

Equality, Neutrality, And Preferences: An American Perspective on Comparative European and American Approaches to Law and Religion

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I. INTRODUCTION

A SIMPLE MISUNDERSTANDING?

In 1997, I met a European scholar in Warsaw who has published extensively on issues related to religion and law. In our first discussion, she told me that she was familiar with an article I had recently published that had been critical of several decisions of the European Court of Human Rights in the area of freedom of religion or belief. She then added, with what she may have intended to be a neutral comment but that sounded to me like clear disapproval, that “it had an American perspective.” Later in that conversation I acknowledged that I was at that point unfamiliar with how the legal system in her own country regulated issues related to religion, and I then asked her informally “how does it work?” Although I had intended my question as a sincere inquiry into how the laws operated in her country, she seemed to have understood me to be asking *how well* the laws function as a precursor to my offering a corrective “American perspective” as to how they might be improved. Her response to my question of “*how?*” was simply: “*The laws operate very well.*” I interpreted her response as a polite way of suggesting that she and her fellow citizens were quite satisfied with their legal system that operated very well and that they did not need any advice from an American. Fortunately, she and I subsequently became colleagues and have been able to laugh about our first conversation and the misunderstanding that arose.

AN AMERICAN PERSPECTIVE?

For several years I have been involved, both inside and outside the United States government, with American jurists and human rights advocates who have analyzed (and frequently criticized) the status of religious freedom in countries and how the legal

systems in those countries operate. In my experience, these Americans, whose political beliefs spread across the entire ideological spectrum and who take sharply divergent positions about constitutional rights inside the United States, are nevertheless very likely to be in basic agreement with each other about what constitutes an infringement on freedom of religion abroad. Differing as they do about their preferred political candidates in the United States or preferred foreign policy actions, these Americans are likely to agree with each other that other countries would do much better if they only handled religion issues the way the American legal system does.

For example, with regard to some issues that may be legally controversial in other countries, most American jurists would agree that: (a) laws should not establish any type of preferred hierarchy (or category) of religious associations with some receiving benefits or privileges not available to others; (b) procedures for religious groups to obtain tax exempt status should be straightforward and equally available to all; (c) the state should be able to interfere in the autonomy of religious (or quasi-religious) groups only in extreme cases, and never in a way that interferes with how religious doctrine is taught (except in cases such as if the group promoted the violation of criminal laws).

I personally agree with the basic description of the “American perspective” outlined above. For me, as with many other Americans, they are reasonably “self-evident,” to use a phrase from the American Declaration of Independence. Legal systems, such as those in Germany and Austria, that established different tiers of religious group and that provide the different groups with different privileges (and responsibilities), *discriminate* on the basis of religion and thus violate international standards. Some groups are recognized as “Public Law Corporations” and are given benefits (and responsibilities) to which mere associations are not entitled. The law in Germany and Austria is not established in such a way that the religious groups themselves may choose which status they prefer (with all requisite benefits and responsibilities), nor are there: (a) objective criteria that are (b) neutrally applied and that (c) are reasonably and fairly related to a rational and non-discriminatory purpose.¹ In many cases decisions about granting Public Law Corporation status are made by *political bodies* whose members may vote against a religious group if they do not like their theology or if the group seems odd. While the judicial system *sometimes* remedies discriminatory decisions, *the laws themselves* establish the discrimination.

Many states, including notably Spain, Italy, Poland, Portugal, and some *Länder* in Germany – but there are of course many others – have a concordat system whereby the Roman Catholic Church negotiates its status, rights, and privileges with secular states. In such cases the Catholic Church typically obtains legal benefits that are not always available to other religions as a matter of right. While defenders of the Concordat system

¹ Some examples of reasonable criteria might be that a religious group may not operate a hospital if it does not have sufficient financial resources to do so or if its religious doctrines reject sound medical doctrine.

would easily recognize the deep injustice of a legal system that allowed racial groups, ethnic groups, or gender groups to obtain a preferred legal status that was denied to other groups, these defenders – in my experience of discussion with them – reject the applicability of the analogy.

