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WHY CITIZENSHIP?

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## The Culture of Citizenship

Leti Volpp\*

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# The Culture of Citizenship

*Leti Volpp\**

*The headscarf debate in France exemplifies what is widely perceived as the battle between a culture-free citizenship and a culturally-laden other. This battle, however, presumes the existence of a neutral state that must either tolerate or ban particular cultural differences. In this Article, I challenge that presumption by demonstrating how both cultural difference and citizenship are imagined and produced. The citizen is assumed to be modern and motivated by reason; the cultural other is assumed to be traditional and motivated by culture. Yet*

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\* Professor, Boalt Hall School of Law, UC Berkeley. My profound thanks to Audrey Macklin and Guy Mundlak for inviting me to participate in the Why Citizenship? workshop and this symposium issue. Generous support for the writing of this article was provided by the MacArthur Foundation Program on Global Security and Sustainability in the form of an Individual Research and Writing Grant. Earlier versions of this article were presented at the Center for the Study of Law and Culture at Columbia Law School, the Gender Institute at the London School of Economics, the Institute for Gender and Women's Studies at the American University of Cairo, the Citizenship and Cultural Difference symposium at Rutgers University, Rockefeller Foundation Conferences at UC Riverside and UC San Diego, the Cultural Studies Program at Sabanci University, the Pembroke Center's Roundtable on Gender and the Politics of "Traditional" Muslim Practices, the Center for Law, Culture and History at USC Law School, the Association of American Studies, the Association of Asian American Studies, the Annual Meeting of Law and Society, and faculty workshops at the University of Melbourne School of Law, the Monash University School of Law, the University of Toronto School of Law, UCLA Law School, and the Boalt Hall School of Law. I received extremely helpful comments at each site; special thanks to Kathryn Abrams, Muneer Ahmad, Linda Bosniak, Devon Carbado, Gina Dent, Mary Dudziak, David Eng, Katherine Franke, Ariela Gross, Lisa Hajjar, Cheryl Harris, Ratna Kapur, Karen Knop, Ian Haney López, Dicle Kogacioglu, Lisa Lowe, Donald Moore, Jennifer Nedelsky, Mae Ngai, Richard Perry, Anne Phillips, Denise Reaume, Russell Robinson, Teemu Ruskola, Kim Rubenstein, Joan Scott, Howard Shelanski, Nomi Stolzenberg, Kendall Thomas, and Sophie Volpp. My thanks as well to Julian Park, Harini Raghupathi, and Emily White for their research assistance.

*citizenship is both a cultural and anti-cultural institution: citizenship positions itself as oppositional to culture, even as it is constituted by cultural values. Recent scholars of multiculturalism have turned to concepts of citizenship as a solution to the dilemma raised by conflicts over culture. But these concepts of citizenship, namely deliberative democracy and civic participation, replicate the presumption of a culture-less "citizenship" — and thus constitute an ironic choice of solution to the problem of cultural difference.*

## INTRODUCTION

In February 2004, the French legislature passed an amendment to the French Code of Education that banned students from wearing "conspicuous religious symbols" in French public primary and secondary schools.<sup>1</sup> French President Jacques Chirac had convened a commission in July 2003, known as the Stasi Commission, to examine how the principle of *laïcité*, or secularity, should apply in practice. The Stasi Commission recommended prohibiting the wearing of headscarves by Muslim girls, yarmulkes by Jewish boys, and large Christian crosses. Small crosses and discreet pendants, such as a Star of David or hand of Fatima, were ruled to be acceptable.<sup>2</sup>

The idea behind the ban, implemented in September 2004, reflects a strict separation between church and state that is believed to foster French republicanism. France's long history of religious conflict and persecution led both to the idea that secularism is the only guarantor of national peace and to the official separation of church and state in 1905.<sup>3</sup> Addressing the French nation on the ban of conspicuous religious symbols, President Jacques

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1 See generally Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190 (*Loi no. 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*).

2 See Christopher Caldwell, *In Europe, "Secular" Doesn't Quite Translate*, N.Y. TIMES, Dec. 21, 2003, § 4, at 10.

3 As taught in French schools, the secular character of the state represents a hard-won victory against anti-Semitism and the authoritarian Catholicism which had previously held sway, although in practice it is suggested that the principle shows a history of pragmatic accommodation. See *The War of the Headscarves*, ECONOMIST, Oct. 13, 2004, available at [http://economist.com/world/europe/displayStory.cfm?story\\_id=2404691](http://economist.com/world/europe/displayStory.cfm?story_id=2404691); see also Jean Bauberot, *The Secular Principle* (Jan. 2001), <http://www.ambafrance-uk.org/Secular-principle-PM-s-Office.html>; Diana Pinto, *The Long, Bloody Path*

Chirac explained that what was at stake was "the principle of secularism," one of "the pillars of our Republic."<sup>4</sup> The school, he urged, "must remain a privileged place for the transmission of republican principles and a melting pot for equal opportunity."<sup>5</sup>

It would not be accurate, however, to think that the law emerged from a concern about the boundary between religion and state in general. In the same statement, President Chirac contended that the ban "protects our schools from breaking down along ethnic lines."<sup>6</sup> Thus, we see in his words a glimmer of what else is at work, as evidenced by his use of the word "ethnic" rather than "religious."<sup>7</sup>

The impetus for the law clearly stemmed from controversy over Muslim girls wearing headscarves to school;<sup>8</sup> President Chirac admitted there had never been a problem with Catholic students wearing crosses "obviously of an excessive dimension," and most Jewish students who wear skullcaps attend private Jewish schools.<sup>9</sup> Thus, the formally "neutral" breadth of the 2004 law with its focus on the conspicuousness of any religious symbol masks the

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*That Led to French Secularism*, INT'L HERALD TRIB., Jan. 7, 2004, available at <http://www.iht.com/articles/124035.html>.

For a sense of the history of pragmatic accommodation of secularism in France, see Alain Badiou, *Behind the Scarfed Law, There is Fear*, LE MONDE, Feb. 22, 2004, available at [http://www.islamonline.net/English/in\\_depth/headscarf/2004-03/article\\_04.shtml](http://www.islamonline.net/English/in_depth/headscarf/2004-03/article_04.shtml).

He writes:

Secularism. A rust-proof principle! Three or four decades ago, high schools forbade the sexes from mixing in a single classroom. Pants weren't allowed for girls. Catechism and chaplaincy were compulsory. Communion was solemn, with the guys in white armbands and the cutie pies under tulle veils. A real veil, not a headscarf. And you'd like me to hold that headscarf as a crime?

*Id.*

4 See Statement by Jacques Chirac, President of the Republic (Jan. 28, 2004), available at [http://www.info-france-usa.org/news/statmnts/2004/chirac\\_secularism\\_012804.asp](http://www.info-france-usa.org/news/statmnts/2004/chirac_secularism_012804.asp).

5 *Id.*

6 *Id.*

7 Thus, for Muslims in France, the state perspective on their religious practice is conjoined with concerns about ethnic, not religious, difference. Culture and religion become fused.

8 See Elaine Sciolino, *France Turns to Tough Policy on Students' Religious Garb*, N.Y. TIMES, Oct. 22, 2004, at A3. She writes: "Officially the law is aimed at enforcing France's republican ideal of secularism. Unofficially it is aimed at stopping female Muslim public school students from swathing themselves in scarves or even long veils." *Id.*

9 See Elaine Sciolino, *Sikhs in France?*, N.Y. TIMES, Jan. 12, 2004, at A3.

particular concern underlying the law. In December 2003, sixty prominent French women had signed a letter in the magazine *Elle*, demanding a ban on the veil as a "visible symbol of the submission of women."<sup>10</sup> The headscarf, in comparison to the cross and the yarmulke, raises different issues in France than does the mere principle of *laïcité*. Swirling about in the debate over the headscarf are the relationship of the veil to the question of gender equality and the desire to see the Muslim community integrated into France.<sup>11</sup>

Thus, we can see that in France, the figure of the republican citizen is not a purely neutral concept. Rather, this figure emerges in opposition to a perceived, particularized threat, positioning an abstract, culture-free citizen against a culturally-laden other. This frames a debate between endorsing the putatively universal values foundational to citizenship (here, *laïcité*) and supporting the practices of a minority community. In this Article, I argue that this debate wrongly approaches controversies involving citizenship and culture. The battle between a culture-free citizenship and a culturally-encumbered other presumes the existence of a neutral state that must either tolerate or ban particular cultural differences. I challenge that presumption by demonstrating how both cultural difference and citizenship are imagined and produced.

I begin by examining the relationship between culture and citizenship. Citizenship is both a cultural and anti-cultural institution, by which I mean that citizenship positions itself as oppositional to specific cultures, even as it is constituted by quite specific cultural values. The citizen is assumed to be modern and motivated by reason; the cultural other is assumed to be traditional and motivated by culture. In order to be assimilated into citizenship, the cultural other needs to shed his excessive and archaic culture. Citizenship emerges through its distinction from the cultural other, who is measured and found wanting for citizenship. We should therefore understand that the cultural other is constitutive of the citizen.

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10 See *Le magazine Elle lance un appel contre le voile*, *ELLE*, Dec. 5, 2003 (describing the veil as a "symbole visible de la soumission de la femme"). Signatories include Isabelle Adjani, Sonia Rykiel, Isabelle Huppert, and Emmanuelle Beart.

