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# Squaring the Circle of Multiculturalism? Religious Freedom and Gender Equality in Canada

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**Abstract:** The Canadian Charter of Rights and Freedoms is globally unique in that it includes explicit commitments to the values of multiculturalism and gender equality. Section 27 of the Charter provides that: “[It] shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians,” whereas section 28 states that: “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” The Canadian experiment (as I will call it) offers us a rare, living laboratory in which a thriving constitutional system searches for legal and institutional pathways to addressing seemingly incongruous demands, obligations, rights, and protections. This article identifies a range of concrete legal responses developed and articulated by Canadian judges and other policymakers in response to claims for fair inclusion raised by members of religious minority communities. Contributing to ongoing theoretical and legal debates, I will conceptualize three variants of such fair inclusion claims. I will then assess what the Canadian multicultural experiment can teach other comparable countries about principled and pragmatic responses to the challenge of “living together” in shared spaces such as workplaces, schools, courthouses, and during citizenship ceremonies. The discussion will then explore the promises and pitfalls of a jurisprudential approach that resists the hierarchy of rights formulas, and tries instead to cover all grounds so as to neither erase diversity nor sacrifice equality.

**Keywords:** diversity, equality, citizenship, religious freedom, multiculturalism, Canada

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## Introduction

In a series of previous articles, I have developed the distinction between *fair inclusion* and *privatized diversity*.<sup>1</sup> Fair inclusion refers to various legal measures designed to permit individuals to participate fully in the public spaces shared among democratic citizens, while expressing, if they wish to do so, certain religious (or other group-based) identity markers. Privatized diversity refers not to claims for inclusion in the wider society, but to demands for insulation, if not outright immunization, from the purview of the legal order enacted by the state, in the name of promoting a community's unique ways of life in the face of an "encroaching" constitutional order.<sup>2</sup> The centrifugal and centripetal pulls of fair inclusion and privatized diversity capture some of the most salient and difficult challenges faced in recent years by countries committed to recognizing both diversity and equality.<sup>3</sup> The oft-noted potential strain between these aims has burst to the fore of the debate and has kept philosophers, legal theorists,

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**1** This distinction is offered as an analytical and illustrative tool rather than an exhaustive list of all kinds of claims and tensions that may arise under a multicultural conception of citizenship. See, e. g., Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQ. L. 573 (2008); Ran Hirschl & Ayelet Shachar, *The New Wall of Separation: Permitting Diversity, Restricting Competition*, 30 (6) CARDOZO L. REV. 2535 (2009); Ayelet Shachar, *Entangled: Family, Religion, and Human Rights*, in HUMAN RIGHTS: THE HARD QUESTIONS 115 (Cindy Holder & David Reidy eds., 2013).

**2** Unlike Will Kymlicka's distinction between polyethnic rights (owed primarily to immigrants and "ethnic" minorities) and self-determination rights (reserved under his scheme primarily to national minorities that may constitute a majority in a territorial sub-unit of a larger polity, such as First Nations or the Quebecois in Canada), the claims of privatized diversity have been advanced primarily by subjects of *religious* minorities (a category that received surprisingly little attention in Kymlicka's otherwise elegant framework) that do not seek territorial self-determination, but instead rely on mechanisms such as refraining from turning to public courts and harnessing coreligionists to resolve disputes in matters such as marriage and its breakdown through community-based alternative dispute resolution processes that base their decisions on religious-informed norms and practices.

**3** There is a rich body of literature that seeks to address these very questions from the perspective of political theory. The full list is too vast to cite. For some of the most influential contributors to these debates, see WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); CHARLES TAYLOR ET AL., *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* (Amy Gutmann ed., 1994); JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (1995); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (2011 ed., 2011); Susan Moller Okin, *Is Multiculturalism Bad for Women?* BOSTON REV. (Oct. 1, 1997), available at <http://bostonreview.net/forum/susan-moller-okin-multiculturalism-bad-women>; AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* (2001); SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* (2002); and ANNE PHILLIPS, *MULTICULTURALISM WITHOUT CULTURE* (2007).

ethicists, social scientists, think tanks, and policymakers (to mention only a few) hard at work. Unlike privatized diversity, which seeks to create a binding normative and legal *nomos* for minority community members that is potentially beyond the reach of the state's "higher law," fair inclusion claims involve promoting the participation of those once-excluded from or discriminated against in mainstream institutions. As such, considerations of fair inclusion are intertwined with struggles to overcome, or at least mitigate, entrenched power and status inequalities; this raises important questions about how these mainstream institutions may, could, or ought to change in a more diverse society. Instead of exploring these conundrums in the abstract, I identify a range of legal responses developed and articulated by judges and other policy-makers in Canada, and work from the bottom up to conceptualize in this article three branches or variants of the family of fair-inclusion claims. In developing these categories, I also elaborate how they might practically operate in a society that is widely recognized as one of the most accommodating jurisdictions in the world of "new constitutionalism," and contrast the Canadian multiculturalism experiment with competing visions of citizenship and membership as practiced and articulated by comparable countries.<sup>4</sup>

The Canadian Charter of Rights and Freedoms is globally unique in that it incorporates both of these commitments using interpretive provisions focusing on multiculturalism and gender equality.<sup>5</sup> Section 27 provides that: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians," whereas section 28 states that: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."<sup>6</sup> The *Canadian experiment* (as I call it) offers us a rare, living laboratory in which a thriving constitutional system searches for legal and institutional pathways to addressing the

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<sup>4</sup> For a comparative analysis, see, e.g. Hirschl & Shachar, *supra* note 1; Will Kymlicka, *Canadian Multiculturalism in Historical and Comparative Perspective: Is Canada Unique?* 13 (1) CONST. FORUM 1 (2003); NORMAN DOW, *LAW AND RELIGION IN EUROPE: A COMPARATIVE INTRODUCTION* (2011).

<sup>5</sup> The Charter also includes specific rights provisions dealing with religious freedom and equality in sections 2(a) and 15(1) respectively. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) [hereinafter "Charter" or "Canadian Charter"].

<sup>6</sup> While not entrenching particular rights, these interpretative provisions express core values of Canadian society and its constitutional order; they are to be taken into account in interpreting the meaning of a right or freedom guaranteed by the Charter, or in assessing the justifications of limits under section 1 of the Charter. *Id.*

seemingly intractable demands, obligations, rights, and protections endowed by sections 27 and 28. The Canadian experiment is fascinating to explore because it attempts to give meaning to the implementation of *both* values. It exposes the promises and pitfalls of a jurisprudential approach that resists the hierarchy of rights formulas, and tries instead to cover all grounds so as to neither erase diversity nor sacrifice equality. No other country has officially enshrined both multiculturalism (section 27) and gender equality (section 28) as interpretive provisions that reflect the “broad directions” and “aims” of its constitutional order.<sup>7</sup>

To fully comprehend the importance of the Canadian experiment, we need to place it in a broader context. In the post 9/11 era, considerations of national security and public order have led to a major rethinking of the relationship between minority and majority communities in many parts of the world. This is perhaps most visible in Europe, where attempts to define the scope, limit, and justification for recognition—and increasingly, *restriction*—of visible public expressions of minority religious identity now represent some of the most charged political and legal issues in public debate.<sup>8</sup> Perhaps no statement better captures the general shift in attitude than the famous declaration by Germany’s Chancellor Angela Merkel that multiculturalism (or *multikulti* as the Germans would put it) has “utterly failed.”<sup>9</sup> In some countries, such as the United Kingdom, there is a renewed emphasis on fostering social cohesion and promoting shared values and a common identity (however difficult these terms remain to define). These policy changes make their mark in and through the political arena; but we have also witnessed the rise of a legal battlefield of sorts, where courts – both domestic and transnational – have repeatedly been called upon for the difficult task of defining the place of religion in the public sphere.<sup>10</sup> Some of the most contested struggles over culture and identity

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7 See Walter S. Tarnopolsky, *The Equality Rights*, in *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY* 441 (Walter Surma Tarnopolsky & Gérald A. Beaudoin eds., 1982).

8 Some have referred to this trend as the “multiculturalism backlash.” See, e.g., *THE BACKLASH AGAINST MULTICULTURALISM: EUROPEAN DISCOURSES, POLICIES AND PRACTICES* (Steven Vertovec & Susanne Wessendorf eds., 2010).

9 Matthew Weaver, *Angela Merkel: German Multiculturalism has ‘Utterly Failed,’* *THE GUARDIAN*, Oct. 17, 2010, available at <http://www.theguardian.com/world/2010/oct/17/angela-merkel-german-multiculturalism-failed>. In German, see “*Der Ansatz für Multikulti ist gescheitert, absolut gescheitert!*,” in *Integration: Merkel erklärt Multikulti für gescheitert*, *SPEIGEL*, Oct. 16, 2010, available at <http://www.spiegel.de/politik/deutschland/integration-merkel-erklart-multikulti-fuer-gescheitert-a-723532.html>.

10 There is a rich and growing body of literature on the relationship between state and religion, and the vital role that courts play in (re)shaping them, see, e.g., CAROLYN EVANS, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2001); RAN HIRSCHL, *CONSTITUTIONAL*

nowadays tend to involve religion. To this we must add the fact that most national constitutions (and supranational human rights conventions) include a protection of religious freedom, making it strategically beneficial to couch identity claims under the rubric of religious freedom, even though the “claims of culture” or “politics of diversity” typically bring to the fore combined elements of religion, culture, tradition, and so on.<sup>11</sup> When gender is brought into the mix, we find the emergence of volatile legal controversies. The debates surrounding the *hijab* (a head cover worn by some Muslim women) and the *niqab* (a face-veil that only leaves the eyes visible) offer concrete examples of this larger trend; even Canada has not escaped these debates.<sup>12</sup> For women wishing to express in public certain aspects of their (non-dominant) religious or cultural identity while enjoying other rights and protections they are entitled to as equal citizens, the combination of perennially charged questions of “who we are” – or what values we share as co-members of a political community – with the return of religion to center stage may, in a bitterly ironic twist, place more pressure on them to assert their “loyalty” to *both* the minority community *and* the larger political community to which they belong. Today, some of the most contested “rounds” of legal debate generated by the *hijab* and the *niqab*, or their banning through governmental action, occur precisely at the moment when the visibly marked “Othered” woman is seeking access to public spaces, receipt of governmental services, or formal inclusion in the body politic. The intersection here of the politics of belonging with gender and religion conflicts turns women who cover into symbolic and potentially also legal “markers” of the boundaries of inclusion/exclusion, delineating the “cusp of membership,” ultimately explaining the critical role their attire and the female body more generally play in heated debates about citizenship, human rights, and collective identity.<sup>13</sup> On a global scale, however, Canada

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THEOCRACY (2010); LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS (Lorenzo Zucca & Camil Ungureanu eds., 2015).

**11** On the claims of culture, see, e.g., BENHABIB, *supra* note 3; on the politics of diversity, see ROGERS BRUBAKER, *Grounds for Difference* (2015).

**12** For comprehensive discussions of the legal controversies surrounding veiling, see, e.g., the excellent collection of essays in *THE EXPERIENCES OF FACE VEIL WEARERS IN EUROPE AND THE LAW* (Eva Brems ed., 2014); BENHABIB, *supra* note 3; Gila Stopler, *Hobby Lobby, SAS, and the Resolution of Religious Based Conflicts in Liberal States*, *ICON* (forthcoming 2016).

