
ON THE SECULARIZATION OF THE PUBLIC SQUARE: JEWS IN FRANCE AND IN THE UNITED STATES

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In 1978, Rabbi M. Schneerson, the head of the Lubavitch, wanted menorahs to be kindled in public squares in recognition of the legitimacy of different religions. He received a letter from Rabbi Joseph Glazer, the President of the Central Conference of American Rabbis and a law school graduate, telling him that placing menorahs on public property is a breach of the “wall of separation.” Rabbi Glazer then “urgently” advised Rabbi Schneerson to read again Alexis de Tocqueville’s *Democracy in America*, in which de Tocqueville, a Catholic, outlines the crucial dimension of the separation of church and state in the United States, which allows religions to expand freely within society. A few years later, in 1989, the Supreme Court decided *County of Allegheny v. ACLU*,¹ in which the Court determined that the display of a menorah next to a Christmas tree in a public square could be appropriate, holding that the menorah and Christmas tree are secular symbols and thus the display was compatible with the First Amendment. As a result of this decision, the issue resurfaced. Nathan Lewin, vice-president of the National Jewish Commission on Law and Public Affairs (COLPA), said, “finally . . . America is a country where Jews are welcome and are first class citizens.” Rabbi Allan Nadler, director of the Yiddish Institute of Research (YIVO), considered that “the kindling of huge menorahs in public spaces across America opens a dangerous constitutional can of worms. It can easily backfire on the Jewish community by undermining the principle of freedom from established religion which has always been such a blessing for American Jewry. . . . There are few, if any, legal institutions, so basic as the constitutional wall separating church and state.”²

Orthodox Jews more or less join Chabad in their negative view of this “blessing” based on the First Amendment, aligning themselves

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¹ 492 U.S. 573 (1989).

² See JONATHAN D. SARNA & DAVID G. DALIN, RELIGION AND STATE IN THE AMERICAN JEWISH EXPERIENCE 296, 298, 300 (1997) (quoting Rabbi Allan Nadler).

more and more with evangelical and born-again Christians in favoring prayers in public schools and state aid to parochial schools, breaking “the wall of separation,” and fighting against any kind of secularization. When, in 2000, Joe Lieberman was the Democratic vice-presidential nominee, an orthodox Jew almost reached the highest elected office while officially keeping his faith, thus bringing religion into the public space. In June of that same year, in keeping with its own interpretation of the wall, the Supreme Court ruled against prayers at public events such as public school graduation ceremonies. While most American Jews applauded this decision, the prominent philosopher David Novak said, “On Torah grounds, Jews ought to encourage non-Jews to pray in public in order to show how much they believe the world, including the political order, is dependent upon God. . . . We Jews should be opposed to [] de facto public atheism”³

American Jewish lawyers and law professors often cite the French model as the most hateful one, France being seen as an atheist society foreign to Jewish values. For instance, in his recent book, Steven Goldberg argues that the United States should not become like Iran, a theocracy, or France, an atheist society in which the state has sought the destruction of every religion since the French Revolution and has succeeded through its *laïcité* to become a deeply secularized society.⁴ He seems to agree with famous sociologists and political scientists like Michael Walzer and Will Kymlicka, who view the French model as an almost totalitarian regime in which identities are repressed. In the name of multiculturalism, they are hostile to the French State, which they view as homogeneous; they favor the strengthening of Jewish and Muslim identities within the public square.⁵ To quote Reinhold Niebuhr, the famous Protestant theologian, France seems to have the most “naked public square,” the one that the United States must avoid. Followers of Horace Kallen favor a hyphenated identity, with a vision of citizenship framed by different values, including religious values.

In this paper, I would like to discuss some strong and surprising similarities between France and the United States and show that, in both societies, most Jews have until recently been key supporters of a “naked public square,” favoring a complete separation of church and state through different means: through the State in France, and through the Supreme Court in the United States. In two completely different societies—one, France, with a strong State, and the other, the United

³ David Novak, *Toward a Jewish Public Philosophy in America*, in *JEWS AND THE AMERICAN PUBLIC SQUARE: DEBATING RELIGION AND REPUBLIC* 331, 351-52 (Alan Mittleman et al. eds., 2002).