11 For a discussion of the earlier headscarf controversy in France, which began in 1989 when three girls were forbidden to attend class with their heads covered, followed by a ruling of the Conseil d'Etat (Supreme Court) stating that *laïcité* and the wearing of a headscarf were not incompatible, see SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* 94-100 (2002). For a description of the three ministerial *circulaires* that followed the decision of the Conseil d'Etat, see WordIQ.com, *Definition of Islam in France*, [http://www.wordiq.com/definition/Islam\\_in\\_France](http://www.wordiq.com/definition/Islam_in_France) (last visited Dec. 1, 2006).

I discuss the origins of the "culture versus citizenship" dichotomy. I also analyze how this binary haunts current writing on multiculturalism. Recent scholars of multiculturalism have turned to concepts of citizenship as a solution to the dilemma raised by conflicts over culture. But these concepts of citizenship, namely deliberative democracy and civic participation, simply reiterate the presumption of a culture-less "citizenship" — and thus constitute an ironic choice of solution to the problem of cultural difference. I then turn to consider the headscarf debate in both France and the United States. That the wearing of headscarves in public schools has met with a very different outcome in the United States might lead us to conclude that the United States is a more tolerant nation. But I end with a cautionary note about how tolerance features in the discourse of citizenship and culture.

## I. CITIZENSHIP V. CULTURE

I begin this Part by examining how recent multicultural scholarship has turned to concepts of citizenship to solve the question of how the liberal state is to respond to cultural difference. I show the circularity at work. To be a citizen, one must rid oneself of certain forms of cultural excess. But citizenship itself is a culturally specific formation.

Political theorists have devoted much energy in recent years to two questions: first, the debate over the rights of ethnic minorities in multiethnic societies, discussed in such terms as multiculturalism and the politics of recognition;<sup>12</sup> and, second, the responsibilities of democratic citizenship, in what some have called the civic virtue debate.<sup>13</sup> These two discussions have largely proceeded along parallel tracks, although they have lately converged in the work of Seyla Benhabib<sup>14</sup> and in a collection of essays edited by Will

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12 See, e.g., MULTICULTURALISM AND THE 'POLITICS OF RECOGNITION' (Amy Gutmann ed., 1992); MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Gutmann ed., 1994); THE RIGHTS OF MINORITY CULTURES (Will Kymlicka ed., 1995).

13 For the formulation of these two separate questions, see Will Kymlicka & Wayne Norman, *Introduction* to CITIZENSHIP IN DIVERSE SOCIETIES 1 (Will Kymlicka & Wayne Norman eds., 2000).

For examples of writings on the responsibilities of democratic citizenship, see WILLIAM GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DUTIES IN THE LIBERAL STATE (1991); THE CITIZENSHIP DEBATES (Gershon Shafir ed., 1998).

14 See generally BENHABIB, *supra* note 11. Benhabib describes these two parallel tracks as the vocation of the "democratic theorist" versus that of the "multiculturalist theorist." *Id.* at ix.

Kymlicka and Wayne Norman.<sup>15</sup> As Audrey Macklin has noted, one way to understand the historical bifurcation between these two debates is that the former focuses on substantive questions as to the content of multiculturalism, while the latter focuses on procedural questions as to the virtues, practices and responsibilities of democratic citizenship.<sup>16</sup>

I am concerned that the attempt to address multiculturalism on the terrain of citizenship is not a salutary turn. The recent reliance upon democratic citizenship as a "solution" to the questions posed by multiculturalism will reflect the limits of a focus on procedural as opposed to substantive rights, with all the much-criticized problems of focusing on process versus outcome, formal versus substantive measures of justice.<sup>17</sup> At the same time, focusing on "civic virtue" masks the manner in which the questions of democratic citizenship are value-laden, as the cultural other continues to haunt what is positioned as the purportedly neutral activity of deliberative democracy.

Pivotal to my argument is the claim that liberal ideas about citizenship presume universals devoid of culture, against which we find racialized others overburdened with culture. The assumption is that public attachments to culture are contradictory to citizenship.<sup>18</sup> Discourses of citizenship tend

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15 See generally CITIZENSHIP IN DIVERSE SOCIETIES, *supra* note 13.

16 See Audrey Macklin, Law and the Encultured Subject (2003) (unpublished manuscript, on file with author). This bifurcation reflects the historical debate between Charles Taylor and Jurgen Habermas. See JURGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY (1998); CHARLES TAYLOR, MULTICULTURALISM AND THE POLITICS OF RECOGNITION (1993).

When I refer to the substantive content of multiculturalism, I mean the question of what kinds of minority practices (language rights, indigenous claims, ethnic claims) the state chooses to ban or accommodate. The debate over the content of multiculturalism includes controversy over the normative issues raised by minority rights, such as the principles on which minority rights should be tolerated or not. By the procedural questions involved in democratic citizenship, I mean the question of what kinds of citizenship practices are necessary for a flourishing democracy. Thus, one way of thinking about "substance" versus "process" is that the first inquiry considers the substance of practices engaged in by individual members of minority groups; the second inquiry considers the rules through which individuals participate in citizenship.

17 For a critique of formal equality in the context of antidiscrimination law, see Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

18 To be a citizen means to "transcend one's ethnic, religious and other particularities and to think and act as a member of a political community." BHIKHU PAREKH, RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY 181 (2000).

to be characterized by the belief that minorities' rights are derived from and vested in the enabling power of liberalism, which positions the non-ethnic as an autonomous, rational and self-sufficient individual, in contrast to the disorderly, irrational, culturally motivated other.<sup>19</sup>

That the specific cultural content of varieties of citizenship assumed in the literature is somehow absent, so that citizenship appears culture-less, is vividly apparent in Kymlicka's and Norman's description of the virtues and practices of democratic citizenship. Citizenship is presented as a blank schematic into which questions of culture are only to be newly introduced. Following the work of William Galston, the authors suggest that "responsible citizenship" should be understood as made up of four distinct types of civic virtues: 1) general virtues: courage, law-abidingness, loyalty; 2) social virtues: independence, open-mindedness; 3) economic virtues: work ethic, capacity to delay self-gratification, adaptability to economic and technological change; and, finally, 4) political virtues: capacity to discern and respect the rights of others, willingness to demand only what can be paid for, ability to evaluate the performance of those in office, and willingness to engage in public discourse.<sup>20</sup> These virtues appear to be culturally specific values that support what we could consider the Protestant work ethic and the spirit of capitalism,<sup>21</sup> molding the values of socially dominant groups into the identity of the citizen.<sup>22</sup> These purportedly neutral virtues are not culture-less. Yet somehow these virtues reappear in contemporary debates on multiculturalism and citizenship as the abstract guidelines through which cultural difference is to be processed.

Cultural attachments are thought to inhibit one's ability to engage in several distinct forms of citizenship. In disaggregating different forms of

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19 My focus here is on liberal discourses of citizenship. There are other conceptions of citizenship that posit a more robust relationship between citizenship and a common culture. See, e.g., Guy Mundlak, *Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages*, 8 THEORETICAL INQUIRIES L. 719 (2007).

20 See Kymlicka & Norman, *supra* note 13, at 7 (quoting GALSTON, *supra* note 13, at 221-24).

21 We could note here Rey Chow's work which draws out the "protestant ethnic" as the figure created by the contemporary belief of salvation in secular modernism and a capitalist economy. See REY CHOW, *THE PROTESTANT ETHNIC AND THE SPIRIT OF CAPITALISM* (2002).

22 That the authors do not see these virtues as culturally specific is indicated by their statement that "it is difficult to imagine anyone really disagreeing with the desirability of these sorts of qualities." See Kymlicka & Norman, *supra* note 13, at 7.



citizenship, I rely upon the work of legal academic Linda Bosniak, who suggests separating citizenship into four different discourses: citizenship as formal legal status (which differentiates the citizen from the alien), citizenship as rights, citizenship as political activity, and citizenship as identity/solidarity.<sup>23</sup> In thinking through these distinct forms of citizenship, the first question is what cultural attachments one must shed (or never have been attached to) in order to gain citizenship as a formal legal status, to be naturalized as a citizen. In the context of the United States, as a contemporary matter, "good moral character" is a prerequisite to naturalization.<sup>24</sup> The requirement of demonstrating "good moral character" contains within it the disavowal of various behaviors thought to inhibit the practice or possibility of good U.S. citizenship, including gambling and prostitution.<sup>25</sup> Because the

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23 See Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 456-88 (2000). Formal citizenship means the qualifications required to possess the legal status of a citizen — in the United States, as granted by the Constitution or by statute. Citizenship as rights signifies the rights necessary to achieve full and equal membership in society. This approach tracks efforts to gain the enjoyment of civil, political and social rights in Western capitalist societies. In the context of the United States, citizenship as rights is premised on a liberal notion of rights, and the failure to be fully enfranchised through the enjoyment of rights guaranteed under the Constitution has been described as exclusion or as "second-class citizenship." Citizenship as political activity posits political engagement in the community as the basis for citizenship, as exemplified both by republican theories that played a key role in the founding of American democracy, as well as by a recent renaissance of civic republicanism. Lastly, citizenship as identity, or citizenship as solidarity, refers to people's collective experience of themselves, their affective ties of identification and solidarity. *Id.*

Alternatively, Will Kymlicka and Wayne Norman provide a schematic of citizenship, which differentiates among status, identity, activity/civic virtue, and the citizenship ideal of social cohesion (which they identify as citizenship at the level of the political community as a whole against concerns of fragmentation). Their citizenship as status encompasses both of Bosniak's concepts of citizenship as formal legal status and citizenship as rights. See Kymlicka & Norman, *supra* note 13, at 30-31.

