

Religion in the Public Sphere: Challenges and Opportunities

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Since I have been given the honor of opening this session, let me thank the organizers for allowing me to offer a rather general reflection on the place of religion in the public sphere in both Europe and the United States.

I. INTRODUCTION

Beginning in 1989, female Muslim students in France were disciplined in schools for refusing to remove their headscarves.¹ At the request of the French Education Ministry, France's Conseil d'Etat (State Council) affirmed the right of religious expression inside the public schools.² The Conseil ruled forty-one times (on forty-nine cases) between 1991 and 1999 against schools who disciplined Muslim girls for wearing headscarves.³ Despite these

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1. *Voile à l'école: les principales dates* [*Veils in School: The Principle Dates*], AP FRENCH WORLDSTREAM, Dec. 17, 2003. The article details the major foulard cases from 1989 to the present.

2. Conseil d'Etat, avis no. 346,893, Nov. 27, 1989, *available at* http://www.conseil-etat.fr/ce/missio/index_mi_cg03_01.shtml.

The result of constitutional and legislative texts and of the [above mentioned] international engagements of France is that the principle of *laïcité* in public teaching, which is one of the elements of State *laïcité* and the neutrality of public services, establishes that teaching be done with respect, on the one hand, for this neutrality by programs and teachers and, on the other hand, for the freedom of conscience of pupils. In accordance with principles recalled by these same texts and international engagements, it prohibits any discrimination in the access to teaching which would be founded on the religious convictions or beliefs of students. This recognized freedom for students thus includes for them the right to express and manifest their religious beliefs within academic establishments, in respect to pluralism and the freedom of others, without undermining the activities of teaching, with the contents of programs and the obligation of assiduity.

Id. (translated by Holly Hinckley Lesan and Richard Call).

3. *L'Islam dans la République* [*Islam in the Republic*], rapport 2000 du Haut Conseil à

rulings, the disputes continued and became extremely contentious during 2003 when the issue received national attention and incited public protests, as well as legislative and executive debate. In March 2004, with broad public support but amid public protests by members of the Muslim community and others, the Assemblée Nationale passed a law banning students from wearing conspicuous religious clothing in public schools.⁴ Although the law also forbids Jewish yarmulkes and Christian crosses, the refusal of Muslim girls to remove their headscarves in school was undoubtedly the catalyst for the law, and debate in the legislature focused almost exclusively on the headscarf cases.

The dispute revolved around a fundamental ideal of the French republic: *laïcité*. Although the concept of *laïcité* defies a precise definition,⁵ it embodies the constitutional principle of the State's neutrality.⁶ As President Jacques Chirac stated, *laïcité* "is at the heart of (the French) republican identity."⁷ *Laïcité* strictly calls for a state that is free from an official or exclusive religion; however, this freedom is commonly understood in France as an absence of religious expression in the public sphere. The constitutional principle of *laïcité*, which permits state neutrality (comparable to the American separation of church and state), differs greatly from its perceived meaning among citizens and the government officials who use the

l'Intégration, available at http://www.islamlaicite.org/IMG/pd/isl_repu_ht_conseil.pdf (last visited May 9, 2005).

4. Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190; JCP G 2004, No. 13, Actu. 168, available at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENX0400001L> (last visited May 9, 2005) and <http://www.religlaw.org>.

5. For an informative discussion about the definition of *laïcité*, see EMILE POULAT, NOTRE LAÏCITÉ PUBLIQUE [OUR PUBLIC LAÏCITÉ] 155-56 (2003) ("There is no firm definition of *laïcité*: neither officially established nor generally accepted.") (translated by T. Jeremy Gunn). The Le Grand Robert Dictionary gives the following definition of *laïcité*: "Political notion involving the separation of civil society and religious society, the State exercising no religious power and the churches exercising no political power." PAUL ROBERT, LE GRAND ROBERT DE LA LANGUE FRANÇAISE (1992) (translated by T. Jeremy Gunn).

6. *Laïcité* first appears as a constitutional term in Article I of the French Constitution of 1946. The text reads: "France is a Republic that is indivisible, laic, democratic, and social." 1946 CONST. art. I (Fr.) (translated by T. Jeremy Gunn). The 1958 Constitution uses exactly the same language. See 1958 CONST. art. II (Fr.).

7. Jacques Chirac, Address at the Elysée Palace (Dec. 17, 2003), available at http://www.elysee.fr/elysee/francais/interventions/discours_et_declarations/2003/decembre/discours_prononce_par_m_jacques_chirac_president_de_la_republique_relatif_au_respect_du_principe_de_laicite_dans_la_republique-palais_de_l_elysee.2829.html.

idea to instinctively oppose one's right to manifest religious conviction in the public sphere. It is often said by Frenchmen that *laïcité* allows religion only in the private sphere.

