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**Rabbis Against State Jews from the Supreme Court
and the Decline of the Naked Public Space**

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**RABBIS AGAINST STATE JEWS FROM THE SUPREME COURT
AND THE DECLINE OF THE NAKED PUBLIC SPACE**

By Pierre Birnbaum

Despite antisemitic diatribes that motivated so many Jews to remain invisible, hidden within the public sphere, the Rebbe Menachem Schneerson did not equivocate: the most revered figure in the Lubavitch world, he thundered against any questioning of religion and enthusiastically rejected the idea of a naked public space. In his eyes, it was better to recite a prayer not charged with an explicit message than not to recite any prayer at all. Speaking out against *Engel v. Vitale*, the Supreme Court's key decision prohibiting prayer—even non-sectarian prayer—in public schools, he assured his interlocutors that, “my views are firmly anchored in the Torah...[there is a] vital need that the children in the public schools should be allowed to begin their day at school with the recitation of a nondenominational prayer, acknowledging the existence of a Creator and Master of the Universe, and our dependence upon Him.” He loudly proclaimed that, “it is necessary to engrave upon the child's mind the idea that any wrongdoing is an offense against the divine authority and order.” For Schneerson, “under existing conditions in this country, a daily prayer in the public schools is for a vast number of boys and girls the only opportunity of cultivating such an awareness.”¹ Without subtlety, he went to war against the Supreme Court decisions that secularized public space. In doing so, the Rebbe implicitly protested against the role of American State Jews who, like many non-Jews, were deeply involved both in leading the battle for the separation of Church and State as well as calling into question Christian society, which gave rise to so many antisemitic pronouncements against them.

In 1962, crowning the Supreme Court's separationist jurisprudence and bringing the *Everson* and *McCollum* decisions to their logical end, the Court decided to extend further the neutrality of public space by prohibiting prayer in the New York public school system—even when this prayer was not tied to any specific religion and recited voluntarily. *Engel v. Vitale* is thus seen as culminating in the exclusion of all forms of prayer. This decision further extended the scope of *McCollum*, a decision in which Felix

¹ Rabbi Menachem Schneerson, “Letter from the Lubavitcher Rabbi,” *Michael* 3 (1975): 364-365.

Frankfurter opposed Will Herberg head on, defending an extreme notion of secularization by enforcing it through the application of the law. Frankfurter's desire was no secret: this exclusion of religious people from public space affected Jewish children as much as all other children. Now, in *Engel v. Vitale*, "It was a version of Frankfurter's view of secularization that prevailed."² As an American State Jew, Frankfurter intended to complete the process of secularization initiated in the 1950s. While this decision, as we have seen, was defended by the Synagogue Council of America as well as the National Jewish Community Relations Advisory Council, it was met with firm opposition by the Lubavitch world. Rebbe Schneerson thus openly went to war against those Jews in favor of a "wall of separation." He even sent a memo to the Court at that time, hoping to maintain these prayers, which would nevertheless be prohibited.³

Schneerson was not alone. A consortium of Orthodox rabbis, under the direction of Agudath Israel, along with the League of Orthodox schools, were already involved in the struggle to bring federal aid to private schools. They unconditionally supported the actions carried out by the Christian organizations who hoped to benefit once again from State support for student transportation, food expenses, etc. Their common front, to which we shall return here, was manifested in the strong hostility toward a policy of secularization. Renowned Jewish figures joined in the fight to challenge the "wall of separation" that penalized religion all the more so as the number of private Jewish schools rapidly increased. Thus, in 1952, Will Herberg protested against the strict separation between Church and State. In his words,

The public school system...makes non- or anti-religion the established religion" in public education...those who speak for the American Jewish community...seem to share the basic secularist presupposition that religion is a "private matter"...and therefore peripheral to the vital areas of social life and culture...How could this isolation of religion from life have arisen in a group with whom religion has traditionally been conceived as coterminous with life?...Deep down, it is Catholic domination that is feared...Yet in the long run

² Noah Feldman, *Divided by God. America's Church-State Problem and What we Should Do About It* (New York: Farrar, Strauss and Giroux, 2005), 179.

³ Edward Hoffman, *Despite All Odds: The Story of Lubavitch* (New York: Simon and Schuster, 1991). On the procedural aspect, Louis Reinstein, "The Growth of Chabad in the United States and the Rise of Chabad Related Litigation," *Nova Law Review* 30.2 (Winter 2006).

such a view is short-sighted and self-defeating. Jewish survival is ultimately conceivable only in religious terms...a thoroughly “de-religionized” society would make Jewish existence impossible...the Jew is inevitably the chosen victim...The American Jew must have sufficient confidence in the capacity of democracy to preserve its pluralistic libertarian without any *absolute* wall of separation between religion and public life. After all, the Jew is no less free in Britain, where church and state are more closely linked.⁴

Will Herberg thus spoke out in favor of prayer in public schools, Bible-reading, and federal aid for student transportation. He held this position even when it would primarily benefit the Christian majority or call into question the foundational legal decisions for secularization such as *Schempp*, emphasizing that since 1787, “good government” can only be achieved through religion, which is indispensable for “national prosperity.” For him, “[there] cannot be a neutrality between religion and no-religion.”⁵ A highly influential personality, theologian, and renowned sociologist, Will Herberg’s position proved to be curiously close to Rebbe Schneerson’s as it lent true legitimacy to those who rejected the separation of Church and State. In the same vein, Milton Himmelfarb, who rigorously edited the American Jewish Year Book, likewise attacks “separationism.” For him,

Jews have special reason for being grateful to the public school: it helped make the America of opportunities for newcomers...So we are all for the public school. At the same time, we tell each other horror stories about what it has become. If we can, we...send our children to private schools...It is not true that freedom is most secure where church and state are separated; separation and separationism are not the same; even in America, separationism is potentially tyrannical... “Wall of separation” may have sounded good once, but if you say it to a young man now he is as likely as not to think you mean the wall that separates Berlin.⁶

⁴ Will Herberg, “The Sectarian Conflict Over Church and State: A Divisive Threat to our Democracy?” *Commentary* 5 (November 1952).

⁵ Will Herberg, *From Marxism to Judaism : Collected Essays of Will Herberg*, in David Dalin ed. (New York: Markus Wiener, 1989), 221.

⁶ Cited in Jonathan Sarna and David Dalin eds., *Religion and State in the American Jewish Experience* (Notre Dame, IN: University of Notre Dame Press, 2000), 266-267.

Orthodox rabbis not belonging to Lubavitch also held this position. For example, Rabbi Seymour Siegel proclaimed his sympathies for the demands made by Catholics and called for federal assistance for Jewish schools:

We Jews owe a great deal to the public school system...But in pluralistic America where there are constitutional guarantees against the establishment of any *one* religion...the strengthening of parochial schools would not endanger the Jewish status as full citizen. What endangers Judaism is ignorance and an all-pervasive secularism...state aid would be good for the Jewish community...I do not question the integrity and the ability of our agencies who have taken such a vigorous stance on the question of Church and State. I do think they have served us well in the past. However, conditions have changed and the Jewish community has changed...it would seem to me more prudent...to urge our states and local authorities to recognize that education must be supported wherever it is being fostered—both in private and public schools.⁷

Rebbe Schneerson's anger would not be extinguished. In an article published by the journal, *Catholic Commonweal*, he stressed that, "the principle of separation of church and state should not be misconstrued or distorted to mean a denial of religion...[it is] the moral duty of every Jew to do his utmost to make federal aid to the secular departments of parochial schools a reality, in order to strengthen and expand the Yeshivoth and Day Schools."⁸ In the 1970s, under his leadership, the Lubavitch movement decided to deal the final blow: they installed giant menorahs in public spaces, thereby making visible an explicit symbol of Judaism in public space—alongside the crèche—legitimizing the presence of religion that the court's jurisprudence attempted to relegate only within the private sphere. Beginning in 1974, they installed menorahs in most major American cities as a means to affirm a Jewish presence. In 1979, Rabbi Avraham Shemtov, one of Rebbe Schneerson's closest confidantes, lit the menorah for the first time in front of the White House and in the presence of President Jimmy Carter. Their activism and commitment to messianism was so vigorous that they succeeded in agitating American Judaism. Political leaders rushed to obtain a few words of approval from Rebbe Schneerson. Candidates for the Senate and House of Representatives and mayors seeking re-election were likely to be seen at his side. In

⁷ Ibid., 268-269.

⁸ Cited by Stuart Rosenberg, *The New Jewish Identity in America* (New York: Hyppocrene Books, 1985), 205.

1983, President Reagan granted him the honor of inviting him in the Oval Office for his eightieth birthday and even planned a kosher reception for him. However, Schneerson refused to leave his headquarters in Brooklyn, the famous 770, and attended the celebration via satellite instead.⁹ In 1993, on the occasion of his ninetieth birthday, Rabbi Shmuel Butman opened a session at the House of Representatives with a prayer in Rebbe Schneerson's honor and in 1994, Congress awarded him a gold medal. In 2001, Rabbi Avraham Shemtov recited blessings honoring President Bush, "the government, the armed forces" at the White House and declared the Lubavitchers' commitment to their "patriotic duty."¹⁰ President Bush then spoke. Having just returned from Afghanistan, he told his audience how quickly he had taken leave of President Karzai: "You don't understand," he said, "I need to get back to the White House for an important event. The Hanukkah reception is always one of the most special events of the season. Laura and I are pleased to be with so many friends. And we are honored to gather with leaders of the Jewish community to celebrate our final Hanukkah here in the White House."¹¹ From one President Bush to the next, this tradition was established alongside a general return to religious tolerance in public space.¹² In December 2009, Rahm Emmanuel, White House Chief of Staff, celebrated the thirtieth anniversary of this ceremony at the White House. President Obama sent a message in Hebrew underlining the importance of Hanukkah that "is not only a time to celebrate the faith and customs of the Jewish people, but for people of all faiths to celebrate the common aspirations we share...may Hanukkah's lessons inspire us all."¹³ A few months later, President Obama participated in a seder for the second time at the White House, during

⁹ Samuel Heilman and Menachem Friedman, *The Rebbe. The Life and Afterlife of Menahem Mendel Schneerson* (Princeton: Princeton University Press, 2010), 181 and 215.

