 avril 2009 portant publication de l'accord entre la République française et le Saint-Siège sur la reconnaissance des grades et diplômes dans l'enseignement supérieur (ensemble un protocole additionnel d'application), signé à Paris le 18 décembre 2008 (1) [Law 2009-427 of April 16, 2009 Promulgating the Agreement Between the French Republic and the Holy See on the Recognition of Degrees and Diplomas in Higher Education (all under an Additional Protocol), Signed in Paris on December 18, 2008 (1)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 16, 2009, p. 6746.

⁴⁵ See Pierre Assouline, *Laïcité: l'Accord en Douce avec le Vatican*, LE MONDE 2, May 23, 2009.

⁴⁶ The Conseil d'Etat decided in the case *Fédération de la Libre Pensée* that the agreement does not contradict *laïcité*. CE Ass., July 9, 2010, available at <http://www.conseil-etat.fr/cde/node.php?articleid=2085>.

CHELINI-PONT: Yes, I would like to ask Nathalie if Christopher Hitchens speaks about the American Radical Enlightenment or the French Radical Enlightenment?

CARON: He refers to both. In the eighteenth century, radical Enlightenment ideas circulated in North America. When you read the book, *God Is Not Great*, you realize that Hitchens actually relies on people like Thomas Paine. I don't know if you are all here familiar with Thomas Paine, but he's the author of *The Age of Reason*, *Common Sense*, and *The Rights of Man*. Hitchens uses Thomas Paine a lot—who himself drew from the French philosophers and also the English Deists—and also Jefferson, and also Voltaire, Rousseau, Diderot.⁴⁷

MOVSESIAN: Thank you. That concludes our first panel.

⁴⁷ See Nathalie Caron, *Debating Freedom of Speech and Conscience: Thomas Paine, the New Atheism Movement, and the European Skeptic Tradition*, COMMON-PLACE, July 2009, <http://www.common-place.org/vol-09/no-04/forum/caron.shtml>.

LAÏCITÉ IN COMPARATIVE PERSPECTIVE PANEL DISCUSSION

DEGIROLAMI: Good afternoon. It's a pleasure to welcome you all back to the second of our panels, "Laïcité in Comparative Perspective." Let me take a moment to introduce the three panelists that we are fortunate to have. First is Professor Nina Crimm, St. John's University School of Law; second will be Professor Javier Martínez-Torrón of Universidad Complutense de Madrid; and third up will be Professor Elisabeth Zoller of Université Panthéon Assas, visiting at Maurer School of Law (Indiana University-Bloomington).

We will follow the format from earlier today. Each panelist will speak for between fifteen and twenty minutes, after which we will open it up to questions from the floor.

So with that, Professor Crimm, please get us started.

CRIMM: Thank you for including me in this conference.

In preparing for this panel on "Laïcité in Comparative Perspective," I was struck at how fitting it is to be here in Paris to share some comparative perspectives on France's and the United States' religious freedom principles and policies and their application to government aid to religion. In particular my focus today is on such aid in the form of tax accommodations. In spite of quite disparate political histories, different religious and cultural traditions, and an ocean dividing the two countries, the national legislatures of the two republics only weeks apart in 1789 approved legal texts containing the strongest guarantees of freedom of religion on

either side of the Atlantic. The French National Assembly adopted the French Declaration of the Rights of Man and Citizen and the first U.S. Congress approved what became the First Amendment to the United States Constitution. Both documents guaranteed freedom of religious conscience, but unlike the First Amendment, the French Declaration did not guarantee nonestablishment of religion. As I will discuss, the laws of France over time evolved to essentially disestablish religion. The initial distinctions in the two countries' approaches were reflected in the political governance structure of each country, which through the years has impacted the manner of national governmental financial aid to religion, exhibiting increasing similarities and yet sustaining differences.

The strength of the guarantees of religious freedom and the close time frames of the First Amendment and the French Declaration were not entirely coincidental. Thomas Jefferson was connected to each. Jefferson, who had authored the 1786 Virginia Act for Establishing Religious Freedom, was the United States Minister Plenipotentiary in Paris from 1785 through the summer of 1789. Jefferson is reported to have advised the Marquis de Lafayette on specific provisions of Lafayette's drafts of the French Declaration. From Paris, Jefferson contemporaneously corresponded with James Madison, the principal architect of the First Amendment, and other congressmen about supplementing the U.S. Constitution with a Bill of Rights and including a strong guarantee of religious freedom.

Yet, despite the Jeffersonian connection, as well as the profound Judeo-Christian influences of the same philosophical writings of Baruch Spinoza, John Locke, Jean-Jacques Rousseau, and Baron de Montesquieu on the framers of the two documents, the principles and language regarding political power and religion embodied in them stand in contrast to one another. They also are different from the legal frameworks and ideologies at the

core of other European church-state relationships, including those based on separation—such as in Holland, Ireland, and Turkey—systems based on separation along with aspects of cooperation with religion—such as Germany, Austria, Belgium, Spain, Portugal, and Italy—and mixed systems of states with official churches—such as England, Scotland, and Sweden.

The religious histories of these various nations differ and are significant in their formulations of church-state relations. But today my focus is purely on the United States and France. So, I'll begin with a brief discussion of the relevant historical legal documents of the United States and France. Then I will discuss their core principles, comparing their modern-day applications in the context of government aid to religion in the forms of tax-related benefits.

Colonial America was a rich conglomeration of settlers from the Old World. Virtually all colonists were Christians and the overwhelming majority were Protestants. But, colonial America was a frontier for those religious minorities, including Jews, Catholics, Mennonites, and others, considered dissenters and heretics in the Old World. Religion was an essential foundation of personal morals and also was connected inextricably with civil government in those colonies having an officially established church, all Protestant and none the Roman Catholic Church.

As disestablishment took hold in the states, eleven of the thirteen state constitutions contained some type of religious liberty protections when the U.S. Constitution was ratified in 1788. But the U.S. Constitution itself had been written without protections of states' rights and individual liberties, including religious freedom, and many Anti-Federalists exerted pressure to set forth such safeguards. This agitation led to our Bill of Rights.

The First Amendment's Religion Clauses provide, "Congress shall make no law respecting an

establishment of religion, or prohibiting the free exercise thereof.”¹ As a general matter, the Establishment Clause prohibits government from “aid[ing] one religion, aid[ing] all religions, or prefer[ring] one religion over another.”² Excessive government entanglement with religion poses the danger of “advancing or inhibiting religion” by endorsing or placing “an imprimatur on one religion, or on religion as such, or to favor [any] sect or religious organization.”³ Some suggest that the Establishment Clause demands strict separation of church and state, but over time the Supreme Court has held that it generally “mandates governmental neutrality [and equality or evenhandedness] between religion and religion, and between religion and nonreligion.”⁴ The Free Exercise Clause aims to guarantee freedom of religious conscience and belief, as well as conduct, both of individuals and religious institutions. So, as a foundational matter, those clauses are understood as governing church-state relations and their formulation was intended generally as limitations on the federal government’s powers. And, as of the 1940s, the Religion Clauses were understood to also limit the powers of states.

The unique history of the struggles between, and relationships of, the Catholic Church and French monarchs and other political officials undergirds France’s approach to church-state relations. Briefly, Roman Catholicism dominated the religious life of France as early as the late fifth century when it was part of Gaul. Despite the strong roots that Protestantism had established in France by the mid-sixteenth century, the French government remained closely connected with the Catholic Church into the nineteenth century. In the interim, many religious battles interrupted the general pattern of Catholic religious dominance.

¹ U.S. CONST. amend. I.

² *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

³ *Gillette v. United States*, 401 U.S. 437, 450 (1971).

⁴ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

After the French Revolution, Catholicism was favored only sporadically by several monarchs, but even that favoritism lasted only a short time.

The legal framework constructed immediately after the French Revolution set up two modes of thinking about religion, which led to great tensions. First, the French Declaration established the right of each individual to follow his or her own religious conscience in private while governing the expression of religion manifest in the public sphere. In particular, article 10 provided that “No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.”⁵ Second, it intended a strong state, while maintaining the importance of a national, public religion. In other words, within a Gallican paradigm, the Catholic Church was recognized as part of the “public order.”⁶ Thus, non-establishment of religion was not mandated, and there was no right to form associations that the State would recognize officially.

As the years progressed, tensions escalated between the French Republic and the Catholic Church, whose clergy demanded varying levels of political, moral, and social authority. These mounting strains sparked further propagation of secularization. The importance placed on state protections for individuals’ private exercise of religious faith and conscience or their non-religious convictions intensified. At the same time, the state officially recognized religions within the public order to include not only Roman Catholicism, but also Calvinism, Lutheranism, and Judaism, thereby expunging distinctions between these organized religions.