24 See 8 U.S.C.A. § 1427 (West 2006) (Requirements of Naturalization):

No person, except as otherwise provided in this title, shall be naturalized, unless such applicant . . . during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

25 For naturalization, one must show that one has been a person of good moral character for the statutory period (typically five years or three years if married to a U.S. citizen or one year for Armed Forces expedited citizenship) prior to filing for naturalization. See *id.* A person cannot be found to be a person of good moral character if during

question of good moral character examines not only present but past practices as well, in certain instances it is of no use even to disavow these practices. A past history of gambling or prostitution bars one from American citizenship.<sup>26</sup>

Secondly, in the discourse of citizenship as political activity, one is to approach one's engagement in the republic free of corruption, and free of other ties of loyalty and attachments. Here, an attachment to culture might be thought to inhibit one's ability to function as a citizen in the political sense. As an example, the idea of Chinese immigrants as being under the sway of foreign despots and engaged in loyalties based upon community ties, inhibiting their ability to follow the rule of law, fueled historic arguments that the Chinese could not become members of the American political body — they could not "understand republican values."<sup>27</sup> Arguably, this vision of Chinese Americans lingers today, so that Chinese Americans continue to be characterized as disloyal, nepotistic and deceitful, as illustrated in the "Asian campaign finance" scandals.<sup>28</sup> Thus, ideas about cultural others are used to frustrate the ability of these others to engage as virtuous participants in the republic.

In addition, we can isolate the argument that cultural attachments are thought to inhibit one's ability to engage in citizenship in another sense, which is that to be a citizen of certain Western democratic states, particular values must be accepted as a baseline for membership — for example, the value of gender equality. The idea that immigrants may espouse contradictory values is thought to preclude them from citizenship, which requires shared moral commitments. We know from Marx's "On the Jewish Question" that the Jewish other was to be "emancipated" from the group and the purported group value of "hucksterism" in order to qualify as a citizen;<sup>29</sup> today, the

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the last five years he or she has engaged in various criminal offenses, including gambling, has been involved in prostitution, has smuggled "illegal aliens" into the U.S., has been a "habitual drunkard," or has not supported his or her dependents. See 8 U.S.C.A. § 1101 (West 2006).

<sup>26</sup> 8 U.S.C.A. § 1101 (West 2006).

<sup>27</sup> See Leti Volpp, *Obnoxious to Their Very Nature: Asian Americans and Constitutional Citizenship*, 5 *CITIZENSHIP STUD.* 71 (2001). This discourse of the inability to understand republican values was invoked in 1866 in Congress during deliberations as to whether to lift the racial ban on naturalization to allow Chinese to naturalize (the answer was no).

<sup>28</sup> While both John Huang and Charlie Yah-lin Trie, implicated in the campaign finance scandals, were naturalized U.S. citizens, the media conflated Asian and Asian American with each other and with political corruption and foreign subversion. *Id.*

<sup>29</sup> See Karl Marx, *On the Jewish Question*, in *THE MARX-ENGELS READER* 46, 49 (Robert C. Tucker ed., 1978).

immigrant other must be emancipated from the group and group values of gender subordination to qualify as a citizen.

In this discussion, the values that immigrants are assumed to espouse, as exemplified by their conduct, are thought to be totally separable from their identities. Writers such as Samuel Huntington do not say "we don't like Mexicans," but write instead that "we disagree with Mexican cultural values" — which, he says, include a "[l]ack of initiative, self reliance and ambition, and little use for education."<sup>30</sup> Obviously, the values that Huntington laments could also be considered "American" cultural values — it all depends on whom one chooses to foreground as "Mexican" or "American." Huntington's decision to ascribe problematic behavior to Mexican national identity demonstrates the terrain of contemporary racism, which takes the guise of concern about integrating cultural norms thought to differ from our own.

According to the conventional narrative of U.S. citizenship, once upon a time there were identity-based exclusions from citizenship, so that one's status — first as nonwhite,<sup>31</sup> later as racially ineligible to naturalize<sup>32</sup> — precluded one from membership; today, citizenship is inclusive of all and no longer features such identity-based exclusions. Today we have neutral, non-identity based restrictions premised upon conduct — all one has to do is to share certain visions and normative beliefs about American democracy, and act accordingly. However, this vision of a progression from status to conduct ignores two facts.<sup>33</sup> First, the historical status-based exclusions were, in fact, premised upon assumptions regarding conduct or behavior. For example,

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30 See Samuel Huntington, *The Hispanic Challenge*, FOREIGN POL'Y REV., Mar.-Apr. 2004, at 30 (lamenting the failure of "Mexicans and other Latinos" to assimilate, given "irreconcilable cultural differences" with "American identity").

31 The first federal citizenship statute, passed by Congress in 1790, restricted naturalization to "free white aliens." Act of Mar. 26, 1790, ch. 3, 1 Stat. 103. Birthright citizenship was not guaranteed regardless of race until the passage of the Fourteenth Amendment, which the Supreme Court, in *Wong Kim Ark* in 1898, ruled applied to Chinese Americans as well as African Americans (but not to "children of members of the Indian tribes, standing in a peculiar relation to the National Government"). *U.S. v. Wong Kim Ark*, 169 U.S. 649, 682 (1898).

32 The law was amended in 1870 to add "aliens of African nativity or African descent." Act of July 14, 1870, ch. 255, § 7, 16 Stat. 254. This led to the "racial prerequisite" cases — litigation where non-citizens attempted to prove they should be considered eligible for naturalization. The racial restrictions were not entirely lifted until 1952. See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 49-78 (1997).

33 In addition, the idea that status and conduct can be separable should be thrown into question. See JANET HALLEY, *DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY* (1999) for a discussion of the "Don't Ask Don't Tell" policy,

the assumption that Chinese immigrants were incapable of comprehending republican values was used to justify the retention of race-based restrictions to naturalization in 1870.<sup>34</sup> Thus, although we remember exclusions as having been status-based, they were in fact premised upon assumptions about normative behavior. Second, the conduct- or behavior-based restrictions that exist today, while conventionally understood as neutral, are both constitutive of and the product of status.<sup>35</sup>

As one example, we could take the idea of the "terrorist" — a conduct-based distinction that purports to separate out one who engages in terrorism from the citizen.<sup>36</sup> This distinction is at the same time foundationally about a particularized status of national origin in the context of governmental policies of detaining, deporting, interrogating and excluding those who are nationals of countries with significant Al Qaeda presence or activity.<sup>37</sup> But the governmental policies are not purely based on national origin, or else they would target nationals of countries such as Germany, which is a country with significant Al Qaeda presence or activity;<sup>38</sup> rather, countries with predominantly Muslim populations are targeted, so that the targeted status fuses national origin and religion. Moreover, when we think about the governmental policies targeting residents of certain neighborhoods in the United States, arresting and detaining individuals based upon their appearance, we understand that the targeted status fuses national origin, religion, and race.<sup>39</sup> Putative terrorists targeted by the public in the context of

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premiered upon the ejection of service personnel who assert same-sex identities but not same-sex conduct, and which President Clinton asserted was a regulation of conduct, not status, while gay and lesbian advocates countered it was a regulation of status, not conduct.

34 See CONG. GLOBE, 41st Cong., 2d Sess. 5121 (1870).

35 On conduct and performativity, see JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCOURSE LIMITS OF "SEX"* (1993); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1999).

36 We could note here the case of Yaser Hamdi, required to "renounce" his citizenship in exchange for being released from U.S. custody, as evidence of the notion that one cannot be both a "citizen" and a "terrorist."

37 For a discussion of these policies, see Leti Volpp, *The Citizen and the Terrorist*, 49 *UCLA L. REV.* 1575, 1577-82 (2002).

38 James Dunnigan, *An Al Qaeda Grows in Germany* (June 8, 2004), <http://www.strategypage.com/dls/articles/200468.asp>.

39 See Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 *CONN. L. REV.* 1185 (2002); Moustafa Bayoumi, *Racing Religion* (2004) (unpublished manuscript, on file with the author); Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 *L. & CONTEMP. PROBS.* 215 (2005).

hate violence are also identified by a fusion of national origin, religion and race, so that an "Arab, Middle Eastern or Muslim" appearance is believed to reflect or augur conduct befitting of "terrorists."<sup>40</sup> At this point, it seems impossible to separate who is likely to engage in terrorist behavior from assumptions about that person's race, religion and national origin. Recognizing that identity, racial and otherwise, is a matter of conduct as well as status,<sup>41</sup> and that the two are in fact mutually constitutive of one another, should help us in framing a new understanding of the story of citizenship. Historically, identity — as construed in terms of both status and conduct — has excluded certain persons from citizenship, and it continues to do so in the contemporary moment, now construed in terms of culture.

If we consider this together with the fact that the perception of cultural behavior is subject to a kind of selective recognition — so that problematic behavior is thought to be characteristic of the culture of entire nations, rather than the product of individual deviants — we can see the perversity of current configurations of the relationship between citizenship and culture.<sup>42</sup> One's cultural identity constitutes a predictor of problematic behavior.<sup>43</sup> To be a citizen, one must not engage in problematic behavior. Both the cultural norms underlying citizenship and the problematic behavior of those who are already recognized as citizens are made invisible. But what gave rise to this opposition between citizenship and culture?

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40 See Volpp, *supra* note 37, at 1580-83; Muneer I. Ahmad, *A Rage Shared by Law: September 11 Racial Violence As Crimes of Passion*, 92 CAL. L. REV. 1259 (2004).