**13** The concept of symbolic boundaries is now prevalent in discussions across the social sciences and humanities, see, e.g., Cynthia Fuchs Epstein, *Tinkerbells and Pinups: The Construction and Reconstruction of Gender Boundaries at Work*, in *CULTIVATING DIFFERENCES: SYMBOLIC BOUNDARIES AND THE MAKING OF INEQUALITY* 232 (Michèle Lamont & Marcel Fournier eds., 1992).

remains an especially strong supporter of multiculturalism and diversity in a world in which support for these policies has been declining, particularly in Europe.<sup>14</sup>

This new reality raises major challenges that law and political theory must tackle in the early twenty-first century, most foundational among these are questions such as: What principles and guidelines can, and should, guide how people “live together” in free and democratic societies that are ever more diverse? Is it possible for courts and legislatures to define an expansive scope of protection for *both* religious freedom *and* gender equality, simultaneously? What are the justifiable limits or best techniques for addressing cases of direct conflicts between such values that, at least in the Canadian context, hold equal footing in the constitutional structure of rights protection? And how much weight should be given to context—historical, circumstantial, power-relational—in determining the claims of members of non-dominant minority communities as compared to the interests of members of majoritarian communities? When defining seminal concepts such as neutrality, the separation of state and religion, and equal opportunity in our increasingly diverse societies, what is the role of the state in such charged disputes? Is it always impartial and even-handed as liberal and democratic theory would lead us to expect, or potentially subject in practice to what public choice theorists have called “capture” by special interests, political vectors, or veto groups?<sup>15</sup>

In the following pages I begin to address these weighty and inevitably sensitive quandaries, exploring what the Canadian experiment can teach us about principled and pragmatic responses to the challenge of “living together”

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<sup>14</sup> See, e. g., Rogers Brubaker, *The Return of Assimilation? Changing Perspectives on Immigration and its Sequels in France, Germany, and the United States*, 24 (4) *ETHN. RACIAL STUD.* 531 (2001); Christian Joppke, *The Retreat from Multiculturalism in the Liberal State: Theory and Practice*, 55 (2) *BRITISH J. SOC.* 237 (2004); Liav Orgad, *Illiberal Liberalism: Cultural Restrictions on Migration Access to Citizenship in Europe*, 58 *AM. J. COMP. L.* 53 (2010); *THE BACKLASH AGAINST MULTICULTURALISM*, *supra* note 8.

<sup>15</sup> Public choice scholars distinguish between “public interest” theories of government regulation (informed by the good of the public interest by impartial state actors, agencies, and decision-makers), and “regulatory capture” theories that emphasizes the distortive impact that interest groups with high-stakes in the regulation of a particular field have on shaping and implementing public policy, potentially to detriment of the public interest. For a classic exposition, see Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision Making: A Theory of Regulatory Capture*, 106 (4) *Q. J. ECON.* 1089 (1991); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, the Public Interest, and the Public Agenda: Toward a Synthesis*, 6 (special issue) *J. L. ECON. ORG.* 167 (1990).

in shared spaces such as workplaces, schools, courthouses, and during citizenship ceremonies. More specifically, I distinguish and articulate three variants of the fair-inclusion family of claims, which are typically brought to the attention of the justice system by those who seek to change the status quo or acquire a remedy for violation of a protected right or interest: 1) freedom from coercion, 2) exemption and accommodation vis-à-vis public authorities, and 3) conflicting rights among individuals.<sup>16</sup> The discussion reveals some of the unique and successful features of Canada's multicultural experiment, as well as the deep and as of yet unresolved challenges raised by this grand social and legal experiment in accommodating diversity *with* equality. Given the renewed centrality of the construction and reconstruction of religious women's "difference," I also provide several examples that illustrate just how volatile the inclusion-exclusion line is in reference to full and equal membership, even in diversity-accommodating Canada. But before we turn to these riveting issues, it is useful to step back in time, roughly half a century ago, in order to acquaint ourselves with the genesis of the invention of Canadian multiculturalism as an *official* government policy—the first in the world.<sup>17</sup>

## Fair Inclusion I: Non-Coercion by the Majority

The "multi" in Canadian multiculturalism represents an explicit rejection of the once unquestioned approach of privileging the dominant majority culture(s) while relegating minority communities to a marginalized, second-class position. In Canada, the government policy of multiculturalism, articulated in 1971 and predating the Charter, rested on a combination of empirical and normative justifications for rejecting mono-or bi-culturalism: "In the face of this [country's] cultural plurality there can be no official Canadian culture or cultures," resoundingly stated a special joint parliamentary committee designated with the task of developing Canada's new constitutional bill of rights, the Canadian Charter of Rights and Freedoms.<sup>18</sup> As part of this effort, a new vision was crafted of a

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<sup>16</sup> This is an illustrative rather than an exhaustive list, which covers the major claims of fair inclusion in both law and political theory.

<sup>17</sup> *Canadian Multiculturalism: An Inclusive Citizenship*, Government of Canada, <http://www.cic.gc.ca/english/multiculturalism/citizenship.asp> (last visited Oct. 19, 2012).

<sup>18</sup> *Special Joint Committee of the Senate and House of Commons on the Constitution of Canada* (1972). The governmental policy was initially framed as "multiculturalism within a bilingual framework."



“pluralistic mosaic,” promoting “equal respect for the *many* origins, creeds and cultures” that form Canadian society.<sup>19</sup>

In the post-Charter era, the earliest judicial pronouncement on section 27 is found in the landmark decision of *R. v. Big M Drug Mart Ltd.*, in which the Supreme Court of Canada struck down the Lord’s Day Act, a federal “Sunday closing law” prohibiting businesses from opening on Sunday, effectively protecting the sanctity the Christian Sabbath.<sup>20</sup> In an oft-cited paragraph of that decision, the Court stated that: “What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not ... be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of the ‘tyranny of the majority.’”<sup>21</sup> This last point is crucial. The majority of Canadians may accept Sunday as the Lord’s Day, but this does not represent the perspective of religious minorities in Canada, be they members of the Jewish faith, Sabbatarians, Muslim Canadians, agnostics, or those with no theistic belief. As Dickson J. (as he then was) said, speaking for the Court: “To the extent that it binds all to a sectarian Christian ideal, the Lord’s Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians.”<sup>22</sup> The Lord’s Day Act, continues the Court, “takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike.”<sup>23</sup> It is at this stage of the analysis that section 27 is brought into the discussion: “to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion [the dominant majority religion] is not consistent with the preservation and enhancement of the multicultural heritage of Canadians.”<sup>24</sup>

The pronouncement in *Big M* that direct compulsion is forbidden is now deeply entrenched in Canadian law.<sup>25</sup> The Supreme Court of Canada recently referred to cases involving religious compulsion as “straightforward”; they fail

<sup>19</sup> *Id.* rec. 5.

<sup>20</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (Can.) [hereinafter “*Big M*”].

<sup>21</sup> *Id.* paras. 94–96.

<sup>22</sup> *Id.* para. 97.

<sup>23</sup> *Id.* para. 98.

<sup>24</sup> *Id.* para. 99. The emphasis on removing majoritarian religious indoctrination (e.g., the “Lord’s Prayer”) is also found in constitutional challenges raised in the public school context.

<sup>25</sup> This case has received not only favorable, but also unfavorable appraisal by legal commentators. See, e.g., Benjamin L. Berger, *Law’s Religion: Rendering Culture*, 45 (2) OSGOODE HALL L.J. 277 (2007).



the test of constitutionality without even triggering a balancing or proportionality analysis.<sup>26</sup> It is worth noting, however, that what is considered straightforward in Canada is not necessarily seen as such elsewhere. Unlike the Supreme Court of Canada, other distinguished courts (whether national or supranational) have been reluctant to declare practices and policies enforcing majoritarian values as a “form of coercion inimical to the Charter [or other human rights instruments] and the dignity of all non-Christians.”<sup>27</sup> Consider, for instance, the much-discussed *Lautsi* decision handed down by the Grand Chamber of the European Court of Human Rights (“ECtHR”), the apex judicial body in the European human rights system, entrusted with interpreting the provisions of the European Convention on Human Rights.<sup>28</sup> In *Lautsi*, the Grand Chamber of the ECtHR overturned an earlier unanimous decision by the Chamber. In it ruled that given the wide variety of approaches adopted by European states regarding the place of religion in public schools, the Italian regulations requiring the prominent display of the crucifix in every classroom in state-run schools fall within the margin-of-appreciation owed to domestic authorities to “perpetuate a tradition” – here, the tradition of the *majority* religion (Catholicism) in Italy.<sup>29</sup> In effect, this decision means that children from different faiths, backgrounds, and ways of life, including non-Christians and those professing no religion, will continue to be educated under the cross—literally—in Italian public schools.

The *Lautsi* decision has been criticized as taking a pro-majority stance in the “cultural wars currently raging in Europe [in which] the relationship between the majority and minorities in society, the extent of their respective claims to shape the social, cultural, and intellectual environment, and the role of the state in their

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<sup>26</sup> *Alberta v. Hutterian Brethren of Wilson County*, [2009] 2 S.C.R. 567, para. 93 (Can.) [hereinafter “Hutterian Brethren”]; *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.).

<sup>27</sup> *Big M*, *supra* note 20, para. 97.

<sup>28</sup> *Lautsi v. Italy*, App. No. 30814/06 2011 Eur. Ct. H.R. (G.C.) (Mar. 18, 2011), <http://hudoc.echr.coe.int/eng?i=001-104040> [hereinafter *Lautsi* (Grand Chamber)]; *Lautsi v. Italy*, App. No. 30814/06, 2009 Eur. Ct. H.R. (Nov. 3, 2009), <http://hudoc.echr.coe.int/eng?i=001-95589> [hereinafter *Lautsi* (Chamber)].

<sup>29</sup> *Lautsi* (Grand Chamber), *supra* note 28, paras. 68–69. In an earlier decision in this case, the Italian *Consiglio di Stato* interpreted the crucifix as a religious symbol when it is affixed in a place of worship, but in a non-religious context like a school, it was defined it as an almost universal symbol (from the perspective of the majority) capable of reflecting various meanings and serving various purposes, including “values which are important for civil society, in particular the values which underpin our constitutional order, the foundation of our civil life. In that sense the crucifix can perform – even in a ‘secular’ perspective distinct from the religious perspective specific to it – a highly educational symbolic function, irrespective of the religion professed by the pupils”: *id.* para. 16.

tug-of-war are the source of recurring tensions.”<sup>30</sup> Under the non-coercion variant of the fair inclusion framework informing the Canadian multiculturalism experiment, a decision like *Lautsi* would be objectionable in that it upholds, rather than dismantles, the “compulsory display of a symbol of a particular [majority] faith in the exercise of public authority,” thus breaching the duty of neutrality and fair inclusion as non-coercion.<sup>31</sup> Recall that s. 27 instructs that “[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of *Canadians*,” not the preservation and enhancement of the heritage of a *majority* tradition or community in Canada. By contrast, the *Lautsi* decision reflects the continued privileging of the majority tradition and the use of the force of the state to inculcate certain values to a “captive audience” in and through a quintessential public institution: the public school.<sup>32</sup> In lieu of multiculturalism, it endorses *monoculturalism* by granting permission to display a “primarily religious symbol” (as the Strasbourg Court put it)—the crucifix—in every state-run classroom where attendance is compulsory regardless of religious convictions, or lack thereof.

As comparative constitutional scholars have rightly observed, legal disputes such as *Lautsi* have come to fore because the ECtHR itself has become a core arena where “some of the most challenging debates around European legal pluralism [now] take place, and its case law has centrally contributed to shaping the terms of such controversies.”<sup>33</sup> Moreover, it is increasingly recognized that the legal arena has become a strategic space for not only exploring the “nature of religious communities, their relationship to state institutions, and the place of minority religious communities in society,” but also in which to re-examine “the

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**30** Dimitrios Kyritsis & Stavros Tsakyrakis, *Neutrality in the Classroom*, 11 (1) INT’L J. CONST. L. 200 (2013).

**31** Importantly, the earlier unanimous decision in *Lautsi* (Chamber), which sided with the applicant against Italy’s position, fully acknowledged the concern with compulsion and coercion, especially in the realm of education, holding that: “The Court cannot see how the display in state-school classrooms of a symbol that it is reasonable to associate with Catholicism (the majority religion in Italy) could serve the educational pluralism which is essential for the preservation of ‘democratic society’ within the Convention meaning of that term.” See *Lausti* (Chamber), *supra* note 28, at paras. 56–57.

**32** As the Chambers’ ultimately-overturned *Lautsi* decision stated: “The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions.” *Id.* para. 47.