⁵ Declaration des Droits de l’Homme et du Citoyen [Declaration of the Rights of Man and of the Citizen] art. 10 (1789) (Fr.).

⁶ See JOHN R. BOWEN, WHY THE FRENCH DON’T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE 22 (2007).

Laïcité further materialized as a unifying concept without formally being employed as a term in new laws. That would wait until adoption of the French Constitution of 1958. In the intervening years, Parliament passed the Law of 1901, which formally provided the right of citizens to form officially recognized associations, and the Law of 1905, entitled the “Law on Separation of Churches and State,” which has assumed a stature similar to that of the First Amendment. The latter law provides measures intended to implement church-state separation, including the revocation of recognition of Catholicism, Calvinism, Lutheranism, and Judaism as official religions. It also reaffirms the guarantees of religious conscience in the French Declaration by providing, “The Republic ensures the liberty of conscience. It guarantees the free exercise of religion, under restrictions prescribed by the interest in public order.”⁷ Together the laws of 1901 and 1905 implemented a redefined vision of religions as part of civil society. Now, approximately one hundred years later than in America, disestablishment took place in France.

So let’s turn to how these similar principles in the U.S. and France as applied in the contexts of tax accommodations.

Briefly, let’s return historically to the American colonies. As a practical matter, only established churches, as state agents, were *not* taxed by civil authorities in the American colonies. Because dissenting churches were considered private organizations, not state agents, local legislation generally did not exempt them from taxation. So, taxes were collected from dissenting churches were distributed to a colony’s established church, as were taxes collected from colonists. As the Revolutionary War began, however, a

⁷ Loi du 9 décembre 1905 concernant la séparation des Églises et de l’État [Law Concerning the Separation of the Churches and the State] art. 1 (enacted Dec. 9, 1905) (Fr.) [hereinafter Law of 1905], *translated at* www.concordatwatch.eu/showkb.php?org_id=867&kb_header_id=849&kb+id=1525.

disestablishment movement accelerated. The movement challenged exemptions from ecclesiastical taxes for church properties.

After the Revolutionary War, disestablishment spread among the states. Jefferson and James Madison rigorously opposed governmental subsidization of religion. In order to protect religion as a purely spiritual matter for individuals and to safeguard against a governmental establishment of religion, they were proponents of placing taxation in support of religion and religious teachings beyond the reach of state and federal legislatures. Perhaps Madison's influence on the design of the U.S. Constitution can be seen in its Article I conferral on Congress of authority to tax all secular and religious entities.

Despite this constitutional authority, as early as the Civil War, Congress imposed an income tax only on corporations that had shareholders, presumably to reach solely those entities perceived as profiting their wealthy investors. Based solely on their institutional structures and lack of profit motive, houses of worship and other religious organizations, along with educational and charitable nonprofits, were not subject to that tax. By 1875, our country had experienced significant Catholic immigration and anti-Catholic sentiments had grown. Catholic institutions were purported to have accumulated substantial wealth and power, which disturbed President Ulysses Grant. He supported Speaker of the House of Representatives, James G. Blaine, in an unsuccessful bid to pressure Congress into amending the Constitution to expressly prohibit the use of public funds for private parochial schools and other religious institutions, and to proscribe tax exemptions for religious organizations. As time moved forward and the Sixteenth Amendment to the Constitution was ratified in 1913, Congress was empowered to impose income taxes on all entities, including religious organizations. But Congress continued to follow its Civil War income tax approach of exempting religious organizations

(along with some secular nonprofits) from taxation. That same year, it enacted what is now section 501(c)(3) of our federal tax code (“Internal Revenue Code” or “I.R.C.”), which also exempts seven categories of secular organizations.

Tellingly, Congress has never justified the tax exemption for religious organizations on the basis of religion per se, that is, as a result of their religious nature, function, or activities, nor on grounds of the First Amendment. As the U.S. became a social welfare state, the explanation always has been grounded in the economics of religious organizations not having income to tax after providing social welfare services to the public, services which also alleviate some governmental burdens. So, the U.S. has an entrenched tax exemption for houses of worship and other religious entities, even though Supreme Court precedent suggests that, within certain limitations, an exemption from taxation is not compelled, but is permitted, by the First Amendment.

The Internal Revenue Service (“I.R.S.”) is charged with initially determining whether an organization qualifies for distinct tax treatment because it is a “religious” entity or, more specifically, a “church.” But as a special tax accommodation, houses of worship are presumed automatically to be tax-exempt under I.R.C. section 501(c)(3) without filing an application with the I.R.S.,⁸ although by refraining from filing an application their donors are not assured a contribution deduction under I.R.C. section 170. Where such a religious institution does file an application or its entitlement to tax-exempt status is later challenged, the I.R.S. relies on a fourteen-category family resemblance test for determining whether the entity is a “church.” Nonetheless, the I.R.S. generally has taken a position that “in the absence of a clear showing that the beliefs or doctrines under consideration are not sincerely held by those

⁸ I.R.C. § 508(c)(1)(A) (2006).

professing or claiming them as a religion, the Service cannot question the ‘religious’ nature of those beliefs,⁹ because too much searching could result in violation of the Establishment Clause. Consequently, groups such as Scientologists and Jehovah’s Witnesses, treated by some European countries as cults, are treated as religions for tax purposes in the United States. Furthermore, once a religious organization is defined as a “church,” such houses of worship uniquely are presumed automatic tax-exempt status without filing an application with the I.R.S.¹⁰

In 1917, to spur giving to section 501(c)(3) religious and secular entities, Congress added section 170 to our tax code, which permits contributors to claim an income tax deduction for donations to these organizations. Pursuant to Supreme Court precedent, gifts deductible under section 170 are limited to “unrequited payments,” that is, those for which the transferor receives no measurable benefit in return and thus denotes some altruistic or donative intent. Year after year, donors give the largest proportion of their contributions to religious entities and not to secular section 501(c)(3) organizations.

Finally, as a general matter, the Supreme Court has upheld the constitutionality of tax exemptions for religious organizations while acknowledging they are functionally and economically the equivalent of direct government grants or economic subsidies.¹¹ Because of this functional equivalence,

⁹ I.R.S. Gen. Couns. Mem. 36,993 (Feb. 3, 1977) (finding that witchcraft qualified as a religion); *see also* I.R.S. Gen. Couns. Mem. 38,827 (Mar. 23, 1982) (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

¹⁰ I.R.C. § 508(c)(1)(A). The caveat for a house of worship refraining from filing an application is that their donors are not assured of entitlement to the I.R.C. section 170 contribution deduction.

¹¹ *See* *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 674–75 (1970) (property tax exemption); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 11 (1989). Nonetheless, as Justice William Brennan noted in his concurrence *Walz*, there may be a distinction between a tax exemption and a subsidy for purposes of constitutional analysis of the propriety of the exemption or subsidy itself. *Walz*, 397 U.S. at 690–91 (Brennan, J.,

in turning now to France, I will discuss not only tax matters but also certain grants beneficial to religion.

The Law of 1901 formally provided the right of official association status. So, post-enactment, although associations in France can be freely formed, only those secular and religious associations approved by the State are entitled to legal personhood, which permits ownership of real property and the receipt of cash legacies.

This State approval and various attributes of aid to religion appear ostensibly incongruent with article 2 of the Law of 1905, which provides, "The Republic does not recognize, finance, or subsidize any religious group."¹² Indeed, the Bureau of Religious Affairs (*Bureau des Cultes*), a division of the powerful French Ministry of the Interior, is charged specifically with substantively reviewing the purposes and activities of groups claiming to be an organized religion. It alone determines whether a group qualifies specifically as an organized religion, as opposed to a cult, and whether it deserves treatment as a religious association. There currently are two categories of associations of State approved organized religions: first, *associations diocésaines*, or Catholic associations, and second, *associations cultuelles*, which include Protestant, Jewish, and Muslim associations.

The Bureau's determination can affect the tax benefits a group receives under tax laws. *Associations cultuelles* and *associations diocésaines* have been accorded tax-exemption on cash donations received. By contrast, the Bureau has not recognized the Jehovah's Witnesses as an organized religion and considers that group to be a cult. So, after the French tax authorities recently levied taxes amounting to millions of euros on the group's receipt of cash contributions, the group

concurring). This point was later echoed by Justice Antonin Scalia, joined by Justice Anthony Kennedy, in *Texas Monthly*, 489 U.S. at 43 (Scalia, J., dissenting).