This insight into France's tendency to confuse the State's neutrality with containment of religious expression in the public sphere nicely introduces my topic for today's address. The degree of toleration of religious expression manifested in the public sphere is related to the historical perception of what the public sphere means. In the case of France, the notion of public sphere explains why, in many ways, the self understanding of the manifestation of public neutrality is more important than the manifestation of collective or individual religious expression.

For this reason, I first discuss in Part I the differences between how Europe, especially France, and the United States define the public sphere. I then describe the place of religion in the public sphere in Europe—focusing primarily on France—and in the United States. In Part II, I contend that both countries' perceptions of the place of religion in the public sphere are endangering freedom of religion. For instance, an unacknowledged but healthy civil religion in the United States limits religious freedom in the public sphere just as surely as strict adherence to *laïcité* limits religious freedom in France.⁸ In Part III, I offer insights into how both Europe and the United States should adapt some of their practices to guarantee freedom of religion more fully. Finally, Part IV offers a brief conclusion.

II. BACKGROUND

A. What Is the Public Sphere?

To address the place of religion in the public sphere requires us, above all, to define what we mean by the phrase "public sphere." Unfortunately, there is no legal definition of public sphere in any of our democratic constitutions.⁹ The public sphere is a rather broad and vague concept that political and juridical theorists use in order to

8. See JEREMY GUNN & BLANDINE CHELINI-PONT, *DIEU EN FRANCE ET AUX ETATS-UNIS, QUAND LES MYTHES FONT LA LOI* [GOD IN FRANCE AND THE UNITED STATES: WHEN MYTHS MAKE LAW] (2005).

9. See CHARLES JONES, *AN INTRODUCTION TO THE STUDY OF PUBLIC POLICY* (1970).

reflect upon and to build a common societal organization.¹⁰ However, this concept does not convey the same meaning on both sides of the Atlantic. For convenience, I will limit my comparison to the different understandings of the public sphere in Europe, focusing primarily on France, and in the United States.

The definitions of the public sphere in the United States and in Europe are similar at first glance: the public sphere is the organized and concretized common space of a given population. It is clearly separate from private space (also well organized and concretized), which allows individuals and families to live their religions privately. However, this perception of the common space is not exactly the same in Europe and in the United States, since both political entities have very different perceptions of religion and its proper place in society.

In the United States, two interconnected theories of the public sphere are particularly relevant. In the liberal tradition of democratic theorists, ranging from Alexis de Tocqueville¹¹ to Harvard doctoral student Evan Charney,¹² the public sphere has been viewed as the space common for all, where citizens can freely discuss and deliberate ideas, commit themselves to voluntary associative forms, and improve and control the various levels of their common life. The second theory, espoused by more recent theorists like Hannah Arendt,¹³ Robert D. Putnam,¹⁴ Jürgen Habermas,¹⁵ and Seyla Benhabib,¹⁶ locates the public sphere not so much in the legal and material organization of this space, as did the Greek polis, but in civil society itself, moved by a continuing deliberative and critical

10. See H. JENKINS-SMITH & PAUL SABATIER, *THEORIES OF POLICY PROCESS* (1999).

11. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., Schocken 1961) (1835).

12. See Evan Charney, *Political Liberalism, Deliberative Democracy, and the Public Sphere*, 92 AM. POL. SCI. REV. 97 (1998).

13. See HANNAH ARENDT, *THE HUMAN CONDITION* (Doubleday & Anchor 1959) (1958).

14. See Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995).

15. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 329 (William Rehg trans., 1996) (1992).

16. See Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 67 (Seyla Benhabib ed., 1996); SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS* 120 (1992).

process.¹⁷ While such theories may resonate among the American citizenry, to Europeans these thoughts reflect on a very high, conceptual level the deeply liberal conscience of American society, whose citizens think of themselves naturally as actors in the common space.¹⁸

Although Europeans are also very sensitive to the deliberative and associative democratic process and diligently strive to cooperatively manage their common space, their conception of the public sphere does not readily accept these theories. Why? Because Europeans understand the State as the first intermediary between society and citizens—the State is responsible for legal and practical civil society.¹⁹ This sensibility is inherited from continental history that painfully gave up feudalism and rediscovered the superiority of Greek political thought and Roman practical organization over the benefit of the monarchic power. In viewing the State as the first intermediary between society and citizens, Europeans immediately associate the rules and functions of the State with the word “State.” The true public sphere in France, for example, is the space where the State exerts its authority for the benefit of all and at the service of all. The concept of the public sphere in Europe relies on the old notion of the common good, originally understood to include the responsibility of accounting to God for one’s actions, but which now also includes accounting to the citizens of the state for the actions of the State. In this conception, the State is responsible for the public order (safety and health)—a concept with ramifications that justify all kinds of circumstantial and legal limitations in the public sphere.²⁰

