

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

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).

successive splintering of faiths. There were formally established churches in eight of the 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

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).

faced one large and historically dominant Church, hostile to the Republic, and they concluded that

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,

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).

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

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.

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).

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 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

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).

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 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

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.

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.

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

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.

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 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

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.

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.

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. 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

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).

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

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 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

³⁴ See Garay et al., *supra* note 3.

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

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?sessionId=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.

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.

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

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

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.

mosque. The resulting press attention led to revelations that there has been unsuccessful grassroots opposition to building mosques in cities all around the country.^{44]}

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.

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.

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).

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 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

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.

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 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

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).

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).

compelling interest in applying a neutral law to a religious practice.⁶⁰

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

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).

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

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.

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

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

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).

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 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

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.

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 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

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/2007-13-08-25-09-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

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.

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

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.

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

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.

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.

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.

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.

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.