¹² Law of 1905, *supra* note 7, art. 2.

brought a lawsuit, claiming the levying of the tax inappropriate. The Court of cassation, France's highest civil court, agreeing with the lower courts, ruled that the tax authority had the power to impose the tax even though it had never previously been imposed on other religious organizations.¹³ None of the courts commented on whether, under the French Constitution, the tax violated any rights of the group to practice their religion or whether the tax had been levied in a discriminatory manner.

In addition to the tax-exemption for *associations cultuelles* and *associations diocésaines*, other forms of State and local government aid to religion might appear in conflict with article 2 of the Law of 1905. Nonetheless, other portions of that same Law actually allow for such financial support. Pursuant to articles 2 and 3, the State nationalized the existing buildings of the former recognized religions. Thus, those cathedrals, churches, and synagogues, schools, abbeys, monasteries, and other structures built before adoption of the Law became property of the State, and the State turned over many of those buildings, other than cathedrals, to municipal governments.¹⁴ Yet, under article 13 of the Law of 1905 the State may permit—and it does permit—the Catholic Church (or other previously official religion) the use of the

¹³ Cour de cassation, Oct. 5, 2004, Bull. civ. IV, No. 178, at 58 nn.95–96 (imposition of the sixty percent tax amounted to \$20 million).

¹⁴ Parenthetically, when the Law of 1905 was adopted, the Alsace-Moselle region in eastern France was under German occupation, and the treatment of this region would remain under the German model. This was a remnant of the Franco-Prussian War of 1870–1871. After World War I, the region was reunited with France, but in an agreement, the Law of 1905 would not be applied to the Alsace-Moselle region. This agreement would differentiate the treatment of religious buildings and activities; their management would remain under the German model. Also, because the prohibition in the Law of 1905 on financing or subsidizing religion does not apply, the constraints that I now proceed to discuss regarding aid to religious institutions throughout the rest of France do not apply in Alsace-Moselle. CE, Apr. 6, 2001, No. 219,379 (Fr.) (upholding this practice and affirming that state support for religious education in Alsace-Moselle does not violate the principle of secularism).

nationalized religious buildings.¹⁵ Interestingly, in an attempt to equalize or neutralize the treatment of Islam after an influx of Muslims, in 1920, Parliament voted to spend 500,000 French francs to construct the Grand Mosque of Paris, and the city of Paris donated the land. At least under general U.S. tax law principles, the Catholic Church's, Islamic, or other organized religion's use of these buildings at below fair market value, if untaxed, would be considered essentially the functional equivalent of a beneficial income tax exemption.

Finally, similar to the U.S. contribution deduction, France provides to donors, up to five percent of their taxable income, a "tax credit" of forty percent of the amounts contributed to approved *associations cultuelles* and *associations diocésaines*. Nonetheless, in contrast to Americans, French citizens' philanthropic giving is reported to be quite low, including to religious institutions, presumably partly due to the deep-rooted secularist culture.

It is clear from these short portraits that the different political, religious, and cultural histories of the United States and France significantly have influenced in nuanced ways how their guarantees of religious freedoms were formulated and implemented. Despite the two countries' sharing the value of strongly guaranteeing religious liberties, the countries' approaches have been quite distinct. *Laïcité* assumes a strong State, as opposed to religious governance in political and cultural matters, which the French historian Jean Baubérot describes as "Nation, constitution, [and]

¹⁵ Moreover, pursuant to article 19 of the Law of 1905, the Catholic Church is not responsible for financing repairs and restoration of those buildings. That responsibility is the State's, although its funding may be supplemented by collections from religious groups, tourists (such as in the case of the Cathedral of Notre Dame) and others. These provisions apparently have not been challenged in French courts.

law, became ‘sacred things.’”¹⁶ By comparison, the U.S. Supreme Court has described the First Amendment’s Religion Clauses as limiting government so that it cannot excessively interfere with religion. Despite these contrasting policies, when we compare the countries in 1789 as a starting point with their contemporary places in the context of government financially supporting religion through tax and grant benefits, it appears that while they maintain distinct characteristics, they have moved toward more parallel positions, prominently sharing some aligned features.

DEGIROLAMI: Thank you, Professor Crimm. Professor Martínez-Torrón.

MARTÍNEZ-TORRÓN: Let me first thank Mark Movsesian, Dean Simons, and all of the organizers of this event for providing me the opportunity and the honor to be here. Also, thanks to the rest of the people at St. John’s University for their hospitality.

My purpose here is to talk about a Spanish example which is related to a subject which is emerging in this meeting in different shapes—and for me, that subject is very important—and that is the conception, and the limits, of state neutrality when regulating the public sphere. I would say that the Spanish example demonstrates an effective way to ruin a good idea through a bad practice. That’s how I would describe the Spanish situation.

The good idea was education for democratic citizenship as a school subject. We had “civic education” in the past in Spanish schools, under Franco’s regime. Nobody paid much attention to it, fortunately, but we did have it, in theory, for many years. This subject disappeared long ago from our education system but reemerged in 2006, following,

¹⁶ IAN BURUMA, *TAMING THE GODS: RELIGION AND DEMOCRACY ON THREE CONTINENTS* 111 (2010) (citing JEAN BAUBÉROT, *HISTOIRE DE LA LAÏCITÉ EN FRANCE* (2000)).

apparently, a recommendation by the Council of Europe that both private and public school curricula should encompass “education for democratic citizenship.”¹⁷ This recommendation was, to a large extent, responding to the rapid and huge enlargement of the Council of Europe to the countries of Eastern Europe, which lacked a truly and well established democratic tradition. The Council was also responding to increasing Muslim immigration in many European countries. The idea was, in short, to try to identify European civic values and to educate the youth as to these values.

Currently the Spanish law requires that this school subject, which is known as “education for citizenship,” must be introduced in all public and private school curricula for pre-university education—elementary, secondary, and high school. The main statute and its subsequent regulations went into effect in 2006.¹⁸ It is interesting to note that, even before the law was actually implemented, it generated a very strong and contrary reaction in Spanish society. As of today, approximately eighty-thousand families

¹⁷ Recommendation Rec (2002) 12 of the Committee of Ministers to Member States on Education for Democratic Citizenship (Adopted by the Committee of Ministers on 16 October 2002, 812th meeting of the Ministers’ Deputies), *available at* <https://wcd.coe.int/wcd/ViewDoc.jsp?id=313139&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

¹⁸ The new school subject was introduced by the Organic Law on Education, Organic Law 2/2006, 3 May 2006 (B.O.E. 5 May 2006). In Spain, the name of “organic laws,” *leyes orgánicas*, is given to some statutes of particular significance that must be approved by absolute majority in the Parliament (Cortes). The 2006 Organic Law on Education was developed by some subsequent regulations, in particular the Royal Decree 1513/2006, 7 December 2006, with respect to primary education (B.O.E. 2006), the Royal Decree 1631/2006, 29 December 2006, with respect to secondary education (B.O.E. 2007) and the Royal Decree 1467/2007, 2 November 2007, with respect to baccalaureat (B.O.E. 2007).

have signed a written statement in opposition to this new subject.¹⁹ Which were the reasons of this remarkable social reaction against the law?²⁰

Sometimes, the reaction against the new curriculum has been presented as a sort of ultra right-wing opposition to educating youth in democratic values. No doubt, some of the people opposing the curriculum may be of this orientation, but the huge bulk of the opposition has nothing to do with ultra conservative people. Rather, it has to do with parents who understand that the law, and its implementation, has gone far beyond the purposes of the Council of Europe's recommendations. In other words, the reason of this social reaction is not a disagreement with education on human rights and civic values like respect, equality, solidarity, tolerance, et cetera. The actual reason is the clear understanding that some aspects of the new subject, as developed in its curriculum, were interfering with the rights of parents to decide the philosophical and religious orientation of their children's education. An

¹⁹ It is difficult to obtain precise figures, for conscientious objections are normally alleged at the local level. Let me add that the number of eighty-thousand families probably means much more in Spain than, for instance, in France, where there is a long tradition of brave spirit of protestation against public authorities. Many Spaniards are still reluctant, out of fear, to put their name in writing to express opposition to a particular governmental project.