17. Charney, *supra* note 12, at 97.

18. Wayne Gabardi, *Contemporary Models of Democracy*, 33 *POLITY* 547 (2001).

19. For a discussion about the French sense of the State, see Ellen Badone, *Identity and Democracy*, 20 *FRENCH POL., CULTURE & SOC’Y*, 121 (2002), which comments on the meaning of Marcel Gauchet’s essay *LA RELIGION DANS LA DEMOCRATIE, PARCOURS DE LA LAÏCITE* 129 (1998). This thought-provoking essay analyzes the changing relationships between the French state and the individual. The author contends that French republican democracy originally developed as a bulwark against the hegemony of the Roman Catholic Church. However, in the secularized context of present-day France, such protection is no longer necessary. Hence, democracy has lost much of its original meaning. In the past, political actors privileged the collective good above private interests and *identités*. Now, however, it is precisely these agendas that have come to dominate French political discourse. In the face of competing minority demands, government must remain neutral and can no longer serve as the moral arbiter for the collectivity.

20. The concept of public order is perhaps as important to France as *laïcité*. Article X of the 1789 Declaration on the Rights of Man limits the right to publicly express opinions,

B. Effects on the Role of Religion

The different perceptions of the concept of public sphere in the United States and in Europe accordingly translate into different perceptions of the State's place and role within that public sphere. There is a difference in the power given to the State by its citizens, and there is especially a difference in the State's legitimate actions in service of its citizens.

1. The role of religion in the European public sphere

In the case of France, virtually all citizens consider the State to be the guardian responsible for everything that occurs outside of the private sphere,²¹ and this cultural fact is not about to change. Europeans cherish the State, its public institutions, and the services it provides, even if they often criticize its tax voracity, its unwieldy bureaucracy, and its inefficiency. With its distant inheritance from the Roman Empire, religion in Europe rises to the responsibility of the State.²² For a very long time, religion was used for the purpose of uniting disparate populations and areas and was thus the best way to build a public sphere. Religion was, more than anything else, an issue of law and order. Kings required the conformity of their subjects to

including religious views, to those public manifestations that do not disturb the public order. DECLARATION OF THE RIGHTS OF MAN, art. X (Fr. 1789), *available at* <http://www.yale.edu/lawweb/avalon/rightsof.htm>. France's 1848 constitution also emphasizes public order, noting that public order is among those values that make up the base of the republic. 1848 CONST. pmbl. (Fr.) (translated by Holly Hinckley Lesan), *available at* <http://www.laicite-republique.org/documents/textesfondateurs/textesfondateurspdf/1848%20France%20constitution.pdf>. In recent years, the Conseil Constitutionnel has held that "preventing violations of public order, in particular violations of the safety of persons and property, [is] necessary for the implementation of constitutional principles and rights." CC decision no. 80-127DC, Jan. 22, 1981, Rec. 15 (translated by Holly Hinckley Lesan), *available at* <http://www.conseil-constitutionnel.fr/decision/1980/80127dc.htm>. The concept of the public order figures heavily in France's debate as to what belongs in the public sphere.

21. See Badone, *supra* note 19.

22. Constantine was the first emperor to use his authority to force the Christian bishops to adopt the same, unique formula of faith when he decided to organize the first Ecumenical Council of Nicaea in AD 325. See KAREN ARMSTRONG, A HISTORY OF GOD 110 (1993). With Theodosius in AD 381, Christianity became the official religion of the Roman Empire and the only religion of its citizens. Jews were thereafter persecuted. The Roman Emperor, originally *pontifex*, was charged with the duty of surveying and favoring the orthodoxy of his citizens. See *id.* at 106; Nigel Pollard, *Roman Religion Gallery*, BBC HOMEPAGE: HISTORY, http://www.bbc.co.uk/history/ancient/romans/roman_religion_gallery_09.shtml (last visited May 10, 2005).

the king's religious precepts, whether Catholic, Orthodox, Lutheran, or Calvinist. This requirement is illustrated by the famous adage, *Cujus regio ejus religio*, Latin for "whose rule, his religion."²³

The legacy of these former times remains influential, as evidenced in two ways: first, by the frequent and legal occurrence of a specific relationship between the state and religion—with the state granting religious status and limiting the scope of a religion's activities; and second, by the normative tendency to consider religion as a public, charitable, medical, educational, and even spiritual service. Consequently, it seems natural for the State to collaborate with religious leaders as much as possible in order to help citizens in need of such services.