¹⁰ Jan Feldman, *Lubavitchers as Citizens* (Ithaca: Cornell University Press, 2003), 52-53.

¹¹ Haaretz

¹² Michael Rosen, "The War on Hanukkah," *National Review* 3 (January 2006).

¹³ *Associated Press*, 17 DECEMBER, 2009. MATZAH AND BITTER HERBS ARE EATEN AND DINERS READ THE HAGGADAH. A SMALL CONTROVERSY ERUPTS WHEN CERTAIN COMMENTATORS SUGGEST MALICIOUSLY THAT THIS CEREMONY IS MORE RESTRAINED THAN THE ONE CELEBRATED BY PRESIDENT BUSH. *NEW YORK TIMES*, 11 DECEMBER, 2009. IN MARCH 2012, WHEN J.J GOLDBERG PRESENTED HIM WITH THE NEW HAGGADAH EDITED BY JONATHAN SAFRAN FOER, OBAMA, AS AN INFORMED CONNOISSEUR, EXCLAIMED, "DOES THIS MEAN WE CAN'T USE THE MAXWELL HOUSE HAGGADAH ANYMORE?" *THE ATLANTIC*, MARCH 11, 2012. GIVEN SUCH FAMILIARITY WITH THE TEXTS, GOLDBERG WRITES, "HE IS THE MOST JEWISH PRESIDENT WE HAVE EVER HAD."

which participants read together—as they would again in 2010—the Haggadah,¹⁴ lending ever-greater public visibility to Judaism.

These changes took place in the context of a profound religious revival affecting American society, which also reached traditional Jewish circles and fit into the long term “decline of secular Judaism.”¹⁵ The American Jewish Congress and American Jewish Committee as well as a number of rabbis were nevertheless offended by the considerable scope of this breach in the “wall of separation.” Thus, in April 1978, Rabbi Joseph Glaser, the vice president of the Central Conference of American Rabbis addressed a letter to the Rebbe Schneerson taking into consideration the fact that installing a menorah in a public space, “is as much a violation of the constitutional principle of separation of church and state as is the erection of Christmas trees and crèches depicting the birth of Jesus. It weakens our hand when we protest this intrusion of Christian doctrine into public life.”¹⁶ He went on to write

The *mitzvah* is fulfilled when *Hannukiot* are lit on Jewish property...the American Constitution provides for the separation of “church and state.” The relative comfort of Jews in the United States has resulted in part from the application of that principle...we have had considerable success in recent decades in preventing Christmas displays, crèches especially, on public property and in preventing religious assemblies and prayer-periods in public schools...When Jews seek to violate the Constitutional principle we weaken our hand in our ongoing efforts to prevent Christian violations.¹⁷

Several weeks later, Rebbe Schneerson responded, emphasizing that

where Chanukah Lamps were kindled publicly, the results have been most gratifying in terms of spreading the light of the Torah and Mitzvoth, and reaching out to Jews who *could not otherwise* have been reached...It was precisely through kindling the Chanukah Lamp in public places, during “ordinary” weekdays, with dignity and pride, that it was brought home to them that true Judaism is practiced daily...With regard to the “Constitutional” question,...I am fully certain that none of all those who participated in, or witnessed, the kindling of a Chanukah Lamp in a public place (and in all cases

¹⁴ *Haaretz*, 30 March, 2010.

¹⁵ Irving Howe, *The End of Jewish Secularism* (New York: Hunter College, 1995).

¹⁶ Correspondence between Rabbi Joseph Glaser and the Rebbe Menachem Schneerson concerning menorahs. Cited in Sarna and Dalin, 291.

¹⁷ *Ibid.*, 291-292.

permission was *readily* granted by the authorities) felt that his or her loyalty to the Constitution of the USA had been weakened or compromised thereby...[I] hope that you will use your influence to put an end to the *destructive* fight against State aid to parochial schools...so as to enable Jewish Day Schools and Yeshivoth [to] open their doors to the maximum number of students... I hope and pray that *everyone* who has a voice and influence in Jewish community affairs and is concerned for the preservation of Jews and Judaism in this country no less than for the preservation of the American way, will indeed act in the spirit of basic principle of “this Nation *under G-d* and government of the people, by the people, and *for* the people,” including also the Jewish people, and do *everything* possible for the good of every Jewish child, that he and she remain Jewish, marry a Jew, and live Jewishly; and, of course, a good Jew is also a good American.¹⁸

Such things were said bluntly. Not only should public space be open to the symbols of Judaism, displaying their presence and their belonging to the nation loudly and clearly, but beyond that, the State itself should provide financial support for all private religious schools, abandoning the secularist strategy implemented by the Supreme Court. Schneerson’s assertions stand in opposition to the French model, which promotes absolute separation—a model supported by American State Jews and advocated by members of the American Jewish Congress such as Leo Pfeffer, the “great guru,” who retired in the early 1980s after playing an essential role in the battle in favor of a “naked public space.”¹⁹ To the contrary, Schneerson claimed that the very survival of Judaism depended upon its public recognition. For him, the Jews were an integral part of an American nation open to all religions and they should not hide in fear of antisemitism: the government for the people must not ignore the diversity of its religious values. For the Rebbe, “if the Constitution prohibits school prayer, then the Constitution ought to be changed.”²⁰ Although he was the exact opposite of Louis Brandeis, Rebbe Schneerson affirmed just as much as Brandeis that a “good” Jew should be, by definition, a “good” American, such that his faith along with his devotion to Zionism participate equally in the formation of his identity. As with Brandeis—poles apart from the Lubavitcher Rebbe in every other way—Schneerson believed that “loyalty” to Judaism in all its forms could

¹⁸ *Ibid.*, 294.

¹⁹ Gregg Ivers, *To Build a Wall. American Jews and the Separation of Church and State* (Charlottesville: University of Virginia Press, 193-194).

²⁰ Jan Feldman, *Lubavitchers as Citizens: A Paradox of Liberal Democracy* (Ithaca: Cornell University Press, 2003), 46.

only reinforce loyalty to the American Constitution and to the American nation itself. However Brandeis hoped contrary to the Rebbe, for fidelity to the “wall of separation,” whereas Schneerson—just as loyal to the American nation—intended to reintroduce religion into the heart of the public sphere.

In 1989, in the essential decision of *Allegheny County v. Greater Pittsburgh*, the Supreme Court ruled that a public menorah-lighting ceremony in Pittsburgh was legitimate, since it stood only in recognition of cultural diversity while the crèche constituted an explicitly religious symbol that could not be accepted. In this spirit, the menorah could be found in public spaces as a secular symbol of the diversity of cultures in America. For Justice Henry Blackmun, “both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society.” Justice Sandra O’Connor added that

The Christmas tree, whatever its origins, is widely viewed today as a secular symbol of the Christmas holiday. Although there may be certain secular aspects to Chanukah, it is primarily a religious holiday and the menorah its central religious symbol and ritual object. By including the menorah with the tree, however, and with the sign saluting liberty, the city conveyed a message of pluralism and freedom of belief during the holiday season, which, in this particular physical setting, could not be interpreted by a reasonable observer as an endorsement of Judaism or Christianity or disapproval of alternative belief.²¹

The Lubavitchers were satisfied with this interpretation for—in the spirit of Rebbe Schneerson—the menorah did indeed assume a political dimension as much as a spiritual one. Notwithstanding opposition coming from major Jewish organizations, public menorah lightings have become commonplace despite legislation that remains uncertain.²²

Two years later, the controversy was reignited in Cincinnati when the vice president of the COLPA association that structured the world of Chabad cited the

²¹ *Allegheny County v. Greater Pittsburgh*, 492 US 173 (1989). See Steven Goldberg, *Bleached Faith. The Tragic Cost when Religion is Forced into the Public Square* (Stanford: Stanford University Press, 2004), ch. 4. See also, Jerome Mintz, *Hassidic People. A Place in the New World* (Cambridge: Harvard University Press, 1992), ch. 17.

²² Nathaniel Popper, “Hanukkah Menorahs Light Path for Nativity Displays,” *Forward*, 23 December, 2005.

Allegheny County v. Greater Pittsburgh ruling in order to delight in the fact that at the same moment others are celebrating Christian holidays

A menorah display in front of a city hall tells the residents of an American city that there are various religious holidays celebrated in December and that America is a country where Jews are welcome and are first-class citizens...Banishing menorahs from public places means derogating religion and denying to Jews the equal access to public forums.

He ironically derided the rearguard battles of the Jewish secularist organizations. The director of YIVO responded holding that

these menorahs have contributed to the most widespread breach of the 'wall of separation' between religion and affairs of state that guarantees Americans of all faiths—not the least Jews—complete religious freedom...the public menorahs reflect the political philosophy of a rebbe who...advocates prayer in the public school system...The Lubavitchers' aggressive menorah-lighting campaign has not been without widespread, and potentially dangerous, religio-political consequences...the Catholic League, taking note of the precedent set by the erection of a huge menorah in New York's Central Park, successfully petitioned for the re-institution of a public nativity scene in the park—a display that had been proscribed for 60 years.

In his view, this “religious exhibitionism” may elicit hostile reactions toward Jews who owe their safety and welfare to the constitutional principal of the wall of separation.²³

The Lubavitchers' success was part of a general religious revival among churches seeking more radical “accommodation.” The profound evangelical renewal fueled by the television campaigns of Jerry Falwell on behalf of the Moral Majority, Robert Billings, who directed the National Christian Coalition, Robert Grant who headed the Christian Voice, and Ed McAteer who led Religious Roundtable, lent considerable weight to the Christian Right beginning in the 1980s. These evangelical circles mobilized into a veritable social movement. Their success speaks more than ever to the remarkable political organization that amplified American society's deep religious values, values that favor, according to polls, maintaining prayer in Congress, reestablishing it in public schools, having moments of silence in schools or, again, installing religious symbols in

²³ These two citations may be found in Sarna and Dalin, 297-300.

public space.²⁴ The religious revival's stated ambition involved turning its back to the Enlightenment, calling into question all aspects of modernism in favor of a fundamentalist return to Scripture and to puritanical origins as a bulwark against the uncertainties and anxieties that give rise to scientific questioning.²⁵ More than ever before, the Christian Right pushed for polarization, rejected all forms of secularization in school, objected to any pedagogy devoid of religious goals, and ruthlessly interrogated the great secularizing decisions made in the 1960s.