²⁰ Among Spanish legal literature on this new school subject and the conflicts of conscience that it has created in a number of parents, see the critical studies of Mercedes Serrano Pérez, *La Objeción de Conciencia a Educación para la Ciudadanía en el Marco Constitucional de la Libertad Ideológica*, REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIASTICO DEL ESTADO, May 2010; Ángel López-Sidro, *La Objeción de Conciencia a la Educación para la Ciudadanía ante los Tribunales Superiores de Justicia*, REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIASTICO DEL ESTADO, May 2008; Lourdes Ruano Espina, *Objeción de Conciencia a la Educación para la Ciudadanía*, REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIASTICO DEL ESTADO, May 2008; Carmen Garcimartín, *Neutralidad y Escuela Pública: A Propósito de la Educación para la Ciudadanía*, REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIASTICO DEL ESTADO, May 2007; José María Martí Sánchez, *La 'Educación para la Ciudadanía' en el Sistema de la Ley Orgánica de Educación*, REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIASTICO DEL ESTADO, Feb. 2006. From a very different perspective, in total support of the government's proposal, see Dionisio Llamazares, *Educación para la Ciudadanía, Laicidad y Enseñanza de la Religión*, 6 LAICIDAD Y LIBERTADES: ESCRITOS JURÍDICOS 219 (2006).

interference that sometimes is derived from the program itself and other times from practical abuses in its implementation in some schools.

Which aspects are these? On the one hand, a percentage of the recommended content of the new curriculum, and sometimes the mandated content, has to do with—and I’m quoting almost literally the words used by the Spanish regulations—the world of emotions, feelings of people, human relationships, the world of human affectivity, the need to construe a critical and autonomous conscience, as well as other issues related to human sexuality, different family models, reproductive health, sexual orientation, et cetera. The mere presence of these contents was considered by many parents, and by some religious communities—very clearly the Catholic Church, but other religious communities in the country as well—as implying a risk, in practice, of transmitting moral views at school that were in contradiction with the moral views of the parents, and therefore with their right to guarantee the education of their children according to their religious or philosophical convictions. In other words, the subject “education for citizenship,” as it was conceived, created the risk of moral indoctrination of young students in Spanish schools, against the Spanish Constitution²¹ and against the well-established case law of the European Court of Human Rights—especially *Kjeldsen*, in 1976, and *Folgerø* and *Zengin*, in 2007.²² According to the people opposing the law, this risk would not be only a consequence of the door that the program of the new subject opened for practical abuses. It was also the consequence of a certain trivialization of subjects with a very important moral dimension under the guise of “objective and scientific treatment”—ignoring the

²¹ CONSTITUCIÓN [C.E.] art. 27 (Spain).

²² See *Kjeldsen, Busk Madsen & Pedersen v. Denmark*, 7 Dec. 1976 (Apps. No. 5095/71, 5920/72 & 5926/72); *Folgerø v. Norway*, 29 June 2007 (App. No. 15472/02); *Zengin v. Turkey*, 9 Oct. 2007 (App. No. 1448/04).

moral dimension of subjects as, for instance, “sexuality” or “the world of emotions” entails in itself a certain moral indoctrination.

On the other hand, there was another part of the curriculum that was considered to be offensive for the parents’ rights, and not just because of the risk of potential abuses but rather because the mere description of some contents was itself inappropriate. For example, the curriculum described human rights and democratic values as the “ultimate and maximum source of morality.” These are strong words to be taught at school. One thing is to say that, in the public sphere, or in the civil society, we agree on certain common values that are our point of reference in organizing social or civic life, and a different thing is to teach the students what the ultimate and maximum source of morality is for themselves as persons—not as citizens, but as persons. Here, there is some confusion between what constitutes the private sphere and what constitutes the public sphere in the life on individuals. States can teach values that are valid for the public sphere but cannot teach what we must or must not believe in our private sphere, for this is something that belongs to the exclusive realm of each individual’s choice and is protected by the freedom of religion or belief (it is the realm of what the European Court of Human Rights has called the *forum internum*, on which no limitation can be imposed by the State).

The irony is that a curriculum that was supposed to transmit commonly shared civic values has created a strong social divide and an awkward situation in Spanish education. And allow me to reiterate that the negative reaction generated by the new school subject has not been impelled by ultra-conservative forces, but by parents who are very concerned about the fact that their children could be indoctrinated with moral views that, respectable as they may be, are in strong disagreement with their beliefs. In other words, the reaction against “education for citizenship,” as it has been designed, is caused by the fact that the

State—and this would be my main point in this presentation—is invading aspects of education that should be reserved to the realm of the family. This is not purely speculation or conjecture. It was very revealing, for example, that some of the well-known authors of the content of the new school subject actually preached the need for a “reeducation of the morals of Spanish youth.” That is, again, a very strongly worded statement. It oversteps, in my opinion, the State’s role with regard to education.

In the short time that “education for citizenship” has been implemented, there has been a number of practical abuses with a various degree of significance. Most of them involve the trivialization of issues that, for many people, have an important moral dimension. The mere fact that these issues are presented in class as not having any moral dimension is a type of moral indoctrination of the youth. We have had also a few gross abuses—fortunately not many. Allow me to be a little specific on this. When masturbation techniques are taught in class, under the subject of education for citizenship, this has nothing to do with democratic citizenship at all. When a teacher invites eleven year old students to experiment with their bodies and with the bodies of their classmates, of both sexes, and then to discuss in public their reactions and emotions—what has it to do with democratic citizenship? Other times, the students have been asked to explain in public their religion, their beliefs, their sexual orientation. All this reveals that there is much confusion about what education for citizenship means in the European context—or much deliberate misuse of the subject as a tool for “moral engineering.” In any event, quite a few teachers have actually overstepped the margins of what could be reasonably understood as civic education.

These gross abuses, together with other less gross, but still important abuses, have persuaded the opponents to the introduction of the new school subject that they were right in their analysis of the

flaws of the government's project and in their predictions about what could happen in practice. I should add that the implementation of education for citizenship has been very dependent on each region's authorities. Competence on education is mostly decentralized in Spain. In some regions, especially those governed by the Socialist Party, the authorities have often acted in a lenient way with respect to practical abuses. This has led many parents to declare themselves as conscientious objectors on behalf of their children—conscientious objection has therefore been a sort of last resource to prevent the moral indoctrination of their children. And this fact has led to a different type of abuse. In many schools, students whose parents objected to the curriculum have been publicly stigmatized and identified as ultra conservatives or not good citizens. Sometimes lists with the objector students' names have been published at the school. These are terrible things, especially at certain levels of education. This is certainly not an ideal scenario and explains what I affirmed at the beginning of my presentation—that “education for citizenship” in Spain can be taken as a counter-example, an example of how to ruin a good idea.

As could be expected, the new school subject has led to frequent litigation in Spanish courts. Currently, there are approximately three-hundred cases pending in different Spanish jurisdictions. Sometimes, this litigation arises from practical abuses. Other times it is the legal framework itself what has been challenged in the courts—and I would like to focus on this latter approach. The argument is that the legal framework of “education for citizenship” contains so many deficiencies that it permits and facilitates school administrators and teachers to distort this type of education, so that abuses can easily happen. In other words, the legal framework itself, and not only the practical implementation of the school subject, is the problem. Plaintiffs have relied on article 2 of the First Protocol to the European Convention, which provides that the State must respect the right of

parents to ensure that the education and teaching that their children receive is in conformity with their own religious and philosophical convictions,²³ and on the equivalent language in the Spanish Constitution, which is even more protective of parents' rights.²⁴

The Spanish Supreme Court issued some significant decisions on these claims in 2009.²⁵ It is not my intention to summarize here these decisions but four points are worth mentioning—in addition to pointing out the fact that these decisions were taken by a strongly divided court. First, the court declared that conscientious objection was not a permissible way to respond to potential abuses. The position of the court was, basically, that neither the students nor their parents had the right to opt out unless it were specifically granted by legislation. I think this is a wrong interpretation of the Spanish Constitution and the case law of the Spanish Constitutional Court on conscientious objection—the Constitutional Court held in 1985, with the occasion of a case regarding abortion, that the right of conscientious objection derived from the fundamental right to religious freedom and could be exercised directly, irrespective of legislative recognition in specific cases. On the other hand, as many scholars commenting on this decision have observed, the Supreme Court's position may prove to be impracticable. If the only way parents have to avoid the indoctrination of their children in school is to challenge directly the legislation or its regulations in court—or actual, concrete abuses by teachers—that will take time. Should their children suffer this indoctrination in their

²³ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

²⁴ CONSTITUCIÓN [C.E.] art. 27, para. 3 (Spain).

