LEGAL SECULARISM IN FRANCE AND FREEDOM OF RELIGION IN THE UNITED STATES: A COMPARISON AND IRAQ AS A CAUTIONARY TALE

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> [There] is [a] model of the relationship between church and state—a model spread across Europe by the armies of Napoleon, and reflected in the Constitution of France, which begins 'France is [a] . . . secular republic. Religion is to be strictly excluded from the public forum. This is not, and never was, the model adopted by America.
>
> —Justice Scalia, dissenting in *McCreary County v. ACLU of Kentucky*[1]

I. INTRODUCTION

Some observers believe that our post-9/11 world is at a historical moment defined by a clash of civilizations—between those societies that are dominated by traditional, religious values and those that are considered to be more modern and secular.[2] Furthermore, given the United States' intervention in Iraq and the current debate over what form of government will ultimately emerge when the Iraqis attain full sovereignty, the role religion should or will play in their society and government[3]

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1. McCreary County v. ACLU of Kentucky, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) (striking down the Ten Commandments monument because government purpose was to advance religion) (citations omitted).

2. *See generally* Samuel P. Huntington, *The Coming Clash of Civilizations Or, The West Against the Rest*, N.Y. TIMES, June 6, 1993, at E19 (explaining a proposed change in the global alignment); Serge Schmemann, *Books of the Times: Analyzing the Cultural Collision That Gave Rise to Sept. 11*, N.Y. TIMES, Jan. 25, 2002, at E47 (explaining that the phrase "clash of civilizations" was coined in the 1990's by Bernard Lewis and gained widespread attention after the September 11, 2001, terrorist attacks). *But see* Farhad Karim, Letter to the Editor, *Simple Categories Just Don't Explain the World*, N.Y. TIMES, June 18, 1993, at A26 (critiquing Samuel Huntington's thesis as a simplistic dichotomy).

3. The problem of determining the role that religion should play in government is known as, to use the French term, "secularism." *See* THE OXFORD ENGLISH DICTIONARY 848 (2d ed. 1989) (defining "secularism" as "[t]he doctrine that morality should be based solely on regard to the well-being of mankind . . . to the exclusion of all considerations drawn from belief in God or in a future state"). In the American system, questions related to the separation of church and state are termed "Establishment Clause" issues. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."). The problem of the role of religion in society, or the individual's right to exercise his or her faith, is one of "Free Exercise," to use American terminology. *See id.* ("Congress shall make no law . . . prohibiting the free exercise [of religion]"). It is important to see these as two intertwined, but distinct, issues.

is an important question.[4] This problem of the relationship between religion and government is also central to democratic societies like France and the United States, and it is perhaps the fundamental question of our time.[5]

The answer to this question may lie in understanding the differences between the United States and France on the issue of freedom of religion[6] and juxtaposing these attitudes with the current situation in Iraq. To grossly oversimplify for introductory purposes, the French system strives to protect the state from religion,[7] whereas the American system works to protect religion from the state.[8] One could posit a spectrum of responses to this question of the proper relationship between religion and government: with regard to the role of religion in government, France would be on one end (the secularist ideal,

4. *See* Richard A. Oppel Jr., *U.S. Seizes Son of a Top Shiite, Stirring Uproar*, N.Y. TIMES, Feb. 24, 2007, at A6 (discussing the concentration of different religious sects in different areas of Iraq and how these are developing into autonomous regions which could ultimately result in a threeway partition of Iraq). If Iraq breaks into Shiite, Sunni, and Kurdish regions, it is likely that religious based forms of government will be established, defeating the current attempt at a multicultural, secular government coalition. *Id.*

5. *See* Karen Tumulty & Matthew Cooper, *Does Bush Owe the Religious Right?*, TIME, Feb. 7, 2005, at 28 (demonstrating the current relevance of the relationship between religion and politics in the United States). Because Evangelical Christians were influential in electing President Bush, they expect him to implement policies in line with their religious based values. *Id.*

6. The terminology used in this Comment is problematic. "Establishment Clause" is an American constitutional term meaning the separation of church and state, or "secularism;" "Free Exercise" is also an American term meaning the freedom to worship and practice religion. *See* U.S. CONST. amend. I; *supra* text accompanying note 3. This Comment utilizes these phrases in relation to the French system, but it should be noted that they are American-specific terms. *Supra* text accompanying note 3. The French term, "laïcité," either encompasses both these components or only means "secularism," depending on who defines the term. *See infra* note 38. Finally, "freedom of religion" is thus intended to be an umbrella term that encompasses both separation of church and state and free exercise.

7. *See, e.g.*, Stefanie Walterick, *The Prohibition of Muslim Headscarves from French Public Schools and the Controversy Surrounding the Hijab in the Western World*, 20 TEMP. INT'L & COMP. L.J. 251, 252 (2006) (explaining the rigid separation of church and state in France).

8. *See* McCreary County v. ACLU of Kentucky, 545 U.S. 844, 881–83 (2005) (O'Connor, J., concurring) (contending that guarantees of religious freedom protect citizens from government intrusion in religious practices).

i.e., no religion in government), Iraq on the other end, and the United States in the middle. With regard to the role of the free exercise of one's religious convictions, the United States would be the most free, Iraq the least free, and France somewhere in the middle.[9]

In both regards, Iraq would serve as a cautionary tale for what happens to religious freedom when these two component principles are not respected: when there is no government protected right to exercise one's religion, the result is discrimination and repression based on religion (persecution of certain groups, a hierarchy of citizens based on religious conviction, and sectarian violence),[10] which will ultimately cause a chilling effect on the fundamental freedom of religion.[11] Similarly, when the institutions of government are too embedded in religion, this results in favoring or endorsing one religion over another, again creating a hierarchy of citizens based on creed, restricting rights based on belief, and ultimately violating the neutrality of government and the equality of all citizens before the law.[12] Again, this results in a chilling effect on democracy and the exclusion or alienation of certain groups from the democratic political process.[13]

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9. *See infra* Section II.A., III.A.; IRAQ CONST. art. 2.

10. *See, e.g.*, Helene Cooper, *U.S. Releases Rights Report, With an Acknowledgement*, N.Y. TIMES, Mar. 7, 2007, at A6 (describing sectarian violence between Sunnis and Shiites in Iraq).

11. The freedom of religion is universally recognized in the Universal Declaration of Human Rights. G.A. Res. 217A (III), art. 18, U.N. Doc. A/810 (Dec. 10, 1948), *available at* http://www.un.org/Overview/rights.html ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.").

