RELIGION AND LAW IN FRANCE:
SECULARISM, SEPARATION, AND STATE INTERVENTION

T. Jeremy Gunn

The world’s two oldest, extant national constitutional texts guaranteeing freedom of religion—Article 10 of the French Declaration of the Rights of Man and Citizen and the First Amendment of the United States Constitution—were proposed, drafted, and approved by legislatures only weeks apart in the year 1789. On June 8, 1789, Virginia Representative James Madison submitted to the First Congress—then meeting in New York City—a draft Bill of Rights to be added to the United States Constitution. On July 11, on the other side of the Atlantic—three days before the storming of the Bastille—the Marquis de Lafayette became the first to propose that the French National Assembly

* Associate Professor of International Studies, Al Akhwayn University, Morocco.

1. If the subtitle were in French, the three terms would appear as laïcité, séparation, and dirigisme. All translations appearing in this Article are by the author unless otherwise noted.

2. THE DECLARATION OF THE RIGHTS OF MAN AND CITIZEN art. 10 (1789) (Fr.), available at http://www.elysee.fr/elysee/elysee.fr/anglais/the_institutions/founding_texts/the_declaration_of_the_human_rights/the_declaration_of_the_human_rights.20240.html (“No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order.”). The Declaration has been incorporated into the current Constitution of France. 1958 CONST. pmbl. (Fr.).

3. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”). The original United States Constitution provided that “[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” Id. art. VI, § 3.


adopt a declaration of rights.\footnote{Id. at 442.} “It goes without saying,” British historian Simon Schama observed, that Lafayette, who was familiar with declarations of rights in state constitutions, “had something like the American model in mind.”\footnote{Id.} One of the persons with whom Lafayette consulted most closely about his draft declarations was the American ambassador to Paris and the principal author of the American Declaration of Independence and the Virginia Bill for Establishing Religious Freedom—Thomas Jefferson.\footnote{Id. at 442–43, 447; see also David Little, Religion and Civil Virtue in America: Jefferson’s Statute Reconsidered, in The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History 237, 237 (Merril D. Peterson & Robert C. Vaughan eds., 1988).} At the same time that Ambassador Jefferson was commenting on the draft French declarations, he also was corresponding with Madison and others in New York about the addition of a Bill of Rights to the United States Constitution.\footnote{See Irving Brant, James Madison: Father of the Constitution 1787–1800, at 267 (1950).}

On July 21, 1789, the First Congress finally accepted Madison’s proposal to consider amending the Constitution and appointed a Committee of Eleven—one member from each state then represented—to prepare draft amendments.\footnote{1 Annals of Cong. 686, 690–91 (Joseph Gales, Sr. ed., 1834).} For the next two months, Congress debated alternative draft resolutions to protect religious freedom and other rights. On August 24, the United States House of Representatives finally adopted a draft Bill of Rights and sent it to the Senate for its consideration.\footnote{See id. at 808–09.} Two days later, the French National Assembly adopted the Declaration of the Rights of Man and Citizen.\footnote{See Georg Jellinek, The Declaration of the Rights of Man and of Citizens 1 (Max Farrand trans., Henry Holt & Co. 1901) (1895).} In New York, on September 24, one month after the French Declaration had been adopted, the American Senate and House of Representatives finally agreed on the text of the First Amendment to be sent to the states for ratification.\footnote{George Anastaplo, The Constitutionalist: Notes on the First Amendment 209–13 (1971).} King Louis XVI ratified the French Declaration on October 5, and it was officially promulgated as the law of France on November 3.\footnote{Raymond Aron, Politics and History 123 (Miriam Bernheim Conant ed. & trans., 3d ed. 2004); Website of the Office of the French President, Declaration of Rights of Man and of Citizen (last visited June 29, 2005).} Lacking the
convenience of a king under house arrest, it took the Americans two additional years—until December 15, 1791—for the requisite number of states to ratify the Bill of Rights.\textsuperscript{16}

Although the final text of the French Declaration is one month older than the First Amendment, and although the French text was ratified two years before the American Amendment, the First Amendment has been part of the Constitution without interruption since 1791, even when legislatures and courts did not take its words seriously. The French Declaration has had a much less stable history, as it has alternatively disappeared and reappeared over time.\textsuperscript{17} The current French Constitution of 1958, however, incorporates by reference the 1789 Declaration of the Rights of Man and Citizen.\textsuperscript{18}

The parallels between France and the United States go beyond the intertwined and contemporaneous drafting of the two fundamental documents in 1789. From a comparative law perspective, the United States and France are generally considered to have “secular” constitutions that “separate church and state.”\textsuperscript{19} This places France and the United States in

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\textsuperscript{16} ANASTAPLO, supra note 14, at 209–13.

\textsuperscript{17} See 1958 CONST. pmbl. (Fr.) (incorporating by reference the Declaration of the Rights of Man and Citizen); 1946 CONST. pmbl. (Fr.) (same); 1875 CONST. (Fr.) (Declaration not included); 1852 CONST. (Fr.) (same); 1848 CONST. ch. II (Fr.) (incorporating some of the rights mentioned in the Declaration); 1830 CONST. cls. 1–11 (Fr.) (same); 1815 CONST. tit. VI (same); 1814 CONST. cls. 1–12 (Fr.) (same); 1804 CONST. (Fr.) (Declaration not included); 1802 CONST. (Fr.) (same); 1799 CONST. (Fr.) (same); 1795 CONST. (Fr.) (incorporating a “Declaration of Rights and Duties of Man and Citizen,” which included some of the same rights as the Declaration) (emphasis added); 1793 CONST. (Fr.) (incorporating a revised and expanded “Declaration of the Rights of Man and Citizen”); 1791 CONST. (Fr.) (incorporating the Declaration).

\textsuperscript{18} 1958 CONST. pmbl. (Fr.) (“The French people solemnly proclaims its attachment to the Rights of Man and to the principles of national sovereignty such as are defined by the Declaration of 1789 . . . .”).

\textsuperscript{19} In order to avoid some confusion, I will use the term “state” here rather than “government.” In France, as in most parliamentary systems (including Great Britain), “government” refers to the temporarily ruling party rather than to the ongoing state system, which typically is referred to as the “administration.” In other words, France and the United States employ the terms “government” and “administration” in opposite ways. Thus, we have the “Obama administration” versus the “Fillon government.” Also unlike the United States, which has a federal system in which subdivisions operate their own governing executives, legislatures, and courts, France has a unified system with a single court apparatus—one in which local officials have much more limited areas of independence.
a category quite different from states that officially encourage “cooperation” between religion and the state—such as Germany\textsuperscript{20} and Spain\textsuperscript{21}—or countries that have single “official” or “established” religions—such as most Muslim countries,\textsuperscript{22} Norway,\textsuperscript{23} and England.\textsuperscript{24} The labels “secular” and “separationist” also differentiate France and the United States from states that broadly seek to control religion—such as China.\textsuperscript{25}

However precise or vague the terms secular and separationist might be, their use is less controversial in France than in the United States. Although the terms separation of church and state and secularism have been a part of the discourse in the United States since at least the eighteenth century, they have become somewhat controversial since the 1970s.\textsuperscript{26} Particularly in the context of the American “culture wars,” some now consider the terms to suggest hostility to religion.\textsuperscript{27} In France,

\textsuperscript{20} See, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS, \& LABOR, GERMANY: INTERNATIONAL RELIGIOUS FREEDOM REPORT 2005, available at http://www.state.gov/g/drl/rls/irf/2005/51554.htm (indicating that in Germany, religious institutions may take the form of public law corporations or receive civil law association status otherwise).