²⁵ See STS 340/2009 (recurso no. 948/2008), Feb. 11, 2008; STS 341/2009 (recurso no. 1013/2008), Feb. 11, 2008; STS 342/2009 (recurso no. 905/2008), Mar. 4, 2008. For a detailed account and a critical view of these decisions, see Lourdes Ruano Espina, *Las Sentencias del Tribunal Supremo de 11 Febrero 2009 Sobre Objeción de Conciencia a EpC*, REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIAÍSTICO DEL ESTADO, May 2009.

education for years, until they finally obtain a just solution from the courts? It is certainly difficult to accept the idea of experimenting with children's education.

Second, the Supreme Court declared that two important decisions from the European Court, *Folgerø v. Norway*, in 2007, and *Zengin v. Turkey*, also in 2007, were not applicable to the issue of Spanish law on civic education. You are probably familiar with these decisions. Very briefly, in these cases, some families successfully challenged systems of religious education in their respective countries; these systems were supposed to be neutral but in practice they were not. The Spanish Supreme Court affirmed that *Folgerø* and *Zengin* did not apply because they related to religious instruction, not civic education.

I was astonished when I read this in the court's opinion, because the *Folgerø* and *Zengin* decisions explicitly affirm—following the European Court's doctrine established in *Kjeldsen*—that the protection of the parents' rights granted by article 2 of the First Protocol to the European Convention applies to all subjects of education and school curricula—indeed, it applies to the entire setting of the school. Actually, article 2 was used in 1983 in *Campbell & Cosans v. United Kingdom*, a European Court's decision relating to physical punishment in public schools in Scotland—the court recognized the parents' right to refuse that type of punishment for their children.²⁶ The main reason I can see for the Supreme Court's statement is that *Folgerø* and *Zengin* implicitly affirmed that, when you have a legal framework for a specific type of education with a high moral profile, and that framework can lead to practical abuses that amount to indoctrination of students, there should be an expeditious way to deal with this problem in practice, in particular the recognition of a right to opt out—the lack of practicable ways to opt out was

²⁶ *Campbell & Cosans v. United Kingdom*, 25 Feb. 1982 (Apps. No. 7511/76 & 7743/76).

one of the reasons why the European Court declared that the Norwegian and Turkish programs of religious instruction, which had the appearance of not being completely neutral, were in violation of parents' rights under article 2 of the First Protocol. This is something that the Supreme Court of Spain was probably not prepared to accept.

The third point I would like to mention is that the Spanish Supreme Court specifically said—and I find it very reasonable—that the State may promote ethical values that are implicit in or derived from human rights and basic constitutional principles. This is, no doubt, a sort of moral indoctrination by the State, because human rights and certain constitutional principles are clearly based on moral values. When, for example, we preach equality of legal treatment for all individuals, irrespective of their religion, race, sex, national origin, et cetera, we derive that principle from a particular moral conception of human beings, namely the equal moral dignity of human beings. The State can—and probably must—promote the teaching of these values in school, although the State cannot require internal adherence to those values, or base students' grades in these subjects on students' internal adherence. Students should have total freedom of choice with respect to what they believe or not believe. And parents should be free to indoctrinate their children in values different from those values that the State thought were grounded in, or derived from, "human rights and constitutional values." This is part of what the European Court has called the *forum internum*, an aspect of religious freedom that the State has no power to limit.

The fourth point is that the Supreme Court took an interpretive approach to the law and regulations on "education for citizenship." The court found that the deficiencies of some legal provisions could lead to practical abuses, but, instead of declaring them void, explained what the right interpretation of these provisions was. Many scholars have

criticized this approach of the court. In Spanish practice, the Constitutional Court has sometimes adopted this type of interpretive approach—when a vague statute or a statutory provision may lead to unconstitutional practices or consequences, instead of declaring it directly unconstitutional, the court has affirmed that the relevant statute or statutory provision is constitutional exclusively when interpreted in a specific way; any other interpretation would be unconstitutional. It is unclear if the Supreme Court can also adopt this interpretive approach. The Supreme Court is the highest court within the ordinary judiciary, while the Constitutional Court is a totally different thing—it is the supreme interpreter of our Constitution.

Leaving aside the Supreme Court's decisions in 2009, there have been other criticisms with respect to the government's attitude in the design and development of this new school subject, and with respect to the training of teachers that should implement it. We may understand these criticisms better in the light of a very interesting document, prepared by a group of OSCE experts, which contains guiding principles for neutral teaching about religion or belief in public schools.²⁷ Among other things, this document explains that, in order to establish a system of neutral religious instruction in public schools—which is a very difficult thing to do—it is important to set up an inclusive procedure to guarantee the actual neutrality of teaching and avoid the indoctrination of students. A detailed and careful process of dialogue with civic society should be followed. Nothing like this was done by the Spanish government, neither in the preparation nor in the implementation of the law. Indeed, the sharp division of society on this subject has been of no

²⁷ See OSCE/ODIHR ADVISORY COUNCIL OF EXPERTS ON FREEDOM OF RELIGION OR BELIEF, *TOLEDO GUIDING PRINCIPLES ON TEACHING ABOUT RELIGIONS AND BELIEFS* (2007), http://www.osce.org/publications/odihr/2007/11/28314_993_en.pdf. This document deals with the difficulties of this type of religious education and contains detailed recommendations to make it efficient and actually neutral.

concern to the government. That, I believe, was a grave mistake. When you see that something that is supposed to build citizenship is in fact doing the opposite, you should be asking yourself, have we done something wrong? In my opinion, the government should have dealt with the real problem and initiated an open dialogue with the stakeholders that are entitled to have a say on this matter. In addition, the government refused to accept the mere possibility of including any provision for opt-out rights as a way of dealing with practical abuses and protecting students from excesses by teachers—this is something particularly relevant in a mandatory school subject that has many moral implications and whose real neutrality raises many doubts. Finally, the government did not establish an appropriate procedure to guarantee the qualification and training of teachers of these subjects, which are essential in subjects like this.

I wish I could be more specific in these points but I am already out of time. Allow me just to mention briefly what are, in my view, the two most significant issues that the case of education of citizenship in Spain has raised.

First, which are the limits of the state's moral indoctrination of the youth? We have this principle in the case law from Strasbourg: the State educational system may not indoctrinate students against the parents' wishes. But, at the same time, it seems logical that the state can require the teaching of civic values that are embedded in human rights and in fundamental constitutional values. This is, in my view, a sort of moral teaching—that is, indoctrination—and a very legitimate one, irrespective of whether parents agree or not. However, the State can never go beyond that—it can never require internal adherence to those moral values, because freedom to believe, and freedom to choose the subject of our own beliefs, is absolute.

Second, is it really possible to deal at school, from a

purely scientific and objective perspective, with certain subjects that may have many and profound moral implications—such as, for instance, civic education, religious education, et cetera? In my opinion it is possible; difficult but possible. However, real objectivity requires that teachers point out that those subjects, for many people, have a very important moral dimension, and in this moral dimension it is not for the State to supplant the role and competences of the family. Therefore, teachers must remark, with all clarity, that it is not for the State to say anything on the moral component of those issues, for this belongs to the realm of personal choice. Teaching those subjects without pointing out their moral dimension would not be objective. The mere fact of ignoring their moral dimension would be a trivialization that would entail a moral indoctrination—passive moral indoctrination, perhaps, but still moral indoctrination. All this shows that this sort of teaching requires a very high professional and moral qualification in teachers, which takes time and is not easy to achieve. Neither improvisation nor haste are good companions on this trip.

This has been the case of “education for citizenship” in Spain. It is an interesting but very difficult project. Ignoring the difficulties has been probably the reason why the effect has been, until now, the opposite of what the authors of this educational project declared—social division instead of social cohesion around certain civic values.

Thank you.

DEGIROLAMI: Thank you, Professor Martínez-Torrón. Professor Zoller.

ZOLLER: Good afternoon. First of all, I would like to thank Professor Movsesian for having invited me to this panel, and also Professor DeGirolami for giving us such good directions as to what we should talk about this afternoon. My understanding is that we

should talk about *laïcité* in a comparative perspective, right? So, this is what I intend to do, but from a very modest viewpoint.

My presentation will deal with the following question: what is the place of *laïcité* in the debate on President Sarkozy's proposal to ban the full veil? How do we relate *laïcité* to the ban on the full veil in the French Republic? I will focus mostly on a very interesting, very rich, comprehensive study of the subject by the Conseil d'État. Let me start by giving you the context of that report, the Conseil d'État being, as you know, a crucial institution in the French Republic.