41 This notion is captured in recent legal scholarship examining the performative aspects of race and other identities. See Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 YALE L.J. 109 (1998); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

42 In this Article I do not discuss why problematic behavior on the part of immigrants is so often identified as having to do with gendered treatment. For a discussion of this pattern, see Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89 (2000); Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001).

43 I am reminded here of the propensity clauses of the U.S. military policy: statements whereby service members come out of the closet, or engage in conduct short of sodomy, are grounds for discharge in demonstrating intent or propensity to engage in homosexual conduct. See HALLEY, *supra* note 33, at 57. For service members for whom staying in the closet is possible, their bodies do not visibly communicate propensity. Racially marked bodies that contain within them the message of propensity (to commit crimes, to engage in terrorism, to commit culturally troubling acts) cannot closet their identity. See Devon Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

## II. DEEPLY ROOTED TRADITIONS

Let us examine the words of New York Times columnist Thomas Friedman, who began a column as follows:

If you listen closely to the emerging debate about Iraq, one of the themes you can start to hear is that culture matters — and therefore this whole Iraq adventure may be a fool's errand. Because the political culture in the Arab world — where family and tribal identities have always trumped the notion of the citizen — is resistant to democracy. I believe culture does matter, although I have no idea how much it explains the absence of Arab democracies. But I also believe cultures can change under the weight of history, economic reform and technological progress . . . .<sup>44</sup>

Friedman is suggesting that "culture" in the "Arab world" bears an adversarial relationship to the "notion of the citizen" and "democracy" that the United States is seeking to encourage in Iraq. In fact, the contradiction between citizenship and culture may be so extreme that the "whole Iraq adventure may be a fool's errand."<sup>45</sup> How did such oppositional ideas regarding "citizenship" and "culture" emerge?

We can look to the roots of Western modernity and concepts of the citizen that have shaped the vision of the West as the site of citizenship, and the rest of the world as the site of culture. The citizen is the rights-bearing subject. Citizenship is, borrowing from the phrasing of Hannah Arendt, the "right to have rights."<sup>46</sup> The bearer of rights is the human; what characterizes the human is the capacity to reason. Ideas about culture have shaped who is thought to have the capacity to reason, so that some are thought to engage in reason, while others engage in irrational conduct, explained as the product of culture.<sup>47</sup>

Historically, the ideas of the modern and the West were structured by

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<sup>44</sup> Thomas Friedman, *52 to 48*, N.Y. TIMES, Sept. 3, 2003, at A19.

<sup>45</sup> *Id.*

<sup>46</sup> See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296 (2d ed. 1958).

<sup>47</sup> See WENDY BROWN, *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE* (2006). As Brown writes: "'[W]e' have culture while culture has 'them,' or we *have* culture while they *are* a culture. Or, we are a democracy while they are a culture." *Id.* at 151. See also Ratna Kapur, *The Citizen and the Migrant: Postcolonial Anxieties, Law and the Politics of Exclusion/Inclusion*, 8 THEORETICAL INQUIRIES L. 537 (2007).

particular disavowals that in fact were constitutive exclusions to what became known as the modern and the West.<sup>48</sup> We should think here, for example, of the Haitian Revolution, and the documentation showing how freedom and emancipation came to be associated with the French and American Revolutions and not the Haitian Revolution.<sup>49</sup> Black self-emancipation from white enslavement is absent from the normative narration of human freedom (depicted instead as white self-emancipation from monarchy and feudalism or, alternatively, as white emancipation of blacks from white — or black — enslavement). Modernity (specifically Western modernity) has been constructed as the product of white freedom, rather than of black enslavement or black self-emancipation; as the product of individual autonomy and rationality, rather than of cultural and group-based determinism; as the product of public engagement, not of private interactions; as the product of activity by the masculine, not the feminine.

That gender is the current sore point of otherness in debates about multiculturalism may reflect the historical bifurcation between public and private, the conceptualization of the "inner world" as the space of cultures and traditions, with women in the home space constituting a bulwark against the outside world.<sup>50</sup> The citizen is engaged in the public; the private is the space for cultural practices. This is evident in the way the British dealt with law in India, leaving religiously based personal laws covering all issues concerning the family to the private sphere (although it bears mention that British colonialism had a great impact on what those family laws were to be) while aligning the laws of the public with British law.<sup>51</sup> Thus, when the discussion focuses on how to "incorporate" immigrants into citizenship —

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48 My thinking on this question has been inspired by conversation with Lisa Lowe, whose work addresses the convergences of colonialisms in the early Americas as the condition for modern humanism and humanistic knowledge. See Lisa Lowe, *The Intimacies of Four Continents*, in *HAUNTED BY EMPIRE: GEOGRAPHIES OF INTIMACY IN NORTH AMERICAN HISTORY* 191 (Ann Laura Stoler ed., 2006).

See also UDAY MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH CENTURY BRITISH LIBERAL THOUGHT* (1999); DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2000).

49 Lisa Lowe drew my attention to this history, described in MICHEL-ROLPH TROUILLOT, *SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY* (1995).

50 See PARTHA CHATTERJEE, *NATIONALIST THOUGHT AND THE COLONIAL WORLD: A DERIVATIVE DISCOURSE* (1986).

51 See SUDHIR CHANDRA, *ENSLAVED DAUGHTERS: COLONIALISM, LAW AND WOMEN'S RIGHTS 1-5* (1998) (describing how the British imported English family law practices into India, including the recognition of claims for the restitution of conjugal rights).

which is equated with incorporating them into the public — one finds the discussion turning time and again to how to emancipate immigrant women from the private.

Scholars who write about multiculturalism and citizenship have focused on the question of how to incorporate the cultural other into citizenship. But this question is premised upon a false bifurcation. Citizenship is constituted through the exclusion of cultural others; the cultural other creates the citizen through contrast and negation. The borders of citizenship are always patrolled, whether these borders are national or normative ones that admit and exclude on the basis of behavior — and so some are always excluded, whether for territorial, moral, or cultural reasons. Due to this othering and exclusion, the citizen can be assumed (falsely) to be absent of culture. Thus, the citizen emerges through distinction from the cultural other, who is repudiated from citizenship through total identification with an unassimilable cultural difference, and through simultaneous denial that the citizen might share similar cultural values.<sup>52</sup>

### III. ON DELIBERATIVE DEMOCRACY

I will now show how such an analysis might illuminate the weaknesses of one of the most influential texts regarding the question of citizenship and multiculturalism, Seyla Benhabib's *The Claims of Culture*. Benhabib argues that a deliberative model of democracy can answer the challenges posed by multiculturalist demands. This model promotes "public deliberation by free and equal citizens," not just within established institutions, but also in the context of "the political activities and struggles of social movements, associations, and groups in civil society."<sup>53</sup> The principles for the deliberative model of democracy come from the discourse model of ethics, which identifies valid norms and institutional arrangements following principles of universal moral respect and egalitarian reciprocity.<sup>54</sup> Benhabib identifies three normative preconditions for resolving multiculturalist dilemmas through "will- and opinion-formation in civil society," namely 1) egalitarian reciprocity (within discourse each of us has the same right to various speech acts, to initiate new topics, to ask for justification

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52 For a parallel critique of how liberalism repudiates culture while denying that it is cultural, see BROWN, *supra* note 47, at 21-23.

53 BENHABIB, *supra* note 11, at 106.

54 *Id.* at 106-07.



of presuppositions of the conversation); 2) voluntary self-ascription (no one is automatically assigned to a cultural, religious, or linguistic group by virtue of his or her birth); 3) freedom of exit and association (the freedom of an individual to exit the ascriptive group must be unrestricted, though such an exit may be accompanied by loss of certain kinds of privileges).<sup>55</sup>

Benhabib's three normative preconditions reflect the prioritization of process over substance. They themselves are values, removed from a grounded reality that would question both whether they are realizable and what they might actually conceal. For example, her first normative precondition concerns the right to engage in speech acts. As many have argued, we live in a world where "freedom of speech" is used to mask the fact that some of us enjoy greater speech rights than others.<sup>56</sup> Thus, Benhabib's model is built upon values that focus on the equal access to the procedure of deliberation, without questioning how power shapes that process.

Benhabib illustrates her model of deliberative democracy with the *Shah Bano* case, which raised the question of personal laws in India, a democratic and secular state.<sup>57</sup> Under the Muslim personal laws, Muslim women are entitled to claim only the dowry they brought into the marriage, not maintenance upon divorce as well. Women had begun to use a section of the (nationally uniform) Criminal Code, which mandates persons with sufficient means to provide economic support to their wives.<sup>58</sup> In 1978 a woman named Shah Bano applied for relief under the Criminal Code. After the Supreme Court decided in her favor, orthodox Muslim politicians, upset by the opinion, rallied against the idea of a Uniform Civil Code, which had been debated at that time (and which would have abolished religiously-based family laws), and then pressured the government to pass a law, the Muslim Women's (Protection after Divorce) Act of 1986.<sup>59</sup> The Act deprived Muslim

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55 *Id.* at 19-20.

56 See, e.g., STANLEY FISH, *THERE IS NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING TOO* (1994); MARI MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT* (1993); John Powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society*, 16 L. & INEQ. 97 (1998).

57 In India, secularism means not the separation of church and state, but the coexistence of various religions under the supervision of the state. See Zakia Pathak & Rajeswari Sunder Rajan, "*Shahbano*," in *FEMINISTS THEORIZE THE POLITICAL* 257 (Judith Butler & Joan W. Scott eds., 1992); see also BRENDA COSSMAN & RATNA KAPUR, *SECULARISM'S LAST SIGH? HINDUTVA AND THE (MIS)RULE OF LAW* (2001).