⁴ STEVEN GOLDBERG, *BLEACHED FAITH: THE TRAGIC COST WHEN RELIGION IS FORCED INTO THE PUBLIC SQUARE* ch. 5 (2008).

⁵ See, e.g., MICHAEL WALZER, *ON TOLERATION* (1997).

States, with, according to de Tocqueville, a weak state—Jews were hostile to a Christian state in favor of a more neutral state separated from the Church. Nevertheless, in France, the strong separation of church and state resulted in a secularized society with a small percentage of citizens with religious beliefs, near-empty churches and synagogues, and a declining Jewish identity. However, with the current retreat of the state, the Jewish identity can grow again. In the United States, in landmark cases since the 1940s in which Jews were frequently crucial actors, the Supreme Court dismantled the Protestant Establishment that provided the Christian framework of the nation by forbidding various Christian expressions within the public square. In the United States, most Jews were, and still are, in favor of a naked public square and are now quite reluctant to acknowledge the necessity of strong multiculturalism within both society and the state. Hence, they lack enthusiasm for affirmative action.⁶ Being so fond of secularization in both cases, Jews almost look like the last Habermassians,⁷ the only remaining lovers of reason seeking the benefits of a public space under the protection of an enlightened Law, threatened by various religious awakenings that have been heard openly in the context of the recent presidential elections. Thus, in both societies, even if they transform the religious environment, neither globalization nor transnationalism really seems to shape Jewish behavior and values. Most contemporary Jews still seek the protection of the state, viewing an alliance with the state as the best way to ensure safety as a minority. Thus, Hannah Arendt incorrectly condemned this strong Jewish connection with a state as inadequate to protect Jews. Even in the face of globalization, the state has not retreated and is still viewed as a means to prevent internal violent religious or ethnic conflicts.

So again, how can we compare the American and French contexts in which Jews are trying to maintain some of their values while favoring a secularist interpretation of the public realm? First, one must remember that there have been many ideas exchanged between the two countries. Thomas Jefferson, the hero of American Jews and all American liberal citizens, and the person responsible for the influential metaphor that the Constitution erected a wall of separation between church and state, was in Paris from 1786 to 1789 when the Bill of Rights—including the First Amendment—was added to the Constitution. Thus, he was confronted with the French Enlightenment and its rationalist universalism hostile to religion, and witnessed the

⁶ *INSIDERS/OUTSIDERS: AMERICAN JEWS AND MULTICULTURALISM* (David Biale et al. eds., 1998).

⁷ JÜRGEN HABERMAS & MAX PENSKEY, *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* (2001).

French Revolution and its attempt to exclude the Church from the public realm.⁸ At the end of the century, when anti-Semitism was spreading in the form of the accusation that Jews contested the Christian nature of the United States, Samuel Kellogg, a Professor of Theology at Western Theological Seminary, preached against American rationalist Jews conspiring to destroy Christianity, and used as an inspiration Edouard Drumont, the author of numerous anti-Semitic books, including *La France Juive*. Thus, “the preachers and their theories attest to the interplay of European and American thinking about the Jews.”⁹ And in 1905, when the separation of church and state was obtained legislatively, one could hear anti-Semitic voices of protest in the streets of New York.¹⁰

In fact, French Jewish involvement in secularization in the second part of the nineteenth century seems to have been imitated by contemporary American Jews since the 1960s. Still, there is a difference in means: While French Jews used Parliament and the state bureaucracy to expand the secularism initiated by atheists and deists at the beginning of the Third Republic, American Jews with their allies used the Supreme Court to dismantle the Christian institutions that had been more or less shaping the public realm since the American Revolution. Jews had an earlier involvement in secularization in France because of the French Revolution, during which the state and the dominant Catholic Church were separated and another church controlled by the state was created. This church fell, resulting, at least for a short period, in a complete disappearance of religious symbols from the public realm. After the Concordat and the new alliance between the state and the church, Jews had to fight against, for example, Catholic presence in the public realm. Within Parliament, some elected Jewish deputies spoke loudly in favor of this process. Before the turn of the century, during the Third Republic, many Jews were active political and administrative elites, elected or appointed to high administrative positions as deputies, ministers, prefects and so on in this institutionalized and differentiated strong state,¹¹ and they were, with the protestant elite, at the forefront of the secularization process. Being confronted by a single, huge Catholic Church in charge of the state for many centuries, their involvement in the secularist battle led to a

⁸ See DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (2002).