**33** Effie Fokas, *Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence*, 4 (1) OX. J. L. & RELIGION 54 (2015); see also Matthias Koenig, *Governance of Religious Diversity at the European Court of Human Rights*, in INTERNATIONAL APPROACHES TO THE GOVERNANCE OF ETHNIC DIVERSITY (Jane Bolden & Will Kymlicka eds., 2015). More generally, see HIRSCHL, *supra* note 10, at 51.

place, role and rights of the ‘Christian majority’ in Europe.”<sup>34</sup> These are highly charged issues, which have become intertwined with a deepening “cultural anxiety” about national identities and shared values that are perceived to be under threat and in danger of being “overwhelmed” by the members of minority religious communities, thus feeding into a dangerous narrative of “*nous*” et les “*autres*,” creating a binary, sum zero dynamic of “us” vs “them.”<sup>35</sup> Canada is not immune to these pressures, but they have been slower to take hold given that a fundamental legacy of multiculturalism has been the dismantling of majoritarian dominance and its replacement with a more diverse and inclusive “social imaginary” constructed in the name of, and in turn affirming, the commitment to equal citizenship as safeguarding diversity-in-unity.<sup>36</sup>

## Fair Inclusion II: Accommodation and Exemption

The legal commitment to non-coercion can be thought of as a concrete articulation of a broader normative principle and policy: the removal of negative background conditions, statutes or regulations that may appear or purport to be neutral but in fact are “implicitly tilted towards the needs, interests, and identities of the majority group.”<sup>37</sup> Beyond it lies a vast range of positive, concrete, and often case-by-case exemptions and accommodations from otherwise generally-applicable laws, rules, regulations and other binding governmental policies. As we have just seen, refraining from coercive use of the power of the state to privilege the tradition(s) of the majority is anything but trivial.

No state is an island. And no state can be regarded as a *tabula rasa*. Each society makes collective choices about its official language(s), public holidays, and national symbols, choices that lead to some members feeling more welcome than others. The exemption and accommodation concerns of fair inclusion are designed

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<sup>34</sup> Fokas, *supra* note 33, at 54–55.

<sup>35</sup> Ralph Grillo & Prakash Shah, *Reasons to Ban? The Anti-Burqa Movement in Western Europe* (MMG Working Papers, Working Paper No. ISSN 2192-2357, 2012), available at [http://www.mmg.mpg.de/fileadmin/user\\_upload/documents/wp/WP\\_12-05\\_Grillo\\_Reasons-to-Ban.pdf](http://www.mmg.mpg.de/fileadmin/user_upload/documents/wp/WP_12-05_Grillo_Reasons-to-Ban.pdf); BENHABIB, *supra* note 3, at 24–26.

<sup>36</sup> The term diversity in unity appears in *Discover Canada*, the official study guide issued by the government for citizenship applicants who seek to naturalize, a carefully-regulated process that culminates with a public citizenship test. On the concept of the social imaginary, see CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* (2004).

<sup>37</sup> Will Kymlicka & Wayne Norman, *Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts*, in *CITIZENSHIP IN DIVERSE SOCIETIES* 4 (Will Kymlicka & Wayne Norman eds., 2000).

to overcome, or at least mitigate, the unfair “burdens, barriers, stigmatizations, and exclusions” that members of non-dominant communities accrue as a result of their minority status, or by virtue of not having had an equal voice and opportunity to shape the “rules of the game” in the first place.<sup>38</sup> In the legal arena, the exemption and accommodation branch of fair inclusion refers to a wide range of measures that are created so that religious and other minorities may “express their cultural [or religious] particularity and pride without it hampering their success in the economic and political institutions of the dominant society.”<sup>39</sup> An illustration of the principle of fair inclusion in operation in the Canadian Charter context is found in the *Multani* case.<sup>40</sup> This legal drama involved an 11-year-old Sikh immigrant, Gurjab Singh Multani, who was enrolled in a public school in Quebec. The Court considered whether the boy should be allowed to carry a *kirpan* (a ceremonial dagger) in accordance with his beliefs, even though this created potential safety hazards and led to an apparent conflict with the school board’s prohibition on weapons and dangerous objects. Indeed, the categorization of the *kirpan* as either a prohibited weapon (as the school board claimed) or an important religious symbol (the position of the student, his parents, and the interveners on behalf of the Sikh community) was at the heart of the dispute.

A decision to universally ban the *kirpan*, the Court ruled, was not the least drastic means by which to address the limited potential harm that might ensue, especially in light of the sincerity of the student’s religious beliefs. The Court thus held in favor of Multani, providing a resounding statement of the fair-inclusion vision of human rights and equal citizenship:

The argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict must fail. Not only is this assertion contradicted by the evidence

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**38** *Id.*

**39** KYMLICKA, *supra* note 3, at 31. In Canada, the duty to accommodate on the basis of a commitment to religious freedom and gender equality as found in sections 27 and 28 of the Charter applies to public and semi-public entities, but it is supplemented by principles of antidiscrimination law, as developed by human rights tribunals, which apply to both public and private actors in a wide range of contexts including employment and the supply of goods and services. See *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 (Can.). For a comprehensive overview, see Emmanuelle Bribosia et al., *Reasonable Accommodation of Religious Minorities – A Promising Concept for European Antidiscrimination Law?* 17 (2) MAASTRICHT J. EUR. COMP. L. REV. 137 (2010). My discussion throughout this article focuses on the constitutional aspect of the duty to accommodate.

**40** *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 (Can.) [hereinafter *Multani*].

regarding the symbolic nature of the kirpan, it is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism.<sup>41</sup>

Translating this commitment into a social reality is, of course, a major challenge. In *Multani*, the Court sought to rein in the absolutist approach of a total ban, cultivating, instead, the constraint and moderation that informs its balancing approach that seeks to mitigate tensions between competing values and interests. The trajectory of searching for such a delicate balance is also manifested in the *Syndicat Northcrest v. Amselem* decision,<sup>42</sup> in which the Supreme Court of Canada held that a condominium association's refusal to permit Orthodox Jewish unit co-owners to install sukkahs (exterior temporary structures that some Jews erect during the Jewish holiday of the Feast of the Tabernacles) on their balconies unjustifiably breached their rights to pursue their religious beliefs.<sup>43</sup> In the decision, religious freedom is conceptually linked to broader themes of respect for minority communities in a diverse society. As explained by the Court: "An important feature of our constitutional democracy is respect for minorities, which includes, of course, religious minorities. Indeed, respect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy."<sup>44</sup>

For the purposes of our discussion, the *Amselem* decision is significant not only because it places an obligation to respect cultural and religious difference on a non-state actor, but also by virtue of its acknowledgement of diversity *within* the accommodated minority. This last point is connected to the Court's holding that "the State is in no position to be, nor should it become, the arbiter of religious dogma."<sup>45</sup> While courts and other state officials are not in a position to rule on the validity or veracity of any given religious practice, courts are "qualified to inquire into the sincerity of a claimant's belief."<sup>46</sup> Insisting on sincerity of belief, however, is not the same as requiring a person

<sup>41</sup> *Id.* para. 71.

<sup>42</sup> *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (Can.) [hereinafter "*Amselem*"].

<sup>43</sup> This case was decided under the Quebec Charter of Human Rights and Freedoms, R.S.Q. 2015, c. C-12 (Can.), [http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C\\_12/C12\\_A.htm](http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_12/C12_A.htm); the Canadian Charter was not applicable because the restriction on the claimant's religious freedom was imposed by a non-state actor, the condominium's association. The majority decision states that the principles applicable in cases where an individual alleges a breach of his or her freedom of religion under the Quebec Charter are also applicable to claims under s. 2(a) of the Canadian Charter.

<sup>44</sup> *Amselem*, *supra* note 42, para. 1 (internal citations omitted).

<sup>45</sup> *Id.* para. 50.

<sup>46</sup> *Id.* paras. 51 & 56.

to prove that his or her religious practices are supported by a mandatory doctrine of faith. In the sukkah dispute, the focus on *sincerity* of belief permitted the claimant to vindicate a religious freedom claim against the condominium in which he owned a unit, despite the fact that expert testimony was divided (between Jewish Halakhic and contemporary sources) on the question of whether the said practice was at all mandatory according to the relevant tradition.<sup>47</sup>

This concentration on the *sincerity* of a claimant's belief opens the door, at least theoretically, for those who follow a given religious tradition to argue that a more gender-egalitarian interpretation of their tradition is *part of* (rather than opposed to) their state-protected religious freedoms and the promotion of multiculturalism, even if such an interpretation is not a dominant or established tenet of the tradition. It allows the court to avoid becoming the arbiter of religious dogma while permitting individuals greater freedom to shape the boundaries of their claim for religious freedom.<sup>48</sup> For “minorities within minorities” such as religious women, both members of a faith community and equal citizens of the state, who seek both recognition for their multilayered identity and the full protection and benefit of the law—such a shift could pave the way for articulating an intersectionist position cutting across overlapping and possibly competing sets of relations and obligations. The Court's decision to focus the religious freedom analysis on practices or beliefs that have a *nexus* with religion (irrespective of whether those practices or beliefs are required by official religious dogma) in conjunction with the sincerity of that belief, could thus prove

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<sup>47</sup> For a critical account of *Amselem*, see in this volume, Gideon Sapir & Daniel Statman, *The Protection of Holy Places*, 10 L. ETHICS HUM. RTS. (2016).

<sup>48</sup> The jurisprudential turn to a “subjective” rather than “objective” conception of freedom of religion is primarily understood by jurists and commentators as empowering individuals and allowing courts to “avoid having to settle contradictory interpretations of a given religious doctrine. They [courts] thus circumvent the risk of falling back on the majority opinion in a religious community and contributing to the marginalization of minority voices.” See GÉRARD BOUCHARD & CHARLES TAYLOR, *BUILDING THE FUTURE: A TIME FOR RECONCILIATION* (2008), art. 176, available at <https://www.mce.gouv.qc.ca/publications/CCPARDC/rapport-final-integral-en.pdf>. In theory, the emphasis on sincerity may also run the risk of sanctioning more extreme variants of religious belief, although in practice even if a sincere belief falls within the scope of protected religious freedom under s. 2(a) of the Charter, courts still have to proceed to the stage of determining whether it infringes on other protected rights and interests (s. 1). For a classic articulation of this last point in Canadian jurisprudence, see *B. (R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315 (Can.). Critics have also argued that determining the sincerity of religious belief may require courts to engage, despite claims to the contrary, in an assessment of religious doctrine. For a comparative analysis, see Anna Su, *Judging Religious Sincerity*, 51 Ox. J. L. REL. 28 (2016).

empowering for women and other minorities seeking to challenge entrenched intra-group power relations, or practices and traditions, that are entangled with state action.

Cases like *Amselem* and *Multani* are brought by litigants who seek fair inclusion in public spaces and institutions, such as schools, streets, workplaces, etc., but without losing identity-based markers that they see as important dimensions of their cultural or religious based affiliations.<sup>49</sup> Of course, there have been instances where the Supreme Court of Canada has refused to vindicate the claims of religious minorities, but on the whole, it remains undisputed that Canadian courts have adopted a more generous interpretive approach to cultural and religious recognition than the ECtHR and other comparable national and supranational tribunals.<sup>50</sup> This branch of fair inclusion demands more than mere avoidance of majority coercion. It anticipates and facilitates, in the words of philosopher Iris Marion Young, “a heterogeneous public, in which persons stand forth with their differences acknowledged and respected.”<sup>51</sup>

## Fair Inclusion III: Conflicting Rights Claims

Up until now our discussion has explored situations in which litigants raised a constitutional challenge vis-à-vis state officials or semi-public authorities. It is time to move to the most difficult set of cases, those that involve the *competing*

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<sup>49</sup> The claim for fair inclusion is of course not absolute or without limits. Several commentators have suggested that the Supreme Court of Canada is gradually retreating from the generous interpretation of religious freedom expressed in cases such as *Multani* and *Amselem*, and provide as evidence cases such as *Hutterian Brethren (Alberta v. Hutterian Brethren of Wilson Colony [2009] 2 S.C.R. 567 (Can.))*, in which members of a rural and communal religious community sought exemption from a regulatory scheme introduced by the provincial government requiring that each newly issued driver's license bear the photo of the license holder. The sincerity of the claimants' religious belief that having their photos willingly taken was prohibited by the Second Commandment was not in dispute. However, the Supreme Court of Canada, in a majority opinion, ruled that the infringement of this protected religious belief was justified under section 1 of the Charter.

<sup>50</sup> The majority holding in *Hutterian Brethren, Id.*, is typically provided as an example of a more restrictive approach. More recent decisions, however, have endorsed strong protection of religious freedom. See, e.g., *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12. For analysis, see Howard Kislowicz, *Loyola High School v. Attorney General of Quebec: On Non-triviality and the Charter Value of Religious Freedom*, 71 Sp. Cr. L. Rev. 332 (2d) (2015). For comparative discussion of the claims of culture in the context of family law disputes, see Ayelet Shachar, *Demystifying Culture*, 10 ICON 429 (2012).

