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Freedom of Religion: A View From Europe

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I. INTRODUCTION

It can be said that all thought begins with assumptions and "ground-motives" that are inherently "religious," in the sense that people unavoidably interpret their empirical reality and guide their thoughts and actions on the basis of a more or less conscious adherence to some world view or belief-system.[1] The success of any belief-system depends on its ability to provide an acceptable explanation for the basic questions of existence, as well as a plausible normative framework for human conduct.[2] According to this view, the modern distinction between sources of knowledge – such as religion, science, philosophy or ideology – is simply an intellectual construct, devoid of any real ontological or epistemological significance.[3] This is because even "objective" science cannot exist

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1. *See* HERMAN DOOYWEERDE, A NEW CRITIQUE OF THEORETICAL TOUGHT, THE NECESSARY PRESUPOSITIONS OF PHILOSOPHY 5, 57 (David H. Freeman et al. trans., 1997).

2. *See* David S. Caudill, *Law and Belief: Critical Legal Studies and Philosophy of the Law-Idea*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 109, 119 (Michael W. McConnell et al. eds., 2001).

3. *See, e.g.*, ARTHUR SCHOPENHAUER, THE WORLD AS WILL AND REPRESENTATION 171 (E.F.J. Payne trans., Dover Publications 1969) (1859):

> [The things of this world] have only a relative being; they are together only in and through their relation to one another; hence, their

apart from theoretical a priori presuppositions.[4] However, this modern way of understanding the world has made it possible to identify a particular domain of human experience that, throughout history, has been a source of controversy, persecution and discrimination among human beings: The domain of religious experience, the general invocation of some supernatural faith, doctrine and worship. People subscribe to various belief-systems that purport to answer the basic questions of life. This is the essence of the "religious question." But the domain of religion is not so much defined by the question itself as it is by the type of answer to the question. Religion tends to answer the ultimate questions with an appeal to a supernatural or ideal dimension, even if not implying the existence of a Supreme Being.

Different answers to this question lead to different views about the Universe, Life and Person, as well as to different conceptions of the good. They also lead to different political, economic, cultural, scientific and artistic values and goals, translating into a vast diversity of ways people choose to live their daily lives. The challenge of a liberal constitutional democracy has always been to allow for the peaceful coexistence and fair cooperation between people with different worldviews by offering some basic principles of liberty, equality, reciprocity, justice and impartiality which can provide common ground when agreement on the answers to the ultimate questions is not possible.[5] It must be noted that the religious question does not necessarily lead to a strictly religious or supernatural answer. Naturalism and materialism are also possible answers to the same questions, meaning that they share some features with religion and, to a certain extent, can rightly be considered functional equivalents of religion.[6] For instance, in a re-

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> whole existence can just as well be called non-being. Consequently, they are likewise not objects of a real knowledge . . . On the contrary, they are only the object of an opinion or a way of thinking, brought about by sensation.

Id.

4. *See* MIKAEL STENMARK, SCIENTISM 1, 1-3 (2001); Seth Holtzman, *Science and Religion: The Categorical Conflict*, 54 INT'L J. FOR PHIL. OF RELIGION 77, 77-80 (2003); Mary Hesse, *Is Science the New Religion?, in* SCIENCE MEETS FAITH 120, 124-26 (Fraser Watts ed., 1998).

5. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 50 (1999).

6. *See* Rob Wipond, *The World is Round (and Other Mythologies of Modern Science)*, THE HUMANIST, Mar./Apr. 1998, at 9; Michael Shermer, *The*

cent interview Ernst Mayr, a reputed evolutionary biologist from Harvard, admits as much: "All of the atheists I know are highly religious; it just doesn't mean believing in the Bible or God. Religion is the basic belief system of the person. Mankind wants the answers to all unanswerable questions."[7] As such, naturalism and materialism can, in some instances, be considered analogous to religious beliefs, and for some purposes it may even make sense, in the light of those basic principles, to give them the same legal treatment. However, current legal doctrine distinguishes religion from naturalist and materialist worldviews. This approach it is certainly commendable, but may also have some shortcomings.

II. RELIGIOUS FREEDOM AND MODERN PUBLIC LAW

1. *Religious Freedom and the Westphalian Model of State Sovereignty*

The historical development of modern European public law is inseparable from religion and the question of religious freedom.[8] I am speaking here of both constitutional and international law.[9] Some of their defining moments have had a strong religious element built into them. On the one hand, religious intolerance and persecution have always been major sources of internal and international conflict. In many cases this was not only the result of exclusive theological perspectives, but also because both political power and social relationships defined and justified themselves in religious terms, thus tending to give a religious tone to every major political and social source of strife.[10] On the other hand, in some of the most important events to help shape European political and legal history – such as the Crusades, the Discoveries, the Wars of Religion, the Liberal Revolutions, the Holy Alliance, the Crimean War and the Holocaust – religion played a major role.

Shamans of Scientism, SCIENTIFIC AMERICAN, June 2002, at 35.

7. C. Bahls, *Ernst Mayr, Darwin's Disciple*, THE SCIENTIST, Nov. 17, 2003, at 17-18.

8. *See* GÖRG HAVERKATE, VERFASSUNGSLEHRE: VERFASSUNG ALS GEGENSEITIGKEITSORDNUNG 196 (1992).

9. Gunther Zimmermann, *Religionsgeschichtliche Grundlagen des Modernen Konstitutionalismus*, 30 DER STAAT 394 (1991).

10. *E.g.*, Edward J. Eberle, *Roger Williams on Liberty of Conscience*, 10 ROGER WILLIAMS UNIV. L. REV. 289, 306-08 (2005).

Religion's role in these defining occasions explain why religious freedom remained a central international concern from the Peace of Westphalia up until contemporary human rights law.

The right to religious freedom and the duty to tolerate religious diversity, to the extent they impose significant limitations in the internal and external sovereignty of States, are important foundations of modern constitutional and international law, peace and security.[11] Both were, to a large degree, by-products of the religious diversity and conflict following the Protestant Reformation. During the Thirty Years War (1618-48), protestant Dutch theologian and international legal scholar Hugo Grotius wrote his seminal work, *De Jure Belli Ac Pacis*, which was primarily concerned with the warfare that had been and persisted in opposition to the Christian kingdoms, largely due to religious disputes.[12] The end of the war, while demonstrating the impossibility of a military solution to a dialectical impasse of unresolved theological questions, opened the way for a new era of tolerance and free exercise of religion.[13] In Article XXVIII of the Treaty of Peace of Westphalia, we find, for the first time, some recognition of "free Exercise of religion" in an international treaty concerned with the preservation of international peace and security.[14] From then on it became clear that in an international setting characterized by a plurality of religious beliefs frequently responsible for war and human devastation, observance of international law was inseparable from religious tolerance, and religious tolerance was inseparable from international law.

Although the Protestant Reformation tended to emphasize the

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11. See Natham A. Adams, IV, *A Human Rights Imperative: Extending Religious Liberty Beyond the Border*, 33 CORNELL INT'L L.J. 1 (2000); Hilaire McCoubrey, *Natural Law, Religion and the Development of International Law*, *in* RELIGION AND INTERNATIONAL LAW 177 (Mark W. Janis & Carolyn Evans eds., 1999).

12. HUGO GROTIUS, THE LAW OF WAR AND PEACE (Louise R. Loomis, trans., Classics Club 1949) (1648).

13. *See* JOHN RAWLS, A THEORY OF JUSTICE 10-15 (rev. ed. 1999) [hereinafter THEORY OF JUSTICE]; JOHN RAWLS, POLITICAL LIBERALISM xxiv, 4, 303 (Columbia Univ. Press 1996) (1993) [hereinafter POLITICAL LIBERALISM]; H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 45-47 (1993).

14. *See* Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. OF INT'L L. 20 (1948); DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 2-3 (2001).

centrality of autonomous individual conviction – as a result of the doctrine of salvation by faith alone – the principle that originally dominated church-state relations in the Westphalian Model of the Sovereign State was *cuius regio eius et religio,* according to which it was up to the Sovereign, as "first member of the Church," to decide matters of religious truth and reform.[15] Religious free exercise, as mentioned in the treaty of Westphalia, was still the exception to the rule.[16] The Sovereign could choose the religion of the State and impose it on his subjects. Tolerance, when it existed at all, was justified for prudential and pragmatic reasons. In protestant States it was mostly confined to protestant factions, with political and religious censorship being enforced through crown copy rights.[17] In Catholic States the prevailing doctrine was the exclusivist notion of *libertas ecclesiae*, based on the rights of truth and in the ordered coalition (*ordinata colligatio*) between Church and State, usually enforced through such institutions as the Inquisition and *Index* of Forbidden Books (*index librorum prohibitorum*).[18] All European States were understood as religious entities, and coercion was seen as a structural part of religious life with important domestic and international implications. Sovereignty remained largely a theologico-political construct, and, even when given a more secular meaning, it was defined as an absolute power over religious factions.[19] The seeds of religious persecution and

15. PIETRO AGOSTINO D'AVACK, TRATTATO DI DIRITTO ECCLESIASTICO ITALIANO 299-300 (1969).

16. *See* Eberle, *supra* note 10, at 308.

17. *See* THOMAS L. TEDFORD, FREEDOM OF SPEECH IN THE UNITED STATES 325-26 (3d ed. 1997); Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CAL. L. REV. 323 (2003).

18. *See* Haverkate, *supra* note 6, at 197; GERALD GÖBEL, DAS VERHÄLTNIS VON KIRCHE UND STAAT NACH DEM CODEX IURIS CANONICI DES JAHRES: 1983 25-26 (1993); D'AVACK, *supra* note 15, at 455; JOHN THOMAS NOONAN JR., THE BELIEVER AND THE POWERS THAT ARE: CASES, HISTORY, AND OTHER DATA BEARING ON THE RELATION OF RELIGION AND GOVERNMENT ch. 4 (1987).

19. *E.g.*, THOMAS HOBBES, LEVIATHAN 426 (Barnes & Noble Books 2004) (1651):

> Seeing that in every Christian common-wealth, the Civill Soveraign is the Supreme Pastor, to whose charge the whole flock of his Subjects is committed . . . it followeth also, that it is from the Civill Soveraign that all other pastors derive their right of Teaching, Preaching, and other functions pertaining to that Office . . . in the same manner as the Magistrates of Towns, Judges in Courts of Justice . . . are all but Ministers of him that is the Magistrate of the

war remained. So while religious tolerance and free exercise were seen as important in the international community, there was still not much room for them internally.

This conception, very influential in European public law, postulated an intimate relationship between Church and State of a theologico-political nature. Some members of the radical Reformation challenged this state of affairs by defending religious freedom as an individual right, paving the way for the fundamentalization and constitutionalization of fundamental rights that began in the Anglo-American tradition.[20] According to Jeffrey Cox, "[i]n a sense the debate about religion as conscientious choice was a working out of the implications of seventeenth-century Baptist confession of faith, which asserted that 'The Magistrate is not by virtue of his office to meddle with religion.'"[21] The same author goes on to say that "[h]owever much it may be asserted that seventeenth-century dissenters were indistinguishable from their neighbors, their religious principles were revolutionary."[22] Roger Williams deserves much of the credit for this new, evangelical understanding of religious freedom. However, it is also fair to say that much is owed to the religious and political thought of John Locke, himself from a Puritan upbringing.[23] This was really the relevant turning point in the history of modern public law. The modern defense of religious freedom is inseparable from the rise of freedom of conscience, freedom of speech, social contract theory and popular sovereignty that were the cornerstones of modern liberal constitutionalism. The liberal constitutional understanding of religious freedom rests on the foundations laid primarily by Roger Williams

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whole common-wealth . . . which is alwaies the Civill Soveraign. *Id.*

20. *See generally* Gerald Stourzh, *Die Begründung der Menschenrechte im englischen und amerikanerischen Verfassungsdenken des 17. und 18. Jahrhunderts, in* MENSCHENRECHTE UND MENSCHENWÜRDE: HISTORISCHE VORAUSSETZUNGEN, SÄKULARE GESTALT, CHRISTLICHES VERSTÄNDNIS 78 (Ernst Wolfgang Böckenförde & Robert Spaemann eds., 1987).

21. Jeffrey Cox, *Religion and Imperial Power in Nineteenth-Century Britain, in* FREEDOM OF RELIGION IN THE NINETEENTH CENTURY 339, 340 (Richard J. Helmstadter ed., 1997).

22. *Id.*

23. Although Locke was born to a family with "Puritan sympathies," he later committed himself to "the classical Anglican tradition of engaging in polemics . . . against both the Church of Rome and the Protestant dissenters." THE CAMBRIDGE COMPANION TO JOHN LOCKE 5, 7 (Vere Chappell ed., 1994).

and John Locke.

2. *Religions Freedom, Natural Rights and Modern Constitutionalism*

Much affected by the persecution of Christians of a Puritan persuasion in England, and himself a victim of religious persecution in the New England Colony of Massachusetts Bay, Roger Williams founded the Colony of Rhode Island upon the principles of religious freedom and separation of Church and State. He considered these principles as required by both the pure teachings of Christianity, and the need to protect that purity from exogenous influences.[24] For Roger Williams religion was a matter of individual conscience and the collective ecclesiastical body.[25] The public magistrate had nothing to do with it. This was understood as a universal principle, applicable "to all men in all nations and countries."[26] Because of this view, Roger Williams has been called by many the father of religious freedom.[27] Also noteworthy is the contribution of the English Leveller William Walwyn, author of *Toleration Justified and Persecution Condemned*,[28] who almost simultaneously defended a similar principle: "[I]n matters disputable and controverted, every man must examine for himself."[29] It is not entirely known to what extent these contributions influenced John Locke in any direct way; however, as we read John Locke's *Letter Concerning Religious Toleration* – written with the recent memories of religious wars in mind[30] – it is not hard to find themes and thoughts common to those of Roger Williams and the Levellers.[31]

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24. Eberle, *supra* note 10, at 301-02.

25. Edward J. Eberle, *Roger Williams' Gift: Religious Freedom in America* 4 ROGER WILLIAMS U. L. REV. 425, 438-40 (1999); *see generally* ROGER WILLIAMS, THE BLOUDY TENENT OF PERSECUTION, FOR THE CAUSE OF CONSCIENCE, DISCUSSED IN A CONFERENCE BETWEEN TRUTH AND PEACE (Richard Groves ed., Mercer Univ. Press 2001) (1644).

26. WILLIAMS, *supra* note 25, at 1-2.

27. *E.g.*, TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY 116-138 (1998).

28. WILLIAM WALWYN, TOLERATION JUSTIFIED AND PERSECUTION CONDEMNED, *reprinted in* THE ENGLISH LEVELLERS ch. 2 (Cambridge Texts in the History of Political Thought, Andrew Sharp ed., 1998) (1646).

29. *Id.*

30. THE CAMBRIDGE COMPANION TO JOHN LOCKE, *supra* note 23, at 13-16.

31. *See* JOSEPH FRANK, THE LEVELLERS: A HISTORY OF THE WRITINGS OF

The originality of John Locke's contribution has to do with his persistent theoretical defense of freedom of conscience and religion as a basis from which natural rights, popular sovereignty, limitations on political power and separation of church and state are derived.[32] Locke's main arguments for individual freedom are based mostly on the notion that true faith has to be sincere, rather than coerced, and that coercion in matters of religion is inconsistent with the doctrine and practice of Christian love.[33] This view of religious freedom is closely associated with Locke's perception of the nature of the Church; indeed his reasoning in a *Letter on Toleration* is illustrative. Locke claimed that a church is a "[v]oluntary society of men, joining themselves together of their own accord in order to the public worshipping of God in such a manner as they judge acceptable to Him, and effectual to the salvation of their souls."[34] This definition clearly defied the traditional conception of an established Church. For John Locke, "[n]o man by nature is bound unto any church or sect, but everyone joins himself voluntarily to that society in which he believes he has found that profession and worship which is truly acceptable to God."[35] All forms of *odium theologicum* and religious violence against dissidents completely contradicted true Christian doctrines, resulting in a fundamental incomprehension of their meaning.[36]

THREE SEVENTEENTH-CENTURY SOCIAL DEMOCRATS: JOHN LILBURNE, RICHARD OVERTON, WILLIAM WALWYM chs. II, III, IV (1955); THE ENGLISH LEVELLERS, *supra* note 28, at 9, 54; PURITANISM AND LIBERTY 5-6 (A.S.P. Woodhouse ed., 1951); MANFRED BROCKER, DIE GRUNDLEGUNG DES LIBERALEN VERFASSUNGSSTAATES: VON DEN LEVELLERN ZU JOHN LOCKE 89-101 (1995).

32. David A. J. Richards, *Revolution and Constitutionalism in America*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 85, 86-87, 107-08 (Michel Rosenfeld ed., 1994); Walter Euchner, *Individuelle und politicshe Macht: der Beitrag John Lockes im Vergleich zu Hobbes und Spinoza*, *in* BÜRGERSCHAFT UND HERRSCHAFT: ZUM VERHÄLTNIS VON MACHT UND DEMOKRATIE IM ANTIKEN UND NEUZEITLICHEN POLITISCHEN DENKEN 117, 131-38 (Jürgen Gebhardt & Herfried Münkler eds., 1993).

33. "No peace and . . . no, not so much as common friendship can even be established or preserved amongst men, so long as this opinion prevails, that dominion is founded in grace, and 'that religion is to be propagated by force of arms.'" JOHN LOCKE, A LETTER CONCERNING TOLERATION 31 (Prometheus Books 1990) (1689).

34. *Id.* at 22.

35. *Id.*

36. *Id.* at 32.

> He that pretends to be a successor of the apostles . . . is obliged also to admonish his hearers of the duties of peace and good-will towards

The notion that religion is a matter of personal conviction, and not of coercion, leads John Locke to a limited view of State sovereignty. According to his theory, the State should not interfere with personal choice in the realm of religion and, consequently, should be separate from the Church: "[T]he care of the salvation of men's souls cannot belong to the magistrate; because, though the rigor of laws and the force of penalties were capable to convince and change men's minds, yet would not help at all to the salvation of their souls."[37] The State should be viewed as "a society of men constituted only for the procuring, preserving, and advancing their own civil interests."[38] It is clear that the principles of individual autonomy and consent are the basis of both religious and political life for Locke. The same is true for the conjugal society of man and woman.[39] According to this view, eliminating government coercion from religious matters minimizes the danger that States will engage in the religious persecution of their citizens, and that they will wage religious warfare against other States. Based on these principles, John Locke articulates a consistent political theory based on individual autonomy, popular sovereignty, limited government, separation of powers and separation of Church and State. While unable to practically implement his ideas due to existing political and social constraints,[40] his basic understanding of

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> all men; as well towards the erroneous as the orthodox; towards those that differ from them in faith and worship, as well as towards those that agree with them therein . . . [I]f any one that professes himself to be a minister of the word of God, a preacher of the Gospel of peace, teach otherwise; he either understands not, or neglects the business of his calling, and shall one day give account thereof unto the Prince of Peace.

Id.

37. *Id.* at 21.

38. *Id.* at 18.

39. JOHN LOCKE, TWO TREATISES OF GOVERNMENT: BOOK TWO ch. VII (The Classics of Liberty Library ed., spec. ed. 1992) (1690).

40. In *The Fundamental Constitutions of Carolina*, written by John Locke in 1669 and amended by the Earl of Shaftesbury for whom he worked, Article 96, which established the religion of the King of England, is thought to have been inserted against John Locke's will, who had separatist convictions. THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA, The Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/states/nc05.htm#3, art. 96, nn.2-3 (last visited Apr. 25, 2005). This constitutional text is interesting because it acknowledges the principle of civic equality for all people regardless of religion, and grants a broad freedom of conscience and religion to all individuals including natives, Jews and slaves. *Id.* arts. 97, 107. Article 97 is

the voluntary nature of individual and institutional religious life certainly influenced the Founding Fathers of the American Republic and their constitutional project.[41] The need to protect the free exercise of religion and to separate the State from the Church was recognized by the First Amendment to the Federal Constitution of the United States in 1791.[42] Roger Williams's and John Locke's contributions to religious freedom are particularly relevant today, given both men's treatment of religion and religious pluralism.

III. SECULARIZATION AND THE MODERNIZATION OF RELIGION

John Locke put forth an understanding of religious freedom premised on the moral and rational autonomy of individuals, a value on which both significant factions of evangelicals and

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worth transcribing here since it is a remarkable piece in the history of religious freedom, with clear Lockean overtones:

> But since the natives of that place, who will be concerned in our plantation, are utterly strangers to Christianity, whose idolatry, ignorance, or mistake gives us no right to expel or use them ill; and those who remove from other parts to plant there will unavoidably be of different opinions concerning matters of religion, the liberty whereof they will expect to have allowed them, and it will not be reasonable for us, on this account, to keep them out, that civil peace may be maintained amidst diversity of opinions, and our agreement and compact with all men may be duly and faithfully observed; the violation whereof, upon what presence soever, cannot be without great offence to Almighty God, and great scandal to the true religion which we profess; and also that Jews, heathens, and other dissenters from the purity of Christian religion may not be scared and kept at a distance from it, but, by having an opportunity of acquainting themselves with the truth and reasonableness of its doctrines, and the peaceableness and inoffensiveness of its professors, may, by good usage and persuasion, and all those convincing methods of gentleness and meekness, suitable to the rules and design of the gospel, be won ever to embrace and unfeignedly receive the truth; therefore, any seven or more persons agreeing in any religion, shall constitute a church or profession, to which they shall give some name, to distinguish it from others.

Id. art. 97.

41. In particular, Thomas Jefferson based his authorship of the Virginia Bill for Establishing Religious Freedom upon Locke's basic arguments in favor of religious liberty; unlike Locke, however, who excluded "Catholics and atheists" from the scope of "his general rule of toleration," the Virginia Bill called for an unqualified right to hold and profess religious doctrine without governmental intrusion. HALL, *supra* note 27, at 125-26.