⁹ Naomi W. Cohen, *Antisemitism in the Gilded Age: The Jewish View*, in *ESSENTIAL PAPERS ON JEWISH-CHRISTIAN RELATIONS IN THE UNITED STATES* 127, 138-39 (Naomi W. Cohen ed., 1990).

¹⁰ Jean-Louis Halpérin, *La Représentation de la Laïcité Parmi les Juristes Français et Étrangers*, in *POLITIQUES DE LA LAÏCITÉ AU XXE SIÈCLE* 181, 196 (Patrick Weil ed., 2007).

¹¹ PIERRE BIRNBAUM, *THE JEWS OF THE REPUBLIC: A POLITICAL HISTORY OF STATE JEWS IN FRANCE FROM GAMBETTA TO VICHY* (Jame Marie Todd trans., 1996).

dangerous backlash, much more so than in the United States. For instance, many well-known prefects played a crucial role in the expulsion of the church from the public realm, and the vociferous, radical Catholic right, with its populist anti-Semitic friends, led the fight against them under the banner of “France to the French.” Later, in 1905, the law separating church and state was drafted by Louis Méjean, a Protestant, and Paul Grunebaum-Ballin, an assimilated Jew, against the wishes of Orthodox Jews who were afraid to leave the shadow of the state and the financial aid it provided. Nevertheless, soon rabbis and major Jewish institutions accepted this separation in the hope that it would bring new life to Jewish institutions now facing their own needs that were being paid for by the common Jewish people.¹² This open involvement of Jews and Protestants in bringing about the separation of church and state led to an explosion of both anti-Semitism and anti-Protestantism. The Catholic periodical *La Croix* and the radical right periodical *La Libre Parole* launched a violent anti-Semitic storm along with hundreds of provincial newspapers. Many anti-Semitic movements occurred all across France as the first organized mass movements involving many hundreds of thousands of members threatened the Jews, sometimes beating them, and sometimes severely. Jews were seen as the new Christ killers in a historically Catholic France. Even in the Parliament, several strong anti-Semitic statements were made with little protest: Jews were openly accused of de-Christianizing France. Even though the hundreds of deputies who voted for separation laws were nonobservant Catholics, deists or atheists, Jews became the target of large anti-Semitic leagues.

Meanwhile, in the United States that same year, Supreme Court Justice David Brewer, in the tradition of Supreme Court Justice William Strong, published his famous lectures in *The United States: A Christian Nation*. Although the United States had no established religion, Christianity was seen by Brewer as “a mighty factor in the life of the republic.”¹³ In this weak state society, Jews were still outside the mainly Protestant Establishment and almost none were included within the main Washington institutions. Jews were alarmed by Brewer’s

¹² The best book on this period is still JEAN-MARIE MAYEUR, *LA SÉPARATION DE L’ÉGLISE ET DE L’ÉTAT* (1991). Another important book on this period is JACQUELINE LALOUETTE, *LA SÉPARATION DES L’ÉGLISES ET DE L’ÉTAT* (2005). See also PIERRE BIRNBAUM, *JEWISH DESTINIES: CITIZENSHIP, STATE AND COMMUNITY IN MODERN FRANCE* ch. 10 (2000) (discussing the Jewish dimension of this process); Sébastien Fath, *Juifs et Protestants Face à la Loi de 1905 sur la Séparation des Églises et de l’État*, 9 *LES CAHIERS DU JUDAÏSME* 104 (2001); Jean Laloum, *La Séparation au Regard de la Presse Israélite*, in *VERS LA LIBERTÉ RELIGIEUSE: LA SÉPARATION DES ÉGLISES ET DE L’ÉTAT* (Philippe Boutry & André Encrevé eds., 2006); Philippe Landau, *L’Organisation Religieuse du Judaïsme Après 1905: Continuation ou Transformation*, in *VERS LA LIBERTÉ RELIGIEUSE: LA SÉPARATION DES ÉGLISES ET DE L’ÉTAT* (Philippe Boutry & André Encrevé eds., 2006).