<sup>51</sup> YOUNG, *supra* note 3, at 119.



*rights of individuals*. Here, the core concern is that facilitating the full force of the right claimed by one side will entail exclusion or breach of a protected right for the other. The recent *N. (S.)* decision serves as an illustration.<sup>52</sup> This case arose in the context of a sexual abuse criminal proceeding, and dealt with the balancing of two fundamental Charter rights that were clashing with one another—namely, the accused’s right to a fair trial and the witness’s right to act in accordance with her religious beliefs and benefit from equal access to the justice system. The complainant, N.S., alleged that she was repeatedly sexually assaulted by the defendants while she was a child. When called as a witness at the preliminary hearing against the accused, N.S. asserted that her religious belief requires her to wear the *niqab*—a veil that covers the face but not the eyes—while testifying in court. The accused disagreed, arguing that the right to a fair trial requires that legal counsel and the trier of fact be able to see the witness’s demeanour during her examination and cross-examination.

The Supreme Court of Canada’s split decision included two opposing positions, delivered by the concurring and dissenting judges, and an intermediate framework adopted by the majority. Writing for the majority, Chief Justice McLachlin reiterated that when faced with conflicts between freedom of religion and other values the Canadian tradition has been to respect the individual’s religious belief and to accommodate it if at all possible.<sup>53</sup> This approach places the competing interests in a balancing formula, rather than categorically prioritizing one set of interests over the others, reflecting the preference for proportionality and minimal impairment that has become deeply entrenched in Canada’s constitutional jurisprudence. In light of this framing of the analysis, the Court held that a total ban on the *niqab* is an intrusion by the state that is inconsistent with the Charter.

The debate about the relevance of section 27 to the analysis is most evident in the concurring opinion by LeBel J., which endorsed stability and continuity in responding to today’s winds of multicultural change (reminiscent, in this sense, of recent European trends), insisting that the “openness of the trial process” requires a *categorical* ban on niqabs in the courtroom. In contrast, the dissenting opinion reached a diametrically opposed conclusion: while “conced[ing] without reservation that seeing more of a witness’ facial expression is better than seeing

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<sup>52</sup> *R. v. N.S.*, [2012] 3 S.C.R. 726 (Can.).

<sup>53</sup> *Id.* para. 54. See also para. 51: rejecting the view that the *niqab*-wearing practice should be banned because it breaches neutrality, the Chief Justice powerfully stated that such an approach is “inconsistent with Canadian jurisprudence, courtroom practice, our tradition of requiring state institutions and actors to accommodate sincerely held religious beliefs insofar as possible.”

less,” Abella J. holds that the assessment of demeanour can nevertheless be achieved even without seeing the bare (or “naked”) face.<sup>54</sup> While the debate among the justices focuses on the technical difficulties of assessing demeanour, the case reveals a far deeper disagreement: it turns the veil into a test case for determining how far the principle of religious freedom will go when it fiercely conflicts with other protected Charter rights, how to conceptualize the balance between stability and change in an increasingly diverse society, and how to navigate the competing interests of religious freedom, the right to a fair trial and access to justice for minorities-within-minorities, here, *niqab*-wearing Muslim women.

This is what makes *N. (S.)* such a hard case. As a minority woman and a sexual assault complainant, N.S.’s religious freedom claim also encapsulates a powerful plea for fair inclusion and equal access to justice for all women, including minority women who profess a non-dominant religious belief or practice. In this way, the judgment also might be seen as relevant to section 28 (although that provision was not discussed in the decision). The value of fairness to the complainant and the broader societal interest of not discouraging *niqab*-wearing women from reporting offenses and participating in the justice system is vital to the analysis; indeed these considerations are now part of the public record, expressed powerfully by the dissenting opinion and echoed in the majority’s reasoning.<sup>55</sup> The Supreme Court of Canada ultimately adopted a case-by-case approach, resisting the idea that users of the justice system must “park their religion at the courtroom door,” just as it rejected the response that says that “a witness can always testify with her face covered.” The *N. (S.)* decision, with its multiplicity of judicial pronouncements, has already attracted considerable attention and may continue to do so in the future, especially as we consider the constitutional challenges directed at the federal government’s *niqab* ban at citizenship ceremonies, which I discuss below, or at Quebec’s controversial “Charter of Values” (had it been adopted as a binding public policy).

Although the law is certainly not the most refined tool for dealing with the dynamism of intersecting and overlapping belongings and the various possible

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<sup>54</sup> The “naked face” imagery is somewhat provocatively evoked in this context, as a rhetorical tool to emphasize the harm that a woman may be exposed to. See, e. g., Pascale Fournier & Erica See, ‘*The Naked Face*’ of *Secular Exclusion: Bill-94 and the Privatization of Belief*, 30 WINDSOR Y.B. ACCESS JUST. 63 (2012).

<sup>55</sup> Access to the courts by sexually assaulted women, an issue central to the dissenting opinion of Abella J., has been identified by the Chief Justice of the Supreme Court as “most pressing.” *Canada’s Top Judge Slams ‘Inaccessible Justice’*, CBN NEWS Aug. 18, 2013, available at <http://www.cbc.ca/news/canada/saskatoon/canada-s-top-judge-slams-inaccessible-justice-1.1306993>.

expressions of “culture” and “identity,” the Court in *N. (S.)* refused to undermine N.S.’s religious freedom and respect for differences claim simply by pointing to the fact that N.S. was willing to expose her face to a female photographer when applying for a driver’s licence (special accommodation in the form of screens was offered to her by the issuing government office).<sup>56</sup> This is an important holding. Had the Court seen this prior engagement with the state as *undermining* the sincerity of her belief, it could have unwittingly discouraged engagement—here, redress in the justice system by minority community sexual assault complainants, a particularly vulnerable constituency—with any institutions of the larger society by legally coding any such engagement as a “compromise” or “sell out” of the community.

This emphasis on sincerity (rather than “strength”) of belief, in this context, also has another advantage. It allows courts in Canada to avoid a value judgment of the face-covering practice. As Abella J. notes in her dissenting opinion, controversies surrounding the *niqab* are prevalent both within and outside the Muslim community. These controversies include questions such as “whether the *niqab* is mandatory for Muslim women or whether it marginalizes the women who wear it; whether it enhances multiculturalism or whether it demeans it.”<sup>57</sup> Justice Abella further states:

These are complex issues about which reasonable people can and do strenuously disagree. But we are not required to try to resolve any of these or related conceptual issues in this case, we are required to try to transcend them in order to answer only one question: Where identity is not an issue, should a witness’ sincerely held religious belief that a *niqab* must be worn in a courtroom, yield to an accused’s ability to see her face.<sup>58</sup>

This lucid analytical approach, with its steadfast resistance of armchair social theory, allows Canadian courts to avoid the trap of *abstractly* stipulating inconsistencies between diversity and equality. Perhaps the most important conceptual lesson to be drawn from *N. (S.)* is that the adoption of a contextual, “*in concreto*” case-by-case approach that remains grounded in the law and facts of each particular dispute, even if it does not offer a perfect solution, is preferable when considered against the tendency towards the *abstract* declaration of irreconcilable value conflicts demonstrated by European courts as we shall explore below.

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<sup>56</sup> The decision thus proceeds on the assumption that sincerity of religious belief has been established. See *N.S.*, *supra* note 52, para. 14.

<sup>57</sup> *Id.* para. 80.

<sup>58</sup> *Id.*

## Context and Membership Matters: A Detour to Strasbourg and Paris

Consider the contrast between the Canadian approach of side-stepping the debate about the symbolic meaning of the veil (and whether it is mandatory for Muslim women at all) and the framework of analysis emerging from Europe's highest human rights court, as reflected in the ECtHR's engagement with respect-for-differences claims brought by women who wish to practice a less extensive form of veiling, namely, donning the *hijab* (a head cover worn by some Muslim women, in which the face remains visible). Much like the decision in *N. (S.)*, the European Court of Human Rights decisions in the *hijab* cases of *Dahlab* and *Sahin* engage in proportionality analysis and balancing of competing interests.<sup>59</sup> But the difference lies in the level of abstraction. Whereas in *N. (S.)* the Supreme Court of Canada endorses a contextual approach, which reserves the ultimate balancing decision to the closest-to-the-ground judicial authority (the presiding judge), in *Dahlab* and *Sahin* the “balancing” that takes place is a balancing of abstract stipulated inconsistencies (secularism and democracy vs. the religious symbolism of the veil; women's equality and tolerance vs. Islamic religious obligation) rather than evidentially demonstrated *in concreto* conflicts of rights with other rights, or of rights with important public interests.”<sup>60</sup>

Similar concerns about the Strasbourg court “sacrifice[ing] concrete individual rights guaranteed by the Convention to abstract principles” were even expressed by the two dissenting judges in the recent *SAS* decision, in which the majority of the ECtHR ultimately upheld the French legal ban that prohibits the wearing of face-veils in public.<sup>61</sup> In that decision, denounced by critics as reinforcing the singling out of Islam as a minority faith, the Court relied on the

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<sup>59</sup> *Dahlab v. Switzerland*, App. No. 42393/98, 2001-V Eur. Ct. H.R. 449 (Feb. 15, 2001), <http://hudoc.echr.coe.int/eng?i=001-22643>; *Leyla Sahin v. Turkey*, App. No. 44774/98 (Nov. 10, 2005), <http://hudoc.echr.coe.int/eng?i=001-70956>. *Dahlab* was a challenge raised by a schoolteacher in Switzerland who was asked to remove her Islamic headcovering (*hijab*) while performing her teaching duties, although there were no complaints from parents of the teacher's pupils. The ECtHR ruled that the interference with the teacher's religious freedom to manifest her religious beliefs (art. 9(2) of the ECHR) was justified and proportionate as a measure to protect the rights of others, namely, the schoolchildren. *Sahin* was a medical student who challenged (and ultimately lost her bid against) Turkey's ban, no longer in effect, which prohibited donning the *hijab* on university campuses.

<sup>60</sup> Nehal Bhuta, *Two Concepts of Religious Freedom in the European Court of Human Rights*, 113 (1) *SOUTH ATLANTIC Q.* 9 (2014).

<sup>61</sup> *SAS v. France*, App. No. 43835/11 para. 2 in the joint dissenting opinion of judges Nussberger and Jadelblom (July 1, 2014), <http://hudoc.echr.coe.int/eng?i=001-145466>.

French government's argument that promoting "living together" (*le 'vivre ensemble'*) is a legitimate ground for restriction of fundamental rights protected by the Convention.<sup>62</sup> To understand this last point, some background regarding the challenged legislation is required. In 2010, France became the first country in the world to *criminalize* the wearing of face veils, such as the *niqab*, *anywhere* in public—with the exception of houses of worship.<sup>63</sup> The draft of the 2010 Law included an explanatory memorandum that stated that "[e]ven though the phenomenon, at present, remains marginal, the wearing of the full veil is the sectarian manifestation of a rejection of the values of the Republic." The law was passed by the National Assembly by an overwhelming majority (335 votes in favor, one vote against, and three abstentions). The Senate also followed suit with 246 votes in favor and one abstention. In drafting the legislation, as part of its fact-finding mission a parliamentary committee had concluded that "the wearing of the full-face veil on national territory" was a recent phenomenon in France, and by the end of 2009, was only practiced by about 1,900 women out of France's 4.7-million-strong Muslim population. This is approximately 0.0004 of the relevant population, or a ratio of less than 1 in 2500. Numbers are not everything in legislation, but in the context of heightened political and legal tensions surrounding an "ostentatious" expression of a minority identity that is increasingly perceived as threatening and "foreign" in Europe, it is hard not to be reminded of William Blackstone's observation that whereas civil injuries are "an infringement ... of the civil rights which belong to individuals ... public wrongs, or crimes ... are a breach and violation of the public rights and duties, due to the whole community."<sup>64</sup> The act of defining an expression of particular, more conservative, variants of the Islamic faith as a public wrong bears not only a punitive function, but also an *expressivist* meaning: the outrage of the majority community against what it perceives as an offensive repudiation of *laïcité* and other foundational values of the republic. From that vantage point, the person who breaches the criminal code's prohibition against face-veiling acts in violation of the whole community and its "common culture." In this way, the criminal code—and the state machinery that enacts and enforces it—expresses moral condemnation of the *actor* not just the prohibited act. The face-veil banning legislation advances a particular vision of the public sphere that sheathes popular anxieties about the majoritarian discomfort of living side by side with veiled Muslim women who are *de jure* included in the polity, but are *de facto*

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<sup>62</sup> For a critical account, see Stopler, *supra* note 12.