A new culture war was unleashed, one that fed on the religious dispute that remained the issue able to incite the most passion. In 1986, Patrick Buchanan, for example, vigorously attacked the Supreme Court for depriving schools of both the Bible and prayer in the 1960s, thereby dealing the fatal blow to the "Godless nation."²⁶ Under the slogan "America is back Again," the powerful, prophetic, Protestant movement made its goal the re-energizing of society, calling upon America to remember its Christian nature, its original culture upon which legitimate nationalism is based. Thus, the question of prayer in public school did not vanish despite the decisions made by what would henceforth become a traditional Supreme Court. In 1998, a constitutional amendment was once again proposed in order to legitimize the presence of religion in the school system. While it failed to receive the majority vote it required, the proposal reemerged incessantly as the issue of prayer in school remained pregnant and enduring, a vital question for the future of society as a whole. The issue became a pretext for dramatic confrontations such as the murder, in December 1997, of three students in Kentucky killed when they recited prayers publically. The latent "culture war" dividing America was therefore shaped by the question of religion. Still today, "religious subjects remain much more prevalent and much more polarized than our history conflicts. More people fight over religion than over history, in short, because they have more to fight

²⁴ Ted Jelen and Clyde Wilcox, *Public Attitudes Toward Church and State* (Armonk: Sharpe, 1995). In 2004, only 36% of Americans approved the Supreme Court decision prohibiting prayer in school. In C. Wilcox and C. Larson, *Onward Christian Soldiers* (Boulder: Perseus, 2000), 178.

²⁵ Walter Capps, *The New Religious Right : Piety, Patriotism and Politics* (Columbia: University of South Carolina Press, 1990). Michael Lienesch, *Redeeming America : Piety and Politics in the New Christian Right* (Chapel Hill: University of North Carolina Press, 1993). Fritz Detwiler, *Standing on the Premises of God. The Christian Right's Fight to Redefine America's Public Schools*. (New York: New York University, 1999).

²⁶ Cited in Capps, 194.

about.”²⁷ Religious renewal thus threatened to “crack” the wall of separation.²⁸ Facing the Communist threat, groups like the American Legion, Daughters of the American Revolution, and the Knights of Columbus—who are opposed to a literal interpretation of the First Amendment—resolutely reintroduced God into public space. At the same moment when American State Jews joined forces with the movement to profoundly secularize “the Christian Nation,” the legal decisions of *McCullum* and later *Abington* and *Engel* brought on a pervasive religious onslaught.

Already in the 1950s, the Fundamentalist movement succeeded in modifying the Pledge of Allegiance by adding “Under God.” This metaphor was originally found in Lincoln’s Gettysburg address and later echoed by President Truman, but it acquired its official character under Eisenhower. Thus, in 1954, Congress modified the Pledge by definitively introducing “Under God.”²⁹ President Reagan almost trivialized this expression by using it relentlessly in various speeches. In August 1984, he declared, “politics and morality are inseparable. And as morality’s foundation is religion, religion and politics are necessarily related. We need religion as a guide...If we ever forget that we’re one nation under God, then we will be one nation gone under.”³⁰ The Pledge of Allegiance “Under God” must, in his view, justify maintaining prayer in school as well as an educational policy designed to solidify patriotism, especially among new immigrants. Reagan’s presidency marked a turning point in the religious revival, personified by Jerry Falwell, one of the stars of the Christian Right. President Carter—a particularly active member of the Southern Baptist Church—showed himself openly to be a “born again Christian,” in his private life and personal commitments; Reagan accentuated the Christian revival to such an extent that there was a “marriage of Reagan and the Religious Right.”³¹ In the context of the Vietnam War, Watergate, moral disarray, and

²⁷ Jonathan Zimmerman, *Whose America? Culture Wars in the Public Schools* (Cambridge: Harvard University Press, 2005), 218.

²⁸ Camille Froidevaux, “L’Etat, le droit et la religion dans la société américaine,” in Philippe Raynaud and Elisabeth Zoller eds., *Le droit dans la culture américaine* (Paris: Panthéon, 2001), 142.

²⁹ Richard Ellis, *To the Flag: The Unlikely History of the Pledge of Allegiance* (Lawrence: University Press of Kansas, 2007), ch. 5.

³⁰ “Without God, there is a coarsening of the society. And without God, democracy will not and cannot long endure. If we ever forget that we’re one nation Under God, then we will be a nation gone under.” Ronald Reagan, Remarks at an Ecumenical Prayer Breakfast in Dallas, Texas August 23, 1984.

³¹ For a comparative study of Presidents Reagan and Carter’s return to Christianity, see Richard Hutcheson, Jr., *God in the White House. How Religion Has Changed the Modern Presidency* (New York:

the cultural revolution, religion returned forcefully to such an extent that it called into question the process of secularization. “It is time,” wrote Cynthia Dunbar, a zealot of the Christian Right, “the body of Christ in the United States was reminded of who we as a nation are...We are a Republic, one nation under God.” On the subject of *Holy Trinity Church v. The United States*, she harshly attacked the “liberal Supreme Court” as “the enemy” that “denigrate[s] our Christian heritage” and whose interpretation of the First Amendment is a “perversion” because it excludes prayer and Bible-reading in public schools. By imposing an allegiance to the State at the expense of God, the Court is responsible for the “decline of America” to the great delight of Satan.³² Evangelical preachers were on the front lines. They invaded television programs and from Billy Graham to Jerry Falwell, the nation witnessed the rapid resurgence of Christian Fundamentalism resulting in political activism from the Christian Right for whom Falwell is the symbol. In 1988, Pastors Jesse Jackson and Pat Robertson even ran for president of the United States in the name of Christian values. This same year, following Eisenhower’s introduction of “Under God” in 1954, the Republicans proposed that the Pledge of Allegiance be recited at the opening of each daily session of Congress. This was especially important since, as Speaker of the House Jim Wright suggested, “it is very important that all of us recognize that the Pledge of Allegiance to the flag is something intended to unite us...Patriotism knows no political party.” Deeply committed to President Eisenhower but even more so to Presidents Reagan and George W. Bush, the Christian Right continued to impose its values. After September 11, 2001, Presidents George W. Bush, Clinton, Carter, Ford as well as George H. W. Bush, recited the Pledge together at the National Cathedral in Washington as a patriotic symbol meant to unite all Americans.³³ Pat Robertson, one of the leading preachers of the Christian Right, then established Operation Supreme Court Freedom in the hopes of replacing Court justices with those sympathetic to his cause during the next nominations. He succeeded quickly

Macmillan, 1988), 3 and following as well as ch. 6. On Reagan’s “marriage”, see, 172 and following. See also, Richard Pierard, “Religion and the New Right in the 1980s,” in James Wood, Jr. ed., *Religion and the State. Essays in Honor of Leo Pfeffer* (Waco: Baylor University Press, 1985), 398 and following.

³² Cynthia Noland Dunbar, *One Nation Under God* (Oviedo, FL: Higher Life, 2008), xv, 16, 85, 91,110. To rectify the Supreme Court’s decisions, the author expresses a desire for more Justices like Antonin Scalia, who belongs to the Christian Right movement, to be nominated, p. 90.

³³ Ellis, ch. 7. The quotation from President Reagan can be found on p. 175, from Jim Wright, p 183. On the Fundamentalist moment around Reagan, see Garry Wills, *Under God: Religion and American Politics* (New York: Simon and Schuster, 1990), 144 and following.

as President Bush nominated Justices John Roberts and Samuel Alito, thereby extending a conservative strategy first applied by President Reagan during his own appointments.³⁴

In 2004, the Supreme Court justified the interpretation of the Pledge as a simple patriotic declaration. They ruled that “Under God” assumes nothing more than a deistic stance acceptable for everyone and not in violation of the Establishment Clause. This stemmed from a case made by a parent (who had never married), who refused to allow his daughter to recite the Pledge according to the terms of the 1954 reform, that is, with the addition of “Under God.” While the Court decided that the father’s complaint was inadmissible, Justice Rehnquist believed that the Pledge thus amended would preserve its secular dimension and does not go against the Establishment Clause. Justices Ruth Ginsburg and Stephen Breyer were part of the majority decision with Justices Stevens, Kennedy and David Souter. Justice O’Connor endorsed this decision by arguing that despite the sectarian vision of those who would suggest this change to the Pledge, it symbolizes only the patriotism that all Americans share. She believed that “Under God” carried no religious significance and that even if it stands as amended, it may only be considered as “ceremonial deism” that acknowledges the country’s religious traditions without legitimizing one particular religion or even religion itself. From then on, the Pledge remained simply a way to express patriotic sentiment. In the same sense, the two American State Jews—Ginsburg and Breyer—in some ways extended the patriotic vision of Frankfurter without becoming advocates for religion as such. They therefore endorsed Justice Stevens who presented the majority position of the Court, arguing that, “the Pledge of Allegiance evolved as a common public acknowledgement of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles... the flag [is] a symbol of our Nation’s indivisibility and commitment to the concept of liberty.”³⁵ In this way, one could argue that this “ceremonial deism” remained—contrary to the intentions of Presidents Eisenhower or Reagan—deprived of any religious dimension. For Presidents Bush or Reagan, “national religious identity merges with national civic identity... ‘Under God’ does not result in

³⁴ Wilcox and Larson, 117.