42. *See* U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

Enlightenment rationalists could, to a large extent, find common ground. Religion was still seen as an important part of life. In fact, it was seen as too important to be prescribed or proscribed by the State. Thus, in the recently created United States of America, religious freedom and separation of Church and State, at least at a federal level, became central principles of constitutional law recognized in the First Amendment to the United States Constitution of 1787 with the support of rationalists like Thomas Jefferson and James Madison, as well as some evangelical groups such as the Baptists.[43] This, however, did not eliminate all problems; in many cases, colonial and state life was full of religious bigotry and persecution.

In Europe the reality was much different. The religio-political establishments, both catholic and protestant, were sources of broad license for absolute political power in the Monarchy. The doctrine of divine sovereignty was the incontestable source of legitimacy. In waging a strong political and ideological fight against anti-liberal forms of Christianity, the European intellectual elite believed that political reform was only possible through a concerted attack against the religious foundations of political power, as well as the religious institutions and clerics themselves. Some of the official protestant churches required little more than infant baptism from their flock, and embraced liberal, rational theologies allowing for the faster development of a rationalistic, naturalistic and positivistic world view, slowly undermining the social influence of the opposing religious world view. In Catholic countries the attack on organized religion was much more virulent. This would tend to explain the anti-religious radicalism and violence of the French Revolution,[44] as well as of liberal revolutions in other

43. For a more thorough analysis on the development of religious liberty within the nascent stage of American constitutional law, see Kathleen A. Brady, *Foundations for Freedom of Conscience: Stronger Than You Might Think*, 10 ROGER WILLIAMS UNIV. L. REV. 359, 373-83 (2005)

44. THOMAS CARLYLE, THE FRENCH REVOLUTION: A HISTORY 11 (Modern Library 2002) (1837).

> Hapless ages: wherein, if ever in any, it is an unhappiness to be born. To be born, and to learn only, by every tradition and example, that God's universe is Belial's and a Lie; and 'the Supreme Quack' the hierarch of men! In which mournfullest faith, nevertheless, do we not see whole generations . . . live, what they call living; and vanish, without chance of reapperance?

European catholic countries (e.g., Italy, Spain, and Portugal).[45] The Enlightenment criticism of religion rested on the assumption that religion was a deficient mode of understanding the world that would inevitably be replaced by empirical observation and rational science.[46] This would be the essence of free inquiry, free thought and free speech.[47] An early manifestation of this anti-religious rationalism can be detected in Article 11 of the French Declaration of the Rights of Men and Citizen of 1789, where freedom of thought is protected without any positive reference to religious freedom, although discrimination on religious grounds is prohibited in Article 10.[48] The liberal emphasis on freedom of religious conscience, originally meant to underscore the sacred nature of individual religious conscience, soon became a means of affirming its private, subjective and ultimately irrelevant character.

This process has been characterized as the secularization, modernization and functional differentiation of society.[49] Through

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Id.

45. State sponsored secularism during the Spanish Revolution sought to relegate the Catholic Church from the status of the official state religion to that of a mere "association," thus enabling the state to place strict limits upon the ability of the Church to evangelize, teach, and engage in commerce. The Spanish revolution culminated in the "unconditional expropriation of [Church] property at the hands of an anti-clerical regime." GABRIELE RANZATO, THE SPANISH CIVIL WAR 39 (Janet Sethe Paxia trans., Interlink Books 1999). Similarly, Italian nationalism during the nineteenth century led to widespread revolution within the Papal States, during which the Pope's temporal power over the Papal lands was completely abolished. HARRY HEARDER, ITALY: A SHORT HISTORY 166 (Jonathan Morris ed., 2d Rev. Ed. 2001). It was not until Mussolini's enactment of the Lateran Pact in 1929 when the Vatican was established as a sovereign city state under the temporal rule of the Holy See. *Id.* Moreover, the Lateran Pact re-established the Catholioc Church as the "sole religion of the state of Italy." *Id.* at 230.

46. *E.g.*, KARL MARX, CRITIQUE OF HEGEL'S DOCTRINE OF THE STATE (1843), *reprinted in* KARL MARX, EARLY WRITINGS 156 (Rodney Livingstone et. al. eds., Penguin Books 1992) ("[C]hristianity or religion in general is an extreme opposite of philosophy. But in reality there is no *true* antithesis between religion and philosophy. For philosophy comprehends *religion* in its *illusory* reality. In the eyes of philosophy, religion . . . must necessarily disintegrate.").

47. See G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996).

48. *See* DECLARATION OF THE RIGHTS OF MAN AND CITIZEN (1789), *reprinted in* THE FRENCH REVOLUTION AND HUMAN RIGHTS: A BRIEF DOCUMENTARY HISTORY, 77-79 (Lynn Hunt ed., 1996).

49. *See* JOHN M. SWOMLEY, RELIGIOUS LIBERTY AND THE SECULAR STATE

this process, state-established religions have come to lose their control over the political, legal, economic, cultural and scientific life, leaving more room for individual freedom and equality in all these spheres of social action. Some of the manifestations of secularization are still with us and should remain. They have made possible the constitutional protection of religious autonomy and the removal of State coercion and legal discrimination from the realm of religion, putting an end to centuries of intolerance and abuse on the part of existing religious institutions. However, secularization went much further than that. During the nineteenth century, the rise of positivism, scientism, materialism, evolutionism and pragmatism are best understood as manifestations of this emerging secularized worldview. Positivism and scientism conceived religion in Darwinian terms, a phase of an evolutionary process that started with mythological knowledge and ended in the rational liberation of mankind.[50] Dogmatism would, inevitably, give way to skepticism, and then to criticism. This line of thought was premised on the belief that reason and science alone could explain the Universe and life, without any need for a supernatural first cause. The "death of God," as proclaimed by Friedrich Nietzsche, was the *leit-motive* of a new secular era of seemingly infinite intellectual, scientific and technological possibilities.[51] While it is not difficult to find flaws in this worldview, the point is that a negative view of religion has been prominent among the intellectual elite in both Europe and the United States, although the

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121-23 (1987); PETER L. BERGER, THE SACRED CANOPY ch. 5 (1967); *Developments in the Law – Religion and the State: The Complex Interaction Between Religion and Government*, 100 HARV. L. REV. 1612-16 (1987); PETER BEYER, RELIGION AND GLOBALIZATION ch. 3 (1994).

50. *E.g.*, FRIEDRICH NIETZSCHE, ON THE GENEAOLOGY OF MORALS (1887), *reprinted in* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS & ECCE HOMO 90-91 (Walter Kaufman ed., Vintage Books 1989):

> The advent of the Christian God . . . was thereofre accompanied by the maximum feeling of indebtedness on earth. Presuming we have gradually entered upon the *reverse* course . . . the prospect cannot be dismissed that the complete and definite victory of atheism might free mankind of this whole feeling of guilty indebtedness toward its origin, its *prima causa*. Atheism and a kind of second innocence belong together.

Id.

51. FRIEDRICH NIETZSCHE, THUS SPOKE ZARATHUSTRA: A BOOK FOR NONE AND ALL 12 (Walter Kaufman ed., Penguin Books 1978) (1891).

strong biblical roots of American popular religion has probably kept it from becoming immediately as pervasive in the United States as it became in Europe. Even today, however, its influence can still be easily detected in most schools of political philosophy and legal theory, where the combined emphasis on "public reason," "communicative ethics," "economic analysis of the law," "hermeneutics," "linguistic turn," "deconstruction," "Machiavellian moments," the "fight against phalologocentrism," the "struggle against patriarchal traditions," "pragmatism" and "systems theory" is frequently used, in more or less subtle ways, to underline the alleged irrational, unreasonable, inefficient, subjective, emotional, oppressive, interpretative, pernicious and marginal nature of religion.

IV. RELIGIOUS RESURGENCE AND "DESECULARIZAION"

In the last years of the twentieth century and early years of the twenty-first, commentators began pointing out signs that seemed to suggest that the move towards secularization was reversing. Renowned sociologist Peter Bergercalls this complex phenomenon "desecularization:" its shape is elusive and its causes are manifold.[52] According to Berger, the end of the Cold War brought an end to communism, the last of the secular metanarratives. For better or worse, this was an important catalyst for the resurgence of religious sentiment, often causing ancient hatreds and ethnic violence to surface.[53] With the probability of a Western-led globalization approaching certainty, Islamic fundamentalism rose to offer the Islamic states a religious and cultural identity to resist the perceived threat of western cultural imperialism. The Iranian revolution of 1979 is generally considered to have started this process.[54] An equally important factor in this trend towards another, albeit very different, form of "desecularization" was the election of Democrat Jimmy Carter as President of the United

52. Peter L. Berger, *The Desecularization of the World: A Global View*, *in* THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS 1 (Peter Berger ed., 1999).

53. *See* Robert Wuthnow, *Indices of Religious Resurgence in the United States*, *in* RELIGIOUS RESURGENCE 15 (Richard T. Antoun & Mary Elaine Hegland eds., 1987).

54. GILLES KEPEL, JIHAD: THE TRAIL OF POLITICAL ISLAM 130-35 (Anthony F. Roberts trans., Beiknap Press 2002) (2000).

States, accompanied by the rise of the predominantly evangelical movements: the Moral Majority and Christian Coalition; these were groups with strong connections to the Republican Party.[55] These events that led to a stronger presence of religious themes in the sphere of public discourse seem to have been an American manifestation of a wider phenomenon: the worldwide growth of evangelicalism.[56] The impact of the media attention to the Papacy of Pope John Paul II thrust religion further into prominence within the global sphere.[57] In natural sciences, the rise of the Intelligent Design Movement, with its claim of empirically measurable evidence of intelligent design and fine-tuning in nature, has made it more difficult to support the rational and scientific necessity of naturalism and materialism.[58] More recently, the religiously motivated September 11 attacks in New York and Washington D.C. have made inevitable religious contemplation as a central question in public life.[59] If the astounding successes of Tim LaHaye's and Jerry B. Jenkin's *Left Behind* series,[60] Mel Gib-

55. *See* A. James Reichley, *Faith in Politics*, *in* RELIGION RETURNS TO THE PUBLIC SQUARE 163 (Hugh Heclo & Wilfred M. McClay eds., 2003).

56. *See* David Martin, *The Evangelical Upsurge and its Political Implications*, *in* THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS, *supra* note 52, at 37.

57. *See* George Weigel, *Roman Catholicism in the Age of John Paul II*, *in* THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS, *supra* note 52, at 19.

58. *See e.g.*, WILLIAM A. DEMBSKI, NO FREE LUNCH: WHY SPECIFIED COMPLEXITY CANNOT BE PURCHASED WITHOUT INTELLIGENCE (2002); CREATIONISM AND ITS CRITICS: PHILOSOPHICAL, THEOLOGICAL, AND SCIENTIFIC PERSPECTIVES (Robert T. Pennock ed., 2001); WERNER GITT, IN THE BEGINNING WAS INFORMATION (2000); PHILLIP E. JOHNSON, THE WEDGE OF TRUTH: SPLITTING THE FOUNDATIONS OF NATURALISM (2000); WILLIAM A. DEMBSKI, THE DESIGN INFERENCE: ELIMINATING CHANCE THROUGH SMALL PROBABILITIES (1998); MICHAEL J. BEHE, DARWIN'S BLACK BOX: THE BIOCHEMICAL CHALLENGE TO EVOLUTION (1996).

59. *See* BRUCE LINCOLN, HOLY TERRORS: THINKING ABOUT RELIGION AFTER SEPTEMBER 11 1, 33 (2003).

60. *See* TIM LAHAYE & JERRY B. JENKINS, LEFT BEHIND: A NOVEL OF THE EARTH'S LAST DAYS (Left Behind Series No. 1, 1996); TRIBULATION FORCE: THE CONTINUING DRAMA (Left Behind Series No. 2, 1997); NICOLAE: THE RISE OF ANTICHRIST (Left Behind Series No. 3, 1998); SOUL HARVEST: THE WORLD TAKES SIDES (Left Behind Series No. 4, 1999); APOLLYON: THE DESTROYER IS UNLEASHED (Left Behind Series No. 5, 2000); ASSASSINS: ASSIGNMENT: JERUSALEM, TARGET: ANTICHRIST (Left Behind Series No. 6, 2000); THE INDWELLING: THE BEAST TAKES POSSESSION (Left Behind Series No. 7, 2001); THE MARK: THE BEAST RULES THE WORLD (Left Behind Series No. 8, 2001);

son's *The Passion of the Christ*,[61] and Dan Brown's fiction novel *The Da Vinci Code*[62] are any indication, it seems that the public at large too recognizes this inevitability.

So far, Europe has been considered an exception to this religious resurgence. The new religious message still faces many obstacles in reaching the general public, despite people affirmatively seeking ritual sanction from the religious communities for the decisive moments of their lives (e.g., Baptism, Wedding and Funeral). The traditional national peoples' churches (*Volkskirchen*) of some European countries are often seen simply as service-providing-agencies, and are facing declining attendance. The problem is even more acute when one considers the intellectual elite.[63] In fact, as we shall see below, there has even been a recent surge of secularism, fuelled by the fear of political Islam. This general trend has been punctuated by several significant religious manifestations at a popular level in the Old Continent. However, the new interest in religion, as shown by Jürgen Habermas – one of Europe's leading thinkers on secularized, communicative reason – may signal a future structural transformation of the European public sphere by allowing more intellectuals to be increasingly vocal about their religious commitments.[64] More and more, religion, with its inherent quest for meaning and value, is presented as an "ethical reservoire in the secular society."[65]

DESECRATION: ANTICHRIST TAKES THE THRONE (Left Behind Series No. 9, 2002); THE REMNANT: ON THE BRINK OF ARMAGEDDON (Left Behind Series No. 10, 2003); ARMAGEDDON: THE COSMIC BATTLE OF THE AGES (Left Behind Series No. 11, 2003); GLORIOUS APPEARING: THE END OF DAYS (Left Behind Series No. 12, 2004); THE RISING: ANTICHRIST IS BORN (Left Behind Series No. 13, 2004).

61. The Passion of the Christ (Newmarket Films 2004).

62. DAN BROWN, THE DA VINCI CODE (1st ed. 2003).

63. Grace Davie, *Europe: The Exception that Proves the Rule?*, *in* THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS, *supra* note 52, at 65.

64. In particular, Habermas sought to revive the Hegelian idea of the *Volksreligion*, the idea that the "religion of reason" would most easily appeal to the masses "only if it connected up with myths and addressed the heart and the imagination . . . ," so as to become "woven into the entire fabric of [the] state." JÜRGEN HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY: TWELVE LECTURES 26 (Frederick G. Lawrence trans., M.I.T. Press 1990) (1985).

65. Otto Depenheuer, *Religion als ethische Reserve der säkularen Gesellschaft? Zur staatstheoretischen Bedeutung der Kirche in nachchristlicher Zeit*, *in* NOMOS UND ETHOS 3, 3 (Otto Depenheuer et al. eds., 2002).

It is too early to characterize this complex phenomenon of religious resurgence and to evaluate its impact in the field of law. However, we can already discern some recent attempts to accommodate a larger role for religious arguments in the liberal discourse of public advocacy and justification,[66] and to rescue some of the leading schools of legal theory from their crisis of faith.[67]

V. RELIGIOUS FREEDOM AS A VALUE OF INTERNATIONAL LAW AND TRANSNATIONAL JUSTICE

Today, the right of freedom of religion can better be understood as both a "transnational" and "international" value. These terms have been coined by legal doctrine to suggest that, from the standpoint of the international community, this right should be promoted both by the constitutional law of each country and by international law at a global level.[68] The main purpose of the international community is to see that this right be recognized and protected for every individual by every State within a democratic legal system of fundamental rights protecting free and equal citizens. Constitutional law, as the basic law of each and every State, is the primary *locus* where the protection of religious freedom, along with all other fundamental rights, must take place. National courts, including Constitutional Courts, should afford the protection of this right to each and every citizen and resident subject to its jurisdiction. It is the responsibility of national courts to guarantee that these rights are directly applicable to individual cases, and also to restrain the normative powers of legislatures and executives.

Freedom of religion is now proclaimed as a fundamental right in virtually all international human rights documents. Article 18

66. *See* CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTIONS IN LIBERAL POLITICS 10-17 (2002).

67. *See* David Kennedy, *Losing Faith in the Secular: Law, Religion, and the Culture of International Governance*, *in* RELIGION AND INTERNATIONAL LAW, *supra* note 11, at 309; Scott Thomas, *The Global Resurgence of Religion, International Law and International Society*, *in* RELIGION AND INTERNATIONAL LAW, *supra* note 11, at 308, 321; Harold J. Berman, *Foreword*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 2, at xi-xiv.

68. *See* Allen Buchanan & David Golove, *Philosophy of International Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 868, 881-86 (Jules Coleman & Scott Shapiro eds., 1999).

of the Universal Declaration of Human Rights (UDHR) states that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[69] This right is premised upon individual rational and moral autonomy as affirmed in Article 1 of the UDHR,[70] which states that all human beings are born free and equal in dignity and rights, and are endowed with reason and conscience. Religious freedom is conceived primarily as an individual right, and not as a national or ethnic right.

It must be remembered that the UDHR is not per se legally binding. However, some countries make it mandatory that their bills of rights be interpreted in accordance with the UDHR. Portugal is a case in point. Article 16(2) of its Constitution states that "[t]he provisions of this Constitution and of laws relating to fundamental rights shall be construed and interpreted in harmony with the Universal Declaration of Human Rights."[71] But even in the absence of such a provision, all countries that are part of the United Nations should be expected, in good faith, to follow the UDHR as an interpretative guideline in the field of fundamental rights.

At a global level, Article 18(1, 3) of the International Covenant of Civil and Political Rights (ICCPR), restates Article 18 of the UDHR and Article 9(2) of the European Convention of Human Rights (ECHR), and adds, respectively, in Sections 2 and 4, the principle that no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice, and a provision on the respect for the liberty of parents and their right to ensure the religious and moral education of their children in conformity with their own convictions.[72] Equally important is the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

69. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., 183d plen. mtg. at 71, U.N. Doc. A/810 (1948), *available at* http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement.

70. *Id.*

71. PORT. CONST. art. 16, § 2.

72. *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 18, §§ 1-4, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

(DEIDRB).[73] After restating the right of freedom of religion, it places it in the broader context of equal freedom by determining, in Article 2, that "[n]o one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief."[74] In Section 2 it defines the expression "intolerance and discrimination based on religion or belief" as meaning "any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis."[75] Further Article 3 states:

> Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.[76]

Every national court thus has the responsibility to act as a Human Rights Court. If they live up to this expectation they will be providing immediate relief to individuals in cases alleging human rights violations, and will alleviate higher court and international court caseloads. In doing so, they will be contributing to a more rational use of scarce personal, financial, institutional and procedural resources that comprise the judicial system. International Human Rights Law cannot be expected to provide relief to every human rights violation that occurs within a State. International Human Rights Courts can deal with individual violations, but they cannot provide the systemic reforms that are needed to put in place the substantive, institutional and procedural norms adequate to protect fundamental rights at a national level. The State still plays a crucial role when it comes to defending the fun-

73. G.A. Res. 36/55, U.N. GAOR, 36th Sess., U.N. Doc. A/RES/36/55 (1981).
74. *Id.* art. 2.
75. *Id.*
76. *Id.* art 3.

damental rights of individuals and communities, both national and resident.

In performing their duty of protecting religious freedom, national courts are not alone and should not act in isolation. As previously stated, religious freedom is to be regarded not only as an international value-protected solely by international law, but also as a transnational value. This means that the international community has a stake in the way each country deals with the religious freedom of its citizens and residents. In other words, this has long ceased to be exclusively a constitutional law problem that each state is to solve as it pleases. The understanding of religious freedom as a transnational value legitimizes the practice of constitutional and international cross-fertilization between national and international courts, much facilitated by new communications technologies.[77] Thus, in solving many of the problems it faces, a national court should consider the way national courts from other countries have dealt with similar situations. For instance, the United States Supreme Court has an important body of jurisprudence on religious freedom and church-state relations[78] that can provide national courts with important hermeneutic guidelines when interpreting relevant constitutional norms. The same is true for other national high courts such as the Italian Corte Costituzionale or the German Bundesverfassugsgericht. Equally important is to consider the decisions of International Human Rights Courts. For instance, the national courts of the States that have subscribed to the ECHR and its 11th Protocol should consider the decisions of the European Court of Human Rights, by whose standards their own decisions will, ultimately, be reviewed. It can be said that national courts should see their own task more as one of affirming religious freedom as a value of transnational justice

77. *See* Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int'l L.J. 191, 199-204 (2003); NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE 3, 19-21 (2002); *see generally* Peter Häberle, *Wechselwirkung zwischen deutschen und ausländischen Verfassungen*, *in* 1 HANDBUCH DER GRUNDRECHTE IN DEUTSCHLAND UND EUROPA: ENTWICKLUNG UND GRUNDLAGEN 313 (Detlef Merten & Hans-Jürgen Papier eds., 2004).

78. *See generally* Donald T. Kramer, Annotation, *Supreme Court Cases Involving Establishment and Freedom of Religion Clauses of the Federal Constitution*, 37 A.L.R.2d 1147 (1996) (providing a comprehensive study of the United States Supreme Court's application of the clauses).

than of simply interpreting the religious freedom provisions of their own constitutions, or any other fundamental rights provision for that matter.

VI. FREEDOM OF RELIGION AND THE EUROPEAN COURT OF HUMAN RIGHTS

In May 1949, a few years after the Holocaust and World War II, and as a conscious reaction to these events, the Council of Europe was established to promote human rights, democracy and the rule of law in the Old Continent.[79] The Council's main objective was to return to the basic principles that provided the substantive foundations of modern liberal constitutionalism in the seventeenth and eighteenth centuries, which had subsequently been overthrown by anti-liberal authoritarian, statist and militaristic ideologies. One year later, this intergovernmental organization approved the ECHR, a regional, legally binding human rights treaty ratified in 1953.[80] The enforcement of human rights provisions fell upon the European Commission of Human Rights, established in 1954, with the exceptional possibility of intervention by the European Court of Human Rights, set up in 1959.[81]

It was the absence of a legally binding effect for the UDHR that led to a concerted effort to create a legally binding system of human rights protection. As far as freedom of religion is concerned, Article 9(1) of the ECHR reads exactly like Article 18 of the UDHR, although Section 2 recognizes the possibility of imposing limitations on freedom of religion, provided those limitations are "prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms

79. *See* Statute of the Council of Europe, May 5, 1949, art. 1(a)(b), 87 U.N.T.S. 103, 105-06.

80. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

81. *See* NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE 68 (2002); Nadine Stronssen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L. J. 805, 807 (1990) (noting that the European Court of Human Rights and the European Commission on Human Rights have created the most developed body of human rights law).

of others."[82] In their first decades, the European Human Rights Commission and the European Court of Human Rights have played an important role in construing this right and defining the scope of its permissible limitations. Their judicial opinions acquired a moral and legal authority that became persuasive in interpreting the construction of human rights clauses making it possible to attain a higher level of human rights protection.

Ever since Protocol 11 to the ECHR entered into force on November 1, 1998, the European Court of Human Rights has been established as a permanent court and has played a central role in the normative development of human rights in general, and of the right of freedom of religion in particular.[83] To the national courts of the States subscribing to the ECHR and its 11th Protocol, the decisions of this international court provide the minimum standards of religious freedom they are supposed to afford in deciding their cases.[84] The European Court of Human Rights functions as a kind of supreme court of appeals on the subject of fundamental rights, including the right of freedom of religion. However, more than affording legal protection in each and every individual case – a task that is proving to be a "mission impossible" as the number of cases increases – this court should be seen as performing the constitutional function of providing substantive transnational standards that all States are expected to follow in their own case law.[85] This Court has always attempted to strike the right balance between the need to promote human rights in Europe, and that of respecting different national traditions, experiences and levels of human rights awareness the various States parties to the European Convention recognize. This has been done by attempting to identify the core human rights standards that every country

82. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

83. *See* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 5, 1994, arts. 19, 32, E.T.S. 155 (entered into force Nov. 1, 1998), *available at* http://www.echr.coe.int/Convention/webConvenENG.pdf [hereinafter Protocol 11]; *see also* Andrew Drzemczewski, *The European Human Rights Convention: Protocol No. 11-Entry into Force and First Year of Application*, 21 HUM. RTS. L.J. 1 (2000).

84. *See* Protocol 11, *supra* note 83, at art. 46.

85. *See* Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 HUM. RTS. L.J. 161 (2003).

should comply with, as well as by allowing a reasonable margin of appreciation to the different States without compromising the principle of European supervision. In the field of religious freedom, this has meant that the Court has had to perform the difficult task of promoting religious freedom while simultaneously acknowledging the specific political, legal and social realities that determine the place of religion in society. The problem with this task is that it creates a risk of inconsistency and can undermine the credibility of the Court. The following points will explore some legal issues concerning freedom of religion and separation of Church and State, referencing some relevant, leading cases from the European Court of Human Rights.

VII. FREEDOM OF RELIGION

1. *The Normative Meaning of Freedom of Religion*

A significant body of scholarship has traditionally considered freedom of religion a cornerstone of modern constitutional law. This is due to its historical importance. Freedom of religion derives from a line of religious arguments that stressed the divine origin of fundamental rights and the solemn nature of the "social contract,"[86] a major challenge to the patriarchal Monarchy and divine right of the Kings. Religious freedom affirms the spiritual and moral competence of the individual conscience in the face of all forms of public and private ideologies and coercive mechanisms. Respect for the individual conscience goes hand in hand with most fundamental rights, as well as democratic principles. It implies a commitment to notions of human dignity, moral and rational autonomy and equal freedom.[87] For instance, the right to

86. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 80-1 (Maurice Cranston trans., Penguin Books 1968) (1743).

> What is good and in conformity with order is such by the very nature of things and independantly of human agreement. All justice comes from God, who alone is its source; and if only we knew how to receive it from that exalted fountain, we should neither need governments nor lws . . . So there must be convenants and positive laws to unite rights with duties and to direct justice to its object.

Id.

87. *See* Martin Kriele, *Freiheit und Gleichheit*, *in* HANDBUCH DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 129, 129-33 (Ernst Benda et al. eds., 1983).

free speech, and of universal, equal, personal and secret suffrage, that make democracy both possible and meaningful, postulate the highest respect for individual conscience.

The European Court of Human Rights has declared that religious freedom is one of the foundations of a democratic society within the meaning of the Convention.

> [I]t is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."[88]

The central role of religious freedom in a constitutional democracy does not preclude the possibility of limitations to this right. However, as mentioned above, there are limitations to the limitations, manifested in a substantive due process that requires the right be validly proscribed by law and necessary to a democratic society in the interests of public safety, the protection of public order, health or morals, or of the rights and freedoms of others.[89] This implies the existence of legal and judicial mechanisms to proportionately balance religious freedom against an enumerated set of legitimate aims and compelling state interests that may legally justify such limitation.

2. *Freedom of Conscience, Religion and Worship*

The modern tradition of religious freedom ascribes a high value to individual spiritual and moral autonomy. James Madison summarized this perspective eloquently when he stated that "[t]he religions then of every man must be left to the convictions and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right."[90] Respect for human conscience posits the sacred,

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88. Kokkinakis v. Greece, App. No. 14307/88, 17 Eur. H.R. Rep. 397 (1993).

89. *See generally* Michael J. Perry, *A Right to Religious Freedom? The Universality of Human Rights, The Relativity of Culture,* 10 ROGER WILLIAMS U. L. REV. 385 (2005).

90. JAMES MADISON, A MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, *reprinted in* TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 837, app. B at (Robert T. Miller & Ronald B. Flow-

personal and voluntary nature of religious faith, even when it leads to an intense communal experience, as a guarantee of its spiritual value and authenticity.[91] This tradition made it into the First Amendment of the U.S. Constitution, and gradually permeated the whole movement of modern liberal constitutionalism.[92] The main international legal instruments base the protection of religious freedom on the protection of thought and conscience. Freedom of conscience is considered the supporting right of freedom of religion and worship, as well as freedom of speech.[93] It assumes, generally, each individual has an innate capacity for moral awareness and insight, and thus provides a strong foundation for the principle of human equality and citizenship.[94] In this way, freedom of conscience underlies the defining ideas of democracy and the rule of law.

Freedom of conscience should be the cornerstone of the legal response to the current phenomenon of religious resurgence, by both constitutional and international law. In fact, the stronger the religious resurgence, the more freedom of conscience should be emphasized by legal doctrine. This will have immediate practical significance, since it will underscore religious freedom first and foremost as an individual right, not a theologico-institutional right (e.g., *libertas ecclesiae*) or an ethnic right, thus curbing the dogmatic and authoritarian tendencies of certain religious groups. Modern constitutional and international law do have experience dealing with a robust presence of religion in the public square.

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ers eds., 5th ed. 1996) (1785).

91. *See generally* James E. Wood, Jr., *The Relationship of Freedom of Religion and Conscience to Other Human Rights and a Democratic State*, *in* LA LIBERTAD RELIGIOSA Y DE CONCIENCIA ANTE LA JUSTICIA CONSTITUCIONAL 875 (Javier Martinez-Torron ed., 1998).

92. *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

93. *See* RAWLS, *supra* note 13, at 181 ("[E]qual liberty of conscience is the only principle that the persons in the original position can acknowledge."); *see also* DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 141 (1986) ("The clauses protect, I believe, a common background right of the inalienable right to conscience at different points of its political peril. This unifying concern gives each clause a proper weight and significance, and suggests ways in which implicit conflict should be resolved.").

94. Michael W. McConnell, *Believers as Equal Citizens*, *in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMODATIONS IN PLURALIST DEMOCRACIES 90, 91 (Nancy L. Rosenblum ed., 2000).

Since the seventeenth century, both areas of law have responded by highlighting the importance of individual conscience, and attempting to limit the authoritarian tendencies of religious groups – in particular of those that could not find a place for individual autonomy – and to limit the use of State power in matters of religion. In Europe the gradual acknowledgment of the paramount value of freedom of conscience made it possible to transcend those definitions of religious freedom that invariably started from the "rights of the true religion," and were thus conceived to serve the interests and ambitions of the dominant religion.[95] The inviolable character of the rights of freedom of conscience and religion does not mean they cannot be limited. But their inviolability demands that any restrictions to those rights must be made by law, and must be narrowly tailored to serve compelling State rights and interests, or subject to a "strict scrutiny" by courts. This is the essence of the "proportionality principle" – expressly acknowledged by the European Court of Human Rights – according to which limitations on human rights must be adequate, necessary and proportionate to the protection of other legally protected rights and interests.[96] Religion is a forbidden ground for persecution and discrimination, a notion particularly relevant when discussing the constitutional and legal status of religious action and expression.

3. *Definition of Religion*

A central problem legislators and judges must solve when approaching issues implicating religious freedom and the regulation of religious communities is defining the concepts of religion and religious community. To solve the problem of definition in the "normative sector" of fundamental rights, Laurence Tribe recommends the search for a high level of generality: "[I]n asking whether an alleged right forms part of a traditional liberty, it is crucial to define the liberty at a high enough level of generality to permit unconventional variants to claim protection along with

95. *See* Keith J. Pavlischek, *John Courtney Murray, Civil Religion, and the Problem of Political Neutrality*, 34 J. CHURCH & STATE 729, 735 (1992); *see also* LUIGI MISTO, "LIBERTAS RELIGIOSA" E "LIBERTAS ECCLESIAE" 35 (1982).

96. *See generally* John Joseph Cremona, *The Proportionality Principle in the Jurisprudence of the European Court of Human Rights*, *in* RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG 323 (Rudolph Bernhardt & Ulrich Beyerlin eds., 1995).

main stream versions of protected conduct."[97] Contemporary European constitutional doctrine tends to adopt the view that in matters of religious freedom there is a "definition prohibition," or at least a "limited definition prohibition," so that, prima facie, this right protects the self-understanding of each group.[98] The purpose of legal scholarship, then, should be to look for definitional concepts as broad as is necessary to place individuals and communities on equal footing with respect to freedom.[99] This means that particular conceptions different religious groups may hold concerning the definition of religious freedom should have merely an "indicative" – rather than "constitutive" – function in constitutional discourse.[100] In this, as in all other domains of religious freedom, national courts would do well to take advantage of an existing *jus commune*, developed by the most influential constitutional and international courts, whose core values are freedom of conscience and equality. Its formal corollaries are the prohibition of coercion, persecution and discrimination in the name of religion. These are the principles that should govern the interpretation and application of international and constitutional law provisions concerning religions freedom. They are important tools for determining the content of religious freedom, and for constructing its basic concepts.

Sufficient protection of an equal right to freedom of religion requires that international and constitutional law make use of broad concepts of "religion" and "religious community."[101] One

97. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1428 (2d ed. 1988); *see also* Richard A. Brisbin, Jr., *The Rehnquist Court and the Free Exercise of Religion*, 34 J. CHURCH & STATE 57, 57 (1992).

98. *See generally* Martin Borowski, *Der Grundrechtsschutz des religiösen Selbstverständnisses*, *in* RELIGION UND WELTANSCHAUUNG IM SÄKULAREN STAAT: 41. TAGUNG DER WISSENSCHAFTLICHEN MITARBEITERINNEN UND MITARBEITER DER FACHRICHTUNG "ÖFFENTLICHES RECHT" 49 (Andreas Haratsch et al. eds., 2001).

99. *See* ROBERT ALEXY, THEORIE DER GRUNDRECHTE 290 (1985); STEPHEN HOLMES, THE ANATOMY OF ANTILIBERALISM 229-30 (1993).

100. HARIBERT FRANZ KÖCK, RECHTLICHE UND POLITISCHE ASPEKTE VON KONKORDATEN 27 (1983).

101. *See* Derek Davis, *The Courts and the Constitutional Meaning of "Religion": A History and Critique*, *in* THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE 89 (James Wood, Jr. & Derek Davis eds., 1993). Davis makes the following remarks regarding the definition of religion in American constitutional law:

problem that has plagued legal doctrine in this field concerns the use of legal concepts (e.g., Truth, God, worship, Church) premised on particular religious conceptions and traditions that do not necessarily fit the self-understanding and social aspirations of many minority or unconventional religions.[102] This is so because the debates on the relationship between the State and religion emerged in a predominantly Christian environment. However, the incorporation of distinctively Christian concepts in the theologico-political and legal discourses has frequently led to conceptual manipulations of the right to religious freedom – a kind of "religious gerrymandering" – that served as a tool of religious persecution and discrimination. For instance, in many European Catholic countries the right of religious freedom has been defined as an exclusive right to religious truth, proclaimed as such by a specific religious body: the Pope. Religious freedom has also been defined in part as a belief in God, thus excluding belief systems where the idea of God is absent.[103] These strategies are completely unacceptable today, since religious freedom is not of much use if the concept of religion is subject to a restrictive interpretation, especially in light of pre-determined religious doctrines.

Religion is generally related to the ultimate concerns of human life, and from a perspective that is neither entirely naturalist nor materialist. It has different subjective-psychological (e.g., faith, nirvana), objective-physical (e.g., crucifix, temple), institutional-collective (e.g., Church, Synagogue) and abstract-ideal (e.g., God, spirits) components, and these should be encompassed by

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> To define the term would have placed a permanent imprimatur upon only those forms of belief that conform to that definition. The framers instead chose to leave the term undefined, thereby protecting a diversity of beliefs, not merely traditional ones, from undue advancement or prohibition of expression by government. This guarantee of freedom or religion, the centrepiece of American liberties, has served to protect all religions, old and new, against government preference, intrusion, and harassment.

Id.

102. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Jónatas Machado, *Pré-Compreensões na Disciplina Jurídica do Fenómeno Religioso*, BOLETIM DA FACULDADE DE DIREITO No. LXVIII, 1992, at 165.

103. *E.g.*, LOCKE, *supra* note 33, at 64 ("Lastly, those are not at all to be tolerated who deny the being of God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all.").

broad legal concepts.[104] The elements of discourse, practice, community and institution are generally perceived necessary components of religion.[105] In many cases religion assumes the existence of a supreme being or spiritual reality, but this is not always the case. The distinction between religion and ideology or philosophy is, in many cases, more a matter of degree than of substance; contemporary jurisprudence has been instrumental in illustrating this concept: "[R]eligious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit [constitutional] protection."[106] The "truth" of a religious doctrine is similarly irrelevant, from a constitutional law perspective.[107]

In constitutional law, religion must be defined in a way that affords protection to minoritarian, unfamiliar and unconventional beliefs.[108] However, to be worthy of constitutional protection a religious community need not have a formally adopted set of dogmas, symbols, liturgies or rites, an elaborate systematic theology, an institutional hierarchy, or any particular external attribute. It is enough that it has a sense of community premised upon a religious self-understanding.[109] Encompassing these broad concepts of religion and religious community, religious freedom, supported by both the legal system and the State's coercive power, is in itself an important defense against the misuse of religious dogma to infringe upon the rights of both religious and non-religious individuals and groups. This is simply a necessary corollary to the protection of individual freedom of conscience, equal rights and government neutrality in religious matters.[110]

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104. *See* Borowski, *supra* note 98, at 51-52.

105. *See* LINCOLN, *supra* note 59, at 5-7.

106. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (quoting Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981)).

107. *See* United States v. Ballard, 322 U.S. 78, 86-87 (1944) (holding that courts may inquire into the sincerity of putatively held religious beliefs, but not their accuracy or truthfulness).

108. *See* HENRY ABRAHAM, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 251 (4th ed. 1982); *see generally* Davie, *supra* note 63.

109. *See* TRIBE, *supra* note 97, at 1179; Augustin Motilla, *Aproximación a la Categoria de Confession Religiosa*, *in* IL DIRITTO ECCLESIASTICO 175 (1988); Joachim Wieland, *Die Angelegenheiten der Religiönsgesellschaften*, 25 DER STAAT 321, 321 (1986).

110. *See* Richards, *supra* note 32, at 142; Joseph Listl, *Glaubens-*,

An analysis of the main International Law documents reveals similar thinking. The United Nations Human Rights Committee (UNHRC), interpreting the relevant international law provision, has stated that

> Article 18 [of the ICCPR] protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community.[111]

Furthermore, a survey of some unpublished legal material has led some authors to conclude that the interpretation given to Article 9 of the ECHR by the European Commission of Human Rights suggests a willingness to adhere to a broad definition of religion, one that may include not only minority religious views, but also philosophical and ideological convictions.[112]

This last point raises an interesting question, not yet much addressed in European human rights doctrine. It concerns the general tendency – deeply rooted in modern rationalistic, naturalistic and positivist thought – to define religion as a set of merely subjective, emotional and value-oriented beliefs, relegating all objective and factual propositions about the nature and history of the world to science. This has led to the facially obvious notion, popularized by the late Harvard paleontologist Stephen Jay Gould, that religion and science are two "non-overlapping magisteria" (NOMA).[113] This construct inevitably adopts a strict defini-

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Bekenntnis-, und Kirchenfreiheit, *in* 1 HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND § 14, at 449 (Joseph Listl & Dietrich Pirson eds., 1994).

111. General comment No. 22 (48) (art. 18), U.N. Hum. Rts. Comm., 48th Sess., 1247 mtg. at 1, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993).

112. P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS § 9, at 548 (1998).

113. STEPHEN JAY GOULD, ROCKS OF AGES: SCIENCE AND RELIGION IN THE

tion of religion that, apart from expecting too much of the explanatory power of naturalistic science and history becomes a subtle form of conceptual manipulation.[114] The inherent danger is the provocation of religious persecution, discrimination and marginalization. The NOMA "doctrine," attempting to identify the proper subjects of religion and science, tries to internalize and privatize religion by completely removing it from the ongoing public debate about the origin, nature and meaning of reality.[115] We can call it "the NOMA trap," and in *Edwards v. Aguillard*[116] the U.S. Supreme Court, with its secular-purpose-driven-jurisprudence, fell into this trap.[117]

By framing the "origins debate" as between standard modern dichotomies of "faith versus reason," and "facts versus values"[118] – as many legal scholars still do[119] – the U.S. Supreme Court overlooked the possibility that faith may be rational, and that reason may rely on indemonstrable fideistic assumptions. This question is certainly far from settled in the current debate. The Court's oversight demonstrates its failure to perceive how naturalist and materialistic beliefs shape the modern understanding of "origins science." It dismissed, *a priori* and without any significant reflection, the possibility that religious belief in a supernatural Creator might actually translate into objective, reasonable and empirically testable factual assertions about the real world.[120] The Court further ignored the evident "promise versus performance" problem of naturalistic science, which has, thus far, failed to provide any convincing accounts of the origins of the Universe and Life beyond a

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FULLNESS OF LIFE 49 (1999).

114. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1085-98 (1990); ANDREAS VON ARNAULD, DIE FREIHEITSRECHTE UND IHRE SCHRANKEN 68, 119 (1999); *see also* Roger Craig Green, Note, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 YALE L.J. 439, 443-59 (1998).

115. The origins of the "NOMA trap" can be traced directly to the ideas of Auguste Comte, who was one of the first proponents of secular positivism. AUGUSTE COMTE, A GENERAL VIEW OF POSITIVISM (1848), *reprinted in* THE EUROPEAN PHILOSOPHERS FROM DESCARTES TO NIETZSCHE 732-764 (Monroe C. Beardsley ed., 2002).

116. 482 U.S. 578 (1987).

117. *Id.* at 596-97.

118. *Id.*

119. STEVEN G. GEY, RELIGION AND THE STATE 167 (2001).

120. *Edwards*, 482 U.S. at 591.

reasonable doubt. The Court's approach, symptomatic of a certain "rationalistic naiveté," prevented American public schools from becoming a "public forum" where naturalistic and non-naturalistic perspectives, with important implications in the interpretation of empirical data and in the creation of explanatory models, could face off in a "free and open encounter," in the liberal tradition of John Milton and John Stuart Mill.[121] In its hurry to detect even the slightest hint of a religious purpose in the law, the Court let full-fledged naturalistic and secular humanistic purposes go unchallenged. In the confrontation between religious non-naturalistic and secular naturalistic perspectives, the Court, by failing to see that science and theoretical thought are never neutral in religion, ended up endorsing a naturalistic belief-system. Given the epistemic nature of the problem, this form of religious discrimination will be more difficult to remove.

In the name of their own assumptions and doctrines, some religious conceptions may seek to challenge the modern naturalistic scientific paradigm, along with the increasingly dubious notion that "evidence of evolution reveals a universe without design,"[122] and provide epistemic support to those scientists who sustain the presence of "intelligent design" in nature.[123] Some religious beliefs may not want simply to be understood as purely subjective, emotional and value-laden, since they pretend to make factual assertions about objective reality. This means that, to a large extent, religion can operate as a functional equivalent to all forms of materialist and naturalist philosophies, sciences and ideologies. Thus, sometimes it will make sense to assign all non-naturalistic and naturalistic worldviews to a common normative category – and therefore on the same legal footing- – so as to prevent the

121. *See Edwards*, 482 U.S. at 594. In all fairness, the Court has made it clear that "teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction." *Id.* But this does not clearly answer the question of what to do when factual challenges to some "icons of evolution" turn out speaking in favor of creation, or when non-naturalistic interpretative models produce more plausible explanations of the existing data. *See generally* JONATHAN WELLS, ICONS OF EVOLUTION: SCIENCE OR MYTH?: WHY MUCH OF WHAT WE TEACH ABOUT EVOLUTION IS WRONG (2000).

122. *See* RICHARD DAWKINS, THE BLIND WATCHMAKER: WHY THE EVIDENCE OF EVOLUTION REVEALS A UNIVERSE WITHOUT DESIGN (1987).

123. *See generally* WILLIAM DEMBSKI, INTELLIGENT DESIGN: THE BRIDGE BETWEEN SCIENCE & THEOLOGY (1999).

State from placing naturalistic beliefs in a position of epistemic advantage.

The U.S. Supreme Court, having acknowledged secular humanism as a religion in *Torcaso v. Watkins*,[124] should understand how easily secular naturalistic assumptions define, permeate, direct and condition scientific research. The origins debate seems to be an appropriate example of materialistic philosophy and naturalistic science being privileged in the sphere of public discourse, their alleged superiority relying upon a restrictive and misguided view of religion. From this perspective religion is *a priori* dismissed as something entirely personal, private, subjective and emotional, totally independent from the real world, and utterly incapable of making objective and factual claims respecting its own origin, purpose and meaning. This view of religion – as intuitive and self-evident as it may seem – is ultimately arbitrary and persecutory. The U.S. Supreme Court should have realized that the origins debate relies not only upon observation and experimentation, but also on the interpretation of observable data according to indemonstrable assumptions, most of which are inherently philosophical and religions in nature.

