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FROM “JUST” TO “JUST DECENT”? CONSTITUTIONAL TRANSFORMATIONS AND THE REORDERING OF THE TWENTY-FIRST-CENTURY PUBLIC SPHERE

CINDY SKACH*

Het kabinet vindt het namelijk onwenselijk dat gezichtsbedekkende kleding—waaronder de boerka—wordt gedragen in de openbare ruimte uit overwegingen van openbare order, veiligheid en berscherming van (mede) burgers.¹

The cabinet finds it, namely, undesirable, that face-covering garments—including the burqa—would be worn in the public sphere, based on considerations of public order, security and the protection of (fellow) citizens.

Je tâcherai d’allier toujours dans cette recherche ce que le droit permet avec ce que l’intérêt prescrit, afin que la justice et l’utilité ne se trouvent point divisées.²

I will try throughout this inquiry to bring together that which law permits with that which interest requires, so that justice and utility are in no way divided.

On November 17, 2006, the Dutch cabinet backed a proposal, introduced by the Dutch Minister for Integration and Immigration, to ban citizens from wearing “face-covering garments—including the burqa—in the public sphere [*openbare ruimte*].”³ The reasons cited for

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1. For an English translation of Algemeen verbod gezichtsbedekkende kleding, the Dutch Ministry of Justice, see General Ban on Garments Covering the Face, Press Release, November 17, 2006, <http://english.justitie.nl/currenttopics/pressreleases/archives2006/General-ban-on-garments-covering-the-face.aspx>. All translations herein, unless otherwise noted, are my own. This Essay is drawn from my forthcoming book, *The Constitution of Peoples*. For helpful discussions I am grateful to Jack Balkin, Francesca Bignami, Jon Elster, Sandy Levinson, Jonathan Pratter, Larry Solum, Mark Tushnet, members of the Constitutional Studies Luncheon at the University of Texas Law School, members of the Colloquium on Constitutional Law and Theory at Georgetown Law, and members of the 2006 Maryland Constitutional Law Schmooze. Any errors, of course, remain my own.

2. JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL* 103 (Clarendon Press 1972) (1762); JOHN RAWLS, *THE LAW OF PEOPLES* 13 (1999).

3. See *supra* note 1.

this ban by the Dutch Ministry of Justice were "considerations of public order, security and the protection of fellow citizens."⁴ To American ears, such a justification certainly seems to be at odds with the concept of freedom. We recall that in 2003, for example, Assistant Attorney General Alexander Acosta intervened on behalf of an eleven-year-old Muslim girl who had been sent home from an Oklahoma public school for wearing an Islamic headscarf. Invoking the Fourteenth Amendment to the U.S. Constitution, which prohibits states from applying dress codes in an inconsistent and discriminatory manner, Acosta ordered the school to allow the girl to attend class with her head veiled, emphasizing that "[r]eligious discrimination has no place in American schools."⁵

But across the European continent, things are different, and this recent move by the Dutch government is not unique. This particular government proposal follows in the footsteps of several recent attempts across Europe, most recently in France and Germany, to legislate, and adjudicate, the rights of religious citizens. Such attempts have almost always been disproportionate, in that they originate with, and mainly affect, practicing female Muslims. Indeed, one of the most important global constitutional challenges in the twenty-first century will be religious diversity and the problems it presents for constitutions constructed in eighteenth- and nineteenth-century social contexts. And this latest legal initiative in the Netherlands is particularly noteworthy; whereas previous attempts to limit the wearing of religious symbols in public concerned public schools (that specific, civic subsphere of the public sphere that claims responsibility for citizen formation), the recent Dutch proposal aims at removing religious symbols from the entire public sphere.⁶

These developments in the member states of the European Union, taken together, demonstrate a rapidly growing trend in European jurisprudence. And seen as a trend, these developments raise critical questions about the possibility, and limits, of liberty in increasingly diverse polities within the European Union and beyond.⁷ These developments also offer proof of an increasing, and perhaps impossible, tension between, on the one hand, a "coming world order" that

4. See *supra* note 1.

5. *US Opposes Oklahoma Headscarf Ban*, BBC News, Mar. 31, 2004, <http://news.bbc.co.uk/2/hi/americas/3585377.stm>.

6. I use here the understanding of public sphere found in the works of Habermas. Jürgen Habermas, *Strukturwandel der Öffentlichkeit*, in *UNTERSUCHUNGEN ZU EINER KATEGORIE DER BÜRGERLICHEN GESELLSCHAFT* (Neuwied: H. Luchterhand ed., MIT Press 1989) (1962).

7. Portions of this section draw on Cindy Skach, *International Decisions: Şahin v. Turkey*; "Teacher Headscarf" Case, 100 AM. J. INT'L LAW 186, 186–196 (2006).

aims at the “cultural extension and legal enforcement of human rights,” including freedom of religion and belief,⁸ and, on the other hand, an increased vigilance of certain religious practices that are considered indicative of a “clash of civilizations.”⁹ This tension in Europe is now most often dealt with through prohibition: legal restrictions on religious freedom, defended in many countries by constitutional and administrative courts, all in the name of a most illusive and yet powerful European constitutional principle: public order.¹⁰

My argument in this Essay is threefold. First, I illustrate this trend in European jurisprudence in member and candidate states of the European Union, showing that it is indeed a trend, and suggesting that it originated from within legal, and not political, society: with judges, not legislatures, and via a changing legal discourse of rights. Second, I excavate the principle of “public order,” which first appeared in Roman law, and I distinguish it from its American counterpart, noting its inclusion in European constitutional law and its redefinition over time. Third, I ask, does this matter? In answer, I argue that indeed it does, that this tension between fundamental freedoms and public order (redefined, broadened, and linked by judges to questions of international security), and the manner in which it is being adjudicated across Europe, constitute a slippage, by way of constitutional law, away from liberal constitutional democracy.¹¹ Such slippage takes place, as I begin to show here, through the return to an “originalist” interpretation of the European constitutional principle of public order. As such, I argue, these cases demonstrate the growth of a pan-European legal discourse of religious symbols not only as text, but as a mechanism, however broad and ambiguous, of social control. The larger implication of these developments for constitutional theory, I argue, is that by forcibly removing Islamic religious symbols from the public sphere (or subsets thereof), states are forcing a Rawlsian thick veil of ignorance on these complex societies, *in the name of* liberalism, but with paradoxical and detrimental effects *for the practice* of liberal constitutional democracy.¹² What I show here is that by delegitimizing

8. WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* 157 (2005).

9. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 28–29 (1996).