¹³ DAVID J. BREWER, *THE UNITED STATES: A CHRISTIAN NATION* 40 (1905).

lectures and could only reply through their own pamphlets, such as *A Reply to Justice Brewer's Lectures* by Isaac Hassler.¹⁴ According to George Marsden, “[i]n 1870 almost all American Protestants thought of America as a Christian nation. . . . [T]hroughout the nineteenth century there had seemed to be reasonable hope for establishing the foundation of something like a ‘Christian America.’”¹⁵ At the turn of the century, in the United States, as in France, populism and Christian groups encouraged Jew-baiting and the so called “Jewish question” was clearly back again. If some Catholics did fight the Protestant Establishment, few of them were free-thinking like so many Jews. Together with liberal religious Jews, they launched the slow process of secularization to question the predominance of the “Christian America,” using as their main tool the Supreme Court, which they considered to be a more efficient means than the law, thus departing from the French process of secularization. This process of secularization through the Supreme Court would finally succeed in the 1960s.

In 1916, Louis Brandeis was appointed to the United States Supreme Court. Later, Felix Frankfurter was so influential in his strategic position at Harvard Law School that he was able to turn Oliver Wendell Holmes, Jr. “into an iconic representative of the American spirit,” a “cultural hero . . . releasing American culture from a Christian bias. . . . The old Brahmin was about as ‘American’ as it was possible to get, but he had put great distance between himself and exactly those parts of Protestant culture most oppressive to Jews.”¹⁶ In 1939, Frankfurter was appointed to the Supreme Court after the death of Justice Benjamin Nathan Cardozo in July, 1938, filling the so-called Jewish seat. In 1940, he authored the opinion in the *Gobitis* case,¹⁷ a turning point for the Court, in which the Court held that the Constitution required the states, as much as Congress, to respect the freedom of religion. This was a painful moment for Frankfurter because, as a Jew, his opinion required students to be loyal, as he was, to the State; thus their compulsory obligation to salute the flag, a ritual of patriotism in a time of national threat. Three years later, in the *Barnette* case,¹⁸ the Court went the other way, holding that there was no reason for the state to coerce anyone against his or her beliefs. In this decision, the Court

¹⁴ NAOMI W. COHEN, *JEWS IN CHRISTIAN AMERICA: THE PURSUIT OF RELIGIOUS EQUALITY* ch. 4 (1992).

¹⁵ GEORGE M. MARSDEN, *FUNDAMENTALISM AND AMERICAN CULTURE* 11, 124 (2006); *see also* DENIS LACORNE, *DE LA RELIGION EN AMÉRIQUE: ESSAI D'HISTOIRE POLITIQUE* ch. 3 (2008).

¹⁶ David A. Hollinger, *Jewish Intellectuals and the De-Christianization of American Public Culture in the Twentieth Century*, in *NEW DIRECTIONS IN AMERICAN RELIGIOUS HISTORY* 470 (Harry S. Stout & D. G. Hart eds., 1997).

¹⁷ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

¹⁸ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

was “faithful to the ideal of secular instruction.” This was, for Noah Feldman, “the first time in [its] history that it said anything about the ‘secular’ character of instruction in public schools”¹⁹ Frankfurter’s argument was rejected. In a surprising and exceptional way, he wrote in his dissent that “[o]ne who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. . . . [A]s judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores.”²⁰ One can say that Frankfurter “foresaw the danger of a constitutional approach that would treat members of various religious denominations differently rather than the same. This was the lesson that he, as a Jew living in the era of Nazi persecution, believed he could understand more clearly than the other members of the Court. . . . Government must pay no mind to religious difference if loyalty was to be universal.”²¹ Frankfurter was strongly in favor of the naked public realm, a rigorous vision of patriotism requiring some kind of secularism. As a liberal Jew, he did not want any religion to be visible; citizens as such had to be loyal to the nation whatever their religion. It was an American Jewish dream close to the French Jewish dream, obvious among the republican “Jews of the State.”