³⁵ *Elk Grove Unified School District et al v. Newdow et al* 542 U.S. 1 (2004)

ceremonial deism.” but of civil religion as Robert Bellah defined it by underestimating its religious character.³⁶ Indeed, this civil identity remained deeply anchored in religion. Furthermore, proponents of extreme secularization in the manner of Frankfurter—whether or not they are Jewish—to this day cannot recognize themselves in these ceremonies despite their tremendous patriotism. Contrary to the Court’s decision and the arguments advanced by Justice O’Conner as well as the State Jews Breyer and Ginsburg, such ceremonies have lost their deist content in order to conform with the spirit of these religious times, to the great satisfaction of all those who have joined the religious revival, including the Hasidim and a number of rabbis. We could certainly argue that the institutional separation between Church and State remains unalterable, that religion only spreads within civil society to the extent that civil religion enables this merger.³⁷ Nonetheless, the religious revival calls into question certain crucial aspects of the “wall of separation,” in some ways shaking the foundations of the State’s autonomy.

Following a policy of “absolutist” separation came a strategy of accommodation that challenges “sterile” confrontation. Above all, the constitutional provision of free exercise was taken into ever-greater consideration, holding the Establishment clause as protection for freedom of opinion, including religious values. Today, “the phrase ‘separation of Church and state’ is judged to be not only sterile but without constitutional justification when applied to the American tradition of Church and state.”³⁸ In this sense, “dichotomies of public-private, religious-secular, and church-state are becoming blurred; church-state tension proliferates in the growing ambiguity.”³⁹ For many scholars of Church-State relations in the United States, the “assault” waged against the “wall of separation” rests on the radical change that challenges the famous test posed in 1971 by *Lemon v Kurtzman*. Here, the Court decided that in order to be considered constitutional, a text must fall under secular legislation, that its essential or secondary effect must not favor or hinder religion, and that it must

³⁶ Wilcox and Larson, 218.

³⁷ Hutcheson Jr., 27-31.

³⁸ James Wood, Jr, “Editorial. Separation Vis-à-Vis Accommodation: A New Direction in American Church-State Relations?” *Journal of Church and State* 31 (1989): 198-199.

³⁹ Thomas Robbins, “The Intensification of Church-State Conflict in the United States,” *Social Compass*, 40.4 (1993): 519.

not lead to excessive government entanglement with religion.⁴⁰ Henceforth, it was only in the name of State neutrality toward religion that certain judges intended to conduct their “assault.” This change in perspective invoked by the tenants of the religious revival (with whom certain Jewish groups associated), was grounded in the legitimacy of cultural pluralism. It threatened head-on the previous policy of secularization and the extreme separation of State and Church.⁴¹

The ruling for *Tinker v Des Moines* in 1969, drafted by the State Jew A. Fortas, thus protected the wearing of signs—religious or otherwise—for students who were expressing, “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners... state-operated schools may not be enclaves of totalitarianism... Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights... students are entitled to freedom of expression of their views.”⁴² This accommodating decision made by a State Jew was inspired by the strong words of an opinion expounded by Justice McReynolds who argued in an earlier decision (*Meyer v Nebraska*) that the State does not have the right to take action within the public school system with the goal to “foster a homogeneous people” as was the case in Sparta with the aim of molding citizens. In *Lynch v Donnelly* (1984), the Court also contended that installing a nativity scene in public space is constitutional. The judgment argued that, “The Constitution does not require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any... such hostility would bring us into ‘war with our national tradition as embodied in the First Amendment’s guaranty of the free exercise of religion.’”⁴³ In the same vein, the

⁴⁰ There is considerable literature on this landmark case. In French, see Elisabeth Zoller, *Grands arrêts de la Cour suprême des Etats Unis* (Paris: Presses Universitaire de France, 2000), 405.

⁴¹ See Erwin Chemerinsky, “The Need for a Wall Separating Church and State: Why the Establishment Clause Is So Important for Jews and Why Jews Are So Important for the Establishment Clause?” in Alan Mittleman ed., *Religion as a Public Good* (Lanham: Rowman and Littlefield, 2003), 100 and following. Chemerinsky asserts that, “the wall that separates Church and state is under assault,” p 98. He implores the Jews to “defend and fight” against this “great assault” that threatens the Establishment Clause which “Jews have played...a crucial role in enforcing...for decades.” p 109.

⁴² *Tinker v. Des Moines* 393 U.S. 503 (1969)

⁴³ *Lynch v. Donnelly* (1984) 465 U.S. 668 (1984) For a lengthy commentary on this decision, see Winnifred Fallers Sullivan, *Paying the Words Extra. Religious Discourse in the Supreme Court of the United States* (Cambridge: Harvard University Press, 1984). The author curiously argues that the Court’s majority position composed by Justice Burger contains a Durkheimian dimension stemming from a

Court—in a very permissive manner—addressed the question of listening to sacred, mostly Christian music on school premises.⁴⁴ The question of the moment of silence also gave rise to a rather open jurisprudence. In *Wallace v. Jaffree* in 1985, Justice O'Connor emphasized that a number of states authorize a moment of silent meditation at the start of classes in public schools. She deemed, contrary to *Engel*, that silence itself does not constitute prayer and a student who participates in this moment of silence would in no way compromise his/her personal beliefs. In her view, concurring with Justice Lynch, this practice is compatible with a secular perspective since, “a moment of silence...[may] permit prayer, meditation, and reflection.” For his part, Justice Rehnquist declared that, “No law prevents a student who is so inclined from praying silently in public schools.” For him, “The Court does not hold that the Establishment Clause is so hostile to religion that it precludes the States from affording schoolchildren an opportunity for voluntary silent prayer; nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion.”⁴⁵ He continued, “The ‘wall of separation between church and State’ is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.” Justice Rehnquist relied on a judgment set forth by Judge A. Goldberg in *Abington School District v. Schempp*. Adopting the minority position, he wrote that who “wisely” warned the Court that, “The Court today has ignored the wise admonition of Justice Goldberg that ‘the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.’” In the same vein, Justice Burger also cited Arthur Goldberg’s contribution and considered that “hostility to the religious...is not only not compelled by the Constitution, but, it seems to me...prohibited by it.”⁴⁶

notion of accommodation that respects the foundational values of national unity. Being that society itself is akin to God in this view, the crèches should be authorized since they express the dominant values and feelings of the society. He protests against this “stupefying” theory, foreign to the Founding Fathers. pp 81 and 93.

⁴⁴ Kent Greenawalt, *Does God Belong in Public Schools?* (Princeton: Princeton University Press, 2005), 50-55.

⁴⁵ *Wallace v. Jaffree*, 472 U.S. 38 (1985). On the issue of silence, see Derek Davis, “Editorial: Moments of Silence in America’s Public Schools: Constitutional and Ethical Considerations,” *Journal of Church and State* 45 (2003). On Chief Justice Rehnquist’s role, see Derek Davis, *Original Intent: Chief Justice Rehnquist and the Course of American Church/State Relations* (Buffalo: Prometheus Books, 1990).

⁴⁶ *Ibid.*

Justice Arthur Goldberg's position in *Schempp* thus heralds a turning point and marks a considerable change in the attitude of certain American State Jews, the Jewish members of the Supreme Court. His opinion also represents more than just the minority position among them; it represents that of a Justice with little experience on the bench whose career was not greatly identified with this high judicial institution. Goldberg, like Fortas, therefore turned away somewhat from the absolute secularist position explicitly defended by the lawyer Leo Pfeffer, the American Jewish Committee, as well as the Synagogue Council of America. To the contrary, Pfeffer and these organizations endorsed the radical position of several groups such as the American Ethical Union, aligning with the secularist vision of Felix Frankfurter. If Justice Goldberg agreed with the Court's position prohibiting prayer and Bible reading in public schools, if he admitted that, "the attitude of government toward religion must be one of neutrality," he nonetheless acknowledged that

untutored devotion to the concept of neutrality can lead to...a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God...Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so...The examples could readily be multiplied, for both the required and the permissible accommodations between state and church frame the relation as one free of hostility or favor and productive of religious and political harmony.⁴⁷

This underlines the fact that in the 1980s, "the wall of separation between, Church and State is no longer solid in the United States; it has not yet collapsed, but repairs are needed"⁴⁸. Little by little, court decisions re-authorized Bible reading in schools. Others permitted religious groups to participate in extracurricular school activities and made State-funding of private schools possible. Justices Ruth Ginsburg and J. Breyer,

⁴⁷ *Abington School District. V. Schempp*, 374 U.S. 203 (1963). It is notable that it was on behalf of "accommodation" that the Court accepted that members of the Amish community did not enroll in secondary public school given the qualities of their own teaching that fulfills the legal criteria. The end of the Court decision elaborates that " The States have had a long history of amicable and effective relationships with church-sponsored schools" , *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

⁴⁸ Derek Davis, "Rebuilding the Wall: Thoughts on Religion and the Supreme Court Under the Clinton Administration," *Journal of Church and State* 35 (1993): 13. Richard Morgan writes of the "decline of the secular religion" *The Supreme Court and Religion* (Ann Arbor: University of Michigan Press, 1972), ch. 6.

American State Jews loyal to the secularist heritage of Felix Frankfurter, joined almost permanently the Court minority hoping in vain to maintain a strong vision of the Establishment Clause. The majority, on the other hand, under the authorship of Justice J. Kennedy, considered that funding from a university to student members of religious organization was not constrained by the concept of State neutrality. The minority justices lamented the ruling As Justice Souter summarized the minority position, “The Court today, for the first time, approves direct funding of core religious activities by an arm of the State.”⁴⁹ Similarly, in 2002, the Court deemed that indirect state funding to students was constitutional. This means that State-issued checks enabled students to choose their institutions themselves, including religious institutions. Today, religion has regained its legitimacy in American public space.

Nevertheless, the reading of prayers in schools remains prohibited, an insurmountable barrier to religious accommodation, despite the relentless efforts of evangelicals, especially under Reagan’s presidency, to reintroduce it.⁵⁰ In 1992, the key decision of *Lee v. Weisman* confirmed this prohibition even though many hoped it would enable a radical rethinking of the separation and once again allow prayer. The case pertained to a prayer recited by a rabbi during a graduation ceremony that came at the request of public school officials. Attendance was not required and the content of the blessing did not refer to any specific religion. Rabbi Gutterman’s prayer follows:

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You...