10. For more information on the clash of civilization theory, see *id.*

11. The more systematic argument and evidence is found in CINDY SKACH, *THE CONSTITUTION OF PEOPLES* (forthcoming).

12. Here I will not enter the communitarianism versus liberalism debates, but rather, will simply state that my assumptions concerning the possibility and limits of a thickly veiled original position are closer to those of Sandel than those of Rawls. See *generally*

religious symbols through legal prohibition, particularly in the public sphere, and in the name of forging a thick veil of ignorance as a basis for consensus, these states risk artificially veiling the multiple comprehensive doctrines within their now immigrant societies. In so doing, these states threaten not only the (albeit fragile) overlapping consensus that had been achieved, but they also risk provoking a legitimacy crisis of the legal order itself. For Habermas's claim was prudent, in that "[l]egal procedures thus stand to lose the force to found legitimacy if notions of a substantial ethical life slowly creep into the interpretation and practice of formal requirements."¹³

In order to suggest, here, the transformations of the European public sphere by way of legal prohibition, I draw on Rawlsian categories that allow for a clean conceptual and analytical starting point.¹⁴ These categories include the liberal constitutional democratic society and the less liberal but decent hierarchical regime.¹⁵ The key difference in these regimes or societies, for my purposes here, lies in Rawls's distinction between the two with respect to liberty of conscience. As he notes, in the decent hierarchical society, as with the liberal constitutional democratic society, a right to liberty that includes sufficient liberty of conscience to ensure freedom of religion and thought is necessary. But in the case of the decent hierarchical society,

this liberty of conscience may not be as extensive nor as equal for *all* members of society: for instance, one religion may legally predominate in the state government, while other religions, though tolerated, may be denied the right to hold certain positions. I refer to this kind of situation as permitting "liberty of conscience, though not an equal liberty."¹⁶

Consider in this context Rawls's condition (iv) for a just constitutional democracy to exist as a reasonable utopia. He specifies that,

RAWLS, *supra* note 2; MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). Moreover, I stress that my use of "veil of ignorance" is in no way meant to be metaphorical.

13. Jürgen Habermas, *Religious Tolerance—The Pacemaker for Cultural Rights*, 79 *PHIL.* 5, 14 (2004).

14. See generally RAWLS, *supra* note 2. I am adapting Rawls's normative, static categories for the purposes of empirical classification and to understand dynamic movement between them. I acknowledge that Rawls's categories each have numerous defining characteristics, which I will neither enumerate nor utilize here, as I will be concerning myself only with the dimension related to religious freedom. I admit and accept all the normal caveats of such conversion.

15. RAWLS, *supra* note 2, at 59–70.

16. *Id.* at 65 n.2 (emphasis added).

[b]ecause of the fact of reasonable pluralism, constitutional democracy must have political and social institutions that effectively lead its citizens to acquire the appropriate sense of justice as they grow up and take part in society. . . . Insofar as liberal conceptions require virtuous conduct of citizens, the necessary (political) virtues are those of political cooperation, such as a sense of fairness and tolerance and a willingness to meet others half way.¹⁷

A crucial challenge for any liberal constitutional democracy then, not just those of Europe, is to balance between the neutrality of the state with respect to the various faiths and beliefs held by citizens within its borders, in the name of tolerance, and the protection of individual freedom of conscience. These are two inseparable aspects of religious freedom, but we should also see them as potentially conflicting imperatives of the same fundamental right.¹⁸ This is true, for example, of the Free Exercise and Establishment Clauses of the First Amendment of the U.S. Constitution. At various points in U.S. history, the Supreme Court has dealt with conflicting imperatives within this fundamental right by adopting either a weak or strong interpretation of each imperative, with shifts in jurisprudence changing over time.¹⁹ European constitutional guarantees of religious freedom are similar, and religious freedom (\approx free expression) and state neutrality (\approx establishment) are both protected by the constitutions of the member states of the Union, and by the European Convention for the Protection of Human Rights and Fundamental Freedoms. For example, in France, the Law on the Separation of Church and State of 1905, which guides the republican constitutional principle of *laïcité*, demands that the state allow for religious freedom, but also requires that the state not interfere with, or privilege, any one religion over any other. The language of the law also demands that the state not ignore any religion, and cautions that it is neither necessary, nor desirable, to remove religion from public life, or to strictly separate civil society from religious society.²⁰

17. *Id.* at 15.

18. Sociologist Reinhard Bendix first drew our attention to concepts that have inherently conflicting imperatives. My point here is that constitutional principles, among them fundamental freedoms, often have inherently conflicting imperatives and, interestingly, are adjudicated as such. For a discussion of Bendix's work, see Andrew C. Gould, *Conflicting Imperatives and Concept Formation*, 61 REV. OF POL. 439 (1999).

19. RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION* 31–72 (2004); KENT GREENAWALT, *DOES GOD BELONG IN PUBLIC SCHOOLS?* 5 (2005).

20. Law on the Separation of Churches and the State of Dec. 9, 1905, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Dec. 11, 1905, p.7205. See also *THE FRENCH LEGAL SYSTEM* 139 (Andrew West et al. eds., 2nd ed. 1998).

However, across the European continent, a third, critical principle makes the European experience somewhat distinct from that of American democracy. This is the constitutional and administrative-legal principle of public order. Inspired by Roman law, and providing the basis for many civil law systems across the European continent, *ordre public* was first crafted into the *Code Napoléon*. Importantly, this legal concept, reflecting the rather authoritarian visions that its architect, Portalis, held with respect to the relationship between a state and its citizens, was originally used as an instrument for orienting social activity, and defending the fundamental values of the state.²¹ As such, in the European legal context, historically, "public order sits in dialectic opposition to individual public freedoms, and especially those of freedom of movement, the inviolability of the home, freedom of conscience and freedom of expression."²² Even the language of the French civil code echoes this original meaning, associating public order with the moral standards of the state.²³ The experience of World War II nudged this dialectic to favor individual freedoms. As a reaction to the "Third Reich" and its atrocities, postwar European constitutions and constitutional jurisprudence privileged the principle of human dignity (entrenched in several postwar constitutions), and in the case of some states including Germany, made institutional space for a strong constitutional court that stood outside of the judiciary and defended individual freedoms. For most of the postwar European period, from the perspective of individual freedoms such as freedom of religion, most states on the continent were, in theory and in practice, close to being liberal democratic constitutional societies.

