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Faith in Sovereignty: Religion and Secularism in the Politics of Canadian Federalism

Benjamin L. Berger

Abstract

L'articolo muove dalle recenti dispute per la composizione delle differenze religiose in Canada e intende svolgere una riflessione più attenta sulle relazioni tra federalismo, sovranità e principio di laicità nel Paese. Il lavoro indaga le origini politiche e il dibattito scaturito dalla Charter of Québec Values, un documento proposto nel 2013-2014 dal Parti Québécois, partito indipendentista di minoranza che ha tentato di promuovere una peculiare visione di Stato "laico". Nel contestualizzare questo documento nell'ambito della lunga storia canadese, dove il peculiare rapporto tra Stato e religione è servito a fornire argomenti per sostenere la diversità politica e culturale del Québec e per le conseguenti rivendicazioni di sovranità, l'articolo suggerisce che le affermazioni sulla natura e sulle esigenze del principio di laicità abbiano fornito un moderno e potente strumento utilizzabile nelle politiche del federalismo.

Introduction

What is the relationship between the politics of federalism and the politics of secularism?

"All modern states… are built on complicated emotional inheritances that determine relations among its citizens"[1]. This claim could serve as an apt starting point for an inquiry into the politics of federalism and sovereignty. It would certainly fit the Canadian case well, where the question of sovereignty, which was central to the constitutional history and evolution of the country over the second half of the 20th century, drew on the deep and complicated history of the relationship between French and English language, culture, colonialism, and empire. Questions about the "emotional inheritances" that shape modern nation

(1) Talal Asad, "French Secularism and the 'Islamic Veil Affair'" (2003), 8 Hedgehog Rev 93, at 102.

states and their political paths, seem no less important to a keen understanding of the contemporary life of the EU, the recent debate on independence in Scotland, and the range of sovereignty issues that have arisen elsewhere in Europe and around the world. And yet Talal Asad did not have issues of federalism or sovereignty in mind when he made this claim; rather, he was interested in the question of secularism.

Emotional inheritances, Asad argues in his essay on the headscarf debate in France, are part of what defines the local shape and character of the range of secularisms that we find around the world. With this, Asad participates in an important literature that has developed over the last number of years, arguing that we simply miss too much of political, historical, and *particular* interest in the capacious invocation of the general idea of "secularism", writ large. This body of research has emphasized the broad range of political and legal configurations that subsist under the general mantle of secularism, a rich variety of secularisms that is obscured by reference to a single modern phenomenon. Jakobsen and Pelligrini, for example, argue for a pluralisation of the idea of the secular, offering a range of studies of the ways that religion and political power can be disentangled in various historical and social contexts[2]. Ahmet Kuru's examination of secularism in France, Turkey, and the United States draws out the diverse methods and mechanisms used to give local shape to the secular in each national setting, emphasizing in particular the influence of political history and responses to an *ancien régime* in the development of various approaches to realizing secularism[3]. These and other works have insistently called upon scholars to attend to the diverse range of local approaches to decoupling religion and political authority and the diverse social, institutional, and legal dynamics involved in the 'varieties of secularism'[4]. But in addition to

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(2) Janet R. Jakobsen & Ann Pelligrini, *Secularisms* (Durham and London: Duke University Press, 2008).

(3) Ahmet Kuru, *Secularism and state Policies Toward Religion: The United States, France, and Turkey* (Cambridge and New York: Cambridge University Press, 2009).

(4) See, *e.g.*, Michael Warner, Jonathan Van Antwerpen & Craig Calhoun, eds., *Varieties of Secularism in a Secular Age* (Cambridge, Mass: Harvard University Press, 2010); James Q. Whitman, "Separating Church and state: The Atlantic Divide" (2008) 34:3 Hist Reflect 86.

constitutional histories and the peculiarities of institutional design, Asad emphasizes that there is an affective dimension to the politics of secularism that lends it a different kind of political dimension, one that defines community through memory and motivates through these "emotional inheritances". He explains that the forms of secularism are made various in part by virtue of the range of connotations and resonances that religion, and its relationship to power, can have within a particular culture and in a particular place: "The ways in which the concept of 'religion' operates in [a] culture as *motive* and as *effect,* how it mutates, what it affords and obstructs, what memories it shelters or excludes, are not eternally fixed"[5]. These motives and effects engendered by religion are the raw material for the politics of secularism[6].

This article seizes on recent debates about the accommodation of religious difference in Canada to think more carefully about the relationship between secularism and the management of religion, on the one hand, and federalism and claims of sovereignty, on the other. In the fall of 2013, a minority sovereigntist Parti Québécois (PQ) government in the Province of Québec introduced Bill 60, a bill referred to as the "*Charter of Québec Values*" or, in much of the debate that ensured, the "*Charter of Secularism*"[7]. The bill sought to respond to one of the most contentious political issues within Québec at the time, namely the accommodation and management of religious difference. Yet it did so in a way that appeared to run afoul of prevailing Canadian constitutional commitments to religious accommodation and multiculturalism. While it declared the religious neutrality and secular nature of the state, as well as the equality of men and women, it contentiously sought to prohibit employees of public bodies (broadly defined) from wearing "os-

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(5) ASAD, *supra,* note 1, at 106.