In the current state of affairs it is considered entirely appropriate to teach in the classroom that evidence of evolution reveals a universe without design; it is totally forbidden, however, to try to demonstrate the opposite: that evidence of design reveals a universe without evolution.[125] This is so not because of any lack of

124. 367 U.S. 488, 495, n.11 (1961).

125. For example, in *Edwards v. Aguillard*, the United States Supreme Court struck down a Louisiana law known as the "Creationism Act," designed to prevent "the teaching of the theory of evolution in public schools unless accompanied by instruction in 'creation science.'" 482 U.S. 578, 581 (1986). The Creationism Act (Act) gave no preference to either the teaching of evolution or creation science, but simply required that the teaching of one theory be accompanied by the other. *Id.* Nonetheless, the Court opined that the seemingly innocuous purpose of giving "equal time" to creation science was in fact an insincere attempt on the part of the Louisiana Legislature to "advance the religious viewpoint that a supernatural being created humankind," thereby violating the Establishment Clause. *Id.* at 591. Moreover, the Court suspiciously characterized the law as an improper limitation on academic freedom because the law mandated "that curriculum guides be developed for creation science . . . [but] says nothing of comparable guides for evolution." *Id.* at 588. In his dissenting opinion, Justice Scalia countered that the mandate within the Act for the specific development of a creation science curriculum constituted a clear advancement of academic freedom due to the "unavailability of

empirical or inferential support, but merely because of epistemic constraints.[126] A more pluralistic approach to the origins debate in public schools seems to be but one example of the accommodations current religious resurgence seems to favor, but only so long as it remains fully compatible with the constitutional imperatives of freedom of conscience and religion, free debate and broad academic freedom.[127] This conclusion is equally valid both in the

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works on creation science suitable for classroom use" in relation to "the existence of ample materials on evolution . . . ." *Id.* at 631 (Scalia, J., dissenting). As such, Scalia viewed the Creationism Act as a permissible remedy to a prevailing "hostility of most scientists and educators to creation science" which led to creation science being "censored from or badly misrepresented in elementary and secondary school texts." *Id.* at 630-31.

126. The firmly rooted bias against the teaching of "creation science" or "intelligent design" theories is best reflected within the writings of two of the most preeminent advocates of Darwinian evolution: Richard Dawkins and Stephen Jay Gould. For example, one of the prevailing critiques of evolution is based upon an empirical finding within the fossil record dating back to the Cambrian age, or six- hundred million years into the past. Discovered within the Cambrian fossil record are fossils of invertebrates which appear to be in an advanced stage of development, but without any traceable line of evolutionary development. This discovery is regarded by evolutionists and creationists alike as a significant "gap" within the the fossil record. DAWKINS, *supra* note 122, at 229. Critics of evolution contend that this gap within the fossil record undermines the fundamental basis of Darwinism: that complex organisms gradually evolved from simple life forms. *Id.*

In response, Dawkins proffers a plausible explanation for this fossil record gap: that the "gap" likely suggests that the evolutionary process was not simply gradual, but rather occurred within "sudden bursts, punctuating long periods of 'stasis,' when no evolutionary change took place in a given lineage." *Id.* Dawkins characterizes this supplemental model of evolution as "punctuationism," a model that purports to interpret the gap within the fossil record in a manner that does not debunk evolution, but rather affirms it. *Id.* at 226-30. However, rather than simply acknowledging that both the Evolutionary and Creationist paradigms present sincere, yet contrary, interpretations of the gaps within the fossil record, Dawkins concludes his analysis with an *ad hominum* attack of his critics, characterizing the alternatives to evolution as *"redneck creationism." Id.* at 251 (emphasis added). Similarly, Stephen Jay Gould blames the modern critiques of evolution on "a small, if vocal, and locally powerful, minority of fundamentalists who proclaim the literal truth of the Bible . . . ." STEPHEN JAY GOULD, THE HEDGEHOG, THE FOX, AND THE MAGISTER'S POX: MENDING THE GAP BETWEEN SCIENCE AND THE HUMANITIES 89 (2003). Gould further contrasts these critics of evolution from "[t]he majority of professional theologians," a more sophisticated group of religious scholars who, in his view, have all but conceded "the factuality of evolution." *Id.*

127. *See generally*, Book Note, *Not Your Daddy's Fundamentalism: Intelligent Design in the Classroom*, 117 HARV. L. REV. 964 (2004) (reviewing Fran-

United States and in Europe. Even if in some cases it may make sense to put religion, philosophy and ideology on equal footing – especially in the name of equal freedom – it is important to use concepts that are neither too restrictive nor too broad to promote State ideological neutrality and an uninhibited, robust and accessible sphere of public discourse. However, a definition of religion that is too broad may implicate questions of legal certainty, clarity and determinacy.

4. *Belief and Action*

The legal protection of religious freedom is incompatible with the dichotomy between belief and action. Bearing witness in words and deeds is bound up with the existence of religious convictions. Beliefs about the origin of the Universe and one's place in it invariable translate existentially and ethically into the way one thinks and acts in all aspects of life. In fact, this applies to all ideological beliefs. They are all seen as points of departure, not as points of arrival.[128] Religious convictions, however, have an inherent "teonomous" component making the belief/action dichotomy even harder to sustain. Religious beliefs are often connected with divine imperatives for conduct. Sometimes an action required from a congregation is so intertwined with convictions that it must be seen as part of the essential nucleus (*kernbereich*) of the right of religious freedom (e.g., Christian Baptism, Jewish Circumcision).[129] Thus, in some cases, both obedience to what is perceived as a divine imperative and the preservation of the moral integrity of the believer require that he or she be protected when acting on his or her religious beliefs. In fact, one criticism often leveled at religious people concerns the inconsistency between their beliefs and their actions.[130] After all, personal consistency should, in prin-

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cis J. Beckwith, LAW, DARWINISM, AND PUBLIC EDUCATION: THE ESTABLISHMENT CLAUSE AND THE CHALLENGE OF INTELLIGENT DESIGN (2003)).

128. *See* Antonio Molina Melia, *La Question Religiosa y la Constitucion, in* ESTUDIOS SOBRE LA CONSTITUCION ESPANOLA DE 1978 96 (1980).

129. See Konrad W. Sahlfeld, *Der Islam als Herausforderung für die Rechtsordnung: Zugleich ein Beitrag zur Rechtsprechung des Schweizer Bundesgerichts in Sachen Religionsfreiheit, in* RELIGION UND WELTANSCHAUUNG IM SÄKULAREN STAAT 127, 137 (Andreas Haratsch et al. eds., 2001).

130. See Gabriel Moens, *The Action-Belief Dichotomy and Freedom of Religion,* 12 SYDNEY L. REV. 195, 215 (1989).

ciple, be expected and positively valued. It is interesting to consider these critiques alongside an earlier argument in favor of religious freedom dealing with the danger of the State endangering religious authenticity and promoting hypocrisy through external coercion in religious matters.[131]

In a community with a plurality of religious beliefs, general laws can result in incidental burdens on the right of freedom of religion, so there should be room to accommodate, to a reasonable extent, multiple modes of thought and action – such as membership in religious groups, the education of juveniles, political participation, economic activity, art, science, dress codes, nutritional habits, or the advertisement of religious symbols – to the extent that such accommodation does not violate fundamental principles of freedom and equality, nor threaten the protection of basic components of the public interest. Thus understood, accommodation is a corollary of State neutrality. This does not mean religious freedom is an absolute right, or that every conscience or religious body is a law unto itself. All rights must be balanced with competing fundamental rights and interests of individuals, the State and the community.

There being no mathematical algorithm to balance the aforementioned rights, the results may seem, at times, unprincipled and even contradictory. The U.S. Supreme Court provides an interesting example. In *Sherbert v. Werner*,[132] concerning the labor rights of a Seventh-Day Adventist, the Court affirmed a principle of accommodation, stating that "the extension of unemployment benefits to Sabbatarians . . . reflects nothing more than the governmental obligation of neutrality in the face of religious differences . . . ."[133] On the other hand, in *Employment Div., Dep't of Human Res. of Or. v. Smith*,[134] considering the religiously motivated ingestion of peyote by Native Americans, the Court endorsed a preference for religion-blind, generally applicable criminal laws.[135] In theory, these doctrines are not necessarily contradictory, but they unavoidably address the relation of "recip-

131. Eberle, *supra* note 10, at296-99.
132. 374 U.S. 398 (1963).
133. *Sherbert*, 374 U.S. at 409.
134. 494 U.S. 872 (1990).
135. *See* Edward J. Eberle, *Free Exercise of Religion in Germany and the United States*, 78 TUL. L. REV. 1023, 1052 (2004).

rocal effect" and "mutual conditioning" (*wechselwirkung*) between fundamental rights and general laws.[136] According to this relationship, the former must take the latter into account – and vice versa – such that both the essential elements of fundamental rights and public interest are protected. The criminal law is properly limited by freedom of religion, and freedom of religion is limited by the criminal law so long as basic constitutional principles of equal dignity and freedom are respected, and no public interest is significantly harmed. For instance, criminal law should punish human sacrifices performed on religious grounds, even if human sacrifice is a central tenet of a religious group; but the criminal law cannot criminalize religious proselytism. Both propositions are totally consistent with the essential requirements of equal dignity and freedom. Theoretically, it seems hard to question the methodology followed by the Court in *Employment Division*, of "weighing the social importance of all law against the centrality of all religious beliefs."[137] The problem is that, in practice, it is not easy to identify the proper limits to fundamental rights, and the results arrived at will often be controversial. It might be argued that the Court overrated one side of the equation. This was the view of Justices Blackmun, Brennan and Marshall, who, in their dissenting opinion, held that the State's interest in enforcing its drug laws against the religious use of peyote was insufficiently compelling to outweigh the right of freedom of religion.[138] And in reality, it had not been demonstrated that allowing for a religious exception to the law would seriously violate essential elements of equal freedom, or significantly threat a public interest. In matters of constitutional law it makes sense to start with a presumption in favor of fundamental rights.[139] However, general laws can be a cause of incidental burdens to other fundamental rights, as well as the right of religious freedom.[140] For instance, the U.S. Supreme

136. *See Spiegel*, BverfGE 20, 162 (176); *Lüth*, BverfGE 7, 198 (208).

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

138. *Id.* at 911 (Blackmun, J., dissenting).

139. It should be taken into account that "[s]ocial interests are always likely to be given serious consideration given the centrifugal forces of majoritarian rule. It is easier to conform to law than to oppose it. Thus, on the whole, religious freedoms are in need of greater solicitude than social interests." Eberle, *supra* note 135, at 1070-71.

140. *See generally* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996).

Court acknowledged as much in its decision in *Branzburg v. Hayes*,[141] stating that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[142]

In Europe, the principle that there should be no dichotomy between belief and action is a structural part of freedom of religion jurisprudence from the European Court of Human Rights. It was recently acknowledged in *Jewish Liturgical Assoc. Cha'are Shalom Ve Tsedek v. France*.[143] The case concerned an ultra-Orthodox Jewish community's access to slaughterhouses in France, and its right to eat "glatt," or Kosher meat, although in the end no actual violation of the right of freedom of religion was found.[144] This dichotomy was also tested on the subject of religious apparel. In *Dahlab v. Switzerland*[145] and *Leyla Sahin v. Turkey*,[146] the European Court of Human Rights has addressed, respectively, the use of a head scarf by a primary school teacher in Geneva, and the use of a head scarf by Islamic women in Turkish public universities. By itself, this facially innocent practice could hardly not be seen as prima facie protected by the right of freedom of religion. On the contrary, some very important constitutional values- – freedom, equality, tolerance and inclusion – seem to militate in favor of the freedom to wear the head scarf, be it a veil, bandana or chador. A burka, completely covering the face of a woman, would probably raise more difficult questions.

The fact is that in *Dahlab v. Switzerland*, the European court found that a democratic State should be allowed to limit the right to wear the Islamic head scarf if it found wearing it was incompatible with the protection of rights and freedoms of others, public order and public safety. The court deferred to the Swiss court's holding, according to which the head scarf produced a proselytizing effect, and wearing it appeared to be a requirement imposed upon women by a precept of the Koran difficult to reconcile with

141. 408 U.S. 665 (1972).
142. *Id.* at 682.
143. 2000-VII Eur. Ct. H.R.
144. *Id.* at ¶ 2.
145. 2001-V Eur. Ct. H.R.
146. App. No. 44774/98 (June 29, 2004).

the principle of gender equality.[147] In *Leyla Sahin v. Turkey*, the court considered all the same values, but it also had to face the possibility that use of the veil could pose more difficult questions regarding the protection of women's rights, as well as those of secular and religious minorities. According to Turkish authorities, if the overwhelmingly Muslim majority of Turkish women wore the veil it would be very easy to discriminate against those who did not. But what really became the major obstacle to the full protection of the free use of the head scarf was the fact that, in the context of Turkish religious and political history, the practice had become not only a religious statement, but also a powerful theologico-political symbol of political Islam. This was an ideology that actively sought to establish a political regime based on the Sharia, threatening human rights, equality, democracy and the rule of law; these were all modern values that the present Turkish secular republic, led by Mustafa Kemal Atatürk, wanted to preserve. It was mostly in the face of this reality that the court thought it best to acknowledge a "margin of appreciation," or deference, to Turkish authorities, and accept their decision to prohibit the use of the head scarf.[148]

The way France is dealing with the head scarf is more troubling. On November 27, 1989, the Conseil d'État issued an advisory opinion on the use of religious symbols in French public schools, and the compatibility thereof with the secular nature (*laicité*) of these schools.[149] The opinion held that the secular nature of the State was totally consistent with the protection of the students' freedom of conscience and their right to State protection from any form of religious discrimination.[150] The students were held to have a right to manifest their religious beliefs in the schools, in an atmosphere of pluralism and equal respect, unless their actions could be perceived as forms of ostentation, pressure, proselytism or propaganda.[151] A couple of years later, the Conseil

147. Sahlfeld, *supra* note 129, at 142.

148. *Sahin*, App. No. 44774/98, ¶ 102.

149. *See* Quelques grands avis du Conseil d'Etat, Nov, 27, 1989, Case No. 346.893, Assemblée générale (Section de l'intérieur), *available at* http://www.conseil-etat.fr/ce/rappor/index_ra_cg03_01.shtml; Jacques Robert, *La Liberté Religieuse*, 64 CONSCIENCE ET LIBERTE 89 (2003).

150. *See id.*

151. *See id.*

d'État deemed the school's internal rules illegal, forbidding the use of any religious, political or philosophical symbol or apparel, on the grounds that such demonstration violated the right of freedom of expression.[152] In March 2004, following a 2003 report by the Stasi Commission to the President of the Republic,[153] several other reports presented to the National Assembly and the Senate,[154] and public debates – in what appears to be an attempt to control the Islamic community – the French legislature enacted a law prohibiting students from wearing clothing and insignia that "conspicuously manifest a religious affiliation" in public schools.[155]

The aim of the law was really to address the question of the Islamic head scarf (*foulard islamique*). However, to make the targeting less discriminatory, the law established a general prohibition for all religious symbols – such as kippas, turbans, monks' or nuns' habits and crucifixes, among others. Considering the strong popular support this initiative received, it is hard not to interpret the law as a manifestation of French rationalist secularism dating back to the free-thinkers, Encyclopedists and Jacobins, and materializing as the strong anti-clerical and anti-religious character of the French revolution and public endorsement of the Cult of Reason.[156] The objective of the legislature was to protect the secular nature of the French Republic by conceiving public institutions – including the educational ones – as "religion-free zones." In reality the legislation enforces a kind of "civic atheism" that demands people present themselves in public as if God did not exist, regardless of whether the use of religious apparel is actually disruptive.

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152. C.E. Novembre 1992, *Les Petites Affiches*, 24, Mai, 1993; Robert, *supra* note 149, at 90.

153. *See* Commission De Refelexion Sur L'Application Du Principe De Laïcite Dans La Republique, *Rapport Au President De La Republique*, 2003, http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf.

154. *See* M. Jean-Louis Debre, *Rapport de la Mission D'Information sur la Question du Port des Signes Religieux á L'École*, 2003, http://www.senat.fr/rap/l03-219/l03-2191.pdf; *see also* M. Jacques Valade, *Sénat Rapport no. 219* (2003-2004), http://www.senat.fr/rap/l03-219/l03-219.html.

155. *See* Law No. 2004-228 of Mar. 15, 2004, J.O., Mar. 17, 2004, p. 5190, http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo'MENX0400001L; Jeremy Gunn, *Under God but Not the Scarf: The Founding Myths of Religious Freedom in the United States and Laïcite in France*, 46 J. OF CHURCH & STATE 7, 7 (2004).

156. *E.g.*, WILLIAM DOYLE, THE OXFORD HISTORY OF THE FRENCH REVOLUTION 49-65 (2002).

The problem with the law is that it is premised upon a secularized version of the values of freedom, equality and neutrality. It completely privatizes religious conduct along the lines of a clear cut "belief/action" dichotomy. Furthermore, it erases important features of religious identity. The equal religious freedom it intends to protect covers only a private, inconsistent and socially innocuous form of religion. Religious freedom is allowed if and only if religious symbols and apparel remain in the closet. Collective republican identity is considered more important than the protection of individual conscience and integrity, values that are completely compromised through what is tantamount to a forced conversion to *laicité*.[157] This law over-interprets the mere use of a religious symbol as a form of proselytism and indoctrination, its enactment probably motivated by the mediatic, "reality-framing" effect of a population automatically equating the head scarf with Islamic radical fundamentalism.[158]

Moreover, the law fails to embody the notion that true civic equality only has substantive merit if it allows people to think and act differently within an environment of tolerance and mutual respect, and does not obliterate difference. The European Court of Human Rights has stressed, at various times and in several contexts, that the role of the authorities is not to remove the cause of tension by eliminating pluralism, but to ensure that competing groups tolerate each other.[159] In a pluralistic society, schools should be expected to reflect that pluralism and to teach students, by words and deeds, how to deal with difference in a respectful way. Instead of identifying and preventing those situations in which Muslim girls are coerced into wearing the scarf, the French

157. *Laicité* is the belief that religious institutions should play no role whatsoever in the establishment of an ideal free society. Originating during the late eighteenth century, adherents of *laictié* frequently blamed the Roman Catholic Church for blocking the advancement of democratic movements throughout western Europe. This strong anti-clerical movement was a forebearer for what would become a more radical form of "exclusive humanism," the belief that religion was the single greatest barrier to freedom and human enlightenment. GEORGE WEIGEL, THE CUBE AND THE CATHEDRAL: EUROPE, AMERICA, AND POLITICS WITHOUT GOD 52 (2005). For an insightful analysis on the systematic de-Christianization of Europe, see HENRI DE LUBAC, THE DRAMA OF ATHEIST HUMANISM (Ignatius Press 1995) (1944).

158. *See* Sahlfeld, *supra* note 129, at 143.

159. *See* Plattform "Ärtze für das Leben" v. Austria, App. No. 10126/82, 13 Eur. H.R. Rep. 204, ¶ 32 (1988).

legislature chose to coerce everybody *not* to wear religious clothing, without offering any justification on the basis of the "least restrictive alternative" test found within the principle of proportionality.[160] Given the coercive nature and discriminatory impact of this law – particularly in the Islamic community – as well as the absence of any clear and present threat political Islam posed to the French democracy, as too was the case in Turkey, it is hard to see, beyond the secular purpose of the law, any compelling state interest justifying this ban on the use of religious apparel. But the problem of the Muslim head scarf has also been developed in the case law of other European national courts, such as those of Germany[161] and Switzerland,[162] which have involved the rights of Muslim teachers in public schools. These decisions have generally restricted individual freedom, and have been based mostly on a "religion-depleted" notion of civil servant neutrality – public school teachers in particular – although arguments were also advanced regarding the proper role of public schools in promoting women's', students' and parents' rights.[163]

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160. Gunn, *supra* note 155, at 18.

161. 2002 BVerwGE 2 C 21.01 (Bundesverwaltungsgericht) (upholding administrative prohibition of a public school teacher's wearing of an Islamic head scarf); BVerfGE 108, 282 (Bundesverfassungsgericht) (leaving the final decision on whether to allow the same public school teacher to wear the head scarf to the State (*Länder*)); 2004 BVerwGE 2 C 45.03 (Bundesverwaltungsgericht) (upholding State law prohibiting public school teachers from working if unprepared to cease wearing Islamic head scarves). For some, the German Federal Administrative Court's decision has been interpreted as leading toward a prohibition of religious apparel for Catholic nuns. *Nicht ohne meine Kutte*, DER SPIEGEL, Oct. 10, 2004, http://www.spiegel.de/unispiegel/studium/0,1518,322789,00.html. Others object to this interpretation based not on freedom of conscience and religion but on the freedom to use a professional uniform. *Id.*

162. BGE 123 I 296 (Geneva head scarf case). This Swiss case eventually gave rise to the above mentioned *Dahlab v. Switzerland*, handed down by the European Court of Human Rights in 1998 after referral. *See* Dahlab v. Switzerland, App. No. 42393/98 (1998).

163. *See* LINCOLN, *supra* note 59, at 56. Lincoln observes that

> [a] believing Muslim woman who covers her hair with a scarf, for instance, need not view this as a surrender to her parents' wish to keep her asexual, nor to patriarchal domination in general. Rather, she is encouraged to regard this as an act of self-fashioning, executed in conformity to precepts established by God, revealed through his prophet, and maintained by his people. The scarf helps constitute her not only as a moral subject, but as a part of the community whose faithful members preserve and are defined by this practice.