\textsuperscript{21} See Art. 5 of the Religious Liberty Law of Spain (B.O.E. 1980, 177) (requiring that each religious group acquire legal personality by registering with the Ministry of Justice).


\textsuperscript{23} See, e.g., Inger Furseht, Civil Religion in a Low Key: The Case of Norway, 37 ACTA SOCIOLOGICA 39, 41 (1994) (stating that the 1814 Norwegian Constitution recognizes the evangelical Lutheran religion as the official religion of the Norwegian state).


\textsuperscript{25} See generally HUMAN RIGHTS WATCH ASIA, HUMAN RIGHTS WATCH, CHINA: STATE CONTROL OF RELIGION (1997) (stating that as interest in religion has increased, so has the Chinese government’s control of religion).

\textsuperscript{26} See generally Gunn, supra note 4, at 495–502 (discussing Congress’s response to the controversial Ninth Circuit decision in Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002), which held that the words under God in the Pledge of Allegiance violated the Establishment Clause).

\textsuperscript{27} See 148 CONG. REC. H4030-08 (daily ed. June 26, 2002) (statement of Rep. Jeff Miller) (stating, following the Newdow decision, that Congress must “respond to this outrageous decision and proclaim that these United States are united against
however, both are widely accepted and have a formal textual basis in French law that is absent in the American law. The first term, laïc, which is generally, but imperfectly, translated as “secular,” appears in Article 2 of the French Constitution of 1958:

France is an indivisible, secular [laïc], democratic, and social republic. It ensures the equality before the law of all of its citizens, without terrorism, united against the decision, and united under God”.

28. See Gunn, supra note 4, at 421 n.2 (“Though these laws were extremely controversial when enacted, they are now described in almost reverential terms.”).
29. 1958 CONST. art. 2 (Fr.).
30. Laïc, the adjective form, and laïcité, the noun, are terms that are difficult to define and almost impossible to translate. See EMILE POULAT, NOTRE LAÏCITÉ PUBLIQUE 116 (2003) (“There is no firm definition of laïcité: neither officially established nor generally accepted.”); id. at 115–24; PAUL ROBERT, 5 LE GRAND ROBERT DE LA LANGUE FRANÇAISE 915 (2d ed. 1992) (defining laïcité as a “political notion involving the separation of civil society and religious society, the State exercising no religious power and the churches exercising no political power”); see also DICTIONNAIRE DE LA LANGUE FRANÇAISE 1392 (Émile Littré ed., 1967).

As I have previously explained:

The term first appeared in the Littré supplement of 1877, but it was defined there only as something that has a laïc character. Laïc or laïque are words originally used in medieval French to identify monastic orders whose members were not ordained to the clergy, thus corresponding to the English sense of “secular” or “lay” in their original English meanings. Thus, a “lay brother” is a Catholic monk who does not hold clerical office. As first used, therefore, laïc referred to those whose lives were inside [and devoted to] the Catholic Church—though they did not hold the priesthood.

During the French Revolution, before the term laïcité was invented, much of the French Left had developed strong anticlerical attitudes toward Catholic clergy. The simmering anticlerical attitudes from the revolutionary period reemerged in full force among the dominant political class from 1879 and continued through much of the first decade of the twentieth century. Between 1879 and 1905, several important French laws that affected the relationship between church and state were enacted, and some, albeit in amended form, continue in force in the twenty-first century. These laws . . . are understood to be among the founding documents of laïcité and the modern French state. . . . Because of the controversial origins of these laws and their association with the doctrine of laïcité, for many French citizens the word evokes anticlericalism, anti-Catholicism, and sometimes blatantly antireligious sentiments. As early as 1880 some began to assert that the word “laïc” was actually a synonym for “irreligious.”

Gunn, supra note 4, at 420–21 n.2.
distinction as to origin, race, or religion. It respects all beliefs.  

The second term, séparation, is in the title of the 1905 “Law on the Separation of Churches and the State” (the 1905 Law). The 1905 Law is not merely a statute; it is also something of a cultural icon in France, the importance of which, both legally and in the popular imagination, approaches that of the Constitution itself. Indeed, in some ways, the 1905 Law is more fundamental than the Constitution of 1958, as it has outlasted the Constitutions of 1940, 1945, and 1946 and it was in effect for more than fifty years before the current Constitution was drafted. With regard to matters involving religion, the prestige and importance of the 1905 Law in France compares to that of the First Amendment’s religion clauses in the Bill of Rights. Although the phrase separation of church and state does not appear in the text of the 1905 Law, the title itself is of sufficient

31. La France est une république indivisible, laïque, démocratique et sociale. Elle assure l’égalité devant la loi de tous les citoyens sans distinction d’origine, de race ou de religion. Elle respecte toutes les croyances. 1958 Const. art. 1 (Fr.). Laïque first appeared as a constitutional term in 1946. See 1946 Const. pmbl., art. 1 (Fr.). The Constitution of 1958 incorporates both the Declaration on the Rights of Man and Citizen and the Preamble to the 1946 Constitution, which contained three clauses pertaining to religion and secularism—clauses 1, 13, and 16. 1958 Const. pmbl. (Fr.).


33. See Gunn, supra note 4, at 420–21 n.2 (stating that the 1905 Law is “understood to be among the founding documents of . . . the modern French State”). A related law of similar status is the 1901 Law on Associations. Law of Associations of July 1, 1901, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 2, 1901, p. 4205. Gunn, supra note 4, at 421 n.2 (stating that the 1901 Law, like the 1905 Law, is considered to be a founding document). Perhaps the closest analogies in American law to those of the 1901 Law and the 1905 Law, in terms of perceived status, are the Judiciary Act of 1789 and the Civil Rights Act of 1964—although neither approaches the prestige or importance of the 1901 Law and 1905 Law.

importance legally and rhetorically to institute the term *separation* as a defining term in the French legal system, characterizing the relationship between religion and the state.\footnote{The term “neutrality” also appears in jurisprudence in France and the United States as a guiding principle. See CE, Nov. 27, 1989, No. 346893 (Fr.), reprinted in Bernard Jeuffroy & François Tricard, Liberté religieuse et régimes des cultes en droit français 1031–34 (1996) (discussing use of the term neutrality in French jurisprudence).}

Article 2 is one of the most quoted provisions of the 1905 Law: “The Republic does not recognize, finance, or subsidize any religious group.”\footnote{Law on the Separation of Churches and State of Dec. 9, 1905, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 11, 1905, p. 7205, art. 2 (“La République ne reconnaît, ne salarie ni ne subventionne aucun culte”).} Although the 1905 Law does not use the phrase *separation of church and state*, it is often cited to illustrate two manifestations of the concept of “separation”: first, the state does not “recognize” any religion; and second, the state does not provide financial support to religious groups.\footnote{See supra text accompanying note 32.} While Article 2 was designed in particular to clarify and settle the state’s future relationship with the Roman Catholic Church—which during many periods of French history was the “recognized” church in France and the recipient of beneficial financial treatment\footnote{See W. Scott Haine, The History of France 91 (2000). The term *recognize* may have at least two important meanings. Among two plausible meanings of what the state may *not* do is “select a single religion as the established church of the state,” or, alternatively, “decide whether a particular entity really is (or is not) religious.” While France certainly does not recognize any particular religion as the established church, the second meaning is also widely accepted as a correct interpretation. The secular French state that separates church and state does not have the authority to decide whether any particular entity is or is not genuinely religious.} —the language is expressed in neutral terms and applies to any religious organization.\footnote{See Law on the Separation of Churches and State of Dec. 9, 1905, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 11, 1905, p. 7205, art. 2.}

