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## The Resurgence of Secularism: Hostility Towards Religion in The United States and France

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# THE RESURGENCE OF SECULARISM: HOSTILITY TOWARDS RELIGION IN THE UNITED STATES AND FRANCE

SARAH NIRENBERG\*

## ABSTRACT

*Secularism is a complex principle that in its most simple formulation calls for the separation of religion and government. In this Note, I examine the classical liberal approach to resolving the tension between religion and the state. I argue that the United States was founded, and the First Amendment of the Constitution was drafted, with John Locke's proposal for toleration in mind. I then argue that the Supreme Court's insertion of the concept of "separation of Church and State" into the Constitution in Everson v. Board of Education took Thomas Jefferson's metaphor out of context, and in doing so betrayed America's founding principles. Yet, the Court's attempt to push for a more secular state ultimately failed because the American people have remained religious. I then contrast the First Amendment and America's founding with the legal form of separation of Church and State in France, as embodied in laïcité. Finally, I argue that the secular elite in the United States have re-emerged in a position of power to push its secular agenda. This is demonstrated by the "contraception mandate" promulgated by the Obama Administration and the U.S. Department of Health and Human Services. I conclude that this new push for secularism is contrary to both America's founding and public sentiment. Even more devastating, it would bring the United States closer to resembling the legal form of secularism embodied by laïcité, which would result in an erosion of the First Amendment and could create hostility towards religion as can be seen in France.*

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## INTRODUCTION

The classical European perspective consists of the belief that there is a link between modernization and secularization.<sup>1</sup> Many European intellectuals believed that progress would lead to secularization because religion would be revealed to be mere superstition.<sup>2</sup> This phenomenon is known as the “Secularization Theory.”<sup>3</sup> It was assumed that Europe led the world in what was an inevitable process, while the United States was

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1. PETER BERGER, GRACE DAVIE & EFFIE FOKAS, RELIGIOUS AMERICA, SECULAR EUROPE?: A THEME AND VARIATIONS 10, 141–42 (2008).

2. *Id.*

3. *Id.*

viewed as the exception. However, this theory has recently been undermined, and it has been determined that Europe is the exception rather than the rule.<sup>4</sup> Nevertheless, it is not clear that American intellectuals have dismissed the Secularization Theory. Although they recognize that the theory has not yet come to fruition, they believe that it may in the future, or they secretly hope that they can push for its end.<sup>5</sup>

The Court's insertion of the "separation of church and state" into the Constitution in the early twentieth century was an attempt to infuse secularism into the United States, but it ultimately failed in its goal of marginalizing religion's influence on political affairs by relegating it to the private sphere. In the aftermath of the School Prayer Cases, Americans continued to be religious and promote religion's influence in public life, while the secular elite remained on the fringes of society. Yet, today there is resurgence among the Obama Administration to push the secular agenda. Such resurgence is at odds with our Founding principles and public sentiment, will have negative implications on society, and may amount to violations of our First Amendment rights.

Throughout history, intellectuals have determined high culture, and in Europe, the "Secularization Theory" trickled down to the general population.<sup>6</sup> Thus, in Europe it is commonly understood that one needs to be secular in order to be progressive and not labeled as a barbarian or backward. Consequently, there is an intense pressure in Europe to be secular. In the United States, intellectuals remain firmly attached to the Secularization Theory. While these American intellectuals lack the influence that their European counterparts possess, they continue to advocate for a secular state, and for the first time in American history they have done so from a position of real power.

Once a nation or a people become strictly secular, in the sense that they take the stance that religion is archaic and obsolete, they can no longer take religion seriously. Europeans cloak the underlying motivation behind assimilation with claims of neutrality and tolerance. In reality, they are intolerant of those who identify themselves with religion. Yet, to deny individuals their religious identity so long as they do not break the law is not only a form of intolerance, but illiberal by American standards. Unlike

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4. *Id.*

5. *Id.* at 12. Peter Berger notes that the "American intelligentsia [has been] much more secular than the rest of the population. This intelligentsia forms a cultural elite, with considerable power in education, the media, and the law. In terms of religion, India and Sweden can serve to mark the antipodes of religiousness and secularity. The American situation can be described as a large population of 'Indians' sat upon by a cultural elite of 'Swedes.'" *Id.*

6. *Id.* at 47.

Europeans, Americans consider themselves to be a religious people. American institutions were constructed to protect the freedom of religion as a natural right.

This note argues that the United States Supreme Court principle of the separation of church and state was an overreach in *Everson v. Board of Education*<sup>7</sup> that was extended in the school-prayer cases<sup>8</sup> and religious display cases.<sup>9</sup> Yet, because of the enduring faith in the Religious Clauses of the First Amendment—the Free Exercise Clause and Establishment Clause—and the public’s commitment and pride in religious freedom, the American people accepted this overreach and were still able to embrace their religious traditions. In contrast, the French principle of *laïcité* is outright hostile to religion. While this legal framework may work for the native population that defines itself as secular, it crumbles before those who have deep faith and who now stand in great numbers in France. Therefore, those who are religious are able to practice their religion more freely in the United States than in the more secular state of France. This is a positive influence on both the policies and citizens of the United States.

#### I. THE TWO-PRINCE PROBLEM: CLASSICAL LIBERALISM AND SOCIAL CONTRACT THEORY

To understand the relationship between religion and the public sphere, one must first review the way liberal tradition and social contract theory treat religion. The modern Western world is considered to be secular, but this was not always the case. Prior to the modern liberal tradition of the separation of church and state, many governments in the West were tightly organized around religion, specifically Christianity.<sup>10</sup> Rulers often used religion as a means of legitimizing their power to gain the trust of their followers.

The philosophies of Hobbes, Locke, and Rousseau helped transform the Western understanding of the relationship between religion and politics. The liberal understanding and approach to religion—as articulated by Thomas Hobbes and John Locke—and the problem of religion for

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7. 330 U.S. 1 (1947).

8. See *Engel v. Vitale*, 370 U.S. 421 (1962); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lee v. Weisman*, 505 U.S. 577 (1992); *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

9. *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

10. BERGER et al., *supra* note 1, at 24. Historically, European countries have maintained “state” churches.

social contract theorists—specifically Jean Jacque Rousseau—provides readers with an understanding of why religion is both important and problematic in politics. According to these great modern philosophers, there is an inherent “problem” of religion in political life. Both classical liberalism and social contract theory find religion objectionable on the basis that it inhibits the power of civil society by acting as a competing source of authority within the political community, leading to violence and instability.<sup>11</sup> (The state and religion competition for power is what I will refer to as the “two-prince problem.”)

However, the approach taken to solve the problem of religion in politics differ markedly for each philosopher. While Hobbes and Rousseau aim to dissolve religion completely and reduce its precepts to obedience to a sovereign, Locke proposes a way to remake religion in order to demote its status as a source of authority that challenges the state by preaching toleration, working with the character, and within the framework of, the church.<sup>12</sup>

#### A. *Religion Relegated to the Private Sphere vs. Eradication of Religion*

In *A Letter Concerning Toleration*, John Locke discusses the problem of religion as it relates to the social and political community.<sup>13</sup> First, implicit in his writing, Locke finds religion—Christianity in particular—to be problematic because the ambiguity of what God demands and the way to achieve salvation leads to violence. Second, he makes an argument similar to Hobbes in which he presents church and state to be two contending sources of authority. Locke, like Hobbes, claims that the final source of authority must be civil society. Yet, he also recognizes that it is unclear where the state’s power begins and God’s power ends. Locke articulates the two-prince problem to be eminent and contends that it is dangerous because any source of power that is believed to be higher than civil society leads to bloodshed and civil war. Therefore, Locke’s goal in

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11. See Michael W. McConnell, *Believers as Equal Citizens*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES 90, 91–92 (Nancy L. Rosenblum ed., 2000). McConnell refers to this as the problem of “citizenship ambiguity” and explains the essential problem to be that “religious believers have an allegiance to an authority outside the commonwealth,” but contends that “the demands of faith do not necessarily (or even frequently) conflict with the laws of the civil society; often they are mutually reinforcing.” This is because demands of both religion and the state are highly dependent upon the nature of both. *Id.*

12. Later, I will explain how the Founding Fathers were influenced by these philosophers and how their views differed from these philosophies and each other.