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all may seek justice, we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America, we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it...

⁴⁹ *Rosenberger v. University of Virginia* U.S (1995).

⁵⁰ Hutscheson Jr, 191 and following.

We give thanks to You, Lord, for keeping us alive, sustaining us, and allowing us to reach this special, happy occasion.

AMEN

Four justices were in favor of authorizing the prayer. Another four, however, invoked the Establishment Clause in order to prohibit it and support the conclusions of Justice Kennedy who did not wish to align with those who were opposed to prayer but who sought other arguments preventing it. Consequently, he composed the majority opinion, highlighting the coercive dimension in the undeniable obligation that forces students to maintain a respectful silence during these blessings, which he deemed, “unconstitutional...The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.” Kennedy refers again to the findings of Justice A. Goldberg saying that, “a relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.” Like Goldberg, Kennedy rejected all “hostile behavior” toward religion but he nevertheless accepted the demand put forth on behalf of the young Deborah Weisman against Rabbi Gutterman’s benediction.⁵¹ Following this same logic, Justices Ginsburg and Breyer joined him in the majority opinion when deciding to prohibit prayer at football games.⁵²

Other Court decisions also helped hinder any extreme reconsideration of the separation of Church and State. Justices Ruth Ginsburg and J. Breyer, following the precedents of *Everson* and *Schempp*, sympathized with the Court’s decision to prohibit a representation of the Ten Commandments in public spaces for they are “a central point of reference in the religious and moral history of Jews and Christians. They proclaim the existence of a monotheistic god (no other gods)...We are centuries away from the St. Bartholomew’s Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable. This is no time to deny the prudence of understanding the Establishment Clause to require

⁵¹ *Lee v. Weisman*, 505 U.S 577. (1992). This decision contains the prayer cited above as well as Justice Kennedy’s opinion. The prohibition of prayer remains essential.

⁵² *Santa Fe Independent School District v. Doe*, 530 U.S 290 (2000).See Greenawalt, 50 and following.

the Government to stay neutral on religious belief, which is reserved for the conscience of the individual”.⁵³

In other circumstances, following the Majority opinion of the Court, Justice Breyer argued that,

It is well recognized that Establishment Clause does not allow the government to compel religious practices, to show favoritism among sects or between religion and non-religion, or to promote religion. Yet at the same time, given the beliefs of most Americans, an absolutist approach [as the French practice it] that would purge all religious references from the public sphere could well promote the very kind of social conflict that the Establishment Clause seeks to avoid. Thus, I thought, the Establishment Clause cannot *automatically* forbid every public display of the Ten Commandments, despite the religious nature of its text...The context of the Texas display differed significantly. A private civic (and primarily secular) organization had placed the tablets on the Capitol grounds as part of the organization’s efforts to combat juvenile delinquency...the public visiting the Capitol grounds had long considered the tablets’ religious message as a secondary part of a broader moral and historical message reflecting a cultural heritage”.⁵⁴

As we have noted, the legal modifications that Justices Goldberg and Fortas desired were sometimes echoed in Justice Breyer’s positions, even if the latter, like Justice Ginsburg, more often than not remained attached to the spirit of Frankfurter and a strict interpretation of the Establishment Clause, which continues to be called into question to this day. A last exemple: in her decision, *Hastings College of the Law*, 28 June 2012, judge Ruth Ginsburg wrote that this public college could correctly opposed any financial help to a Christian student organization excluding any non-Christians or gays students claiming that otherwise this group could be lead in its study of the Bible by someone who don’t believe in it. For Ginsburg, “It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers”⁵⁵. In her views, Hastings College’s decision seems to be “reasonable”. Judges Stephen Breyer, John Stevens, Anthony Kennedy and Sonia Sotomator agreed. Finally, in a very recent

⁵³ *McCreary County, Kentucky et al. v. American Civil Liberties Union of Kentucky* (2005).

⁵⁴ Stephen Breyer, *Active Liberty: Interpretating Our Democratic Constitution* (New York:Knopf,2005),133-123

⁵⁵ *CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW*, aka HASTINGS CHRISTIAN FELLOWSHIP v. *MARTINEZ* et al. 562 U.S. 28 June 2010.

decision written by judge Kennedy, 2 april 2012, the Court said that jail strip searches is a legitimate procedure; in its dissent joined by justice Ginsburg, justice Kagan and justice Sotomayor, justice Breyer disagreed, seeing jail strip searches as a serious invasion of a person's privacy, "an affront to human dignity", the three Jewish judges being on the same side with justice Sotomayor in their defense of a rational public realm⁵⁶.

Moreover, there are considerable internal divisions in the Jewish world as we witness a spirited offensive from certain associations participating in the general movement toward religious revival initially fueled by the Christian Right. After all, as Jerold Auerbach argues, if the United States remains a fundamentally Christian culture, wherein Christianity shapes everyday life down to the calendar and language, then "Jews should have nothing to fear from being themselves, in public and in private." Why should it be deemed "too risky" for Jews to appear openly in public sharing a specific collective identity?⁵⁷ Taking Justice Douglas at his word when he upheld, in *Zorach v. Clauson* that, "we are a religious people," why should Jews be afraid to recognize this? Of course, Irving Kristol seems to fear that a society more open to religion would provoke a return to antisemitism⁵⁸ whereas Abraham Foxman, on behalf of the Anti-Defamation League and taking his inspiration from Tocqueville, continues to see the "wall of separation" as protective. For, in his view, the presence of religion in public space would necessarily decrease pluralism and would "marginalize" the Jews.⁵⁹ Others, like Deborah Dash Moore, intend to limit Judaism's presence only to the private sphere,⁶⁰ implicitly hoping, like Cynthia Ozick before her, that the *heder* will thrive without calling into question the "wall of separation."⁶¹ But Milton Himmelfarb, on the other hand, harshly denounced the consequences of such an approach,⁶² similar to David Novak who considered that "the strict separation of religion from public life

⁵⁶ *FLORENCE v. BOARD OF CHOSEN FREEHOLDERS OF COUNTY OF BURLINGTON ET AL.* 2 April 2012.

⁵⁷ Quoted in David Dalin, ed., *American Jews and the Separationist Faith* (Lanham: Ethics and Public Policy Center. National Book Network, 1993), 17-18. See also Jerold Auerbach, *Rabbis and Lawyers. The Journey from Torah to Constitution*, Ibid. XVII-XIX.

⁵⁸ *Idem.*, 164.

⁵⁹ *Idem.*, 47-48.

⁶⁰ *Idem.*, 85.

⁶¹ *Idem.*, 99.

⁶² *Idem.*, 67.

has not been good” for the Jews.⁶³ Alternatively, Noah Feldman, a distinguished professor from Harvard Law School, distanced himself from the fundamentally secularist position of his predecessor, Felix Frankfurter, even as he remained in favor of the separation of Church and State. According to Feldman,

When Jews were almost the only non-Christians in the United States, apart from a handful of scattered atheists, the [secularist] concern arguably made some sense...Minimizing public religious symbols—in effect, minimizing public Christianity—seemed on the surface like a plausible method for facilitating Jewish inclusion...But today, the increasing presence of other non-Christian religious minorities, and an attendant atmosphere of religious multiculturalism, means that public manifestations of religion...are becoming increasingly pluralistic and inclusive.

President Bush’s speech commemorating the victims of September 11th was delivered on September 14th, 2001 as part of the National Day of Prayer and Remembrance. Speaking before members of his cabinet, Congress, and the Supreme Court, he uttered these words, “The Lord of life holds all who die and all who mourn...May He Bless the souls of the departed. May He comfort our own. And may He always guide our country.”⁶⁴ In the oh-so-Protestant context of the Episcopal Washington National Cathedral, the dean of the cathedral spoke next followed by an African-American reverend, Billy Graham, a rabbi, and an imam. This return to religious visibility was also rooted in the rampant march toward multiculturalism which legitimates the most diverse cultures and also reinforces, in the name of affirmative action, how profoundly unacceptable the Christian Right’s perspective had become: a perspective that saw the source of the disunity threatening American society in multiculturalism and relativism.⁶⁵ This new multiculturalism is accompanied, to this day, by a desire for recognition emanating from a host of religious and ethnic groups anxious to appear in broad daylight under their own collective identities. The full-scale eruption of a return to roots theorized by the Jewish sociologist Horace Kallen, which became the leitmotif of cultural pluralist claims, caused a distancing from universalist ideals. In this sense, today’s multiculturalist America challenges the predominance of the Christian nation, leads to

⁶³ *Idem.*, 95.

⁶⁴ Feldman, 241.

⁶⁵ Detwiler, ch. 9.

an explosion of the most distinct religious identities, and at the same time, weakens the earlier secularist option for Jews. Rejected by “white” America and not affected by affirmative action, “white ethnics” for whom the New Deal project was created,⁶⁶ Jews were likely from that point on to turn toward a defensive “ethnic” politics. Whether reform or orthodox, many rose up against a purely secular vision of society by favoring the rapid development of a network of private schools likely to transmit Jewish identity and benefit from a vast system of tax deductions—designed during Johnson’s presidency—for nonprofit organizations.⁶⁷

Various Hasidic communities found themselves at the forefront of the Court’s legal controversy, which remained, according to them, unfavorable to the free expression of religion in public space. The Supreme Court decision *Kiryas Joel v. Grumet* in 1994, illustrates the extent of the disagreements still coursing through the American Jewish world. This time, it was again the American State Jews who contributed to blocking the (non-Lubavitch) Satmar Hasidim. In the village of Kiryas Joel, a religious enclave, the Satmar sent their children to private schools where they spoke Yiddish, boys and girls were separated, and teaching was based on the Torah. They wished to place handicapped children from their community into a public school adapted to their disabilities. However, they were stifled by the absence of sex separation and their own linguistic practices. They also risked being bullied for their clothing, their appearance, and their customs, all while finding themselves stigmatized by their own community for having acquired knowledge relevant to a secularized world.⁶⁸ In this public school, the children would experience “the panic, fear and trauma [caused by] leaving their own community and being with people whose ways were so different.”⁶⁹ Therefore, the Satmar intended to create a separate public school reserved for children with disabilities who would benefit, as with all schools of this type, from public aid. In agreement with New York State Governor Mario Cuomo, the State Assembly accepted that the village, recognized as a separate entity despite its homogeneous population,

⁶⁶ Nathan Glazer was, however, one of the first to denounce affirmative action. *Affirmative discrimination: Ethnic inequality and Public Policy* (New York: Basic Books, 1975).