Some states, have a particularly dislike of what they call “cults” (in English) or “*sectes*” (in French). While France and China are the most notorious examples, other countries have gone through phases of conducting parliamentary inquiries or establishing agencies to investigate “sects and cults,” including Belgium, Germany, Austria, and the United States. While the harassment of “*sectes*” in France pales in comparison with the brutality that frequently occurs in China, there nevertheless is a remarkable similarity in the ideology that allows groups to be branded as such. In the 1980s, when the French state apparatus first began to think of protecting its citizens from the *secte* phenomenon because of their alleged child abuse, medically suspicious practices, and regimented lifestyles under a dominant leader who seized the money of his followers, the French state did not similarly denounce the abuses of children by Roman Catholic clergy, claims about the healing powers of the waters of Lourdes, nor monasteries where acolytes make a lifetime commitment to poverty, chastity, and obedience. The criticism against France is not that the government wants to protect children from abuse, but that mechanisms were established to broadly label groups as being dangerous based upon the rare (but real) activities of a few. The government’s target was not *abuses* that were committed, but *groups that were labeled “sectes.”*

Although I do not wish to overly criticize France, and although I consider myself to be a Francophile, there is yet another issue in which France and Turkey have taken the lead in Europe: restricting the wearing of the Muslim headscarf (*hijab*).² (In Europe, outside of France and Turkey the issue has typically involved only subdivisions of states and not the state as a whole.)

In the United States, many of the most heated constitutional and political disputes revolve around religion. Both jurists and the general public sharply dispute the appropriateness of state-sponsored religious activity in public schools and state-sponsored display of religious monuments (typically the Ten Commandments) on government property. Other sharply controversial issues that do not themselves involve the religion clauses of the U.S. Constitution also implicate religious values, as in the disputes about abortion and same-sex marriage. Curiously, American jurists who will be on opposite sides in the United States on these contentious issues will, however, for the most part, be in general agreement with what I have described as the “American perspective.”

In a very general way, across the ideological spectrum, most American observers of other countries would probably fundamentally agree that: (a) first, the state should freely allow religious groups to organize and to obtain legal personality, (b) religious groups

² Tunisia also imposes restrictions on the wearing of the *hijab* in some circumstances.

should be permitted to act with only minimal state interference, (c) that the state should not show preferences for specific religious groups, and (d) that tax exemption for non-profit religious organizations should be assumed rather than be a matter of case-by-case decision making by bureaucrats. Religion, most Americans presume, should rest safely outside the province of state manipulation and the state should let individuals form, operate, and dissolve their own groups with minimal interference. This agreement is not limited to rejecting the heavy-handed approaches of authoritarian governments, but extends to a broad range of approaches by countries that take seriously religious freedom issues and that have pride in their own systems.

A COMPLICATED MISUNDERSTANDING?

I have engaged in dozens of conversations with jurists and government officials who defend concordats, multi-tiered hierarchies of religious groups, vigilance against sects and cults, and the banning of the wearing of the *hijab*. Although the words and arguments deployed in these conversations are seemingly straightforward, I have repeatedly observed that there is a misunderstanding about these issues that goes far deeper than the arguments suggest. I have frequently perceived, as in my conversation in 1997 in Warsaw described above, that there is frequently a tendency to be suspicious of and even to dismiss immediately “the American perspective,” as if it were tainted *prima facie* as being either ignorant or arrogant or imperialistic. Whereas my intended arguments were always based on (what I believed to be advocacy for) nondiscrimination, treating religious groups equally (unless there was concrete evidence that a particular group had in fact violated the law), and allowing adult human beings the dignity of making their own decisions about whether they wear a headcovering (or not) or wish to be a Catholic or a Muslim or a Jehovah’s Witness. To be sure, some of my European colleagues with whom I disagree about Concordats nevertheless share my belief on the right to wear the *hijab* or the problems with the French campaign against *sectes*. (And of course there is internal dissent in each of these countries as to whether the laws are fair or not.) Thus the issue is not a pure one of Americans versus Europeans; there must be some other explanation.