13. See generally JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION (Paul Negri et al. eds., 2002).

*A Letter of Toleration* is to minimize this problem by aligning religious understanding with the political community. He is concerned with religion only in regards to the problem that it poses a threat to the protection of life, liberty, and property.<sup>14</sup>

In order to solve that potential threat, Locke proposes toleration. Accordingly, he calls for a separation of church and state to ensure this toleration. Furthermore, he aims to transform Christianity by promoting toleration at a time when there were many sects. Consequently, by promoting toleration on religious grounds he relegates religion to the private, thereby weakening its authority. He maintains that the state's function is the preservation of life in worldly matters, whereas the function of the church is the salvation of souls.<sup>15</sup> In addition, he defines the purpose of government and politics to be the securing of individual liberties, and he appropriately determines that government has no business in caring for men's souls. Therefore, he calculates religion to be a private matter.

Locke makes his argument on the side of Christianity. In the opening of *A Letter Concerning Toleration*, Locke declares the mark of the true church to be toleration.<sup>16</sup> He argues that Christianity is amenable to the concept of separation of church and state in ways that other religions are not because toleration is inherent in Christian precept.<sup>17</sup> He admits that Christianity specifically calls for the toleration of others and asserts that this principle ought to generally apply to all humanity because of its sensibility in maintaining and achieving peace, the goal of religion.

Locke's approach is to show that religion—particularly Christianity—is already agreeable to the political community and can coexist in a different sphere so long as religion and politics remain separate and individual rights reign supreme.<sup>18</sup> On the other hand, Hobbes's intent is to weaken religion in a more radical manner and replace it with science and

14. *Id.* at 118.

15. *Id.* at 133. Locke protests that “[t]he only business of the church is the salvation of souls, and it no way concerns the commonwealth, or any member of it, that this or the other ceremony be there made use of.” *Id.*

16. *Id.* at 115. Locke states, “I esteem that toleration to be the chief characteristic mark of the true church.” *Id.*

17. *Id.* at 117. Locke argues that “[t]he toleration of those that differ from others in matters of religion, is so agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind, that it seems monstrous for men to be so blind as not to perceive the necessity and advantage of it in so clear a light.” *Id.*

18. MCCONNELL, *supra* note 11, at 93 (describing Locke's understanding of the problem to be the result of “government, or religion, or both, overstepping their proper bounds. If religion and government would stick to their own proper spheres, a believer could be a citizen of both sacred and secular realms—he could enjoy dual citizenship—with no conflict of obligations”).

the rule of an absolute sovereign.<sup>19</sup> In other words, Hobbes dreams of the time when men are strong enough to realize that they no longer need the concept of God to explain causes. However, Locke's approach is generally more accepted. Because he presents an argument from inside Christianity as a believer, he is more successful in weakening the authority of religion in secular affairs.

Locke's approach to dealing with the issue of religion and politics is also more realistic because he acts as a renovator. He strives to make religion and politics more compatible from the inside, not destroy it from the outside. As a result, religious people are more willing to accept Locke's approach because it represents more subtle changes. History has shown that renovation is clearly more effective in resolving complication between religion and politics. Thus, Hobbes' understanding of religion's role in civil society is meaningless without the less radical philosophy of toleration and separation of church and state as articulated by John Locke.<sup>20</sup>

I believe Locke became the guiding light for American Constitutionalism and continues to be the predominant philosophy of Americans confronting the "problem" of religion and politics. This holds despite the fact that there are many religions in the United States, not just Christianity, which Locke framed his philosophy around.

## II. THE CONSTITUTION AND FREEDOM OF RELIGION

Like liberal thinkers before them, the Founding Fathers recognized that religion is a troublesome matter, which historically led to fighting and even war. Yet, the United States was founded on principles of religious freedom before it was an independent nation. In this way, the Founding Fathers had an easier time dealing with the two-prince problem than Europe, where religion was so closely tied to government that a revolution against the monarchy meant a revolution against the Church as well.

The Founding Fathers addressed the two-prince problem with Locke's separation of church and state in mind. They determined that freedom of religion is a two-part demand, evidenced by the two religion clauses of the

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19. See generally THOMAS HOBBS, THE LEVIATHAN (Edwin Curley ed., 1994).

20. Somewhere in between Locke's renovation of religion and Hobbes' eradication of religion lies Rousseau's unique and new civil religion, which resembled the relationship between government and religion that predated the modern state. See MCCONNELL, *supra* note 11, at 93 (articulating Rousseau's position to call for a total suppression of religion in the modern state and replacing it with mandatory civil religion that preaches "the sanctity of the social contract and the law"). I come back to Rousseau's theory and civil religion later in regard to the Founders and France.

First Amendment of the Constitution that read: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”<sup>21</sup> The Establishment Clause and the Free Exercise Clause, the first and the second clauses respectively, articulate two distinct objectives that have been treated separately by the courts, yet have a tendency to overlap and even conflict with one another.<sup>22</sup> Still, the Founding Fathers’ perspectives on the constitutional religious freedom they created were different, both from the Lockean understanding and from each other, in subtle, yet important, ways.

#### A. *Freedom of Conscience*

James Madison believed that faith and religious obligations take precedence over civil obligations and laws because allegiance to God is primary while civil society is a “subordinate” form of association.<sup>23</sup> Further, he believed that when religious obligation and civil obligations are in conflict, religion trumps so long as it “does not trespass on private rights or the public peace.”<sup>24</sup> Locke, on the other hand, believed that when religion and civil law conflict, which will rarely happen, civil authority reigns supreme.<sup>25</sup>

Even more distinguishable from Madison is Rousseau. Like Locke, Madison believed that religion was concerned with more ethereal affairs rather than affairs of this world, and that conflicts between religion and the state would be few, whereas Rousseau believed they would be more frequent.<sup>26</sup> Still, in the end, both Locke and Rousseau would agree that all conflicts, regardless of their frequency, must be resolved in favor of the state.<sup>27</sup> As stated above, Madison placed a higher value on religion.<sup>28</sup> It is possible that Madison did not view the two-prince problem as a complete negative; rather he understood it to be another check against the tyranny of government.<sup>29</sup>

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21. U.S. CONST. amend. I

22. Christopher Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 11, 12 (2011) (noting that Establishment cases and Free Exercise cases are separate and the doctrines are separate, which is puzzling because the legal provision mentions the word “religion” only once).

23. See MCCONNELL, *supra* note 11, at 93.

24. *Id.* at 95 (quoting JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 98–100 (G. Hunt ed., 1901)).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 96 (arguing that the “difference between Madison and Rousseau may have been that the latter had more ambitious plans for government”). Thomas Jefferson’s solution to the two-prince

*B. Promoting Values Necessary for Democracy*

George Washington's solution to the two-prince problem is one that works with religion, but in a different manner than Locke. Specifically, Washington believed that religion was important to democracy because it encourages the virtues that are necessary in a successful democracy.<sup>30</sup> However, Washington either did not consider the conflicts between religion and civil law or, like Locke, thought that they were unlikely to present themselves.<sup>31</sup> In order to limit conflicts further, Washington insisted that laws should accommodate religious obligations and convictions where possible without excessive injury to the essential interests of the nation.<sup>32</sup> Washington was more concerned with treating religious minorities with sensitivity than Madison, who spoke of general unalienable rights.<sup>33</sup> Further, Madison was more concerned with freedom of conscience, to believe whatever one wants and to let those beliefs guide one's life, whereas Washington was more concerned with the virtues and morals that religion provided to democratic citizens.<sup>34</sup> Washington's views were more in line with Alexis de Toqueville's observations of America, in which he concluded that religion provides the public spiritedness and morals necessary to combat selfish individualism that threatens all democracies.<sup>35</sup> Still, when Washington and Tocqueville lived, the dominant religion in the United States was Protestant Christianity, whose values were in line with those of liberal, democratic society.<sup>36</sup> Would their responses have been different in a more plural society, or where the dominant or even minority religions preached doctrines that would be considered illiberal by American standards? Perhaps under that situation, Madison's unalienable rights make sense, or even Rousseau's solution:

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problem and understanding of the constitutional religious freedom most closely resembles Madison's. Both Jefferson and Madison clearly viewed constitutional religious freedom in terms of federalism.

30. *Id.* at 97. In Washington's Farewell Address, he stated, "[o]f all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports." *Id.* McConnell also makes a persuasive case that Washington meant all religions, not just the dominant religion. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Tocqueville recognized that "[e]very religion also imposes on each man some obligation toward mankind, to be performed in common with the rest of mankind, as so draws him away, from time to time, from thinking about himself" *Id.* at 98–99 (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 293 (J.P. Mayer ed., George Lawrence trans., Doubleday 1969 (1840))).

36. *Id.* at 99 ("Washington saw no conflict between religion and citizenship because the dominant religion of America—Protestant Christianity—preached ideals consistent with the principles of the republic").

that religious dogma that is contrary to the dogma of the state must be eliminated.