⁶⁷ Marc Dollinger, “‘A Proper Blessing?’: The Jew and the American Public Square,” in Mittleman.

⁶⁸ Jerome Mintz, *Hassidic People: A Place in the New World* (Cambridge: Harvard College, 2004), ch. 26. The author sheds light on the strong internal disagreements among Hasidim.

⁶⁹ *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2485 (1994)

could create its own public school district. It would be a Satmar school even though secular subjects would be taught there, boys and girls would not be separated, prayer books would remain absent from the premises, and the school would close during secular holidays. The New York State School Board Association as well as several of the village's citizen and some dissident Jews filed a complaint before the Supreme Court of Albany County, finding that this measure was unconstitutional. The Court of Appeals, in the same way, believed that "the statute created a 'symbolic union of church and state'" that was "likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval' of their own." The Supreme Court majority ruled similarly in 1994, through conclusions drawn by Justice Souter. The secular majority saw in this decision a lack of "neutrality," that New York State "violate[d] the Establishment Clause," concluding that "accommodation is not a principle without limits." For the majority, "government should not prefer one religion to another, or religion to irreligion." The statute establishing such a school results in "religious favoritism," and "therefore crosses the line from permissible accommodation to impermissible establishment," which violates the logic of the First Amendment.⁷⁰

Justice Ruth Ginsburg joined the majority decision along with a supplementary concurrence written by Justice Stevens. They emphasized that, "The isolation of these children, ... increased the likelihood that they would remain within the fold, faithful adherents of their parents' religious faith...the State provided official support to cement the attachment of young adherents to a particular faith." Agreeing with Justice Souter, this decision rejects all forms of segregation and isolation. In so doing, Justice Ginsburg remains loyal to the secularist perspective of the State Jews and adopts a role favoring the American Jewish Congress, the American Jewish Committee, and the Anti-Defamation League, who were already active in these matters since *Everson*, similar to several non-Jewish organizations who advocated in favor of the separation of Church from State. At the same time, she set herself—along with the majority of the Court—against the Hasidim who were supported by Agudath Israel as well as other orthodox Jewish groups, the New York Catholic Church, and various Christian organizations.

⁷⁰ *Idem.*

These groups formed an alliance sealed around the defense of menorahs and other religious symbols in public space.

This landmark decision generated a considerable amount of literature. Certain commentators, frequently evoking notable political theorists like Carole Pateman or John Rawls, supported the Court's position, which was hostile to the creation of non-democratic "enclaves" that would tear to pieces citizens' public space,⁷¹ a perspective that is incompatible with the traditional notion of *dina d'malkhuta dina*, respecting the law of the land.⁷² Others emphasized the ambiguity of the Court's majority position concerning its conception of the neutrality of and equality among religions. They questioned the exact meaning of the theory of religious "fusion," holding that the statute was conferred to the people, to citizens who happen to share a certain religion, and not to a religious group. They note that unless the school was created for a particular religion rather than a religiously homogenous community who express themselves democratically, the statute remains constitutional.⁷³ Still others endeavored to reconcile hostility toward liberalism and conformity with democratic practices to which the Satmar subscribe.⁷⁴ This "American shtetl" is the paradoxical result of the application of liberal principles that authorize the creation of such communities, contrary to the "aggressive" secularist policy of the French.⁷⁵ These thinkers pointed out that such voluntary segregation is only a "partial exit," an acceptable form of "permeable sovereignty," a form of self-government compatible with maintaining strong ties to

⁷¹ Judith Lynn Failer, "The Draw and Drawbacks of religious Enclaves in a Constitutional democracy: Hasidic Public Schools in Kiryas Joel," *Indiana Law Journal* 72 (1996-1997): 71.

⁷² Martha Minow, "The Constitution of the Subgroup Question," *Indiana Law Journal* 1 (1995-1996): 5 and following.

⁷³ See Nomi Stolzenberg's important article that highlights these contradictions, "Board of Education of Kiryas Joel Village School District v. Grumet A Religious Group's Quest For Its Own Public School," *University of Southern California Law School Paper* 48 (2009). Most specialists on Church-State relations in the United States disagree with the Court's decision. See for example, Douglas Laycock's works or Michael McConnell, "The Church-State Game: A Symposium on Kiryas Joel," *First Things* 47 (November 1994).

⁷⁴ Jan Feldman, *Lubavitchers as Citizens: A Paradox of Liberal Democracy* (Ithaca: Cornell University Press, 2003), ch. 5. This remarkable book contains an interesting defense of the Hasidim based on, among others, the Kiryas Joel case. For the author, "Rawls does not provide a context in which Lubavitch can be understood." p 92. Nonetheless, she also critiques the works of Will Kymlicka, who is more open to multiculturalism. In her view, Kymlicka did not believe that the Hasidim would survive as a culture. "He would not be likely to validate the claim that Lubavitchers would suffer irreparable loss of freedom and identity if deprived of Hassidic culture, as long as alternative cultures were available to them," p 105.

⁷⁵ David Myers and Noami Stolzenberg, "An American Shtetl: Politics and Piety in Kiryas Joel," 12 and 15. On line Docstoc Messages.

exterior society and particularly with the diverse political parties with whom they foster clientelist relationships.⁷⁶ Such relationships are incompatible with a truly civil society of citizens oriented toward the public good. Because the Satmar are not at all concerned with the kind of collective deliberation crucial to a participatory democracy, the local sovereignty conferred upon them would negate the collective dimension of the national will. In this way, by adopting the expected Supreme Court decision, several observers who were loyal to the secularist line regretted that handicapped Satmar children would not be able to pursue their studies in normal public schools with teachers open to diverse cultures who are trained to work with such students without provoking either fear or panic. Such is the French solution, which avoids segregation at all costs, thereby adopting a logic that favors assimilation, “far from being the enemy of diversity.”⁷⁷

The *Kiryas Joel v. Grumet* decision implicitly challenges the strict territorial separation established by the Satmar, such a homogeneous enclave dedicated to the most rigorous version of Judaism that is constitutes an island cut off from global society. Nevertheless, in the end the public school specific to the Satmarim continues to operate to this day without disruption. This came about after the New York State Assembly, respecting the principal of neutrality, voted for a new statute authorizing each local community to establish their own school district, thereby enabling the Satmarim to keep their territorial “enclave” alive, endowed with its own constitutionally-recognized public school.⁷⁸ In some ways, this real territorial autonomy evokes the symbolic autonomy shaped by the *eruv*, a fictive territory determined by wires, cables, ribbons, with the help of streets, rivers, roads, and railways that isolates the Jews on Shabbat in order to enable them to carry their children, food, bags, or books. This separation facilitates women’s participation in the shabbat ceremonies, as they bear the main responsibilities for these tasks. The use of the *eruv* is based on a rabbinic law dating back to the second

⁷⁶ Abner Greene, “Kiryas Joel and Two Mistakes about Equality,” *Columbia Law Review* 96 (January 1996): 8 and following. For a vigorous critique of these concepts applied to the Satmar case, see Ira Lupu, “Uncovering the Village of Kiryas Joel,” *Columbia Law Review* 96 (1996): 104.

⁷⁷ Christopher Eisgruber, “The Constitutional Value of Assimilation,” *Columbia Law Review* 96 (January 1996): 103. Eisgruber critiques Green’s work as it states that, “government may draw political boundaries to facilitate the creation of segregated communities, including racially segregated communities,” p93. He refused to accept “the idea that ethnically homogeneous localities are desirable,” p99.

⁷⁸ Certain authors draw attention to the fundamentally political dimension of these votes, given that Governor Cuomo had established solid relationships with the Satmarim who then voted as a block in his favor.

century; the Mishna carefully lays out the process of its installation. It involves the explicit agreement of neighbors and city officials who receive a symbolic payment. To this day, *eruvim* can be found in large numbers in cities across the globe, from Australia to Great Britain, to Belgium, Germany, Italy, and especially in the United States and Canada. The expansion of these *eruvim* in the United States dates principally to the 1980s and 90s and their creation thus coincides with the general movement toward seeking accommodation between the State and religion as a way to challenge absolute secularization. They also emerge in the midst of the civil rights movement and demonstrate a willingness among Jews to appear in broad daylight, affirming their right to exist in the public sphere, and rejecting the confinement of Judaism to the private domain only. There are currently over 150 *eruvim* in the United States from Baltimore to Denver, Atlanta to Michigan, New Haven to Phoenix, Pittsburgh to Houston, Philadelphia to St. Louis, Seattle to Charleston, Chicago to Miami. There are dozens of them in New York alone from Queens to Manhattan, from Brooklyn to Staten Island. They form symbolic enclaves that facilitate sociability and interaction, as much as they function as a rejection of anonymity and urban individualism. Their existence serves as a challenge against secularist rationalism but also as a protest against globalization by recreating an “imagined community” rooted in the distant past, a nostalgic collective identity which rejects the centralization of the nation-State as much as the homogenization of societies.⁷⁹ In this way, the *eruv* is an example of the attempt to prevent the uprooting and assimilation that are an inherent part of diaspora life.

An eminently pluralistic society open to multiculturalism during these years of triumphant return to identity, including religious identity, Americans generally considered the rapid growth of *eruvim* to be compatible with their values and their conception of public space, all the more so when the highest authorities in the nation recognized their legitimacy. Thus, in 1990, the former President Bush wrote:

⁷⁹ S. Westwood and J. Williams, *Imagining Cities* (London: Routledge, 1997). Peter Vincent and Barney Warft, “Eruvim: Talmudic places in a postmodern world,” *Transactions of the Institute of British Geographers* 27 (2002).