58 INDIA UNIF. CRIM. PROC. CODE § 125 (1973).

59 The Muslim Women's (Protection of Rights on Divorce) Act, 1986, No. 25, Acts of Parliament, 1986.

women of the prerogative of using the Criminal Code for relief, mandating that divorced Muslim women be supported only by male relatives (rather than the husband), or by the community if the relatives were unable to provide support. During this furor, engendered by the communal climate in India at that time, Shah Bano recanted her demand for maintenance.<sup>60</sup>

Benhabib applies the model of deliberative democracy to suggest how it might function in the *Shah Bano* case. Benhabib recognizes that discourse ethics is an "idealized model,"<sup>61</sup> but she asserts it can serve as a guide to measuring the fairness and legitimacy of existing practices, leading to reformation if the democratic will of the participants exists.<sup>62</sup> First, Benhabib focuses on the first prong of her model, the idea of egalitarian reciprocity, where participants engage in a hypothetical discourse in which all participate freely. She reviews the norms that prohibited Shah Bano from receiving maintenance — practices of unilateral polygamy and divorce, the expectation that a divorced woman should be economically dependent upon male relatives for her livelihood, and the conviction that nothing could be done to enable Shah Bano to achieve independence — and then imagines that the participants in the hypothetical discourse include "Muslim women of all ages to whom the norms apply."<sup>63</sup> Her conclusion: "We have to ask ourselves whether these norms could still be upheld."<sup>64</sup>

She then turns to the last two prongs of her model, namely the issues of voluntary self-ascription and free exit from a community. She writes, "[w]e would have to ask why women would freely put themselves in conditions of such subordination, vulnerability and jeopardy"<sup>65</sup> — by these "conditions," she seems to be referring to the life of a Muslim woman in India, subjected to the norms she has identified. Her answer: "Bracketing fear of retribution, coercion, ostracism, and other punitive sanctions, which we assume would not hold in a discourse situation, the most frequent reason that women themselves give as an answer is that this is their tradition and their way of life."<sup>66</sup> In other

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60 For accounts of the *Shah Bano* case, see Pathak & Rajan, *supra* note 57; Lisa Hajjar, *Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis*, 29 L. & SOC. INQUIRY 1 (2004); Sally Engle Merry, *Constructing a Global Law — Violence Against Women and the Human Rights System*, 28 L. & SOC. INQUIRY 941 (2003).

61 BENHABIB, *supra* note 11, at 115.

62 *Id.*

63 *Id.* at 116.

64 *Id.*

65 *Id.*

66 *Id.*

words, in an idealized situation, bracketing punitive pressures, the common answer as to why be a Muslim woman in India under these circumstances (and not somehow exit the community) is to cling to tradition. Then Benhabib seeks to complicate the idea of "tradition" by suggesting that tradition is a false construct, evident here where Shah Bano was "angry enough at her spouse" and "intelligent enough herself" to resort to an Indian federal court.<sup>67</sup> But in turn we must complicate Benhabib's take on tradition — in counterposing tradition to a woman's anger at her husband and to her use of intelligent recourse, she paints a debilitating picture of "traditional" women as women who feel no anger at spousal oppression or, if they were able to feel such, could not respond in an intelligent fashion. The passage further suggests that there is no reason, the norms being what they are, for a Muslim woman in India to remain in her community, absent punitive pressures and the idea of "tradition." Despite this suggestion, there are positive as well as negative experiences that come with being a member of a community.<sup>68</sup>

Benhabib relies upon notions of freedom, choice, and agency that are posited in opposition to tradition, in an analysis conducted on entirely abstract terms.<sup>69</sup> To suggest that Shah Bano should feel no tie of "tradition" binding herself to her community, so that she could voluntarily choose to exit or might never have chosen her community in the first instance, or to suggest that a hypothetical discourse might possibly lead to a rejection of norms, does not clear new analytic ground.

What I find most curious about Benhabib's account is that her discussion of the *Shah Bano* case is entirely devoid of any mention that Muslims are a religious minority in India, other than as implicitly suggested within a quote in Benhabib's text by Veena Das.<sup>70</sup> The uninformed reader would have

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<sup>67</sup> *Id.*

<sup>68</sup> See AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 66 (2001) (on why women might remain loyal to minority groups without constituting victims).

The only remaining analysis of the case is Benhabib's taking the "Muslim community" to task for playing "ostrich" while a national dialogue subsequently took place over reform. BENHABIB, *supra* note 11, at 117.

<sup>69</sup> My criticism here should not be taken to mean that I do not find Benhabib to make important interventions. Benhabib's discussion of the headscarf debate in the 1990s in France is far more productive. What differentiates that discussion from her discussion of the *Shah Bano* case is the specificity of the facts she narrates in her original description of the controversy, *id.* at 94-100, and her openness to considering multiple meanings of the wearing of the scarf: religious observance, cultural defiance, adolescent acting-out, motivations of fear, conviction, or narcissism, *id.* at 117.

<sup>70</sup> Veena Das writes:

How would one resolve conflicts which arise between the desire to preserve

no idea of the context in which the *Shah Bano* case and subsequent events took place.<sup>71</sup> Indian Muslims could be described as a generally besieged community in a country where they constitute about 13.4% of the population (Hindus constitute about 80.5%).<sup>72</sup> Muslims who remained in post-Partition India are a generally impoverished population; the Hindu right characterizes Muslim men as rapacious, uncivilized, and barbaric and equates "Indian" with Hindu. The Hindu right seeks to expel all Muslims from India,<sup>73</sup> and in recent history several communal riots have left thousands dead.<sup>74</sup> The *Shah Bano* case and the campaign for a Uniform Civil Code were largely played out by the Hindu right as a campaign against Muslims for oppressing their women and as a campaign for a Hindu (not Uniform) Code. Feminists who had been campaigning for a Uniform Code found themselves allied with Hindu fundamentalists.<sup>75</sup> The Baratiya Janata Party (BJP) (a Hindu fundamentalist party that until May 2004 was in control of the national government) had campaigned vociferously against the discriminatory treatment of Muslim

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culture by a filiative community such as an ethnic or religious minority, and a similar but affiliate community, such as the community of women, which wishes to reinterpret that culture according to a different set of principles?

Veena Das, *Cultural Rights and the Definition of Community*, in *THE RIGHTS OF SUBORDINATED PEOPLES* 117 (Oliver Mendelsohn & Upendra Baxi eds., 1994), quoted in BENHABIB, *supra* note 11, at 92.

Arguably, since Benhabib is discussing questions of "multiculturalism" and "gender" in the chapter, the reader would assume for a fact that Muslims must be a minority in India. However, I think the fact and the context bear emphasis.

71 That Benhabib includes the Hindu community when she describes the "hierarchical and inegalitarian practices of many of India's subcommunities — Hindu, Muslim, Buddhist, and other," BENHABIB, *supra* note 11, at 115, would suggest that she does not recognize that India is majority Hindu.

72 The percentages of Muslims and Hindus in the national population come from the most recent Indian census (2001). Census of India, Data on Religion, <http://www.censusindia.net/religiondata/index.html> (last visited Dec. 1, 2006).

73 See The Campaign to Stop Funding Hate, <http://stopfundinghate.org/index.shtml> (last visited Dec. 1, 2006); see also V.D. SAVARKAR, *HINDUTVA: WHO IS A HINDU?* (1949).

74 See, e.g., *We Have No Orders to Save You: State Participation and Complicity in Communal Violence in Gujarat*, 14 HUM. RTS. WATCH PUBLICATIONS (2002), <http://www.hrw.org/reports/2002/india/>.

75 See Ratna Kapur & Brenda Cossman, *Communalising Gender, Engendering Community: Women, Legal Discourse and the Saffron Agenda*, in *WOMEN AND RIGHT-WING MOVEMENTS: INDIAN EXPERIENCES* 82 (Tanika Sarkar & Urvashi Butalia eds., 1995).

women, arguing ostensibly that "all women must be treated equally," but in fact arguing that Muslim women should be subordinated to Hindu norms.<sup>76</sup>

This dynamic in India is the same one that appears in discussions of culture and citizenship. First, we can observe the reliance upon a cultural other as a contrast to the neutral norms into which the other can assimilate; and second, we can see the concomitant obscuring of the cultural specificity of those norms. The dynamic I describe is thus not specific to the discussion of immigration to the West, but is a tool for the subordination of minorities by majorities, available in a variety of cultural contexts.

The failure to examine the importance of context is foundational to the use of political theories that abstract from the grounded into the space of the ideal, that separate that which is traditional and cultural from the rational individual.<sup>77</sup> We have returned to the specter of the woman burdened by cultural traditions who must be liberated into the universal. As I note above, the desire to liberate the Muslim woman into the universal is complicit with the domestic agenda of "liberating" the Muslim woman into the Hindu. In other words, the "neutral" backdrop of "citizenship" is far from neutral, but is in fact the religion of the majority community. The construct of the willed individual who must be emancipated from the burdens of tradition in order to be a citizen allows the cultural specificity of that citizenship to be obscured.

#### IV. REVISITING THE HEADSCARF DEBATE

Let us return to the headscarf debate in France. Hidden in that debate lies the question concerning the cultural specificity of France's policy of *laïcité*. France purportedly embraces a neutral "secularism" foundational to the republic.<sup>78</sup> But this is a secularism that features the perpetuation of

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<sup>76</sup> *Id.*

<sup>77</sup> Helpful here might be Judith Butler's description of Hegel's critique of formalism. She writes:

If the abstract is itself produced through separating off and denying the concrete, and the concrete clings to the abstract as its necessary contamination, exposing the failure of its formalism to remain rigorously itself, then it follows that the abstract is fundamentally dependent on the concrete and "is" that concrete other in a way which is systematically elided by the posterior appearance of the concrete as an illustrative example of an abstract formalism.