(6) Although I have emphasized the literature arguing for a pluralization of the concept of secularism, there are also an important set of arguments to be made about that which links these varieties of forms of secularism together. See my discussion in BENJAMIN L. BERGER, "Belonging to Law Religious Difference, Secularism, and the Conditions of Civic Inclusion" (2015), Soc Leg Stud, online: http://sls.sagepub.com/content/early/2014/09/18/0964663914549408.

(7) *Charter affirming the values of state secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*, 1st Sess, 40th Leg, Québec, 2013.

tentatious" or conspicuous religious symbols, such as Sikh turban, Jewish kippot, and Islamic headscarves. With this proposed ban, the Parti Québécois government charted out a form of secularism for Québec quite at odds with Canadian constitutional wisdom and thereby ignited a fierce debate, both inside and outside of Québec. Most agreed that if it were passed and challenged in the courts, this bill would be declared unconstitutional in light of the Canadian *Charter of Rights and Freedoms*[8], with its protection of freedom of religion and religious equality. And yet the Parti Québécois government attempted to put this bill at the centre of a snap election called in the spring of 2014. For a variety of reasons, the Parti Québécois suffered a resounding defeat in that election. And yet the "*Charter of Secularism*" has only been moved to the political background, not removed from the scene entirely.

One story that can be told about this proposed *Charter* is simply a story about the progressive stripping of religion from Québec culture and politics – the "secularization" of Québec. Since the 1960s, in a process referred to as the "Quiet Revolution", the Roman Catholic Church has been ousted from its former position of cultural and political influence[9]. From a highly Catholic society since prior to Canadian Confederation in 1867, through to the 1960s, Québec has become less and less overtly religious and its strong identity with the Catholic religion has been replaced with something more akin to a pervasive antipathy. And so one way of reading this proposed *Charter* is as the next move in this progressive marginalization of religion in Québec public life.

And yet that is not the story that I want to advance in this article. Rather, I want to read this Québec *Charter* as fundamentally a piece in the ongoing story of Canadian federalism and the politics of Québec sovereignty. Read in this way, the Québec *Charter* is evidence that a polity's relationship with religion is a potent resource for making claims about

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(8) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

(9) For more on the Quiet Revolution, see Gregory Baum, "Catholicism and Secularization in Québec", in David Lyon & Marguerite Van Die, eds., *Rethink Church state Mod Can Eur Am* (Toronto; Buffalo; London: University of Toronto Press, 2000), 149; David Seljak, "Why the Quiet Revolution was 'Quiet': The Catholic Church's Reaction to the Secularization of Nationalism in Québec after 1960" (1996), 62 Hist Stud 109.

political distinctiveness and identity. In Canada, the assertion of a distinctive relationship with religion has always been and remains one of the grounds for assertions of political and cultural distinctiveness and claims of sovereignty that are thereby engendered. Whether that lesson is transferrable to other political contexts is an interesting question; it seems, however, that claims about the management and relationship to religion are part of the genetic material of sovereignty in Canada.
Following a swift and broad brush-strokes review of the history of the place of Québec in Canadian federalism and the development of the Québec sovereignty movement, I will review the genesis and features of the 2013 proposed Québec *Charter of Secularism* in greater detail. The next section will draw the link between the proposed *Charter* and claims of sovereignty, reading this moment in claims about secularism into the long history of federalism in Canada. The article concludes with some reflections on the links between secularism and political sovereignty.

I. Québec Sovereignty and Canadian Constitutional History

Canadian federalism was formally established with Confederation in 1867 and the passage of the first Canadian constitution, the *British North America Act*[10]. Yet the origins of the federalism that Confederation constitutionalized had deeper roots. The *Treaty of Paris,* 1763[11]*,* which settled the claims between the French, British, and Spanish Crowns following the Seven Years' War, ceded all French possessions in what would later be Canada to the British Crown, which, in exchange, guaranteed certain rights – including the right to practice the Catholic religion – to the substantial population of French settlers living in the territory. This arrangement became more formal, with firmer territorial divisions, beginning with the *Québec Act,* 1774[12]. Very early on, then, the political structures in Canada recognized that, within a territory held by the British, some formal regard was necessary for the French Catholic inhabit-

(10) *British North America Act,* 1867 (UK), 30 & 31 Vict, c 3.

(11) *Definitive Treaty of Peace between Great Britain and the United States,* 3 September 1783, 48 CTS 487 (entered into force 12 May 1784).

(12) *The Québec Act,* 1774 (UK), 14 Geo III, c 83.

ants of what would later be Québec (though the long story of Canadian political life is one of insufficient regard being given to the political sovereignty of the indigenous peoples). By the time of confederation in 1867, approximately 35% of the population of Canada was French, a number that has dropped to approximately 20% today.