12. *See McCreary County*, 545 U.S. at 881–83 (O'Connor, J., concurring) (explaining the importance of neutrality in government with respect to freedom of religion).

13. The Sunnis' situation in Iraq provides a good example of this chilling effect. *See* Michael R. Gordon & Jeff Zeleny, *Latest Plan Sets a Series of Goals for Iraq Leaders*, N.Y. TIMES, Jan. 8, 2007, at A1 (describing the U.S. administration's plan to draw more Sunnis into the political process in Iraq despite the Sunnis' initial boycott of the process for sectarian and political reasons). The idea is that if the Sunnis do not participate, it will undermine the neutrality of the process. *See id.*

Thus, the United States' approach serves as a model for the free exercise of religion,[14] whereas the French approach serves as a model for the role of the separation of religion from government.[15] Taking the best of each system would form the ideal legal approach to the question of the relationship between government and religion. As this Comment will explore, this melding together is perhaps impossible given the interaction, and sometimes contradiction, between the two distinct axes of the freedom of religion ("free exercise" and "separation of church and state"). However, both France and the United States should look to Iraq as a dire warning of the consequences of compromising the ideals of free exercise and secularism, respectively.

This Comment will explore the differences between the French and American approaches to freedom of religion and will evoke the specter of Iraq to warn against extreme deviation from the ideals of democracy as embodied in French laïcité and American free exercise. Because the American approach to free exercise provides the most freedom, this Comment will focus on the flawed French approach, as exemplified by the Headscarf Law,[16] a law which actually tends to restrict religious freedom. Likewise, because the French approach to establishment of religion provides the most neutral[17]—and therefore fair and democratic—approach to establishment, this Comment will focus on the flawed American approach in the two Ten Commandments cases.

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14. This is the individual rights issue. *McCreary County*, 545 U.S. at 881–83 (O'Connor, J., concurring).

15. This is the separation of church and state issue. *See* Walterick, *supra* note 7, at 252.

16. Law No. 2004–22 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190, *available at* http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENX0400001L [hereinafter Headscarf Law].

17. *See* Michel Troper, *French Secularism, or Laïcité*, 21 CARDOZO L. REV. 1267, 1267 (2000) (explaining French secularism).

A. FRANCE

In March 2004, against the backdrop of events such as the war in Iraq and terrorist attacks around the world,[18] the French Parliament passed a law banning the wearing of "ostentatious" religious symbols in public schools.[19] Although it did not specifically target the Muslim headscarf,[20] given the way the law was drafted, many commentators saw the elimination of the headscarf from public schools as the principal goal.[21] The law has become the subject of much debate within France itself and has received much international criticism.[22] Although the law generated a controversy, this Comment argues that it is both consistent with one strand of secularism already present in

18. The war in Iraq began on March 20, 2003. David E. Sanger & John F. Burns, *President Warns of Difficulty—Airstrikes on Baghdad*, N.Y. TIMES, Mar. 20, 2003, at A1. A terrorist attack on a Madrid train occurred on March 11, 2004, in Spain. Elaine Sciolino, *10 Bombs Shatter Trains in Madrid, Killing 192*, N.Y. TIMES, Mar. 12, 2004, at A1.

19. Headscarf Law, *supra* note 16.

The text reads:

> In public elementary schools, junior high schools, and high schools, students are prohibited from wearing signs or attire through which they exhibit conspicuously a religious affiliation. Note that internal regulations require disciplinary procedures to be preceded by a dialogue with the student.

Walterick, *supra* note 7, at 258–59.

20 Walterick, *supra* note 7, at 251. Note that the most popular religion in France is Catholicism, making up approximately 85% of the population. U.S. Department of State, Background Notes: France, Aug. 2007, http://www.state.gov/r/pa/ei/bgn/3842.htm (last visited Nov. 19, 2007). About 10% of the population is Muslim. *Id.*

21. *See* Walterick, *supra* note 7, at 251, 260–61 (stating that the Headscarf Law is seen as more restrictive of the headscarf, as opposed to other religious symbols like crosses, but similarly affects the wearing of other religious garb such as Sikh turbans and Jewish yarmulkes).

22. *See, e.g.*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, 52–53 (2004), *available at* http://www.uscirf.gov/countries/publications/currentreport/2004annualRpt.pdf ("The proposed French law would violate the rights to freedom of religion and expression . . . ."); HUMAN RIGHTS WATCH, FRANCE: HEADSCARF BAN VIOLATES RELIGIOUS FREEDOM BY DISPROPORTIONATELY AFFECTING MUSLIM GIRLS, PROPOSED LAW IS DISCRIMINATORY (2004), *available at* http://hrw.org/english/docs/2004/02/26/france7666.htm; *see also* Jessica Fourneret, *France: Banning Legal Pluralism by Passing A Law*, 29 HASTINGS INT'L & COMP. L. REV. 233, 233–37 (2006) (critiquing the French Headscarf Law as impeding freedom of religion).

French law and society,[23] and that it also embodies the conflicting philosophies inherent in the notion of laïcité.

B. UNITED STATES

In 2005, a year after the passage of the Headscarf Law in France, the U.S. Supreme Court upheld the display of a Ten Commandments monument outside the Texas State Capitol in *Van Orden v. Perry*.[24] During the same session, in *McCreary County v. ACLU of Kentucky*,[25] the Court struck down similar displays inside two Kentucky courthouses.[26] These holdings did not generate the public response, nor did they have the social import of the French Headscarf Law.[27] However, just as outsiders to the French system were quick to criticize the French Headscarf Law, looking at the result of *Van Orden* alone, an outsider unfamiliar with U.S. freedom of religion precedent would question whether or not the United States respects a strict separation of church and state.[28] Furthermore, taking *Van Orden* and *McCreary County* together, these contrasting

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23. *See* Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUS. L. REV. 1, 11–13 (2005) (arguing that the Headscarf Law was not anti-Muslim, but conformed to notions of secularism already present in French law).

24. *See* Van Orden v. Perry, 545 U.S. 677, 677 (2005) (upholding the Ten Commandments monument at the Texas State Capitol because it had historical, as well as religious, meaning for the state).

25. 545 U.S. 844 (2005).

26. *See id.* at 873–74, 881 (striking down the Ten Commandments monument because the government purpose was to advance religion).

27. The low response to the cases generated in the press characterized the split decisions as a mixed message. *See, e.g.*, Ralph Blumenthal, *Split Rulings On Displays Draw Praise and Dismay*, N.Y. TIMES, June 28, 2005, at A17 (describing the different reactions to the Supreme Court decision).