The ostensible similarities of the religion and law regimes of France and the United States that have thus far been described are, however, likely to be misleading to an American jurist who approaches them with an American understanding of what “secularism” and “separation” are likely to mean.\footnote{Throughout this Article, I will be using the shorthand terms American categories, American jurists, and American perspective. It is very important that such}
that the French state avoids entangling itself in religious matters, or that the state does not fund religious institutions directly, such is not the case. Indeed, American jurists across a broad ideological spectrum—from civil libertarians to the religious right—would likely agree that many actions routinely taken by the French state in the area of religion would violate core constitutional principles on the other side of the Atlantic.41

Perhaps the most surprising example of the French state transcending what Americans would think of as permissible under the United States Constitution was its seizure of all religious buildings constructed before 1905.42 The famous medieval cathedrals of Paris, Rheims, Chartres, Amiens, and Toulouse, as well as hundreds of other cathedrals, churches, abbeys, and monasteries that were seized by the French state at various times since the Revolution of 1789, are now state property.43 While the Roman Catholic Church is permitted to use the buildings that it built over hundreds of years, the state allows this only at its discretion.44 At the same time, the state pays for repairs and restoration of the churches, either in conjunction with or independent of contributions made by religious groups, tourists, and others.45 Although such subsidies might have been thought to be in violation of the principle of secularism, the authority to provide for upkeep is explicitly provided in Article 19 of the 1905 Law (as amended)

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41. See Gunn, supra note 4, at 466–67, 467 n.214 (noting that under French law, the state can limit the exercise of religious rights when the restriction can be justified as promoting the “public order” and stating that “American jurists might see public order as an unduly vague doctrine that is susceptible to manipulation and abuse”).

42. Although properties had been seized, and sometimes returned, since the French Revolution, the 1905 Law completed the acquisition of what are now called “religious edifices belonging to the public domain.” Law on the Separation of Churches and State of Dec. 9, 1905, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 11, 1905, p. 7205, art. 7.

43. See id.; see also Haine, supra note 38, at 127.


45. See id. art. 19.
and is unchallenged before French courts.46

In the region of eastern France known as Alsace-Moselle,47 the French state finances Catholic and Protestant religious education in public schools.48 The historical explanation for this seeming anomaly is that when the 1905 Law was adopted, Alsace-Moselle was under German occupation, as it had been since the Franco-Prussian War of 1870–1871.49 When the region was reunited with France following World War I, an agreement was reached not to apply the law that had been adopted while the region was under German control.50 Thus, the laws allowing direct state support for religion in Alsace-Moselle resemble the “German model,” under which state funds may be used to support religious activities.51 Putting aside the question of whether the French or the German model is more appropriate for Alsace-Moselle, the region was part of France when the Republic's 1958 Constitution declared the country to be “secular” and “indivisible.”52
The French state, however, has placed greater importance on the “historical” reasons for granting an exception to the region than it has on the implications of the terms *secular* and *indivisible* in the 1958 Constitution. The highest French administrative court—the Council of State (*Conseil d’État*)—has upheld this practice as recently as 2001, by affirming that state support for sectarian religious education in Alsace-Moselle does not violate the constitutional principal of secularism. The prohibition on state subsidy of religion comes only from the 1905 Law, which the Council of State reaffirmed does not apply in the region. The 1905 Law also abrogated the Concordat of 1801 between Napoleon Bonaparte and Pope Pius VII, as well as the Organic Articles of 1802, by which the French state had exercised the authority of appointing both Catholic and Protestant clergy. But once again, because Alsace-Moselle was not part of France in 1905, the French state continues to play a role in the appointment of Catholic bishops and, to a lesser extent, Protestant clergy in that region.

Alsace-Moselle is not the only French jurisdiction exempt from the reach of the 1905 Law. Several of France’s overseas collectivities (*collectivités d’outre-mer*) similarly are not bound by its prohibitions of

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53. 1958 CONST. art. 1 (Fr.); *see also*, e.g., CE, Apr. 6, 2001, No. 219379 (Fr.).
54. CE, Apr. 6, 2001, No. 219379 (Fr.).
55. *See* Law on the Separation of Churches and State of Dec. 9, 1905, Journal Officiel de la République Française [J.O.][Official Gazette of France], Dec. 11, 1905, p. 7205. A commission appointed by President Jacques Chirac in 2003 for the purpose of reflecting on secularism, particularly in the context of whether Muslim girls should be permitted to wear the headscarf in public schools, briefly considered whether the laws in Alsace-Moselle should be changed to correspond with the remainder of France, but decided against making the recommendation. BERNARD STASI, COMMISSION DE REFLEXION SUR L’APPLICATION DU PRINCIPE DE LAÏCITE DANS LA REPUBLIQUE, RAPPORT AU PRESIDENT DE LA REPUBLIQUE 51 (2003), available at http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf.
57. TRAITÉ DE DROIT FRANÇAIS DES RELIGIONS 975–1007 (Francis Messner et al. eds., 2003). We have thus the peculiar irony that German occupation of Alsace-Moselle from 1871–1918 was sufficiently important to exempt the region from retroactively having the 1905 Law applied to it, but the occupation was not important enough to nullify the applicability of a treaty between the Vatican and France.
direct state funding of religious activities. In 2001, when the local government in French Polynesia decided to pay for the rebuilding of an Evangelical Christian church on the tiny island of Raiatea (near Tahiti) that had been destroyed by a hurricane, the French ministry in Paris responsible for the islands objected and attempted to block the payment through the administrative courts. In 2004, the Council of State held that French Polynesia, like Alsace-Moselle, was not subject to the 1905 Law, and that the 1958 Constitution did not prohibit the “secular” and “indivisible” republic from subsidizing the rebuilding of a church that had been destroyed by an act of God.

These are not the only instances that one might reasonably think of as being in conflict with secularism and separation of church and state. In 1920—fifteen years after enacting the law separating church and state and prohibiting state subsidies for religious entities—the French Parliament voted to spend 500,000 French Francs for the construction of the Grand Mosque in Paris, the land for which had been donated by the City of Paris. In addition, the French state, acting on a case-by-case basis, subsidizes private religious schools, the majority of which are Roman Catholic. Although French public schools are prohibited from teaching sectarian religion courses—Alsace-Moselle being the continuing exception—and although since 2004 public school students are prohibited from wearing “conspicuous” religious symbols or attire, members of the clergy, wearing clerical robes, are authorized to go on to public school property and provide religious counseling to students who wish to receive

58. Id. The overseas collectivities are more than a dozen islands around the world that have different legal relationships with France. Four of them are, for example, full “departments” while others have a more tangential relationship to mainland France. See id.

59. See CE, Mar. 16, 2005, No. 265560 (Fr.) (explaining the factual background surrounding the dispute over the use of public funds to rebuild the church building).

60. Id. (stating that Art. 2 of the 1905 Law could prevent such an expenditure, but that the 1905 Law does not apply in French Polynesia).


The secular French state observes several holidays that come directly from the Roman Catholic calendar: Easter Sunday and Monday, the Ascension, Pentecost Sunday and Monday, the Assumption, All Saints Day, and Christmas.

In 1921, several years after the 1905 Law abrogated the Concordat of 1801, the secular state of France accepted the role of reviewing nominations of Catholic clergy throughout France and consulting with the Vatican about its appointments. The responsibility for reviewing these appointments (as well as for making the appointments for Alsace-Moselle) rests with the Ministry of the Interior. Unlike the American Department of the Interior—the responsibilities of which are primarily limited to operating federal parks and negotiating issues related to the Native American population—the French Ministry of the Interior is by far the most powerful and influential ministry in the French political system. It is responsible for all national and local police in France, domestic intelligence surveillance, criminal investigations, and administration of all departments and overseas territories under French control. The equivalent—nearly unimaginable in the American context—would be a cabinet level department responsible for the Federal Bureau of Investigation, all state and local police, all criminal investigations, appointing governors, and administration of all fifty states and overseas territories.