The constitutional structure established with the *British North America Act* afforded a list of powers to the federal and provincial governments, respectively. Although on the face of the *British North America Act* it appears that Canadian federalism imagined a strong central government and comparatively weaker provincial governments, the reality was that, over the developing political life of the country, and through judicial interpretation of the Constitution by the Judicial Committee of the Privy Council, provinces became increasingly powerful, holding key heads of legislative power[13]. The *British North America Act* contained no bill of rights and remained a piece of UK legislation, amendable only in the UK, both issues that would be resolved with patriation of the constitution in 1982 and the enactment of the *Constitution Act,* 1982[14], complete with the *Charter of Rights and Freedoms*. Yet prior to 1982, and over the course of the 20th century, substantial shifts in political life within Canada took place. To the original 4 provinces that made up Confederation, 6 more were added. Canada gained increasing independence from the UK, through the *Statute of Westminster,* 1931[15], and other constitutional developments. In Québec, the crucial period in the development of the modern relationship between Québec and the rest of Canada came in the 1960s. Over the course of the 1960s, political parties coalesced around a sovereignty movement and produced the Parti Québécois, which remains the chief provincial party within Québec advancing a sovereigntist agenda. Spurred on by events like Charles de Gaulle's famous statement, "vive le Québec libre!" on a visit to Canada in 1967, from this point forward, the central dynamic of Canadian federalism would be Québec's relationship to the rest of Canada, with the

(13) For one account of this, see JOHN T. SAYWELL, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto; Buffalo: University of Toronto Press, 2002).

(14) *Constitution Act,* 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

(15) *Statute of Westminster,* 1931 (UK), 22 & 23 Geo V, c 4.

French language serving as the symbolic heart of the movement. In 1976, the Parti Québécois formed the government in Québec.
This sovereignty movement led to a referendum in 1980 in which 60% of Québecers voted "no" to a form of independence from Canada, sovereignty association. Seizing the moment, Prime Minister Pierre Trudeau moved ahead with a constitutional reform package that would bring the Canadian constitution home to Canada, with a domestic amending formula, and would introduce the *Charter of Rights and Freedoms* in 1982. In a political trauma that would shape the years to come, the new constitution was approved and passed without Québec's agreement.
Over the course of the next 10 years, attempts were made to bring Québec into the constitutional fold with the Meech Lake Accord, 1987, and the Charlottetown Accord, 1992. Neither was successful in achieving the consensus required by the new amending formula. Disaffection within Québec with the state of confederation, and a strong sovereignty movement, led to another referendum on sovereignty in 1995, this time resulting in the narrowest of negative results, with a "no" vote of 50.58%. This led to the famous Supreme Court of Canada decision in *Reference re Secession of Québec*[16], in which the Court was asked to rule on the question of whether Québec could unilaterally secede from Canada. In a politically deft judgment, the Court held that, although neither international law nor domestic constitutional conventions gave Québec a unilateral right to secede, under the conventions and principles of the Canadian constitution, a clear majority vote on a clear question would trigger a binding (but not justiciable) obligation to negotiate toward secession. Any such negotiation would, however, have to respect the principles of (a) federalism, (b) democracy, (c) constitutionalism and the rule of law, and (d) the protection of minorities.
In the years following the *Secession Reference*, the Parti Québécois held the position of both the party of Québec sovereignty and the most salient socially progressive option in Québec politics. Flying these banners, the PQ achieved may electoral successes, as did its federal sibling, the Bloc Québécois. The sovereignty movement focussed its efforts on protecting and preserving the French language and French culture within

(16) [1998] 2 S.C.R. 217.

Québec and won a series of important legal and political victories in this regard. Moving into the 21st century, Québec governments succeeded in securing powers and privileges for Québec within confederation, as well as in protecting French language and culture. Moreover, as the world moved through a financial crisis in 2008, Canada's economy and banking system proved surprisingly resilient.

In the result, by the early 2010s, the Québec sovereignty movement entered a period of relative quiescence. Economically, it seemed to be a good time to be within Canada. Meanwhile, a set of important language issues had been fought and won on behalf of Québec, and this had been achieved *within* Canada. The political fortunes of the PQ lagged with an ebb in the vitality of the sovereignty movement. This was the situation in 2012 when a political scandal knocked the governing Liberal Party from power and installed a minority PQ government, the first PQ government since the 1998 election.

II. Religious accommodation and the Charter of Québec Values

Another issue of constitutional salience had emerged at the forefront of public debate in Canada over the first years of the 21st century, namely the management and accommodation of deep religious difference. Since the 1970s, Canada had adopted a formal policy of multiculturalism, and the introduction of the *Charter of Rights and Freedoms* in 1982 added a constitutional rights dimension to the issue of religious freedom and equality. Although this aspect of the jurisprudence under the Canadian *Charter* had been somewhat slow to develop, the early 2000s saw an explosion of high-profile cases and issues surrounding religious freedom and equality, leading to a series of Supreme Court decisions on the nature and scope of the right of religious freedom[17]. A number of the leading cases emerged out of Québec, one concerning the accommodation of Jewish Succahs within the regulations governing a condominium association[18], and another famously holding that, as a matter of freedom of re-

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(17) See, *e.g.*, Benjamin L. Berger, "Law's Religion: Rendering Culture" (2007), 45:2 Osgoode Hall Law J 277; Benjamin L. Berger, "The Cultural Limits of Legal Tolerance" (2008), 21:2 Can J Law Jurisprud 245.