28. *See* Eric Leser, *La Cour Suprême américaine est divisée sur la séparation de l'Eglise et de l'Etat* (U.S. Supreme Court Divided on Separation of Church and State), LE MONDE, June 29, 2005, http://www.lemonde.fr/cgi-bin/ACHATS/acheter.cgi?offre=ARCHIVES&type_item=ART_ARCH_30J&object_id=907451 (calling the double verdict "ambiguous"). Certainly, to the lay observer, when a courthouse has the Ten Commandments posted, "separation" of church and state is not present in its commonsense definition.

decisions pose the question of whether or not the Supreme Court adopts a consistent approach to issues of separation of church and state.[29]

This Comment will argue that the two Ten Commandments cases, when examined side-by-side, illustrate the conflict inherent in the American idea of the freedom of religion: namely, that having two separate clauses (Establishment Clause and Free Exercise Clause) with slightly different goals can lead to a clash between them, and on close cases, the balancing can seem arbitrary.

Using the American cases and the French law as starting points, this Comment will be a comparison of the two versions of freedom of religion as they exist in the their respective countries and legal systems. The freedom of religion has two components that are clearly defined and named in the American system[30] but also exist, albeit less explicitly, in the French system.[31] A basic tension between these two components often arises, and how the two resolve this contradiction is culturally and historically influenced. Each system tends to favor one component over the other; specifically, the French system places the most value on the separation of church and state,[32] while the American system emphasizes the Free Exercise right.[33] The two U.S. cases dealing with religious displays in courthouses and the French Headscarf Law have been selected because they

29. *See* Jeffrey Toobin, *Breyer's Big Idea*; *The Justice's Vision for a Progressive Revival on the Supreme Court*, NEW YORKER, Oct. 31, 2005, at 36, 39 (arguing that the major distinction between the two cases was Justice Breyer's vote). Furthermore, Breyer distinguished the two cases mainly on the fact that the Texas monument had been in existence and unchallenged for 40 years, whereas the Kentucky monuments were recent and controversial from their inception, a seemingly tenuous distinction. *Id.*

30. The two components are the Free Exercise Clause and the Establishment Clause. *See* U.S. CONST. amend. I.

31. *See* Troper, *supra* note 17, at 1277.

32. *See* Gey, *supra* note 23, at 2–3.

33. *See discussion supra* note 3; Gey, *supra* note 23, at 2–4 (explaining the American right to the free exercise of religion). This generalization is by no means infallible. A clear exception arises in the U.S. public school context, where the Supreme Court's reasoning parallels the French reasoning, stressing the need to separate church and state in order to avoid undue influence on malleable and vulnerable young minds in a captive audience. *See* Stone v. Graham, 449 U.S. 39, 42 (1980) (explaining that religious symbols in a school setting could induce children to follow their teachings).

highlight and epitomize the differences between the two systems. Thus, this Comment explores how the two systems tend to resolve their internal contradictions between free exercise rights and the principle of secularism by favoring one component or the other.

Despite the many differences between the two systems, it is also necessary to keep in mind the greater similarities between the French and American attitudes towards the freedom of religion.[34] Put in a global context, and within a spectrum of possible approaches to the relationship between religion and government, these two versions of religious freedom are quite similar.[35] First, both overarching principles—the free exercise of one's religion and the separation of church and state—exist in both systems.[36] Second, both countries' laws support a high level of human rights.[37] However, due to cultural and historical policy considerations, the two countries implement these principles of religious freedom differently and produce different outcomes.

In Section II, this Comment will outline a brief history and evolution of France's philosophy of laïcité, in addition to addressing important modern legal developments. Section III will present an overview of American freedom of religion history and law. Section IV will address the Headscarf Law and the Ten Commandments cases in detail. Section V will provide generalized comparisons of the two systems. Finally, Section VI will conclude with ongoing controversies over the issue of freedom of religion.

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34. *See* T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 452 (2004) [hereinafter *Freedom*] (explaining the American right to the free exercise of religion).

35. Compare the French and American approaches with the Saudi Arabian approach. *See* SAUDI ARABIA CONST. art. 7, *available at* http://www.oefre.unibe.ch/law/icl/sa00000_.html (declaring Islam as the official state religion in the Constitution).

36. *See* Gey, *supra* note 23, at 62–63.

37. *See Freedom*, *supra* note 34, at 425.

II. LAICITE IN FRANCE

A. HISTORICAL BACKGROUND

"Laïcité" is a French term whose meaning is difficult to translate but loosely means "freedom of religion."[38] It is most easily translated as "secularism,"[39] or a separation of church and state,[40] but the term in English lacks many of the connotations and underlying historical meanings of the term in French.[41] The roots of laïcité, or secularism, in France can be traced back to the French Revolution of 1789.[42] Prior to this event, the Catholic Church was heavily involved in state affairs.[43] In the time leading up to the Revolution, the clergy was viewed as complicit with the monarchy in causing social unrest.[44] One of the major reasons for the Revolution was a desire on the part of the masses to separate religion and government. Their purpose was to reduce the power of the Church, because they believed they had been denied many rights due to the union of powerful political and religious

38. The difficulty in translating the term mirrors the basic legal problem: is laïcité merely "secularism" in the narrow sense of law mandating the separation of church and state, or is it "freedom of religion" in the broader sense, encompassing secularism as well as freedom to exercise one's religion?

39. BERYL T. ATKINS ET AL., FRENCH-ENGLISH ENGLISH-FRENCH DICTIONARY 397 (2d ed. 1987).

40. Kamari Maxine Clark, *Internationalizing the Statecraft: Genocide, Religious Revivalism, and the Cultural Politics of International Criminal law*, 28 LOY. L.A. INT'L & COMP. L. REV. 279, 321 (2006). "Secularism" is also indifference to, or rejection or exclusion of, religions and religious considerations. *Id.*

41. *See* T. Jeremy Gunn, *French Secularism as Utopia and Myth*, 42 HOUS. L. REV. 81, 82 (2005) [hereinafter *Utopia*] (describing laïcité as having "historical, anticlerical, and sometimes antireligious connotations"); Elisa T. Beller, *The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society*, 39 TEX. INT'L L.J. 581, 608 (2004) (noting that the translation of "laïcité" by the word "secularism" is inadequate). *But see Freedom*, *supra* note 34, at 420–22 (defining laïcité as "religious freedom").

42. *Freedom*, *supra* note 34, at 432–43 (discussing the historical basis of French secularism); Walterick, *supra* note 7, at 252–53.

43. *See Freedom*, *supra* note 34, at 432–43 (discussing the Catholic Church's involvement in the French state).