Differences aside, the Founding Fathers' agreed that religion is a matter between each believer and his God, and that any attempt by government to influence or control faith only produced a backlash among both religious followers and the clergy.<sup>37</sup> It is clear that the Founders were more concerned with protecting religion from the state, rather than protecting the state from religion.

### III. THE SUPREME COURT AND "THE WALL OF SEPARATION" METAPHOR

The Supreme Court is responsible for interpreting the religion clauses of the Constitution. In doing so, it has oscillated between an accommodationist stance and a strict separation of church and state stance. This oscillation makes it clear that there is no absolute way to approach freedom of religion. I argue that it is impossible and undesirable to have an absolute standard. Freedom of religion is complex, and no metaphor invoked by the Supreme Court has been or will be able to overcome the difficulty inherent in this complexity.

#### A. *Everson v. Board of Education*

In 1947, the Supreme Court made its first decision regarding the First Amendment's religious provisions applicability to the states via the Fourteenth Amendment.<sup>38</sup> Although the Court came to the correct conclusion, it invoked Jefferson's "wall of separation" metaphor by taking it out of context and inappropriately inserting it into the Constitution, which would have devastating future consequences.

In *Everson*, the Supreme Court reviewed a taxpayer's suit challenging the constitutionality of a New Jersey statute that authorized local school boards to make rules and contracts for the transportation of school children. Pursuant to the statute, the Board of Education, authorized reimbursement to parents of money spent on transportation of children attending Catholic parochial schools.<sup>39</sup> The taxpayer alleged that the statute violated the First Amendment because it forced citizens to pay taxes to help support schools that taught the Catholic faith.<sup>40</sup>

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37. *Id.* at 98.

38. *See Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947).

39. *Id.* at 3.

40. *Id.*

Justice Black, in writing for a 5–4 majority, concluded that a state statute authorizing reimbursement to parents for money spent on their children’s transportation to parochial schools does not violate the First Amendment.<sup>41</sup> In doing so, he cited Jefferson for the rule that “the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”<sup>42</sup> The Court reasoned that the First Amendment forbids a state to exclude any of its citizens because of their religious faith, or lack thereof, from receiving the benefits of public welfare legislation.<sup>43</sup> The Court determined that the statute was such an act of public welfare legislation that was protected under the First Amendment.<sup>44</sup> The Court also recognized that the Fourteenth Amendment prevented the states from making a law respecting an establishment of religion or prohibiting the free exercise thereof.<sup>45</sup> Consequently, a state could not contribute public funds to any institution that teaches the tenets and faith of any church.<sup>46</sup> However, neither can it exclude members of any faith and thereby handicap religions. The Court went on to say that parents might be less willing to permit their children to attend parochial schools if they were cut off from state reimbursement for their children’s school transportation.<sup>47</sup> Therefore, the Court concluded that to exclude reimbursement for children who attended Catholic parochial schools would be unconstitutional.<sup>48</sup>

Although the Supreme Court came to the correct conclusion, it misrepresented Jefferson’s views on the matter of church-state relations by evoking the wall metaphor out of context and implicitly representing the wall as rigid. Such a misrepresentation orchestrated a betrayal of America’s founding. Both the majority and minority opinions in *Everson* selectively relied on Jefferson’s work to support the separationist interpretation of the First Amendment, citing Jefferson’s Bill for Establishing Religious Freedom for expressing the principle of complete separation of church and state.<sup>49</sup>

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41. *Id.* at 17.

42. *Id.* at 16.

43. *Id.*

44. *Id.* at 17.

45. *Id.* at 29.

46. *Id.* at 16.

47. *Id.* at 17–18.

48. *Id.*

49. *Id.* at 13 (“This Court has previously recognized that the provisions of the First Amendment . . . had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [for religious liberty]”). See also *id.* at 39–40

“A Bill for Establishing Religious Freedom” was drafted by Jefferson in 1777 as part of Virginia’s revision of laws following the Declaration of Independence.<sup>50</sup> The bill was passed in 1786 while Madison was Governor.<sup>51</sup> The statute provided:

that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.<sup>52</sup>

However, this was only the first of five consecutive bills in Virginia’s revised code fathered by Jefferson pertaining to church-state relations.<sup>53</sup> The remaining four bills were numbered 82–85. Bill No. 82 was entitled “Statue for Establishing Religious Freedom.”<sup>54</sup> The bill did not explicitly prohibit establishment, but rather took a Lockean approach to religious freedom.<sup>55</sup> It contains a lengthy preamble which invokes the “Almighty God”<sup>56</sup> and an operative portion which contains the following provisions:

In the Commonwealth of Virginia no man shall (1) be compelled by civil government to attend or support any religious worship, place or ministry, nor (2) be punished or restrained by the Commonwealth on account of his religious beliefs; but on the contrary, every man shall (3) be free to profess and contend for his religious beliefs, and (4) such activity shall in no way affect his civil capacities.<sup>57</sup>

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(Rutledge, J., dissenting) (the great documents of the “Virginia struggle for religious liberty. . . became the warp and woof of our constitutional tradition” of church-state separation).

50. Daniel L. Dreisbach, *A New Perspective on Jefferson’s Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in Its Legislative Context*, 35 AM. J. LEGAL HIST. 172, 172 (1991).

51. *Id.* at 174.

52. *Id.* at 172.

53. *Id.* at 177.

54. *Id.* at 183.

55. *Id.* at 184–85.

56. *Id.* at 186.

57. *Id.*

According to strict separationists, Bill No. 82 would violate the Establishment Clause.<sup>58</sup> Daniel Dreisbach concludes that:

Jefferson's bill did not advocate, in the modern sense at least, a strict separation between religion and civil government, nor was it a blueprint for a wholly secular state. It was a bold and eloquent affirmation of the individual's right to worship God, or not, according to the dictates of conscience, free from governmental interference or discrimination.<sup>59</sup>

This becomes even clearer in proposed bills Nos. 83–85. These bills were introduced by Madison as governor, but never enacted. Bill No. 83 was “A Bill for Saving the Property of the Church Heretofore by Law Established.”<sup>60</sup> The Bill provided for the transfer of legal title and control of Church assets to parishioners, who would manage the funds and use them to support the ministry.<sup>61</sup> Even more abhorrent to strict separationists is Bill No. 84, entitled, “A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers.”<sup>62</sup> It provided for imprisonment and fines for disturbing public worship and individuals caught working or making their servants and slaves work on the Sabbath.<sup>63</sup> The use of the word Sabbath rather than Sunday indicates that the purpose was to protect the religious component of the day of rest and not merely to provide for rest and recreation from regular work.<sup>64</sup> The Bill represented Jefferson's view that it was the state government's responsibility to protect citizens' right to worship without disruption.<sup>65</sup> Bill No. 85, entitled, “A Bill for Appointing Days of Public Fasting and Thanksgiving,” empowered the governor to proclaim days of thanksgiving and fasting.<sup>66</sup> Finally, Bill No. 86, entitled, “A Bill Annuling Marriages Prohibited by the Levitical Law, and Appointing the Mode of Solemnizing Lawful Marriage,” excluded former requirements that marriages be performed and authorized by members of the clergy, but required that couples acquire a legal marriage license and

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58. *Id.* at 187.

59. *Id.*

60. *Id.*

61. *Id.* at 188 (“The purpose of Bill No. 83 was to protect the property interests of the Anglican Church, which had recently lost its tax subsidies, and to ensure that the Church could use its resources to meet any outstanding contractual obligations”).

62. *Id.* at 189.

63. *Id.*

64. *Id.* at 190.

65. *Id.*

66. *Id.* at 191.

“declare marriage vows in the presence of witnesses” prior to living together.<sup>67</sup>

These five consecutive bills offer a different picture than the one painted by the Supreme Court in *Everson*. Taken together, the bills represent a far more accommodationist stance towards church-state relations than the separationist model attributed to it. Yet, the *Everson* Court and subsequent courts have failed to acknowledge this full legislative history. Instead, the Supreme Court took the bill out of context to serve its purpose of erecting a wall between church and state. The dissent in *Everson* exposes the fact that the Court was aware of the full legislative context of Bill No. 82, but refused to acknowledge it because it did not further its separationist goal.<sup>68</sup>

The *Everson* Court also relied on Jefferson’s letter as President of the United States to the Danbury Baptist Association of Connecticut in response to its request for a proclamation of a national day of fasting and thanksgiving.<sup>69</sup> Here, Jefferson evoked the wall of separation between church and state.<sup>70</sup> Some scholars argue that Jefferson’s perspective on church-state relations changed from the time he was Governor of Virginia, before the First Amendment was drafted and enacted, to when he was President of the United States. Others maintain that Jefferson was merely accommodating the conservative tendency in Virginia in order for his more progressive Bill to pass.<sup>71</sup> These arguments overlook the straightforward answer to Jefferson’s seemingly conflicting and irreconcilable perspective on church-state relations as Governor and then as President. Jefferson was first and foremost a champion of federalism and he invoked the “wall” metaphor to argue that the separation of church and state applied to the federal government. The Bill of Rights was constructed it was intended to limit the federal government, not the States. Jefferson and the other Founders clearly rejected the establishment of a national religion, but they left the States free to make their own decisions regarding religion.<sup>72</sup> The Founders did not want to create a government

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67. *Id.* at 196.