The rest of the story is well-known. It was only after the Second World War that American Jews could involve themselves openly in the process of separation of church and state, acting as Jews in a way that Frankfurter would have probably rejected. They still wanted a secular public square excluding any religious symbols, but their open strategy was to act in the name of Jewish institutions in an historical framework shaped by a new Great Awakening, a strong revival of the fundamentalist movement.²² Also on the front lines of the struggle were other organizations like the ACLU, moving toward an “absolutist”

¹⁹ NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 157 (2005).

²⁰ *Barnette*, 319 U.S. at 646-47 (Frankfurter, J., dissenting).

²¹ FELDMAN, *supra* note 19, at 161-62; *see also* LEONARD BAKER, *BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY*, chs. 20-21 (1984). Brandeis argued similarly that:

This country demands that its sons and daughters whatever their race—however intense or diverse their religious connections—be politically merely American citizens. Habits of living, of thought which tend to keep alive difference of origin or to classify men according to their religious beliefs are inconsistent with the American idea of brotherhood and are disloyal.

ARTHUR A. GOREN, *THE POLITICS AND PUBLIC CULTURE OF AMERICAN* 27 (1999) (quoting Justice Brandeis); *see also* ROBERT BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* (1988).

²² JOEL A. CARPENTER, *REVIVE US AGAIN: THE REAWAKENING OF AMERICAN FUNDAMENTALISM* (1997).

position on the issue of church and state separation.²³ In 1947, the ACLU supported the crucial *Everson* decision,²⁴ which concerned a New Jersey law that allowed the use of public funds for busing parochial school children.²⁵ The Court sustained the New Jersey law, though Justice Black stated in the opinion that “[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We would not approve the slightest breach.”²⁶ Jews were crucial actors in this struggle for an absolutist interpretation of the wall of separation. The American Jewish Congress led the cause, with the American Jewish Committee²⁷ and the Anti-Defamation League often joining. Leo Pfeffer started working with the American Jewish Congress in 1945 and became a key actor in the secularization process. According to Pfeffer, he wrote numerous briefs for the Supreme Court and was indirectly involved in a large number of others. He was willing to file an amicus brief in the *Everson* case, but was prevented for “political reasons.” Things changed with the 1948 case of *McCullum v. Board of Education*,²⁸ in which the Supreme Court invalidated the “released time” program as a violation of the Establishment Clause: Pfeffer filed an amicus brief for the case, and Frankfurter, still on the Supreme Court, wrote an opinion that used Jefferson’s metaphor of a “wall of separation” between church and state.²⁹

Then came other important cases in the secularization of the public realm, each involving Pfeffer and many Jewish and non-Jewish organizations. The most famous case was *Engel v. Vitale*,³⁰ decided in 1962, prohibiting all prayer, even voluntary prayer, within public schools. The Lubavitcher Rebbe, Rabbi Schneerson, was more or less alone among Jews in strongly disapproving of this decision on the grounds of “Halacha and common sense.” Thus, through his actions before the Court, Leo Pfeffer can be seen as the “apostle of strict Separationism.” But one can also see that, even though he had retired,

²³ SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU ch. 10 (1990).

²⁴ *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947).

²⁵ *Id.* at 3.

²⁶ *Id.* at 18.

²⁷ See MARIANNE RACHEL SANUA, LET US PROVE STRONG: THE AMERICAN JEWISH COMMITTEE, 1945-2006 (2007).

²⁸ 333 U.S. 203 (1948).