Writing now in 2007, in light of recent legislation and the adjudication of the rights of religious citizens across the continent within the past few years, one can no longer claim this as true. So what do we make of it? The bulk of this Essay attempts to show that, quite problematically for democratic practice, this change across the continent begins to constitute a slippage away from the postwar starting point of liberal democratic constitutional regimes in several of the member states of the European Union, a slippage that will be difficult (if not impossible) to reverse. I also suggest herein that, problematically for constitutional theory, such slippage was made possible through,

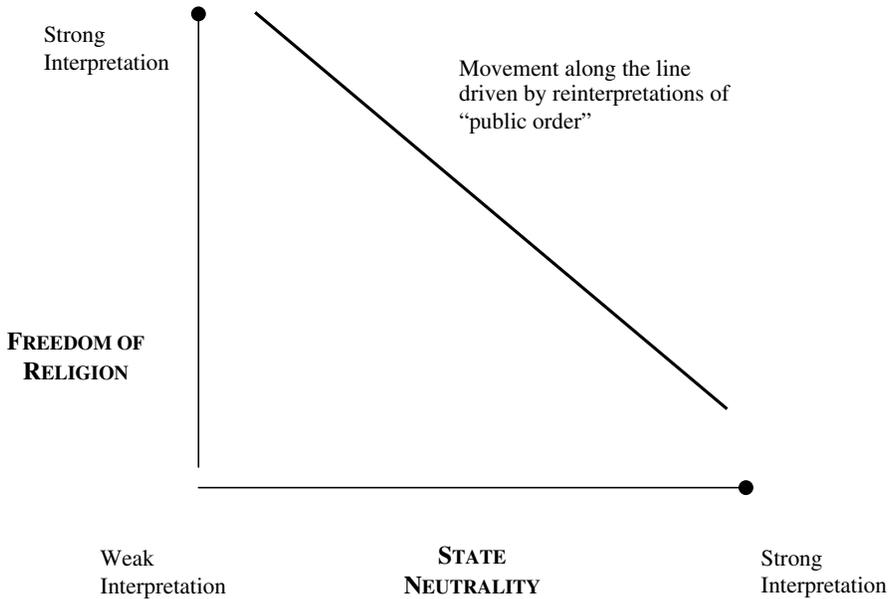
21. Dictionnaire de la culture juridique (Denis Alland & Stephanie Rials eds., 2003).

22. Lexique des termes juridiques (Raymond Guillien et al. eds., 1999).

23. In the French Civil Code it currently appears in Article 6: "Art. 6—One may not derogate by private agreements from laws which involve public policy and morality." THE FRENCH CIVIL CODE 2 (John H. Crabb trans., rev. ed. 1995).

rather than against, constitutional principles. That is, I show that this slippage results from changes in the delicate balance between the European equivalents of free exercise and establishment clauses, changes that come as a result of a European reframing of the critical legal concept of public order. See *Figure 1*.²⁴

FIGURE I: THE CONFLICTING IMPERATIVES OF CONSTITUTIONAL PRINCIPLES



Two recent court cases, in which the reasoning of the judges and justices in both the majority and dissenting opinions is indicative of this constitutional slippage, escaped attention in the United States. These are the case of *Şahin v. Turkey*,²⁵ in which the European Court of Human Rights (ECHR) permitted the state to regulate the wearing of headscarves, and the *Teacher Headscarf* case,²⁶ in which the German Constitutional Court rejected such regulation (at least on the particu-

24. My neutrality dimension here conflates various aspects of neutrality for the purposes of illustration. Actual neutrality, its various discourses within law and its practice, are of course much more complex than I depict here, and the nuance gets more systematic treatment in my book, CINDY SKACH, *THE CONSTITUTION OF PEOPLES* (forthcoming).

25. *Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. 99 (2005) (Court report), available at <http://www.echr.coe.int> [hereinafter *Şahin II*].

26. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 24, 2003, 2 Entscheidungen des Bundesverfassungsgerichts [BVerwGE] 1 (F.R.G.), available at http://www.bverfg.de/entscheidungen/rs20030924_2bvr143602en.html [hereinafter *Teacher Headscarf Case*].

lar facts of the case). The events leading to the judgment in *Şahin v. Turkey* began on August 26, 1997, when Şahin, a twenty-four-year-old woman, then in her fifth year of studies in the Faculty of Medicine at the University of Bursa, Turkey, enrolled in the Cerrahpasa Faculty of Medicine at the University of Istanbul.²⁷ According to Şahin, she had been wearing an Islamic headscarf during her first four years at the University of Bursa, and then continued to wear the headscarf at the University of Istanbul until February 1998.²⁸ On February 23, the vice-chancellor of the University of Istanbul issued an official statement (a "circular") declaring that

[b]y virtue of the Constitution, the law and regulations, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the university administrative boards, students whose "heads are covered" (who wear the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials.²⁹

Accordingly, on March 12, Şahin, wearing the Islamic headscarf, was denied entrance to a written university exam.³⁰ On March 20, and again on April 16 and June 10, she was refused entrance into lectures and examinations.³¹ The Dean of the faculty then issued a warning to Şahin, stating that her attitude and failure to comply with the dress code were not befitting of a student.³² On July 21, Şahin filed an application with the European Commission for Human Rights under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms.³³ She alleged that a ban on the Islamic headscarf in higher education institutions violated her rights and freedoms under Articles 8 (right to privacy), 9 (freedom of thought, conscience, and religion), 10 (freedom of expression), and 14 (freedom from discrimination) of the Convention, and Article 2 of its Protocol No. 1 (right to education).³⁴

27. *Şahin II*, 44 Eur. H.R. Rep. at 106.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 107.

33. Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Sept. 21, 1970, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

34. *Şahin II*, 44 Eur. H.R. Rep. at 99.

On July 29, Şahin requested in writing an exception to the vice-chancellor's circular.³⁵ She claimed that the circular and its implementation by the university infringed her rights as guaranteed by Articles 8, 9, and 14 of the Convention, and Article 2 of Protocol No. 1, and that the university had no regulatory power in this sphere.³⁶ On February 26, 1999, eleven days after an unauthorized assembly protested the dress code outside the dean's office at the Faculty of Medicine, the Dean began disciplinary proceedings against various students, including Şahin.³⁷ On March 19, the Istanbul Administrative Court dismissed her application to suspend the circular and held instead that section 13(b) of Law No. 2547, the Higher Education Act, gave university chancellors power to regulate students' dress for the purposes of "maintaining order."³⁸ Şahin appealed. On April 13, the Dean suspended the applicant for one semester, citing Article 9(j) of the Students Disciplinary Procedure Rules.³⁹ On June 10, Şahin filed an application with the Istanbul Administrative Court for an order reversing her suspension.⁴⁰ On September 16, she enrolled in the University of Vienna.⁴¹ The Istanbul Administrative Court dismissed her application on November 30, holding that "in the light of the material in the case file and the settled case law on the subject, the impugned measure could not be regarded as illegal."⁴² The applicant appealed.