The office within the Interior Ministry with responsibility for religious matters is the Bureau of Religious Affairs (Bureau des Cultes). The Bureau has other important responsibilities for religious matters, including

65. See TRAITÉ DE DROIT FRANÇAIS DES RELIGIONS, supra note 57, at 1148–58.
67. See RIDLEY & BLONDEL, supra note 47, at 170–71 (indicating that the relations with the churches and religious affairs fall under the control of the Ministry of the Interior).
68. Id.
70. See RIDLEY & BLONDEL, supra note 47, at 170–73 (outlining the many departments and broad powers of the French Ministry of the Interior).
71. Id. at 168–73.
72. TRAITÉ DE DROIT FRANÇAIS DES RELIGIONS, supra note 57, at 968–74; see also Véronique Altglas, French Cult Controversy at the Turn of the New Millenium: Escalation, Dissensions and New Forms of Mobilisations Across the Battlefield, in THE CENTRALITY OF RELIGION IN SOCIAL LIFE 55, 61 (Eileen Barker ed., 1996).
issuing guidelines to Préfets\(^73\) regarding which entities should be recognized officially as “religious associations.”\(^74\) The ability of a religious group to register under the 1905 Law is of major importance because it provides the entity with an additional protection against being labeled a “cult.” When it was decided that the Jehovah’s Witnesses in France did not qualify as a religion under the 1905 Law, the religious society was ordered to pay millions of dollars in taxes, and was fined for publishing religious tracts without approval.\(^75\)

In 2004, the French Parliament—with the full support of President Jacques Chirac, Prime Minister Pierre Raffarin, and then-Interior Minister Nicolas Sarkozy—overwhelmingly voted to adopt a popular new law that prohibited French students from wearing “conspicuous” religious clothing or symbols inside public schools, including the Islamic headscarf, the Jewish yarmulke, the Sikh turban, and the Christian cross (the Headscarf law).\(^76\) Although the highest French administrative court, the Council of State, had ruled more than forty times that Muslim schoolgirls’ right to wear the headscarf was consistent with the French Constitution, the doctrine of laïcité, and international law, the Headscarf law superseded the administrative court’s prior rulings.\(^77\) Designed to promote secularism, the Headscarf law had the curious consequence of prompting many Muslim schoolgirls to transfer to government-subsidized Roman Catholic schools

\(^73\). Each of France’s departments is headed by a Préfet, or Prefect, a state official appointed and supervised by the Ministry of the Interior. A Préfet is roughly the French equivalent of the governor of a state. RIDLEY & BLONDEL, supra note 47, at 92–93.

\(^74\). See Altglas, supra note 72, at 61. The word cult in French refers to a religious group, and under the 1905 Law it is a religious group that is legally recognized as such by the state. Despite its apparent similarity to the English word cult, there is no similar pejorative connotation in French. The French equivalent to the English word cult is secte, which has highly pejorative connotations.


\(^77\). See Beller, supra note 76, at 584 (stating that forty-nine cases were brought before the Conseil d’Etat between 1992 and 1999).
that permitted the girls to wear the headscarf.78

These examples, among others, certainly should draw into question the extent to which France is “secular” and whether it has, in actuality, “separated” religion from the state. But how do we account for these apparent anomalies? It is of course possible—and perhaps likely—that every country might have such contradictions within its laws, which may be puzzling to outsiders but largely accepted inside. There are two characteristics of the French system, at least in comparison with that of the United States, that might help explain these apparent contradictions. First, relative to the United States, France defers to the political–legislative process to decide what laws should mean, rather than to a judiciary that interprets constitutional texts.79 Second, France, far more than the United States, has traditionally accepted the legitimacy of state management of religious affairs. As a pedagogical device to illustrate these two points, I will compare a hypothetical American legal casebook on “religion and law” to a French legal treatise on the same subject.

One way to illustrate some of the differences between the two countries is to compare the topics that would and would not be included in an American casebook on religion and law in the United States80 with the range of subjects discussed in a French treatise on religion and law.81 In

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79. Compare John Bell et al., Principles of French Law 33 (2d ed. 2008) (stating that “after the Revolution, judges were not really trusted and their powers of interpretation were seriously curtailed as a result”), with Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

80. See generally Michael W. McConnell et al., Religion and the Constitution (2d ed. 2006) (providing illustration of the topics that American jurists consider pertinent for a study of law and religion in the United States).

81. See, e.g., Xavier Delsol, Alain Garay & Emmanuel Tawil, Droit des Cultes: Personnes, Activités, Biens et Structures (2005) (providing a first-rate study of the French system by three French jurists who bring a refreshing and direct approach to the subject). The American casebook could equally have been compared to the other leading French treatise, Traité de Droit Français des Religions, supra note 57. The reasons for selecting Delsol’s treatise for comparison are that it was published more recently and that the Messner treatise was written by several different scholars and contains a great deal of overlap in its presentation. There are, of course, obvious differences between a casebook designed to be used in an
order to highlight just how different the two countries’ approaches to religion are, we might first note that in other areas of law, such as contracts, American and French jurists would ultimately be looking at the same underlying fundamental questions: At what point is a contract formed? Who has the legal capacity to enter into an enforceable contract? When must a contract be in writing to be enforceable? What are the consequences when a private contract runs afoul of public policy? What constitutes a breach? What constitutes a material breach? When can specific enforcement be required? While there obviously are differences in approach that arise between the common law and civil law—perhaps reduced somewhat by the Uniform Commercial Code—and while the courts play different roles in the two countries, the American and French lawyers will be reasonably comfortable with the range of questions and the range of answers that the two systems provide. The comparative textbooks on religion and law, however, are more likely to be perplexing for jurists sitting on opposite sides of the Atlantic with regard to how the law is formed and the content of the law.

The principal focus of the American casebook on religion and law is most likely to be on how courts have interpreted the constitutional language of “the free exercise of religion” and “laws respecting an establishment of religion.” In order to probe the meaning of this constitutional language, the casebook would most likely emphasize pertinent opinions and dissents from the United States Supreme Court and, to a lesser extent, decisions by lower federal courts and state supreme courts. Unlike the French treatise described below, it is entirely possible that the American casebook would include no decision by any administrative law judge. While the American casebook is likely to

American law school and a treatise to be used by French law students and jurists. The latter is designed to be more systematic and comprehensive, while the casebook is designed to train lawyers to analyze court decisions. These differences are very important, but the value in comparison is to illustrate the striking differences in emphasis in such a way that the French approach will become more understandable to the American jurist.