I am pleased to send greetings to Congregation Keshet Israel and to the Orthodox Jewish Community in Washington as you celebrate the inauguration of the first *eruv* in the District of Columbia.

The construction of this *eruv* is particularly significant not only because it marks the growth of the Orthodox Jewish Community in Washington but also because this city is our nation's Capital. Indeed, there is a long tradition linking the establishment of *eruvim* with the secular authorities in the great political centers where Jewish communities have lived.

In the words of a responsa of Rabbi Moses Sofer: "Bless the Lord, God of Israel, who has inclined the hearts of kings, rulers, and officers – under whose sovereign jurisdiction we, the Jewish people find protection – to grant permission to us to keep our faith in general, and specifically to establish *eruvim* in their thoroughfares, even on streets where the most important members of the government themselves live . . . in this city, there are places where we need to install a number of objects in order to create an *eruv* and we have not hidden our work, rather it is publicized and open to all without doubt and permission has been granted.

Now you have built this *eruv* in Washington, and the territory it covers includes the Capitol, the White House, the Supreme Court, and many other Federal buildings. By permitting Jewish families to spend more time together on the Sabbath, it will enable them to enjoy the Sabbath more and promote traditional family values, and it will lead to a fuller and better life for the entire Jewish community in Washington. I look upon this work as a favorable endeavor.

God bless you.⁸⁰

In the heart of Washington, encircling the highest institutions—including the Supreme Court where the American State Jews are asked to examine critically this territorialization of Judaism—the *eruv* thus constitutes a "positive contribution" to the American nation. Today, Chicago's *eruv* surrounds President Obama's private residence. This serves to underscore how familiar, banal, how integrated into the urban landscape the *eruv's* presence has become, as if it were accepted by everyone. In the United States, a large number of *eruvim* can be found in nearly every big city but also in

⁸⁰ See www.whbqt.info/UserFiles/eruv10192008.pdf . In this document one can find similar proclamations in favor of *eruvim* in their own cities signed by the mayors of Baltimore, Philadelphia, Cincinnati, Jacksonville, Charleston and so on. See also Charlotte Elisheva Fonrobert, "Une cartographie symbolique: l'eruv en Diaspora," *Les Cahiers du Judaïsme* 25 (2009): 5-6.

all sorts of small towns.⁸¹ The reality is quite different: witness the strong dissent raised in north London,⁸² Palo Alto, or, in a particularly emblematic case, the conflict that led to the construction of an *eruv* in Tenafly, New Jersey. In 1999, a project was proposed to establish an *eruv* in this small town; after long discussions, the city council decided to oppose the project, which ran into opposition from the town's inhabitants. Meanwhile, the wire symbolizing the *eruv* had already been put into place by a cable company who worked for the city. The city council ordered its removal and the District Court agreed. But the Third Circuit American Court of Appeals reversed this decision deeming it discriminatory and bringing the lawsuit to an end; in 2003, the Supreme Court refused to hear the case. For the city council, the *eruv* went against the Establishment Clause and opened the way for other demands of this same type. To the contrary, the association in charge of constructing the *eruv* believed that the city was challenging the free exercise of religion and that its refusal constituted discrimination against Jews. In fact, the city council members feared that the *eruv* would lead to the arrival of more orthodox Jews, an "invasion" of Jews who would challenge gentrification, reduce property value, lower the level of schools, profoundly transform the neighborhood by depreciating it, and that all this would lead to a decline in business. A long legal suit followed marked by numerous incidents, incessant quarreling, conflicts that separated Jews from their non-Jewish fellow citizens, as well as separating Jews from one another. Witnesses are heard: one believed that, "people living inside the *eruv* become its prisoners against their own will," another declared that he, "opposes that public property could be transformed into a private domain." One inhabitant was offended by the "enormous power conferred onto this iron wire, an enormous power," he repeated, "an extreme power." Many opposed the creation of a ghetto analogous to the Warsaw ghetto: an elderly Jewish citizen regretted the demands formulated by his orthodox co-religionists who, "invent a community within a community. The Jews in Europe," he added, "were constrained to live in such communities from which they tried desperately to escape. I disapprove of this symbolic wall that separates inhabitants." Another Jewish resident, a Holocaust survivor who considered himself a believer, asserted no less than

⁸¹ See Adam Mintz, *Halakhah in America: The History of City Eruvim, 1894-1962* (New York: Ph.d New York University, September 2011).

⁸² Davina Cooper, "Talmudic Territory? Space, Law and Modernist Discourse," *Journal of Law and Society* 4 (1996).

that the orthodox were, “building their own ghetto.” The tone mounted, antisemitism surfaced to such a point that one person who attend the debates at the city council regretted the “hatred and resentment” that had emerged.

As grounds for its decision, the Court held that the *eruv* does not “communicate any idea or message...[it]serves the purely functional purpose of delineating an area within which certain activities are permitted.” Since the *eruv* did not serve as a means of communication or expression, it should not be approached from this point of view. Inspired by the shift in focus made by Justice O’Connor who challenged the “Lemon test” from *Lemon v. Kurtzman*, the Court held that, “even if there is some slight risk that a reasonable, informed observer might ‘misperceive the endorsement of religion,’ there is a much greater risk that the observer would perceive hostility toward Orthodox Jews if the Borough removes the *lechis*.” In the eyes of the Court, the Free Exercise Clause implies a neutral treatment of religions and—with the exception of decisions that run counter to the Establishment Clause, like the one from *Kiryas Joel*—the Establishment Clause cannot be invoked because it would demonstrate “discrimination.” The Court concluded by affirming that “allowing the *eruv* to remain in place serves the secular purpose of complying with the Free Exercise Clause, does not have the effect of advancing religion because no reasonable, informed observer would perceive an endorsement of religion, and involves no government entanglement with religion because the Borough will not monitor or support the maintenance of the *eruv*.”⁸³ Because the Supreme Court would not hear this decision, it is unclear how the American State Jews who serve there would have voted. However, it is striking to note the surprising endorsement by secular Jews who opposed the demands formulated by the Hasidim of Kiryas Joel. For example, the American Jewish Committee approved of the *eruv*’s installation that, “did not violate the first amendment,⁸⁴ along with the Anti-

⁸³ *Tenafly Residents Association Inc. V the Borough of Tenafly*. US Court of Appeal for the Third Circuit. October 2002. There are at least two other decisions favoring the installation of an *eruv*, including, *ACLU of N.J. v. City of Long Branch*, 670 F. Supp. 1293, 1293 (D.N.J. 1987) as well as *Smith v. Community Board*. No. 14, 491 N.Y.S.2d 584 (Sup. Ct. 1985). Joshua Letzger analyzes these two decisions and demonstrates how, when the Lemon test is applied, they do not constitute an advantage conceded to religions but an accommodation, given the secular purpose of the *eruv*. “The Eruv: Can Government Constitutionally Permit Jews to Build a Fictional Wall Without Breaking the Wall Between Church and State,” *National Jewish Law Review* 4 (1989): 82 and following.

⁸⁴ AJC. Global Jewish Advocacy. 26 June 2006.

Defamation League, a secular organization led mostly by non-Orthodox Jews who supported the idea that the *eruv*, “Is the eruv a violation of the separation of church and state? No...[it] does not require any government interference or entanglement with, or endorsement of any particular religion.”⁸⁵ Tenafly’s *eruv* was definitely authorized much to the chagrin of the city council. This decision provoked considerable commentaries⁸⁶ for it legitimized the formation of symbolic territories in the heart of public space even if the *eruv* does not imply any “entanglement” between State and Church. This perspective could only have appalled Felix Frankfurter as well as his heirs like Ruth Ginsburg and Steven Breyer who, following the logic of *Everson* or *McCullum*, most often remained loyal to a secularist vision of public space. They could only stand up against such an accommodation that legitimizes collective Jewish identity.⁸⁷

Challenging the Christian nation was at first translated by growing secularization. The resurgence of identities and the explosion of multiculturalism, on the other hand, to this day are met with accommodations more open to religious practices as well as a restructuring of public space now more welcoming to cultural enclaves. Legitimizing the *eruv* would pose a general challenge to the standardization of national space. It would affect the United States similar to the way European societies would disavow the legacy of the Treaty of Westphalia, unifying each of the nation-States by conjuring up all the complexities of local jurisdictions, all the intertwined regional structures that frame

⁸⁵ *Newsday*, 25 August, 2008. <http://www.newsday.com/opinion/eruv-will-be-good-for-community-1.509741> Conversely, Noah Feldman was against the construction of an *eruv* in Tenafly. *Jerusalem Post*, 9 August, 2007.

⁸⁶ Susan Lees, “Jewish Space in Suburbia: Interpreting the Eruv Conflict in Tenafly, New Jersey,” *Contemporary Jewry* 27.1 (2007). Sophie Watson, “Symbolic spaces of difference: contesting the eruv in Barnet, London and Tenafly, New Jersey,” *Environment and Planning D: Society and Space* 23 (2005). For a journalistic perspective, see M. Purdy, “Our towns: a wire-thin line sharply divides a suburbs’ Jews,” *New York Times*, 25 March, 2005.