On June 28, 2000, Turkish Law No. 4584 came into force, affording students an amnesty for disciplinary offenses, and annulling all penalties.⁴³ In light of the amnesty legislation, the Supreme Administrative Court ruled it unnecessary to examine Şahin's appeal against the judgment of November 30, 1999.⁴⁴ Consequently, on April 19, 2001, that court dismissed her appeal of the November 30 decision of the Istanbul Administrative Court.⁴⁵

In its decision of June 29, 2004, regarding Şahin's application of July 1998, a seven-judge chamber of the ECHR held unanimously that there had been no violation of Şahin's freedom of thought, conscience, and religion under Convention Article 9, and that there was

35. *Id.* at 106.

36. *Id.*

37. *Id.* at 107.

38. *Id.* at 106–07.

39. *Id.* at 107.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

no separate question arising from that Article in conjunction with Articles 8, 10, or 14, or Article 2 of Protocol No. 1.⁴⁶ Moreover, the Court explicitly stated that “the University of Istanbul’s regulations imposing restrictions on the wearing of Islamic headscarves and the measures taken to implement them were justified in principle and proportionate to the aims pursued and, therefore, could be regarded as ‘necessary in a democratic society.’”⁴⁷ In reaching its decision, the Court drew on the Constitution of Turkey and on legal practice concerning Turkey’s development as a secular (*laik*) state, as well as on the case law of Turkey’s Constitutional Court.⁴⁸ Importantly, the ECHR also drew on comparative law that included court decisions and legal debates concerning the Islamic headscarf and state education in Belgium, France, Germany, the Netherlands, Switzerland, and the United Kingdom.⁴⁹ In its decisions, the ECHR explicitly quoted the French National Assembly’s bill of February 2004, which banned “visible” religious symbols in state primary and secondary schools.⁵⁰ The ECHR also cited the decision of the German Constitutional Court in the *Teacher Headscarf* case of September 24, 2003, discussed below, as an example of a legal position that seemed to run counter to that of other member states of the European Union.⁵¹

On September 27, 2004, the applicant requested that the case be referred to the Grand Chamber of the European Court of Human Rights, pursuant to Convention Article 43.⁵² On November 10, the Grand Chamber agreed to hear the case and, exactly one year later, a seventeen-judge panel handed down a lengthy decision, which included one separate, concurring opinion of two judges (Rozakis and Vajic) and one dissenting opinion (Tulkens).⁵³ The majority decision held that there was no violation of Article 9 of the Convention (16-1 vote), that there had been no violation of the first sentence of Article 2 of Protocol No. 1 (16-1), that there had been no violation of Article 8 of the Convention (unanimous), and that there had been no violation of Article 10 of the Convention (unanimous).⁵⁴ Relying substantially on the existing rules and regulations of various organs of the

46. *Şahin v. Turkey*, App. No. 44774/98, 41 Eur. H.R. Rep. 109, 109–110 (2004) (Court report), *available at* <http://www.echr.coe.int> [hereinafter *Şahin I*].

47. *Id.* at 134.

48. *Id.* at 118–19.

49. *Id.* at 122–23.

50. *Id.* at 123.

51. *Id.*

52. *Şahin II*, 44 Eur. H.R. Rep. at 119.

53. *Id.* at 99, 138.

54. *Id.* at 99–100.

Turkish state, along with the case law of the Turkish Constitutional Court, the Grand Chamber stated that “[b]y reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course.”⁵⁵ It went on to note that “[i]n the light of the foregoing and having regard to the contracting states’ margin of appreciation in this sphere, the Court finds that the interference in issue was justified in principle and proportionate to the aim pursued[,]” and the court found no breach of Article 9 of the Convention.⁵⁶

The events leading to the judgment in what is known as the *Teacher Headscarf* case in Germany began when Fereshta Ludin, a twenty-six-year-old German school teacher of Muslim faith, was turned down for a teaching position in the Baden-Württemberg school system because, it was said, the Islamic headscarf she wore in the classroom was incompatible with the principle of separation of church and state in the German Basic Law (*Grundgesetz*).⁵⁷ Ludin was born in Kabul, Afghanistan in 1972, moved to Germany in 1987, and became a German citizen in 1995.⁵⁸ After having passed the First State Examination (required of all teachers in Germany), and after having completed a required apprenticeship, Ludin passed the Second State Examination for teachers of primary and secondary schools.⁵⁹

In July 1998, the state of Baden-Württemberg’s board of education declined Ludin’s application for employment as a teacher in primary and secondary schools in the state of Baden-Württemberg on grounds of her “lack of personal aptitude[]” for the teaching profession.⁶⁰ According to the board of education’s office in Stuttgart, Ludin showed no interest in removing her headscarf while teaching classes.⁶¹ From the board of education’s point of view, this refusal was problematic because the board believed that the Islamic headscarf had a “signaling effect” (*Signalwirkung*), which it considered incompatible with the principle of state neutrality (*staatlichen Neutralitätsgesbot*).⁶² The board feared that the wearing of headscarves by teachers of Baden-Württemberg’s primary and secondary schools

55. *Id.* at 130.

56. *Id.*

57. *Teacher Headscarf Case*, paras. 2–3.

58. *Id.* para. 2.

59. *Id.*

60. *Id.* paras. 3, 6.

61. *See id.* para. 12 (stating that the court made the teaching position dependant on Ludin’s readiness to teach without her headscarf).

62. *Id.* para. 3.

would not only force impressionable young students to confront Islam, but, more importantly, undermine the objective of integration, notably of Muslim girls.⁶³ In this context, the board considered the headscarf to be an expression of cultural demarcation and therefore a *political*, as well as a religious, symbol.⁶⁴

Ludin appealed this decision through three levels of the German administrative courts: from the administrative trial court (Verwaltungsgericht) of Stuttgart (decision of March 24, 2000), to the administrative appeals court (Verwaltungsgerichtshof) of Baden-Württemberg (June 26, 2001), to the Federal Administrative Court (Bundesverwaltungsgericht) (July 4, 2002), the highest court of appeal for administrative law in Germany.⁶⁵ The Federal Administrative Court upheld the board of education's denial of employment to Ludin and ruled that teachers in public schools must refrain from openly displaying religious symbols in class.⁶⁶ It reasoned that public school teachers are representatives of the state and must serve as role models for students.⁶⁷