83. See U.S. Const. amend. I; McConnell et al., supra note 80, at xvii.
84. See McConnell et al., supra note 80, at xvii–xix. It is even possible to imagine that a lengthy book on religion and law in the United States might offer little in addition to Supreme Court interpretations of the religion clauses of the Constitution, though any conscientious casebook for a law course would certainly go further.
85. See id. (containing no opinions authored by administrative law judges).
emphasize Supreme Court decisions on the First Amendment religion clauses, it would also include court decisions on other pertinent provisions of the Constitution, including Article VI’s “no religious test,” the Fourteenth Amendment and the Amendment’s incorporation doctrine, and freedom of expression.\textsuperscript{86} There also would be a discussion of state constitutions and decisions of state courts interpreting them.\textsuperscript{87} An American casebook appearing after the 1990s would also focus on statutes involving religion, including the federal Religious Freedom Restoration Act (RFRA),\textsuperscript{88} the Religious Land Use and Institutionalized Persons Act (RLUIPA),\textsuperscript{89} and state “mini-RFRAs.”\textsuperscript{90} While the statutes would be considered in many ways, one of the principal concerns would be the extent to which they are constitutional, as in \textit{City of Boerne v. Flores}.\textsuperscript{91} We also would expect that the opening chapter of the American text would discuss American colonial religious history, and would emphasize disestablishment and church–state debates between the 1770s and the 1820s.\textsuperscript{92} The Virginia assessment controversy in the mid-1780s would likely be analyzed in some depth, and there would presumably be included a discussion of church–state practices that occurred in the early years of the United States.\textsuperscript{93} In terms of highlighted substantive topics, one of the clusters of issues that would likely prompt the lengthiest treatment would be religion and schools—both public and private—including student religious expression, promotion of religious activities in public schools, access to public school facilities by private groups, and government funding of private religious schools.\textsuperscript{94} The law student trained by the American casebook would likely assume that the principal focus of religion and law in the United States is the interpretation of the United States Constitution.

It would not be surprising if the American casebook included no discussion about the legal process necessary for a religious body to

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\textsuperscript{86} See \textit{id.} at 71–84 (discussing the Fourteenth Amendment).
\textsuperscript{87} See, \textit{e.g.}, \textit{id.} at 17–18 (discussing the Massachusetts Constitution concerning religion).
\textsuperscript{88} See \textit{id.} at 150–57.
\textsuperscript{89} See \textit{id.} at 158–61, 246–47.
\textsuperscript{90} See \textit{id.} at 161.
\textsuperscript{91} See \textit{City of Boerne v. Flores}, 521 U.S. 507, 536 (1997) (holding that the reach and scope of RFRA exceeded the enforcement power of Congress, and was an intrusion into the principles of separation of powers and federal balance).
\textsuperscript{92} See, \textit{e.g.}, \textit{MCCONNELL ET AL., supra} note 80, at 1–15 (discussing the background of religion and law in America).
\textsuperscript{93} See, \textit{e.g.}, \textit{id.} at 45–56.
\textsuperscript{94} See, \textit{e.g.}, \textit{id.} at 339–586, 634–649.
\end{footnotesize}
“incorporate,” whereby a religious organization registers with government officials in order to acquire legal personality. Legal personality enables the religious group to buy land in the name of the religious organization rather than its individual members, open bank accounts, hire employees, and engage in other contracts as a juridical person. Similarly, the textbook presumably would offer no discussion of what it means for a governmental body to “recognize” the legal existence of a religious entity, nor would it offer details of the process for revoking incorporation or dissolving the body, except to the extent that a court decided a constitutional question pertaining to a property dispute. It would be unlikely that the textbook would devote much, if any, discussion to the comparative organizational structures of different religious groups—such as the hierarchical nature of the Roman Catholic Church versus the congregational structure of many Protestant and Muslim groups—or the extent to which state laws should accommodate those differences, even though there are a wide variety of practices in this regard. At best, scattered footnotes might suggest that incorporation and dissolution are matters of state law and are handled differently throughout the country, but that incorporation and dissolution are largely ministerial tasks that enable religious groups to be easily registered or dissolved without any government involvement, provided only that fraud or some other illegal activity surfaces; even then, it becomes an issue only after evidence has been provided to government authorities. American jurists are likely to assume that state incorporation laws must accommodate the different religious organizational structures such that the possibility of not accommodating them may not even arise as a question to be considered.

95. See generally id.

96. In the United States, the process of obtaining legal personality is sufficiently routine and unremarkable that it may go without mention in the American casebook—although obtaining legal personality is often one of the most complicated and controversial legal issues in other countries. See id.; see also SILVIO FERRARI, RELIGIOUS COMMUNITIES AS LEGAL PERSONS: AN INTRODUCTION TO THE NATIONAL REPORTS 3–10 (2007) (indicating that being a religious organization is rarely enough to obtain legal personality and the rights and recognition that come along with it).

97. See generally MCCONNELL ET AL., supra note 80.

98. See id. at 282–84 (engaging in a very brief discussion on religious structure); see also RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY AND THE LAW 223–53 (James A. Serritella et al. eds., 2006) [hereinafter Serritella et al.] (outlining the structure of religious organizations).

99. MCCONNELL ET AL., supra note 80, at 284–86; Seritella et al., supra note 98, at 231–34 nn.32–49.

100. Seritella et al., supra note 98, at 213–22.
With regard to taxation issues involving religion, the American casebook is likely to focus on the constitutional implications of taxing religious groups or the extent to which religious materials may be subject to state taxes.\textsuperscript{101} The casebook might briefly mention that religious groups may obtain tax-exempt status under United States federal law without any government investigation of the bona fides of the religious organization, but would probably not mention the specific steps that a religious organization must follow to obtain tax-exempt status at the federal, state, or local levels.\textsuperscript{102} American legal scholars, however, debate whether churches and other religious groups should be entitled to tax-exempt status as a matter of constitutional law, and the casebook probably would reflect that disagreement.\textsuperscript{103} Few American scholars would argue that government tax authorities should be empowered to review applications by religious groups to obtain tax-exempt status with an eye to evaluating whether the groups are sufficiently religious, and thus permitted to obtain tax-exempt status.\textsuperscript{104} The American debate, to the extent that there is one, is whether religious groups as a whole should be tax-exempt, not which groups sufficiently satisfy the criteria of being religious.\textsuperscript{105}

An American textbook would have little detailed discussion of the financing of religious organizations, but would certainly cover cases in which officials had attempted to restrict fundraising,\textsuperscript{106} whether fundraising appeals can be fraudulent,\textsuperscript{107} and whether the government constitutionally

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\item For example, a casebook would cite to \textit{Walz v. Tax Commission of New York}, 397 U.S. 664 (1970), and \textit{Texas Monthly v. Bullock}, 489 U.S. 1 (1989), for the constitutional implications of taxation on religious groups and materials. \textit{See McConnell et al., supra} note 80, at 246–47, 383–86 (discussing \textit{Walz} and \textit{Texas Monthly}).
\item \textit{See McConnell et al., supra} note 80, at 695–704 (presenting Branch Ministries v. Rosotti, 211 F.3d 137 (D.C. Cir. 2000), which held that a bona fide church’s tax exempt status was properly revoked because of its political involvement).
\item \textit{See id.} at 699–704.
\item \textit{See supra} notes 72–75 and accompanying text (discussing the role of the French Interior Ministry).
\item \textit{See supra} notes 101–03 and accompanying text.
\item \textit{See McConnell et al., supra} note 80, at 251–52 (presenting Larson v. Valete, 456 U.S. 228 (1982), which held that a Minnesota law requiring religious organizations that receive half or less of their total contributions from members or affiliated organizations to report and register under the Charitable Solicitations Act violated the Establishment Clause).
\item \textit{See id.} at 193–97 (presenting United States v. Ballard, 322 U.S. 78 (1944), which considered a conviction for fraudulently using the mail to obtain donations for a religious movement).
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may provide funding to religious organizations—each of which involves the constitutional questions of free exercise or laws respecting establishments of religion. The American casebook presumably would not consider questions regarding the amounts of money that groups should legally be able to receive from contributors or whether religious groups should be required to obtain prior authorization from state officials before receiving large gifts or bequests.

The casebook would probably include discussions of real estate issues involving religious buildings, including zoning ordinances, landmark designation cases, church property disputes, and RLUIPA. Even a discussion focusing on real estate issues would likely address the constitutional issues raised. A particularly conscientious casebook might include broad discussions of religious entities as employers, torts committed by religious organizations, whether a clerical privilege exists, and a variety of other issues. These issues would not, however, be raised in a systematic way to identify the scope of legal issues involving religion, but the constitutional issues that arise when religious groups and individuals seek exemptions from laws that bind others in society.