This indicates that the animosity toward conspicuous religious symbols is far from a uniquely French phenomenon. In one Swiss case involving a primary school, the head scarf was depicted as a strong "religious symbol," and thus deemed incompatible with the constitutional imperative of State neutrality in public schools.[164] Cases such as these have led some scholars to call attention to the need to give more weight to individual freedom of conscience and religion – assuming, of course, that wearing the head scarf is voluntary.[165] The fact that a public school teacher wears a religious symbol in the classroom should be understood in light of her constitutionally protected right to religious freedom, and not as a State endorsement and imposition of religious symbolism in the school. The personal decision to wear a head scarf or a necklace with a Crucifix should be distinguished from the official decision to place a Crucifix in every classroom. Similarly, it must be stressed that the mere conscience-motivated use of certain religious apparel in the classroom should not be seen, in itself, as an attempt at religious indoctrination entailing a violation of both the rights of pupils and their parents. To state the opposite view is problematic, since there is no empirical evidence to support it; it would also raise some difficult questions. What about the danger of secular pressure on religious students? Would a total lack of religious symbolism public schools not send a message that religious conviction is unwelcome in the public sphere? And what if a public servant were to write a high profile book on Christian apologetics? Would he thereby violate the principle of State neutrality and thus threaten his students' rights? Should his publication be prohibited on those grounds? Also important is the notion that the neutral State is not represented in public schools by Muslim head scarf-wearing teachers alone, but by all teachers, each with his or her own religious and non-religious convictions and diverse apparel that the students should learn to respect. This perspective affirms the notion that the ability of civil servants to wear decent and appropriate apparel, even if religiously motivated, should *prima facie* be seen as perfectly compatible with their own rights

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Id.

164. *Dahlab*, App. No. 42393/98 (quoting BGE 123 I 296, 300).

165. *See* Eberle, *supra* note 135, at 1059-60; Jürgen Habermas, *Intolerance and Discrimination*, 1 INT'L J. CONST. L. 2, 6-9 (2003); *see generally* Sahlfeld, *supra* note 129.

to autonomy, as well as principles of rational recruitment and equal treatment that regulate the selection of civil servants in a modern, plural and inclusive State.[166]

One other relevant point stressed by some legal scholarship concerns the danger to social cohesion that arises from an increased systemic pressure on the Muslim community to retreat to their own private schools where Muslims can practice their religion free from intolerance or regulation, yet isolated from society at large.[167] Religious freedom requires an inclusive approach able to integrate different worldviews without compromising their basic tenets, and to teach tolerance and mutual respect in the real world of social pluralism and diversity. This is particularly important,

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166. For example, a peculiar conflict recently occured involving a group of Muslim police officers in Newark, N.J. who violated a department policy against facial hair by refusing to shave their beards. *See* Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999). The officers asserted that to shave their beards would constitute a grave sin against their Muslim beliefs. The policy contained a special exemption for officers who had been diagnosed with a rare medical condition known as *pseudo folliculitis barbae* (PFB), a condition known to occur among those of Arab and African descent whose curly facial hair is susceptible to becoming in-grown when shaven. As such, PFB is a painful dermatological condition that is relieved only by allowing the facial hair to grow out to a certain length. The Muslim officers argued that the department was required, under the Free Exercise Clause, to treat their religious sensitivities against shaving with the same level of deference provided to sufferers of PFB. *Id.* at 360-61. The Third Circuit Court of Appeals agreed with the Muslim officers, but only because "[t]he Department [had] made a value judgment that secular (i.e. medical) motivations for wearing a beard [were] important enough to overcome its general interest in uniformity but that religious motivations [were] not." *Id.* at 366.

One commentator has noted that the holding in *Newark* is only a partial victory for religious freedom advocates:

> A favorable outcome [for the Muslim officers] depended on the fortuitous existence of some significant secular burden that prompted the creation of a secular exemption. Had an identical fact-pattern arisen in Alaska or Wisconsin where PFB is virtually nonexistent, there would have been no secular exemption and, by extension, no victory for religious liberty.

Andrew A. Beerworth, *Treating Spiritual and Legal Counselors Differently: Mandatory Reporting Laws and the Limitations of Current Free Exercise Doctrine*, 10 ROGER WILLIAMS U. L. REV. 73, 96 (2004); *see also* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 647-48 (2003).

167. Sahlfeld, *supra* note 129, at 135-44; Gerhard Robbers, *Schule und Religion*, *in* IM DIENSTE DER SACHE: LIBER AMICORUM FÜR JOACHIM GAERTNER 585, 590 (Ricarda Dill et al. eds., 2003).

since "when we lose the right to be different, we loose the right to be free."[168] The dominant view in the head scarf debate is clearly an exaggerated response to – and thus focuses on the prevention of – the speculative danger that open society will be overthrown by some theocratic republic, where every religious symbol is seen as a clear and present danger. This may set a dangerous precedent to human rights discourse and practice as it may be used to justify further attempts to remove controversial religious concepts (e.g., sin, retribution, salvation) and beliefs (e.g., creation, the sanctity of life and marriage) from the sphere of public action and discourse, in ways that threaten the core of freedom of conscience and belief. A more plausible alternative would be to endorse a religiously pluralistic state,[169] where all religious and non-religious people can act and speak consistently with their own consciences, limited only by the rights of others and fundamental principles of public interest and peaceful coexistence.

5. *Belief and Speech*

Religious experience is inseparable from various forms of religious discourse. It is as dangerous to interpret religious freedom within a "belief/action" dichotomy[170] as it is to interpret it on the basis of a "belief/speech" dichotomy. Freedom of religion requires the protection, not only of religious beliefs and actions, but also of religious speech. On the other hand, the principle of separation of Church and State is not incompatible with a robust presence of religious speech in the sphere of public discourse. The origin of modern constitutionalism, as the American experience illustrates so well, was not premised on the assumption that religious discourse should be deemed inferior to non-religious speech – and thus be totally removed from the public square – in the name of a naturalistic and materialistic conception of public reason; instead it simply assumed that religious discourse should be both free and freely challenged.[171] Instead of a theologico-political monopoly of reli-

168. James E. Wood, Jr., *The Relationship of Religious Liberty to Civil Liberty and a Democratic State*, 1998 B.Y.U. L. REV. 479, 490 (1998).

169. McConnell, *supra* note 92, at 1515-16.

170. Moens, *supra* note 130, at 215.

171. DAVID A. J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 177 (1989).

gious discourse, as was the case in both Catholic and Protestant continental Europe, there should be a free market place of religious ideas, even if "religious spillovers" to the political and legal system are unavoidable. This was the view that inspired men such as Roger Williams, John Milton, John Locke and Thomas Jefferson.[172] Their views of the political and legal system were clearly inspired by their religious views. This understanding has the merit of taking religion seriously, while at the same time protecting freedom of conscience, thought and expression of believers and non-believers alike.

Religion deals with the so-called "ultimate concerns" of human life – man's place in this world. But it does not stop there. It also deals with the search for existential and ethical meaning and purpose. It can also deal with matters concerning spiritual salvation and life after death. Religion can be an important source of a personal dignity and purpose. In this light, religion is a natural subject of human communication, as it concerns the deepest human feelings and experiences. Religious life is very often communal and, as such, inherently communicative. Worship is usually a collective experience, even if individual religious worship is also valued. Religious discourse is an essential component of the "community-creative" function of religion. This notion implies the constitutional protection of freedom of speech of religious communities. This is important, not just because these communities consist of free and equal individuals, but also because they often become social actors in their own right, with messages and voices that transcend those of their individual members.

However, religion does not necessarily want to remain in the realm of subjective experience. In fact, the problem of defining religion illustrates that in many cases religion wants to make factual and interpretative statements about the origin of the Universe, Life and Man, as well as about history and the role of Providence in it. There are more examples. Religion may want to stress the supernatural foundation of human dignity and human rights. Religious communities may want to participate in discussions on the war on terrorism, immigration, the rights of foreign residents, family values, contraception, abortion, euthanasia, human cloning and genetic engineering. Religion may have some-

172. Brady, *supra* note 43, at 373-83.

thing to say about nuclear weapons, the anti-social activities of transnational corporations or the debt of third world countries. Freedom of religious expression should include the right to communicate the subjective, communal and objective components of religious discourse.

German sociologist Niklas Luhmann has understood society essentially as a communicative system consisting of several subsystems, each communicating to its "environment."[173] Religion is a part of the larger social system. One can borrow here Luhmann's distinction between "function" and "performance" of social systems. The expression, "religious performance," describes those situations in which religion, understood as a kind of "social system," wants to influence the larger political, economic, cultural and scientific "environment." Freedom of religious speech is indispensable if religion is to realize its social "function." Religion itself can be a source if insights that impact matters outside the religious social sphere. Religion wants to reciprocate the challenges of different kinds of social discourse.[174] One may or may not agree with religion's pronouncements on these or other matters, but they are a legitimate part of its "performance" in the sphere of public discourse.[175] In fact, the efficacy of a robust presence of religious discourse in the public sphere can be traced back to Joahnes Gutemberg. As Ithiel de Sola Pool remarked:

> Chief among the early social impacts of printing was the strengthening of Protestantism and the weakening of the Roman Catholic Church. When family Bibles became available to common people, the priest was no longer its exclusive interpreter. Tracts, sermons and private interpretations of all sorts were diffused in print. Printing promoted Protestantism in less obvious ways too. Manuscript copying was one of the economic mainstays of the monasteries, whereas printing was done by bourgeois

173. NIKLAS LUHMANN, SOCIAL SYSTEMS 177 (John Bednarz, Jr. & Dirck Baecker trans., 1995).

174. *See generally* NIKLAUS LUHMANN, FUNKTION DER RELIGION (1977).

175. Edward M. Gaffney, Jr., *Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality*, 64 TUL. L. REV. 1143, 1182 (1990).

craftsmen.[176]

Of course, as Niklas Luhmann notes, the mechanisms that made access to the Bible possible also facilitated access to other modes of discourse as well.[177] In any case, there is an abundance of literature on the influence of religious values on other domains of life, such as human rights protection, economic prosperity, democracy, transparency and so on. It is simply impossible to separate religion from other spheres of social life and prevent it from communicating with them. Speech is as essential to religion as it is to politics, law, economics, science and the arts. As such it should be afforded equivalent constitutional and legal protection.[178] If all knowledge is based on indemonstrable assumptions about the world,[179] then religion is not that different from other spheres of society. It thus follows that believers – individually and collectively – must be able to communicate their faith and beliefs in both the religious sphere and all other spheres of social action.

In some religious traditions persuading people to believe is a crucial part of religious practice. Christianity is a paramount example. Speaking about faith in Christ, the Apostle Paul asks "how can they believe in Him if they have never heard about Him? And how can they hear about Him unless someone tells them?"[180] For Paul, the relationship between religious conviction and religious speech was crystal clear: "I believe, therefore I speak."[181] As long as it is done in an atmosphere of respect for others, the fact that people who hold strong convictions – religious or otherwise – attempt to persuade others about their beliefs is a natural and indispensable component of intellectual and moral development. This is, of course, valid for every form of speech. John Locke him-

176. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM: ON FREE SPEECH IN AN ELECTRONIC AGE 14 (1983).

177. NIKLAS LUHMANN, 1 DIE GESELLSCHAFT DER GESELLSCHAFT 292 (1997).

178. One can recall the U.S. Supreme Court's reference to James Madison regarding the similarity between political and religious freedom: "Security for civil rights must be the same as that for religious rights. It consists in the one case of multiplicity of interests and in the other in the multiplicity of sects." *See* Larson v. Valente, 456 U.S. 228, 245 (1982) (quoting THE FEDERALIST NO. 51, at 237 (James Madison) (J.R. Pole ed., 1987)).

179. *See* MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE (1969), *reprinted in* MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE & THE DISCOURSE ON LANGUAGE 38-9 (A.M. Sheridan Smith trans., 1972).

180. *Romans* 10:14.

181. 2 *Corinthians* 4:13.

self acknowledged the persuasive character of discourse when attempting to place limits on public and ecclesiastical coercion:

> It is one thing to persuade another to command; one thing to press with arguments, another with penalties. This, the civil power alone has a right to do; to the other, goodwill is authority enough. Every man is entitled to admonish, exhort, convince another of error, and by reasoning to draw him into the truth.[182]

The notion that religious speech should develop free of any State censorship or coercion has a strong pedigree in modern constitutional law. John Milton defended it in his famous essay *Areopagitica*: "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple: whoever knew Truth put to the worst, in a free and open encounter."[183] Thomas Jefferson, following John Milton, held that

> truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them."[184]

It is clear then, that freedom of religious expression is an original component of modern liberal constitutionalism, and that it has always been, and still is, associated with the use of communication technologies.[185] Despite the fact that the following discussion addresses some legal questions raised by individual religious

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182. LOCKE, *supra* note 33, at 20.

183. John Milton, *Areopagitica*, *in* 4 THE WORKS OF JOHN MILTON 347 (1931); *see* GERALD STOURZH, WEGE ZUR GRUNDRECHTSDEMOKRATIE: STUDIEN ZUR BEGRIFFS-UND INSTITUTIONENGESCHICHTE DES LIBERALEN VERFASSUNGSSTAATES 177-79 (1989).

184. Thomas Jefferson, *A Bill for Establishing Religious Freedom*, *in* THOMAS JEFFERSON: POLITICAL WRITINGS (Joyce Appleby & Terence Ball eds., 1999); Tony Davies, *Borrowed Language: Milton, Jefferson, Mirabeau*, *in* MILTON AND REPUBLICANISM 264-71 (David Armitage et al. eds., 1995).

185. *See generally* Martin Bullinger, *Multimediale Kommunikation in Wirtschaft und Gesellschaft*, 40 ZEITSCHRIFT FÜR URHEBER-UND MEDIENRECHT 750 (1996).

proselytism, the general right to a broad freedom of religious expression has important implications for religious communities' access to public and private mass media, namely through special rights of access, ownership of media outlets, leased access, direct satellite broadcasting and "set aside rules" in cable networks.[186]

Because of their particularly insistent style of religious proselytism, testing the boundaries of the right to freedom of religious speech seems to have been left to Jehovah's Witnesses. In the United States this right has been upheld by the Supreme Court in *Cantwell v. Connecticut*[187] and *Murdock v. Pennsylvania*.[188] There is the famous dictum which reads:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been or are prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy."[189]

The U.S Supreme Court recognized that religious freedom requires the freedom to communicate religious convictions.[190] This kind of religious discourse is inherently persuasive, a quality it shares with many other types of discourse, including political and economic discourse.[191] This in no way diminishes its legitimate

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186. *See generally* MARTIN FISCHER, KIRCHLICHE BEITRÄGE IM FERNSEHEN: DARSTELLUNG EINES ABGESTUFTEN MITGESTALTUNGSMODELLS KIRCHLICHER BETEILIGUNG IM FERNSEHEN 39 (2001).

187. 310 U.S. 296, 300, 311 (1940).

188. 319 U.S. 105, 117 (1943).

189. *Cantwell*, 310 U.S. at 310.

190. *Accord* ULRICH HÄFELIN & WALTER HALLER, SCHWEIZERISCHES BUNDESSTAATSRECHT: EIN GRUNDNISS § 44, at 369 (2d ed. 1988) (referring, in the section entitled "[Das r]echt auf Äuserung religiöser Überzeugungen," to the right to express religious convictions).

191. *See* Gary Goodpaster, *Equality and Free Speech: The Case Against Substantive Equality*, 82 IOWA L. REV. 645, 682 (1997); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COL. L. REV. 334, 336 (1991); Gaffney, Jr., *supra* note 175, at 1182; BRUNO SCHMIDT-BLEIBTREU & FRANZ KLEIN, KOMMENTAR ZUM GRUNDGESETZ 223-34 (8th ed. 1995).

claim to legal protection, even when the persuasive efforts of religious conviction lead to some excesses.[192]

The European Court of Human Rights has also made a powerful statement in favor of this right in the famous case *Kokkinakis v. Greece*.[193] The case concerned a Jehovah's Witness, Mr. Kokkinakis, who had been arrested more than sixty times for proselytism, and even imprisoned several times pursuant to a law – enacted in 1938 – that made proselytism a criminal offense.The European Court was not particularly impressed with the arguments put forth by the Greek authorities, who claimed proselytism was an intrusion into the beliefs of others; it was a way of taking advantage of the inexperience and low intellect of people. The court held that freedom of religion included the right to try to convince one's neighbor – for example through "teaching" – based upon each individual's "freedom to change [his or her] religion or belief," enshrined in Article 9.[194] The court stressed this point, since "[a] person can not think freely if it [sic] cannot speak; and he cannot think freely if others cannot speak, for it is in hearing the thoughts of others and being able to communicate with them that we develop our thoughts."[195] Equally persuasive was the notion that if people are presumed to have a "low intellect" in a way that does not allow them to listen to Jehovah's Witness doctrines, why should they be allowed to be indoctrinated in the Greek Orthodox doctrines?[196]

Another argument that failed to convince the European court in *Kokkinakis* alleged that the systematic and insistent nature of Jehovah's Witness proselytism made it unlawful. Since there was no proof of the use of improper means – such as the offering of material or social advantages, violence or brainwashing – the court disagreed.[197] This point is important: The individual or collective manifestation of religious zeal, even within a reasonable measure of excess, is not necessarily improper. The court deemed irrelevant the State's appeal to the special place of the Orthodox Church in

192. *See* Cantwell, 310 U.S. at 303.
193. App. No. 14307/88, 17 Eur. H.R. Rep. 397 (1993).
194. *Id.* ¶ 54.
195. Judith Lichtenberg, *Foundations and Limits of Freedom of the Press*, *in* DEMOCRACY AND THE MASS MEDIA 108 (Judith Lichtenberg ed., 1990).
196. *See Kokkinakis*, 17 Eur. H.R. Rep. 397, ¶¶ 69-75.
197. *See id.*

Greece. Instead, the court gave full weight to the notion that the free exercise of religion encompassed the freedom of religious teaching within a context of pluralism and a free flow of ideas. These rights were considered too important to be limited by a law containing a vague notion of proselytism, in any case bound to be selectively applied.[198] This case affirmed that in a free and democratic society the purpose is not to oust religion from the public square, but to free religious speech from all political and confessional monopolies.At this juncture it must be underlined that the traditional constitutional arguments used to keep religious discourse out of the public sphere, or at least to place it in a secondary position, are no longer cogent. The privileged character of political speech in free speech doctrine looks increasingly like the imposition of an arbitrary restriction on freedom of speech, rather than a self-evident truth.[199] The legal implications that some have tried to draw from the idea that religion is irrational and subjective should be reassessed in light of the fact that some religions rest their doctrines upon factual claims and use rational arguments as part of their persuasive tool-kit. At the same time, emotions are considered a legitimate part of human identity, reason and speech, and play an important role in scientific inquiry and theory–building.[200] Emotive expression should be fully protected by freedom of speech, not only in the realm of religion, but also in fields such as politics, economics, art and science. In fact, "[w]hen deliberative reason is going on, it hardly ever needs the Constitution's protection."[201] One should take in to account that politics, and even science, require significant interpretive, subjective and emotive pre-commitment. Thus, a right of freedom of expression that disregards religious expression ignores a kind of speech of utmost value to individuals, one that attempts to speak to a person's deepest emotional needs and fears.

198. *Id.*

199. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 112 n.13 (1982).

200. Paul Gerwirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023, 1028 (1996).

201. Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 97 (1990).

6. Freedom to Speak About Religion

If religious speech must be given its due place in the sphere of public discourse – along with political, economic, scientific, philosophical or artistic speech – it is only fair that there also be the freedom to challenge religious beliefs, doctrines, and institutions without fear of religious inquisitions or "fatwas." Moreover, when widely held religious beliefs inevitably result in normative externalities, or "spillover" into other communicative and institutional spheres of the social system, they end up affecting many who do not even hold those beliefs. Religion, being a "total narrative," naturally tends to go far beyond what is generally assumed to be strictly the religious sphere of dogma and worship. It wants to deal not just with "ultimate concerns," but often also with all levels of concern. Religious doctrines generally want to inject their normative tenets into the daily lives of individuals and communities.[202]

A variety of religious dogmas, doctrines and institutional structures inevitably lead to opposing views on many important political and social questions. There are many religious traditions, and some are much more liberal than others.[203] Religious perspectives influence the way society deals with issues like war, peace, authority, human rights, women's' rights, homosexual rights, animal rights, democracy, transparency, environmental protection, money, prosperity, poverty, development, sexuality, abortion, euthanasia, history, science and education, to name a few. This influence is real, but neither monolithic nor devoid of controversy. Religious views can shape the political, legal, economic, social and cultural "status" of entire populations and groups. Religious groups may want to influence, directly or indirectly, the making of public policy in various domains. Religion is seen by some as politically liberating, economically empowering and socially integrating;[204] by others as a tool of political subordination, and the

202. *See, e.g.*, RUTH NANDA ANSHEN, RELIGIOUS PERSPECTIVES: ITS MEANING AND PURPOSE (1960), *reprinted in* PAUL RICOEUR, THE SYMBOLISM OF EVIL 358-62 (Emerson Buchannon trans., Beacon Press 1969) (1967).

203. BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION 67 (1992) (pointing out that there are many Christianities, and some much more liberal than others).

204. *See* JERE COHEN, PROTESTANTISM AND CAPITALISM: THE MECHANICS OF INFLUENCE 35 (2002); *see generally* SAMUEL HUNTINGTON, WHO ARE WE? THE

perpetuation of patriarchal structures and homophobic prejudices.[205]

Controversial as this and other assessments of religion may be, they should have a right to be fully and freely expressed. The institutional and political history of the West clearly demonstrates how religious discourse affects all aspects of society. Just as the *Respublica Cristiana* of the Middle Ages cannot be understood apart from Catholicism, so modern liberal constitutionalism would be unthinkable without the Protestant Reformation and Calvinism.[206] It must be underlined that the fundamental rights of freedom of religion speech developed, to a large extent, with the purpose of protecting challenges to dominant religious dogma by various dissidents, such as heretics, schismatics, apostates and infidels.[207] Religious discourse, therefore, is warranted because religious communities, like many other public and private entities, can be involved in anti-social and even criminal behavior.[208] Religion can be linked to financial scandal, sexual abuse or terrorism, and therefore should be openly debated; religious dissent must be protected as a form of religious speech. Equally important, however, in a free and democratic society, is the protection of non-religious discourse about religion, by implementing a "model of equal communicative freedom."[209]

Consideration of *Otto-Preminger Institute v. Austria*[210] is appropriate here. This case is one of the most relevant decisions of the European Court of Human Rights on this matter. The case

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CHALLENGES TO AMERICA'S NATIONAL IDENTITY (2004).