This background illustrates that the place for religion in the European public sphere is well delineated and ordered. The clarity of religion's role in the public sphere means that new or minority religions benefit from the state-religion dynamic only after they make necessary legal claims. For example, although the French State organizes worship in places that it is responsible for administering, such as chaplaincies, prisons, hospitals, the military, and public schools, the State organizes only for the three oldest religions: Catholicism, Protestantism, and Judaism.²⁴ The Islamic religion has had some difficulties penetrating these institutions (except prisons and sometimes hospitals), and other movements are frankly kept away by the very strict and complex process of authorization. Additionally, minority religions either do not know about or have difficulties obtaining legal privileges that are given to mainstream religions.²⁵

23. See, e.g., DAVID OGG, *EUROPE IN THE SEVENTEENTH CENTURY* 36 (Adam & Charles Black 1971) (1925). The phrase means that "a ruler has the right to determine the religion of his territory." NEW CATHOLIC DICTIONARY (1910), available at <http://www.catholic-forum.com/saints/ncd02512.htm>.

24. See Francis Messner, *L'aumônerie des services publics* [*Chaplaincy in Public Services*], in *TRAITÉ DE DROIT FRANÇAIS DES RELIGIONS* [TREATISE ON FRENCH LAW CONCERNING RELIGION] 455–62 (Litec ed., 2003) [hereinafter TREATISE ON FRENCH LAW].

25. If the religious association is organized under the legal framework of worship association (Law of December 9, 1905), the French administration has to verify the strict conformity of the associative activity with the legal terms of the Law about "worship activity" and can refuse the previous exemptions. If the religious association is organized under the auspices of the common association (Law on Associations, 1901), then the French administration can give it the status of public utility (Décret of Aug. 16, 1901, J.O. Aug. 17, 1901), which exempts the association from taxes on benefit and land. The French administration can confer this status only after the association asks for it and presents reliable

To reach the public sphere and to profit fully from freedom of public worship in France, a religion must appear to have the characteristics of an established religion with which society is already familiar. For example, traditional Catholic processions in French cities do not need to be declared to the Mayor, but plans for other religious processions or public meetings must be submitted in advance in an official declaration to the Town Hall.²⁶ To distribute religious literature was, until December 2004, strictly limited by a law regulating hocking.²⁷ Public preaching or leafletting is otherwise prohibited in many places considered public ways.²⁸ The implicit tendency of the French State is to define first whether its religious partner is religious and only then to accept its entry into the public sphere if its actions are deemed useful. The numerical size of the religion is very valuable in this perception.²⁹

documents. As a result of the Law of July 23, 1987, French associations can receive money from individuals and companies, but if they are worship associations, then they need administrative authorization. The French revenue administration is the only agency that determines whether an association meets the “general interest” test, which would exempt it from paying taxes on money received. Catholic associations are traditionally well treated by the French administration. For instance, the diocesan associations, as well as the other Catholic associations (especially the charitable ones), are always tax-exempt and left in peace with their incomes and properties. See Francis Messner, *Droit fiscal et patrimonial* [Tax and Inheritance Law], in TREATISE ON FRENCH LAW, *supra* note 24, at 855–94; Alain Garay, *Les régimes fiscaux et leur influence sur les politiques religieuses* [Tax Systems and Their Influence on Religious Policy], in QUELLE POLITIQUE RELIGIEUSE EN EUROPE ET EN MÉDITERRANÉE [WHAT RELIGIOUS POLICY IN EUROPE AND IN THE MEDITERRANEAN] 45–67 (PUAM 2004) [hereinafter WHAT RELIGIOUS POLICY].

26. Law of Oct. 23, 1935, Dalloz *Législation* [D.L.], périodique 1935, Part IV p. 367 (indicating that some religions “are under an obligation of a preliminary declaration for any procession, parade, or assembly of any person and in a general way any manifestation in the public way” (translation by Holly Hinckley Lesan and Richard Call)).

27. Law of July 29, 1881 on freedom of the press, Chapter III, art. 18–22 (“Posting, Hawking and Selling in the Public Way” (translation by Holly Hinckley Lesan and Richard Call)). The text was extended by a decision of the Criminal Chamber of the Cour de Cassation, January 26, 1950, to the religious literature and regulated the religious hocking until its abrogation by Law No. 2004-1343 of Dec. 9, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 10, 2004, article 131.

28. Emmanuel Tawil, *La police administrative des cultes en droit français* [The Administrative Police of Religious Sects in French Law], in REVUE DE LA RECHERCHE JURIDIQUE, DROIT PROSPECTIF [REVIEW OF JURIDICAL RESEARCH, PROSPECTIVE LAW] III 508–09 (2004).

29. For a discussion of the distinctions between religious entities based on size, see generally T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419. Religious associations may be either registered or unregistered and are classified based on various criterion, one of which is size.