While the analysis of court opinions on the First Amendment would presumably constitute the core of American legal education about religion and the state, that would not be true in France. In fact, no French court under the current 1958 Constitution has ever issued an opinion rejecting the constitutionality of any statute regarding religion. Although this stark difference may be attributed in part to the different roles played by the courts in France and the United States, it also points to the fact that

108. See id. at 403–15 (presenting Zelman v. Simmons-Harris, 536 U.S. 639 (2002), which held that Ohio Pilot Project Scholarship Program providing tuition aid for students in both public and private parochial schools in disadvantaged area did not violate Establishment Clause).

109. See generally id.

110. See, e.g., id. at 211–12 (discussing whether a church is permitted, pursuant to the Free Exercise Clause, to operate in violation of zoning ordinances).

111. See id. at 210–12 (indicating that there are constitutional dimensions to landlord-tenant and local land use law).

112. See id. at 309–38.

113. See id.

whereas in the United States the study of religion and law focuses generally on probing the potential meanings of the constitutional text, in France the study of religion and law focuses on the mechanics of the statutes enacted by Parliament. While both countries have vibrant public debates about the separation of church and state and secularism, the debate in the United States focuses on interpreting a revered text written more than two hundred years ago and applying it to situations that may not have been anticipated by its drafters. Americans across the entire ideological spectrum are likely to assume the Constitution provides the correct principles to govern the appropriate relationship between religion and the state, but dispute how the text should be interpreted. French pundits across the ideological spectrum are likely to assume the term secularism—l'\textit{icité}—provides the correct governing principle, but debate how it should be understood. In France, the meaning of “secular” is debated not because the word appears in the French Constitution, but because it is a fundamental concept upon which the French Constitution itself is founded.

In the French judicial system, the only institution that has the legal authority to find a statute unconstitutional is the Constitutional Council (\textit{Conseil Constitutionnel}), which has never decided a case focusing squarely on whether a statute violates the secularism provisions of the French Constitution. The Constitutional Council, an institution which

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  \item[115.] The term \textit{judicial system} is being used here in its broadest English-language sense to combine what the French would separately designate \textit{l'ordre judiciare}—the judiciary narrowly understood—\textit{l'ordre administratif}—the administrative law system—as well as the institution—\textit{Conseil Constitutionnel}—known as the Constitutional Council. The broader term that would be used in France is \textit{Organisation juridictionnelle}—literally jurisdictional organization—though even this broader term does not include the work of the Constitutional Council. \textit{See id.} at 568 (stating that the Constitutional Council “does not perform [its] function as a judicial body”).
  \item[117.] This is not to say that the Constitutional Council has never issued a decision related to religion or conscience, only that the issue has been largely tangential to the Council’s decision. Reviewing a law regarding academic freedom, for example, the Constitutional Council said, in passing and without elaboration, that “[f]reedom of conscience must be regarded as one of the fundamental principles recognized in the laws of the Republic.” \textit{CC decision no. 77–87DC, Nov. 25, 1977, J.O. p. 5530 (Fr.).} Statements of this sort—phrased in general language—punctuate many decisions of the Constitutional Council, but offer little concrete insight as to the scope or meaning of constitutional protections. The Constitutional Council has also rendered an opinion that the proposed European Constitution was not inconsistent with the French Constitution’s secularism requirements, again without elaboration. \textit{CC}
has no equivalent in the United States, is comprised of nine eminent jurists and political appointees, as well as former presidents of the country.118 This institution may offer its opinion on the constitutionality of a draft law or a newly enacted law only after having been specifically requested to do so, in a timely way, by a legally authorized authority (including the President of the Republic, the Prime Minister, the President of the National Assembly—the equivalent of the American Speaker of the House—or the President of the Senate—the equivalent of the American Senate Majority Leader).119 Beginning in 2008, additional procedures have been instituted to open up the process by which bills may be submitted for constitutional review.120 Nevertheless, if the Constitutional Council is not properly requested to opine on a bill in a timely way, neither it nor any other body may later hold a statute to be unconstitutional, regardless of how flagrantly contrary to the French Constitution jurists might find it to be.121 Even the prestigious Council of State is not permitted to make determinations about a law enacted by Parliament.122 Unlike American


118. RIDLEY & BLONDEL, supra note 47, at 128 n.2.

119. Id.


121. While never having rendered a judgment on the constitutionality of any parliamentary action under the religion clauses of the French Constitution, the Constitutional Council rendered a very important judgment on the right of organizations to incorporate under the 1901 Law. See note 13. In 2003, when the French Parliament adopted the Headscarf Law, many hoped that the bill would be referred to the Constitutional Council for a decision on its constitutionality. See JOHN WALLACH SCOTT, THE POLITICS OF THE VEIL 148 (2007) (indicating that scholars and opponents of the Headscarf law saw the headscarf not as a religious symbol but as a constitutionally protected expression of individual conviction). The authorities who could have referred the question to the Council, however, chose not to do so. See Kathryn Boustead, The French Headscarf Law Before the European Court of Human Rights, 16 J. TRANSNAT’L L. & POL’Y 167, 169 (2007) (noting that at least sixty members of Parliament must refer the draft law to the Council, but the Headscarf Law did not have sixty members who would refer the draft).

122. An example of how rigorous the French legal system is in not allowing administrative or judicial courts to make decisions about the constitutionality of statutes was pointedly illustrated to me during a 2005 lecture I delivered to the law faculty at the Université Aix-Marseille. Among those in the audience was the late Professor Louis Favoreu, a preeminent French scholar of administrative law. In that lecture I quoted a decision of the French Council of State, which had ruled several years earlier that under then-existing French law, Muslim school girls had a right under
law, which places a high value on court decisions interpreting the United States Constitution, no French civil, criminal, or administrative court—at any appellate level—has the authority to declare a statute unconstitutional.\textsuperscript{123} The authority assumed by American federal courts since \textit{Marbury v. Madison}\textsuperscript{124} to make such determinations is not available in the judicial or administrative process in France.\textsuperscript{125}

Courts in the United States, which are responsible for routine civil and criminal matters, also play an important role in constitutional interpretation. In France, however, the civil and criminal courts play no such role.\textsuperscript{126} The three broadest divisions are the separate civil, criminal, and administrative courts. Both civil and criminal cases are heard in the judicial branch (\textit{l’ordre judiciaire}), whereas administrative matters are heard in an entirely separate system (\textit{l’ordre administratif}).\textsuperscript{127} Not only are civil and criminal cases tried by different judges within the judiciary, but civil judges themselves specialize in particular fields, the most prominent of which are commercial, civil law proper, and employment.\textsuperscript{128}

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\item The proposition that a single court might be able to declare a legislative act unconstitutional and issue a nationwide injunction against its enforcement is doubly inconceivable in the French system. F.H. \textsc{Lawson} \textit{et al.}, \textsc{Amos and Walton’s Introduction to French Law} 9–10, 9 n.4 (3d ed. 1967).
\item See \textsc{Bell et al.}, \textit{supra} note 79, at 17.
\item See \textsc{Brown \& Bell}, \textit{supra} note 116, at 44 (discussing the organization and jurisdiction of the French administrative law system); \textsc{Lawson \textit{et al.}}, \textit{supra} note 125, at 7–9 (explaining the organization and jurisdiction of the French judicial branch).
\item See \textsc{Bell \textit{et al.}}, \textit{supra} note 79, at 38–50 (discussing the separation of civil and criminal jurisdiction and the specialization of civil judges). The American state and federal judicial systems, in contrast to the French system, have what is broadly described as a “unified judiciary” in which the same court is empowered to preside over a wide variety of cases ranging from criminal prosecutions, private contract
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The civil and criminal courts have a three-step hierarchy of trial court, intermediate appellate court, and the highest *Cour de cassation* in Paris.\(^{129}\) The appellate courts also are separated into divisions in which judges specialize in one particular area of law.\(^{130}\) None of the civil or criminal courts, including the highest *Cour de cassation*, has the power to declare acts of Parliament to be unconstitutional or to find actions of state officials to be in violation of the French Constitution.\(^{131}\) As a result, there are no court decisions from the civil–criminal judiciary in France analyzing whether an act of the French Parliament has violated any constitutional provision with respect to the religious freedom provisions of the Declaration of the Rights of Man. Court opinions on the constitutionality of laws—the backbone of an American casebook on religion and law, the legal education system, and popular debate in the United States—are nonexistent in France.