44. *See id.* (discussing the clergy's and monarchy's joint participation in causing social unrest).

leaders.[45] Thus, one of the founding principles of the Republic was secularism, or protecting the state from religion.[46] This is supported by the inclusion of secularist principles in the country's founding documents, such as the Declaration of the Rights of Man and Citizen,[47] the Preamble to the 1946 Constitution,[48] and the 1958 Constitution.[49] Accompanying the secularist notion was a corollary right of freedom of religion.[50] This freedom of religion was not an absolute right, but could cede to other compelling state interests such as public order or

45. *See* Beller, *supra* note 41, at 589 (discussing the Catholic Church's privileged status during the old regime).

46. *See Freedom*, *supra* note 34, at 421–22 (noting the popular belief that laïcité was a founding principle of the Republic). *But see Freedom*, *supra* note 34, at 422, 432–52 (debunking the myth of laïcité as a founding principle of the Republic). Although often proudly cited as a founding principle by French politicians, Gunn contends that laïcité emerged tenuously during two periods of violent history. *Id.* at 433, 439. Furthermore, he argues that this rhetoric of tolerance is often used to mask division and oppression. *Id.* at 422. Similarly, the freedom of religion has emerged slowly in the United States, accompanied by much violence and oppression, especially towards non-Protestant denominations. *Id.* at 442–52.

47. *See* DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 10 (1789), *available at* http://www.hrcr.org/docs/frenchdec.html ("No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.").

48. 1946 CONST. pmbl., *available at* http://www.elysee.fr/elysee/elysee.fr/anglais/the_institutions/founding_texts/preambule_to_the_27th_of_october_1946_constitution/preambule_to_the_27th_of_october_1946_constitution.20243.html ("[E]ach human being, without distinction of race, religion or creed, possesses sacred and inalienable rights."). Secularism was thus "readopted" as fundamental to the nation's values at the time of the 1946 Constitution, which, significantly, was in the aftermath of World War II and the deportation of Jews from France to German concentration camps. *See* Julie Chi-hye Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295, 309–10 (2007).

49. 1958 CONST. art. I, *available at* http://www.elysee.fr/elysee/elysee.fr/anglais/the_institutions/founding_texts/the_1958_constitution/the_1958_constitution.20245.html ("France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.").

50. *See* DECLARATION OF RIGHTS OF MAN AND OF THE CITIZEN, *supra* note 47, art. 10. (providing for a protection for individual religious beliefs). However, herein lies the heart of the debate: does free exercise exist in the French system, and if so, is it subordinate to the secularist principles? The origin of the separation of church and state is clearer than the free exercise right, and is more often cited by politicians and the press. *See* Beller, *supra* note 41, at 611–12.

health.[51] Thus, a balancing of values is an important facet of the French freedom of religion. In sum, the historical roots of laïcité are strong and fundamental to the Republic's identity.[52]

Another possible explanation of the roots of secularism can be found by looking at French society itself. French society is monocultural compared to the United States:[53] it stresses assimilation, integration, and shared values.[54] There is an ideal of citizenship that is inscribed in official documents and reinforced by politicians across the political spectrum.[55] Furthermore, the role of government in the lives of citizens is that of the welfare state, which is based on utilitarian notions.[56]

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51. Beller, *supra* note 41, at 591 (citing the ban on religious based female circumcision due to health concerns).

52. *But see Utopia*, *supra* note 41, at 89–90 (arguing that despite the existence of laïcité as a myth, France does not rigorously separate public life from religion). For example, Gunn cites the fact that the French President can appoint Catholic bishops, the state has financed the building of the Paris mosque, and the state owns all older churches in France. *Id.* Additionally, in the education context, France subsidizes religious schools and allows certain religious activities to take place. *Id.*

53. This is not to ignore France's significant immigrant population. *See* Beller, *supra* note 41, at 587 (citing GERARD NOIREL, THE FRENCH MELTING POT: IMMIGRATION, CITIZENSHIP, AND NATIONAL IDENTITY 278 (Geoffroy de Laforcade trans., Univ. of Minn. Press 1996) (1988) (challenging the idea that France was culturally homogeneous)). However, compare the myth that France is a nation with a strong identity (as seen through cultural expressions) to the American myths of the melting pot, the open acceptance of immigrants, and the modern discourse of multiculturalism. *See* James E. Bond, *Multiculturalism: America's Enduring Challenge*, 1 SEATTLE J. FOR SOC. JUST. 59, 59–60 (2002) (highlighting the "melting pot" myth debate through a discussion of two different multiculturalist viewpoints of the U.S. population). Although these myths may not be reality, they both shape and reflect the two cultures' values.

54. *See* C. CIV. art. 21–2, *available at* http://195.83.177.9/upl/pdf/code_22.pdf (stating citizenship requirements such as the French language test); *see also* Beller, *supra* note 41, at 586 (construing Rogers Brubaker to mean that a citizen is someone who takes on the French culture and language and participates in civic life); *id.* at 592 (quoting revolutionary leader Jean-Lambert Tallien as saying, "[T]he only foreigners in France are bad citizens," thus espousing the view that French culture and values were more important to some early leaders than was a person's actual nationality).

55. *See* Beller, *supra* note 41, at 586–87 (describing the tendency for French citizens to "actively take on its culture" keeping "its ideological and political function as a way of defining participation in French culture and civic life"). *But see* Beller, *supra* note 41, at 587 (identifying opposing viewpoints that debunk the Brubakerian notion, arguing this is merely a myth that France tells itself—citizenship is open to all).

56. *See* Beller, *supra* note 41, at 591 (noting the idea that the will of society, as viewed from the collective good, is the source of the state's legitimacy). One must also

As a result, individual rights are seen as less important than those of society as a whole.[57]

Religion is also considered a personal choice and thus a private affair.[58] As a result, one person's right to exercise his or her faith in certain public contexts is seen as infringing on, and inferior to, the rights of others to exist in a neutral, nonproselytizing sphere.[59] Extending this logic, it is easy to see how prohibiting religious dress in public fits into a broad utilitarian philosophy that values society over the individual, assimilation to "neutral" dress standards, and the public forum over private interests.

Finally, the public school system is considered a pillar of French society and the laboratory of democracy where republican values are instilled.[60] Education thus plays a central role in this concept of the citizen since it shapes children into the

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consider the importance of government benefits and the significant role played by the state in the lives of French citizens: socialized medicine, unemployment and disability benefits, retirement pensions, government involvement in public transport, utilities, etc. Thomas J. Osborne, *Civility on Trial: Welfare in the Western World*, THE HUMANIST, Jan.–Feb. 1997, *available at* http://findarticles.com/p/articles/mi_m1374/is_n1_v57/ai_19016000. The size of government is such that about one quarter of the French population are civil servants. DGAFP, POINT STAT: L'EMPLOI DANS LA FONCTION PUBLIQUE (May 1999), *available at* http://www.fonction-publique.gouv.fr/article585.html.