Judith Butler, *Restaging the Universal: Hegemony and the Limits of Formalism*, in JUDITH BUTLER ET AL., *CONTINGENCY, HEGEMONY, UNIVERSALITY* 19 (2000).

<sup>78</sup> For the argument that *laïcité* constitutes a founding myth that is used to belittle those whose beliefs do not conform to popular preferences, see T. Jeremy Gunn,

Christian holidays in the republican calendar,<sup>79</sup> government funding of nine hundred private Catholic schools (in contrast to one Muslim school) in the country,<sup>80</sup> chaplains — mostly Catechism-teaching and Catholic — on public school staffs,<sup>81</sup> and the definition of national culture as Christian.<sup>82</sup> Thus, one commentator claims that France's policy of *laïcité* is better understood as "*catho-laïcité*."<sup>83</sup> As one New York Times reporter noted, the French government saw "no contradiction or irony" in the fact that it sought to "get tough" on students wearing religious symbols to clear those cases before "the 10-day All Saints school vacation that ends with a national holiday honoring all of Catholicism's saints."<sup>84</sup> And we must note the asymmetry in the effect of the ban on "conspicuous religious symbols." The notion of religion as one's private faith is arguably a Christian theological idea, in contrast to the Jewish or Islamic idea of a social community of visible mores and rules.<sup>85</sup>

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*Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419 (2004).

79 See *French Ban on Headscarves*, STRAIGHT GOODS, Feb. 18, 2004, <http://www.straightgoods.ca/ViewLetter.cfm?REF=1325> (pointing out that the religious holidays Easter Monday, Ascension Day, Pentecost Friday, Whit-Monday, Assumption Day, and Christmas are all statutory holidays in France); Sciolino, *supra* note 8.

80 There are over eighty Jewish schools, like the Catholic and Muslim schools, private schools that receive public funding. See Catherine Field, *France Is Not as Secular As It Purports*, N.Z. HERALD, Feb. 11, 2004, available at <http://www.nzherald.co.nz/storydisplay.cfm?storyID=3548489&thesection=news&thesubsection=world> (describing government funding of nine hundred Catholic schools and one Muslim school in the country and differing reactions to whether the Catholic schools endanger secularism in the same fashion as the Muslim school). See Antisemitism and Racism, France, <http://www.tau.ac.il/Anti-Semitism/asw2002-3/france.htm> (last visited Dec. 1, 2006) (describing over eighty Jewish schools as both the product of a revitalization of communal life and a reaction to anti-Semitism).

81 See Sciolino, *supra* note 8.

82 See Etienne Balibar, *Dissonances within Laïcité*, 11 CONSTELLATIONS 353 (2004), available at <http://www.blackwell-synergy.com/links/doi/10.1111/j.1351-0487.2004.00382.x/enhancedabs/>.

83 Vera Lustig, *A Very French Affair*, NEW HUMANIST, Mar. 1, 2004, [http://www.newhumanist.org.uk/volume119issue2\\_more.php?id=601\\_0\\_26\\_0\\_C](http://www.newhumanist.org.uk/volume119issue2_more.php?id=601_0_26_0_C). Lustig notes that since 1959, France has allowed elite Catholic schools to be set up, which are under contract to, and funded by, the state. Interestingly, she states that the Catholic schools, which have an open admissions policy, have become a refuge for Muslim girls barred from non-denominational schools for wearing the scarf.

84 See Sciolino, *supra* note 8.

85 This is the assertion of Balibar, *supra* note 82. I would amend this to suggest that the notion of religion as one's private faith might be more accurately described as

Thus, not only is the secular French state not truly secular, but the ban on religious display selectively favors Christians and targets Muslims and Jews. The ban serves to unify an identitarian notion of France — as Christian, and as "French" in opposition to "North African," under the guise of unifying a republican conception of France.

A petition initiated by French sociologist Christine Delphy and the "Feminists for Equality" collective makes apparent one "illegible factor" that has otherwise disappeared from the debate.<sup>86</sup> The petition directs our attention to the question of race.<sup>87</sup> Pointing out the slippage whereby certain citizens, born and educated in France, are turned into "eternal migrants," the petition authors assert that because the French cannot send them "back home," they are

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a Protestant rather than Catholic theological idea; Balibar may be describing how Catholicism is understood in France, which is primarily Catholic (estimated statistics as to religious identity in the French population are as follows: Roman Catholic 83%-88%, Protestant 2%, Jewish 1%, Muslim 5%-10%, unaffiliated 4%, *see* [exxun.com](http://www.exxun.com), Religions (Nov. 29, 2006), [http://www.exxun.com/elfd/fd\\_religions\\_ek.html](http://www.exxun.com/elfd/fd_religions_ek.html)).

<sup>86</sup> *See* Islam & laïcité, Petition contre une loi d'exclusion: Un Voile Sur Les Discriminations, <http://www.islamlaicite.org/rubrique13.html> (last visited Dec. 1, 2006) [hereinafter *Veiled Discrimination*].

<sup>87</sup> For an important analysis of another under-theorized aspect of the headscarf debate, see Joan Scott, *Symptomatic Politics: The Banning of Islamic Head Scarves in French Public Schools* (2005) (unpublished version, on file with the author) (a previous version was published in 23 *FRENCH CULTURE POL. & SOC'Y* (2005)). Scott argues that what lies at stake in the prohibition of the veil is the protection of French republican notions of sexuality against the "disturbing difference of Islam — an Islam whose difference is phantasmatically cast in terms of a difference of sexual practice." This reflects a contradiction at the heart of the republican vision represented by women: "their difference is both denied and avowed." In republicanism equality depends on sameness, which is achieved by abstraction, but sex is not considered susceptible to abstraction. To cover this contradiction, French politicians and republican theorists have elevated sexual difference to a distinct cultural character trait with great emphasis on the public display of women's bodies. She writes:

Perhaps the most stunning contradiction was the alliance of so many French feminists who in the name of emancipation of Muslim girls, rushed to support a law that offered the status quo in France (women as the object of male desire!!) as a universal model of women's liberation. Entirely forgotten in the glorification of the freedom of French sexual relations was the critique of these same feminists, who for years have decried the limits of their own patriarchal system with its objectification of women and overemphasis on their sexual attractiveness. It is the power of their unconscious identification with the republican project that led many of them to unequivocally condemn the head scarf/veil as a denial of women's rights and to talk as if the status of women in France were not a problem at all.

treated as "second-class citizens," as an "inferior caste."<sup>88</sup> This, the authors say, is the issue that the debates on the headscarf attempt to "veil"; this is the "crux of the only true problem of, and for, the Republic."<sup>89</sup> The petition calls for both an abandonment of France's de facto system of national preference for the "true French" and research on how racism is institutionalized and can be redressed. The petition also warns that so long as France denies the existence of this discrimination and refuses to provide equality to the descendants of people colonized by the French, the country will only develop greater problems.<sup>90</sup> This discrimination has profound material consequences in the workplace, the neighborhood, the school — the petition states: "Not a single act of daily life in France is free of racism against those who through all our colonialist history were perceived as inferior human beings."<sup>91</sup> Importantly, the petition also points to the manner in which broader geopolitical issues shape race, in its need to rebut the claim that girls and women who wear the "Islamic scarf" constitute a "fifth column of a foreign power."<sup>92</sup> French Muslims are racialized as putative terrorists. The headscarf is now considered a "provocation": it represents global Islamic terrorism.<sup>93</sup>

While this has disappeared in the debate, the Stasi Commission had actually recommended, in addition to the ban on conspicuous religious symbols, twenty-five measures that its report stated were essential for the French government to implement. These measures included the destruction of urban ghettos and re-planning of the cities, the addition of Yom Kippur and Eid as national holidays, the creation of an anti-discrimination authority, instruction about slavery, immigration, colonization and decolonization in public schools, and policies against racism in schools.<sup>94</sup> But the French legislature chose to implement only the ban on religious symbols. All the tremendous weight of concerns circulating over French Muslim communities

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88 Veiled Discrimination, *supra* note 86.

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 See Jane Kramer, *Taking the Veil*, NEW YORKER, Nov. 22, 2004, at 59 (describing the accusations of strangers that a young veiled Muslim woman was carrying bombs in her book-bag). Kramer describes how multiple issues — September 11th, the invasion of Iraq, concern about terror networks in Europe, anti-Semitism, a turn to religious fundamentalism or to a Muslim identity in the face of state racism and social isolation, feminist perspectives on both sides of the ban, and the coercion of girls — are circulating in the debate. *Id.* at 59-71.

94 See Rapport Au President de la Republique (Dec. 11, 2003), [lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf](http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf).