<sup>63</sup> In France, the terminology of face veils confusingly conflates *niqab* and *burka*.

<sup>64</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS, WITH AN ANALYSIS OF THE WORK: BOOK IV 28 (1861).

ostracized as the quintessential “Other.” Tremendous political capital is invested in such laws as symbolic manifestations of an idealized “France [which] is never as much itself, faithful to its history, its destiny, its image, than when united around the values of the Republic: liberty, equality, fraternity,” as the 2010 Law explanatory memorandum reads. Although ostensibly advanced as promoting neutrality, openness, and dialogue, these measures may inadvertently become a variant of “indirect persuasion,” even rising to “direct compulsion” reminiscent of the kind that occurred in the past when the state would use public authority to advance the symbols and practices of a majority religion (as we saw earlier in *Big M*), though now such methods are applied to the “new church” of secularism.

From the official French statist perspective, however, prohibiting such expression of religious minority identity, or “sectarianism,” is not a failure of fair inclusion but merely a manifestation of the familiar *laïcité* principle, dating back to 1905, which resists *any* expression of religiosity as a breach of neutrality and secularism; it is also a necessary measure for promoting social cohesion. However, this framework fails to take context into account—in which using the full force of the power of the state to legally prohibit a member of a *minority community* expressing certain aspects of her religious identity holds additional dimensions of marginalization and exclusion. Equality among citizens is affected by defining her “veiled” presence in public spaces as harmful to others. These other dimensions are camouflaged when the statist discourse simply claims to be evenhandedly applying facially-neutral laws, practices and policies – a point that advocates of fair inclusion as non-coercion and accommodation have long emphasized in Canadian debates.<sup>65</sup> To put this last point differently, absent from the official narrative is an account of the *power relations* and *context* in which the encounter between the (“sectarian”) individual and the (“universal”) state occurs. The ECtHR, alas, sided with the latter over the former. It cited the French parliamentary report that described the practice of face-veiling as “at odds with the values of the Republic,” implicitly reinforcing, in direct contrast to Canada’s *Big M*, the power of a dominant majority to impose *its* (in this case, *laïcité*) worldview by means of national, purportedly neutral, legislation that in effect imposes concrete and predictable burdens and restrictions on the protected rights of members belonging to already marginalized religious minority communities. Yet as we have seen earlier in the discussion, in the resounding words of *Big M*: “What may appear good and true to a

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<sup>65</sup> This point has been elaborated by many a political theorist, see, e.g., Kymlicka & Norman, *supra* note 37; in legal terminology, we would refer here to the prohibition against both direct and indirect discrimination.

majoritarian ... group, or to the state acting at their behest, may not ... be imposed upon citizens who take a contrary view.”

As part of its larger debates about membership and collective identity, France has also forged a link between veiling, the return of assimilation, and restriction of access to citizenship and government services, again placing a penalizing burden on veiled women who belong to minority religious communities. Consider the case of *Faiza M.*, from France, in which the *Conseil d'État* upheld a decision to decline citizenship to a *niqab*-wearing Muslim woman who was fluent in French, married to a French citizen, and had three French children, because “she had adopted a radical practice of her religion, incompatible with the values essential to the French *communauté*, notably the principle of equality of the sexes.”<sup>66</sup> This case dealt with an immigrant who was already residing in France as a lawful permanent resident by virtue of her marriage to a French national and sought to take the additional step of gaining full inclusion as an equal in the political community. Her naturalization application was denied, however, because her cultural and religious “differences” made her, in the eyes of the state, “un-assimilable” to French society. These differences were evidenced by her insufficient knowledge of the semi-sacred principle of *laïcité*, as well as by her reclusive and domestic-centered family life, which was seen by the *Conseil* as a sign of both submission to the male figures in her family and evidence of a lack of assimilation.<sup>67</sup>

This is an ironic reversal of the feminist emancipatory slogan the “personal is political”—here providing the excuse for a state to heavy-handedly determine whether a woman ought to qualify as a citizen. This is surely not the first time that administrative agencies and reviewing courts have been caught in the muddy waters of defining what a “legitimate” form of the family unit is for purposes of granting eligibility to government services or benefits, nor will it be the last. However, this decision went a step further: it used the degree of an immigrant woman’s commitment (or lack thereof) to gender equality within the private sphere of her family circle as a foundation for denying her access to the most public of state entitlements: citizenship. As theorists and activists have long recognized, citizenship not only offers the individual a juridical, legal status. It also has the potential to play a significant role in societal struggles for equality, dignity and the fair inclusion of those once excluded, since it bears the moral and

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<sup>66</sup> This legal ruling was based on art. 21-4 of the *Civil Code*, which states that “[b]y a decree in the *Conseil d'État*, the Government may, on grounds of indignity or lack of assimilation other than linguistic, oppose the acquisition of French nationality by the foreign spouse.” See CODE CIVIL [C. civ.] [Civil Code] art. 21-4 (Fr.) (as it applied in 2005).

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



legal force required to make “a claim to be accepted as full members of the society” hold firm.<sup>68</sup> The decision in *Faiza M.*, alas, sends a chilling message to similarly situated women that they are not welcome in contemporary France. The applicant’s lack of familiarity with the basic values and rights of citizenship in her adoptive country may indeed be alarming from the perspective of the state, especially if the objective of the naturalization process is to engender an informed and participatory citizenry. This governmental objective, however, could reasonably have been addressed by less drastic means than the denial of naturalization, such as by allowing—or even requiring—the applicant to enroll in citizenship classes or by counting her agency in challenging the naturalization-denial decision before the court system as evidence of a degree of civic engagement and immersion into French society.

Unlike the denial of citizenship in *Faiza M.*, the Supreme Court in *N. (S.)* had no interest in ascribing meaning to the wearing of the *niqab* or making a judgment regarding whether that meaning accorded with Canadian values. This approach helps avoid the dangerously charged terrain of assumed (rather than proven) tensions and inconsistencies. If gender equality and the empowerment of the immigrant Muslim woman applicant were the end goals of the *Faiza M.* decision, then it is hard to see how denying her request for full inclusion and membership in the state—a legal status cementing a direct and unmediated bond between the individual and the political community that, once bestowed on her, is *independent* of her relationship with her husband—is conducive to that goal. Instead, we can interpret this decision as endorsing the statist interpretation of the veil, and especially its more extensive covering variants, as a symbolic affront to European countries’ self-definition as liberal and “civic.” No one expressed this sentiment better than France’s former urban affairs minister, Fadela Amara, herself a practicing Muslim, who in a press interview endorsing the *Conseil d’État* ruling described *Faiza M.*’s religious attire as “a prison, it’s a straightjacket.”<sup>69</sup> The ultimate force of this characterization is to place substantial—and arguably unfair and disproportional—burden on women’s (covered) heads and bodies.<sup>70</sup> In a society formally committed, since the French Revolution, to *liberté, égalité, and fraternité*, denial of access to citizenship must remain a rare, exceptional, last-resort measure. It would be

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<sup>68</sup> THOMAS H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* 8 (1950).

<sup>69</sup> *French Minister Denounces Burka*, BBC News, Jul. 16, 2008, available at <http://news.bbc.co.uk/2/hi/europe/7509339.stm>.

<sup>70</sup> See, e.g., BENHABIB, *supra* note 3; Leti Volpp, *The Culture of Citizenship*, 8 (2) THEORETICAL INQ. L. 571 (2007); MARTHA C. NUSSBAUM, *THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE* (2012).

more conducive and democratic to first invest heavily in putting women's interests and special needs at the heart of the analysis, for instance by providing them with advice about their legal rights or facilitating the cultural and social know-how to allow them to stand on their own feet in their new country of residence. This is a more promising route than turning them into pawns in renewed battles between state and (minority) religion. By denying an immigrant woman citizenship, the *Conseil d'État* left her in a dependent position vis-à-vis her husband, who already had a secure legal status in the state, and further politicized the debate over the "compatibility" of certain Islamic practices with both women's rights and the *laïcité* predominant in France's vision of republican citizenship.

As Canadian courts have repeatedly stated, even if a given law and regulatory scheme promotes an important social goal, the burden is on the government to explain why a significantly less intrusive and equally effective measure was not chosen and to demonstrate that the chosen measure only minimally impairs the protected rights and interests at stake.<sup>71</sup> This is especially true given the profound significance of citizenship, which has been described as "nothing less than the right to have rights" by the U.S. Supreme Court (echoing the famous words of philosopher Hannah Arendt); any restrictions must be narrowly tailored and operate as a last resort only, for at stake is the vital membership and dignity interest of the individual.<sup>72</sup>

## Troubles in Paradise: When Diversity and Equality Collide

Even in multicultural Canada, tensions have arisen in recent years surrounding questions of membership and belonging. As in other countries, the laws and regulations governing citizenship reveal much about the society that construed them, telling us "who the state considers a full member, how that membership

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<sup>71</sup> See the classic *R. v. Oakes*, *supra* note 26 (establishing the "Oakes test").

<sup>72</sup> *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren C.J., dissenting opinion); HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 177 (1968): "We became aware of the existence of a right to have rights ... and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights ..." See also Ayelet Shachar, *Citizenship*, in *OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 1002 (Andres Sajó & Michel Rosenfeld eds., 2012).

is transmitted inter-generationally, and how it can be lost, gained, and reclaimed.”<sup>73</sup> The history of access to citizenship in Canada still bears the scars of past exclusion on the basis of considerations such as race, gender, national origin, religion and indigenous status.<sup>74</sup> While Canada now rightly takes pride in being an open, multicultural society that welcomes immigrants from the four corners of the world, any restrictions on the basic right to have rights appearing to target a particular group of settled immigrants or newcomers because of a particular characteristic or religious practice deemed “too different” from the perspective of the majority may taint this reputation and confirm a sense of injustice that may be felt by those affected.

In 2011, the Minister of Citizenship and Immigration Canada (“CIC”) released in an operational bulletin (an internal ministerial set of guidelines) providing instruction to CIC staff to help ensure that participants in a citizenship ceremony, the final step of the naturalization process, will not be permitted to take the oath of citizenship while wearing face covering.<sup>75</sup> In explaining the objective of the new rules, the Minister reasoned that: “The oath of citizenship and the citizenship ceremony is a solemn and essentially public time when the individual expresses his or her loyalty to Canada in front of fellow citizens. ... That is why I clarified yesterday that citizenship applicants will now be required to recite the oath in an open and transparent manner and to do so without being obscured by

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<sup>73</sup> Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N. Y. U. L. REV. 11, 20 (2006).

<sup>74</sup> For a concise historical overview of such exclusionary measures, see NINETTE KELLEY & Michael Trebilcock, *The Making of the Mosaic: A History of CANADIAN IMMIGRATION POLICY* 132–63 (1998).