A very interesting example of the different roles of the courts of France and the United States is shown in a tax case involving the Jehovah’s Witnesses of France.\(^{132}\) In relevant part, French tax law permits, in some circumstances, a 60% tax to be levied on cash gifts from one person to another.\(^{133}\) In France, non-profit “associations” and “religious groups” that are legally recognized by the state traditionally are not subject to this hefty tax.\(^{134}\) In 1995, a parliamentary report identified the Jehovah’s Witnesses disputes, commercial disputes, employment discrimination, administrative law matters, and challenges to the constitutionality of statutes. See Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 33–47 (6th rev. ed. 2009) (detailing the organization and jurisdiction of the U.S. courts). While there are specialized courts in the United States with limited jurisdiction—for example, bankruptcy, tax, traffic, juvenile, and the Court of Appeals for the Federal Circuit—these courts are the exception rather than the rule. See id. In French, the employment tribunal is called *le tribunal du travail*, though the more traditional and common term for it, which reflects its medieval origins, is *le Conseil des prud’Hommes* (the counsel of the wise, or prudent, men). See Bell et al., supra note 79, at 48–49.

129. The *Cour de cassation* is the court of “annulment” or “reversal.” See Lawson et al., supra note 125, at 7–9.

130. See *Introduction to French Law* 312 (George A. Berman & Etienne Picard eds., 2008) (outlining the French court system and the division of French appellate courts into thirty-five divisions with specialized judges).

131. Bell et al., supra note 79, at 17.


133. See France 2007 Report, supra note 64.

134. See id.
as a “cult,” a designation that at least in theory had no legal or statutory consequences apart from the prejudicial response that being named as such might have. Immediately thereafter, French tax authorities decided to levy the 60% tax on cash contributions received by the Jehovah’s Witnesses over several years, which resulted in a tax liability of more than twenty million dollars. The Jehovah’s Witnesses objected, arguing—without contradiction by tax authorities—that this tax had never previously been imposed on other religious organizations. Nor did the tax authorities suggest there was any fraud or malfeasance on the part of the Jehovah’s Witnesses in terms of how they acquired the contributions or the legitimacy of how the money was spent. Neither the trial court, nor the Court of Appeals of Versailles, nor the highest Cour de cassation considered the questions of whether the tax violated any rights of Jehovah’s Witnesses to practice their religion under the French Constitution, or whether the tax had been levied in a discriminatory fashion. The only issue entertained by the courts was whether the French code could be understood to give the tax authorities the power to impose the tax, and each of the three courts held in favor of the state and against the Jehovah’s Witnesses. The fact that no other similarly situated group had been taxed and that there was no basis for discriminatory treatment did not enter into the courts’ opinions.

138. See id.
139. See id. (stating that French tax authorities acknowledged the tax-exempt status of the Jehovah’s Witnesses, but applied “a law designed to prevent individuals from escaping inheritance taxes by making donations”); see also Cour de cassation [Cass. com.] [highest court of ordinary jurisdiction] Oct. 5, 2004, Bull. civ. IV, Nos. 178, 201 (Fr.).
142. See id. The Jehovah’s Witnesses filed an application before the European Court of Human Rights, which has not decided the case. Jehovah’s Witnesses Press
The judicial responsibility for determining whether state officials have complied with French law, including the French Constitution, rests entirely within the administrative law system. Administrative courts, which operate entirely parallel to the civil and criminal courts, have a familiar three-part hierarchical organization headed by the highest administrative tribunal, the Council of State, the members of which are known as Counselors of State. Although in the United States administrative law judges might be perceived as working in a relatively unglamorous area of law, such is not the case in France, where administrative judges—particularly those in the Council of State—are at the peak of the legal community. Counselors of State typically are graduates of the elite École Nationale d’Administration (ENA), the state institution that trains the top echelons of state officials. The graduates of ENA, known in France as Énarques, cultivate close relations with other graduates who are likely to become the highest ranking civil servants, heads of major corporations, and leading French politicians. Unlike American judges, who likely have had diverse experiences in the legal profession as litigators, prosecutors, and public interest lawyers before becoming judges, French administrative law judges are trained as such and begin their work immediately after having completed their studies. Because the administrative law judges and those whom they are judging frequently emerge from the same social and educational institutions, it would be natural to imagine that they might often be more deferential to the actions of others in the same elite cadres, lessening the prospect of the type of challenge to official actions that might be more common in the United States. But it should also be noted that the Council of State has such prestige in France that it is fully capable of striking down administrative actions of local officials that it deems to be in violation of law.

Release, supra note 140.

143. See Brown & Bell, supra note 116, at 44–61.
144. The three levels consist of Administrative Tribunals (Tribunaux administratifs), Administrative Courts of Appeal (Cours administratives d’appel), and the highest, the Council of State (Conseil d’État). Id. at 44.
145. Id. at 62.
146. Id. at 82–83.
147. Id. at 63.
148. Id. at 82–83.
149. See id. at 62–63 (“[T]he Conseil d’État has something of the atmosphere of an exclusive club . . . .”).
150. See id. at 39 (describing local governments as subject to an administrative “system of supervision”).
The striking difference between a country where decisions of judges have shaped the basic parameters of the law by reference to a binding Constitution and one where courts are effectively excluded from making decisions about constitutionality is more than a technical difference in the relative subject-matter jurisdiction of courts. Rather, it reveals the differences between a system in which hundreds of judges in hundreds of courts are expected to analyze, debate, justify, or challenge the constitutionality of laws and actions by reference to words in a two hundred-year-old document and by the opinions of other judges, and a system in which judges are expected to assume, without questioning, the constitutionality of acts of Parliament. In one country, the judiciary is expected to apply the principles of constitutional language, and in the other, the Parliament is assumed to have made constitutional decisions. This might be summarized, perhaps somewhat simplistically, as a difference between a country where the question is “what does the text of the Constitution mean?” and a country where the question is “what did the Parliament decide?”

Comparatively, French treatises on religion and law focus on the relatively more technical issues of “what do the statutes say?” and “how are the statutes applied?” rather than the more philosophical questions of “what does secular mean within the French Constitution?” or “what is and is not included within separation of church and state?” In the case discussed above regarding the state-financed rebuilding of an Evangelical Christian church, the Council of State’s conclusion that the constitutional requirement of secularism does not prohibit spending of funds on a church was accompanied by no citations to any previous French case, no constitutional history, and no linguistic analysis of the meaning of “secular.” A comparable decision by the United States Supreme Court interpreting the United States Constitution would likely have come in an opinion of scores of pages citing constitutional history and prior Court decisions. There would likely have been one or more vigorous dissents of equal length. The Court’s decision would have prompted the writing of

151. See id. at 162 (“[T]he Conseil d'État has no control [over] the French parliament . . . .”).
152. See id.
153. See id.
154. See generally TRAITÉ DE DROIT FRANÇAIS DES RELIGIONS, supra note 57 (illustrating the technical treatment of religion and law in French treatises).
155. See supra note 59 and accompanying text.
156. CE, Mar. 16, 2005, No. 265560 (Fr.).
dozens—if not hundreds—of law review articles and would have been subjected to intense treatment in casebooks. The Delsol treatise noted the Council of State’s decision in one sentence as “affirming” that “the principle of non-funding does not flow from the constitutional principle of secularism.”