The phrase that I heard most frequently in my discussions about these issues (other than “that is an American perspective”) was a variation on: “You don’t understand. This is a part of our history.” For example, the Spanish concordats have been described as being intimately associated with Spanish history. In one conversation on this issue, I was taken back to the fifteenth century and *los Reyes Católicos*. Another conversation stressed the high percentage of Catholics in the country. A third conversation emphasized Franco and the Civil War. Another conversation referenced the importance of sensitive political changes in the 1970s and how the Concordats were a keystone in holding together a deeply fractured state. In other cases, I have heard defenders of state-sponsored sectarian religious education in public schools (*including in the United States* where it nevertheless

is not legally allowed), as insisting that “our” heritage needs to be taught to the younger generation. I have heard the justification for the Catholic Church’s recognition as a Public Law Corporation as being due to the “unique” role that the Church has played in Austria’s history.

Is it possible that what to me appear to be reasonably clear examples of violations of international standards cannot be explained by logic? Can they be explained only by history?

Although my conversation in Warsaw involved some simple misunderstandings that were readily corrected, it nevertheless provided me with an early hint into what may be a more fundamental problem in comparative studies of laws on religion. Other conversations about European practices have provided others. I have observed, based upon these discussions about comparative law on religion, three recurring and inter-related points:

First, religion, more than any other area regulated by law, is frequently associated with a country’s perceived national identity.

Second, because religion is so often intimately connected to a country’s perceived national identity, laws regulating religion (or laws protecting religious freedom) frequently become associated in the public mind with that perceived national identity and come to be seen as embodying the country’s perceived values, history, and traditions.

Third, and largely as a consequence of the first two points, there is a tendency for public authorities, legal scholars, and even the general public to find that the laws on religion are particularly effective in providing the requisite protection for religious freedom and in providing sound guidance for state regulation of religious activity – even when they violate the standards of non-discrimination, equality, and dignity.

I do not assert and cannot prove that these three points are always present in every country, and I certainly am aware of counterexamples. Nevertheless, I have found that understanding these three points both in isolation and in their interrelationship helps explain some of the disagreements that arise among scholars. In the event that it might be thought that these observations are offered in a condescending way by an American about European countries, let me hasten to state that I find that they also apply – perhaps even more pointedly – to the United States as well. Recognition of the importance of these three points may also provide some insight into the frequent disinclination of political authorities, and sometimes scholars, to recognize that longstanding and revered laws often discriminate among religious groups, that they treat some groups unfairly, and they do not always provide individuals and families the dignity and respect to make their own decisions about affiliation with religious communities.

The following parts of this paper (II-IV) will develop the three points described above. The conclusion will attempt to tie together a few loose ends and make a few general comments.

II. RELIGION AND THE PERCEIVED NATIONAL IDENTITY

It appears that the subject of religion, more than any other area regulated by law, is closely connected to a country's history and perceived national identity.³ Although a country's commercial law and personal law may have long historical roots extending as far back as the *Corpus Juris Civilis* or into the ancient common law, current avatars of those laws are less likely to be justified *today* on the basis of their historical roots than are laws on religion. Laws regarding religion are often seen as having responded in a compelling way to competing forces in the country's history, and that a delicate balance might unravel if the laws were to be revised.⁴

The only competing subject regulated by law that may be closely tied to perceived national identity would seem to be ethnicity or race. Prior to the modern repudiation of racial discrimination, there were many more laws that explicitly or implicitly provided legal support for racial segregation and even slavery and which tied race preference to national identity. Salient examples of these were race laws in South Africa, Nazi Germany, and the "National Origins Act" (1924) in the United States. Similar examples could be found in individual states, particularly in the south, in the "Jim Crow laws." In recognition of this change in the legal system, to the extent that there are now laws on race they are likely either to prohibit discrimination on the basis of race or to provide benefits ("affirmative action") to minority races that were long the target of discrimination.