<sup>75</sup> OPERATIONAL BULLETIN 359, Dec. 2011, available at <http://www.cic.gc.ca/english/resources/tools/updates/2015/2015-02-27.asp>. The most recent of these legislative changes to Canada’s citizenship law is found in provisions of: Strengthening Canadian Citizenship Act, S.C. 2014, c. 22 (Can.); *Backgrounder – Strengthening the Value of Canadian Citizenship: Amending the Citizenship Act to Protect the Integrity of Canadian Citizenship*, GOVERNMENT OF CANADA, available at <http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010-06-10.asp> (last visited Jun. 10, 2010) [hereinafter *Backgrounder*]. The government also tabled the *Zero Tolerance for Barbaric Cultural Practices Act* (turning polygamy into an inadmissibility ground), which, given its provocative title, has led commentators to suggest that by using the term “barbaric” the government is “targeting particular [racialized immigrant] communities and the does not see the problem of polygamy and early and forced marriage as a ‘Canadian issue,’” thus “sending a political message with this legislation.” See Kim Mackrael, *Experts Question Use of Bill Banning Immigrants in Polygamous Marriages*, THE GLOBE AND MAIL, NOV. 5, 2014, available at <http://www.theglobeandmail.com/news/politics/conservatives-to-table-bill-on-banning-immigrants-in-polygamous-marriages/article21453356/>. The implied contrast between “enlightened” and “barbaric” that informs this legislation contributes to the construction of a dangerous “us”-“them” dichotomy, as discussed above.

a face covering. This decision underscores the essentially public nature of the oath.”<sup>76</sup> The emphasis in this statement on expressing loyalty in front of fellow citizens—echoed by top government brass stating that taking the oath while veiled is “offensive”<sup>77</sup>—provides a manifestation of the traditional “undifferentiated” (or monocultural) model of membership, according to which citizens, or citizens-in-the-making, must transcend their particular interests, perspectives, and experiences; a demand that “ends up reinforcing the position of the dominant groups in the public domain.”<sup>78</sup> The particular-cloaked-as-universal vision of the idea of “living together” (which we saw earlier emphasized in a more comprehensive fashion in the context of the French face-veil ban and the SAS decision) may all too quickly run amok and lead us to the (misguided) conclusion that, in order achieve fair inclusion and equal footing with other members of the shared political community, *some* members, but not others, will have to relinquish a sincerely held belief, or be asked to denounce certain aspects of a minority identity that they view as constitutive of who they are and how they perceive themselves.<sup>79</sup>

Recent years has nevertheless seen the rise of a concentrated governmental campaign to “reinforce the value of Canadian citizenship,” which has generated a spate of legislative and executive initiatives. Preventing women wearing the face-cover from accessing the citizenship ceremony is part of this more muscular version of “Strengthening Canadian Citizenship” (a revealing title of a recent amendment to

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**76** See Jason Kenney on Citizenship and Immigration, OPENPARLIAMENT.CA, Dec. 13, 2011, available at <https://openparliament.ca/debates/2011/12/13/jason-kenney-1/only/>. In another public statement, Canada’s Citizenship and Immigration Minister made an even stronger claim against face-veiled citizenship-candidates, as “hiding their identity.” See *Speaking Notes for The Honorable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism: On the Value of Canadian Citizenship*, GOVERNMENT OF CANADA, Dec. 12, 2011, available at <http://www.cic.gc.ca/english/department/media/speeches/2011/2011-12-12.asp>.

**77** This sharp terminology was used by Canada’s Prime Minister during a public meeting in Quebec and received significant coverage in the media. It was also later repeated in a Conservative party email signed by Chris Alexander, Minister of Citizenship and Immigration, soliciting signatures by those who “agree with our prime minister.” See, e.g., Morgan Lowrie, *Harper Says Ottawa Will Appeal Ruling Allowing Veil during Citizenship Oath*, THE GLOBE AND MAIL, Feb. 12, 2015, available at <http://www.theglobeandmail.com/news/national/harper-says-ottawa-will-appeal-ruling-allowing-veil-during-citizenship-oath/article22979142/>.

**78** TIM SOUTHPHOMMASANE, THE VIRTUOUS CITIZEN: PATRIOTISM IN A MULTICULTURAL SOCIETY 47 (2012).

**79** Debates surrounding new citizenship requirements have proliferated on both sides of the Atlantic. See, e.g., Gregory Baldi & Sara Wallace Goodman, *Migrants into Members: Social Rights, Civic Requirements, and Citizenship in Western Europe*, 38 WEST EUR. POLIT. 1152 (2015). The debate in Israel over the loyalty oath has emphasized the disproportionate burden that such an oath would impose on Israel’s non-Jewish citizens.

the *Citizenship Act*).<sup>80</sup> The more aggressive emphasis on expressing and demonstrating “loyalty” by erasing certain markers of religious or other identity-based minority affiliation is, alas, foreign to the letter and spirit of the concept of fair inclusion as developed through the jurisprudence. As the majority enunciated in *N. (S.)* when considering whether a witness may wear the *niqab* in court, “to remove religion from the courtroom is *not* the Canadian tradition. Canadians have, since the country’s inception, taken oaths based on holy books—be they the Bible, the Koran, or some other sacred text.”<sup>81</sup> The same considerations should, by analogy and with equal force, be applied in the context of taking the oath in a citizenship ceremony, where religious and cultural identities are to be celebrated according to Canada’s multicultural tradition rather than forcibly removed from the public sphere.<sup>82</sup> The face-veiling ban in citizenship ceremonies also stands in tension with the official version of multiculturalism that Citizenship and Immigration Canada itself publically endorses:

In 1971, Canada was the first country in the world to adopt multiculturalism as an official policy. By so doing, Canada affirmed the value and dignity of all Canadian citizens regardless of their racial or ethnic origins, their language, or their religious affiliation. ... Multiculturalism ensures that all [Canadians] can keep their identities, can take pride in their ancestry and have a sense of belonging. Acceptance gives Canadians a feeling of security and self-confidence, making them more open to, and accepting of, diverse cultures. ... Multiculturalism has led to higher rates of naturalization than ever before. With no pressure to assimilate and give up their culture, immigrants freely choose their new citizenship because they want to be Canadians.<sup>83</sup>

Inspiring words. The motivating idea here is to treat newcomers as citizens-in-waiting, not as presumed “outsiders.”<sup>84</sup> The Canadian Bar Association, which,

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**80** The most recent of these legislative changes to Canada’s citizenship law is found in provisions of the Strengthening Canadian Citizenship Act, *supra* note 75; *Backgrounder*, *supra* note 75; Mackrael, *supra* note 75.

**81** *N.S.*, *supra* note 52, para. 53 [emphasis added].

**82** Canada’s Citizenship Regulations, SOR/93-246 requires in s. 17(1)(b) that citizenship judges “administer the oath of citizenship with dignity and solemnity, allowing the greatest possible freedom in the religious solemnization or the solemn affirmation thereof.”

**83** *Canadian Multiculturalism: An Inclusive Citizenship*, *supra* note 17.

**84** This variant of conceptualizing immigration as transition is at the core of the influential discussion by HIROSHI MOTOMURA in his book: *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006). In Canada, the introduction of multiculturalism has coincided with and supplemented other legal and institutional efforts by different levels of government to encourage immigrant integration and naturalization, resulting in higher levels of citizenship acquisition than those recorded in other immigrant-receiving societies, including the United States. For a comparative, institutional analysis, see IRENE BLOMERAAD, *BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA* (2006).

like many other civil society organizations across Canada, has volunteered to conduct citizenship ceremonies captures the special environment of these ceremonies, stating that “for many individuals and families, the citizenship ceremony is the realization of a dream. It is a formalized rite of passage that marks your entry into the Canadian family.”<sup>85</sup>

Recent legislative changes have made this rite of passage more difficult to secure, however. The government has introduced stricter residency requirements, and as of 2015, freshly-minted naturalized citizens must demonstrate an “intention to reside” in Canada – echoing the air of suspicion we met earlier in our discussion of the restrictive turn in Europe.<sup>86</sup> It is within this context that the face-veiling ban in citizenship ceremonies, accentuated by the accompanying public declarations by government officials, can be seen as part of a subtle yet persistent attempt to distinguish between inclusion for the majority of “loyal immigrants” who willingly and “successfully demonstrate that they have internalized prevailing ‘values’ ... [and exclusion for those immigrants who are] judged to have rejected liberal-democratic norms, through their deeds and/or speech.”<sup>87</sup> As a policy instrument, the government’s operational bulletin is not directly subject to constitutional challenge, but an individual is free to challenge the government’s new rules if she is denied citizenship solely on the basis of refusal to remove the niqab while taking the oath, or if she makes a request for an exemption or accommodation and that request is denied. Both scenarios involve state action, and are thus open to a constitutional challenge. Unlike the conflicting rights of *individuals* at issue in *N. S.*, here we are dealing with *state action*. In the past, before the operational bulletin took effect, the oath, typically recited publicly as part of the citizenship ceremony, was in such

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<sup>85</sup> Canadian Bar Association, *Citizenship Ceremonies*, <http://www.cba.org/lawweek/events/main/citizenship.aspx>.

<sup>86</sup> On the restrictive turn, see BRUBAKER, *supra* note 11; Joppke, *supra* note 14; Orgad, *supra* note 14. In Canada, the transition from immigrant-to-citizen now incorporates tougher naturalization requirements, ranging from fulfilling a longer physical residency period prior to gaining eligibility to naturalize, to demonstrating an “intent to reside in Canada,” to expanding the grounds on which dual citizenship can be revoked. See Strengthening Canadian Citizenship Act, *supra* note 74. For a thorough legal analysis of these new provisions, see *Bill C-24, Strengthening Canadian Citizenship Act*, NATIONAL IMMIGRATION LAW SECTION, CANADIAN BAR ASSOCIATION 2004).

<sup>87</sup> See Triadafilos Triadafilopoulos, *Illiberal Means to Liberal Ends? Understanding Recent Immigrant Integration Policies in Europe*, 37 (6) J. ETHN. MIGR. STUD. 861, 862 (2011). As Jason Kenney, former Minister of Citizenship and Immigration, put it: “Canadian citizenship is predicated on loyalty to this country.” See Stewart Bell, *Jason Kenney Suggests New Legislation is Need to Strip Citizenship of Dual Nationals Involved in Terrorism*, NATIONAL POST, Feb. 6, 2013, available at <http://news.nationalpost.com/news/canada/jason-kenney-suggests-new-legislation-needed-to-strip-citizenship-of-dual-nationals-involved-in-terrorism>.

circumstances recited in private in front of a female citizenship judge. No longer so, argued the government. A constitutional challenge soon followed on the basis of breach of the constitutional protection of religious freedom and gender equality, the twin concerns at the heart of our inquiry. It was brought by a *niqab*-wearing immigrant, Zunera Ishaq, who successfully passed all the prerequisite requirements to naturalization, including the citizenship test. She requested to take the citizenship oath with her face covered during the citizenship ceremony, a request that was denied by the government.<sup>88</sup>

The Federal Court heard from the claimant that she perceived the “governmental policy regarding veils at citizenship oath ceremonies [a]s a personal attack on me, my identity as a Muslim woman and my religious beliefs.”<sup>89</sup> The presiding judge accepted her claim and struck down the ban: “To the extent that the policy interferes with a citizenship judge’s duty to allow candidates for citizenship the greatest possible freedom in the religious solemnization or the solemn affirmation of the oath,” wrote the federal court, “it is unlawful.”<sup>90</sup> Although the case was determined on administrative rather than constitutional grounds, the decision also took account of the gendered and exclusionary message such a ban carries with it: “The policy in this case could be dissuading women who wear a *niqab* from even applying for citizenship. In such circumstances, a direct challenge to the policy is appropriate,” read the decision.<sup>91</sup> This last point is important. It offered a rejection by the court of the government’s argument that the applicant did not have to pursue Canadian citizenship; she could simply remain a permanent resident (or what scholars have termed a “denizen” who lacks political rights), ignoring the *inequality* that such a solution perpetuates when compared to gaining full membership – and its accompanying rights and protections – including political rights to participate in the democratic act of authoring the laws that collectively govern our public life.<sup>92</sup>

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<sup>88</sup> Much like *N.S.*, the claimant in this case had no issue with removing her *niqab* in a private and accommodating setting if required for security or identification purposes.

<sup>89</sup> Douglas Quan, *Woman Asks to be Sworn as Citizen as soon as Possible after Overturn of Policy Requiring her to Remove Niqab*, NATIONAL POST, Feb. 11, 2015, available at <http://news.nationalpost.com/news/canada/niqab-ruling> (citing the claimant, Zunera Ishaq, a 29-year-old Toronto resident who immigrated to Canada from Pakistan). The issue of expression of individual choice and “identity” has gained tremendous impact not only in scholarly circles, but also in recent judicial opinions. See, e.g., *Obergefell v. Hodges*, 576 U.S. \_ (2015).

<sup>90</sup> *Ishaq v. Canada* (Citizenship and Immigration), 2015 FC 156, para. 68 (Can.).

<sup>91</sup> *Id.* para. 42.

<sup>92</sup> On the concept of denizen, see THOMAS HAMMAR, *DEMOCRACY AND THE NATION STATE: ALIENS, DENIZENS AND CITIZENS IN A WORLD OF INTERNATIONAL MIGRATION* (1990).