²⁹ *Id.* at 231; see also Leo Pfeffer, *An Autobiographical Sketch*, in RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER, 493-99 (James E. Wood, Jr. ed., 1985) [hereinafter *Autobiographical Sketch*]. Pfeffer gives a superb presentation of his work in his famous book, CHURCH, STATE AND FREEDOM (1953) [hereinafter CHURCH, STATE AND FREEDOM]; see Eric Pace, *Leo Pfeffer, 83, Lawyer on Staff Of the American Jewish Congress*, N.Y. TIMES, June 7, 1993, at D8. For more on Frankfurter and the *Everson*, *McCullum* and *Zorach* cases, see CLYDE EDWARD JACOBS, JUSTICE FRANKFURTER AND CIVIL LIBERTIES 43-51 (1961).

³⁰ 370 U.S. 421 (1962).

Frankfurter's interpretations shaped this crucial decision. The next big case in this line was *School District of Abington Township, Pennsylvania v. Schempp*,³¹ challenging the practice of Bible reading at the beginning of the school day, a decision "that would make legal secularism the law of the land."³² Then, in 1989, came *County of Allegheny*, where the Court held that the display of a crèche in a public space in Pittsburgh endorsed Christianity and was thus unconstitutional, but the Court allowed the presence of a Christmas tree, a Chanukah menorah and a sign saluting liberty placed outside the City County building because "both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society."³³ Since then, the decisions of the Court have been quite confusing, but "one thing is clear: only if the display secularizes the holiday does it have a chance of passing muster."³⁴

Another thing is also obvious: the increasing anti-Semitic anger of some Christians. Thus, for instance, this editorial published in *America*, the national Jesuit weekly, entitled "To Our Jewish Friends:"

This fall the Supreme Court will rule on a number of cases relative to religious practices in the schools. If, as they are now bending every effort to do, Leo Pfeffer and his fellows campaigners succeed in winning Supreme Court decisions that strike down the Lord's Prayer and Bible reading in school classrooms, there will be once again—as there was at the time of the *Engel* decision, only more so—an intensely unfavorable public reaction. When and if such decisions are handed down, then unless it has been made clear that Dr. Pfeffer and the American Jewish Congress do not speak for the whole of American Jewry, Jews in general will be unfairly blamed for what in fact will have been accomplished by a mere handful of militants, allied with an assortment of humanist groups, ethical culturists, Unitarians, secularists and atheists.³⁵

Today, secularism is no longer the main problem. Religious pluralism³⁶ is becoming more important, shifting the United States from

³¹ 374 U.S. 203 (1963).

³² FELDMAN, *supra* note 19, at 180. The story of those decisions has been given several times. See, e.g., ELISABETH ZOLLER & DANIEL O. CONKLE, *LA CONCEPTION AMÉRICAINNE DE LA LAÏCITÉ* (2005); GREGG IVERS, *TO BUILD A WALL: AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE* (1995); FRANK J. SORAUF, *THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE* (1976); Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching about Religion, Civic Education, and the Constitution*, 43 WM. & MARY L. REV. 1159, 1172-91 (2002) (providing a presentation of the evolution since *Schempp*).

³³ *County of Allegheny v. ACLU*, 492 U.S. 573, 616 (1989).

³⁴ GOLDBERG, *supra* note 4, at 76.

³⁵ See *Autobiographical Sketch*, *supra* note 29, at 515. There is often hostility and the threat of violence against plaintiffs in cases like *Schempp*, *McCullum* and *Zorach*. CHURCH, STATE AND FREEDOM, *supra* note 29, at 185.

³⁶ James Davison Hunter & David Franz, *Religious Pluralism and Civil Society*, in *A NATION*

a homogeneous “Christian America.” As a result, the question of Church and State separation has become less explosive. The public square is less naked, neutrality is less compatible with the equal presence of religions in the public realm, and a growing number of Jewish thinkers, following Will Herberg and Milton Himmelfarb, are openly speaking against separatism. Thus, menorahs are now seen within the public square, even if the large majority of American Jews still favor a more conventional wall of separation as protection, a neutral public space in which Judaism is limited to the private sphere. Quarrels still exist among American Jews. As an example, consider this statement:

The Jewish festival of lights ended on Monday. But before it even started, on December 12, the Tennessee chapter of the American Civil Liberties Union sent a letter to Governor Phil Bredesen urging him to remove a Hanukkah menorah from the state capitol in Nashville. The menorah display is part of an annual lighting ceremony sponsored by a Jewish organization responsible for 1,500 similar lightings worldwide.