(18) *Syndicat Northcrest v Amselem*, 2004 SCC 47.

ligion, a school was under an obligation to accommodate a Sikh student who wished to carry a ceremonial dagger, a *kirpan*, while at school[19]. Meanwhile Ontario had experienced a debate about the accommodation of Islamic law within its private arbitration scheme, resulting in provincial legislation that purported to ban all faith-based family arbitration[20]. As they did elsewhere in the West, debates about the wearing of the religious symbols and clothing also took root in Canada[21].

In both judicial decisions and public debate, the default frame for these conversations in Canada was the idea of multiculturalism – both its requirements and its limits. And yet this language had never sat entirely comfortably within Québec, given that the cultural issue of chief salience in that province was, of course, the question of the preservation of Québec culture. Debates about religious accommodation, generated in part from these high-profile cases that began in the province, were particularly volatile and salient in Québec. In 2007, and in response to perceived public concern about the scope of religious accommodation, the Liberal government of the day struck a commission of inquiry into reasonable accommodation, appointing philosopher Charles Taylor and historian and sociologist Gérard Bouchard as commissioners. In its final report, the commission focussed on the idea of secularism, distinguishing "open" from "closed" forms of secularism, and concluded that Québec had something of a different tradition regarding the management of religious and cultural difference[22]. The report also recommended that the Québec government should develop a white

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(19) *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6. For an analysis of the relationship between the Supreme Court of Canada's leading decisions on freedom of religion and the politics of federalism, see Sujit Choudhry, "Rights Adjudication in a Plurinational state: the Supreme Court of Canada, Freedom of Religion, and the Politics of Reasonable Accommodation" (2013), 50 Osgoode Hall Law J 575.

(20) See Berger, *supra,* note 6.

(21) Juridically, this debate would make its most high-profile appearance in the case of *R v NS*, 2012 SCC 72, which addressed the question of whether a Muslim sexual assault complainant would be permitted to wear the *niqab* while testifying in criminal proceedings.

(22) Gérard Bouchard & Charles Taylor, *Building the Future: A Time for Reconciliation* ([Québec]: Commission de consultation sur les pratiques d'accomodement reliées aux différences culturelles, 2008). For further discussion of the context surrounding the Bouchard-Taylor commission, see Lori G. Beaman, "Battles Over Symbols: The 'Religion' of the Minority Versus the 'Culture' of the Majority" (2012), 28 J Law Relig 67 at 72–77.

paper setting out a proposal for the management of religious difference within the province. Although the Liberal Government took some steps towards addressing public concern about religious accommodation[23], in the fall of 2013 the minority Parti Québécois government introduced Bill 60 – its "*Charter of Québec Values*" – putatively as a response to the Bouchard-Taylor recommendation.
In the debate that ensured, this bill was frequently referred to as the "*Charter of Secularism*", a label that arose as a product of Premier Pauline Marois's claim that the legislation was designed to codify and entrench principles of state neutrality in matters of religion and, specifically, Québec's commitment to secularism. One gains a sense of the character and thrust of the legislation by considering section 1 of the bill:

"In the pursuit of its mission, a public body must remain neutral in religious matters and reflect the secular nature of the state, while making allowance, if applicable, for the emblematic and toponymic elements of Québec's cultural heritage that testify to its history".

Reference to the "emblematic and toponymic" elements of Québec society was necessitated by the saturation of day-to-day life in Québec with symbols of the Roman Catholicism that it had reacted against in the 1960s. Street names like "St. Hubert" and "St. Denis" are omnipresent in Québec and the mountain at the centre of Montreal has a cross atop it, visible in many parts of the city below. Indeed, in the National Assembly, the legislative assembly for the province of Québec, a crucifix hangs above the speaker's chair.
The bill proposed a number of measures, including making amendments to existing human rights instruments by emphasizing a priority on gender equality, and providing a broad scheme for the handling of requests for religious accommodation. A key amendment was the addition of the following new statement of purpose in the preamble to Québec's existing *Charter*, the *Charter of Human Rights and Freedoms*[24]:

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(23) In 2011, the Liberal Government tabled Bill 94, which appealed to the idea of "open secularism", found in the Bouchard-Taylor report, and which would prohibit any employee of the government delivering a government service, and anyone accessing such a service, from wearing a face covering.

(24) *Charter of Human Rights and Freedoms*, RSQ, c C-12.

"Whereas equality between women and men and the primacy of the French language as well as the separation of religions and state and the religious neutrality and secular nature of the state are fundamental values of the Québec nation…".

This "*Charter of Québec Values*" was, thus, very much farmed as an appeal to a particular claim about the nature of secularism, of the "*caractère laïque de l'État*".
However, the centrepiece of the bill, and the flashpoint for debate, was the proposed restriction on the wearing of religious symbols[25]. If the bill were passed, employees of public bodies would be prohibited from wearing headgear, clothing, jewellery or other adornments that overtly indicated religious affiliation. "Public bodies" would be broadly defined as including government departments, municipal authorities like transit authorities, school boards, colleges, universities, and hospitals and health services. In effect, after a transition period, the legislation would prohibit doctors, dentists, midwives, child care workers, and anyone else acting for and remunerated by the states, as well as judges, tribunal members, police, and prison guards, from wearing "conspicuous" religious symbols. Thus, the heart of the debate around this "*Charter of Québec Values*" or "*Charter of Secularism*" was the following government-issued infographic:

(25) For a discussion of this aspect of the bill, see Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014), at 118-124.