The Federal Court's decision was quickly appealed by the government, and none other than the Prime Minister, himself, publically commented on it during a visit to Quebec, stating that he believes the practice of veiling at the citizenship ceremonies is "not acceptable." Further inflaming the rhetoric, the Prime Minister objected to the idea of newcomers "hid[ing] their identity at the very moment where they are committing to join the Canadian family."<sup>93</sup> At this stage, in the midst of an election year, the citizenship-oath *niqab* saga gained attention well beyond the courtroom, receiving ample domestic and international media coverage.<sup>94</sup> In a much-anticipated decision, the Federal Court of Appeal, like the Federal Court before it, ruled against the new policy on procedural grounds; the decision did not engage the substantive Charter rights at issue.<sup>95</sup> As in the response to the previous court ruling, various government officials continued to tout the value of the new (and by then, struck down) policy. The minister responsible for citizenship and immigration, for example, expressed the view that: "New citizens should recite the oath proudly, loudly and for everyone to see and hear." He also implied that the policy might be extended to hijabs.<sup>96</sup> The Prime Minister was quoted as saying: "[W]hen someone joins the Canadian family, there are times in our open, tolerant, pluralistic society that as part of our interactions with each other we reveal our identity through revealing our face."<sup>97</sup>

This articulation of the rationale for the ban represents the majority as generous and inclusive (hence the rhetorical power of the analogy between joining a family and one's new home/society), while implicitly placing the "blame" for eroding such openness on those who are not willing to reveal their identity and their face at the constitutive moment of *becoming* Canadian. This framing of the issue helps explain why analysts dubbed it a "wedge issue"; opinion polls showed ample popular support for the ban, while its detractors

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<sup>93</sup> Conservative Party of Canada – *Not the Way We Do Things Here*, THIS WEEK IN TOMORROW, Oct. 7, 2015, available at <http://www.thisweekintomorrow.com/not-the-way-we-do-things-here-vol-2-no-49-3/>.

<sup>94</sup> Douglas Quan, 'It's Classic Wedge Politics': Tories Continue to Tout Niqab Ban as Battle Heats Up in Court of Appeals, THE NATIONAL POST, Jul. 14, 2015, available at <http://news.nationalpost.com/news/canada/its-classic-wedge-politics-tories-continue-to-tout-niqab-ban-as-battle-heats-up-in-court-of-appeals>; John Barber, *Veil debate becomes big issue in Canada election, putting Conservatives into lead*, THE GUARDIAN, Oct. 1, 2015, available at <http://www.theguardian.com/world/2015/oct/01/zunera-ishaq-veil-canada-election-conservatives>.

<sup>95</sup> *Ishaq v Canada* (Minister of Citizenship and Immigration), 2015 FCA 194 (Federal Court of Appeal).

<sup>96</sup> Quan, *supra* note 94.

<sup>97</sup> Les Whittington, *Ottawa Wants Postponement of Ruling that Quashes Niqab Ban*, THE TORONTO STAR, Sept. 18, 2015, available at <http://www.thestar.com/news/canada/2015/09/18/ottawa-determined-to-continue-niqab-ban-at-citizenship-ceremonies.html>.

emphasized that “Canada defends the rights of minorities, we respect people’s rights.” Another interesting twist in this story was the fact that the government sought an expeditious stay to the Federal Court of Appeal ruling, a legal move that would have had the immediate effect of barring Ishaq, the woman who challenged the face-covering ban, from obtaining citizenship and the franchise.

We have earlier seen the deprecation of women’s ability to access the direct and reciprocal relationship of citizenship in the context of France’s *Faiza M*, a move that is particularly punishing for female members of minority communities who have historically been denied such access.<sup>98</sup> This belittles their agency and makes them pawns in renewed state-religion struggle for power and recognition. Whatever the merits of such realignments, the price of exclusion is unfairly borne by those already marginalized and stigmatized. Another challenge to watch for in the coming years stems from the relationship between veiling and denial of access to public services, as conceptualized, for example, in the controversial (and ultimately-failed) attempt to introduce the Charter of Quebec Values, which would have prohibited the wearing of “conspicuous religious symbols” (including turbans, *kippas*, *hijabs*, and large crosses) by civil servants while on the job, and would have also made the giving and receiving of state services conditional on the showing of an “uncovered face.”<sup>99</sup> The Quebec Minister of Democratic Institutions

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**98** Juan de villa, *Veils, Oaths, and Canadian Citizenship: Ishaq v. Canada*, THE COURT, Mar. 2, 2015, available at <http://www.thecourt.ca/2015/03/02/veils-oaths-and-canadian-citizenship-ishaq-v-canada/>.

**99** The proposed Charter of Values ignited a public debate in Quebec and throughout Canada about the demands of neutrality in a diverse society such as Quebec, which officially defines itself as adhering to interculturalism rather than multiculturalism. For an illuminating exposition and critique, see Luc B. Trembley, *The Bouchard-Taylor Report on Cultural and Religious Accommodation: Multiculturalism by Any Other Name?* (EUI Working Papers Law No.2009/18, 2009). Even those holding the position that a distinction can be drawn between the provision and the reception of public services, according to which as representative of the state, civil servants must adhere to a stricter standard of uniformity – even at the expense of suppressing expression of their religious “particularism” while on the job (a position that would arguably counter previous case law and practice in Canada), would be hard pressed to find a justification for a ban that prohibits certain classes of persons, such as face-veiled Muslim women, from receiving basic public services merely on account of a sincere religious belief. Such a ban would seem to breach the constitutional protection of both religious freedom and gender equality, in contradiction with s. 2(a), 15, 27 and 28 of the Charter, and also stands in tension with human rights codes and anti-discrimination provisions that place a duty of reasonable accommodation in the provision of public goods and services on public authorities. The duty to accommodate in Canadian antidiscrimination law is ‘the duty of the author of a provision, practice, or policy, which de facto penalizes an individual on the basis of a prohibited ground of discrimination, to take into account as far as possible the specific needs of that individual and to protect him or her from the discriminatory effects of such provision, practice, or policy.’”

and Active Citizenship at the time, Bernard Drainville, reasoned that “[p]eople have to be identifiable, mainly for security reasons,” holding that an exemption or accommodation to the face-covering ban must be denied if “reasons of security, communication or identification warrant it.”<sup>100</sup>

The Charter of Values proposed by Parti Québécois government bitterly divided Quebecers, and never came into law. But the underlying tensions it tracked concerning the relations between state and (minority) religion have anything but disappeared. The current liberal government in Quebec is also preparing a new piece of “value legislation” that will be tamer than the inflammatory Charter of Values, but nevertheless reinstates some of its core provisions, including provisions that proscribe face covering while dispensing or receiving government-funded services at public schools, hospitals, courts, licensing bureaus, and other institutions that represent the “official visage” of state authority.<sup>101</sup> If the face-covering ban becomes binding law, the courts will have to confront squarely the question of the constitutionality of impeding a *niqab*-wearing woman from receiving basic governmental services while also maintaining her sincere religious belief.<sup>102</sup> Here again we see how the idea of “living together” can be distanced and distorted from an inclusionary meaning to an exclusionary fiat, riding on, or actively engendering, suspicion if not prejudice against those who are perceived, in the eyes of growing segments of the population, as the quintessential “Others.”

## Educational Interludes

It is time to take stock. I have identified three different kinds of fair inclusion, reflecting the distinctively Canadian multiculturalism experiment. Our journey has revealed that the “multi” is premised on eradicating, or at least curtailing, the visible and explicit privileges once held by the majority, under color of law, as part of a broader policy shift that took place more than half a century ago that opened Canada to a world through more aggressive recruitment of immigrants,

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**100** Bill n°94, *supra* note 93, art. 6. This emphasis on security and identity resembles the structure of argument adopted by Alberta and approved by the majority of the Court in *Hutterian Brethren*, *supra* note 26.

**101** Such a scenario may pit Quebec-against-the-rest-of-Canada, a dangerously loaded dynamics that many in Canada would prefer to avoid,

**102** Part of the concern here is the symmetry between giving and getting services; while the state may have a legitimate interest in regulating the former, it arguably exceeds its authority and unduly restricts an individual’s basic freedom when restricting the latter without specific cause.

most of them highly-skilled and well-educated, from literally every corner of the world. It is also part of a broader political culture that counsels “negotiation, compromise and a willingness to accommodate groups whose religious beliefs and cultural practices may diverge from those of the majority.”<sup>103</sup> Less often recognized, however, are the ground rules that fair inclusion policies, in their three variants, place on social actors. In opening up opportunities for newcomers and established minority communities, nontrivial expectations and ground-rules are placed on those participating in the “Canadian multiculturalism experiment.”

Two recent examples from the realm of higher education can help explain this last point. In 2014, a male student who self-identified as holding “firm religious views” (without declaring of which religion) and was enrolled in a bachelor degree program at a major public university in Toronto, sought exemption from an on-campus component of an online course offered by the university, claiming that his religious beliefs forbid him from meeting or intermingling in public with women. While Canadian public universities, especially those located in large urban centers, proactively create fair inclusion practices designed to respect and accommodate the religious observances of the many faith communities on campus through measures ranging from providing alternative exam dates for students affected by a conflict to ensuring campus dining halls feature kosher and halal dishes, as well as vegan and vegetarian options to meet the needs of an increasingly multicultural student population, the male student’s refusal to interact with female students on account of their gender sparked a public furor.<sup>104</sup>

The instructor of the course denied the request, on grounds that it would set a “dangerous precedent, labelling women as second-class citizens,” but the university’s administration overturned the instructor’s decision.<sup>105</sup> Following a

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**103** Triadafilopoulos, *supra* note 85, at 863.

**104** On the religious accommodation of students at the University of Toronto, for example, see *Religious Accommodations*, UNIVERSITY OF TORONTO, available at <https://www.studentlife.utoronto.ca/mf/accommodation> (last visited Nov. 29, 2015).

**105** It is not fully clear why the administration overturned the instructor’s decision. Some media reports indicate that the university’s administration was not convinced that allowing the male student to opt out of the focus group would affect the “experience of other students in the class [the majority of which were female]” if they “were not made aware of the accommodation.” See Tristin Hopper, *York University Professor who Refused Student’s Request to be Separated from Female Classmates Broke ‘Obligation to Accommodate’: Officials*, NATIONAL POST, Jan. 8, 2014, available at <http://news.nationalpost.com/news/canada/york-university-professor-who-refused-students-request-to-be-separated-from-female-classmates-broke-obligation-to-accommodate-officials>. Other reports suggest that an analogy was drawn to granting an exemption from an on-campus activity for students enrolled abroad in online cases, a rationale that seems to sidestep the principled issue at stake. See Elaine Smith, *Canada Grapples with*

sharp 12-page response by the professor to the university's ruling (which was not made public due to privacy reasons), the story went viral. The student eventually rescinded his request and the matter never reached the stage of a judicial pronouncement. In the court of public opinion, however, it was the instructor, rather than the student and the university administration that gained the strongest support. The position that female students must be treated with dignity and respect, just like their male colleagues, resonated with many Canadians as the only way to ensure we can live together and interact with members of different communities in a society committed to diversity-in-unity.

The devout student's demand to be exempted from attending a section of the course that would have required him to interact with female students because of his religious belief was not perceived as insincere or as falling outside the realm of a protected religious freedom claim. Rather, it was opposed on grounds of balancing competing rights: accepting without reservation the religious freedom claim to refuse to interact with certain segments of the student population on account of their gender that would have come at the expense of directly restricting the equality rights of others. This reveals an underlying assumption of reciprocity in the acceptance of "differences" – whether they are based on religion, gender, race, sexuality, and the like – that is built into the Canadian premise of "living together." You will not judge me (or grant me or deprive me opportunities) and I will not judge you (or grant you or deprive you opportunities) on prohibited grounds. Put differently, what was objected to was the breach of the commitment to mutuality inherent in the "multi."