Having exhausted all possible lines of appeal in the German administrative court system, Ludin launched a "constitutional complaint" (*Verfassungsbeschwerde*) with Germany's Federal Constitutional Court (Bundesverfassungsgericht).⁶⁸ Her complaint alleged that her basic right of religious freedom, as enshrined in the German Basic Law Article 4, had been violated.⁶⁹ Specifically, Ludin maintained that her wearing of the headscarf was a characteristic of her personality and an expression of her internal religious beliefs. She therefore claimed a violation of her rights under the German Basic Law Articles 1(1) (human dignity), 2(1) (personal freedoms), 3(1) and (3) (equality before the law), 4(1) and (2) (freedom of faith, conscience, and creed), and 33(2) and (3) (equal citizenship and equal access to civil service employment).⁷⁰

Ludin's attorney before the Constitutional Court, Hansjörg Melchinger, maintained that Ludin's right to act in accordance with her beliefs should be protected, and he cautioned that the Islamic headscarf should not be in itself equated with Islamic fundamental-

63. *Id.* para. 5.

64. *Id.* para. 3.

65. *Id.* para. 1 (ruling).

66. *Id.* para. 12 (opinion).

67. *Id.* para. 13.

68. *Id.* para. 1.

69. *Id.* paras. 16, 25.

70. *Id.* para. 16.

ism.⁷¹ He also argued that the scarf's so-called signaling effect was less significant than had been stated by the board of education, noting, in particular, that "it is not about what a teacher has *on* the head, but rather, what she has *in* her head."⁷²

Arguing the case for Baden-Württemberg, Ferdinand Kirchhof, a law professor at the University of Tübingen, maintained that regardless of Ludin's motive for wearing the scarf, the symbolic meaning and signaling effect of the Islamic scarf itself were the state's principal sources of concern.⁷³ Invoking the state neutrality principle in German constitutional law, Kirchhof went on to argue that increased immigration in Germany obligates the state to be vigilant with respect to all religious matters, and particularly with respect to school children—who, he claimed, learn through imitation and are, when entering primary and secondary schools, at a critical stage of development.⁷⁴

On September 24, 2003, the Constitutional Court overturned the Federal Administrative Court's decision and upheld Ludin's right to wear a headscarf in the classroom.⁷⁵ The Constitutional Court's rationale, supported by five of the eight justices in its second chamber, was that in the absence of any clear, unambiguous regulations in the German states concerning the wearing of religious symbols in the classroom, the states could not legally ban qualified teachers, such as Ludin, from holding this public office.⁷⁶ At the same time, the majority noted that, given the increased religious pluralism in German society, there may indeed be a "greater potential for possible conflicts in schools."⁷⁷ Therefore, the majority concluded, there may be both good reasons for a stricter interpretation of the neutrality principle when it comes to schools and, in particular, a need for rules governing the "outward appearance" (*äußeres Auftreten*) of instructors.⁷⁸ The majority stressed, however, that decisions regarding which *particular* rules should be enacted in order to keep "religious peace" (*religiösen Frieden*) in schools, as well as the content of specific rules that might eventually govern the suitability (*Eignung*) of a teacher for the teach-

71. See *id.* paras. 50–51 (noting that the headscarf can have many meanings).

72. *Court Hears Muslim Teacher's Case for Head Scarf*, June 6, 2003, <http://www.germany.info/relaunch/info/publications/week/2003/030606/politics4.html>.

73. *Kampf ums Kopftuch [Battle over Headscarf]*, September 23, 2003, <http://www.zdf.de/ZDFde/inhalt/26/0,1872,2068602,00.html>.

74. *Id.*

75. *Teacher Headscarf Case*, para. 1 (ruling).

76. *Id.* para. 72 (opinion).

77. *Id.* para. 65.

78. *Id.*

ing profession in this changed social environment, were not to be taken by public school authorities themselves.⁷⁹ Rather, the majority stressed, such a decision could be taken *only* by the "democratically legitimized [regional] legislator."⁸⁰

This majority opinion further opened the door for new regional laws concerning the relationship between state neutrality and freedom of religion by declaring that future legislation concerning headscarves in public schools might be "a permissible restriction of [the] freedom of faith" that conforms to Article 9 of the European Convention.⁸¹ Article 9, as discussed above, guarantees "the right to freedom of thought, conscience, and religion," but makes this right subject "to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."⁸²

These two cases give the reader a sense of the developing trend in European jurisprudence I outlined earlier. The transformation in German jurisprudence is particularly telling. The German Basic Law of 1949, Article 4, protects freedom of religion *without any reservations or possibilities of restriction on this freedom*.⁸³ This strongly enforced constitutional protection of the individual from the power of the state stems from Germany's totalitarian history. As was noted by Jutta Limbach, former president of the German Constitutional Court, "the Weimar Republic collapsed . . . from deep-rooted authoritarian state traditions. The Court's case law may be seen as one fruit of this insight,"⁸⁴ and the protection of religious freedom is no exception. This long-established German approach contrasts sharply with the European Convention (as we saw in *Şahin*), which expressly states that some limitations on freedom of religion may be necessary in a democratic society in the interests of public safety, public order, health, or morals, or for the protection of the rights and freedoms of others.

79. *Id.* para. 66.

80. *Id.*

81. *Id.*

82. HUMAN RIGHTS AND THE EUROPEAN CONVENTION, app. A 232–33 (Brice Dickson ed., 1997).

83. Oliver Gerstenberg, *Germany: Freedom of Conscience in Public Schools*, 3 INT'L J. CONST. L. 94, 95 (2005).

84. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1998, Entscheidung des Bundesverfassungsgerichts [BVerwGE] (F.R.G.) (unavailable in English).

The 1995 *Classroom Crucifix* case⁸⁵ marked the first shift in German jurisprudence toward an understanding of religious freedom that is in greater harmony with the European Convention and the jurisprudence of the ECHR. In that case, the Constitutional Court initially held that crucifixes should be removed from all public elementary school classrooms (though the Court then backed down from this position in the face of a public outcry and strong objections from the state of Bavaria).⁸⁶ *Teacher Headscarf*, as the first high-profile case concerning religious freedom and public neutrality to reach the Constitutional Court since that time, is of considerable significance. The Court's holding—in which it overturned the decision of the Baden-Württemberg board of education *solely* on the grounds that there were no regulations in place that would allow for a ban on religious symbols,⁸⁷ and suggested the possibility of future restrictions on religious freedom according to Article 9(2) of the European Convention—implies a consolidation of the trend in jurisprudence that began with *Classroom Crucifix*.