Paradoxically, because of the historical relationship between the state and religion, and the subsequent reaction against it, separation between church and state was reached. In Europe, separation between church and state connotes the State's regulation of the public sphere and religious freedom in the private sphere. Consequently, this separation has resulted in the fading of religion from the European public sphere. Separation between church and state was established in Europe for the benefit of the confessional neutrality of the State vis-à-vis religion, which neutrality in theory works to guarantee freedoms for citizens and to ensure a governmental system based on liberal, universal, and reasonable values, rather than religious values.

This concept of separation, however, has surely led to a more visible secularization of the public sphere, where the State now has a monopoly. To some extent, the secularization of the State—that was gradually or abruptly reached, depending on the nation's history—allowed the citizens to exert their freedom of conscience and to avoid membership in a single or state-authorized religion. However, this secularization led to the visible disappearance of religion from the public sphere. For example, in France, the Conseil d'Etat established in September 1972 that the State's neutrality principle unequivocally required that its public officers not wear any manifestation of religious adherence while performing their public functions.³⁰

The departure from the fused relationship between religion and the State in Europe led not only to a secularization of the public space but also to a privatization of religion. While France appears to be a country where religion is excluded from the public sphere, this perception is false in many real and juridical ways;³¹ however, as a

30. Avis of September 21, 1972 about the neutrality of the public officers. *See also* Avis Dlle Marteaux of May 3, 2000, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 23, 2000, available at <http://www.legifrance.org> and <http://www.religlaw.org>. For other references, see *Réflexions sur la Laïcité, rapport 2004 du Conseil d'Etat*, La Documentation Française, Paris, 2004, available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/044000121/0001.pdf>; Francis Messner, *La neutralité des fonctionnaires dans le service, La neutralité religieuse de l'Etat* [The Neutrality of Civil Servants], in TREATISE ON FRENCH LAW, *supra* note 24, at 430–32.

31. Free and public worship activity in places of worship is protected by the Laws of January 2, 1907 and March 28, 1907. Places of worship are free from a legal declaration. *See* Francis Messner, *Les manifestations extérieures des cultes* [Exterior Manifestations of Sects], in TREATISE ON FRENCH LAW, *supra* note 24, at 518–27.

practical matter, it is often true that religion is indeed excluded from the public sphere. The fear that religion might once again take on a public role, however painfully reduced this role may be, drives officials and politicians to consider new movements like Islam as a threat to the now-secularized public sphere. The general French population fears harm to the neutrality of the public sphere from religious activities such as public proselyting (particularly favored by African Pentecostals) or the wearing of the Islamic veil in public schools. The populace believes that the public sphere should be a neutral space, free from authoritarian religious influence. The separation of church and state is instinctively considered to be a salutary survey of religion in the public sphere because of both the State's neutrality and the freedom of conscience of the citizens. The French law of March 2004,³² in response to the Muslim veil controversy, is an archetypal example of this cultural perception of the public sphere.

2. The role of religion in the United States' public sphere

In comparison, U.S. citizens do not consider the State to be a supervisor that must oversee religion or drive it out of the public sphere to avoid possible manipulation. To the contrary, the State is seen as guaranteeing most scrupulously all forms of religious manifestation. For example, American public opinion was strongly against the Supreme Court's decision in *Employment Division v. Smith*,³³ in which the Court upheld the denial of unemployment benefits to two Native Americans who were fired for misbehavior because they used peyote as part of their religious practice.³⁴ The American populace seemed to feel that this decision permitted undue limitations on an individual's right to freely practice her religion. It is

32. See *supra* note 5.

33. 494 U.S. 872 (1990). See also DANIEL A. BROWN, CHURCH-STATE ISSUES IN THE UNITED STATES, 1989–1991; Quaderni di Diritto E Politica Exxlesiastica, 1991–1992/2, CEDAM, 166–90.

34. See BROWN, *supra* note 33, at 182. He states,

There followed an immediate flurry of activity on the part of many churches and civil rights organisations to have the case reviewed. Editorials of major law school reviews, Native American publications and church organisations have roundly opposed the Supreme Court's action as an abridgement of the free exercise clause of the First Amendment.

Id.

very clear for a European—as it is for the United States Supreme Court—that the legislature *should* limit religious activity that is also illegal behavior, such as polygamy,³⁵ or in this instance, narcotic use.³⁶

Nevertheless, many Americans and numerous associations disagreed with the *Smith* decision. The United States Congress responded to *Smith* by passing the Religious Freedom Restoration Act, which prohibits the government from substantially burdening an individual's free exercise of religion even if the burden is one of general applicability.³⁷ Only in circumstances where the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest” can the government pass and enforce a law that prohibits an individual from practicing certain tenets of her religion.³⁸ The Court responded by ruling the Religious Freedom Restoration Act unconstitutional as applied to state governments,³⁹ once again demonstrating that there are some limitations on the United States Constitution's protection of the right to freely practice one's religion.