68. *Id.* at 197.

69. *Id.* at 192.

70. *Id.* Jefferson wrote: “Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church and State.” *Id.*

71. *Id.* at 193.

72. *Id.* at 194–95.

hostile to religion. Instead they envisioned a government that encouraged freedom of expression in all forms; religious expression most of all. Hence, one of the main goals of the First Amendment was to protect religious freedom from interference by the federal government. There remains no historical foundation for the idea that the Framers intended to formulate a strict wall of separation between church and state governments that was authorized in *Everson*.

The Supreme Court misconstrued the intent of Jefferson's "wall" metaphor to construct a constitutional principle. After *Everson* the "wall" metaphor became "firmly grafted onto the language of the First Amendment."<sup>73</sup> The Court simply could have responded that public education did not exist when the Constitution was written and therefore was not considered by the Framers. Instead, the Court saw *Everson* as an opportunity to push for a more secular polity, where the wall was "high and impregnable" and applied not just to the federal government, but to the states as well.

*B. Regent's Prayer: Engel v. Vitale*

The reality of the Court's decision in *Everson* came to bear in *Engel v. Vitale*.<sup>74</sup> In *Engel*, the Court ruled that a voluntary, short, nondenominational prayer read at the start of each school day—authorized by the Board of Regents for the State of New York—violated the Establishment Clause of the First Amendment.<sup>75</sup> The Court reasoned that the prayer violated the First Amendment because it represented New York's official approval of religion.<sup>76</sup> It is the first in a series of cases that used the Establishment Clause to strike prayer in school and other religious activities in public,<sup>77</sup> and the signals the Court's hostility towards religion and push for a secular state, against the wishes of the majority of Americans and in contravention of the Founding Fathers' goals and beliefs.

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73. BRUCE J. DIERENFIELD, *THE BATTLE OVER SCHOOL PRAYER: HOW ENGEL V. VITALE CHANGED AMERICA* 49 (2007).

74. 370 U.S. 421 (1962).

75. *Id.* at 430.

76. *Id.*

77. See *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding that Alabama's law permitting one minute for prayer or meditation was unconstitutional); see also *Lee v. Weisman*, 505 U.S. 577 (1992) (prohibiting clergy led prayer at high school graduation ceremonies); *Santa Fe ISD v. Doe*, 530 U.S. 290 (2000) (extending the ban to school sanctioning of student-led prayer at high school football games).

### C. *Schempp and The Lemon Test*

Two years after *Engel*, the Supreme Court decided *Abington Township School District v. Schempp*,<sup>78</sup> holding school-sponsored Bible reading in public schools to be unconstitutional. The case served to uphold *Engel*. The most significant consequence of *Schempp* was the backlash that it created. Both the public and newspapers were highly critical of the decision.<sup>79</sup> Congress attempted to overturn the decision by drafting over 150 resolutions to amend the Constitution without success.<sup>80</sup>

*Lemon v. Kurtzman*<sup>81</sup> followed and set the three-part “Lemon test” based on precedent under *Schempp*.<sup>82</sup> The Court held that a Pennsylvania statute allowing the Superintendent of Public Schools to reimburse nonpublic schools, mostly Catholic, for salaries of teachers who taught secular subjects, for the costs of secular textbooks, and for secular instructional materials violated the Establishment Clause of the First Amendment.<sup>83</sup> The Lemon Test requires a state’s action to: (1) have a secular purpose; (2) not have the primary effect of either advancing or inhibiting religion and; (3) not result in an “excessive government entanglement” with religion.<sup>84</sup>

The Lemon Test has been used in subsequent cases, but has been criticized by Justice Scalia and Justice Thomas.<sup>85</sup> The Lemon Test’s future is uncertain as evidenced by the dissent in *McCreary County v. ACLU of Kentucky*<sup>86</sup> and the majority in *Van Orden v. Perry*.<sup>87</sup> Both these cases involved public displays of Ten Commandments. In *McCreary*, two Kentucky counties posted the Ten Commandments in their respective courthouses.<sup>88</sup> Following the Lemon Test, the majority found that the displays violated the Establishment Clause of the First Amendment despite

78. 374 U.S. 203 (1963)

79. Madalyn Murray O’Hair, the mother of the plaintiff in the combined case was the founder and president of American Atheists and was so vilified by the public and the media that in 1964 *Life* magazine referred to her as “the most hated woman in America.” See AMERICAN ATHEIST, <http://www.atheists.org/history>.

80. MADALYN MURRAY O’HAIR, FREEDOM UNDER SIEGE: THE IMPACT OF ORGANIZED RELIGION ON YOUR LIBERTY AND YOUR POCKETBOOK 55 (1974).

81. 403 U.S. 602 (1971).

82. *Id.* at 612–13.

83. *Id.* at 609–10.

84. *Id.* at 612–13.

85. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, J., dissenting, joined by Scalia, J., and Thomas, J.)

86. 545 U.S. 844 (2005).

87. 545 U.S. 677 (2005).

88. *McCreary*, 545 U.S. at 844.

the fact that the display included other documents and also included a history of the Ten Commandments, indicating its value to democracy and the founding of the United States.<sup>89</sup> In the dissent, Justice Scalia proclaims that the Constitution has never required the complete exclusion of religion from public life.<sup>90</sup> In fact, he recognizes that the Founders made multiple official references to religion and believed that morality, as fostered by religion, was crucial for the social order.<sup>91</sup> He concluded that in the United States, government *can* favor religion over irreligion and it can also favor one religion—specifically, monotheistic religion—over another.<sup>92</sup> He pronounced that the effect of the majority opinion was to increase hostility towards religion by requiring that a secular purpose must “predominate” in government action.<sup>93</sup>

At the same time it heard *McCreary*, the Supreme Court heard *Van Orden v. Perry*. *Van Orden* also involved the constitutionality of a display of the Ten Commandments, but on the grounds of the Texas State Capital.<sup>94</sup> The display was intended to commemorate “Texan Identity” and included other historical markers.<sup>95</sup> In writing for the majority, Chief Justice Rehnquist held that the display did not violate the Constitution as government action that has religious content, and further that a display that promotes a religious message does not necessarily violate the Establishment Clause.<sup>96</sup> He reasoned that the three-factor test announced in *Lemon* did not apply because the case is more appropriately analyzed by considering the nature of the Ten Commandments monument and American history.<sup>97</sup> He went on to explain that, while the Ten Commandments are religious, the person whom Judeo-Christians believe to have delivered the Ten Commandments, Moses, was also a lawgiver.<sup>98</sup> In this way, he viewed Texas as treating the display as an expression of the State’s political and legal history, which therefore does not violate the Establishment Clause.<sup>99</sup>

The effect of the strong dissent in *McCreary* and the majority in *Van Orden* has been to withdraw some of the Court’s hostility towards religion

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89. *Id.*

90. *Id.* at 885 (Scalia, J., dissenting).

91. *Id.* at 887.

92. *Id.* at 893–95.

93. *Id.* at 900–01.

94. *Van Orden*, 545 U.S. at 677.

95. *Id.* at 681.

96. *Id.* at 691–92.

97. *Id.* at 686.

98. *Id.* at 691.

99. *Id.* at 692.

that grew out of Justice Black's improper invocation of Jefferson's wall metaphor. The two decisions diminish the use of the Lemon Test and the predominance test used in *McCreary*.

*D. Effects of the Supreme Court's Treatment of the Establishment Clause*

Jefferson's infamous phrase concerning separation of church and state was never meant to exclude people of faith from influencing and shaping government based on that faith. To create a government hostile to religion and religious influence is not only contrary to American history, but violates the Free Exercise Clause.