Last January, the French Prime Minister requested an advisory opinion from the Conseil d'État on a possible ban of the full facial veil. In his letter of mission, the Prime Minister said that the female garment known as the burqa, or niqab, was "at odds with the Republican conception of life in society" and raised the question of "whether there are possible legal grounds for preventing social practices of this kind in a democratic society." The Conseil d'État's advisory opinion, titled "Study of Possible Legal Grounds for Banning the Full Veil," held that "no incontestable legal basis can be relied upon in support of a ban on wearing the full veil as such."²⁸ In other words, there is no solid legal ground for a total prohibition of all facial masks, whatever they may be, including a complete mask of the face, such as the niqab. Unless an undisputable legal ground for the ban could be found, a ban of the full veil would be unlawful.

Among the various possible legal grounds for the ban, the Conseil d'État considered *laïcité*—see, in

²⁸ CONSEIL D'ÉTAT, STUDY OF POSSIBLE LEGAL GROUNDS FOR BANNING THE FULL VEIL 19 (2010) [hereinafter CE STUDY], available at http://www.conseil-etat.fr/cde/media/document/RAPPORT%20ETUDES/etude_voile_integral_anglais.pdf.

particular, pages 17–18 in its opinion.²⁹ These two pages give witness to important changes in the French approach to laïcité. This is the point I will comment upon from a comparative perspective. My main argument is that the Conseil d’Etat, in a few sentences, has brought laïcité, the French version of secularism, very close to the conception of religious freedom as enshrined in the First Amendment. It has changed the nature as well as the effects of the traditional French principle.

The key passage in the Study by the Conseil d’Etat is at page 17. I will give the French quote and then provide the official English translation: “Même si le port du voile intégral peut être regardé par ceux qui s’y livrent comme ayant une connotation ou une finalité religieuse, il ressort des travaux menés par la mission de l’Assemblée nationale sur la pratique du port du voile intégral que la question des justifications religieuses de cette tenue ne fait pas l’objet d’un consensus.”³⁰ Which means, in English: “Even if the full veil is regarded by those who wear it as having a religious connotation or purpose, it has emerged from investigations by the parliamentary mission into the practice of wearing the full veil that there is no consensus on its religious significance.”³¹ Concretely, if wearing the full veil may usually be regarded as motivated by religious reasons, in practice we are unsure that religion is always the sole motive for wearing it. For example, conscientiousness in one’s appearance could explain wearing the full veil. Some women may think that being completely hidden behind a black veil makes them look more mysterious, therefore more attractive, more desirable, and sexier. And, therefore, the Conseil d’Etat goes on, laïcité cannot be retained as a legal foundation for a total ban.

²⁹ CONSEIL D’ÉTAT, ETUDE RELATIVE AUX POSSIBILITÉS JURIDIQUES D’INTERDICTION DU PORT DU VOILE INTÉGRA 17–18 (2010) [hereinafter CE ETUDE], available at http://www.conseil-etat.fr/cde/media/document/avis/etude_vi_30032010.pdf.

³⁰ CE ETUDE, *supra* note 29, at 17.

³¹ CE STUDY, *supra* note 28, at 19–20.

What does that statement mean? It means that wearing the veil is no longer the expression of a religious creed, but rather the expression of an opinion. The full veil is speech, symbolic speech. Its legality should therefore be governed by freedom of speech, not by freedom of religion. If the full veil is just speech, the principle of laïcité indeed becomes irrelevant.

This is a major change in the approach to laïcité, insofar as it implies that religious practices are to be accepted in the public sphere as long as they may be regarded as speech. But that is precisely what laïcité precludes or, more exactly, what it used to preclude. In the traditional French approach to laïcité, religion is not just speech; it is religion and subject to a special regime. And that brings us to the second point that I would like to develop here a little more at length. The position of the Conseil d'État implies a change in the consequences of laïcité.

According to the Conseil d'Etat, "Le principe de laïcité impose ainsi la *stricte* neutralité de l'Etat et des collectivités publiques vis-à-vis des pratiques religieuses."³² Because of the adjective, "stricte," neutrality of the State means that the State must be indifferent to religious practices; it must pay no attention to religious outfits and respect religious freedom, which is not severable from freedom to speak one's mind. Freedom of conscience goes hand in hand with freedom of expression. Both freedoms are protected by the French Constitution and the European Convention of Human Rights.

It follows from this approach to neutrality that the Conseil d'Etat has adopted a mild or soft version of laïcité, a noncombative approach that brings that concept closer to the American concept of religious freedom. French exceptionalism in religious

³² CE ETUDE, *supra* note 29, at 18 (emphasis added). The English version reads: "The principle of secularism thus requires a strictly neutral attitude on the part of the state and public authorities towards the practitioners of a religion and vice versa." CE STUDY, *supra* note 28, at 20.

matters is dead; laïcité is no longer dramatized and amplified. Religious freedom is the rule and religion may be expressed freely in the public sphere. Separation between church and state does not mean or, rather, no longer means, banning all religious expressions from the public domain. This is precisely what the United States Supreme Court recently held in *Salazar v. Buono*: “The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm.”³³

When is the State entitled not to be neutral? The Conseil d’Etat mentions two situations: first, when the functioning of the *service public*—the public administration—is at stake, which is the case, for instance, with the 2004 statute prohibiting head scarves for little girls at schools; it is an exception justified by the context; and, second, when the religious practice or speech implies “non compliance with the common rules governing the relations between public communities and private individuals.” Here, the Conseil d’État relies on the decision by the Conseil Constitutionnel.³⁴ Save for the narrow exception regarding the functioning of the public service, the Conseil d’État’s position is very close to that of the United States Supreme Court in *Employment Division v. Smith*: a religious practice may not go against and a fortiori breach a “valid and neutral law of general applicability.”³⁵ And that’s all.

Such is the case with religious practices or principles that go against the principles of the Civil code. But that is not germane to the French Republic. With respect to some Islamic principles—the sharia, in particular—the European Court of Human Rights said, in the case of *Refah Partisi* (dealing with Turkey), “It is difficult to declare one’s respect for democracy and

³³ *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010).

³⁴ CC decision no. 2004-505DC, Nov. 19, 2004, Rec. 173, para. 18.

³⁵ *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.”³⁶

So, where does that bring us? It brings us to this. Laïcité cannot provide legal foundation for a total prohibition against the display of any religious beliefs in the public space and, therefore, could not justify a total ban of full facial veils in the public space. Laïcité comes into play in the relations between public persons and religions only, and it may not be imposed on the civil society save within the context of some public administrations—as is the case with public schools.

I would even go so far as to say this. Laïcité is no longer viewed as a civil religion that could replace religious values. The tone was set on December 20, 2007, when President Sarkozy said that “the school master will never replace the priest or the pastor,” because, in his opinion, “he [the schoolmaster] will always miss the experience of sacrificing his own life and lack that charisma which flows from a commitment carried by hope.”³⁷ President Sarkozy elaborated on positive laïcité and negative laïcité, explaining that the former should replace the latter.

The Study of the Conseil d’Etat goes in that direction. Laïcité as a fighting device against Catholicism is no longer necessary; it has fulfilled its historic mission, which was to put an end to Catholicism as the dominant religion in social life

³⁶ *Refah Partisi v. Turkey*, 37 Eur. Ct. H.R. 1, 44 (2003).

³⁷ *Allocution de M. le Président de la République Française*, PRÉSIDENTE DE LA RÉPUBLIQUE, Dec. 20, 2007, <http://www.elysee.fr/president/les-actualites/discours/2007/allocution-de-m-le-president-de-la-republique.7012.html?search=Latran>. The official French version reads: “[L]’instituteur ne pourra jamais remplacer le curé ou le pasteur . . . , parce qu’il lui manquera toujours la radicalité du sacrifice de sa vie et le charisme d’un engagement porté par l’espérance.” *Id.*

and to replace it with republican values. That does not mean that the burqa will not be banned on French territory. The bill may go forward and be eventually adopted. But laïcité is not likely to be its legal foundation. It will be, maybe, the dignity of women, or, maybe—this would be my position—citizenship. But it will no longer be laïcité. And that is a major development in the evolution of that quintessentially French constitutional principle.³⁸

Thank you very much.

DEGIROLAMI: Thank you very much, Professor Zoller. We have some time now for questions and answers. If you would just signal to me that you have a question, I will put you in our queue. And maybe I will exercise the moderator's privilege of asking the first question, which is to Professor Zoller. Just the last thing that you said, Professor Zoller, that citizenship ought to be the legal ground for the ban of the burqa. Would your position then entail that the ban shouldn't be effective for noncitizens?

ZOLLER: Foreigners? In theory, they should be entitled to wear the burqa. This is my position, my personal position, and it has, of course, no legal weight other than my opinion, that's all. We do not tell foreigners the way to dress. This would be absurd. But, French citizens, yes. Yes, we could. Or, to put it better, we should.