57. *See* Beller, *supra* note 41, at 612 (describing the French view as not just "your rights vs. mine," but, rather, "society's rights" as a distinct entity).

58. The Headscarf Law was never meant to reach the wearing of the veil at home or in the private sphere, but rather only the school environment. *See id.* at 581 (noting that the legislation applies only in public schools). Furthermore, privacy is a right in France—laws against invasion of privacy exist—unlike in the United States, where notions of privacy are nebulous and controversial, such as with the debate over abortion. *See id.* at 621 (characterizing the headscarf affair as fundamentally a debate between the public and private spheres of French society).

59. *See Freedom*, *supra* note 34, at 428 (discussing former President Jacques Chirac's comments regarding the 2004 law and how it creates a neutral zone, "protect[ing] the freedom to believe or not to believe").

60. *See* Beller, *supra* note 41, at 593 (noting the passage of a law in 1882 requiring primary school education in order to "instill republican fervor" and impart French values in children).

republican ideal where utilitarianism trumps individualism.[61] Also, an 1882 law made primary school mandatory, meaning that this republican experience would apply to all.[62]

B. MODERN LEGAL CONCEPTS

The modern basis for secularism in France presents a continuation, or reaffirmation, of the historical concept of laïcité born around the time of the Revolution.[63] Major modern legal documents, such as the 1905 Law on Separation of Churches and State,[64] the Preamble to the 1946 Constitution,[65] and the Constitution of the Fifth Republic[66] all emphasize this philosophy as essential to the French Republic. Thus, at the beginning of the twentieth century, the principle of laïcité was reiterated and readopted.

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61. Beller, *supra* note 41, at 589, 593, 610, 612.

62. *Id.* at 610. Loi 28 Mars 1882, Loi Portent sur l'Organisation de l'Enseignement Primaire (1882).

63. *Freedom*, *supra* note 34, at 432–41 (arguing that a second wave of secularism occurred during the Third Republic, beginning in 1870, culminating in the 1905 Law on the Separation of Churches and State). *See also* Beller, *supra* note 41, at 593 (linking secularist impulses to the aftermath of the notorious Dreyfus Affair, where a Jewish army Captain was wrongly convicted of treason based mainly on antisemitism, and drawing parallels between the antisemitism of the Dreyfus affair and the anti-Islamic sentiment of the headscarf affair).

64. Law on the Separation of Churches and State of Dec. 9, 1905, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 11, 1905, p. 7205, *available at* http://www.legifrance.gouv.fr/texteconsolide/MCEBW.htm. *See* Walterick, *supra* note 7, at 253 (calling this law the "official" separation of church and state in France).

65. 1946 CONST. pmbl., *available at* http://www.elysee.fr/elysee/elysee.fr/anglais/the_institutions/founding_texts/preambule_to_the_27th_of_october_1946_constitution/preambule_to_the_27th_of_october_1946_constitution.20243.html.

66. 1958 CONST., *available at* http://www.elysee.fr/ elysee/elysee.fr/anglais/the_institutions/founding_texts/the_1958_constitution/the_1958_constitution.20245.html. *But see* Walterick, *supra* note 7, at 253–54 (the Headscarf Law allows for a limitation of religious expression for reasons of public order or other compelling reasons).

III. FREEDOM OF RELIGION IN THE UNITED STATES

A. HISTORICAL BACKGROUND

In the United States, on the other hand, the philosophical impetus behind secularism has always been to protect religion from the state.[67] Giving people the right to worship free from government interference is the fundamental notion of American secularism.[68] Although religious freedoms are guaranteed by the founding documents of the United States, the desire for the separation of church and state was not as central to the birth of the American nation as it was to that of the French Republic.[69]

American society may also be more tolerant and accepting of differences. At least in official discourse, American society is meant to be multicultural and diverse: the U.S. government outwardly supports the values of diversity and autonomy.[70] Furthermore, the government exists to support an

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67. Also, this can be placed within a wider tradition of American distrust of government. *See* U.S. CONST. arts. 1–10 (explaining that the Bill of Rights "expressed a desire, in order to prevent misconstruction or abuse of [the Constitution's] powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the Government").

68. One could argue that the American Revolution was primarily the moment of separation of the United States from England (a war for decolonization, separation of the colonies from the Crown), as opposed to the French Revolution, which was a civil war fought among one people over the definition of their state and government. *Compare* Christian G. Fritz, *Recovering the Lost Worlds of America's Written Constitutions*, 65 ALB. L. REV. 261, 262 (2005) (stating that the American Revolution released America from England's control), *with* John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109, 109–10 (1996) (highlighting internal conflict within France leading up to the French Revolution).

69. *See Freedom*, *supra* note 34, at 445–46 (noting that the congressional debates preceding the adoption of the Bill of Rights did not assert the primacy of religious freedom over other rights). Interestingly, the freedom of religion was not originally in the Constitution. *Id.* at 445. Furthermore, the First Amendment became the first numerically by default, undercutting the myth of its primacy due to its position in the Bill of Rights. *Id.* Nonetheless, many immigrants did come to the United States precisely to seek freedom from religious persecution. *Id.* at 430.

70. *See, e.g.*, EMMA LAZARUS, THE NEW COLOSSUS (1883) (appearing at the Statue of Liberty National Monument) ("Give me your tired, your poor, [y]our huddled masses yearning to breath free, [t]he wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!"). *But see Freedom*, *supra* note 34, at 442–52 (noting historical bias against non-Protestant religions).

individualistic society where citizens make choices with free will and the government intervenes as little as possible to give each person maximum autonomy over his or her own life.[71] The freedom to worship as one sees fit with as few encumbrances as possible fits squarely in this tradition. Finally, religion is not necessarily a private affair; religion can be brought into the public sphere.[72] To disallow public expressions of religion would be to burden the individual in favor of society at large.

B. LEGAL CONCEPTS: FROM FIRST AMENDMENT TO PRESENT

The First Amendment of the U.S. Constitution guarantees the freedom of religion: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[73] This freedom has two components—the separation of church and state (the Establishment Clause) and the freedom to worship (the Free Exercise Clause).[74]

1. The Establishment Clause

The Establishment Clause is broadly worded: "Congress shall make no law respecting an establishment of religion . . . .", but has been interpreted over time to have a specific meaning.[75] The basic tenets of the Establishment Clause are derived from *Everson v. Board of Education* and *Lemon v. Kurtzman*.[76] *Everson* lays out a laundry list of actions that are prohibited by

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71. *See generally* U.S. CONST. arts. 1–10. (representing the fundamental American distrust of government).