This proposal is one that appears more at home in France or Turkey than it does in Canada. It sparked enormous excitement and pitched debate. There were substantial portions of the population within Québec that supported the bill, with proponents arguing that it captured the distinctive character of Québec's relationship to religion and attitude towards religious accommodation. Interestingly, sizeable segments of the population outside of Québec also voiced support for this kind of ban. And yet, within Québec, minorities and Anglophones, overwhelmingly concentrated in Montréal, as well as professionals and universities there, objected fiercely. In this, they joined with the dominant sentiment from outside of Québec, which characterized this proposal as discriminatory and xenophobic. Many from outside Québec cast the debate in terms of Canadian multiculturalism at large, as contrasted with an exclusionary and negative attitude towards minorities and religious difference in Québec society.

A number of features of the bill call for comment. First, Parti Québécois proponents of the bill drew the strong link between this proposal and the French tradition of *laïcité*, arguing that the relationship to religion in France, which had famously led to a similar ban on conspicuous religious symbols, was more natural to Québec society. Québec's understanding of secularism, they argued, was more akin to the *laïcité* of France than the multiculturalism of the rest of Canada and Britain. Second, the bill was riddled with implementational problems and inconsistencies. Finally, this aspect of the proposal seemed plainly unconstitutional, as measured against the jurisprudence that had developed since 1982 under the *Charter of Rights and Freedoms*. Many made the rather safe prediction that if this bill were passed and challenged before the courts, it would be ruled inconsistent with the *Charter* protection of freedom of religion and guarantee of religious equality. Indeed, the Commission des droits de la personne et des droits de la jeunesse, the Québec body responsible for promoting the rights and principles found in the *Québec Charter of Human Rights and Freedoms*, declared that Bill 60 would violate Québec's own *Charter*, adopted in 1975[26].

(26) http://www.montrealgazette.com/life/Charter+infringes+human+rights+commission/9047976/story.html.

These predictions were never tested, however, as the minority Parti Québécois fell in a snap election that it had called for the spring of 2014. Although it sought to turn that election into a referendum on Bill 60, economic questions and other political dynamics intervened, confoundingly, to lead to the worst electoral defeat in modern Parti Québécois history. The "*Charter of Values*" would be placed on the backburner.

III. Secularism, Religion, and the Politics of Canadian Federalism

How might one understand the remarkable appearance of Bill 60 in Québec and the pitched debate that it engendered? What stories can be told to make historical sense out of this notable moment in the relationship between law and religion in Canada? I wish to entertain two possible accounts, each offering a different vision of what was at stake in the introduction of this bill and, in particular, what role religion and religious diversity was playing in this affair.

The first is a story of discontinuity and change in the role of religion in Québec politics and society. This account begins with the recognition that one of the defining characteristics of Québec society in the 18th century origins of the country – indeed, perhaps the most politically salient, as I will explain – was its devout Catholicism. Québec society was thoroughly Catholic in a Protestant Anglophone sea. The Catholic character of Québec society would imprint on the early life of the province and exerted both cultural and overt political influences on public life. Indeed, it is notable that, beginning in the mid-19th century, the ultramontane movement in Roman Catholicism gained a substantial foothold in Québec and a sympathetic ear among conservatives. Ultramontanism translated Papal supremacy and infallibility into a claim about the relationship between Church and state. Inferior to the Church in origin and nature, the state was beholden and should accede to the positions, directions, and interests of the Church. On this view, there was no principled basis for drawing a sharp line between the theological and the political, with the Church's authority serving as the controlling principle for both. This vision of the relationship between religion and state authority had political purchase and was the subject of legal and electoral debate in the early life of the province[27].

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(27) See, *e.g.*, *Brassard* et al *v. Langevin* (1877), 1 S.C.R. 145.

And yet, jumping ahead to contemporary times, Québec is often now described as "the most secular province of Canada"[28], with Québecers now highly skeptical of religious authority, and holding some of the most progressive views on social matters very much in tension with Catholic teaching. This radical transformation in the religious life of the province began in the 1960s with the "Quiet Revolution", a fascinating moment in social history in which Québec society pushed back hard on the authority of the Catholic church and began a process of untethering the Church from public power in all domains of life. This hard break and rapid transformation left its mark on education, politics, law, language, and everyday social practices.