The Establishment Clause of the First Amendment denies any state sponsored church, ultimately prohibiting any form of a theocracy. Yet, a theocracy is not established if certain public schools allow their students to pray at the beginning of the school day, or students participate in Christmas or Easter assemblies, or schools transport parochial students to their schools as part of the bus route, or communities construct manger and nativity scenes on town hall grounds, or courthouses display the Ten Commandments above their steps. These actions do not require anyone to change their religious affiliations, nor do they ask secularists to accept God's existence. No one is required to worship against his or her beliefs or to worship at all. While these scenes may cause individuals to become uncomfortable, or maybe even offended, none of them amounts to a Constitutional violation. There is no constitutional right against being offended.<sup>100</sup> Many of these same arguments were used in the Supreme Court cases concerning religion and the public sphere, particularly in public school.

In a different way, Erwin Griswold, Harvard Law School's dean, was critical of the decision in *Engel* to ban the regents' prayer on the basis of a principle declared in *Everson*. He regarded the regents' prayer as "simply the 'free exercise of religion.'"<sup>101</sup> He noted, "[The U.S.] has been, and is, a Christian country, in origin, history, tradition, and culture."<sup>102</sup> Furthermore, he "conceded that U.S. religious minorities—he mentioned Muslims—were welcome to worship freely and hold office, but such

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100. DIERENFIELD, *supra* note 73, at 211. Reverend Richard Land made the point when he remarked, "I don't care if a prayer is offensive to someone. There's no constitutional right against being offended. Nowhere does it say that you have a right not be offended by your peers in high school." *Id.* Clearly this comment disregards the social pressure of a child to conform, but it also has some merit in addressing the heart of the issue.

101. *Id.* at 136.

102. *Id.*

tolerance did not mean the majority had to abandon its religious heritage.”<sup>103</sup> The Supreme Court has come down on the side of the secularist time and time again. The passive expressions of religious liberty, which were mentioned above, must, according to both the secularist and the Court, be abandoned. By doing so, the Supreme Court justices have unintentionally immersed themselves in religious matters by segregating God and religion from public life. They are the “final word” on the matter in creating a secular polity.

Still, the Regent’s Prayer and other battles over religion in public schools were not merely contests between the believers and the non-believers. Quite the contrary, many religious groups supported the *Engel* decision on the basis that prayer in school and any form of religious teaching or worship degraded both religion and education.<sup>104</sup> The issue was highly controversial amongst both believers and non-believers, and the public did not welcome the decision.<sup>105</sup> Contrary to the Supreme Court’s decision, the majority of people were in favor of school prayer.<sup>106</sup> Nevertheless, Americans accepted the Supreme Court’s decision. In fact, many were able to make something positive of it. President Kennedy, who was in office during the decision, stated:

“[I]t is important to support the Supreme Court decisions, even when we may not agree with them. In addition, we have in this case a very easy remedy, and that is to pray ourselves. And I would think that it would be a welcome reminder to every American family that . . . we can make the true meaning of prayer much more important in the lives of all our children. That power is very much open to us.”<sup>107</sup>

He urged Americans to pray “a good deal more at home and attend churches with a good deal more fidelity.”<sup>108</sup> This commonsense interpretation of the *Engel* decision—to privatize religion—was exactly what the Court had in mind.

The *Schempp* and *Murray* cases upheld *Engel* and expanded on them. Yet, in their soft absolutism the Supreme Court justices curtailed religion

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103. *Id.*

104. *Id.*

105. *Id.* at 145–46 (Noting that *Engel* was “a wildly unpopular decision, engendering more public hostility than almost any previous opinion in the Court’s history. . . . The *Engel* decision jolted Americans because their sense of national identity was inseparable from their religious feelings”).

106. *Id.*

107. *Id.* at 150.

108. *Id.*

with the preface that there is room for religion in public spaces. Although they tend toward restricting religion, the Court left room for accommodation.

#### IV. CONTEMPORARY HOSTILITY TOWARDS RELIGION

##### A. *The Role of Secular Elite in the United States*

Intellectuals came into existence in the 19th Century as the spokesmen of the Enlightenment.<sup>109</sup> But just as there were two different Enlightenments, on either side of the Atlantic, there were two different types of intellectual.<sup>110</sup> In Europe, the intellectuals were able to successfully promote secularism, whereas the opposite occurred in the United States.<sup>111</sup> This was primarily due to the fact that intellectuals are much more influential and powerful in Europe than in the United States.<sup>112</sup> Still, intellectuals have been the biggest proponents of a strictly secular state in the United States.<sup>113</sup> Despite the fact that most Americans consider themselves religious,<sup>114</sup> these intellectuals and elitists, whom this note refers to collectively as the secular elite, continue to advocate for the secular state. They make up a majority of Hollywood, the media, and higher education. They also attempt to infiltrate politics and the judiciary in an attempt to effectuate their beliefs. They seek to superimpose their vision of the proper relations between church and state on an American public that strongly opposes them.

The secular elite refuses to cast aside the Secularization Theory, even after it has been discounted.<sup>115</sup> Instead, their response to the threat of religious revival is to term it “fundamentalism.”<sup>116</sup> They remain dumbstruck by the flourishing and growth of religion in modern society. In the same way that the vehement belief that there is no God is a make-

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109. BERGER et al., *supra* note 1, at 18.

110. *Id.*

111. *Id.*

112. *Id.* Intellectuals have not had much influence outside their academic bubbles because “the United States has been from its beginnings a commercial and therefore a pragmatic society. It did not bestow much esteem, let alone power on the ‘chattering class.’ Hence the telling American taunt: ‘If you’re so smart, why ain’t you rich.’”

113. *Id.*

114. Over 90% of Americans believe in God. Only 37% of Americans would consider voting for a President who does not believe in God. *Id.* at 60.

115. The early twentieth century witnessed a surge in religious vitality throughout the world. This included the religious intensification of Islam in the Middle East and Evangelical as well as Pentecostal movements in Africa, Latin America, Asia, and the United States. *Id.* at 11.

116. *Id.* at 57.

shift religion for atheists, secularism has replaced religion for the secular elite. They replace God with science, reason, the state, or even power. Secularism is not simply the absence of religion, but rather an intellectual and political category that itself needs to be understood as a historical construction.

### *B. The Obama Administration's Animus Towards Religion*

Secularism is continuing to grow in Europe. It is also growing in the United States, but it remains confined to an extremely small base.<sup>117</sup> In Europe, the clear rival of secularism is the dominant church, but in the United States the absence of such a dominant church makes it difficult to determine who represents the opposition.<sup>118</sup> The culture wars in the United States tend to pit the secular Liberals<sup>119</sup> against the moral Conservatives.<sup>120</sup> These culture wars seem to be growing.

This was evidenced in the 2000 and 2004 presidential elections, where religion appeared to largely influence voter preferences.<sup>121</sup> It became clear that many Americans value religion as part of the solution and oppose the advancement of the secular alternative.<sup>122</sup> Democrats realized that even though they represent the secularists, they needed to capture the majority of Americans who consider themselves to be believers if they wanted to win in 2008.<sup>123</sup> In fact, the Democrats were successful in doing such, although other factors also weighed heavily in the presidential election. Barack Obama ran as a religious man, despite the fact that the Republicans and others on the Right criticized his true religious convictions and history with Black Liberation Theology and Reverend Jeremiah Wright.<sup>124</sup> Even those who questioned the extent of his convictions would not have

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117. *Id.*

118. *Id.*

119. Liberals with a capital L should be distinguished between liberal with a lower case l. Liberal, with a capital L, refers to those on the political left in the United States, who are closer associated with the social welfare state, whereas liberal, refers to classical liberals, which draw from Locke and Hobbes. To a European this is even more confusing, as liberal refers only to classical liberals, who tend to be more politically similar to conservatives in the United States.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Barack Obama's former minister and Black Liberation proponent. He is famous for his 2003 sermon in which he roared, "No, no, no, not God Bless America! God damn America." *Black Liberation Theology, in it's Founder's Words*, NPR (Mar. 31, 2008), <http://www.npr.org/templates/story/story.php?storyId=89236116>; see also Adelle M. Banks, *Obama Finds Pulpit in Center of Racial Divide*, WASH.POST (Mar. 22, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/21/AR2008032102683.html>.

believed that he would turn on religion and estrange Catholics who comprise 24% of the American public.<sup>125</sup> In fact, 54% of Catholics supported Obama in 2008 and 50% in 2012.<sup>126</sup> Obama defended the influence of religion in politics in 2006.<sup>127</sup> Still, it became clear that religion took a back seat to his progressive agenda.