205. *See* Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, *in* THE BILL OF RIGHTS AND THE MODERN STATE 453, 479 (Geoffery R. Stone et al. eds., 1992); *see generally* SEXUAL ORIENTATION AND HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE 5-6 (Saul M. Olyan & Martha C. Nussbaum eds., 1998).

206. *See* Arci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Conviction*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 2, at 296-98.

207. See Haim H. Cohen, *The Law of Religious Dissidents: A Comparative Historical Survey*, 34 ISR. L. REV. 40 (2000).

208. *See generally* James Gobart & Maurice Punch, *Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998*, 63 MOD. L. REV. 25 (2000).

209. HELMUT GOERLICH, GRUNDRECHTE ALS VERFAHRENSGARANTIEN: EIN BEITRAG ZUM VERHÄLTNIS DES GRUNDGESETZES FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 150 (1981).

210. App. No. 13470/87, 19 Eur. H.R. Rep. 34 (1994).

dealt with the presentation – in Insbrück, in the Tirol area of Austria – of the film "Das Liebekonzil" (Council in Heaven) in an "art cinema" of the Otto-Preminger Institute (OPI). The film presented a highly satirical view of the worldly relationship between religion, money, sex and power, with special attention on the Catholic Church, by far the dominant Austrian religion. The informational bulletin circulated by the OPI described the film: "Trivial imagery and absurdities of the Christian creed are targeted in a caricatural mode and the relationship between religious beliefs and worldly mechanisms of oppression is investigated."[211] The film was based on an 1894 play by Oskar Panizza, who was imprisoned in 1895 for crimes against religion. The play was performed in theatres in Rome, and in several Austrian cities, including Insbrück. The film was given wide, but relatively discrete, promotion, and the showings were restricted to persons older than seventeen. A complaint was issued by the Catholic Diocese of Insbrück, and a the director of OPI was criminally charged with "disparaging religious doctrines," pursuant to Section 188 of the Austrian Penal Code.[212] All film showings in Austria were cancelled, despite the fact that they in no way interfered with the religious freedom of Catholics.[213]

The European Court of Human Rights stressed the importance of respect for the freedom of religion of others – including respect for their religious feelings – in a setting that values tolerance and the protection of public order.[214] Equally considered was the style of speech and the "right not to be insulted," leading the court to the conclusion that public discourse should avoid "gratuitously offensive" expressions.[215] The court also paid attention to the special role of the dominant religion.[216] It acknowledged a "margin of appreciation" to the Austrian authority, overlooking a violation of the right to freedom of speech granted by Article 10 of the ECHR.[217] In doing so, the court failed to give due weight to the

211. *Id.* ¶ 10.
212. *Id.* ¶ 11.
213. *See* PIETER VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 551 (1984).
214. *Otto Preminger*, 19 Eur. H.R. Rep. 34, ¶ 48.
215. *Id.* ¶ 49.
216. *Id.* ¶ 56.
217. *Id.* ¶ 50.

notion that freedom of speech must be interpreted in a way that protects shocking, offensive and provocative speech – a notion to which the Court itself subscribes[218] – including those that promote discourse critical of religion, even (and especially) the dominant religion. A major historical factor in the fight for freedom of speech was the protection of controversial and minority opinions, since they were more vulnerable to censorship.This goes hand in hand with a strong presumption, in freedom of speech doctrine, in favor of the prohibition of "prior restraints."[219] Free speech requires less censorship and more speech.

Thus, robust debate in the public sphere is better than silencing hostile perspectives. Besides freedom of speech, the *Otto-Preminger* case also concerns the right to artistic freedom, which is afforded broader protection in some European legal systems. For instance, the Federal Constitutional Court of Germany has held that artistic freedom is limited only by the "order of values" of the German Constitution, and by the principle of human dignity.[220]

Two final notes seem appropriate. First, modern liberal constitutional government owes much to the highly satirical discourse that, in the seventeenth and eighteenth centuries, exposed the moral hypocrisy of both the *Ancien Regime* clergy and nobility, whose privileges and power were based on claims of "Divine Right."[221] Second, while Austria banned a form of discourse hostile to Christianity involving a selected group fond of alternative culture, Christ himself was crucified by the authorities of His time because he effectively challenged the dominant religious institutions.[222]

Another interesting case, decided by the European Court of Human Rights, was *Jerusalem v. Austria*.[223] In this case, the ap-

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218. *See id.* ¶ 56.

219. *See* Wingrove v. United Kingdom, App. No. 17419/90, 24 Eur. H.R. Rep. 1, ¶ 58 (1996).

220. Mephisto, BVerfGE 30, 173; *see also* MARK JANIS, RICHARD KAY & ANTHONY BRADLEY, EUROPEAN HUMAN RIGHTS LAW 158-60 (1995).

221. *See* NICHOLAS WOLFSON, HATE SPEECH, SEX SPEECH, FREE SPEECH 119-20 (1997); RONALD K.L. COLLINS & DAVID M. SCOVER, THE DEATH OF DISCOURSE 144-45 (1996).

222. *E.g.*, JOHN DOMINIC CROSSAN, THE HISTORICAL JESUS: THE LIFE OF A MEDITERRANEAN JEWISH PEASANT 359-60 (1992).

223. 121 Eur. Ct. H.R. (2001).

plicant, Susanne Jerusalem, during a debate in the Vienna Municipal Council, called the Institute for a Better Understanding of Human Psychology (IBHP) a "sect," ascribed it totalitarian tendencies and accused it of having undue influence over the Austrian People's Party's drug policies. The IBHP, along with another association, filed a civil-law action requesting the court to issue an injunction prohibiting the applicant from repeating her statement and ordering her to publicly retract. The European Court of Human Rights stated that "freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for individual self-fulfillment."[224] According to the court, the right to speak words that "offend, shock or disturb," is required by the demands of pluralism, tolerance and broadmindedness, without which there can be no "democratic society."[225] The court upheld broader limits of acceptable criticism in the case of politicians acting in their public capacity, while stating that private individuals or associations lay themselves open to scrutiny when they enter the arena of public debate, which had been the case with the IBHP and its attempt to influence drug policy.[226]

It is worth comparing these two cases with the famous U.S. Supreme Court case *Hustler Magazine, Inc. v. Falwell*[227] – which involved a satirical cartoon featuring Baptist Pastor Jerry Falwell – within the social context of ideological debates between conservative and liberal segments of the American society. The caricature at issue suggested that Falwell had his first sexual experience with his mother, an allegation Falwell considered "outrageous," and that caused "emotional distress."[228] Although the satire was highly personal and offensive, the case should be understood as dealing with an ideological attack on the political involvement of the "religious right," through Falwell's "Moral Majority." In a way, the case dealt with the possibility of secular individuals and organizations challenging the presence and activity of religious institutions in the public square. The U.S. Supreme

224. *Id.* at ¶ 32.
225. *Id.*
226. *Id.* ¶ 38.
227. 485 U.S. 46 (1998). *See also* DOUGLAS S. CAMPBELL, THE SUPREME COURT AND THE MASS MEDIA 82 (1990).
228. *HustlerMagazine*, 485 U.S. at 50.

Court determined the cartoon was permissible, because "public figures" are natural targets of vehement, caustic, and sometimes unpleasantly sharp attacks. According to the Court, this is unavoidable amidst a robust political debate as is required by the First Amendment.[229] The Court also acknowledged the importance of protecting the expressive and artistic excesses of some forms of satire and caricature, even when they result in highly offensive and shocking speech.[230] In fact, as early as 1969 the Court had stated that "[i]t is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[231] In the caricature in question, no factual conduct was imputed to Reverend Jerry Falwell. The prime justification for the highly satirical tone of caricature was the hotly disputed confrontation between a pornographer and a Pastor, not so much on personal grounds, but because of their social roles as representatives of the most antagonistic ideological factions of American society. In the face of political confrontation, the Court understood that the sphere of public discourse was willing to set aside basic norms of civility and communicative ethics to enlarge the possibility of debate.[232]

An "open society" must welcome the right to engage in an uninhibited, robust and wide open discussion and cross-examination of religious dogmas, doctrines, assumptions, forms of organization and public figures within the public sphere.[233] The various religious communities and their memberships must have the right to speak about each others' doctrines without fear. The same is true for non-religious individuals and institutions. Tolerance and mutual respect cannot mean the absence of discussion and sharp criticism. Religious debate and debate about religion between free and equal citizens is essential to prevent religious absolutism and normative stagnation.[234] This is an important reason why dis-

229. *Id.* at 51.
230. *Id.* at 54-55.
231. Street v. New York, 39 U.S. 576, 592 (1969).
232. *See* GOERGE R. WRIGHT, THE FUTURE OF FREE SPEECH ch. 2 (1990).
233. *See, e.g.*, KARL POPPER, 1 THE OPEN SOCIETY AND ITS ENEMIES: THE SPELL OF PLATO 169-73 (5th ed., rev. 1966); JEAN BAUDOIUN, LA PHILOSOPHIE POLITIQUE DE KARL POPPER 11, 47 (1994); REALISMO Y EL OBJECTIVO DE LA CIENCA 51 (1985); L'UNIVERS IRRESOLU: PLAYDOYER POUR L'INDETERMINISME 4 (1984).
234. *See* Nathan A. Adams, IV, *A Human Rights Imperative: Extending*

course about religious dogmas, doctrines, rituals and activities should be broadly protected. One of the advantages of a strong protection of speech among religions and about religion is the promotion of self-critical thought, fallibility and normative progress, goals impossible to attain when dominant religious views go unchallenged. Religious dogmas and doctrines cannot be placed above and beyond the "ceaseless critical engagement"[235] and "meaningful conversation"[236] that are the building blocks of a free and democratic society. In this light, it is only fair to require that freedom of expression for religious individuals and organizations be broadly protected in all the various spheres of public discourse, so as to enable them to strike back. In the words of Justice Frankfurter, "compelling belief implies denial of opportunity to combat it and to assert dissident views."[237] This has particularly relevance when dealing with matters concerning freedom of religious speech and freedom of speech about religion.

VIII. SEPARATION OF CHURCH AND STATE

1. European Public Law

In modern constitutional law, separation of Church and State has come to play an essential role, not only for freedom of religion, but also for the modern "type" of "Constitutional State."[238] It has become a central tenet of the constitutional law of religion in a multidenominational political community where the State wants to be the common "home for all citizens" (*"Heimstaat für alle Bürger"*).[239] This principle is now considered a structural corollary of

Religious Liberty Beyond the Border, 33 CORNELL INT'L L.J. 35-36 (2000).

235. *See generally* Katharine T. Bartlett, *Feminists Legal Methods*, 103 HARV. L. REV. 829 (1990).

236. *See generally* Robert W. Bennett, *Democracy as Meaningful Conversation*, 14 CONST. COMMENT. 481 (1997).

237. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 656 (1943) (Frankfurter, J., dissenting).

238. *See* PETER HÄBERLE, VERFASSUNGSENTWICKLUNGEN IN OSTEUROPA – AUS DER SICHT DER RECHTSPHILOSOPHIE UND DER VERFASSUNGSLEHRE, 117 ARCHIV DES ÖFFENTLICHEN RECHTS 170, 180-84 (1992); *see generally* PETER HÄBERLE, DIE ENTWICKLUNG DER HEUTIGEN VERFASSUNGSSTAATES, 22 RECHTSTHEORIE 431 (1991).

239. Martin Heckel, *Die Religionsrechtliche Parität*, *in* 1 HANDBUCH DES

the right to religious freedom, as well as an institutional guarantee of State ideological neutrality. Separation prevents the State from using its power to coerce, persecute and discriminate in the name of religion.[240] The essence of this principle is the creation of a "non-confessional State," understood as an association of free and equal citizens where people who hold different religious and non-religious convictions can coexist peacefully and respectfully as full members of the political community. This is important because historical experience suggests that separation of Church and State only operates in favor of moral and rational autonomy when inserted into a broader set of constitutional values and principles. This notion is now an integral part of the *Jus Publicum Europeaum*, and European integration should foster a non-confessional understanding of the "Constitutional State."[241] This, of course, does not mean that the principle is applied uniformly in the Old Continent. On the contrary, in some contexts it cannot even be said that the principle is followed, since numerous examples of institutional union between Church and State in Europe remain, holdovers from deep-rooted traditions of theologico-political unity.[242] In fact, the constitutional relationship between Church and State in Europe is still very much influenced by the "presence of history" (*Präsenz der Geschichte*),[243] thus creating a wealth of obstacles to a principled and consistent design for politi-

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STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, *supra* note 87, § 20, at 621.

240. J.J. GOMES CANOTILHO & VITAL MOREIRA, CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA ANOTADA 244 (3d ed. 1993).

241. *See* PETER HÄBERLE, EUROPÄISCHE VERFASSUNGSLEHRE IN EINZELSTUDIEN 221-36 (1999).

242. For example, the increasing obliteration of church-state separation in Russia signals a remarkable reversal of the anti-clerical and atheist policies of the now defunct Soviet regime. A Moscow court recently convicted a group of artists for inciting "religious hatred" by creating artwork which the Patriarchate of the Russian Orthodox Church considered to be offensive. Guy Chazan, *Russian Church-State Line Blurs*, WALL ST. J., Mar. 29, 2005, at A12. This recent ruling is viewed by many as the result of an attempt by President Vladimir Putin to re-establish the Russian Orthodox Church as the preeminent guardian of moral and cultural mores within Russia, a status which belonged exclusively to the Church prior to the October Revolution and subsequent advent of Soviet Communism. *Id.*

243. PETER HÄBERLE, VERFASSUNG ALS ÖFFENTLICHER PROZESS: MATERIALEN ZU EINER VERFASSUNGSTHEORIE DER OFFENEN GESELLSCHAFT 334 (1998).

cal and legal institutions.

Each European State has its own legal regime of Church/State relations, in what some describe as "*cuius regio eius et legislatio.*"[244] Currently, this regime is a complex, if not totally inconsistent. On the one hand, the European Union (EU) institutions – upon principles of respect for national identities and subsidiarity[245] – and the European Court of Human Rights – by the doctrine of "margin of appreciation" – have decided not to challenge existing institutional arrangements head on.[246] On the other hand, EU structural principles – free markets, fundamental rights, religious freedom, equal European citizenship and non discrimination[247] – create strong systemic pressures towards weakening, if not dismantling, existing religious establishments and privileges.[248] Thus, in regards to European public law as a whole, separation of Church and State should be accepted *not* as an "all-

244. *See* CARLO CARDIA, ORDINAMENTI RELIGIOSI E ORDINAMENTI DELLO STATO, PROFILI GIURISDIZIONALI 15 (2003).

245. Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 253, 1992 O.J. (C 191) 1, arts. 2, 6 [hereinafter Treaty on EU].

246. The Eleventh Final Declaration contained in the annex to the Amsterdam Treaty, adopted by the Intergovernmental Conference of 1996, states that the European Union (EU) will respect and not effect the domestic law status enjoyed by the Churches, other religious communities and non-religious and philosophical organizations. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340), Annex, Final Declaration 11 (1997) [hereinafter Treaty of Amsterdam]. Similarly, Article 51 of a 2003 draft for a constitutional treaty for the EU, adopted by a consensus of the European Convention, states that the Union "respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States." *Draft*, Treaty Establishing a Constitution for Europe, July 18, 2003, CONV 850/03, art. 51, ¶ 1. In addition, the draft treaty affirms that the EU "shall maintain an open, transparent and regular dialogue these churches and organisations." *Id.* ¶ 3. In the Case of the European Court of Human Rights, as we have seen, the strategy seems to be the elimination of the most serious forms of religious persecution and discrimination, while deferring to the essential features of national establishments, by means of the application of the margin of appreciation doctrine. *See supra* note 217 and accompanying text.

247. *See, e.g.*, Treaty on EU, arts. 2, 6, 12, 13; Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340) 3, art. 14 (1997); Charter of Fundamental Rights of the European Union, Dec. 18, 2000, O.J. (C 364) 1, art. 10(1) (2000).

248. See Marco Ventura, *Protectionisme et libre-echengisme – La Nouvelle Gestion Juridique de la Religion en Europa*, 64 CONSCIENCE ET LIBERTE 122 (2003).

or-nothing" rule, but as a relatively open, normative principle, requiring optimization and harmonization with other competing values and principles, and compatible with different forms and degrees of realization. It is, after all, a "substantive regulatory ideal" derived from the values of equal freedom and equal citizenship, whose implementation and optimization will be dependent upon creative interaction between normative European principles and national constitutional, historic and cultural realities.[249] This means that in some areas change will probably be gradual, slow and partial.

This principle has proved to be a complex normative construct, whose meaning continues to be hotly contested. Thus, even if and when the complete disestablishment of official European churches occurs, separation of Church and State will be interpreted in a way that is compatible, to a reasonable extent, with different cultural values, historical traditions and institutional arrangements only so long as its core human rights values remain untouched. Some European legal scholarship qualifies this principle with expressions such as "positive separation," "cooperative separation," "weak separation," "separation with exceptions," "balanced separation," "*sui generis* separation" and "neutrality with exceptions," to name a few.[250] Perhaps several of these could aptly characterize the reality of American separation as well. An absolute, strict, geometrically perfect adherence to separation is virtually impossible – if not completely undesirable – given relevant civilizational, historical and cultural constraints. In a liberal constitutional democracy the legal system must attempt to strike a reasonable balance between the "basic elements of social community life," on the one hand, and the fundamental requirements of free and equal citizenship on the other.[251] The following pages will attempt to provide a brief assessment of the historic under-

249. Michael Brenner, *Die Kirchen als Körperschaften des öffentlichen Rechts zwischen Grundgesetz und Gemeinschaftsrecht: Rechtslagen und Perspektiven, in* DEUTSCHES STAATSKIRCHENRECHT ZWISCHEN GRUNDGESETZ UND EU-GEMEINSCHAFT: SYMPOSIUM IM KIRCHENAMT DER EVANGELISCHEN KIRCHE IN DEUTSCHLAND AM 25. UND 26. APRIL 2002 IN HANNOVER 43, 43 (Axel Freiherr von Campenhausen ed., 2003).

250. GESA DIRKSEN, DAS DEUTSCHE STAATSKIRCHENRECHT – FREIHEITSORDNUNG ODER FEHLERENTWICKLUNG? 63, 64-66 (2003).

251. ANDREAS GRUBE, DER SONNTAG UND DIE KIRCHLICHEN FEIERTAGE ZWISCHEN GEFÄHRDUNG UND BEWÄHRUNG 223 (2003).

standing of this principle, as well as its meaning and purpose. We will also consider the relevance of separation to the institutional union of Church and State, as illustrated by European Court of Human Rights case law. the following discussion will try to advance an understanding of separation of Church and State that takes religion, religious heritage and religious freedom seriously, while at the same time preventing its "capture" by anti-religious ideological forces of secularism, rationalism and naturalism.

2. *History in America and Europe*

The original understanding of separation of Church and State can be reasonably associated with the brand of Anglo-American Puritan independentism that stressed the importance of individual freedom of conscience, conviction and choice in religious matters, as well as the need to preserve the free and voluntary nature of the church. This principle was also the essence of the thought of men like John Locke and Thomas Jefferson.[252] Another important component of Puritanism was the protection of the purity of the church from worldly corruption, just as a garden must be protected from the wilderness in the famous image of Roger Williams.[253] These values and ideals were incompatible with State establishment of official churches. However, most early American settlers were not separationists, but established Puritan churches upon social contract principles, in political and geographical locations where the power of the primary, established European churches had been significantly weakened.[254] The general Protestant and rationalist belief in individual autonomy, plus the weak influence of the main Old Continent establishments, along with the diverse content of religious establishments at colonial and State levels encouraged the emergence of the principle of separa-

252. *See generally* Jefferson, *supra* note 184.

253. Eberle, *supra* note 25, at 453 (quoting ROGER WILLIAMS, THE BLOODY TENENT OF PERSECUTION, FOR THE CAUSE OF CONSCIENCE (1644), *reprinted in* PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 124 (1965)).

254. *See, e.g.*, NOONAN, JR., *supra* note 18, at 95; David Flahetery, *Law and the Enforcement of Morals in Early America, in* AMERICAN LAW AND CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 58 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978); Edward Terrar, *Was There a Separation Between Church and State in Mid-17th Century England and Colonial America?*, 35 J. CHURCH & STATE 61 (1993).

tion of Church and State at the federal level.[255] Formal federal separation first appeared in positive constitutional law in Article VI, Section 4, of the U.S. Constitution. This provision established that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[256] Apparently the American Founding Fathers thought the non-confessional State as a necessary precondition to equal citizenship, even if that precise provision did not perfectly correspond to either colonial or State level traditions.

Equally important was the Establishment Clause of the First Amendment to the U.S. Constitution, according to which "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[257] The literal content of this provision suggests it was based on the understanding that religious freedom ascribes "negative powers" to the State, so as to prevent it from either prescribing or proscribing a particular religion. These notions assumed there was an institutional and functional difference between church and State; however, these clauses far from required total alienation of religion from the public sphere. In fact, a body of constitutional theory that emphasizes the connection between religious free exercise and economic free enterprise[258] suggests that the State was expected to create a competitive and religious-friendly environment, while abstaining from granting a competitive advantage to any one existing religious faction.

There are other noteworthy things about this provision. First, the text of this clause does not literally speak of separation of church and State. This expression was in fact borrowed from Roger Williams, who used it to defend the church against the State; and from Thomas Jefferson, who spoke of a "wall of separation between Church and State" to protect the natural right of conscience.[259] In reality, this provision has always legitimatized

255. Eberle, *supra* note 10, at 320-21.
256. U.S. CONST. art. VI, § 3.
257. *Id.* amend. I.
258. *See* Dean Kelley, *Free Enterprise in Religion, or How Does the Constitution Protect Religious Freedom?, in* HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM 119 (Robert A. Godwin & Art Kaufman, eds., 1987); H. LEON MCBETH, THE BAPTIST HERITAGE 124 (1987).
259. See Thomas Jefferson, *Letter to Messrs. Nehemiah Dodge, Ephran Robbins, and Stephen S. Nelson, a Committee of the Danbury Baptist Associa-*

public recognition of the central role religion has played in American constitutional, legal and political history, shaping its values, principles and institutions. The historical emergence of separation itself owes as much to the emergence of Puritan independentism as it does to Enlightenment rationalism. What is more, the relevance of the Establishment Clause was limited to the federal level, meaning that its immediate purpose was to guarantee respect for States' rights by the federal government, as well as the equal treatment of all States, regardless of particular religious inclinations.[260] Even in America this principle can be best understood as the result of a very long maturation process, involving federal and state constitutional law, legal doctrine and judicial decisions.