Read in this story – about a highly religious society becoming non- and even anti-religious in a rapid transformation over the last half-century – the introduction of Bill 60 and its "*Charter of Values*" appears as a contentious moment and a trouble spot, but one that is simply part of a process of the internalization of a vision of the secular. The nature and details of the *Charter* were contentious, to be sure, but all of those distinctive features can be explained by Québec's peculiar history of a hard break with the Catholic church and by sensitivity around Francophone language and cultural identity. The debate that emerged around the Québec *Charter*, on this reading, best understood as essentially about contested visions of what secularism should look like. Québec society had broken hard with a devoutly Catholic past and the Parti Québécois was seeking to formalize a French form of *laïcité* more natural and fitted to Québec society than the multiculturalism found elsewhere in the country. Bill 60 is best read as part of a story about discontinuity and change from a Catholic past to a secular present, the artefact of a fundamental shift in the role of religion in Québec's legal and political life.

There has, indeed, been a shift in the role of Catholicism in Québec and the religiosity of the society, and so this story has some appeal, reflecting certain truths. And yet, as is so often the case when appeal is made to "the secular" or "the secular nature of the state" (as though

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(28) BAUM, *supra,* note 8, at 149.

the concept had a discernibly stable meaning independent of the political milieu in which it emerges), this story also seems to confound our understanding. To identify just one deficit in this account, consider the certainty and resolve with which Parti Québécois leaders appealed to the French inspiration for its vision of *laïcité*. This appeal is baldly anachronistic. The anti-clerical moment that defined *laïcité* in France occurred in 1905 *Law on the Separation of Churches and the state*[29] and with the Third Republic. At this point, Québec's embrace of Catholicism has been firm since the 18th century and it was not until the 1960s that anything resembling a similar movement took place. There is, to be sure, something attractive in the appeal to an indigenous attachment to French *laïcité*, but that appeal is not a function of its historical accuracy. And so let us see what can be taken from a differently framed story about what was at stake in the Parti Québécois proposing Bill 60. This account looks back to the origins of the Canadian state and sees that the *Treaty of Paris,* 1763, which settled the claims between the French, English, and Spanish Crowns in North America, included a single central concession to the French in exchange for English control of Canada:

"His Britannic Majesty, on his side, agrees to grant the liberty of the Catholic religion to the inhabitants of Canada: he will, in consequence, give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish church, as far as the laws of Great Britain permit".

In the *Québec Act,* 1774, an essential element of the founding of the province was the declaration "that His Majesty's Subjects, professing the Religion of the Church of Rome of and in the said Province of Québec, may have, hold, and enjoy, the free Exercise of the Religion of the Church of Rome, subject to the King's Supremacy, … and that the Clergy of the said Church may hold, receive, and enjoy their accustomed Dues and Rights, with respect to such Persons only as shall profess the said Religion". Looking ahead to Confederation in 1867, the

(29) *Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat*, JO, 9 December 1905.

British North America Act, 1867, the founding constitution, contained a provision – s. 93 – that protected denominational schooling. In 1996, the Supreme Court of Canada underscored the centrality of this provision to the historical compromise that created Canada: "Without this 'solemn pact', this 'cardinal term' of Union, there would have been no Confederation"[30]. The lesson of this history is that the political identity of Québec in Canada was very much fashioned through claims about its special relationship with religion.

This story also looks to the more modern political history of Québec and recognizes that the quiet revolution was co-emergent with the growing sovereignty movement, associating the reconfiguration of the relationship between the Church and life in Québec with a shift in claims about Québec's place in confederation and the rise of the Parti Québécois. The "*Charter of Values*" thereby becomes part of a story that includes the fact that when the Canadian constitution was patriated in 1982, and the *Charter of Rights and Freedoms* became part of Canada's supreme law, Québec did not accede to the new constitution. That failure to sign on to the new constitution led to the referenda on sovereignty and the continued political potency of the Parti Québécois.

So how does the *Charter of Québec Values* appear when read into this second story? What was at stake in its invocation, what were the motives and effects, to draw from Asad, that influenced its appeal to secularism? On this account, the *Charter of Québec Values* is part of a story of political continuity – not religious discontinuity and rupture – whereby a distinctive relationship with religion has consistently been invoked as a dimension of the politics of federalism in Canada. In the early years, Roman Catholicism was the foundation of the religious uniqueness of Québec, a singularity that was conscripted to secure political identity within the federation; today, the terms of that invocation have shifted from Roman Catholicism to *laïcité*, but the essential role played by appeal to a unique relationship with religion has remained.

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(30) *Adler v. Ontario*, [1996] 3 S.C.R. 609, para. 29.

Consider the political and constitutional dynamics engendered by the Parti Québécois' *Charter*. The proposal came at a time when the Parti Québécois had struggled with its sovereignty platform, in part because Canada had fared so well economically and so much had been achieved over the years for French language and culture within confederation. In the context of a relative waning in sovereigntist sentiment, Bill 60 and a strong claim about Québec's distinctive brand of secularism presented to the populace a stark difference from the rest of Canada in "the way we are" and did so on a point of tenderness and concern: the accommodation of religious difference. In this short term, the politics of secularism opened up a Québec/rest-of-Canada divide that might energize and invigorate support for the Parti Québécois.

Consider also the long-term possibilities, building from the observation, noted earlier in this article, that the bill, if it passed, was unconstitutional. How would this have played out, given Canada's constitutional history and structure? If the bill were passed and challenged in the courts, the issue would likely make its way to the Supreme Court of Canada. This federal institution, sitting in Ottawa, would then assess the constitutionality of a piece of legislation styled the "*Charter of Québec Values*" and likely rule that it was unconstitutional by reference to a constitution to which Québec had never agreed. This imagined unfolding would be a kind of sovereigntist political fantasy.