— public racism, fear of rising fundamentalism and global terrorist networks, unemployment rates as high as 60% in the *banlieues*, and enormous social isolation — has been placed on the heads of girls.<sup>95</sup>

The opposition posited — "for or against" the religious ban — removes these questions from the conversation. Also absent are other complicated and often contradictory issues, such as what the headscarf represents to what person in which context. Clearly, to many French feminists, the headscarf symbolizes the submission of women. Wearing a headscarf can connote just what it purports to connote: religious piety.<sup>96</sup> Some girls may wear the headscarf because of parental or community coercion.<sup>97</sup> Some may wear veils to identify as members of a racial and not just religious minority, and still others may wear the headscarf as a shaming device to ward off sexual harassment. At this point, some may even wear it to signal their position on this controversy, as a political statement against a government that has banned the practice and as an expression of rebellion against the assimilative norms of the French republic.<sup>98</sup>

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95 Stasi apparently became furious that only the "repressive aspects" of his commission's recommendations were implemented. See Dominique Gerbaud, *Reconcentre Avec Bernard Stasi*, LA CROIX, Jan. 8, 2004, at 8 ("Bernard Stasi est encore furieux que les deputes n'en aient garde que les aspects repressifs."). But for a criticism of how the Stasi Commission failed to accurately identify why Muslim girls might wear headscarves, and did not sufficiently study the potential impact of the ban, see Gunn, *supra* note 78, at 467-79.

96 As Saba Mahmood writes, the fact that the veil is widely assumed to be a symbol of something reflects secular reasoning. In a critique of secular normativity, she notes: It is widely assumed that the veil is a symbol whose variable meanings inhere either in the woman's intentions or in the context of its adornment. Whether it is those who hail the veil as a symbol of their religious or cultural identity or those who spurn it as a symbol of women's oppression (as do many feminists), the idea that the veil should be understood primarily as a sign (that signifies *something*) reigns supreme. Women who contend that the veil is part of a religious doctrine, a divine edict, or a form of ethical practice and that it therefore has nothing to do with "Identity" are usually judged to be victims of false consciousness, mired in a traditionalism that leads them to mistakenly internalize the opinions of misogynist jurists whom they should resist.

Saba Mahmood, *Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation*, 18 PUB. CULTURE 323 (2006).

97 See Gunn, *supra* note 78, at 469-70 (criticizing the weak evidence on which the Stasi Commission based its finding of coercion as the basis for the wearing of headscarves by girls).

98 See Joseph Carens & Melissa Williams, *Muslim Minorities in Liberal Democracies: The Politics of Misrecognition*, in THE CHALLENGE OF DIVERSITY: INTEGRATION AND PLURALISM IN SOCIETIES OF IMMIGRATION 157 (Rainer Bauböck et al. eds., 1996).

Since the ban was implemented, forty-four Muslim girls who refused to remove their head coverings have been thrown out of schools across France.<sup>99</sup> Students have been banned from school for wearing berets to class, as the law prohibits anything that can be construed as an Islamic veil, including headscarves, bandannas, and berets.<sup>100</sup> Under the new law, students expelled from school must either be schooled at home or by correspondence, or find a private school.<sup>101</sup> In cases where girls are forced by family or community to don the headscarf, they are being doubly victimized — now not only by their family or community but also by the French state, which perversely denies them the possibility of alternatives to isolation in their community. And the failure of the French government to attend to the factors of racism and material deprivation while expelling girls from school has played into the hands of cultural nationalists, who seek to control the bodies of women and girls in the name of protecting culture. The French government has now created the possibility for repressive community traditions to be conflated with anti-racism, critiques of the French state, and community pride.<sup>102</sup>

In addition to the forty-four Muslim girls, up to six Sikh boys have been expelled from school for wearing "conspicuous religious symbols."<sup>103</sup>

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99 See U.S. Department of State, France: International Religious Freedom Report 2005 (Nov. 8, 2005), <http://www.state.gov/g/drl/rls/irf/2005/51552.htm>; see also Naima Bouteldja, French Hijab Ban: One Year On (May 2005), <http://www.redpepper.org.uk/europe/x-may2005-hijab.htm>; Elizabeth Bryant, *Headscarf Ban Played Down After Holidays*, UPI, Jan. 3, 2005; Marie-Joëlle Gross, *Voile: 43 Élèves Exclus Depuis La Rentrée*, LA LIBÉRATION, Dec. 18, 2004, at 15. One source suggests that the number of girls refusing to respect the law was smaller than might otherwise have been expected, and that this was linked to the outpouring of sympathy for the two French hostages in Iraq, whose captors had demanded that France rescind the ban. See News24.com, 101 Still Defy French Law (Sept. 20, 2004), [http://www.news24.com/News24/World/News/0,,2-10-1462\\_1592214,00.html](http://www.news24.com/News24/World/News/0,,2-10-1462_1592214,00.html).

100 One student, Cennet Doganay, a fifteen-year-old Muslim of Turkish origin, who showed up on the first day of school wearing a large beret, was told that the beret was a religious symbol and was advised to take a correspondence course from home. She refused, shaved off her hair, reappeared at school with the beret, and when ordered to remove it, revealed her bald head in protest. She said, "They drove me crazy . . . Now I feel alone; I feel like a monster." See Sciolino, *supra* note 8.

101 *Id.*

102 To be clear, I am not thinking here of the headscarf as a repressive community tradition by definition. Like any symbol or practice, it can have multiple meanings. And as should be clear from this Article, I believe that repressive community traditions are invented and reconfigured as traditions.

103 See Bouteldja, *supra* note 99. The U.S. State Department Report mentions three Sikh boys. U.S. Department of State, *supra* note 99.

The Stasi Commission neglected to consider what the law would mean for Sikhs, who are forbidden by the law to wear turbans.<sup>104</sup> The Sikh community is seeking an exemption from the law by arguing that the turban is a cultural, not a religious, symbol.<sup>105</sup>

To make sense of the approach of the Sikh community, we need to consider three different conceptions of culture. (I am focusing here on conceptions within a liberal state that purports not to require its members to embrace a particular national culture.) One conception of culture is that heretofore discussed in this Article: the culture described by anthropologist Renato Rosaldo as inversely correlated to full citizenship.<sup>106</sup> This conception of culture refers to the cultural practices of ethnic others posed as oppositional to civilization. In the French context, practices of the Muslim community function as the cultural opposite to republican tradition, a republican tradition in fact marked by a Christianity that appears not visible to the French. Thus, in France, the religiously motivated acts of Muslims are experienced as not just religious, but also cultural. The headscarf is considered something "they" do, because of "their" culture and "their" religion. This conception of culture poses a cultural difference that is troubling to ideas of assimilation and citizenship. For Sikhs to suggest that the turban be seen as "cultural" and not "religious" would not be a successful venture if this first conception of culture were to be followed. That is because this notion of culture is threatening — and powerful, for note how it transmutes the headscarf's articulation as a religious phenomenon into a product of ethnic difference — and must be contained.

The second conception of culture involves practices that are not usually marked as cultural but that function as the backdrop to everyday life, the activities in which "we all engage," that constitute the culture of our civilization. When practices *are* marked as cultural, it is often because they are majority religious practices that dominate the landscape, so that they can be excused as a universal cultural practice rather than perceived as specific

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104 See Sciolino, *supra* note 8. After the Sikh community began to push for an exemption from the law, Stasi asked, "Why didn't they protest while we were doing our investigation?" but acknowledged that no French Sikhs were among the more than two hundred people interviewed by his commission during its six-month investigation. *Id.* An official at the Ministry of National Education said, "What? There are Sikhs in France?" *Id.*

105 *Id.* But see United Sikhs, Right to Turban Petition, [http://www.unitedsikhs.org/us-eu/petitions/petition\\_eng.htm](http://www.unitedsikhs.org/us-eu/petitions/petition_eng.htm) (last visited Dec. 1, 2006) (describing the turban as a "mandatory requirement of the Sikh faith").

106 See RENATO ROSALDO, CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS 198 (1989).

religious dominance. This notion of culture allows Christmas in the United States to be considered not solely or primarily a religious holiday, but "just cultural"; it allows Christmas, as a majority religious practice, to melt into the backdrop as "normal" and "ordinary." Christmas thus becomes something "we" do, because of "our" culture and not "our" religion.<sup>107</sup> But this embrace of a practice as "ours" evaporates as soon as there is anything troubling about it. Then the practice becomes what "they" do — either because of "religion," as in the case of Mormon sects, or because of individual pathologies. Would the Sikh community succeed in having the turban accepted under this conception of culture? Probably not. The ethnic difference of Sikhs would cast them out from the universal French "us."

The third conception of culture posits the nation-state not as a melting pot, in which disorderly difference must be assimilated into a universal homogenous whole, but as a salad bowl. Here, individual cultures can coexist as equal ingredients, with autonomous identities. This notion of culture presumes that cultural difference is benign, even enjoyable. In fact, the terrain on which this notion of culture most frequently operates is that of food, where increasing diversity is considered exciting and positive. This, then, appears to be the construction of culture into which the Sikh community is seeking to slip the turban, not as the practice of a threatening ethnic other on the wrong side of a religious ban, but as a benign cultural practice. What remains to be seen is whether the turban can be conceptualized as an acceptable difference.

Narratives of France restrict French identity to those who are not considered the bearers of excessive "cultural difference." This reflects the existence of a French national personality of which the republic, secular and rational, is claimed to be the embodiment, and the majority population its representatives.<sup>108</sup> Thus, one's status as truly "French" is connected to one's membership in a specific historical group, not to one's membership in the abstract class of citizens.<sup>109</sup> Formal citizenship in the state does not produce citizenship as a matter of identity; in other words, merely possessing a French passport does not guarantee being viewed as a citizen, and not a migrant. Thus, citizenship in the state — created through legal formalities of *jus soli* and *jus sanguinis* — does not inevitably constitute citizenship in the nation —

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107 I am speaking here not of individual Christian beliefs but how the state and national culture construe the annual "Christmas holiday."