In Europe, the American understanding of separation of Church and State – gradually conceived as a means to protect individual conscience and the freedom of a plurality of independent religious factions – never really took off, although many of its early proponents were European. In fact, the European experience is polarized, albeit with significant gray areas. On the one hand, a significant number of European countries maintained, and some still maintain, a *de jure* or *de facto* established church, or several established religious groups, pursuant to its own tradition and history; these States never dare to consistently apply the values of constitutional liberal democracy to the realm of religious choice, or the relationship between religion and the State.[261] This is still the case in countries such as England, Germany, Holland, Norway, Finland, Italy, Greece, Spain and Portugal. In these countries we observe the existence of different constitutional, legal and institutional arrangements within a spectrum that stretches from constitutionally established churches to secular laicist separatism, with intermediate regimes that may include a recognition of public law status for religious denominations, and the celebration of special *sui generis* agreements with the Catholic Church, and, in some

tion in the State of Connecticut, in THOMAS JEFFERSON: POLITICAL WRITINGS, *supra* note 184, at 390-402; *see generally* Derek Davis, *Thomas Jefferson and the Wall of Separation Metaphor*, 45 J. CHURCH & STATE 1 (2003).

260. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 84-86 (1994).

261. *See* Paul Kirchhof, *Die Kirchen und Religionsgemeinschaften als Körperschaften des Öffentlichen Rechts*, *in* 1 HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, *supra* note 87, § 22, at 651-56.

cases, with other dominant or minoritarian religious denominations.[262] Some scholars went so far as to speak of the public nature of religion and to affirm its dependence on the State's positive "provision of freedom."[263] Despite notable improvements in religious freedom and the legal status of minority religious group memberships, the end result of these regimes is the guarantee of a privileged position for the dominant religion, and the discrimination of minority religious groups.[264]

On the other hand, there is the radical understanding of separation of Church and State that attempts to privatize and neutralize religious conviction. This view – influential in some stages of the political and constitutional history of countries such as Italy, Spain and Portugal – represents religious conviction as purely subjective, emotive and contrafactual in nature, if not entirely irrational. It was first promoted by the radical left wing of the French Revolution, and was later refined, with more sophisticated arguments, by scientist, positivist and materialist intellectuals who significantly impacted even some of those countries that still maintain special ties with their dominant religions.[265] This line of thought relies heavily on anti-metaphysical assumptions, although the contributions of liberal Protestants, rationalist Deists, and free-thinkers cannot be ignored.[266] Today this perspective

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262. *See* CARLO CARDIA, ORDINAMENTI RELIGIOSI E ORDINAMENTI DELLO STATO, PROFILI GIURISDIZIONALI 15 (2003).

263. *See* Alexander Hollerbach, *Finances and Assets of the Churches: Survey on the Legal Situation in the Federal Republic of Germany*, *in* STATI E CONFESSIONI RELIGIOSE IN EUROPE 59 (Dott. A. Giuffre' ed., 1992).

264. *See* JÓNATAS E.M. MACHADO, O REGIME CONCORDATÁRIO ENTRE A "LIBERTAS ECLESIAE" E A LIBERDADE RELIGIOSA: LIBERDADE DE RELIGIAO OU LIBERDADE DA IGREJA? 58 (1993) (unpublished doctoral thesis, University of Coimbra) (on file with author); Sergio Lariccia, *Garanzie di Liberta non Garanzie di Privilegi*, *in* IL DIRITTO ECCLESIASTICO 283 (1977); *see* Georg-Christoph Unruh, *Grundzüge der Verfassungsentwicklung Deutschlands zum Rechtsstaat*, *in* 11 JURISTISCHE ARBEITSBLÄTTER 299, 300-02 (1992); Amadeo Franco, *Confessioni Religiosi Senza Intese e Discriminazioni Legislative*, *in* 2 DIRITTO E SOCIETÁ 183 (1991); Silvio Ferrari, *Comportamenti "Eteridossi" e Libertá Religiosa*, *in* I IL FORO ITALIANO 271 (1991).

265. *Supra* Part III; Danièle Hervieu-Léger, *The Past in the Present: Redefining* Laïcité *in Multicultural France*, *in* THE LIMITS OF SOCIAL COHESION: CONFLICT AND MEDIATION IN PLURALIST SOCIETIES 41-42 (Peter L. Berger ed., 1998).

266. *See* DOMENICO BARILLARO, SOCIETA CIVILE ET SOCIETA RELIGIOSA 22 (1978); GEORGES BURDEAU, LES LIBERTES PUBLIQUES 349 (4th ed. 1972).

heavily influences the French interpretation of *laicité*.[267] One of the victories of *laicité* was the education reform, which boasted the creation of a public, mandatory and free school system expected to function as a stronghold of humanist resistance against the clerical and royal forces of antiliberal theologico-political absolutism (*le clericalisme, voilá l'énnemie*).[268] This concept developed, to a large extent, as a reaction to what was perceived (with good reason) as a history of systematic abuse of dominant positions by the ruling religious confession.[269] Rationalists and free-thinkers expected the principle of separation to prevent dominant religious confessions from "capturing" State power to enforce their own conception of truth in a religious monopoly. In developing this thought, Rationalists and free-thinkers saw this principle as a defense against the so-called dogmatic, irrational and authoritarian dimensions of religion. Although the contribution of this line of thought to religious freedom and the civic equality of religious groups is undeniable, it is based on assumptions that tend to downplay the importance of religion, and threaten the presence of religious manifestations in the public square. In European authoritarian regimes these assumptions led to militant atheism and the removal of all vestigial traces of religion from public life.[270]

Although most contemporary European constitutions tend to recognize a right of freedom of religion and the principle of separation of Church and State, they do so against a backdrop that is a complex mosaic of different notions of religious freedom, religious confession, equality, laicism, secularism and State neutrality. This potpourri collectively reflects different historical experiences and cultural understandings, each translating into unique legal prescriptions and judicial solutions. This has led to the contamination

267. *See generally* Louis Lafourcade, *Petite Histoire de la Laicite*, 128 HUMANISME 45 (1979); Roberto Berardi, *Considerazione sul Laicismo*, 1972 IL POLITICO 37 (1972).

268. *See generally* Pierre Lamarque, *Obligation, Gratuite, Laicite*, 128 HUMANISME 27 (1979); JOHN GRAND-CARTERET, CONTRE ROME 9 (1907).

269. *E.g.*, ROGER PRICE, A CONCISE HISTORY OF FRANCE 109-110 (1993).

270. *See* RELIGION AND ATHEISM IN THE U.S.S.R AND EASTERN EUROPE 151 (Bohdan R. Bociurkiw & John W. Strong eds., 1975); DAVID MCLELLAN, MARXISM AND RELIGION: A DESCRIPTION AND ASSESSMENT OF THE MARXIST CRITIQUE OF CHRISTIANITY 90-92 (1987); ADOLPH WILHELM ZIEGLER, RELIGION, KIRCHE UND STAAT IM GESCHICHTE UND GEGENWART: EIN HANDBUCH 464 (1969).

of legal concepts by particular theological and philosophical conceptions, often resulting in a biased and prejudiced jurisprudence that is *a priori* hostile to minoritarian and unconventional religious groups.[271] In many cases, different individuals and groups used the same concept of religious freedom, but assigned the right incongruous meanings, merely serving antagonistic liberal and authoritarian political and religious agendas.[272] In the face of this reality, contemporary constitutional legal scholarship has attempted to free conceptual constitutional terminology from those biases.[273] One of the tasks of the European Court of Human Rights has been to identify some concrete normative propositions that could provide substantive coherence to the separation principle all across Europe.

3. *Normative Meaning*

The principle of separation of Church and State fits very well in the modern constitutional law bias against any concentration of private and public power, as illustrated by anti-trust law and economics. In this light, separation of Church and State can be understood as a corollary of the principle of separation of powers, promoting the pluralistic diffusion of social power. This principle was defended by John Locke in his political philosophy of natural rights, popular sovereignty and limited State power as a way to prevent legislative or executive abuse inevitable with power concentrations. [274] Montesquieu was another well known defender of this principle, but his understanding of it was markedly different from Locke's, since it was mainly concerned with the distribution

271. *See* Alfonso Fernandez & Miranda Campoamor, *Estado Laico y Libertad Religiosa*, 6 REVISTA DE ESTUDIOS POLITICOS 57, 65-71 (1978); Piero Bellini, *Confessioni Religiose, in* 8 ENCICLOPEDIA DEL DIRITTO 926, 926-28 (1961); Ulrich Scheuner, *Rechtsgrundlagen der Beziehungen von Kirche und Staat, in* SCHRIFTEN ZUM STAATSKIRCHENRECHT 169, 179-83 (Joseph Listl ed., 1973); *see generally* Wieland, *supra* note 109.

272. FRANCESCO RUFFINI, CORSO DI DIRITTO ECCLESIASTICO ITALIANO 133 (1924).

273. *See* Ansgar Hense, *Staatskirchenrecht oder Religionsverfassungsrecht: mehr als ein Streit um Begriffe?, in* RELIGION UND WELTANSCHAUNG IM SAKULAREN STAAT 9, 39-42 (Andreas Haratsch et al. eds., 2001); PETER HÄBERLE, VERFASSUNG ALS ÖFFENLICHER PROZESS: MATERIALEN ZU EINER VERFASSUNGSTHEORIE DER OFFENEN GESELLSCHAFT 329-31 (1978).

274. LOCKE, *supra* note 39, at 277-280.

of State functions and powers by different social bodies.[275]. The separation of powers principle ended up enshrined in Article 16 of the French Declaration of the Rights of Man and of Citizen of 1789.[276]

The anti-concentration feature of separation of Church and State encourages mutual surveillance between religious groups, who act as a *Censor Morum* over each other,[277] and triggers doctrinal and normative development, thereby serving as an antidote for dogmatic stagnation. From the viewpoint of individual freedom and collective self-government, concentration of political power is bad enough; concentration of political and religious power is simply intolerable. Separation of Church and State prevents a theologico-political understanding of State sovereignty often used – in the ideological and cultural wars of modernity – as a tool to legitimatize the authoritarian exercise of public power.[278] By performing this function, this principle also guarantees the integrity of the modern constitutional doctrines of social contract and democratic self-government. The complexity the separation principle and the high ideological stakes involved have many times transformed it into a "political struggle concept" (*politishes kampfbegriff*), whose meaning has been disputed by the different factions in the religious-political wars that followed the liberal revolutions. It has frequently been used as a majoritarian weapon against State interference with religion, as a minoritarian weapon against the coalition of political power in the dominant religion,[279] as well as an instrument of secularism and rationalism in their fight against religion generally.[280] The principle of separation of Church

275. BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 162-74 (Thomas Nugent trans., Fred B. Rothman & Co. ed. 1991) (1914); *see* KARL DOEHRING, ALLGEMEINE STAATSLEHRE 157-63 (2d ed. 2000); MAURIZIO FIORAVANTI, STATO E COSTITUZIONE 163 (G. Giappichelli ed., 1993).

276. THE FRENCH DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (1789), *available at* http://www.constitution.org/fr/fr_drm.htm (last visited Apr. 25, 2005).

277. Thomas Jefferson, *Notes on Virginia, Query XVII, IN* THOMAS JEFFERSON: POLITICAL WRITINGS, *supra* note 184, at 392, 395.

278. *See* UDO DI FABIO, DAS RECHT OFFENER STAATEN: GRUNDLINIEN EINER STAATS-UND RECHTSTHEORIE, 27-31 (1998).

279. For a detailed discussion on the application of church-state separation within the original drafting of the Establishment Clause, see LEVY, *supra* note 260, at 79-102.

280. *See generally* BERTRAND RUSSELL, WHY I AM NOT A CHRISTIAN AND

and State must regain its constitutional status as a normative instrument of spiritual, moral and rational autonomy within a free and democratic society, devoid of any religious or anti-religious bias.

This principle applies to all religious communities, despite the fact that "church" is a Christian concept; it could not be otherwise if one values equal rights for Christian and non-Christian individuals and communities alike. Separation of religious communities and the State means a normative, institutional, symbolic and financial separation.[281] This separation is compatible with relevant forms of mutual acknowledgment and cooperation, within a normative framework built upon the promotion of public interest and respect for the equal freedom of citizens, and both religious and non religious communities.[282] It should also be compatible with the public acknowledgment of the important historical role religious bodies, doctrines and symbols have played in making our present political and legal institutions. What's more, it does not have to preclude forms of symbolic connection between the State and religion as long as these are mediated by the rights of democratic self-government and freedom of conscience that comprise a well-ordered, open society. Separation does not necessarily require the imposition of an historical and cultural *tabula rasa*, erasing all evidence of the role that religion has played and continues to play in public life, action and speech. Individuals and groups participate in molding public opinion and political decisions, to a large extent, on the basis of their religious convictions. Separation of Church and State is to be seen, above all, as an expression of the general principle of State neutrality when different ideologies, philosophies, parties and civic groups clash. This is the kind of neutrality that is both required and conditioned by the constitutional imperative that every individual be treated with equal concern and respect.[283] This is not a claim to absolute value neutrality, of course, but rather to the substantive and procedural neutrality that underlies the moral and normative option that fa-

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OTHER ESSAYS ON RELIGION AND RELATED SUBJECTS (Paul Edwards ed., 1957).

281. POLITICAL LIBERALISM, *supra* note 13, at 192-94.

282. *See* Heuta Däuber-Gmelin, *Anmerkigen zum Verhältnis von Staat und Kirche im 21. Jahrhundert*, *in* IM DIENSTE DER SACHE: LIBER AMICORUM FÜR JOACHIM GAERTNER, *supra* note 167, at 149, 150-53.

283. POLITICAL LIBERALISM, *supra* note 13, at 190-94.

vors a free, fair, impartial, tolerant, democratic and open society.[284] Separation of Church and State cannot be understood as requiring absolute value neutrality since this it is premised upon a set of values that clearly oppose authoritarian religious doctrines and secular ideologies which hold contrary values, and are willing to violate fundamental rights and democratic rules to capture political and legal institutions to impose those values.[285]

On the other hand, in the context of European public law, the principle of separation of Church and State must accommodate the way Judeo-Christian principles, traditions and doctrines have, over centuries, influenced some of the central social, political and legal institutions, without requiring that all laws justify themselves by claiming a secular purpose. Nor does this principle preclude public recognition of religion in the development of the State's political, legal and social institutions. These public institutions (*lato sensu*) still incorporate, in many European countries, explicitly or implicitly, many concepts, symbols and rituals with a religious origin and significance (e.g., religious holidays, religious symbols in national flags, chaplaincies, human dignity). Moreover, religious individuals and denominations are subject to the various branches of the law (e.g., civil, criminal, labor, administrative, tax, social security; copyright); as such, these religious individuals and groups are entitled to participate – according to their own values, principles, interests and sense of public mission – in the uniquely democratic processes as the formation of public opinion and political will that precede the legislative function.[286] The kind of reli-

284. *See id.* at 195:

> [I]f a constitutional regime takes certain steps to strengthen the virtues of toleration and mutual trust, say by discouraging various kinds of religious and racial discrimination (in ways consistent with liberty of conscience and freedom of speech), it does not thereby become a perfectionist state of the kind found in Plato or Aristotle, nor does it establish a particular religion as in the Catholic and Protestant states of the early modern period. Rather, it is taking reasonable measures to strengthen the forms of thought and feeling that sustain fair social cooperation between its citizens regarded as free and equal. This is very different from the state's advancing a particular comprehensive doctrine in its own name.

Id.

285. *Id.* at 196.

286. Joachim E. Cristoph, *Die Rolle der Kirchen in der Europäischen Entscheidungsprozessen*, *in* IM DIENSTE DER SACHE: LIBER AMICORUM FÜR

gious neutrality implied by the principle of separation of Church and State can be understood as a "benevolent neutrality,"[287] or, in other words, as a "non adversarial separation" between religious communities and the State.[288] Far from being interpreted as a sign of hostility towards religion, religious institutions or the religious sentiment and experience of the political community, this principle is better understood as an important, substantive constitutional goal.[289]

4. *Substantive Goals*

It is important to understand the substantive constitutional ends of the principle of separation of Church and State. First, it removes state coercion or endorsement from the realm of religion, considering religious choice and conviction too important to be proscribed or prescribed by the State. This is a powerful institutional guarantee for human autonomy and freedom of conscience.[290] As we have seen above, the connection between separation of Church and State and freedom of conscience was central to the arguments put forth by Roger Williams, The Levellers and John Locke. For them, individuals could only be truly free if church membership and religious expression was beyond the reach of State coercion. The principle of separation is a corollary to the voluntary nature of religion. The history of Christendom and of the European Christian States – its elements of moral and cultural excellence notwithstanding – is rife with examples of persecution, violence and death leveled against religious dissenters and

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JOACHIM GAERTNER, *supra* note 167, at 119, 120.

287. ROBERT T. MILLER & RONALD B. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE AND THE SUPREME COURT vi (4th ed. 1992) (quoting Walz v. Tax Commission, 397 U.S 664, 669 (1970)).

288. The principle of a non-adversarial separation of Church and State implies that even clergy members have a constitutionally protected right to participate within all forms of public life, including the right to hold public office. Accordingly, the United States Supreme Court has expressly held that the government may not disqualify clergy members from serving in a legislative capacity. McDaniel v. Paty, 435 U.S. 618 (1978).

289. Wojciech Sadurski, *Neutrality of Law Towards Religion,* 12 SYDNEY L. REV. 420, 441 (1990); *see generally* Lucas Swaine, *Principled Separation: Liberal Governance and Religious Free Exercise*, 38 J. CHURCH & STATE 595 (1996).

290. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 243-48 (1983).

their communities. Even if one defends a balanced and moderate "religion-sensitive" view of the principle of separation of Church and State – capable of acknowledging both the historical and current relevance of religion, and of accommodating various religious symbols, institutions and ideas in the public sphere – one should not be surprised that the origin and history of this principle is inextricably interwoven with the modern, liberal, political and constitutional fight against dominant anti-liberal religious groups; especially against the conservative "ultramontanist" version of Catholicism,[291] by far the sect with the most extensive history of religious coercion, censorship, persecution and discrimination.[292]

The connection between the separation of Church and State and freedom of conscience is evident in a second reason supporting separation. Besides guaranteeing freedom of conscience, this separation principle is also a precondition of civic equality between all members of the political community. In a free and democratic society every citizen should feel as a full member of the political community, and not as an outsider.[293] This substantive goal cannot be over interpreted as requiring the erasure of all traces and vestigial evidences of the way religious traditions have shaped political and legal institutions and discursive practices. Some public acknowledgement of these traditions, desirable as illustrative of the history and identity of communities – particularly in Europe where there are countries with rich, strong cultural heritages – is perfectly compatible with the voluntary nature of religion generally, and with the substantive value of equal citizenship. Members of minority religions and atheists must be granted full protection of their fundamental rights – including religious and expressive rights. At the same time religious minorities must understand that the political community does not exist in a cultural or historical vacuum, but has developed its own set of fundamental values.

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291. Ultramontanism began in nineteenth century France as a radical reaction to the prevailing belief that all theological propositions must be scrutinized by human reason. Ultramontanists have been characterized has having been "excessively dependant upon Papal direction," a sect of French Catholics who literally "look[ed] 'beyond the mountains,' the Alps, to Rome." RICHARD P. MCBRIEN, CATHOLICISM 643-44 (1994).

292. *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 193-251 (2002).

293. *See* Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

These may have both religious and non-religious dimensions, the public acknowledgment of which may presuppose a certain degree of openness to religious diversity, as well as to non-religious ideological and philosophical views.

However, some legitimate recognition of the history and identity of a certain political community cannot justify the violation of basic tenets of religious freedom and civic equality. This notion was discussed above in *Kokkinakis v. Greece*,[294] even though a feeling of "outsidedness" by someone who does not share dominant views may be unavoidable. On the other hand, even if full institutional and normative separation of Church and State was in place, a member of a minority religion or an atheist could still feel the "outsider syndrome." For instance, such an individual might still feel like an outsider if temples of the dominant religion stood on every corner, or if the values of the dominant religion were widely published or broadcast over the airwaves, exerting substantial influence over popular culture and political debate. He or she might even feel that his or her chances to seek election to political office were, realistically speaking, diminutive (e.g., a Muslim running for President of the United States or of the European Commission), even if there was no express prohibition or disqualification. Freedom of religion would be seriously endangered if this was seen as a sufficient ground for the State to target the dominant religious denominations by, for example, censoring their religious books, or denying them permits to build more temples or licenses to operate their religious broadcasting outlets.[295] It would be absurd to make use of the "state action doctrine" to hold that by licensing these facilities the State is contributing to a religiously impregnated public (atmo)sphere which makes members of minority religions and atheists feel uncomfortable.

The voluntary nature of religion plus the guarantee of equal

294. App. No. 14307/88, 17 Eur. H.R. Rep. 397, ¶ 34 (1993).

295. The United States Congress has already taken steps to preempt any unreasonable limits upon the ability of religious communities to build houses of worship or otherwise use land for religious purposes. Under the Religious Land Use and Institutionalized Persons Act, local governments are forbidden from enacting zoning ordinances which "impose[] a substantial burden on the religious exercise of a person, including a religious assembly or institution," unless an ordinance is "in furtherance of a compelling governmental interest," and is "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1) (2000).

citizenship raise the question of the admissibility of religious tests as a requirement for the exercise of public office. This is a question the United States answered – at least to some extent – in 1787. The European Court of Human Rights dealt with this subject in *Buscarini et al. v. S. Marino*.[296] This case, referred to the Court in March of 1998, originated with a complaint against the Republic of San Marino by Mr. Buscarini and other nationals of that country. They had all been elected members of the General Grand Council and requested to take the oath required by S. Marino's electoral legislation without the prescribed reference to the "Holy Gospels." Their oaths were considered invalid by the General Grand Council, who ordered the members to retake the oath with reference to the Gospels. If they refused, they would forfeit their parliamentary seats. Later, however, the General Grand Council changed the law by allowing members to replace the "Holy Gospels" reference the alternative language "on my honor." The traditional wording remained mandatory for other public offices.