U.S. citizens consider religion in the United States to be foremost a personal freedom. The public sphere is seen as a place where individuals exercise multiple personal freedoms in their capacity as religious citizens, politicians, legislators, or as members of religious groups or institutions. For Europeans, it is surprising that a President, elected by a majority of citizens, could call publicly for the blessing of God,⁴⁰ or justify his actions with his faith. In the United

35. See *Reynolds v. United States*, 98 U.S. 145 (1878).

36. *Smith*, 494 U.S. at 890.

37. 42 U.S.C. § 2000bb-1 (1993).

38. *Id.*

39. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court held that requiring states to meet the compelling interest test overstepped Congress' duty not to infringe on state sovereignty and therefore contradicted “vital principles necessary to maintain separation of powers and the federal balance.” *Id.* at 536. However, “[e]very appellate court that has squarely addressed the question has held that the [Religious Freedom Restoration Act] governs the activities of federal officers and agencies.” *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003).

40. At his first inaugural address, President George W. Bush, a born-again Methodist, “referred to God in vague[] terms as a ‘higher power’ and ‘author’; used such words as ‘democratic faith’; and referred to a saying by Mother Teresa and the parable of the good Samaritan to bolster his doctrine of ‘compassionate conservatism.’” Julia Duin, *Faithful Bush Calls on God's Blessings*, WASH. TIMES, Jan. 21, 2005, available at

States, religion is often present in political debates and in legislative ceremony.⁴¹ Religions enjoy a long associative tradition, a liberal tax policy,⁴² ample freedom of worship, and open expression in the public sphere.

In American history, the principle of free exercise of religion ultimately undermined the former legal prohibitions that several states had imposed against Catholics, Adventists, Mormons, and Jehovah's Witnesses.⁴³ The Civil Rights Act of 1964,⁴⁴ the Religious Freedom Restoration Act of 1993,⁴⁵ and related Supreme Court cases⁴⁶ show that the United States goes extremely far to protect freedom of conscience and collective and public religious expression.

III. A COMMITMENT TO RELIGIOUS FREEDOM FOR BOTH EUROPE AND THE UNITED STATES

Given this overview, the following question arises: in light of such important differences in the public manifestation of religion between Europe and the United States, does the commitment to defend religious freedom concern only Europe? In other words, does Europe need to question its commitment to the requirements of religious freedom while the United States leads the way? I propose that a real commitment to religious freedom would correct not only the failures of European systems but also the less obvious failures of

<http://washingtontimes.com/national/20050121-122814-5978r.htm>. At the outset of his second inaugural address, President Bush said, "every man and woman on this earth has rights, and dignity, and matchless value, because they bear the image of the Maker of heaven and earth." Later, while challenging the world's dictators, he quoted Abraham Lincoln: "Those who deny freedom to others deserve it not for themselves; and, under the rule of a just God, cannot long retain it." *Id.* See also Press Release, The White House, President George W. Bush's Inaugural Address (Jan. 20, 2001), available at <http://www.whitehouse.gov/news/inaugural-address.html>; Press Release, The White House, President Sworn-In to Second Term (Jan. 20, 2005), available at <http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html>.

41. See generally *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding Nebraska's legislative prayer despite a First Amendment challenge).

42. I.R.C. §§ 501(c)(3), 170(b)(1)(A)(i) (2000); Treas. Reg. §§ 1.501(c)(3)-1(c)-(d), 1.170A-9(a) (2000).

43. See PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002); WILLIAM R. HUTCHISON, *RELIGIOUS PLURALISM IN AMERICA: THE CONTENTIOUS HISTORY OF A FOUNDING IDEAL* (2003); JOHN WITTE JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* 100 (2000).

44. 42 U.S.C. § 1981 (2000).

45. *Id.* § 2000bb-1.

46. See, e.g., *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

the American system. Although it is easier to note and to criticize Europe's sometimes excessive protection of the public sphere from religion, similar failings exist in the American system of religious freedom. In truth, lessons can be learned from the failures and successes of both systems.

A. Europe

The European system often regards religion in the public sphere as an interference and a form of competition necessary to control and contain. This explains European choices to discriminate between known and lesser-known religions concerning their respective relations with the State.⁴⁷ When public expression of religion is organized in a specific manner by the State, things may appear to be normalized; the State retains some control of what expression is and is not acceptable. The State fixes the rules of religious expression in a space (the public sphere) that it controls and that is very large. The State is neutral from a denominational point of view, but religions must pass through its formal or abstract recognition process (like the French Council of Muslim Worship)⁴⁸ in order to be accepted in the public sphere.