72. *See, e.g.*, *Freedom*, *supra* note 34, at 424 (noting recitation of the Pledge of Allegiance in public schools). The concept of privacy is problematic in U.S. law. For example, debates over abortion center on whether a right to privacy exists under the Constitution or not. *See*, *e.g.*, Roe v. Wade, 410 U.S. 113, 153–54 (1973). Perhaps, as a result, there can be no relegation of religion to the private sphere, as has become the case in France.

73. U.S. CONST. amend. I (containing the Establishment Clause and the Free Exercise Clause, respectively).

74. *Id.*

75. *Id.*

76. Everson v. Bd. of Educ., 330 U.S. 1 (1947); Lemon v. Kurtzman, 403 U.S. 602 (1971).

the Establishment Clause.[77] Specifically, there can be no: 1) official state church, 2) government coercion to be religious, 3) punishment for one's beliefs, 4) state preference among religions, and 5) government participation in religion.[78] In addition, *Lemon* sets out a three part test of what must be done in order for a law to satisfy the Establishment Clause.[79] The law can have no: 1) sole religious purpose; 2) primary religious effect; or 3) government entanglement in religious affairs.[80]

As with the French headscarf legislation, much Establishment Clause case law has been hammered out in the setting of public schools.[81] This is the area where there are many similarities to French law and also where scrutiny is the highest.[82] One line of cases deals with religious instruction as an extracurricular activity.[83] *Widmar v. Vincent* established one of the bedrock principles of the Establishment Clause law: facilities must be equally open to religious and nonreligious groups.[84] This notion was codified in the Equal Access Act, which stated that religious groups must be treated like other

77. *Everson*, 330 U.S. at 15–16.

78. *Id.*

79. *Lemon*, 403 U.S. at 612–13.

80. *Id.* This test may have been undercut, or at least made less relevant, in light of *Bd. of Educ. v. Grumet*, 512 U.S. 687, 750–51 (1994) (Scalia, J., dissenting) (failing to mention *Lemon* or the three part test in striking down the creation of a Hasidic school district that was created using state funds). *Van Orden v. Perry* also dismissed the *Lemon* test. 545 U.S. 677, 686 (2005). *See generally* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 16–17 (1989) (offering a simpler test than *Lemon*: whether or not the government conduct amounts to an endorsement of religion).

81. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 42–43 (1980) (holding that a display of the Ten Commandments in a public school classroom violated the Establishment Clause).

82. *See, e.g.*, *id.* (stressing that "however desirable [reading, meditating, and obeying] might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause").

83. *See, e.g.*, McCollum v. Bd. of Educ., 333 U.S. 203, 209–10 (1948) (disallowing voluntary religious classes on public school grounds).

84. 454 U.S. 263 (1981). *See id.* at 271 (articulating the equal access principle).

extracurricular groups.[85] This means that because the focus is on equal access, a religious group can use public facilities to conduct a fundamentally religious activity, such as prayer, if it is an extracurricular activity. A result like this certainly raises some issues as to whether a strict line separating church and state still exists. Simply viewing the result—that prayer can be conducted on school facilities—seems counterintuitive without knowing the evolution of the law in this area.[86]

An issue on which the Court has not wavered is the prohibition of prayer readings in public schools during school time.[87] Here, certain similarities to the French reasoning can be seen. In this line of cases,[88] the Court comes closest in theory to the French idea of the captive audience and the necessity to maintain the public school as an ideologically neutral environment.[89] The heightened need to scrutinize religion cases

85. Equal Access Act, 20 U.S.C. § 4071 (2000). *See also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113 (2001) (holding that religious and nonreligious groups can meet on school grounds for after school activities); Rosenberger v. Univ. of Va., 515 U.S. 819, 845–46 (1995) (holding that government or public institutions must treat religious and nonreligious groups alike).

86. Likewise, as outsiders looking in on French law, Americans have a natural initial impulse to see the Headscarf Law as limiting the freedom of religion. *See* Freedom, *supra* note 34, at 427 (explaining the ease with which the French and the Americans would be able to recognize each others' actions—the banning of religious clothing or the promoting of state sponsored declarations about God—as violating the freedom of religion). While that is a valid critique, the Headscarf Law should also be seen within the context and evolution of French law.

87. *See* Engel v. Vitale, 370 U.S. 421, 430 (1962) (holding that in-class prayer readings were impermissible even if no child was compelled to participate); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 205 (1963) (striking down in-class Bible reading); Wallace v. Jaffree, 472 U.S. 38, 60–61 (1985) (striking down a one minute of silence law because it had a mainly religious purpose). The Court has extended the prohibition during class hours to apply to certain extracurricular activities with wide participation of the student body. *See* Lee v. Weisman, 505 U.S. 577, 598–99 (1992) (holding there could be no prayer at a high school graduation ceremony); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000) (striking down prayer at a high school football game).

88. *See* discussion *supra* note 87.

89. Walterick, *supra* note 7, at 251–52 (stating the goal of the longstanding tradition of strict separation in France is to preserve neutrality in public schools). The concern of neutrality in public schools also appears in cases involving a recurring flashpoint in Establishment Clause litigation—the teaching of the theory of evolution. Edwards v. Aguillard, 483 U.S. 578, 593 (1987) (striking down a law forbidding the teaching of evolution unless accompanied by creationist belief because the legislative

in the school context brings out the shared notion in both cultures of youth as especially susceptible to religious "indoctrination."[90]

Establishment Clause issues have also arisen outside of the public school context.[91] For example, religious displays are also commonly litigated, such as in *Van Orden*, where a Ten Commandments monument outside the Texas State Capitol was deemed acceptable because of its historical significance,[92] and *McCreary County*, where the Court held a similar display unacceptable because it was seen as endorsing religion.[93]

2. Free Exercise Clause

The Free Exercise Clause states: "Congress shall make no law . . . prohibiting the free exercise [of religion]."[94] However, other compelling interests may outweigh this right, such as the dictates of criminal statutes.[95] Other than these exceptions, in a

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history showed that the purpose of statute was to promote religious belief); Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (striking down a statute forbidding the teaching of the theory of evolution because the sole purpose was religious; namely, to denounce the theory as in opposition to creationist belief).

90. *See* Stone v. Graham, 449 U.S. 39, 42 (1980) (explaining that the posted copies of the Ten Commandments will cause schoolchildren "to read, meditate upon, perhaps to venerate and obey, the Commandments").

91. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 451–52 (1961) (upholding a Sunday closing law as constitutional because a statute can have both a secular and nonsecular purpose: to give a day of rest to all citizens). *But see* Thornton v. Caldor, Inc., 472 U.S. 703, 710–11 (1985) (striking down a statute that required a day off for an individual employee on the Sabbath).

92. 545 U.S. 671, 691–92 (2005).

93. 545 U.S. 844, 881 (2005); *accord* Allegheny County v. ACLU, 492 U.S. 573, 578–79 (1989) (holding a display held unconstitutional because it endorsed a religious message).

94. U.S.CONST. amend. I.

95. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 893 (1990) (upholding a criminal law banning the use of the drug peyote even if it burdens the exercise of Native American religious beliefs); Reynolds v. United States, 98 U.S. 145, 166–67 (1878) (upholding a law making bigamy a crime for social policy reasons, despite the burden on Mormon religious polygamy practice). *But see* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (striking down an ordinance banning ritual animal sacrifice because the specific purpose was to outlaw Santeria religious practice).

purely private setting, the free exercise right is powerful and often upheld.[96]

IV. CURRENT STATE OF THE LAW

A. FRANCE: THE HEADSCARF LAW

The headscarf controversy began with a series of events in 1989[97] that laid the foundation for the passage of the 2004 law commonly referred to as the Headscarf Law.[98] Three young girls were expelled from school for refusing to remove their Islamic headscarves.[99] The flames of the controversy were fanned by the comments of then First Lady of France, Danielle Mitterrand, who expressed public support for the girls.[100] In response, the Minister of Education, Lionel Jospin, requested an opinion from the Conseil d'Etat (the Council of State)—the highest administrative tribunal in France, akin to the U.S. Supreme Court in matters of public law[101]—on the constitutionality of expelling the girls.[102] The Conseil d'Etat issued an opinion in 1989 reinstating the girls.[103] In its opinion, the Court balanced French and international human rights concerns with the principle of laïcité and ruled that students could wear religious clothing at school as long as it did not constitute a disruption of

96. *See City of Hialeah*, *supra* note 95, at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. A law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases."). In any case, a belief cannot be infringed upon, but conduct or practice can be regulated. *See generally Reynolds*, 98 U.S. at 166 (1878) (noting that while laws cannot interfere with religious belief and opinions, they may with practices).

97. Walterick, *supra* note 7, at 256; Beller, *supra* note 41, at 582.

98. Headscarf Law, *supra* note 16, at 5190.

99. *Freedom*, *supra* note 34, at 454; Walterick, *supra* note 7, at 256.

100. Beller, *supra* note 41, at 583.

101. *Id.* at 602.

102. Walterick, *supra* note 7, at 256; *Freedom*, *supra* note 34, at 455.

103. CE, Nov. 27, 1989, No. 346.893, *available at* http://www.conseil-etat.fr/ce/rappor/index_ra_cg03_01.shtml. *See also Freedom*, *supra* note 34, at 455; Beller, *supra* note 41, at 586.

school activities or an attempt to purvey propaganda.[104] Clearly, for the Court, the principle of laïcité included, and protected, the free expression of religion.[105] The decision further called on principals to decide future incidents on a case-by-case basis but did not give much guidance as to what criteria to consider.[106]

As a result, Jospin and his successor, Education Minister François Bayrou, issued circulars[107] giving more guidance to principals for judging future cases in their schools.[108] In the meantime, the Conseil d'Etat decided forty nine headscarf cases, and the right to wear them was upheld in forty one instances.[109]

However, this did not settle the controversy. Due to mounting public pressure, intense media attention[110] to the topic, and political gamesmanship, then-President Jacques

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104. Walterick, *supra* note 7, at 256–57; *Freedom*, *supra* note 34, at 455. *See also Utopia*, *supra* note 41, at 91 (arguing that the Conseil d'Etat decision stood for the proposition that religious expression is protected under the principle of laïcité). In addition, religious dress had been allowed in schools until 2004, strengthening this interpretation. *Id.* Using Breyer's reasoning from the *Van Orden* case, the fact that no would had complained about it until 2004 would be an important reason to continue to allow religious dress in public schools. *See id.* at 90–91; Van Orden v. Perry, 545 U.S. 677, 702–04 (2005) (Breyer, J., concurring) (reasoning that since the text of the Ten Commandments on a monument went unchallenged for 40 years, it conveyed a predominantly secular message to the public).

105. Beller, *supra* note 41, at 608, 610.

106. *See id.* at 608.

107. A circular (circulaire) is an administrative memorandum issued to give guidance on a specific point of law. Claire M. Germain, *French Law Guide*, http://library.lawschool.cornell.edu/encyclopedia/countries/france/fguide.html (last visited Nov. 19, 2007). It does not have the "force of law, but can be reviewed by administrative courts." *Id.*

108. *See, e.g.*, Lionel Jospin, Circulaire du 12 Decembre 1989, Journal Officiel de la République [J.O.], Dec. 15, 1989; François Bayrou, Circulaire 1649 du 20 Septembre 1994, Sept. 24, 1994, *available at* http://site.voila.fr/lpjf/dossiers/Laicite/CircBayrou94.pdf. The Jospin and Bayrou circulars were seen to narrow the circumstances in which wearing the headscarf was permissible. *See* Walterick, *supra* note 7, at 257 ("The effect of the directive was to 'narrow the circumstances under which a headscarf would be considered permissible.'"); Beller, *supra* note 41, at 584–85 (arguing that while the circular did not have the authority to define which symbols should be considered "ostentatoire," it employs the same term as the Conseil d'Etat and distinguishes between permissible and forbidden symbols).

109. Beller, *supra* note 41, at 584.

110. *See id.* at 583 (citing Oct. 4, 1989 article in *Liberation* reporting basic facts of the Headscarf case).

Chirac requested the formation of a commission to study the issue and present its findings to him.[111] In 2003, the Stasi Commission issued its report (called the Stasi Report) to the President.[112] The Stasi Commission found that young women were often forced to wear the veil due to pressure from their male relatives or to protect their physical safety in the context of potential violence.[113] In 2004, the Headscarf Law was passed,[114] stating:

> In public elementary schools, junior high schools, and high schools, students are prohibited from wearing signs or attire through which they exhibit conspicuously a religious affiliation. Note that internal regulations require disciplinary procedures to be preceded by a dialogue with the student.[115]

Overruled by statute, the Conseil d'Etat's opinion was thus no longer the definitive law on the subject.[116]

Commentators on the Headscarf Law seem to fall into two basic camps: those who view it as part of a long tradition of laïcité, and those who view it as a violation of the principles of laïcité. The former use laïcité in its narrow definition as only the

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111. *See Freedom*, *supra* note 34, at 457–58 (citing Chirac's remarks requesting the commission's opinions).