In 2011, the U.S. Department of Health and Human Services (DHHS) embraced certain recommendations concerning women's preventative health care from the Institute of Medicine including the use of contraception for this purpose.<sup>128</sup> The Patient Protection and Affordable Care Act of 2010 included these recommendations and consequently mandated that new private health plans made on or after August 1, 2012 cover all FDA-approved methods of contraception without co-pays or any other out of pocket expenses.<sup>129</sup> Prior to the mandate in the Affordable Care Act, more than half the states already required insurance policies to cover all FDA-approved contraceptive drugs and devices in addition to medical services.<sup>130</sup>

125. *U.S. Religious Landscape Survey*, THE PEW FORUM ON RELIGION & PUBLIC LIFE, <http://religions.pewforum.org/maps> (last visited Nov. 11, 2012).

126. *How the Faithful Voted: 2012 Preliminary Analysis*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (Nov. 7, 2012), available at <http://www.pewforum.org/Politics-and-Elections/How-the-Faithful-Voted-2012-Preliminary-Exit-Poll-Analysis.aspx> (last visited Nov. 10, 2012).

127. "Secularists are wrong when they ask believers to leave their religion at the door before entering the public square. To say that men and women should not inject their personal morality into public policy debates is a practical absurdity; our law is by definition a codification of morality, much of it grounded in the Judeo-Christian tradition." Yet he went on to say, "What our pluralistic democracy does demand is that the religiously motivated translate their concerns into universal, rather than religion-specific, values. Those opposed to abortion cannot simply invoke God's will—they have to explain why abortion violates some principle that is accessible to people of all faiths." Barack Obama, *THE AUDACITY OF HOPE* 216–19 (2006).

128. *State Policies in Brief: Insurance Coverage of Contraceptives*, GUTTMACHER INSTITUTE (Feb. 2, 2012), [http://www.guttmacher.org/statecenter/spibs/spib\\_ICC.pdf](http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf).

129. *Id.*

130. *Id.* Twenty-eight (28) states require insurers that cover prescription drugs to provide coverage for all FDA-approved contraceptive drugs and devices; seventeen (17) of these twenty-eight (28) states also require coverage of related outpatient services. Two (2) of these states, Arkansas and North Carolina, exclude emergency contraception from the required coverage while 1 other state, West Virginia, excludes minor dependents from coverage). Many states, twenty (20) in total, give exemptions to particular employers and insurance from the mandate, while eight lack any provision that allows certain employers or insurers to refuse to provide contraception. Four (4) states include a "limited" refusal clause that allows only churches and church associations to refuse to provide coverage, but does not allow hospitals or other entities to do the same. Seven (7) states include a "broader" refusal clause that allows churches, associations of churches, religiously affiliated elementary schools and secondary schools, and even some religious charities and universities to refuse, but not hospitals. Eight (8) states include an "expansive" refusal clause that permits religious organizations, including some hospitals, to refuse to provide coverage; two (2) of these states also exempt secular organizations with moral or religious objections, while Nevada does not exempt any employers but allows religious insurers to refuse to provide coverage and two (2) other states exempt

In 2000, the Equal Employment Opportunity Commission (EEOC) held in a decision that the exclusion of contraception violated the Pregnancy Discrimination Act (PDA).<sup>131</sup> In that decision, the EEOC equated contraception to general preventative care and concluded that PDA prohibition on discrimination related to a woman's ability to become pregnant necessarily includes refusal to provide contraception.<sup>132</sup> However, federal district courts are split on the issue.<sup>133</sup> The only federal circuit court to rule on the matter is the Eighth Circuit, which rejected the EEOC position that exclusion of contraception is a violation of Title VII as amended by the Pregnancy Discrimination Act.<sup>134</sup>

Prior to announcing the contraception mandate on January 20, 2012, President Obama had a phone conference with Archbishop Timothy Dolan and later met with him in the Oval Office.<sup>135</sup> After the announcement was made, Archbishop Dolan released a video message condemning the mandate as "literally unconscionable" and expressing his disappointment in the Obama Administration's offer for a one-year transition period "to figure out how to violate our consciences."<sup>136</sup>

After two weeks of intense criticism, President Obama announced a so-called "compromise" in which he stated that contraception coverage will be provided to all female employees at no cost by the insurance companies.<sup>137</sup> The real questions are: first, whether this "accommodation"

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insurers as well as employers. In addition, fourteen (14) of the twenty (20) states with exemptions require either employers or insurers to notify employees when their health plan does not cover contraceptives. Finally, four (4) of these twenty (20) states with exemptions provide access to contraception to employees by allowing them to purchase coverage on their own, but at a group rate when their employer refuses to offer contraceptives). *Id.*

131. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Dec. 14, 2000), <http://www.eeoc.gov/policy/docs/decision-contraception.html>.

132. *Id.*

133. *Compare* Cooley v. Daimler Chrysler Corp., 281 F. Supp. 2d 979 (E.D. Mo. 2003), Mauldin v. Wal-Mart Stores, Inc. 2002 WL 2022334 (N.D. Ga. 2003), and Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266 (W.D. Wa. 2001) (holding that excluding prescription contraception from medical plan coverage was a violation of Title VII, as amended by the Pregnancy Discrimination Act); *with* Alexander v. American Airlines, Inc., 2002 WL 731815 (N.D. Tex. 2002) and EEOC v. United Parcel Service, Inc. 141 F. Supp. 2d 1216 (D. Minn. 2001) (holding that excluding coverage for contraception did not violate Title VII).

134. *In re* Union Pacific R.R. Emp't Practices Litig., 479 F.3d 936 (8th Cir. 2007).

135. Glenn Thrush & Carrie Budoff Brown, *President Obama Boxed in on Birth Control*, POLITICO (Feb. 10, 2012), <http://www.politico.com/news/stories/0212/72713.html>.

136. *Id.* In addition, he wrote a letter to all of the bishops in the United States asking them to read a letter criticizing the mandate to their congregations.

137. "[I]f a woman's employer is a charity or a hospital that has a religious objection to providing contraceptive services as part of their health plan, the insurance company—not the hospital, not the charity—will be required to reach out and offer the woman contraceptive care free of charge, without co-pays and without hassles." *Remarks by the President on Preventative Care*, THE WHITE HOUSE:

remedies the moral and religious liberty objections to the mandate and second, whether it is even practically feasible. It is not clear who will pay for these services. If the insurance company is offering contraception “free of charge,” it seems likely that insurance companies will pass off the costs to the employer through a higher premium. In this case, the accommodation represents a distinction without a difference, as the organization with the religious qualms is still required to pay for contraception and other services, albeit indirectly. The accommodation does not take into account Catholic Hospitals and other organizations that are self-insured.<sup>138</sup> It also fails to acknowledge Catholic insurance companies that have never provided these services. It was later reported that the Obama Administration did not even consider the issue of self-insured employers.<sup>139</sup> Therefore, the accommodation seems to fail on both issues.

The media has reported that a majority of Catholics “are at odds with the [Catholic] church’s official stance.”<sup>140</sup> However, a survey conducted by the Pew Research Center’s Forum on Religion and Public Life reported that 55% of Catholics and 63% of those whom attend church weekly are opposed to the mandate.<sup>141</sup> Further, Obama’s compromise did not affect the number in any substantial way.<sup>142</sup> What explains the difference in these polling numbers? Perhaps it is how the questions are phrased, such as asking about free services without mentioning the religious liberty

OFFICE OF THE PRESS SECRETARY (Feb. 10, 2012), <http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care>.

138. Organizations can choose to self-fund health benefit plans for their employees without purchasing coverage from an insurance company under the Employee Retirement Income Security Act (ERISA). In this case, there is no “insurer” to provide coverage in the place of the organization. Today, 60% of employees who receive health benefits from an employer-sponsored plan are from self-funded plans. Employers that tend to self-fund are large organizations that include religiously affiliated hospitals and universities. *Employer Health Benefits 2011 Annual Survey*, THE KAISER FAMILY FOUNDATION (Sept. 27, 2011), <http://ehbs.kff.org/?page=charts&id=2&sn=25&ch=2186> (on file with author).

139. Kate Thomas, *Self-Insured Complicate Health Deal*, N.Y. TIMES (Feb. 15, 2012), <http://www.nytimes.com/2012/02/16/business/self-insured-complicate-health-deal.html>.

140. Marjorie Connelly, *Support Is Found for Birth Control Coverage and Gay Marriage*, N.Y. TIMES (Feb. 14, 2012), <http://www.nytimes.com/2012/02/15/us/politics/poll-finds-support-for-contraception-policy-and-gay-couples.html>. The NY Times/CBS News poll reported that 65% of voters support the contraception mandate and 59% agree that with the mandate for religiously affiliated employers. 57% of Catholic voters support the mandate for religiously affiliated employers.