The letter, written by the Tennessee ACLU’s executive director, Hedy Weinberg, stated that “the Center for Jewish Awareness’ request to place a menorah on state property and hold a candle-lighting ceremony is clearly religious. In that context, the display would violate the Constitution.” . . .

[T]here’s no reason to be afraid of the word “Christmas” and its traditional accoutrements. The efforts of groups like the ACLU serve only to antagonize the vast majority of Americans—with no discernible benefits.

On the other hand, the Christmas warriors convinced of a nationwide conspiracy should also take a deep breath. . . .

These, indeed, are the hallmarks of the American tradition of religious tolerance—an openness rooted in religiosity. The formal separation of church and state plays an important, but supporting, role by enabling our rich civil society to simultaneously express its religiosity and welcome people of all faiths—and no faith at all. . . .

Indeed, the worldwide Jewish community will continue to feel dangerously squeezed as leftist and extreme secularist groups tighten their grip on liberalism³⁷

As a result, today, as at the turn of the previous century and in the 1960s, one can hear some anti-Semitic Christian voices against menorahs, seen as an intolerable symbol in a pluralist but still deeply

OF RELIGIONS: THE POLITICS OF PLURALISM IN MULTIRELIGIOUS AMERICA (Stephen R. Prothero ed., 2006).

³⁷ Michael Rosen, *And Now, the War on Hanukkah*, NAT’L REV., Jan. 3, 2006. Rosen is an attorney in San Diego and the head of the Republican Jewish Coalition’s San Diego chapter.

Christian America.

This is an example of the many anti-Semitic statements:

JEWES TELL US that separation of Church & State is a fundamental Constitutional decree. But they are lying. . . .

JEWES MADE UP THE LIE OF SEPARATION OF CHURCH & STATE

ALL OF THE ORIGINAL AMERICAN COLONIAL CHARTERS gave reference to the Christian religion as the *raison d'être* of the settlements' purposes. . . .

HOW CAN WE STOP THE JEWS FROM JEWIFYING AMERICA?

Here are 3 options:

- 1) Whenever you see a Chanukah Menorah in a public area, demand that a Nativity Scene be put up next to it.
- 2) Start putting up Crosses on private properties, both residences and businesses, in order to show the Jews that America is a Christian nation—not a Jewish one.
- 3) Demand that Jews like Attorney General Michael Mukasey keep his Anti-Christ rabbi friends off of the White House Lawn & out of the Oval Office!³⁸

In France also, a more “open” *laïcité* has arisen,³⁹ with the state helping religions and funding an increasing number of religious schools, aiming even to ignore the law of 1905 so as to legally help Muslims organize themselves, now allowing diverse religions to be openly seen in the public realm. Today, maybe twenty to twenty-five percent of the Jewish children in France are in Jewish schools, a new Lubavitch high school has been opened in Paris, and yeshivot and visibly kosher shops are spreading. Orthodox Jews and lubavitches are now following Rabbi Schneeshon's values and displaying large numbers of menorahs. In Paris, one can walk down the Champs Elysées, the Grands Boulevards or Place de la Sorbonne and see impressive kindled menorahs. The same occurs in other main cities. Local authorities must have accepted those displays, or else they would have brought actions against these

³⁸ Nathanael Kapner, *Separation of Church & State Is a Jewish Lie*, REAL JEW NEWS, Feb. 10, 2008. In the recent Marcus Brown case at the East Brunswick High School in New Jersey, the coach bowed his head and took a knee before a game as a member of the team led a prayer. The school board ordered him to stop in vain. The American Jewish Congress and the Jewish Social Policy Action Network went to the Court of Appeals in November, 2006. The case is not over but it “has been closely watched not only by those interested in the law regarding separation of church and state, but also by members of the local community. Virulent anti-Semitism was directed at Jewish members of the cheerleading squad by members of the community who believed that they had prompted the school board to act” against the coach. *High School Can Prevent the Football Coach from Continuing to Join with His Team in Organized Group Prayer*, JEWISH SOCIAL POLICY ACTION NETWORK, Apr. 16., 2008.