If this story is convincing, then at a time at which there was an apparent lack of appetite on questions of sovereignty, the invocation of a particular concept of secularism served political purposes in exciting a debate within the federation. On this reading, an important dimension of the story of the *Charter of Québec Values* is a way in which the management of religious identity has consistently served as terrain on which political identity and sovereignty works itself out. The *Québec Charter* was certainly an important moment in the ongoing debate – taking place within Canada and elsewhere – about the management of religious difference and the limits of accommodation. And yet religion and "secularism" are doing a great deal of other work when the proposed bill is read together with the politics of federalism. Recall Asad's claim that secularisms emerge as a product of the polysemy and imaginative agility of religion, "what it affords and obstructs, what memories it shel-

ters or excludes". The invocation of French *laïcité* afforded certain political opportunities; it obstructed certain truths and memories. This episode was about secularism, but only as a currently available marker for a debate about distinctiveness and as a contemporary instantiation of a long-established role for religion in constructing the politics of belonging – the heart of federalism – in Canada.

IV. ***Conclusion: Secularism and Federalism***

The practice of states making claims about the political significance of religious expressions, and then backing those semiotic claims with the force of law, has emerged as something of a transnational pattern, a kind of habit of modern governance at a time at which religious difference is felt to be an issue of particular political salience. The headscarf has often been the focus of this symbolic work done in the name of one version of secularism or another, as the cases of France and Turkey show so clearly[31]. In France, the 2003 Stasi Commission's report on secularity in schools was provoked by public debate about the "Islamic headscarf" and whether girls should be permitted to wear these items in public schools. The Commission's report led to a 2004 law that prohibited the display of "conspicuous religious signs", a law that, as Asad shows so convincingly, depended on the state involving itself deeply in questions of religious meaning and theological significance[32]. This work was underwritten by a set of commitments about the republican political identity of the state in which a brand of secularism, *laïcité,* plays a central role in the historical and emotional development of the policy. The idea that religion is not supposed to figure in the public lives of the French, however distracting that claim might be from the realities of day-to-day life[33], has emerged as central to the construction of political community.

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(31) See Carolyn Evans, "The 'Islamic Scarf' in the European Court of Human Rights" (2006), 7 Melb J Int Law 52.

(32) Asad, *supra,* note 1. See also Mayanthi Fernando, "Reconfiguring Freedom: Muslim Piety and the Limits of Secular Law and Public Discourse in France" (2010), 37 Am Ethnol 19.

(33) For a discussion of the rich associational life that exists beneath the claims of republican identity in France, see John R. Bowen, *Can Islam Be French?: Pluralism and Pragmatism in a Secularist State* (Princeton; Oxford: Princeton University Press, 2011).

In Turkey, the case of *Leila Sahin v Turkey*[34] dramatized a similar role for the state construction of symbolic meaning, as well as a similarly strong claim for a commitment to *laïcité* as central to national identity, albeit arising from a profoundly different history than that found in France. Assessing a ban on the wearing of the headscarf at Turkish universities in 2005, the Grand Chamber of the European Court of Human Rights set the issue within the history of the formation of the Turkish republic and the central role that a particular relationship with religion played in the revolutionary reforms that established the modern Turkish state. Leila Sahin's wish to wear a headscarf during her studies at Istanbul University had to be read within a story about the abolition of the caliphate, the rejection of Islam as the state religion, and concerns over the recent rise in "political Islam", which some understood as threatening this commitment to Turkish political secularism. Again, whether this framing of the relationship between religion and the state accurately captures the facts of religious life in Turkey was is not the point of greatest interest[35]; rather, what stands out from the *Sahin* case is that the margin of appreciation that the Grand Chamber granted to Turkey on the limitation of religious freedom was set by the idea that the political identity of the state – which, according to the judges, the government has a right to defend – is forged through its peculiar relationship with religion[36].

This symbol play as a way of defining a national relationship with religion and, thereby, a claim about political identity is not solely a phenomenon arising in polities committed to ideas of *laïcité* and solely

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(34) *Leila Sahin v Turkey*, 10 November 2005, European Court of Human Rights (Grand Chamber), No. 44774/98.

(35) For one account of the history and character of Turkish secularism, see Taha Parla & Andrew Davison, "Secularism and Laicism in Turkey", in Janet R. Jakobsen & Ann Pelligrini, eds., *Secularisms* (Durham and London: Duke University Press, 2008), 58.