The treatise does not suggest that the Council of State should have elaborated its reasons for this conclusion; nor does it challenge its correctness.

The Delsol treatise is organized into four major parts, each of which is approximately one hundred to one hundred fifty pages in length: first, Sources of the Law (Les sources du droit des cultes); second, Legal Regulation of Religious Activities and Property (Le cadre juridique des activités et des biens cultuels); third, Legal Regulation of Persons: Clergy and Members (Le cadre juridique des personnes: Les ministres du culte et les fidèles); and fourth, Laws Governing the Structure of Religious Organizations (Le cadre juridique des structures cultuelles: Les groupements associatifs pour l’exercice du culte). The scope of information included in the first part, Sources of the Law, draws upon French history; the language contained in the Constitution and French laws; international human rights laws; and the philosophical and historical doctrines of secularism, freedom of religion, and separation of religion and the state. While the specific content is, of course, different from what would be included in an American textbook, the type of information included would not be surprising.

Much of the three remaining parts of the text—more than two-thirds of its entire length—examines legal issues that are either alien to an American audience or sufficiently unimportant that they would probably not be raised in the casebook. The first chapter of Part II, which takes the treatise from the more abstract and philosophical underpinnings of French law into concrete legal issues, bears a title that is almost untranslatable to an American audience: La police des cultes, principes généraux du droit français. It refers to the role played by the French Ministry of the Interior in regulating religious groups and activities in France. The first

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157. DELSOL ET AL., supra note 81, at 441.
158. See id. at 7–9.
159. See id. at 37–192.
161. See id. For the role played by the Ministry of the Interior in the French state, see supra notes 69–72 and accompanying text.
chapter of Part II explains the role of the Ministry of the Interior and its Bureau of Religious Affairs in regulating and supervising religious activities.162 This centralized office in the heart of the most powerful domestic ministry—which is the launching point for the discussion of practical matters of religion and law in France163—has no equivalent in the United States, and the idea of creating one would presumably be opposed across the entire ideological spectrum in the United States.

Whereas the American casebook would likely assume that government officials have no role to play in religious matters except to the extent strictly necessary to preserve safety or public order, the French treatise begins with an uncritical description of the role of the Ministry of the Interior and its supervisory responsibilities pertaining to religious activity.164 After noting that the Minister of the Interior supervises the police, the text then notes, without questioning its legitimacy, that the police consequently have authority over such issues as the ringing of church bells and other sounds that might be made by religious groups.165 While acknowledging that limitations on religious activities must be “strictly necessary” under French law, the focus of the text is outlining police powers rather than maximizing the rights of religious actors.166 Most of the discussion occurs without the sharp questioning that would likely exist in a comparable American text, regardless of the ideological bent of the author. The closest that the French text comes to challenging such assumptions comes when it asks, without sharp questioning, whether parts of this jurisprudence really are compatible with fundamental rights.167 The text notes, without comment or criticism, that the Council of State has recognized that even in the absence of express statutory authority, the Prime Minister also has inherent authority to issue regulations governing religious activities in France.168

162. DELSOL ET AL., supra note 81, at 197–216.
163. See id.
164. Id. at 21.
165. Id. at 200. While it would not be surprising if the American casebook raised such a question, it is not likely that it would begin its analysis of the role of the state with this particular topic.
166. Id. at 195–222.
167. Id. at 219.
168. Id. at 198. Acting pursuant to such authority, Prime Ministers have established within their offices institutions that investigate the dangerous activities of cults, such as the Mission Interministerielle de lutter contre les sectes. Keturah A. Dunne, Comment, Addressing Religious Intolerance in Europe: The Limited Application of Article 9 of the European Convention of Human Rights and
The second half of Part II contains a discussion of the law related to religious buildings that an American jurist, applying American law, would likely find to be very difficult to reconcile with any common-sense application of the concepts of separation of church and state and secularism. The Delsol text begins its discussion not with the legality or constitutionality of the French state’s seizure of religious buildings constructed before 1905, but rather with how those buildings should be classified as property under French law. The text discusses how these buildings are now operated and the extent to which the French state is responsible for their maintenance, repair, and restoration. The implicit assumption is that such seizures were entirely proper. For buildings constructed after 1905, the text treats the topic as if it were a combination of property law and tax law.

French law provides two basic legal vehicles by which a religious organization may obtain legal personality. The first manner is as an “association” under the 1901 Law, and the second is as a “religion” (culte or association cultuelle) under the 1905 Law. The 1901 Law is very liberal—it effectively allows for any two individuals to form a legal “association” (association or association déclarée) after following a few simple procedures that are not subject to substantive review by state officials. The mechanism for forming an association with legal personality in France is typically simpler and more straightforward than in most states in the United States. The process for forming a “religion” with legal personality is, however, much more difficult, and it requires that state officials conduct a substantive review of the purposes and projected

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170. Id. at 225–26.
171. Id. at 233–45.
172. See id.
173. Although there are other types of legal entity statuses available in some circumstances, including unions d’associations cultuelles and congrégations autorisées, the two most frequent are those described infra. As mentioned earlier, legal personality allows a group to act in the name of the group to handle issues such as owning property, opening bank accounts, hiring employees, suing, and engaging in contracts. Although every state in the United States has different procedures and rules for religious and other nonprofit associations to obtain legal personality, the procedures are largely ministerial, and state officials generally have little authority to make decisions beyond whether the application has been correctly prepared according to state law.
activities.175  In this very real sense, and in a seeming contradiction with Article 2 of the 1905 Law,176 the state does “recognize” some entities as being only associations, and others as being religions.177  If the state does not accept an application to become a religion, the applicant cannot describe itself as such and cannot take advantage of the benefits that are available only to recognized religions and not to associations.178

CONCLUSION

Although secular and separation are the formal terms that appear in the French Constitution and the fundamental 1905 Law to describe the relationship between religion and the state, there is a third term that does not appear in either text but that has an importance that may be equal to—or, arguably, even greater than—the others: dirigisme. Although the term dirigisme has been used in France since at least the 1930s to refer to state intervention in the economy,179 it can also refer more broadly to state intervention in other aspects of society, whether in providing social services, the micromanagement of public schools, or matters involving religion.180  It is even possible to associate dirigisme with the ancien régime and the model of Louis XIV and his chief minister, Colbert, who sought to have the state apparatus and the populace bend to royal will.181  Neither the courts of France nor legal treatises question in a fundamental way the legitimacy of state intervention in religion, or implications of that intervention on the underlying freedoms the French Constitution is supposed to protect.

176.  See id. (stating that “[t]he Republic does not recognize, remunerate or subsidize any religion”).
177.  See id.
178.  See id. (providing that associations of worship are exempt from certain taxes).
179.  See JOSSETTE REY-DEBOVE & ALAIN REY, LE NOUVEAU PETIT ROBERT 759 (2002); VOCABULAIRE JURIDIQUE 294 (Gérard Cornu ed., 8th ed. 2001).  Dirigisme is the nominative form of the verb diriger, meaning “to direct.”
181.  Id. at 106.