³⁹ JEAN BAUBÉROT, *L'INTÉGRISME RÉPUBLICAIN CONTRE LA LAÏCITÉ* (2006).

displays in court. But the Conseil d'Etat has not handled any cases on these situations. Like in Boston, Baltimore and Washington, *eruv* marked the streets of Strasbourg and some others French cities. The only Conseil d'Etat decision on Jewish matters was in 1995, when this highest institution did not allow a student to miss his examinations that took place on Shabbat, arguing that this competition implied the actual presence of students.⁴⁰ In general, the Conseil d'Etat has not forbidden the wearing of religious symbols in public schools,⁴¹ but, in November 1989, it prevented students from wearing religious symbols that were openly "ostentatious" (*ostentatoire*) and "proselytic." With the distinctions between permissible and impermissible religious symbols being unclear, leading to numerous local incidents, in 2003 the Commissioner Bernard Stasi wrote a report and a law was passed in March 2004 forbidding the wearing of those signs that are openly ("*ostensiblement*") meaningful, which meant that headscarves, crosses and kippas were not allowed in public. One is struck by the fact that, as with the secular process of the previous turn of the century, some Jews were again at the forefront of secularism: philosophers like Alain Finkielkraut and Elisabeth Badinter, and lawyers in the Conseil d'Etat, like Rémy Schwartz, who is in charge of the Commission Stasi, working on new legislation.⁴²

In this strong state, Jews still favor secularism, maybe more than American Jews, who see themselves more and more as part of a peculiar religion among others whose symbolic presence in the public square, like the presence of Muslim headscarves, is legitimate. So secularism and separatism, whatever the visions of Felix Frankfurter, Leo Pfeffer and of the American Jewish Congress, still mean something quite different in American and French societies, shaped by radically different state traditions. And if one considers that, in the context of strong anti-Semitic incidents, Joseph Sitruck, then the Grand Rabbin de France, more or less forbade the wearing of yarmulkes on the streets of Paris and its suburbs, one cannot but recognize that the United States—where Congress, to comply with *Goldman v. Weinberger*,⁴³ passed a law requiring the armed services to allow its members to wear a "neat and conservative" skullcap if it would not interfere with their duties⁴⁴—is

⁴⁰ Y. Aguila, *Koen et Consistoire Central des Israélites de France*, REVUE FRANÇAISE DE DROIT ADMINISTRATIF, May-June 1995.

⁴¹ 1. Comp. 1992-11-02, Mme Kherouaa et Mme Kachour et Balo et Mme Kizic, p. 389.

⁴² See Rémy Schwartz, *Entre Assimilation et Communautarisme : Sur le Port des Signes Religieux à l'école*, 16 LES CAHIERS DU JUDAÏSME (2004) (dialogue entre Rémy Schwartz et Pierre Birnbaum); Rémy Schwartz, *La Jurisprudence de la Loi de 1905*, in POLITIQUES DE LA LAÏCITÉ 147 (Patrick Weil ed., 2007).

⁴³ *Goldman v. Weinberger*, 475 U.S. 503 (1986).

⁴⁴ See SARNA, *supra* note 2, at 279. Kent Greenawalt argues that teaching religious values in American public schools is increasing while not talking about specific religions. According to him,

still quite far from the French “laïcité.” So-called globalization is unable to explain these crucial remaining differences.

This completes our analysis of religion and the public schools. Does God belong in those schools? Yes, but only in some respects. . . . [S]chools can legally make some accommodations in their regular program to satisfy special religious claims of parents The schools themselves cannot undertake devotional exercises or teach that religious propositions are true or false. . . . The most important concerns about religion and public schools involve teaching *about* religion.

KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? 186 (2005).