Examples of the linkage between religion and national identity are not difficult to find. Many of the great symbols of French Catholic history are symbols of French national history as well. The great Roman Catholic cathedrals, now owned by the state, are themselves intimately tied with the country's "secular" history. The Reims Cathedral was the site of the crowning of kings, and the abbey church of St. Denis (now a cathedral) was for hundreds of years the official burial grounds of kings, queens, princesses, and princes. Many historical figures are seen simultaneously as French national heroes and Catholic heroes: Charles Martel, Charlemagne, Louis IX, and Joan of Arc. The Panthéon in Paris, the official monument of French secularism (*laïcité*), was placed inside a converted

³ I use the phrase "perceived national identity" to suggest the possibility that what may be "perceived" as the "national identity" may be mistaken and founded on false assumptions or dubious history. The point here is neither to challenge nor accept the accuracy of national identity assertions. Henceforth, whenever "national identity" is used it should be understood as meaning "perceived national identity."

⁴ A corollary of this second observation is that there is a tendency to believe that outsiders who criticize a country's laws on religion do not really understand them – largely because those outsiders cannot fully appreciate the historical and cultural context in which the laws arose and in which they now operate.

Roman Catholic Church and it continues to have a cross outside on its dome and paintings inside depicting the life of St. Genevieve. The symbol that the “Free French” forces used to declare their difference from the Vichy government and to liberate the country from German occupation was the “Cross of Lorraine” – the same symbol displayed by Joan of Arc in her divine calling to liberate France from English occupation.

France is far from the only European country where important sites of religious history are also important sites in the nation’s cultural and political history. Kings and queens were long crowned in prominent churches like Notre Dame in Reims, including Westminster Abbey in London and the Cathedral of the Assumption in Moscow’s Kremlin. Other important *religious* sites are closely connected with *national history* sites: the Jvari monastery in Georgia, Jasna Gora in Poland, Santiago de Compostela in Spain, the Kiev-Percherak monastery in Ukraine, Kosovo Field, and perhaps the Schlosskirche in Wittenberg, Germany. Rulers not only went to churches when they were being coronated, chapels were brought to them in their palaces, whether at Versailles, the Louvre, the Burgkappelle in the Hofburg (Vienna), Schönbrunn, Christiansborg Palace Chapel (Copenhagen), the Chapel Royal at Hampton Court, St. George’s basilica and St. Vitus Cathedral in the Hradcany Palace, and the chapels in the Palacio Real, the Escorial, and the alcazars of Spain. These churches, many of which are now state-owned museums, are displayed as part of the historical legacy of the country.

In many countries there remain popular assumptions about the equivalence of national identity and religious identity: to be Polish is to be Catholic, to be Turk is to be Muslim, to be Norwegian is to be Lutheran. Variations on traditional religious symbols continue to be deployed (sometimes with controversial intent) to associate modern political leaders to religious legitimacy, such as General DeGaulle’s Cross of Lorraine. A giant Cross of Lorraine was erected above DeGaulle’s home at Colombey-les-Deux-Églises and Generalissimo Franco erected the giant Santa Cruz del Valle de los Caidos not far from Madrid. Although the giant Santa Cruz ostensibly honors the fallen from both sides in the Spanish Civil War, the choice of symbols was designed to show a preference and glory in the winning side.

What traditional religions might think of “neutral” appreciation of venerable cultural legacies and national traditions – crosses, churches, saints – may well be seen fairly by others as the continuation of a long practice of favoritism and even celebration of their persecutors.⁵ While such symbols may honestly be thought of by some as “unifying” and “national,” they are not neutral.

⁵ There are very important counterexamples. The first type of counterexample comes from regimes that deliberately attempted to suppress favoritism towards a majority or traditional religion for reasons of political control and to eliminate opposition. Obvious examples of this phenomenon include Burma, the former Soviet Union, communist Poland, Nazi Germany, and Iran under the Shah. In these countries, the regimes also sought to promote (or invent) alternative national identities as a substitute for those that previously had been provided by traditional religions. The fact that several of the regimes that attempted to suppress traditional religions are also examples of regimes that subsequently collapsed suggests the enduring power that religious