Citizenship is a very meaningful value. The traditional French approach to citizenship, particularly among constitutional lawyers, is to reduce it to the right to vote. I think that it is much more than that. I must confess that my position is strongly influenced by American case

³⁸ On October 7, 2010, the Constitutional Council handed down its decision in the so-called integral veil case. CC decision no. 2010-613DC, Oct. 7, 2010, J.O. 18345. It validated the bill on several grounds, which are listed in the third paragraph of its opinion. Most of them are drawn from the Declaration of 1789. One is taken from the Preamble of 1946. Article 1 of the French Constitution of 1958, which embodies the principle of laïcité, is conspicuously absent.

law and the position of the Supreme Court on citizenship in that wonderful case of *Brown v. Board of Education*,³⁹ which I find of profound implication, profound importance on the meaning of citizenship. Citizenship means to have relationships with each other. Just as a statute cannot legitimately segregate people, as the Jim Crow laws used to do, you cannot segregate yourself from others. Sure, you can segregate yourself by living at home, living in your castle, and seeing nobody. And that is, absolutely, your fundamental right. But when you are participating in social life, can you behave in a way totally disconnected from other people?

Look, we have in the penal code the obligation to save someone's life if it's in danger. But such an outfit, I mean, the burqa, could preclude you from fulfilling your civic duty. In French law, you have the obligation to try to save a person who is drowning, if it poses no danger to you, if it's completely harmless. Suppose there is a pole right there on the wharf and you see somebody drowning. You must take the pole and hand it to the person. If you do not save the person, you can be punished under the penal law. This is a duty of citizenship. That concept implies that people cannot be segregated from one another. This is my position.

DEGIROLAMI: Rosemary?

SALOMONE: Yes, Javier, your presentation resonated for me in so many ways, in terms of looking at education for democratic citizenship. I have a comment and a question. There seems to be something ironic here. I think you suggested that the parents are invoking the U.N. Convention on the Rights of the Child. Is that what you said?

³⁹ 347 U.S. 483 (1954).

MARTÍNEZ-TORRÓN: The European Convention on Human Rights, article 2 of the First Protocol.

SALOMONE: Ah.

MARTÍNEZ-TORRÓN: It recognizes, in the context of the right to education, that the parents have the right to ensure the education of children in conformity with their religious and philosophical convictions. The wording of the Spanish Constitution looks a little different. It includes this right, but it may go even beyond that.

SALOMONE: In the United States, religious fundamentalists have opposed U.S. ratification of the U.N. Convention on the Rights of the Child for exactly that same reason, that it would contravene their rights to direct the education of their children. And, for that reason, it's just us and Somalia who have not ratified the U.N. Convention—and Somalia has no government.

So, in terms of education for democratic citizenship, it seems—I'm a little bit familiar with the Council of Europe and their effort to develop a sense of European citizenship. That's what I think they're really trying to do. But it seems to me that the Spanish program has a much more comprehensive definition of citizenship. It's not as comprehensive as the French definition, but far more comprehensive than we would ordinarily understand. Was there another agenda here?

MARTÍNEZ-TORRÓN: That's the fear of many people. And a part of the problem is this idea that has been described as "social or moral engineering"—the idea that the government—an allegedly "enlightened" government—can dictate to the population what the population should believe with regard to morals. Personally, I think that the people behind this educational project actually lacked the self-restraint that would have allowed them to distinguish between, on the one hand, the realm of public morals and citizenship, that is, the realm of public life, and, on the other hand, a

different dimension in which every person must make his or her own choices. And, while children are minors, those choices are made by parents. No one can substitute families in that role. My impression is that the actual intention of some of these people was to replace the role of families because they thought that families are wrong with regard to how they educate their children—so they could be thinking: we are going to educate their children instead of them “in the right way.” This is the fear, I would say, of most of the families behind the opposition to the project. And some of the opposition has to do with the fact that a substantial part of the curriculum would be totally unnecessary from the perspective of the Council of Europe recommendations. Those subjects shouldn’t be in the curriculum. But once they are in the curriculum, because they have a moral dimension, the alternative is this: either that moral dimension is treated by teachers with extreme care or there is indoctrination of the youth beyond the state’s legitimate competence.

SALOMONE: They go so far beyond the Council of Europe recommendations, but they were presented as a response to the recommendations.

MARTÍNEZ-TORRÓN: Right.

DEGIROLAMI: Okay, thanks very much. Next up is Nathalie.

CARON: Thank you. Thank you to all presenters for their papers. Elisabeth, your paper was a nice complement, I found, to what I said about the three different approaches to laïcité today: positive laïcité on the one hand, *laïcité en mouvement*, on the other hand, and *laïcité de combat*, by the more militant. And you indeed said that the Conseil d’État has a noncombative approach to the problem.

However, Jean Baubérot, the historian of laïcité, who is a proponent of *laïcité en mouvement*, is also against the ban on the burqa, and he is not close to President Sarkozy. So, when you say that French

exceptionalism is a thing of the past in terms of laïcité, that laïcité is no longer combative and that we have something which is close to President Sarkozy's way of looking at things, well, I wonder if you're not overlooking this other approach, defended by people like Baubérot and others who are against the ban on the burqa without necessarily being in favor of positive laïcité the way President Sarkozy sees it. Do you know what I'm saying?

ZOLLER: Yeah, absolutely. The advisory opinion by the Conseil d'État is extremely important because of the place of the Conseil d'État as an institution and what it represents and the way it works. And we know that what it does is usually carefully combed and screened and studied and discussed and debated, so we can be sure that all arguments have been weighed with great care, including probably *laïcité en mouvement*.

CARON: Can I have a follow-up question?

DEGIROLAMI: You may.

CARON: You said, Elisabeth—and this is also a reaction to what Rosemary said. About the 2004 law, Elisabeth reminded us that it was about girls being prevented from wearing the veil. But, again, the law is not about the veil. It's about conspicuous religious signs. It's also about crosses and also about the kippah, right? And Rosemary, earlier on, said that the reasons for the ban on the veil had nothing to do with public safety. You said something like that. And what I wanted to bring up here is the issue of anti-Semitism. We haven't mentioned it yet today, but I wonder if—well, this is something which we don't talk about a lot in France because there is some kind of taboo here about this. But I remember when we had this big debate over the veil in 2003 and 2004, there was this thing about the fact that in schools there might be fights between kids, between Jews and Arabs—and all Arabs here are expected to be Muslims.

So, I wonder how that plays out in the debate. We don't talk about it, but maybe we should remember that there is some anti-Semitism, again. That is an issue here, isn't it? When you say that it has nothing to do with public safety, I don't know, maybe there was something there. We focused on the veil, we focused on young girls and hijabs, but we didn't say a word, or we said hardly a word, about the kippah. But it was also about the kippah.

SALOMONE: Perhaps I'm wrong, but the kippah issue preceded the 1989 expulsion of the girls over the veil. I believe that was the case. So, that started percolating before the veil issue even began.

ZOLLER: Yeah, but the rationale of the 2004 statute, which addresses, as you said, all religious artifacts or devices, I mean, the cross, the kippah, the veil, anything conspicuously visible.

SALOMONE: Turbans.

ZOLLER: Turbans, yes, anything. The rationale for this is that a young child has no capacity to choose freely what he or she wants to believe. A young child does not have what we call in French, *libre-arbitre*, that is to say, the full ability to think as a rational person. This is the key reason for the 2004 statute. And in that sense, yes, it was supported by *laïcité*—yes, in that sense. It's a statute that was definitely supported by *laïcité*, on the ground that, until a certain age, we are not sure that the person has really chosen to wear that religious artifact, or garment, or whatever.

SALOMONE: Well, can I just make a quick response to that—

DEGIROLAMI: Sure, sure.

SALOMONE: The assumption there, though, is that the parents cannot make their choice for them. I mean, what you're talking about the capacity—

ZOLLER: Absolutely.

SALOMONE:—of the child to make those independent judgments. In U.S. culture, we would assume that the parents have—

LAYCOCK: The parents, yeah.

SALOMONE:—the parents can make that choice.

LAYCOCK: You could take the problem from a different viewpoint and say, well, after all, the parents could make the choice for the children just by sending their children to the private schools.

DEGIROLAMI: Let me interject that we have a few more people in the queue, as interesting as this discussion is. Mark, you're next up.

MOVSESIAN: Thank you very much. I enjoyed all of the presentations. I have two quick questions, one for Elisabeth, one for Javier.