Another recent legal controversy, pitting religious diversity v. equality for sexual minorities, emerged when an evangelical Christian university, Trinity Western University (TWU), applied to receive accreditation to establish a faith-based law school in which admitted applicants would be obliged to sign a community covenant agreement which specifically contemplates that gay, lesbian, or bisexual students may be subject to disciplinary measures, including expulsion. As required by law, Trinity Western filed an application for approval of its proposed law school from the relevant provincial authorities in British Columbia, where the school was to be built. It also submitted a request for accreditation from the Federation of Law Societies in Canada, a national coordinating body of the legal profession which is self-governing in Canada.<sup>106</sup> Initially, the respective regulatory bodies determined that the proposed law

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*Adapting to Minority Needs*, N. Y. TIMES, Mar. 2, 2014, available at [http://www.nytimes.com/2014/03/03/world/americas/canada-grapples-with-adapting-to-minority-needs.html?\\_r=1](http://www.nytimes.com/2014/03/03/world/americas/canada-grapples-with-adapting-to-minority-needs.html?_r=1).

**106** Each lawyer in Canada must be called to a law society, and once admitted, has to comply with its rules.

school met national standards and granted preliminary approval for its accreditation.<sup>107</sup> At this stage, however, lawyers from different parts of Canada galvanized their opposition to such accreditation and several provincial law societies passed resolutions declaring that the TWU was not an approved law school, or withholding their approval until Trinity Western would amend its community covenant or exempt law students from the mandatory requirement of signing it.<sup>108</sup> In effect, such resolutions mean that graduates of the new law school would not be able to practice law in these provinces. With litigation pending, the British Columbia Ministry of Advanced Education which originally approved the law school's request, switched its position and revoked the approval.<sup>109</sup> Several law suits ensued, and are still ongoing. A court in Ontario recently held that in balancing the competing interests, the decision of the law society in Ontario not to accredit the law school interferes with the university's protected religious freedom under the Charter. But this determination is not the end of the story. It is only the beginning of the balancing exercise. "On the one hand, there the right of the applicants [TWU] to freedom of religion including their right to operate a law school designed for person who share a common religious belief." On the other hand, continues the court "are the equality rights of persons who might wish to attend TWU's law school in order to pursue their legal education but who, at the same time, wish to be true to themselves and their own beliefs."<sup>110</sup> At this stage of the analysis, the court ruled that the law society was entitled to balance against TWU's religious freedom the impact on equality rights that accrediting the faith-based law school would have had on historically disadvantaged minorities:

While much attention in this case was directed at the discriminatory effect of TWU's Community Covenant on LGBTQ persons, the reality is that the discrimination inherent in the Community Covenant extends not only to those persons, but also to women

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**107** *Special Advisory Committee on Trinity Western's Proposed School of Law: Final Report*, FEDERATION OF LAW SOCIETIES OF CANADA, art. 5 (Dec. 2013), available at <http://www.lawsociety.nf.ca/wp-content/uploads/2014/05/Special-Advisory-Committee-on-Trinity-Westerns-Proposed-School-of-Law-Final-Report.pdf>. See also, *Statement on Trinity Western University's Proposed Law Degree*, BRITISH COLUMBIA: MINISTRY OF ADVANCED EDUCATION (Dec. 18, 2013), available at <https://news.gov.bc.ca/stories/statement-on-trinity-western-universitys-proposed-law-degree>.

**108** Such resolutions were passed in Ontario (the largest law society in Canada), British Columbia, and Nova Scotia.

**109** *Statement on Trinity Western University's School of Law*, BRITISH COLUMBIA: MINISTRY OF ADVANCED EDUCATION (Dec. 11, 2014), available at <http://www.newsroom.gov.bc.ca/2014/12/state-ment-on-trinity-western-universitys-school-of-law.html>.

**110** *Trinity Western University v. Law Society of Upper Canada* [2015] O.J. No 3492, paras. 102, 104.

generally; to those persons of any gender who might prefer, for their own purposes, to live in a common law relationship rather than engage in the institution of marriage; and to those persons who have other religious beliefs.<sup>111</sup>

True to Canada's "*in concreto*" approach, the court acknowledges that "Evangelical Christians are a [non-dominant] religious subculture" in Canada and that TWU was "created to support the collective practice of evangelical Christianity."<sup>112</sup> At the same time, the court also recognizes that TWU's community covenant discriminates against "two historically disadvantaged minorities (LGBTQ persons and women)."<sup>113</sup> In balancing the faith-based law school's protected rights to freedom of religion with the equality rights of members of historically disadvantaged minorities, the former cannot supersede the latter. Any other solution, held the court, would entangle the accrediting law society in "condoning discrimination [which] can be ever much as harmful as the act of discrimination itself."<sup>114</sup> In those infrequent cases where diversity and equality diametrically and concretely clash, then, and where no legal considerations can mitigate the conflict, the Canadian approach concludes that it is unjust for one person's claim for fair inclusion to trump another's right to it. To put this point more schematically, it is unjust to accept X's claim for fair inclusion, if it leads to Y's unfair exclusion.<sup>115</sup>

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**111** *Id.* para. 104.

**112** *Id.* paras. 10, 83.

**113** *Id.* paras. 10, 116.

**114** *Id.* para. 116.

**115** This is a general formula: In order to put it into operation as a legal guideline, we will need to know much about the specific claim, the context in which it was raised, the power relations between X and Y, and so on. Here, the Canadian Supreme Court's contextual approach could prove highly valuable. It may also prove instructive in the context of "constitutional borrowing" by other countries facing related concerns. Take Israel, with its recent controversies surrounding the segregation, even exclusion of women ("hadarat nashim"), from certain public spaces in the name of respecting religious piety. Perhaps the most famous example is the demand to create special public bus lines where men and women are segregated along gender lines: men sitting in the front of the bus, women in the rear. The few Rosa-Parks-like women who dared oppose these arrangements were subjected to threats, verbal violence, and removal from these buses, which operated on public transit routes and by state-subsidized companies. These special bus lines, known as *me'hadrin* (religiously scrupulous) lines operated for almost a decade until the Supreme Court of Israel finally ruled that such arrangements were blatantly illegal and in breach of the constitutionally protected rights to equality, freedom of conscience, and freedom of religion. Another, yet unresolved, source of tension between diversity and equality in Israel stems from the recent recruitment of Orthodox male soldiers into combat units in the Israeli military; this is partly due to pressure for fair inclusion of the once self-segregated Orthodox communities into the mainstream institutions of society, in order to create a more equitable share of the rights and responsibilities of living together in a shared society



TWU appealed. Although this legal dispute is far from concluded (there are other pending cases in other parts of Canada), it is striking to note how jealously the legal profession—across its various actors—guarded the legal system's unique role in the state as a “higher law” guiding (however imperfectly) our collective life and whose ordained “priests” must be carefully selected and regulated. Pushing this image further, we can think about the language of neutrality and balancing that we have encountered throughout our journey through Canada's multicultural experience as the new “religion” (although it

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(Hebrew: “shivyon ba'netel”). Although the general ethos and structure of the military everywhere is that of uniformity and hierarchical chains of command—once leading the United States Supreme Court to controversially hold that an Orthodox Jewish serviceman's religious freedom to wear his *kippa* must yield to the competing interest of upholding a uniform military dress code—Orthodox soldiers in Israel may legitimately expect, as part of their fair inclusion into this statist institution, a broad range of diversity-based exemptions and accommodations, but what are the limits when such exemptions and accommodations threaten to curtail the equality rights of women and sexual minorities? For comprehensive discussion of these questions, see Karin Carmit Yefet, *Synagogue and State in the Israeli Military: 'Inappropriate Integration,'* 10 L. ETHICS HUM. RTS. (2016) in this journal. I have elsewhere argued against either/or resolutions of such disputes. See, e.g., SHACHAR, *supra* note 3. The dilemmas faced by Israel in this project echo Canada's attempt to make university campuses more welcoming by catering to the rich and diverse traditions of those entering their august gates and the hypothetical legal rights balancing exemplified by the Canadian student who, by seeking a religious exemption, impinged on the dignity of his female classmates. However, if the Canadian experiment is to serve as a legal barometer, it can teach us that as a matter of principle, the *outer* limit of respect for diversity in the spaces we share as political equals is reached when it requires denying access to or excluding from full participation and equal treatment to other, once-vulnerable groups, such as female soldiers, who in Israel have long been subject to mandatory conscription but have only recently gained the right to full inclusion in the military “in any role,” including combat service. As stated above, the fair inclusion of X cannot justify the unfair exclusion of Y. In the clash between diversity and equality, Orthodox soldiers enlisted to the military—a *public* institution that, lest we forget, is constituted by state law on behalf of the defense of the collective—are now demanding they not be instructed by female commanders, not be treated by female medics, not be trained by female coaches, to mention but a few key examples, in effect seeking to impose a hierarchy of rights whereby diversity trumps equality. If the Canadian approach were to be followed here, such a categorical approach would have to be rejected, since it stands in direct contravention of the combined interpretive mandate of s. 27 and s. 28. Instead, the attempt would be to provide as much accommodation as possible (for example, upholding an official uniform dress code for instructors in the military, whether male or female, as a way to respect religious or cultural diversity in such shared spaces) but adamantly rejecting a call to discriminate against, or worse, exclude, women or members of any other prescribed group from an activity or service provision simply on account of their ascribed gender, sexual orientation, race, ethnicity and so on. Fair inclusion is not bottomless pit. It is a commitment to changing and challenging majority privilege, not a tool to create in its stead the “tyranny of the minority.”

clearly differs from the absolutist “secular religion” that we have seen in France) that provides a law- and human-centered alternative to the once-sacred sources of authority that provided guidelines for public life.<sup>116</sup>

## Conclusion

In this article, I have identified three different variants of the fair-inclusion branch of response to the imminent challenge of living together as equals in our increasingly diverse societies. The focus has been on how courts, legislatures, and other legal actors now find themselves grappling with how to give meaning to the constitutional commitment of preserving and enhancing the multicultural heritage of Canadians, while at the same time fulfilling the obligation to treat every member of society as an equal worthy of full dignity and respect. As we have seen, there are no predefined or easy formulas for how to best fulfill the requirements of diversity and equality. Although the judiciary in Canada adamantly averted direct compulsion or coercion, safeguarding religious minorities from the “tyranny of the majority,” we have seen that in several European countries the power of the state and lawgiving has been used to reinforce what scholars have called the “retreat of multiculturalism” and the “return of assimilation.”<sup>117</sup> We have also seen that this process implicitly codifies a dangerous “us” versus “them” *mentalité*. Nor has this trend fully escaped Canada, as the recent citizenship oath saga demonstrates.

In Canada, as elsewhere, there is a real risk that with greater polarization on a political level, populist vote seeking behavior may create further incentives to scapegoat those deemed “too different” who offend the sensitivities of the majority and to exclude them from full and equal membership. Such attitudes and policies run counter to the commitment to the “multi” that is explicit in multiculturalism but also embedded in the rich traditions of pluralism and liberalism; yet the pressures and tensions now felt everywhere are real and pressing.

In the public spaces we share, in the workplace, the marketplace, the school or the university, the old rules must give way to new ones. These are yet to be fully written. Even with an explicit commitment to advancing *both* diversity *and*

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<sup>116</sup> This idea has been developed in the context of legal, historical and political analysis of modern constitutionalism. For influential contributions, see e.g., MONTESQUIEU: SPIRIT OF THE LAWS (Anne M. Choler et al. eds. & trans., 1989); SANFORD LEVINSON, CONSTITUTIONAL FAITH (2011); HIRSCHL, *supra* note 10.

<sup>117</sup> See Brubaker, *supra* note 14; Joppke, *supra* note 14; Orgad, *supra* note 14.

equality, as encoded in the Canadian Charter of Rights and Freedoms, this grand task remains an ongoing work-in-progress. Despite these challenges, at its best, Canada's unique multiculturalism in its three variations of fair inclusion can foster an inclusive environment that allows minorities to express, in the words of Will Kymlicka, their "cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society."<sup>118</sup> In doing so, the Canadian model can illuminate and unravel the dilemmas and challenges now faced by literally every society throughout the globe. Contrary to the claims advanced by its detectors, multiculturalism, at least in the Canadian version of fair inclusion, is not about creating hermetic "silos" or "parallel" islands of jurisdiction. Tremendous social and political capital is invested in creating possibilities for dialogue, negotiation, and "balancing." This is no panacea or even an easy model to follow. It offers, however, a more inclusive framework for addressing the challenge of "living together" than the formulas currently offered by other comparable constitutional orders. In setting – and constantly stretching – the legal boundaries of exemption and accommodation, as we have seen, the relations among rights are not hierarchical but they are mutually limiting.

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118 KYMLICKA, *supra* note 3, at 31.