108 TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 175-77 (2003).

109 *Id.* at 175.

created through notions of kinship and belonging.<sup>110</sup> Nor do robust citizenship practices guarantee that Muslims will be seen as French. Even though French Muslims have opposed the ban by exercising their freedom of assembly and explicitly invoking liberty, the tricolor, the vote, the Marseillaise, and the republic,<sup>111</sup> the relationship between democratic citizenship activity, coded as French, and the Muslim community remains presumptively contradictory.<sup>112</sup> Any hope of successfully addressing the question of religious garb in French public schools — or the future of French Muslims — must move beyond the binary debate about the ban and attend to France's purportedly inclusive, but actually exclusionary, culture of citizenship.

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110 And of course legal formalities can be shaped by notions of kinship and belonging, just as notions of kinship and belonging can be shaped through legal formalities. For this argument, see JACQUELINE STEVENS, *REPRODUCING THE STATE* (1999) (asserting that kinship rules are not independent of political societies but are produced by political societies that are then reproduced through those rules).

I have divided the concept of citizenship in the nation-state here into two: first, formal citizenship in the state, constituted by territory or descent; and second, citizenship in the nation, constituted by ties of affect, kinship, and belonging. Like the United States, France combines policies of *jus sanguinis* (citizenship through descent) with *jus soli* (citizenship based on birth in French territory). See European Citizenship Laws: French Citizenship, <http://eucitizenship.blogspot.com/2005/12/french-citizenship.html> (last visited Dec. 1, 2006). It is apparent that countries with *jus sanguinis* policies include the idea of kinship in transferring formal citizenship, so that this "legal formality" also reflects notions of kinship.

111 As Paul Silverstein writes:

On January 17, 2004, exactly one month after Chirac proposed the law, over 20,000 French Muslims — mostly women wearing various forms of *hijab* — took to the streets of Paris, Lille, Marseille, Mulhouse and other cities to protest the legislation . . . . Countering the discourse linking the "veil" to the subjugation of Muslim women, they insisted that their decision to wear the *hijab* emerged from their own free will . . . . Alongside these evocations of freedom of choice, the protesting women embraced their simultaneous identity as Muslims and French citizens. Demonstrators throughout France carried French flags, marched with banners evoking "Liberty, Equality, Fraternity, *laïcité*," released blue-white-and-red balloons, and even wore headscarves emblazoned with the French tricolor. They faultlessly sang the "Marseillaise," including, as reporters remarked with amazement, verses seldom heard at national celebrations.

Paul Silverstein, *Headscarves and the French Tricolor* (Jan. 30, 2004), <http://usa.mediamonitors.net/layout/set/print/content/view/full/4458/>.

112 That French Muslims are not effortlessly considered fully French, but rather, need to try to prove their identity as French citizens, is indicated by the very efforts that Silverstein describes. *Id.*

## CONCLUSION

In the words of Renato Rosaldo, full citizenship and cultural visibility appear to be inversely correlated, so that the least powerful in a society are the most culturally endowed.<sup>113</sup> Thus, cultural difference is used to account for the acts of those who are not full citizens. Whereas the "noncitizen"<sup>114</sup> is described as culturally motivated, the citizen's motivations are explained as the embrace of universal liberal values and rational choice, or as the product of psychological pressures. But in this narrative, both the citizen's cultural values and the culture of citizenship are obliterated.

Let me conclude by returning to the cultural context of the United States. It seems impossible to imagine the United States banning the headscarf in public schools.<sup>115</sup> In fact, the U.S. Department of Justice intervened in a suit to protest such a ban, when a sixth-grader named Nashala Hearn in Muskogee, Oklahoma was suspended from school for refusing to remove her headscarf.<sup>116</sup> Under the Muskogee policy, students were banned from wearing hats, caps, bandannas, or jacket hoods inside school buildings; Hearn's headscarf was classified as a "bandanna."<sup>117</sup> Hearn had actually worn a headscarf to school with permission from her home-room teacher from August 18, 2003 until September 10, 2003.<sup>118</sup> On September 11, 2003, the same home-room teacher, after discussing the September 11, 2001 attacks

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113 ROSALDO, *supra* note 106, at 198.

114 By noncitizen here I do not mean in the sense of citizenship as formal status but rather in the sense of citizenship as identity.

115 *See France: Headscarf Ban Violates Religious Freedom*, HUM. RTS. NEWS, Feb. 27, 2004, <http://www.hrw.org/english/docs/2004/02/26/france7666.htm> (asserting that the ban violates religious liberty and is also discriminatory towards Muslim girls).

116 Nashala Hearn is an African-American whose father converted to Islam. In July, 2003, she began to wear a headscarf. *See* U.S. Justice Dept. Wades into Legal Flap Over Muslim Headscarf (Mar. 30, 2004), <http://www.keepmedia.com/pubs/AFP/2004/03/30/404273> (on her racial identity); United States' Memorandum of Law in Support of Its Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment, *Hearn v. Muskogee Pub. Sch. Dist.*, No. Civ. 03-598-S (E.D. Okla. May 6, 2004), *available at* [http://www.usdoj.gov/crt/religdisc/musk\\_memo.htm](http://www.usdoj.gov/crt/religdisc/musk_memo.htm) [hereinafter Muskogee Memorandum] (on when she began to wear a headscarf).

117 *See* Afzhal Khan, Schoolgirl in Oklahoma Fights for Muslim Identity (Apr. 9, 2004), <http://usembassy.state.gov/islamabad/www04040903.html>; Muskogee Memorandum, *supra* note 116.

118 Muskogee Memorandum, *supra* note 116.

with a colleague, told Hearn that she should not be wearing a headscarf and sent her to the principal's office.<sup>119</sup> The district had granted exceptions to the ban on head coverings for costumes worn during school plays, "Cat in the Hat" hats on Dr. Seuss's birthday during "Read across America Week," caps during "hat days" in support of the "Put a Cap on Drugs" Program, and head coverings on Halloween.<sup>120</sup> While the district's dress code was created in part to maintain the school as a "religion-free zone,"<sup>121</sup> students had been permitted to wear crucifixes and shirts with Christian messages;<sup>122</sup> moreover, there was no indication that Hearn's headscarf threatened the preservation of safety and discipline, which underlay the policy.<sup>123</sup>

In settling the suit in May, 2004, the Assistant Attorney General for Civil Rights of the Department of Justice stated that the Department would "not tolerate discrimination against Muslims or any other religious group. As the President and the Attorney General have made clear repeatedly, such intolerance is un-American, and is morally despicable."<sup>124</sup> Thus, the state will not tolerate discrimination and equates intolerance with being un-American. We may assume that part of the impetus for this stance was to create space for Christian practice; while purportedly secular, the United States by no means follows the *laïcité* of France.<sup>125</sup> But let us focus on the question of tolerance and national identity: to be American, then, is to tolerate others and their differences. In considering a ban versus the tolerance of difference in this particular context, surely the latter is preferable. Yet, we should consider

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119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 As the government's memorandum pointed out, the only "disruptions" caused by Hearn's headscarf were "comments by students and teachers" and one incident in which another student pulled off her headscarf; these students reported being "frightened" or "concerned" by Hearn's headscarf. *Id.*

124 See Department of Justice, Justice Department Reaches Settlement Agreement with Oklahoma School District in Muslim Student Headscarf Case (May 19, 2004), [http://www.usdoj.gov/opa/pr/2004/May/04\\_crt\\_343.htm](http://www.usdoj.gov/opa/pr/2004/May/04_crt_343.htm).

125 On liberal anxiety that the Bush administration threatens to dissolve the state's claim to religious neutrality in actively promoting the far-right Christian agenda, see Mahmood, *supra* note 96, at 326. For the important argument that the United States, in direct contrast to France, has a strong separation of religion and state, but not of religion and politics, and tracing this difference to the way in which the French state, unlike the American state, has assumed many of the historic functions performed by the medieval Church, see James. Q. Whitman, Church and State: Why are America and Europe so Different? (2006) (unpublished manuscript, on file with author).

what underlies the concept of tolerance.<sup>126</sup> Tolerance suggests that there is a dominant majority extending its beneficence to a minority community — I choose to tolerate you, or I choose to tolerate what you do. Only some cultures are depicted as tolerant, while non-Western practices or regimes are defined through their intolerance. And tolerance poses as both a universal value and an impartial practice.<sup>127</sup> Thus, a state that espouses the value of tolerance masks the fact that tolerance is always conferred by the dominant while its object is "inevitably figured as something more lowly,"<sup>128</sup> and elides how the object of tolerance is aligned with difference, placing it outside of the universal and purifying the tolerant entity of all intolerance.<sup>129</sup>

Tolerance presumes a difference that is to be tolerated, and a majority that does not practice those norms. But the cultural practices that are the subject of tolerance (or banning) are not unique to minority communities. This selective ascription is rendered invisible because we associate behavior with the identity of the actor, in selectively labelling it as the product of "their" culture, or as the product of individual acts. Thus, the call for "tolerance" will emerge in a context when the practices to be tolerated are in fact norms of the community that tolerates, but are denied as such. We must attend to when, and in what contexts, the state feels the need to "tolerate," and when the language of toleration disappears. The state will feel no need to assert the language of tolerance once the community at issue is considered to be made up of citizens, engaged in acts invisible to us as cultural practices. Unlike the bearers of cultural difference, citizens are part of our everyday world.

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126 On tolerance and the liberal state, see Nomi Maya Stolzenburg, *The Return of the Repressed: Illiberal Groups in a Liberal State*, 12 J. CONTEMP. LEGAL ISSUES 897 (2002).

127 BROWN, *supra* note 47, at 7.

128 *Id.* at 178.

129 *Id.* at 187.