In their separate opinion, the three dissenting justices in *Teacher Headscarf* went further than the majority in this jurisprudential direction, stressing that the individual rights of *civil servants*, in particular, could be limited, and that public school teachers, as civil servants, do not enjoy the same legal rights as school children and their parents—precisely because teachers are organs of the state.⁸⁸ These dissenting justices observed that the majority position misjudged this special position of civil servants and their role in the formation of the democratic will.⁸⁹

In the context of this dissent, it is helpful to contrast the official positions—and to understand the implications thereof for public order—of Şahin, the applicant to the European Court of Human Rights, versus Ludin, the applicant to the German Constitutional Court. Şahin was a university student, a woman of legal age, who wished to attend a state university with a headscarf.⁹⁰ Although Ludin was also a woman of legal age, she was applying to be a civil servant (a representative of the state) and wished to teach in the classroom while wearing

85. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 16, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BVerwGE] 1 (F.R.G.) (unavailable in English) [hereinafter *Classroom Crucifix Case*].

86. *Id.*

87. *Teacher Headscarf Case*, para. 72.

88. *Id.* para. 77.

89. *Id.* para. 76–79.

90. *Şahin II*, 44 Eur. H.R. Rep. at 106.

a headscarf.⁹¹ The difference has important implications for those adjudicating the delicate line between religious freedom and state neutrality; for although the decisions in both cases permitted prohibitions—either the maintenance of prohibitions on Islamic headscarves for students in public universities, or the eventual creation of new prohibitions on Islamic headscarves for teachers in state schools—the dissenting opinion of the German justices in *Teacher Headscarf* draws our attention to the critical question of the applicants’ different positions vis-à-vis the civil service, and the tensions between individual religious freedom and the neutrality of those employed by the state in diverse societies. In *Şahin*, the majority opinion did not even acknowledge this critical difference in the applicant’s position—which the single dissenting judge criticized as a crucial failure.⁹²

The different positions of these applicants, along with the implication that the official position of a woman vis-à-vis the state administration may affect the meaning and potential consequences of her wearing of the Islamic headscarf, raise a core controversy that provokes debate in plural societies. For what was explicit, if not fully developed, in the majority and dissenting opinions in *Teacher Headscarf*, as well as the majority opinion in *Şahin*, was the perceived *political*, and potentially negative, meaning of the Islamic headscarf in a democratic society. No longer simply considered a religious symbol, these decisions suggest that the Islamic headscarf is increasingly seen as a symbol of a clearly *political* nature, which increasingly is perceived to have, in and of itself, negative implications for public order in a democratic society. In neither *Teacher Headscarf* nor *Şahin*, however, did the majority demonstrate that the headscarf, in the specific contexts relative to the applicants, presented a clear and present threat to public order, or to the liberty of others. Moreover, neither the European Court of Human Rights in *Şahin* nor the German Constitutional Court in *Teacher Headscarf* presented any tangible argument or evidence that the headscarves in general posed a threat to public order, to women’s rights, or to their religious expression. The lack of evidence concerning such issues was specifically noted by the dissenting judge in *Şahin*, who, in criticizing the majority’s views on the meaning of headscarves in a secular and democratic society, stressed that not even the Turkish government, in its defense, argued that Şahin used the headscarf in a way that threatened public order, in an “ostentatious or aggressive” manner, or to “exert pressure, to provoke a reaction, to proselytize or

91. *Teacher Headscarf Case*, para. 1.

92. *Şahin II*, 44 Eur. H.R. Rep. at 141 (Tulkens, J., dissenting).

to spread propaganda.”⁹³ This dissenting judge went on to raise a fundamental point that is increasingly contested across Europe—namely, that “[m]erely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and ‘extremists’ who seek to impose the headscarf as they do other religious symbols.”⁹⁴ The same judge asked, “[W]hat, in fact, is the connection between the [ban on wearing headscarves] and sexual equality? . . . As the German Constitutional Court noted in [*Teacher Headscarf*], wearing the headscarf has no single meaning; it is a practice that is engaged in for a variety of reasons.”⁹⁵

Nowhere is the narrowness of the Grand Chamber’s outlook more apparent than in its discussion of the headscarf and gender equality.⁹⁶ Although the majority in *Şahin* found that the ban on wearing the headscarf was also a means of protecting gender equality, the court’s analysis in this regard was notably thin and unsatisfying: in addition to simply quoting the chamber opinion at length, the Grand Chamber quoted its own language from *Dahlab v. Switzerland* (which characterized the headscarf as a “powerful external symbol” that was “imposed on women by a religious precept that was hard to reconcile with the principle of gender equality”)⁹⁷ and expressed the need to protect citizens “from external pressure from extremist movements” such as those that would “impose on society as a whole their religious symbols and conception of a society founded on religious precepts.”⁹⁸ But this kind of conclusory reasoning is simply inadequate to address the fundamental questions here, especially in the context of the particular facts that arose in *Şahin*: To what extent is the wearing of the Islamic headscarf a freely chosen individual act of religious freedom, one that is to be guaranteed and protected, and to what extent might it represent a religious *coercion* of individuals, and of women in particular, thereby threatening the protection of equality between men and women and resulting in discrimination, and therefore, a threat to public order, where public order is understood as the fundamental value associated with the constitutional state?

In highlighting the German Constitutional Court’s understanding in *Teacher Headscarf* that there is no single, straightforward way of understanding the practice of wearing a headscarf, the dissenting

93. *Id.* at 142.

94. *Id.* at 143.

95. *Id.*

96. *See id.* at 128–29 (majority opinion).

97. *Id.* at 127.

98. *Id.* at 127–28, 128–29.

judge in *Şahin* highlighted the striking divergence in the two courts' discussions concerning the nature, meaning, and consequences of the Islamic headscarf—both in and of itself, and with regard to its implications for women's rights and for equality between the sexes in a democratic society. It is, indeed, the vehement disagreement over the nature, meaning, and implications of the headscarf that lies at the heart of these cases, and that is therefore essential for understanding and adjudicating the limits of religious freedom. And yet, in *Teacher Headscarf* it was only the dissenting justices who addressed either the controversial question of the symbolic nature of the Islamic headscarf in relation to the equality of men and women, or the relationship between freedom of religion and the protection of other fundamental, individual freedoms in a democratic society. And in *Şahin*, although the Grand Chamber addressed these issues in somewhat greater depth than was done in the earlier chamber judgment, the Grand Chamber's analysis still did little to move past generalities and to engage the actual facts and complexities of the case, with regard both to *Şahin* herself and to the larger religious, social, and political phenomena against which her protest needed to be understood.