The European court rejected the argument, advanced by S. Marino, that the oath in question had lost its original religious meaning and should now be understood simply as a pledge of loyalty to republican values with only secular, historical and social significance.[297] On the contrary, the court held that requiring the members of Parliament "to swear allegiance to a particular religion under pain of forfeiting their parliamentary seats" was undoubtedly a coercive limitation on their right of freedom of religion.[298] In addition, the court noted the State lacked any compelling constitutional justification. Besides, "it would be contradictory to make the exercise of a mandate intended to represent different views of society within Parliament subject to a prior declaration of commitment to a particular set of beliefs."[299] In this other potential areas of conflict between the State and individual autonomy, freedom of conscience and equal citizenship should function as regulatory principles.[300]

296. App. No. 24645/95, 30 Eur. H.R. Rep. 208 (2000).
297. *Id.* ¶ 32.
298. *Id.* ¶ 34.
299. *Id.* ¶ 39.
300. See Michael McConnell, *Believers as Equal Citizens*, *in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMODATION IN PLURALIST DEMOCRACIES 91-107 (Nancy L. Rosenblum ed., 2000).

Third, the principle of separation of Church and State prevents politically motivated State interference with the proper subjects of the dominant religion, as was the case in the many European authoritarian regimes. European history, from the time of Emperors Constantine and Theodosius, shows that the State has always attempted to manipulate the dominant religious community to pursue its own political objectives of social cohesion and stability (*pax terrena*). The State succeeded by using the carrots of official establishment, privilege, money and power, along with the sticks of command, control, coercion and censorship.[301] Often political power was looking for the aura of religious legitimacy enjoyed by the dominant religion. For its part, the dominant religion never really resisted the temptation of official establishment – or the comparative advantage that comes with it – which it saw as a natural recognition of the "self-evident" character of its "truth" claims.[302] From the Middle Ages through the advent of the modern State, European monarchs have always expected religion to back their claims of political authority (e.g., *un roi, une loi, une foi*; *Dieu et mon Droit*). More recent European history demonstrates that authoritarian political leaders – such as Napoleon, Hitler and Mussolini – also searched for religious legitimacy.[303] This has slowed the advance of the democratic, republican ideals of social contract, popular sovereignty and self-government. Some observers have remarked that the political

301. Axel Freiherr von Campenhausen, *Religionsfreiheit*, *in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND § 136, at 372 n.12 (Joseph Isensee & Paul Kirchenhof eds., 6th ed. 1989).

302. Richard Posner recognizes as much when he observes that "[w]hen religious zealots succeed through the persecution of dissenters in enforcing uniformity of belief, they do not infer that consensus is the result of persecution. They infer that theirs is the true faith." RICHARD POSNER, OVERCOMING LAW 58 (1995).

303. For example, Hitler appealed to both Catholics and Protestants alike by setting forth his own version of "positive Christianity," claiming that "National Socialism alone could provide the Church with a barrier against Marxism." IAN KERSHAW, THE HITLER MYTH: IMAGE AND REALITY IN THE THIRD REICH 36 (1987). Similarly, Pope Pius XI regarded Mussolini as a "man of providence," a ruler who sought to insulate the privileged status of the Catholic Church in Italy from the threat of Marxism. THE OXFORD ILLUSTRATED HISTORY OF ITALY 279-80 (George Holmes ed., 1997). Napolean, on the other hand, seemed to have a more pragmatic view of the role of religion: "My policy . . . is to govern men the way the great majority wants to be governed . . . . By making myself Catholic, I brought the war in the Vendeé to an end. By becoming a Moslem, I established myself in Egypt." J. CHRISTOPHER HEROLD, THE AGE OF NAPOLEAN 130 (Mariner Books 2002) (1963).

ers have remarked that the political manipulation of religion, often with the approval of religion itself, proved to be, in the long run, harmful to religion. Religion became associated with monarchical, absolutist, obscurantist and authoritarian forms of political government, giving away its critical and prophetic mission.[304] Both factors opened the doors to a virulent and resentful criticism of all religion, based on rationalistic, scientistic, naturalistic, materialistic, positivistic and anti-metaphysical assumptions. These assumptions became, in some instances, at least as authoritarian and obscurantist as religion had been, and downplayed the role of religious discourse in the rise of individual freedom, democracy, the rule of law, modern economics and modern science. It is precisely the radicalization of "state-induced religion" and "state-induced secularism" – in their more or less coercive manifestations – that the values of religious freedom and separation of Church

304. For example, the writings of the German theologian Dietrich Bonhoeffer illustrate the political manipulation of religion at its most insidious form. Writing during the seminal days of the Nazi Party and its rise to power, Bonhoeffer was an outspoken critic of the clerical establishment within Germany for its willingness to capitulate to the Nazi agenda. In particular, the Evangelical Church of the Old Prussian Union adopted what was commonly known as the "Aryan Clause," a declaration by which the Old Prussian Synod agreed to ordain only clergy members who were of pure Aryan ancestory and had pledged allegiance to the Nazi regime. DIETRICH BONHOEFFER, CORRESPONDENCE WITH KARL BARTH (1933), *reprinted in* DIETRICH BONHOEFFER: A TESTAMENT TO FREEDOM 389 (Geffrey B. Kelly et. al. eds., rev. ed. 1995). In the wake of the enactment of the Aryan Clause, Bonhoeffer proclaimed that "[any] ministry which has become a privilege of Aryans" has "ceased to be a Christian Church" because it "has cut itself off from the Church of Christ." *Id.*

Likewise, an effort on the part of a large faction of clergy within the Russian Orthodox Church to unite the Church with the Soviet government ended in failure. In 1921-22, a synod of Russian Orthodox clergy called upon each of the faithful "to fight with all of his might together with the Soviet authority for the realization of the Kingdom of God upon earth . . . and to use all means to realize in life the grand principle of the October Revolution." JOHN LAWRENCE, A HISTORY OF RUSSIA 261 (7th rev. ed. 1993). Adherents to this policy of church-state establishment regarded themselves as members of the "Living Church," but the majority of the Russian Orthodox faithful "regarded the formation of the 'Living Church' as a treachery to Christ." *Id.* As such, the "Living Church" in Russia failed to unite Russian Orthodoxy with the communist goals of the Soviet government because it "failed to understand that a passionate atheism forms an essential part of all real Communism and they did not realize that the Bolshevik leaders were using the 'Living Church' as a tool to be thrown away as soon as it had served its purpose." *Id.* at 262.

and State, within the framework of a free and democratic society, seek to overcome.

Fourth, separation of religious communities from the State prevents a coalition between the State and the dominant religion in a way that threatens the equal dignity and freedom of minority religious communities.[305] When there is an established official religion, or even a majoritarian religion, the protection of minorities becomes a matter of increased concern since any minority is more vulnerable to coercion, persecution and discrimination.[306] In this light, the principle of separation is a part of the "structure of undominated equality" that should characterize liberal constitutionalism.[307] History shows that both the overt and covert persecution and discrimination of minority and unconventional religions, as well as of majority religion members who decide to convert to a minority group, are often perpetrated by this kind of State-Church coalition.[308] Regulatory theory says that "[t]he State has one basic resource which in pure principle is not shared with even the mightiest of its citizens: the power to coerce."[309] Thus it is no surprise that different groups, including religious groups, will try to control this resource and use it to strengthen – in a definite, global and rigid way – their own comparative position *vis-à-vis* other competing groups.[310] The ideological, "metanarrative" and legiti-

305. The United States Supreme Court put it eloquently, remarking that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." Engel v. Vitale, 320 U.S. 421, 431 (1962).

306. *See* NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE 641 (2002).

307. *See* ACKERMAN, *supra* note 203, at 7-11.

308. In *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), the United States Supreme Court recalled that "[w]ith the power of Government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews." *Id.* at 9. *See also* Robert A. Holland, *A Theory of Establishment Clause: Individualism, Social Contract in Identifying Threats to Religious Liberty*, 80 CAL. L. REV. 1599, 1658 (1992).

309. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. & MGMT. SCIENCE 3, 4 (1971).

310. Steven P. Croley, THEORIES OF REGULATION: INCORPORATING THE ADMINISTRATIVE PROCESS, 98 COLUM. L. REV. 1, 36 (1998).

matizing power of religious discourse has made it relatively easy, throughout the centuries, for "spiritual power" to capture "temporal power." This being the case, separation of Church and State should be seen today, in a free and democratic society, as an important structural component of the principle of equal treatment. Even in some European countries where there is not an explicit constitutional prohibition against the establishment of an official Church, legal scholars have contended that the separation of Church and State is a structural corollary to the principles of State neutrality and substantive equality of treatment for all religious groups.[311] Separation militates for the institutional freedom of all religious groups, required by the goal that would guarantee full institutional autonomy for both the dominant and minority religious groups. The main substantive goal in this respect then is a guarantee of the right of self-determination and self-government for all religious groups, within a normative framework as favorable and deferential to the particular self-understandings of each entity.[312] One corollary of this principle is the notion that the State should not interfere with religious groups' right to define the procedure for selecting their own clergy. It is not the State's task to appoint or veto a religious leader, or to determine the rules of his selection.[313]

The European Court of Human Rights has affirmed this principle in *Serif v. Greece*,[314] holding that "punishing a person for the

311. Sahlfeld, *supra* note 129, at 130-32.

312. *See* Ulrich Scheuner, *Kirche und Staat*, *in* SCHRIFTEN ZUM STAATSKIRCHENRECHT, *supra* note 271, at 109, 114-15; Scheuner, *supra* note 271, at 172-79.

313. The plight of Roman Catholics living in modern day China illustrates how state induced secularism and state induced religion can sometimes intersect. Although comprising a mere two percent of the population in China, Chinese Catholics are required by the communist government to follow the teachings of the so-called "Patriotic Church," the only officially sanctioned Catholic Church in China which is headquartered in Beijing. Gabriel Kahn et. al., *Catholic Church Faces Hurdles in Asia*, WALL ST. J., Apr. 6, 2005, at A9. The establishment of the "Patriotic Church" ensures that Catholic doctrine does not seek to subvert the communist regime since every aspect of ecclesiastical life, including the appointment of priests and bishops, is controlled by the bureaucracy in Beijing which is responsible for regulating all religious activity in China. *Id.* However, Chinese Catholics who wish to follow the teachings of the Apostolic Church in Rome must do so in secret, and under the constant threat of arrest and state persecution. *Id.*

314. 1999-IX Eur. Ct. H.R., App. No. 38178/97, 31 Eur. H.R. Rep. 20

mere fact that he acted as the religious leader of a group that willingly followed him can hardly be considered compatible with the demands of religious pluralism in a democratic society."[315] Thus, European official church systems (e.g., Anglican Church), where the head of State – such as the Prime Minister – influences the procedure governing the election of the church leader (e.g., Archbishop of Canterbury), should be deemed constitutionally unacceptable. These systems either implicitly require that the head of State belong to the official church, in violation of the principles of freedom of religion and equal citizenship, or they give the head of State the power to appoint religious leaders based on purely political reasons.

Another important corollary to the principle of separation of Church and State is the notion that the State should not settle religious disputes in a Constantinian fashion. This self-evident view in the modern constitutional law of religion can give rise to unexpected difficulties in some parts of Europe, as the European Court of Human Rights has recently learned in *Metropolitan Church of Bessarabia, et al. v. Moldova*.[316] The Metropolitan Church of Bessariabia was created in 1992, and was attached to the Patriarchate of Bucharest in Romania.[317] Government authorities deniedlegal recognition to MCB, despite the fact it claimed to have approximately one million members and 160 clergymen. The government contended that MCB was a dissident branch of the existing Metropolitan Church of Moldova (MCM), attached to the Patriarchate of Moscow. What is more, it was held that the granting of legal recognition to the MCB would be a form of State intervention in a Church dispute. According to this view, the conflict between MCB and MCM should be settled, not by an act of the State, but by an agreement between the patriarchates of Russia and Romania.[318] The government added that recognition of MCB would create a danger to public order and even threaten the State's sovereignty and territorial integrity of Moldova; it was rumored that MCB was a predominantly ethnic Church made by Moldovans of Romanian descent with special and ongoing ties to

(2001).

315. *Id.* ¶ 51.

316. App. No. 45701/99, 35 Eur. H.R. Rep. 13 (2001).

317. *Id.* ¶ 10.

318. *Id.* ¶ 23.

Romania.The European Court of Human Rights was not receptive to these arguments. The court privileged the notion that legal recognition of the Church was required by the protections of the right to freedom of religion; this includes the protection of the right to religious dissent and identity.[319] Equally stressed was the relevance of the right of institutional freedom, as well as the right to legal personality.[320] The European court embraced an imperative of State denominational neutrality that requires public authorities to grant legal recognition to all religious groups – even dissident factions of existing groups – within a normative framework of equal freedom, pluralism and tolerance.[321]

Finally, the separation of Church and State preserves an "uninhibited, robust and wide open" sphere of public discourse; here, every subject, doctrine, worldview, theory and opinion can be thoroughly debated and cross-examined, dependent solely upon reason and persuasion.[322] In the liberal constitutional State, the old tradition of placing institutions above discussion has given way to social integration through communicative action.[323] The above discussion illustrates the internal connection between religious freedom and freedom of speech and action. Now it is time to address the link between these fundamental rights and the principle of separation of Church and State. History demonstrates both the authoritarian tendencies of religious establishments as well as their diversity and fallibility.[324] Religious establishments,

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319. *Id.* ¶¶ 116, 117.
320. *Id.* ¶ 118.
321. *Id.* ¶ 123.
322. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1963).
323. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 17-19 (William Rehg trans., 1992); Stephen White, *Reason, Modernity, and Democracy*, *in* THE CAMBRIDGE COMPANION TO HABERMAS 3, 11 (Stephen K. White ed., 1993).
324. While discussing the history of religious intolerance throughout Europe, Thomas Paine scornfully characterized the state establishment of religion as follows:

> All religions are . . . benign, and united with principles of morality. They could not have made proselites at first, by professing any thing that was vicious, cruel, persecuting, or immoral . . . . By engendering the church with state, a sort of mule-animal, capable only of destroying , and not of breeding up, is produced, called the *Church established by Law* . . . . Persecution is not an original feature in *any* religion; but it is always a strongly-marked feature of all law-religions, or religions established by law. Take away the law-

when they operate *de facto*, invariably threaten the pursuit of knowledge and truth, since they impose only a specific, narrow theological doctrine or perspective without any mechanism for independent validation. This is because there is no objective evidence to prove absolute truth above the varying subjective, controversial claims to it.[325] Uniformity of opinion in religious matters only seems possible by exercising coercion over the hearts of men (*Mach über Herzen*).[326] On the other hand, religious establishments represent a danger for the rational and moral autonomy of individuals, jeopardizing the individual rights of conscience and free public debate.[327]

Separation of Church and State limits the government's ability to interfere with secular speech for religious reasons, and with religious speech for secular or religious reasons. This principle postulates the State as an impartial regulator of the free marketplace of ideas. It guarantees necessary room for the "spiritual confrontation" and "spiritual competition," both religious and naturalistic, that inevitably occurs in a free, democratic society through the channels of public opinion, political will and legal process.[328] There is, thus, a difference between the constitutional community and the various moral communities that coexist within it.[329] The former must be as broad and inclusive as required by the principles of equal dignity and freedom, whereas the latter can be as exclusive as is required by each religious group's self-understanding, provided is compatible with equal dignity and

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establishment, and every religion reassumes its original benignity. THOMAS PAINE, RIGHTS OF MAN (1791), *reprinted in* THOMAS PAINE, RIGHTS OF MAN, COMMON SENSE & OTHER POLITICAL WRITINGS 138-39 (Mark Phillip ed., Oxford Univ. Press 1995).

325. *See* JEREMY WALDRON, LAW AND DISAGREEMENT 111-13 (1999).

326. *See* Benedict de Spinoza, *A Treatise on Religion and Politics, in* THE POLITICAL WORKS 48, 179-81 (A.G. Wernheim ed., 1958).

327. *See generally* Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHILOSOPHY AND PUBLIC AFFAIRS 204 (1972).

328. *See* John G. Francis, *The Evolving Regulatory Structure of European Church-State Relationships*, 34 J. CHURCH & STATE 775, 775 (1992); BODO KLEIN, KONKURRENZ AUF DEM MARKT DER GEISTEGEN FREIHEITEN: VERFASSUNGSFRAGEN DES WETTBEWERBS IM PRESSEWESEN 19-20 (1990); Michael McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 Yale L.J. 1501, 1517 (1989); *see generally* ERWIN FISCHER, VOLKKIRCHE ADE! TRENNUNG VON STAAT UND KIRCHE (1993).

329. MICHAEL J. PERRY, MORALITY, POLITICS AND LAW 51, 157-59 (1988).

freedom as well.[330]

As Robert Post rightly suggests, "the concept of public discourse requires the State to remain neutral in the 'marketplace of communities.'"[331] This goal, however, may be both impossible and undesirable to achieve in its entirety. The values of the modern liberal constitutional community were influenced by existing moral communities, and will thus inevitably collide with other values and principles. As long as the separation of Church and State remains a strong component of the constitutional structure of the State, then Post's neutrality thesis can be approximately achieved, thus removing public coercion from the sphere of public discourse. In the words of Fred M. Frohock, "[t]he liberal state governs on the expectations that persons have incompatible beliefs and that a shared form of reasoning can adjudicate the disputes that follow differences in beliefs."[332] In fact, one of the purposes of freedom of religion and separation of Church and State is to secure the possibility that new beliefs and religious communities will emerge to challenge existing ones. In this sense, the constitutional social contract must protect the religious choices of both present and future generations. This is the demand for "fairness to future generations."[333] In this same vein, Immanuel Kant stated that "[i]t is absolutely impermissible to agree, even for a single lifetime, to a permanent religious constitution which no one might publicly question."[334] The principle of separation of Church and State is a precondition of the kind of free and fair competition between religious communities that is required by human freedom

330. *See generally* Konrad Hesse, *Grundrechtsbindung der Kirchen?*, *in* KIRCHE UND STAAT IN DER NEUEREN ENTWICKLUNG 287 (Paul Mikat ed., 1980).

331. ROBERT POST, CONSTITUTIONAL DOMAINS, DEMOCRACY COMMUNITY, MANAGEMENT 139 (1995).

332. *See* Louis Henkin, *Morals and the Constitution:The Sin of Obscenity*, 63 COLUM. L. REV. 391, 411 (1963) (observing that "[t]he domain of Government, it is suggested, is that in which social problems are resolved by rational social processes, in which men can reason together, can examine problems and propose solutions capable of objective proof or persuasion, subject to objective scrutiny by courts and electors"); *see generally* Fred M. Frohock, *The Boundaries of Public Reason*, 91 AM. POL. SCIENCE REV. 833 (1997).

333. A THEORY OF JUSTICE, *supra* note 13, at 205; *see* EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 34-40 (1989).

334. Immanuel Kant, *What is Enlightment?*, *in* KANT'S POLITICAL WRITINGS 58 (H.B. Nisbet trans., Hans Reiss ed., 1970).

and equality.[335] To succeed in its substantive ends, this principle must be complied with both *de jure* and *de facto*.

IX. CONCLUSION

Freedom of religion, premised upon freedom of conscience, is a paramount right in European public law. It plays a central role both in the constitutional traditions of European States, and in the regional mechanisms of international legal protection. This right remains a core value of European constitutionalism, even if it has not consistently led to the necessary institutional arrangements of separation between Church and State, or to a reasonable degree of accommodation and inclusion for all religious manifestations in the various political and social institutions, and in the sphere of public discourse. The reasons for this failure are typically historical and cultural. However, cultures can incorporate new values and adapt to new challenges, and our understanding of history is continually evolving.

In Europe, the current phenomenon of religious resurgence has given rise to a new wave of secularization, oriented towards removing strong religious symbols from the public square. This sets a dangerous precedent, however, since it may open the door to further attempts to remove strong religious concepts and doctrines from the sphere of public discourse and action. Religious resurgence should not lead to a change in the basic nature of freedom of religion, nor compromise its place as a cornerstone of human rights and modern constitutional and international law.[336] At best,

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335. Michael McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 4-5 (1989).

336. For an insightful discussion on the crucial interrelation between Church and State, see DIETRICH BONHOEFFER, THY KINGDOM COME: THE PRAYER OF THE CHURCH FOR THE KINGDOM OF GOD ON EARTH (1932), *reprinted in* DIETRICH BONHOEFFER, A TESTAMENT TO FREEDOM, *supra* note 304, at 90-2:

> The Kingdom of God exists in our world exclusively in the duality of the church and state. Each is necessarily related to the other; neither exists for itself. Every attempt of one to take control of the other disregards this relationship of the kingdom of God on earth . . . . Therefore, the power of death . . . is destroyed in the church by the authoritative witness to the miracle of the resurrection, whereas in the state it is restrained by the order of the preservation of life . . . . The church limits the state, just as the state limits the church, and each must remain conscious of their mutual limitation . . . . Only thus do both together, and never one alone, point to the kingdom of

this phenomenon simply shows that attempts to create a purely secular political community, and to marginalize and privatize religion were misguided. The obvious limits of secular science, history and philosophy in answering the basic questions about the origin, meaning and destiny of our lives promises more room for religious inquiry. The fundamental right of religious freedom should try to accommodate the emotive, subjective and private, as well as the rational, objective and public dimensions of religion. Such accommodation will acknowledge religion's relevance in shaping political and legal values, norms and institutions, and in the fostering of individual identity without ever compromising the central role of the individual right of freedom of conscience.

God, which here is attested in such a wonderful twofold form . . . .
Id.