It is perhaps worth an aside to make a brief mention of the United States in this regard. Unlike most European countries, the United States does not have prominent religious symbols that are also national symbols. Whether from a deep-seated social-psychological need or for some other reason, Americans have tended instead to convert secular and “pagan” symbols into quasi-religious symbols. Whereas Generals Franco and DeGaulle chose Christian crosses as national symbols, Americans honored General Washington by erecting the world’s largest obelisk – a symbol used by the Egyptians to represent the sun god Amon Ra. (Whether in irony or not, the Washington Monument, a giant phallus, was built in memory of the childless man whom Americans describe as the “father of their country.”) Unlike most European countries, Americans often elevate former heads of state (particularly after they are safely dead) to the status of revered quasi-saints. The boyhood homes and adult residences of former presidents become shrines to which Americans make pilgrimages and in which they speak in hushed tones. While there are some European parallels to such shrines – Colombey-les-deux-Églises again comes to mind – they are the exception rather than the rule as in America, where the still-standing homes of most former presidents are now state-owned museums. Many European visitors to American churches also are surprised to see the “secular” American flag hoisted not only on a flag pole in front of churches, but often displayed inside the sanctuary as well. Every morning, schoolchildren across the land place their hands over their hearts and “pledge allegiance” (not to God) but to the “American flag.”

III. RELIGION LAWS THAT EMBODY AND EXEMPLIFY THE PERCEIVED NATIONAL RELIGION

Because a country’s religious history is often connected with its perceived national identity, it is only logical to imagine the possibility that laws closely identified with protecting or regulating religion may themselves share in that luster.⁶ In more than any other legal field, laws related to religion come closest to revealing and to perpetuating a country’s history, culture, and national identity. Laws on religion do not simply regulate goods in commerce or the rights of workers, they reveal (sometimes only indirectly) the role that particular religions have played in the past and how the state has supported or

identity retains in national cultures. A second type of counterexample comes from states that have made concerted efforts in the political process to move towards the standards of non-discrimination and non-interference, with two pertinent examples being Sweden (which disestablished its state church in 2000) and England (not Great Britain), that has slowly (but far from completely) reduced the privileges and burdens associated with the Church of England being the established church of the realm.

⁶ Of course the contrary also might be true. If particular laws were associated with suppressing the predominant religion, they may suffer from a particular ignominy in the popular imagination.

curtailed past influences. If the laws are seen as having resolved a religious conflict or as having struck an important balance between competing forces, they too may be treated as exemplifying or embodying the national identity. Laws pertaining to religion today are likely to have been influenced by hundreds – and in some cases thousands – of years of history. Unlike laws on contracts, securities regulation, criminal law, or torts, laws on religion are much more likely to touch upon a country’s historical experiences, traditions, and religious identity. To the extent that laws on religion become associated with the national identity, they also will reveal how difficult it is in some countries to distinguish between the country’s supposedly “neutral” history and culture and the traditions, symbols, and imagery of its dominant religion.⁷

This relationship between laws on religion and the perceived national identity is perhaps easiest to observe in European countries that have had a dominant religion for an extended period of time, such as in Spain, Poland, Ireland, England, Norway, and Italy – although we also must be mindful of a secular trend. If we go outside of Europe, this association between laws and religion can be seen throughout the Muslim world, particularly in countries that explicitly declare that *sharia* (rarely defined in any meaningful jurisprudential way) is claimed to be the basis of all laws. In some countries where the battle between religion and secularism is particularly tense, as in India and Turkey, the “secular” laws will be perceived by their defenders *as fundamental to the identity of their countries as secular* while those who challenge those laws will think of them as *undermining national religious identity*.

Two countries that illustrate the connection between laws on religion and perceived national identity are France and the United States. Unlike Turkey and India, where laws regulating religion are deeply controversial between the “secularizers” and the “traditionalists,” the relevant laws in France and the United States are deeply revered and widely believed to be at the core of the respective country’s character.