141. *Public Divided Over Birth Control Insurance Mandate: Religious, Partisan and Gender Differences*, PEW RESEARCH FOR THE PEOPLE & THE PRESS (Feb. 14, 2012), <http://www.people-press.org/2012/02/14/public-divided-over-birth-control-insurance-mandate/>. The divide is even sharper among white evangelical Protestants who oppose the mandate and favor giving religious institutions an exemption 68% to 22%.

142. *Id.*

implications or whether exemptions should be considered. Whatever the reason for the difference in these results, it is clear that the media wants to portray the issue in the light most favorable to the Obama Administration.<sup>143</sup>

As far as the constitutionality of the original mandate, and the revised mandate, it is unclear what lines precedent would draw.<sup>144</sup> Many states have also mandated that religiously affiliated employers offer contraceptives, while others have exempted such employers.<sup>145</sup> The Becket Fund filed a suit challenging the contraception mandate on behalf of Eternal Word Television Network, a Catholic news organization, on the basis of violation of freedom of religion as secured by the First Amendment and the Religious Freedom Restoration Act.<sup>146</sup> The Complaint asserts that the contraception mandate is a direct attack on a religious organization because it has arbitrarily exempted other employers for non-religious reasons. The Complaint further alleges that Human Health and Services (HHS), through Secretary Sebelius, had full knowledge that the mandate would cause religious employers to either violate their conscience or pay fines.<sup>147</sup>

In addition to this litigation, state attorney generals have stated their opposition to the contraception mandate and have threatened to take legal action.<sup>148</sup> More problematic is the fact that Secretary Sebelius did not

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143. The media has not reported that 59% of Catholics now disapprove of Obama's job performance. *59% of Catholics Disapprove of Obama's Job Performance*, RASMUSSEN REPORTS (Feb. 14, 2012), [http://www.rasmussenreports.com/public\\_content/politics/obama\\_administration/february\\_2012/59\\_of\\_catholics\\_disapprove\\_of\\_obama\\_s\\_job\\_performance](http://www.rasmussenreports.com/public_content/politics/obama_administration/february_2012/59_of_catholics_disapprove_of_obama_s_job_performance).

144. This Note does not analyze the constitutionality of the HHS contraception mandate. Discussion is limited to the mandate as evidence of the influence of the secular elite today.

145. See *supra* note 130.

146. Complaint, *ETWN v. Sebelius* (No. 12-00501), 2012 WL 401609, available at <http://www.becketfund.org/wp-content/uploads/2012/02/EWTN-Complaint-file-stamped.pdf>. The complaint also asserts a violation of First Amendment Freedom of Speech and a violation of the Administrative Procedure Act.

147. *Id.* at 3. "Had EWTN's religious beliefs been obscure or unknown, the Defendants' actions might have been an accident. But because the Defendants acted with full knowledge of those beliefs, and because they arbitrarily exempt some plans for a wide range of reasons other than religious conviction, the Mandate can be interpreted as nothing other than a deliberate attack by the Defendants on the religious beliefs of EWTN and millions of other Americans. The Defendants have, in sum, intentionally used government power to force religious groups to believe something about the mandated services manifestly contrary to their own religious convictions, and then to act on that coerced belief."

148. Niraj Warikoo, *Michigan to Take Lead in Lawsuits Against Obama's Birth Control Mandate in Health Care Plans*, DETROIT FREE PRESS (Feb. 10, 2012), <http://www.freep.com/article/20120210/NEWS06/120210013/Michigan-AG-joins-lawsuits-against-Obama-s-contraception-mandate-state-to-take-lead-role-and-first-to-get-involved>. Michigan Attorney General Bill Schuette announced plans to file briefs in support of lawsuits filed by the Becket Fund; see also Michael Foust, *Thirteen AGs Challenge Contraceptive Mandate*, CHRISTIAN EXAMINER (Feb. 14, 2012), <http://www.bpnews.net/bpnews.asp>

change anything in the final regulation to reflect the “compromise” that was published in the *Federal Register* on February 15, 2012.<sup>149</sup>

The contraception mandate and its revised version represent the most obvious alienation of religion, particularly Catholicism, by any president. Perhaps this is an indication that the secular elite is more willing to impose its beliefs on the American public in a far-reaching policy than ever before. This action reflects more than just political deafness; it is outright hostility towards religion. Perhaps, at a time so close to a presidential election, the Obama Administration believes women’s votes will far exceed and make up for the lost Catholic votes.

#### V. A LEGAL FORM OF SECULARISM: FRENCH *LAÏCITÉ*

The logic and perspective of the French towards religion is particular to France, although it is representative of Europe in general. Europe embraces secularism, but secularism as a national identity is only fully expressed in France. French *laïcité* is a historical phenomenon enacted to confront the political influence of the Catholic Church.<sup>150</sup> In this way, the French Enlightenment stands in stark contrast to the Anglo-Enlightenment of Britain and the United States. The French Enlightenment and the French Revolution in particular stood in direct opposition to the Catholic Church, whereas the American Enlightenment used the multiplicity of religion to benefit and support the Enlightenment. As a result, freedom of religion in America was seen as a political liberty. On the other hand, the French Revolution produced a sentiment that was formulated as freedom *from* religion. The French Revolution established what would be similar to the Establishment Clause of the American Constitution without the Free Exercise Clause.

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?ID=37175. Nebraska Attorney General Jon Bruning submitted a letter to the secretaries of the Departments of Health and Human Services, Labor, and Treasury strongly opposing the contraception mandate and the calling the compromise an “accounting gimmick.” The letter stated: “Should this unconstitutional mandate be promulgated, we are prepared to vigorously oppose it in court.” The letter was signed by eleven other attorneys general. *Id.*

149. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727 (Feb. 15, 2012) (to be codified at 45 CFR pt. 127), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-02-15/pdf/2012-3547.pdf>. Secretary Sebelius merely creates a safe-harbor, stating that she will not enforce the mandate for non-profit employers who refuse to provide contraception because of religious beliefs. See also Guidance on the Temporary Enforcement Safe Harbor, DEPARTMENT OF HEALTH & HUMAN SERVICES (Feb. 10, 2012), <http://ccio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf>.

150. See generally OLIVIER ROY, SECULARISM CONFRONTS ISLAM (George Holoch trans. 2007).

### A. History of *Laïcité* as a National Identity

Now that religion and the Catholic Church have been subordinated to the state, *laïcité* has become a national identity in France. Secularization and *laïcité* are not synonymous terms that can be used interchangeably. Rather, secularization can be defined as a sociological term used to describe the attitude that religion is no longer at the center of individuals' lives.<sup>151</sup> This is contrasted with the concept of *laïcité*, which legally "defines the place of religion" and is "decreed by the state, which then organizes public space."<sup>152</sup> *Laïcité* is more than mere secularization; it is a political definition of French society.<sup>153</sup> *Laïcité* is employed in a fashion consistent with the Hobbesian/Rousseau view of religion, where religion is completely reduced to the point that it is replaced by the state. While this approach may work for those who are moderate in their religious beliefs and non-believers, it poses a problem for the deeply religious and those who identify themselves as believers. This tension between *laïcité* and religious peoples stems from the fact that the French are smug in their attitude towards religion; they view themselves as more civilized and progressive.<sup>154</sup> Furthermore, they feel themselves to be morally superior to those who cling to religion and God. The French, in particular, are willing to impose this view on anyone who wishes to live in France.<sup>155</sup>

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151. *Id.* at 8 ("Secularization is not antireligious or anticlerical: people merely stop worshipping and talking about religion; it is a process").

152. *Id.*

153. *Id.* at 11 ("It is therefore clear that it is futile to think of *laïcité* as a simple relation between state and religion; it sets out the way in which society defines itself politically").

154. This is consistent with the premise of the Secularization Theory, in that the state and the individuals who comprise it must be secular in order to be modern and not antiquated/barbaric.

155. This is most vividly evidenced by Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de *laïcité*, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées public [Law 2004-228 of March 15, 2004 concerning, as an application of the principle of the separation of church and state, the wearing of symbols or garb which show religious affiliation in public primary and secondary schools] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], March 17, 2004. Known as the "headscarf ban," this law bans all religious symbols in schools but is effectively interpreted to target the wearing of headscarves by Muslim women and girls. See Sénate, *Objet de texte*, <http://www.senat.fr/dossier-legislatif/pjl03-209.html>. Other laws prohibit covering one's face in public, which clearly, though not explicitly stated, is intended to prohibit Muslim women from wearing the burqa or niqab. Violators of the law may incur a fine of 150 euros and/or a course in citizenship. Those who force women to cover their faces are subject to a fine of 30,000 euros and a sentence of up to a year in prison. See Assessing Religious Expression in France, U.S. STATE DEPARTMENT (Oct. 1, 2012), <http://www.state.gov/documents/organization/171694.pdf>.