Even from a strict, narrow legal perspective, the Grand Chamber's judgment in *Şahin* can be faulted. As the dissenting judge argued, the majority had failed both to clarify the permitted legal reasons for interfering with the applicant's right to freedom of religion, and—unlike other European states where bans on religious attire in public schools apply only to minors (who are considered more vulnerable to pressure)—to take into account that the applicant in this case, *Şahin*, was of legal age. This dissenting judge also noted that in “relying exclusively on the reasons cited by the national authorities and courts” (and one might add, in following so closely the reasoning of the chamber), the majority had merely sought to “weigh” the principles of secularism, equality, and liberty “against the other” rather than attempting to harmonize them.⁹⁹ And here the dissenting judge argued that there was no evidence before the court to suggest that *Şahin* had any intention of using her headscarf to exert pressure, provoke a reaction, proselytize, or spread propaganda.¹⁰⁰ Moreover, the judge noted that there was no suggestion or demonstration that there was any disruption in teaching or any disorderly conduct associated with the wearing of the headscarf.¹⁰¹ Therefore, the judge concluded that the dual conditions that would justify imposing legal restrictions

99. *Id.* at 140 (Tulkens, J., dissenting).

100. *Id.* at 142.

101. *Id.*

on religious freedom—protection of the rights of others and the maintenance of public order—had not been satisfied in Şahin’s case.¹⁰² With her religious freedom on one side of the equation, there was, in effect, nothing on the other. There was, as it were, nothing against which Şahin’s religious freedom could be weighed or balanced.

It is helpful to compare the dissenting judge’s opinion in *Şahin* to the *majority* opinion of the United Nations Human Rights Committee in *Raihon Hudoyberganova v. Uzbekistan*.¹⁰³ In that case, the Committee determined that Uzbekistan had violated Raihon’s rights under Article 18(2) of the International Covenant on Civil and Political Rights.¹⁰⁴ Raihon, a twenty-two-year-old student at the Tashkent State Institute for Eastern Languages, claimed that she had repeatedly been denied access to the institute’s courses and residence for having refused to remove her headscarf (in this case, the word *hijab* was used).¹⁰⁵ The Committee noted that Article 18, paragraph 2, “prohibits any coercion that would impair the individual’s freedom to have or adopt a religion,” and that Uzbekistan “has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of article 18, paragraph 3” (to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others).¹⁰⁶ In one of the three individual opinions appended to that of the Committee, however, Ruth Wedgwood noted the lack of clarity in the facts of the case; for example, the degree to which the scarf actually covered the woman’s face, or whether it just covered her neck and hair, was simply indeterminate.¹⁰⁷ Wedgwood juxtaposed her reasoning to that of the ECHR in *Şahin*, noting that she found “problematic” the ECHR’s decision that, on the very general basis that “‘extremist political movements in Turkey’ sought ‘to impose on society as a whole their religious symbols,’” Turkey could interfere with the applicants’ right to religious expression.¹⁰⁸ Wedgwood noted that a “state may be allowed to restrict forms of dress that

102. *Id.*

103. *Raihon Hudoyberganova v. Uzbekistan*, Judgments of U.N. Human Rights Committee, Communication No. 931/2000, UN Doc. CCPR/C/82/D/931/2000 (2005).

104. *Id.* paras. 6.2, 7. Article 18(2) provides: “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” International Covenant on Civil and Political Rights, art. 18, Dec. 16, 1966, *available at* <http://www.ohchr.org/english/law/ccpr.htm>.

105. *Raihon Hudoyberganova*, Comm. No. 931/2000, paras. 2.2, 2.4.

106. *Id.* para. 6.2.

107. *Id.* para. 1 (Wedgwood, J., dissenting).

108. *Id.* paras. 3–4.

directly interfere with effective *pedagogy*”; consequently, what was needed in *Raihon*, and presumably in *Şahin*, was a more detailed discussion of the headscarf as a form of clothing that could interfere with the daily classroom activities.¹⁰⁹

A second major set of questions for twenty-first-century constitutionalism raised by *Şahin* and *Teacher Headscarf* concerns the appropriate allocation of decision-making authority for these divisive issues. Who should decide how to interpret “public order”? Should there be a pan-European interpretation of this critical, and historical, legal concept? If so, who should decide what constitutes a threat to a European “public order”? Are local government authorities, or central and international courts, in a more appropriate position to decide the issue? The questions raised illustrate the growing tensions more generally emanating from an internationalization of law, including “one of the most cosmopolitan, and controversial, trends in constitutional law: using foreign and international law as an aid to interpreting” domestic constitutional law.¹¹⁰ In both cases discussed above we see the difficulties of establishing and maintaining, in the diverse member states of the European Union, a “European jurisprudence of religious freedom” in line with that of Article 9(2) of the European Convention.¹¹¹ That Article guarantees religious freedom but also establishes the possibility of legally restricting religious freedom in the name of protecting public order and the rights and fundamental freedoms of others. Interestingly, the ECHR Court and the German Constitutional Court both delegated the final authority concerning the legalization of religious symbols to the respective subunits of each “federation” (in the case of the ECHR, to the member states, and in the case of the German Constitutional Court, to the states or *länder*). This delegation allows for, in effect, and for better or for worse, a plurality of practices across the respective subunits.

Rather than presenting or developing a “European” perspective on this sensitive issue concerning the governmental control of such matters as religious practices, the majority in the ECHR’s Grand Chamber specifically declined to intervene in *Şahin*’s situation, which would have required the court to assess “local needs and conditions.”¹¹² In so doing, the Grand Chamber left intact two critical judg-

109. *Id.* para. 4 (emphasis added).

110. Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005, at 42.

111. For the text of Article 9(2) of the European Convention, see HUMAN RIGHTS AND THE EUROPEAN CONVENTION, *supra* note 82, app. A at 233.