(36) Judge Tulkens, writing in dissent, objected to the Court ruling on the symbolic valence of the headscarf and to the majority's approach to both secularism and equality. Judge Tulkens insisted that "[e]quality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them" (para. 12) and that "[w]hat is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to" (para. 11).

concerned about the headscarf as a threatening appearance of Islam. In Italy, the Catholic history and identity of the country was harmonized with a commitment to religious equality and state neutrality when the Grand Chamber of the European Court of Human Rights found that the practice of displaying a Crucifix in public school classrooms fell within Italy's margin of appreciation around the management of religion[37]. The intricate character of the symbolic exegesis involved in constructing these claims about the relationship between religion, political identity, and the character of a modern secular state is apparent in the reasoning of the Administrative Court, cited in the Grand Chamber judgment. Rather than an exclusionary expression of a particular religious affiliation for the state, Jesus dying on the cross was really a symbol of secularity:

"It can therefore be contended that in the present-day social reality the crucifix should be regarded not only as a symbol of a historical and cultural development, and therefore of the identity of our people, but also as a symbol of a value system: liberty, equality, human dignity and religious toleration, and accordingly also of the secular nature of the state – principles which underpin our Constitution"[38].

Catholicism, national identity, and secularity, are all read together in this remarkable hermeneutic exercise. And in the United States, expressions of religious affiliation such as the reference to God in the pledge of allegiance have been interpreted as patriotic rather than religious exercises, what Justice O'Connor assembled into a category called "ceremonial deism"[39]. In her concurring opinion, Justice O'Connor explained

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(37) *Lautsi and others v Italy*, 19 March 2011, European Court of Human Rights (Grand Chamber), No. 30814/06. For analysis of this case, see Jeroen Temperman, ed., *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden; Boston: Martinus Nijhoff, 2012). For the purposes of this article, of particular interest is Richard Moon, "Christianity, Multiculturalism, and National Identity: A Canadian Comment on Lautsi and others v. Italy", in Jeroen Temperman, ed., *Lautsi Pap Multidiscip Reflect Relig Symb Public Sch Classr* (Leiden; Boston: Martinus Nijhoff, 2012), 241.

(38) *Lautsi*, para. 15, citing para. 11.9 of the Administrative Court's decision.

(39) *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

that "although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes"[40]. "It is unsurprising», she explains, «that a nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths"[41]. National identity is forged through a particular relationship with religion, one that is now understood through a claim about culture and the character of the secular[42].

The proposed *Charter of Values* was another expression of this pattern. In asserted defence of a brand of secularism, the Parti Québécois government involved itself in the essentially theological work of defining the significance of religious attire. The claims were not just prescriptive but, rather, descriptive: they purported to reflect and respect the particular relationship between the Québec nation and religion. But the Québec case adds something of constitutional interest and import, namely the display of how this pattern can also fit into and serve the politics of federalism. The story told in this article shows how defining a distinctive relationship with religion has always been a key aspect of how Québec has distinguished its political character from that of the rest of Canada, securing for itself a unique place in the federation. That relationship was defined by attachment to Roman Catholicism in the early history, reaction against it during the 1960s and the Quiet Revolution, and the claim is now being made that it is a different form of secularism that plays a significant role in differentiating Québec from the rest of Canada. On the reading offered in this article, debate over the Québec *Charter* displayed the way in which secularism is a handy tool in the toolkit of the politics of federalism, interestingly at hand in service of claims of sovereignty. Whether that role for the politics of secularism is generalizable outside of the Québec

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(40) *Elk Grove*, at 35.

(41) *Elk Grove*, at 35-6.

(42) For an insightful examination of the way in which religious symbols are transformed into "cultural" symbols, and the politics of this shift, see Beaman, *supra,* note 16. Examining the *Lautsi* case and the Québec setting as cases-in-point, Beaman argues that "such a transformation allows for the preservation of a majority religious hegemony in the name of culture" (68).

and Canadian setting is not clear. Perhaps there are peculiar features of the Canadian national story – the attachment to official multiculturalism, the immigrant history of the country, etc. – that make it a unique case. I suspect, however, that this is not so and one can begin to think of other constitutional settings in which working out relationships to religion has been tethered to claims of sovereignty. Stepping back, there are good reasons to think that we should view secularism as an available resource in contemporary debates about federalism and sovereignty.

Federalism is fundamentally concerned with the construction and negotiation of political identity. Given the historically central role that religion has played in the definition of community belonging and national identity, it would be odd, indeed, if contemporary debates about religion and contemporary debates about federalism did not converge and interact. Moreover, from a more theoretical perspective, the concept that beats at the heart of federalism and independence movements – sovereignty – has an ineluctably theological flavor to it. One need not adopt the whole of his political thought to appreciate Schmitt's insight in this respect:

"All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver – but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts"[43].

If there is truth in this claim, why would one expect that federalism, itself a significant concept of the modern theory of the state, would be uniquely immune from the echoes and resonances between sovereignty and religion that contemporary scholarship on political theology points

(43) Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University Of Chicago Press, 2006), at 36.

out to us[44]? And if, as Asad argues, secularism is profitably understood as a means by which the modern state secures its own power[45] – if it is a political technology – we should expect that it would activated as a means of negotiating the power and sovereignty relationships at work in projects of federalism and political independence.

The debate over the Québec *Charter of Values* was an important episode in the unfolding story of Canadian federalism. And yet what might prove of most interest to scholars of federalism is the way in which this episode serves as an invitation to think more carefully about the relationship between debates about the character of secularism and the contemporary politics of federalism.

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(44) Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011).

(45) Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003).