Thus, although the mechanisms are in place to foster genuine religious freedom, it takes a religious organization's time and hard work to enjoy the concrete implications of religious freedom. Liberty in the public sphere is currently theoretically recognized for all religions, and nation-states in Europe are likely to slowly lose their old, strict supervisory status. The examples of Italy and Spain⁴⁹ are illustrative because both states had been historically denominational,

47. See RELIGIONS ET LAÏCITÉ EN EUROPE [RELIGIONS AND LAÏCITÉ IN EUROPE] (Jean Baubérot ed., 1994).

48. Frank Frégosi, *le culte musulman et la République, la régulation publique de l'islam dans un cadre laïque* [Muslim Worship and the Republic: The Public Regulation of Islam in the Secular Scope], in L'ISLAM EN FRANCE ET EN ALLEMAGNE: IDENTITÉS ET CITOYENNETÉS [ISLAM IN FRANCE AND IN GERMANY: IDENTITIES AND CITIZENSHIPS] 63–71 (Rémy Leveau et al. eds., 2001).

49. Joaquim Mantecon, *Relations Etat-Religion et liberté religieuse en Espagne* [Church-State Relations and Religious Liberty in Spain], in WHAT RELIGIOUS POLICY, *supra* note 25, at 72–78; Francis Messner, *Le Statut des Confessions Religieuses dans les Pays du Sud de l'Europe* [The Status of Religious Confessions in the Countries of Southern Europe], in ETATS, RELIGIONS ET LIBERTÉ RELIGIEUSE EN MÉDITERRANÉE [STATES, RELIGIONS AND RELIGIOUS LIBERTY IN THE MEDITERRANEAN] 137–47 (PUAM 2002) [hereinafter RELIGIOUS LIBERTY IN THE MEDITERRANEAN]. The Spanish legal texts on religious regulation are available at http://www.mju.es/asuntos_religiosos/menu_ne.html.

had entered into concordats with the Vatican, and had recognized public religious demonstrations by only the Catholic Church.⁵⁰ Recently, however, they have undergone evolutions modifying how they deal with religious freedom.

B. United States

Religious freedom as a principle is also in need of defending in the United States, although many Americans do not seem to recognize it. With unique frequency, the State as a political and administrative organization is subjected to pressure by religious lobbies “to save or support religion” in the public sphere. To analyze the danger of this reality, I turn to John Rawls’ definition of political liberalism.⁵¹ If a liberal democracy regards its public sphere as a renewable field of its own possibilities, it should not forget that democracy is weakened when the public sphere is not adequately protected from civil society harassment—in this case, harassment from religious groups that are advancing their private religious agendas. Rawls points out that the public sphere is more than a broad choice of competitive opinions that fight to influence legal institutions and state services.⁵² If the State is transformed into the servant of the best-defended or best-financed opinions, then it ends up abdicating its irreducible duty to represent all the interests of all its citizens⁵³ because the inequalities of greater private wealth permit certain individuals or groups greater influence.⁵⁴ In time, it is likely that the inequalities of influence will lead to certain individuals having a preponderant weight of authority.⁵⁵

There is an inherent danger in treating the public sphere as a sphere to be sold to the best-financed religious cause rather than as a common space where public institutions are available for all. Such treatment of the public sphere implies that some religious groups wish to divert the democratic system for their own private interests.

50. Brigitte Basdevant-Gaudemet, *Organisation culturelle, du XIXème siècle à la décolonisation en Europe du Sud* [Religious Organization, from the Nineteenth Century to the Decolonization of Southern Europe], in RELIGIOUS LIBERTY IN THE MEDITERRANEAN, *supra* note 49, at 15–40.

51. See JOHN RAWLS, POLITICAL LIBERALISM 43–44 (Columbia Univ. Press 1993).

52. JOHN RAWLS, A THEORY OF JUSTICE 225 (Belknap Press 1971).

53. See THE PUBLIC INTEREST 14–26 (Carl J. Friedrich ed., Atherton Press 1962).

54. *Id.* at 1–14.

55. *Id.*

Religion should *never* have the opportunity to control public offices, notably the highest offices, or directly influence public debates and changes in the laws. To allow religions such power adversely affects the practice of democracy, which in turn threatens the very survival of religious freedom. A few examples will illustrate this point.