In France, the two core pillars of the legal regulation of religion are the doctrine of *laïcité* and the 1905 Law on Separation of Churches and the State. Although both the law and the doctrine emerged from an intense political struggle between “Republicans” and the Roman Catholic Church, both are now seen not only as the final reference point for French law on religion, but fundamental exhibits of what makes France “France.” The Constitution of 1958 declares France to be *laïc*, thereby giving the doctrine constitutional status, but the importance of *laïcité* in French law did not originate with this brief mention in the Constitution and it is readily imaginable that *laïcité* would have the same status in France had it been omitted in 1958. Even without any accepted legal definition

⁷ In countries where religion plays a broader societal role than in many modern “secular” European countries, we see that religion and its culture enter into other areas of law, notably personal law (or family law), where rules on marriage, divorce, and inheritance are likely to reflect religious traditions, as well as in criminal law where “blasphemy” might be punished by the state or even where religiously sanctioned punishments might be imposed.

of “*laïcité*,” and even though its parameters are both broad and vague, public figures do not hesitate to emphasize the importance of this (rather vague) doctrine to France. At the time of the French headscarf debate in 2004, President Jacques Chirac declared that “*laïcité* is inscribed in our traditions. It is at the heart of our republican identity.” He declared that it is a “principle” to which citizens must be “faithful” “It is in fidelity to the principle of *laïcité*, the cornerstone of the Republic, the bundle of our common values of respect, tolerance, and dialogue, to which I call all of the French to rally.” This is effusive praise indeed for a “principle” that is in fact written nowhere and which has been interpreted in sharply divergent ways. The current president, Nicolas Sarkozy, similarly said that “*laïcité* is not a belief like others. It is our shared belief that allows others to live with respect for the public order and with respect for the convictions of everyone.” While linguists might argue that there is a difference between a “principle” (the term used by Chirac) and a “belief” (the term chosen by Sarkozy), the difference really is of no consequence in French public discourse.

The 1905 law is widely known in France; indeed it is possibly the best known law in the country by the general public. Although the 1905 law has in fact been amended several times, governments nevertheless are reluctant to propose changes to it because of its revered status. Potential amendments are *a fortiori* likely to be seen by a significant part of the population as tampering with something that is vital about France. In many ways it is akin to how a majority Muslim population in a country might respond if a government were to suggest altering something that was perceived as being a part of *sharia*.⁸ In the French public debate of 2004 over whether Muslim girls should be permitted to wear the *hijab* in public schools, neither the *Stasi Commission* nor the government recommended an amendment to the 1905 Law in part for this reason.

The two most revered political/legal documents in the United States are the Constitution (including the Bill of Rights) and the 1776 Declaration of Independence. While the Declaration played a dramatic role in America’s struggle for independence, its role is now confined to the symbolic and historical. The Constitution, however, the oldest continuously operating constitution of a nation-state, plays both a symbolic and legal role. Both documents, even more so than the English Magna Carta, are imbued with a quasi-religious value. The originals of the two documents are enshrined in the National Archives in Washington, and are an integral part of an American tourist’s visit to the nation’s capital. Although I would be the first to repudiate a comparison of the merits of the U.S. Constitution and the political figures of Lenin, Ho Chi Minh, and Mao Tse-Tung, all are now enshrined in their respective capitals behind thick plate glass and

⁸ While the *Shah Bano Case* in India is perhaps the most dramatic illustration of this point, the inverse case is quite capable of provoking a similar reaction from others. The Canadian public denounced a proposal in the province of Ottawa that considered allowing *sharia* to be used in some personal law cases among (at least theoretically) consenting parties. The public reaction in Britain was very strong against the Archbishop of Canterbury’s rather modest suggestion that the issue should be considered among consenting parties.

protected by temperature, humidity, and air controls. The U.S. Constitution is on display in America somewhat in the way that the communist states wanted the embodiments of their revolutions to be put on reverential visual display in Moscow, Beijing, and Hanoi.

In the United States, religion is frequently described as “the first freedom,” in part because the first words of the First Amendment (drafted in 1789) are the religion clauses. That particular rationale is of course historically incorrect inasmuch as the original Constitution (drafted in 1787) enumerated some other rights and because the first two proposed amendments to the Constitution were never ratified. (It of course sounds better to refer to religion as “the first freedom” rather than “the third freedom.”) Other historical arguments for the primacy of “religious freedom” similarly are suspect. While many of the first settlers in America did in fact come so that they could practice their religion freely, they certainly did not come to establish “religious freedom.” The Puritans of Massachusetts, who are associated in the public mind with having come to America for religious freedom, were notorious for their intolerance of all other religious groups.