112. *Şahin II*, 44 Eur. H.R. Rep. at 130.

ments of the Constitutional Court of Turkey, one on March 7, 1989, and the other on April 9, 1991. In the 1989 judgment, the Constitutional Court declared unconstitutional the Turkish Higher Education Act (Law No. 2547) that specifically allowed for the wearing of a veil or headscarf in institutions of higher education, when done out of religious conviction.¹¹³ Citing the Preamble and Article 174 of the Turkish Constitution, the court noted that this law “could not be reconciled with the principle of sexual equality implicit, *inter alia*, in republican and revolutionary values.”¹¹⁴ The Grand Chamber also noted that the Constitutional Court of Turkey, in its 1989 decision, stressed that freedom of religion was not equivalent to the right to wear religious attire; instead, first and foremost, freedom of religion meant the liberty to decide whether to follow a particular religion.¹¹⁵ The Grand Chamber noted that in this important sense, the Constitutional Court of Turkey made clear that when the wearing of an Islamic headscarf is imposed on individuals, it is incompatible with the values of a democratic society, especially the values of secularism and the religious neutrality of the state.¹¹⁶ The Grand Chamber noted, however, that in October 1990, transitional section 17 of Law No. 2547 came into force in Turkey, providing that “[c]hoice of dress shall be free in institutions of higher education, provided that it does not contravene the laws in force.”¹¹⁷ But did that imply that university students were entitled to wear any clothing that they chose, thus superseding the holding of the 1989 case? This question, as the Grand Chamber observed, was decided in the April 1991 case: the Turkish Constitutional Court found the Constitution still prohibited the wearing of headscarves (as decided in the 1989 case), with the consequence that section 17 could not be interpreted as authorizing students to wear headscarves.¹¹⁸

In challenging the majority’s delegation of decision-making authority to the member states, the dissenting judge in *Şahin* called into question the “margin of appreciation” approach used by the majority to justify their conclusion that “the university authorities are in principle better placed than an international court to evaluate local needs.”¹¹⁹ This judge asked: *who* is best placed to decide how member states should “discharge their Convention obligations in what is a sen-

113. *Id.* at 111.

114. *Id.* at 112.

115. *Id.*

116. *Id.*

117. *Id.* at 113.

118. *Id.*

119. *Id.* at 139–40 (Tulkens, J., dissenting); *id.* at 130 (majority opinion).

sitive area[?]"¹²⁰ In responding, the judge presented two criticisms of the majority's analysis, specifically with regard to its argument that a wide margin of appreciation was required because of "the diversity of practice between the states on the issue of regulating the wearing of religious symbols in educational institutions[,]" with the implication that "a European consensus [was lacking] in this sphere."¹²¹ First, the dissenting judge noted that none of the other member states had bans in place on religious attire at the university level; the diversity of state practice underlying the majority position simply did not exist.¹²² Second, even if the majority chose to deal with these issues through a margin of appreciation, the court was ignoring its obligation to provide the necessary "European supervision" on such matters; "the issue raised in the application . . . , is not merely a 'local' issue, but one of importance to all the Member States. European supervision cannot, therefore, be escaped simply by invoking the margin of appreciation."¹²³

Taken in their entirety, the majority and dissenting opinions in *Şahin* and *Teacher Headscarf* alert us to the problem of slippage in those liberal constitutional democracies that are asked to balance religious freedom and state neutrality in an increasingly diverse and socially explosive world. Several countries in Europe have begun looking to Turkey and Germany for models of secularism that they hope will limit, rather than exacerbate, social conflict. Notwithstanding important differences in the jurisprudence of *Şahin* and *Teacher Headscarf*, the reasoning in both judgments seems to point in the direction of a structural transformation, by way of law, of public spheres in Europe. This jurisprudential trend seems to constitute a return to an "originalist" position on the definition and interpretation of public order.¹²⁴ Invoking this interpretation, courts privilege strong interpretations of neutrality over religious free expression, resulting in a politics of hierarchical rights and a reordering of peoples within their societies. See *Figure II*.

120. *Id.* at 139 (Tulkens, J., dissenting).

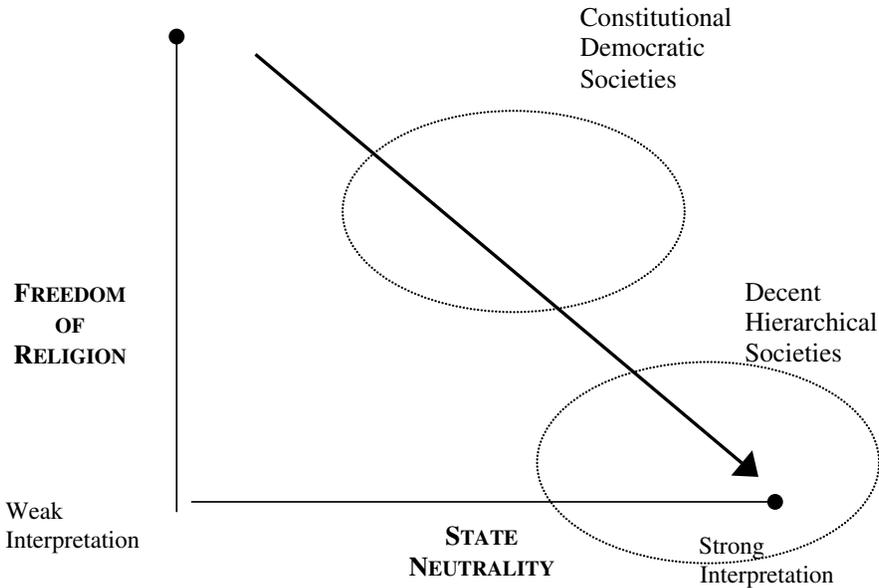
121. *Id.* at 140.

122. *Id.*

123. *Id.*

124. By "originalism," I mean here a specific version of the complex concept that is usually understood and applied in the context of American jurisprudence. In my account, however, and adapting Keith E. Whittington's definition, originalism regards the discoverable meaning of the principles or values underlying the text "at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present." Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599, 599 (2004).

FIGURE II: DEMOCRATIC SLIPPAGE VIA CONSTITUTIONAL PRINCIPLES



So while Rawls viewed a thick veil of ignorance as necessary for the maintenance of a constitutional democratic society amid reasonable pluralism, he saw a gradual lifting of this veil through four sequential stages, culminating in a fully-lifted adjudication phase. In contrast, recent legal efforts across Europe have demonstrated a will to build anew a thick veil via prohibition, and to maintain it through constitutional convention, legislation and adjudication phases of EU's development. What I am suggesting here and arguing more systematically in the larger project from which this Essay is drawn, is that forced veiling of the original position is producing, paradoxically, slippage from liberal constitutional democracy across the European continent. Jurisprudence in this last Rawlsian phase, with its return to what I am calling an originalist employment of the legal concept of public order, must then be seen as the culmination of an attempt by European states to carve a thickly veiled original position as a starting point for the (stalled) European constitutional project, as a new attempt, by way of prohibition, at a European Constitution of Peoples. But by so doing, and as Sandel observed for another democratic federation nearly two decades ago, it seems clear that "this version of liberalism fails to secure the toleration it promises."¹²⁵

125. Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, in ARTICLES OF FAITH, ARTICLES OF PEACE 92 (James Davison Hunter & Os Guinness eds., 1990).