Prohibiting abortion because God forbids it in the holy texts of Christians, Jews, or Muslims is not a legitimate reason in a liberal democracy to prohibit abortion—although it could be a very legitimate question, of public debate, about the degree of respect for human life in free societies. It is additionally a serious deviance from liberal democracy for citizens or religious groups to demand direct government grants for their churches on the basis of their belief in their individual freedom and in their church's ability to deal with social problems. President Bush's faith-based initiatives project, which allows religious charities to compete equally for government grants without sacrificing their spiritual character,⁵⁶ demonstrates that many people in America fail to appreciate the important difference between their private actions and the appropriate aims of the public sphere. The State's policy is founded on the fundamental principle that any citizen should have the right, as a member of the national community, to minimal education, health, and security.⁵⁷ That some believers commit to mobilize themselves by compassion and moral duty to relieve others of misery is a question of personal engagement in which the State need not get directly involved. The public wealth distribution resulting from taxes is not the business of charity or faith, but the realm of law within constitutional limits.⁵⁸ Forgetting, in the name of the primacy of personal freedom, the difference between the public sphere and private interests threatens

56. See generally Kathryn Dunn Tenpas, *Can an Office Change a Country? The White House Office of Faith-Based and Community Initiatives, A Year in Review*, THE PEW FORUM ON RELIGION & PUBLIC LIFE, available at <http://pewforum.org/events/022002/tenpas.pdf>.

57. See U.S. CONST. pmbl.

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Id.

58. Dana Milbank, *Bush Legislative Approach Failed in Faith Bill Battle; White House is Faulted for Not Building a Consensus in Congress*, WASH. POST, Apr. 23, 2003, at A1.

democracy itself. To point out the difference between the public and private spheres and to defend that difference in the name of religious freedom preserves the democratic spirit, which in turn preserves religious freedom.

The public sphere, according to Rawls, should be at the service of the people.⁵⁹ The State should not put itself in charge of the interests of religious groups, even when they are joined together in powerful associations. From this point of view, rejecting a state-endorsed religion, the famous “wall of separation” about which Jefferson⁶⁰ and others⁶¹ spoke, prevents religion from imposing itself on others and also protects American institutions from religious imposition. A true wall of separation would protect American citizens from being constrained contrary to their freedom of conscience and expression. The defense of religious freedom should be used in the United States to remind people that the wall of separation between the State and religion is a prerequisite to many principles, including freedom of individual conscience and expression, equal treatment of all religions in their personal and collective expression, denominational neutrality of public institutions, and finally, educational freedom and freedom to proselytize.

In order to fully realize religious freedom, which joins together so many fundamental values, it is necessary that the State favor no single religion. Petitioning for the return of religion to public schools, for example, is like asking the State to restrict religious freedom by imposing its own religious vision or allowing specific groups to impose their views on others in public schools. Religious freedom will be much more secure if children are taught the values of democracy in conformity with the sense of a public sphere. Similarly, the recent laws enacted to maintain the expression “under God” in the Pledge of Allegiance⁶² appear to an outsider as the

59. RAWLS, *supra* note 52, at 9.

60. Letter from Thomas Jefferson to the Danbury Baptist Association of Connecticut (Jan. 1, 1802), *available at* <http://www.usconstitution.net/jeffwall.html>.

61. Sometime after 1817, President James Madison wrote an essay entitled *Monopolies*, which also refers to the importance of church-state separation. He stated in part, “Strongly guarded as is the separation between religion and Government in the Constitution of the United States the danger of encroachment by Ecclesiastical Bodies, may be illustrated by precedents already furnished in their short history.” James Madison, *Monopolies* (n.d.), *available at* <http://worldpolicy.org/globalrights/religion/madison-detachedmem.html>.

62. The Buck Act, 4 U.S.C. § 4 (1998), *upheld in* Elk Grove Unified Sch. Dist. v.

defense of a civil religion, as obligatory as the French *laïcité*, when this constitutional principle is called upon by politicians to prohibit religious behavior at public school. In both cases, freedom of conscience is not seriously considered. The oath, “under God,” does not prove that the State respects freedom of religion or its own neutrality, because its political representatives voted for an obviously Christian phrase.

Whereas in the United States, religious activists pursuing their private religious objectives overwhelm the public sphere, it is also recognizable that sometimes the public sphere in Europe restricts religions unfairly in their public manifestations.

IV. CONCLUSION

Religious neutrality of the State is the best guarantee for religious freedom of its citizens, especially when they are not Christians or when they don't adhere to any religion. With thirty million immigrants in its population in 2000,⁶³ the future of the United States and its society would be enhanced if its public institutions and the State would release themselves from this actual civil religion, openly Christian and providential, because of the very religious freedom that the First Amendment professes. In the same way, France should reduce its civil religion of *laïcité* if it wants to respect its constitutional principle of neutrality, which demands respect for all beliefs and freedom of religion, even in their collective manifestations.

Newdow, 124 S. Ct. 2301 (2004).

63. Estimates of the numbers of immigrants in the United States range from 28.4 to 31.1 million, based on varying interpretations of census data collected in the year 2000. (The total U.S. population in 2000 was 281 million.) See OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY 2003 YEARBOOK OF IMMIGRATION STATISTICS (2004), available at <http://uscis.gov/graphics/shared/statistics/yearbook/2003/2003Yearbook.pdf>.

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