Elisabeth, I very much enjoyed your talk, especially your relating *laïcité* specifically to Catholicism. As an outsider reading the history, that seems very much the case. Even the word “*laïcité*” suggests a contrast with something—“clericalism,” maybe? The laity versus the Catholic clergy, right? And I understand your point that that particular fight is now over, largely. And yet, people are still using the word “*laïcité*” to talk about other religions, too. And I wonder, is this an instance of “the song is ended, but the melody lingers on?” What explains the fact that people are still talking this way about *laïcité*?

And, for Javier, I wonder about the nature of the exit option in Spanish society. For example, in the United States—and Doug knows more about these cases than I do, I'm sure—most of the time, parents who are upset about similar things in the public schools lose, ultimately, and are told, “Well, that's how it is; this is the public school.” And, oftentimes, they seek to exit. And, especially in America, now, particularly among Evangelical Christians, there is the concept of homeschooling,

in which you just—you educate your kid at home. There are certain exams that the kids have to take, I believe, but they're educated by the family at home. So, there is an exit option. And I wonder what the nature of that is in Spanish society.

DEGIROLAMI: Maybe Elisabeth can go first.

ZOLLER: I think you're right. It may bubble up a little more in the public debate, but certainly not with the same background and consequences as before. It may also mean—this combative *laïcité*—that religion should be out of the public sphere. Maybe that's what it means for certain people. It's certainly not the position of the Conseil d'État. *Laïcité* also survives in the sense that it has become very difficult to be indifferent to religion in the public sphere. In that sense, yes, *laïcité* survives. Indifference—you know, “we don't care”—is difficult, because of this history and this fight against Catholicism as the dominant religion. So, this is how I would explain it.

MARTÍNEZ-TORRÓN: I thought that the main subjects that have been raised in your country related to the dispute between creationism and evolutionism. I think there is a different story behind that dispute, because of the social and religious context of the dispute. Also, when you teach science, it is possible to stick to the facts that have been proved by the state of science at a given time. You don't need to make moral judgments. If you do, then you are indoctrinating people. If some teachers do, then you have every right to complain.

I think that the Spanish situation is different because it relates directly to questions of morality. It's not just that the program allows for isolated abuses by a few teachers. It's that it creates an atmosphere in which teachers can say whatever they want and are entitled to replace the role of parents in certain areas. For example, to put it more clearly, some of the classes refer to the use of contraceptives. You can trivialize that issue because, for some people, it is a trivial thing. For

some families, though, it is a serious thing. It would be as if, one day, for the sake of self-defense, teachers start explaining how to use a gun. If you trivialize the use of a gun, you are touching a very sensitive, moral dimension of human life. And, for some families, the use of contraceptives is exactly the same.

About the exit option, in Spain we don't have this sort of easy alternative. In Spain, we have public schools, which cover approximately two-thirds of the entire education system, and private schools, most run by Catholic institutions, that cover one-third. We don't have a homeschooling system. And, actually, this is a very interesting subject, because the issue has been raised by some families in isolated parts of the country. We don't have any tradition about homeschooling, though. It's not forbidden, as it is in some European countries, but it is not regulated, either. There is basically a void in the legislation.⁴⁰

But the presumption, I would say, is that homeschooling is not permitted, and therefore the alternative parents have is either to move the kid to another school or to take the kid to a private school. Very often, this entails an economic burden. Our system is not as generous as other European systems with regard to the financing of private education. It depends on the regions. Each region makes its own choice about how and when to fund private education. And the tricky part of it is that private schools only receive approximately half the money per student as public schools do. Which means in practice, curiously, that a student in a public school is worth double the student in a private school. At the same time private schools are prohibited from demanding additional money from parents. It is certainly a bizarre situation.

⁴⁰ In a recent decision, the Spanish Constitutional Court held that the legislator is entitled both to legalize and illegalize home schooling without infringing the constitutional rights of parents or the state's constitutional obligations in the realm of education. *See* STC 133/2010, Dec. 2, 2010.

DEGIROLAMI: Our last question of the day is from Brett Scharffs.

SCHARFFS: My question is for Elisabeth. I agree with Nathalie that your presentation was a really interesting counterpart to hers. I wish you had been here this morning, because I got very different impressions of the social debate about laïcité from your two presentations. So, Nathalie, maybe I'm looking for a response from you, as well.

Elisabeth, if I understood you correctly, you were describing a situation in which laïcité, as a singular conception, as a uniquely French conception, was in a state of decline, in which the concept had been domesticated. And, if I am correct, I detected an air of sadness that laïcité was becoming a little bit more like the United States' conceptions of religious freedom—

ZOLLER: Everybody knows here that I am a great friend of the United States. Absolutely nothing to be sorry about; on the contrary—

SCHARFFS: —Well, be that as it may, from Nathalie's presentation this morning, I got a little bit of a different picture, that there was on the ascendance a conception of laïcité that was a little bit more militant, a little bit more hard-line, a little bit more, not just anticlerical, but antireligious, that was a little bit more hostile to religion per se and to Islam in particular. And I must say that, viewed from outside, as a distant and not particularly attentive observer, that sounds a little bit closer to the truth. I mean, we see the 2004 law as one step in the direction of trying to further displace religion from public life and as an expression of, if not Islamophobia, at least a certain view about what the headscarf means as a symbol and who gets to decide what it means as a symbol. And the recent proposals in the Winter and Spring of this year about the full ban, I think, are viewed by many as a continuation of that trend, as the next step down this same road. And that would be viewed as a part of this reenergization of a

muscular conception of laïcité, perhaps a secularism rather than a secularity. And I would perceive a further divergence of U.S. and French conceptions. I wish I could agree with your description, but it feels quite the opposite of what I'm sensing in the direction of the two debates.

ZOLLER: I think the two laws, the currently pending bill and the 2004 law, do not have common ground. They are not the same thing, if only because the ban of the full veil, or the full mask, actually—interestingly enough, they had to refer to a “mask” and not a “veil,” because otherwise it would have been obvious that the bill discriminates against a specific religion and is especially targeted against one religious group. But article 1 of the French Constitution says that the law cannot discriminate among people on the basis of race, national origin, and religion. We are exactly like in the United States in that respect. In the 2004 law, no religious group in particular is targeted. It is, in fact, as Nathalie said. Absolutely no religion in particular is targeted. All religions are covered.

In addition, the 2004 law defends the role of the State as a public educator, and is consistent with the philosophy of Condorcet and the Enlightenment, that the first mission of public education is to open minds, to give people the tools to create themselves, to find by their own judgment their place in the universe, not being taught by external groups what they have to think. It is the philosophy of giving people the capacity, without any outside constraints, to make the choices that they want. For me, maybe because I am so close to the United States, I find that we have so much more in common than you believe, so much more in common. You know, when Justice Kennedy talks about the right of every individual to have his or her own conception of the mystery of life,⁴¹ it's

⁴¹ For an illustration of the common inspiration in Justice Kennedy's views, see, for example, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (“the right to define one's own concept of existence”), and *Laurence v. Texas*, 539 U.S. 558, 562 (2003) (“autonomy of self”).

exactly the same thing in the French Republic, exactly the same thing. The 2004 law is based on that philosophy. Also, after all, the public schools are the only place where we integrate young kids from immigrant backgrounds. That is absolutely crucial—and the Supreme Court had exactly the same idea regarding the role of public schools in the states, exactly the same philosophy. So, I would not say that there is a continuum between the 2004 statute and the current pending bill. And, in fact, the Conseil d'État, in its opinion on laïcité, said it very clearly.

DEGIROLAMI: Nathalie, last word.

CARON: Thank you. I agree with Elisabeth that we have many points in common that we're not necessarily aware of. So, that's one thing. And, to respond to Brett, well, actually, the people I spoke about this morning are reacting to what Elisabeth described, this change in the interpretation of laïcité, and they are worried about it. Among the other examples I gave, I spoke about the *Le Monde Diplomatique*. I think that these people in particular, the people that I spoke about this morning, are not necessarily in favor of the ban on the burqa. They don't talk a lot about the burqa, as I said, but I am not sure that they all favor the ban on the burqa. We have to take the whole political context into account. I don't know if you realize, we have had a lot of new legislation in France since President Sarkozy was elected. And there is a reaction to the fact that, each time that something goes wrong, we have a new law. And, personally, I'm not sure I would like to see this law passed. Because, okay, you forbid people from wearing a burqa, are you then going to forbid what, women from wearing miniskirts or, I don't know what? So, I think we have to be careful.

DEGIROLAMI: Okay, great. Let's wrap it up there.