What is now understood to be the “American model” of “religious freedom” has relatively little to do with the constitutional language drafted in 1789 or the practices that existed in the early years of the Republic – though steps taken at that time were extremely important in the context of eighteenth-century history and in launching an ideology. Rather, the current “American model” largely came into existence in the 1940s. It was at that time that the Supreme Court started to give meaning to the relatively vague language of the First Amendment. Nevertheless, the constitutional language on religion is widely understood as embodying American values on religion. As suggested above, advocacy groups that are on the left, right, and center, as well as libertarians, all will point to the First Amendment of the U.S. Constitution as articulating the correct doctrine on religion and law. From time to time members of Congress introduce legislation to amend the Constitution with regard to religion, but they do so invariably with the explanation that they are simply trying to correct the erroneous interpretations by courts and to restore the original meaning of the Constitution.⁹ Americans have the faith that the drafters of the Constitution were correct, even though they disagree about what the drafters actually intended. While they may have dramatically different notions of what it means, they will agree that it is the fundamental document.

Americans thus *agree* that the specific words employed in their constitution are correct, even though they do not agree about what they mean. The French agree that *laïcité* is the correct principle (or belief), even though they do not agree about what it means. All agree, however, that the doctrines express fundamental national values.

⁹ A curious irony in this “consensus” viewpoint among many Americans that the United States is more protective of religious freedom than other countries is that issues involving religion and law are among the most contentious and volatile inside the country today.

IV. ADMIRATION FOR ONE'S OWN COUNTRY'S LAWS ON RELIGION

There appears to be a tendency, again according to my personal observations, both among legal scholars and government authorities to believe that laws related to religion *in their own country* are particularly good at protecting religious freedom and at regulating religious behavior.¹⁰ The anecdote from Warsaw mentioned above is a trivial instance of this phenomenon. While we need not caricature this into a Panglossian belief that they are purporting to defend “the best of all possible laws in the best of all possible countries,” the admiration expressed for laws on religion does not seem to extend to other areas of law, such as contracts, banking, labor, or securities. There is something different about laws on religion that suggests a disproportionate attachment to them.

In those countries where the laws are closely seen as connected to national identity, as in France and the United States, the reasons for this tendency are obvious. I have already mentioned that most American jurists, when looking *outside* the United States, are likely to agree that their country provides a better defense of freedom of religion than does any other country. But even in countries where the laws are more distant from national identity, the general rule seems to hold. Of course my observation may be incorrect. But I also find that the defenses of laws that discriminate are typically made by persons who are affiliated with religions (or groups) that are privileged in those systems. Defenders of Concordats and multi-tiered systems typically are not affiliated with religions that have been denied privileged recognition by the state. In France, it is sometimes noted, many of those involved in the “*anti-secte*” movement are affiliated with Masonic Orders (particularly the *le Grand Orient de France*). One suspects that if the French press vehemently declared that Freemasons are a “*secte*” because of their secretiveness and peculiar rituals and called for investigations, all Freemasons, including the *secte*-hunters among them, would no doubt find such accusations to be slanderous, ignorant, and naïve – and correctly so.

I certainly do not intend this possible explanation for some defenses of (what I perceive as) discriminatory systems to be an *ad hominem* attack against its defenders, though I can readily imagine that it would be taken as such. After many conversations and debates, where their affiliation with the privileged groups was a salient if unmentioned factor, it is an explanation that cannot be overlooked. As a practical human matter, it is obviously easier to recognize an injustice when one is its victim rather than its beneficiary. It is easier to downplay the degree of discrimination when one profits from it, just as it is easy to exaggerate the degree discrimination when one is its victim.

¹⁰ In some countries there is even a missionary zeal to export their laws to other countries as models. France and the United States of course come to mind.