⁸⁷ Alexandra Lang Susman, “Strings Attached: An Analysis of the Eruv Under the Religion Clauses of the First Amendment and the Religious Land Use and Institutionalized Persons Act,” *University of Maryland Law Journal of Race, Religion Gender and Class* 9.1 (2010). In this lengthy scholarly article, the author expresses shock in the lack of response from the Courts and commentators in the “entanglement” (p 96) resulting from the *Tenafly* decision. For Susman, “The eruv has no secular purpose whatsoever,” as it “satisfy[ies] the religious needs,” of Orthodox Jews (p 111). She argues that, “A local government’s allowance of an eruv, which converts the public domain into the private domain and into the property of the Orthodox Jewish community, is a violation of the Establishment Clause of the Constitution,” (p 130). The *eruv* is thereby incompatible with the Lemon test. See also the lengthy commentary on *Tenafly* by Shira Schlaff who emphasizes the contradictory character of the *eruv* ruling. She nonetheless accepts this *eruv* as long as it is in no way binding and does not interfere with traffic. “Using an Eruv to Untangle the Boundaries of the Supreme Court’s Religion-Clause Jurisprudence,” *Journal of Constitutional Law* 2 (2003).

recognizable spaces.⁸⁸ The *eruv* is thus a territory without sovereignty: its reality, like the persistence of a public school for the Satmarim within their homogeneous enclave, authorized despite the negative decision of the Supreme Court, has therefore also marked contemporary discussions about diasporic cultures.⁸⁹

Despite recent challenges to absolute secularization in France and frequent calls for a more open and tolerant secularism, despite, also, a return to decentralization that legitimizes functioning at the local level, these American court cases help us measure to what extent French society remains the antithesis of the American model. Just as the burka cannot be prohibited in the United States, the *eruv* remains a symbolic territory unimaginable in the eyes of French republicans who are hostile to multiculturalism and fiercely attached to secularism. Their crusade against the veil and the near unanimous vote—thanks to the abstention of the socialist deputies—for a law prohibiting wearing a burka not only in State institutions (schools, hospitals, courts) but also in the streets or marketplaces seems like an almost totalitarian practice in the United States, something unacceptable like the *eruv* in France. Thus, during the preparatory discussions surrounding the development of law on the burka, Caroline Fourest asserted, as a supporter of secularism:

The duty to preserve community harmony and public order require that we oppose particularist demands formulated on behalf of religion—this does not concern only one particular religion or only one sectarian deviation—which tend to jeopardize collective security and multiply.

I am thinking notably of a demand presented by an ultra-orthodox Jewish community to the municipality of Outremont in Quebec. It appertained to the installation of an *eruv* in the city, a symbolic fence demarcating urban space

⁸⁸ Barry Smith analyzes the explosion of *eruvim* in this manner, also using the example of Tenafly as proof of its contestations to State sovereignty following the Treaty of Westphalia. “On Place and Space: The Ontology of the Eruv,” in C. Kanzian ed., *Cultures : Conflict-Analysis-Dialog* (Frankfurt: Orlo Verlag, 2007). There is a tendency in contemporary State theory to attempt to demonstrate the likelihood of a return to a kind of feudalism in Europe, challenging the preeminence of the State. See Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (London: Polity Press, 1998).

⁸⁹ Charlotte Fonrobert, “The Political Symbolism of the Eruv,” *Jewish Social Studies* (Spring-Summer 2005): 29.

within which those who observe Shabbat can move. The city council rejected the request, arguing that it was incompatible with the concept of public roads. But Quebec's Supreme Court, invoking freedom of religion and the obligation toward "reasonable accommodation," authorized the *eruv's* installation. A similar demand was formulated in France, at Garges-lès-Gonesse. The Jewish community there demanded not only the construction of an *eruv*, but also the neutralization of the electronic codes at building entrances during Shabbat. One must imagine the implications of such a demand: knowing which Jew is practicing and in which building, managing the conflicts that would inevitably arise between practicing Jews and their neighbors whose codes have been disconnected for religious reasons, in the case of a burglary, even gather practicing Jews into buildings not protected electronically, etc. Fortunately, in France, no court would allow the "reasonable accommodation" accepted in Canada.⁹⁰

The possible formation of an *eruv* in France is thus vigorously denounced as having alarming consequences, analogous to those resulting from militant Islam, which would clash with and threaten republican public space. This project, born deep in the Parisian suburbs, is in reality quite difficult to trace and seems to be almost an imaginary danger, equivalent to the burka. Certainly, *eruvim* could be found in France before the French Revolution, particularly in the eastern regions. By January 13, 1794, the Supervisory Committee of Hagenthal-le-Bas, ordered the end to all external signs of religions finding them contrary to the equality among citizens. From then on, it befitted the Jews to, "remove the iron wires that are strung from one house to the next." The Director of the Altkirch District, to whom the Jews issued their appeal, confirmed the decree.⁹¹ The universalist French Revolution proved to be radically hostile toward intermediary group but also to all forms of collective organizations that divide public space and threaten unity. Essentially, the Revolution abolished *eruvim* in the same way it put an end to feudal corporations: its homogenizing logic weakened collective identities, whether they were social or cultural. From then on, the *eruv* almost disappeared from the landscape. It appears an *eruv* existed in Paris up until the years following the Franco-Prussian War, because in order to protect the city, Adolphe Thiers constructed a ring of fortifications enclosing the city between 1840 and 1845, which would have enabled rabbinic

⁹⁰ Fact-finding mission on the practice of wearing the full veil on national territory. 12 November, 2009. Assemblée nationale.

⁹¹ Cited by Freddy Raphaël and Robert Weyl, *Juifs en Alsace*. (Privat.1977).307.

authorities of the period to establish an *eruv*. After World War One, the fortifications were destroyed, doing away with the imaginary *eruv* at the same time. Even today, in Strasbourg an *eruv* could not be erected without causing such quarreling that it had to be made literally invisible to the inhabitants. Various international publications report the existence of *eruvim* in Metz and Reims, but despite much research, there is no proof of their existence.

Since the French conception of public space was imported to Quebec, the *eruv* is not welcome in this society where Catholics and secularists both reject internal cultural diversity. The example of the Jews from Outremont is the proof. In today's secularized, urban Quebec, the demand formulated by the Hasidim gave rise to such a vigorous reaction, as if it were a return to religion from which they had distanced themselves. The *eruv* is seen as comparable to the segregationist measures imposed by the Taliban, an Islamic threat that places secular public space in danger. Following this logic, it was Daniel Baril, the president of the *Mouvement Laïque* who led the charge against this dreadful precedent that reflects the, "danger of this reasonable accommodation." This refusal also illustrates the fierce "ethnic" and linguistic nationalism Quebec, which finds the increasing power of internal multiculturalism alarming. Such multiculturalism is found among groups who sometimes identify more closely with the anglo-saxon world and is met with a nationalism that sometimes expresses itself in a xenophobic and overtly antisemitic manner vis-à-vis the Hasidim "who will never be like us."⁹²

Justice Allan Hilton who presides over the Quebec Superior Court declared, to the contrary, that he was in favor of the *eruv* and inspired by the logic of the American decisions.⁹³ In his view, citizens may understand public space from a variety of perspectives. Even if he recognized, unlike the judgment of *Tenafly* that presented the *eruv* as functional and secularized, that it takes on a religious dimension because it

⁹² William Shaffir, "Boundaries and Self-Presentation among the Hassidim," in J.S Belcove-Shalin ed., *New World Hassidim* (New York: Suny Press, 1995). See also, from the same author, "Outremont's Hassidim and their Neighbours: An Eruv and Its Repercussions," *Jewish Journal of Sociology* 1-2 (2002) as well as "Hassidim and the 'Reasonable Accommodation' Debate in Quebec," *Jewish Journal of Sociology* 1 (2008).

⁹³ Several years after this incident, Daniel Baril continued to protest against the religious particularism of the *eruv* and *hijab*. See his article in *La Presse*, 28 July 2007 where he writes: "Religious ghettos. The 'we' of republicans who embrace the foundational values of democracy cannot include the 'we' of fundamentalists who refuse these values."

allows Jews to move, the Justice believed that it was not proprietary to religious Jews. Henceforth, the American notion of reasonable accommodation was needed, according to him, as a sign of respect for religious neutrality, just as it permitted Sikhs to conserve their turbans and young Muslim women to keep their heads covered. Despite hostility from a large part of the non-Jewish Franco-Canadian population who feared the formation of a “ghetto” violating its view of neutral public space, Justice Allan Hilton considered it legitimate.⁹⁴

By drawing attention to the meaning of the *eruv*, we also participate in the recent explosion in Jewish studies of works on territory that reflect a “spatial turn,”⁹⁵ which is fully realized from the perspective of comparative sociology dealing with relations between State and Church. Although we may recognize many compromises to the secularist principle emerging in contemporary France, they are nothing when compared with those accommodations at deep at work in an American society open to cultural pluralism and far from the French variety of secularization which—today as in the past—has the support of American State Jews. If they had been called upon to judge the case concerning the prohibition against wearing the veil and, a fortiori, against wearing the burka in streets and markets, these State Jews would vote along the same lines as the French legislators. Like the French, they would vote in the name of a republican tradition anxious to respect radical secularism bringing attention, again in the case of the burka, to the logic of the founding fathers of the Third Republic.⁹⁶

⁹⁴ For the most comprehensive study on this affair, see Valerie Stoker, “Drawing the Line: Hassidic Jews, Eruvim, and the Public Space of Outremont, Canada,” *History of Religions* 1 (August 2003).

⁹⁵ Charlotte Fonrobert, “Brief Essay: The New Spatial Turn in Jewish Studies,” *AJS Review* 33.1 (2009).

⁹⁶ Douglas Laycock applies the same logic to his argument, “a law concerning the wearing of the veil would not even be debated in American law...Creating or preserving a secular environment would not be of primary interest.” Douglas Laycock, “La religion et l’Etat aux Etats-Unis: affrontement des théories et changements historique,” in E. Zoller, *La conception américaine de la laïcité* (Paris: Dalloz, 2009), 67-68. In the same volume, Daniel Conkle writes that, “the *Tinker* ruling, combined with the extreme reluctance of the 1st Amendment toward any regulation of private religious expression, would certainly lead to an invalidation of French law,” in “Expression et symbolisme religieux dans la tradition constitutionnelle américaine,” 167. The discussion surrounding the veil and the shock that it elicited in the United States remains considerable, with most commentators pointing out that the First Amendment would prohibit the implementation of such laws. See for example, Derek Davis, “Reacting to France’s: Ban Headscarves and other Religious Attire in American Public Schools,” *Journal of Church and State* 46.2 (2004): 7. In the same volume, Jeremy Gunn, “Under God but Not the Scarf: The Founding Myths of Religious Freedom in the United States and Laïcité in France.”