### B. Hostility Towards Religious Immigrants

In France, the public opinion is one that is hostile to religion.<sup>156</sup> Precisely at the very moment that the French thought that they had finally solved the problem of religion, they were confronted by a flood of immigrants who are not only religious, but require and demand recognition.<sup>157</sup> Secularism became a non-issue in Europe for years, and if it were not for immigration it would have remained so. Now the question has become how to deal with people who are religious and define themselves in such a way. Europeans have not seriously contemplated the importance of religion in terms of identity. Instead, they hold that secularization is a matter of education and assimilation. Following this line of thinking, Europeans insist that Muslims will assimilate and leave Islam behind.<sup>158</sup> In this way, *laïcité* is more than just a political tool utilized by the State to solve the two-prince problem of religion, rather it political and social identity that is used as a cloak for France's intolerance.<sup>159</sup>

Muslim immigrants challenge France's national identity and adherence to *laïcité*. In *Secularism Confronts Islam*,<sup>160</sup> Olivier Roy invites his western reader to approach Islam in the same fashion as any other religion. He concludes that it is wrong to single out Islam on the basis of dogma. He shows that a strict form of *laïcité*, which was developed to face Catholicism, does not work in the face of other religions. In the name of assimilation and a desire to maintain their identity as secularists, France has pushed Muslim immigrants into their own enclaves. This perpetuates xenophobia, alienation, and radicalization among Muslim groups. In fact, Islamic fundamentalism is a reaction to rigid French *laïcité*.<sup>161</sup> Strict *laïcité*

156. Public opinion polls in 2005 show France as displaying a "hostile" social attitude towards other or nontraditional religions, trying to shut out established and/or existing religions, and being intolerant of "nontraditional" faiths. Furthermore, only 11% professed to attend religious services at least once a month. *Comparing Public Opinion of Religion in France and Indonesia*, ASSOCIATION OF RELIGIOUS DATA ARCHIVES (Oct. 1, 2012), <http://www.thearda.com/internationalData/MultiCompare5.asp?c=109,%2083>.

157. Consistent with the underlying premise of *laïcité*, France does not gather or maintain statistics on religious affiliation.

158. In regards to the law banning religious symbols in the schools, Bernard Stasi—French politician and ombudsman of the French Republic—remarked "Muslims must understand that secularism is a chance for Islam . . . Secularism is the separation of church and state, but it is also the respect of differences." *France to Ban Pupils' Religious Dress*, THE GUARDIAN (Dec. 12, 2003), <http://www.guardian.co.uk/world/2003/dec/12/france.schools>.

159. Religious leaders in France see *laïcité*, particularly the ban on religious symbols in schools to be a pretext for religious intolerance. Joseph Sitruk, the chief rabbi of France weighed in on the ban, stating that it would be an "aberration" to try to "muzzle religions under the pretext of secularism." *Id.*

160. ROY, *supra* note 150.

161. *Id.* at 99. Roy proclaims, "*Laïcité* creates religion by making it a category apart that has to be

has had the opposite reaction it desired; instead of promoting assimilation, it has divided the community further. The ban of the veil has resulted in a backlash among Muslims who are not identified as fanatics, but rather moderates. Muslims refuse to accommodate to French hostility towards Islam and wear the veil as a political statement.<sup>162</sup> The problem is that *laïcité* demands that the believer not identify himself or herself with religion.

Perhaps if France embraced a more Lockean form of separation of church and state and relinquished its pursuit of a Rousseau-like form of strict *laïcité*, a more agreeable relationship between the Muslims and France would ensue. Instead of eliminating religion completely and any particular identification with religion in favor of the supreme authority of the state, France ought to embrace a more tolerant form or separation of church and state in which the state supersedes religion only when religion conflicts with the state and the law. Many Muslims already accept the law and obey it. Muslims do not have to reform their religion, but merely accept the rules of the game, whatever they may be.<sup>163</sup> In order to do so, France must re-examine its secular identity that has transformed *laïcité* into an ideology.<sup>164</sup> France must recognize that reality is one of multiple modernities; there is not one path to modernity, but rather many. Islam is neither a hindrance to the secular state nor a hindrance to modernity. In fact, it is no different from any other religion and as such, it also has a path to modernity. Europe must give up on the “Secularization Theory” and the anxiety of “Eurabia,”<sup>165</sup> and instead embrace religious plurality.

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isolated and circumscribed. It reinforces religious identities rather than allowing them to dissolve in more diversified practices and identities.”

162. See Angelique Chrisafis, *Muslim Women Protest on First Day of France's Face Veil Ban*, THE GUARDIAN (Oct. 1, 2012), <http://www.guardian.co.uk/world/2011/apr/11/france-bans-burqa-and-niqab>.

163. ROY, *supra* note 150, at 95 (“What the state asks of them is what it asks of every citizen: not to incite murder and even less to commit one, under threat of penalties provided by the law. In fact, the state does not have to adapt to Islam: it suffices that it maintain the secular line, understood as a legal tool, not an ideology (which it has tended to become)”).

164. This solution is more in common with American Constitutionalism as it has been interpreted by the Supreme Court; the decisions have been rendered based on action rather than dogma.

165. “Eurabia” signifies the panic that Muslims are taking over Europe. Although first coined in the 1970s, it was revived as a political term in 2005. See generally BAT YE’OR, EURABIA: THE EURO-ARAB AXIS (2005), available at [http://www.dhimmitude.org/archive/bat\\_yeor\\_eurabia\\_summary\\_2004dec.pdf](http://www.dhimmitude.org/archive/bat_yeor_eurabia_summary_2004dec.pdf).

## CONCLUSION

France is primarily concerned with how to protect the state and society *from religion*. This is different from the American perspective, which is concerned with protecting religion *from the state*.

France's approach is consistent with the Hobbesian and Rousseau-like approach of church and state relations where the state completely pushes out religion or pushes out any religion that teaches a dogma inconsistent with the dogma of the state thereby creating a civil religion—*laïcité*. The French Revolution sought to purge the two sources of oppression: the monarchy and the Catholic Church.<sup>166</sup> As such, the French identify themselves as secular progressives who no longer need institutionalized religion or God. Instead, the state has become the only source of values and morals. It has put the Church out of business in both morality and charity. The French are content in this state and have faith in its superiority. They have pushed their secular identity onto their new immigrants. This creates a backlash among these newcomers, who feel threatened and ostracized. Although they are willing to obey the law, even if it may conflict with dogma, for the sake of stability in society and respect for state authority, they are unwilling to accept intolerance and racism.

Despite the shortcomings in American Constitutionalism and the Supreme Court's decision in *Everson*, which clearly overreached, the American people have accepted the decision and welcomed a pluralist society. Unlike France and many European countries, the United States understands the desire for believers to identify themselves as such. Undeterred by the fact that the Court tends to rule in favor of restricting religion in the public sphere, it continues to recognize that religion can be practiced and acknowledged so long as it is not criminal. This Lockean concept of the relationship of church and state in tandem with a separate Free Exercise Clause establishes a better relationship between the believer and the government than a policy that only prohibits state sponsored religion. For this reason, the believer, whether he or she be a Muslim, Protestant, Catholic, Jew, or Hindu, is free to practice his religion and identify himself as religious in the United States in a way that is not possible in France. The First Amendment protects this freedom while

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166. Although the Catholic Church was not eliminated, its role in society was tremendously marginalized. It survived only insofar as its leaders were willing to make concessions for pragmatic and political, not theological, reasons.

simultaneously allowing a religious influence on government, which the Founding Fathers found essential to good government.

Yet, the secular elite in the United States is also the predominant proponent of a social welfare state and seeks to bring American politics more in line with European social democracy. Although these secular elites have historically played a far more limited role in politics in terms of influence and real change, the tide is beginning to change. Today, they occupy the White House and push for secular ends by elevating progressive ideals and other rights, such as equality and women's sexual and reproductive rights over civil liberties, such as freedom of religion. While such rights have a place in liberal democracy, they do not have a priority over liberty. Despite the media's portrayal, many Americans are offended and recognize that the real issue is one of religious liberty, not contraception. Perhaps this issue will get to the Supreme Court, but either way, the American people have the opportunity to have their say in the 2012 Presidential Election. It will soon be determined whether the United States will stay true to its religious freedom embodied in the Free Exercise Clause and the Establishment Clause or if it will reduce the power and scope of the Free Exercise Clause and come closer to resembling France.