Perhaps my argument here will be more palatable if I use the United States as a (negative) example to illustrate this same point. While I find that the United States does relatively quite well in avoiding legal discrimination among religious groups – though there are exceptions to this¹¹ – the country fails when it comes to discrimination against non-believers. Although for practical purposes there are no laws that facially discriminate against non-believers, they are often treated as being either non-entities or pariahs in the political system. It is virtually impossible for a candidate for major political office in the United States to declare that she or he is a non-believer and have any hope of winning election. A rather stunning and ugly example of this problem occurred in the election for U.S. Senator in North Carolina in 2008, where the incumbent senator accused her opponent – who happened to be a very religious Christian – of taking money and supporting causes of known atheists. The candidate against whom the accusations were made did not reply “it does not matter whether my supporters are atheists or not,” but defended her own religious bona fides. While in this particular case the allegation backfired on the incumbent senator, it did so only because *in that particular case* the allegation was patently false. While children are not required to recite the Pledge of Allegiance declaring that the United States is “one nation under God” in public schools, there is strong social pressure for them to do so. “God” appears on currency, in the national motto, in public meetings, and political speeches. The majority who like these references typically have little sympathy for those who find them to be an intrusion. I have seen the same type of dismissal of the minority perspective from those who believe that God *is* a part of their country and believe that it is the role of the government to promote this belief.

V. CONCLUSION: CONTRADICTIONS, NATIONAL TRADITIONS AND INTERNATIONAL NORMS

International human rights norms were drafted without the intent to protect specific national religious groups or to preserve discriminatory traditions within particular countries. They do not embody perceived national identities or show favoritism to dominant religions. They treat all religious beliefs and practices from a position of relative neutrality. They recognize that people should be accorded the dignity to make their own life decisions about joining religions, leaving religions, or continuing to live in the religious communities in which they were born. While many state constitutions repeat

¹¹ The two religious communities in the United States that are often subjected to disproportionate discrimination on the basis of religion are Muslims and Native Americans. Although the laws do not formally create hierarchies, there are often fewer accommodations for religious practices of Native Americans and there frequently are disproportionate security screenings for Muslims (and sometimes Sikhs).

these “neutral” norms of non-discrimination and equality, national laws and practices often ignore them. As I have explained from personal experiences, not only are the discriminations permitted to continue, they are actively defended by jurists and political officials.

I do not underestimate the difficulty of reducing discrimination in laws when those laws are tied to the public’s perception of their national identity. My own example of the United States is a case where I do not anticipate in my lifetime that there will be much of a change. Religion laws and practices favoring privileged groups, which are defended on historical grounds, are presumably more immune to change than are other laws. Harmonizing laws to comply with international norms is a difficult process in the best of circumstances. The European Union’s effort to bring harmony to contract law is a sufficiently difficult endeavor.¹² While contract laws indeed have ancient origins, efforts to promote unification are likely to meet resistance because of familiarity with current rules and a desire to avoid the inconvenience of change – far less serious obstacles than attempting to alter laws strongly associated with a nation’s history and values.

Americans are often accused of being impatient for change and insufficiently sensitive to traditions, a criticism that I can well imagine even the most patient of readers having considered several times during the course of perusing this piece. I do not suffer from the naïve imagining that anything is likely to change particularly soon. I expect that in twenty years Spain will continue to have its concordats and Austria will have its multi-tier hierarchy of religions. While I can understand why it may be politically impractical at this point for Spain to change its laws, I cannot see how they can be defended as non-discriminatory. From my *American* perspective, Spanish jurists should be challenging the laws and not defending them as being consistent with international standards.

My final appeal will be, once again, to the analogy of racial discrimination. I doubt that any good European jurist today would have patience with defenders of laws that discriminate on the basis of race or think highly of a defender of apartheid or Jim Crow laws who defended them as being part of the culture, history, and traditions of South Africa or the American South. While European impatience with bringing an end to such laws may not have made them disappear any sooner, such impatience would be well-founded, even if such impatience seemed to be very American.

¹² For the European Parliament’s efforts to promote unification of contract law, see Resolution of 3 September 2008 on the common frame of reference for European contract law, http://www.cjel.net/online/15_2-vezirtzi/.