112. *Id.* at 462. RAPPORT 2003 AU PRESIDENT DE LA REPUBLIQUE ET AU PARLEMENT (2003), *available at* http://lesrapports.ladocumentationfrancaise.fr/BRP/044000099/0000.pdf [hereinafter STASI REPORT].

113. *See* STASI REPORT, *supra* note 112, at 46–47. *But see Utopia*, *supra* note 41, at 100 (stating that if the Headscarf Law is meant to protect Muslim girls from the violence of men in housing projects or from their domineering fathers, as the Stasi Report hinted, there was never a logical explanation for how removing the veil at school would further this goal).

114. Beller, *supra* note 41, at 620 (noting that the Conseil d'Etat decision governed from the time it was rendered until the enactment of the 2004 law, a period of 15 years).

115. Headscarf Law, *supra* note 16, at 5190; Walterick, *supra* note 7, at 258–59 (translating a portion of Law No. 2004–22 of March 15, 2004).

116. In the civil law tradition, one can argue that as judicially-made law, the Conseil d'Etat's decision never represented the definitive law. *See* JAMES G. APPLE & ROBERT P. DEYLING, FED. JUDICIAL CENTER, A PRIMER ON THE CIVIL-LAW SYSTEM 36 (1995) ("In civil-law systems, the role and influence of judicial precedent, at least until more recent times, has been negligible."). However, because it was controlling for fifteen years, the opinion undoubtedly became part of the meaning of the Headscarf Law and became akin to legislative history for purposes of interpreting the statute.

separation of church and state;[117] the latter use laïcité to mean the broader freedom of religion, encompassing what Americans break down into two categories—separation of church and state (i.e., secularism) and free exercise.[118] Those in favor of the law make arguments that the goal is to provide a religion-free zone where youth are protected from the proselytizing aspect of religion.[119]

This split among the commentators can also be characterized as another dichotomy: American attitudes toward the freedom of religion versus French attitudes. Those opposing the law seem to be more "American" in the sense that they value the free exercise right over the separation of church and state. Opponents to the Headscarf Law see it as actually preventing the free expression of religious belief, and thus in direct contradiction with the policy behind the concept of laïcité.[120] This camp would focus more on the free exercise component (in

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117. *See* Gey, *supra* note 23, at 60–63 (noting how the French government seeks to help young students by exposing them to many different religious possibilities and ideas in an environment that is free of religious coercion); *see also* McCreary County v. ACLU of Kentucky, 542 U.S. 844, 885 (2005) (Scalia, J., dissenting) (characterizing the French system as banning religion from the public sphere, although not specifically referring to the Headscarf Law).

118. *See Freedom*, *supra* note 34, at 430 ("[T]he United States terms 'free exercise of religion' and 'establishment of religion' are not more revealing than laïcité."); Beller, *supra* note 41, at 589 (explaining how freedom from the public influence of religion was central to Republicans).

119. Gey, *supra* note 23, at 63–64 (arguing that the French goal is ultimately to protect individual liberties by creating a sphere in which there is no pressure to adopt any specific ideology). The law is not meant to create an antireligion zone but a religion-free zone in schools. *Id. But see Utopia*, *supra* note 41, at 93–94 (critiquing Gey's idea because it presupposes that religious instruction is coercive in all cases, and it also neglects the idea that, by law, parents in France and United States have the right to raise their children as they see fit); Dina Alsowayel, *The Elephant in the Room: A Commentary on Steven Gey's Analysis of the French Headscarf Ban*, 42 HOUS. L. REV. 103, 113 (2005) (critiquing Gey because removing the veil or other religious signs by law replaces supposedly coercive thinking by another coercive act, and thus cannot be a step towards true freedom of conscience). Finally, this idea also presupposes that the school environment is ideologically neutral, a false assumption.

120. *See, e.g.*, *Utopia*, *supra* note 41, at 92 (stating that the Headscarf Law specifically targets the Islamic headscarf); Alsowayel, *supra* note 119, at 106, 108, 116 (criticizing proponents of the Headscarf Law as ignoring the historical context of the law and advising them to consider it within the Orientalist tradition of relations between Islam and the West).

American terminology), which they see as a part of laïcité or the freedom of religion.[121] Putting aside, for the moment, the human rights question of whether one agrees with the law and whether it represses religious freedom, there is still the legal question of whether this is really a contradiction or, instead, a part of the French tradition of laïcité and the French Constitution.

The criticism leveled at the law can additionally be grouped into four types: 1) the law disregarded France's constitutional tradition of freedom of religion;[122] 2) the law ignored the Conseil d'Etat's interpretation of the concept of laïcité as an umbrella which also protects free exercise; [123] 3) the law singled out the Islamic faith; and 4) the law was not in conformity with the European and international laws under which France operates.

The third critique of the law is that it is seen as discriminatory because it targets the headscarf over other religious symbols by using the term "ostentatious."[124] This word is seen as more descriptive of a highly visible headscarf than a small cross necklace that could easily be hidden under clothing. Thus, the very nature of a Muslim religious sign seemed to be the main target of the law.[125] Additionally, the law was largely based on the recommendations of the Stasi Report, and upon

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121. *See* DOMINQUE DECHERF, FRENCH VIEWS OF RELIGIOUS FREEDOM, HARVARD CENTER FOR INTERNATIONAL AFFAIRS (2001), http://www.brookings.edu/fp/cusf/analysis/relfreedom.htm.

122. Human Rights Watch, *France: Headscarf Ban Violates Religious Freedom*, http://hrw.org/english/docs/2004/02/26/france7666.htm (last visited Nov. 19, 2007). *See* discussion *supra* Section II.B.

123. To elaborate on the second category, some critique the law as at odds with the Conseil d'Etat's decision since its analysis of laïcité included the right of free exercise. *Freedom*, *supra* note 34, at 428.

124. *See* Cynthia DeBula Baines, *L'Affaire des Foulards—Discrimination, or the Price of a Secular Public Education System?*, 29 VAND. J. TRANSNAT'L L. 303, 308–09, 320 (2006) (arguing that since symbols of Christianity or Judaism do not violate the constitutional guarantee, neither should the headscarf).

125. *See generally* Alsowayel, *supra* note 119 (critiquing the law as perpetuating Orientalist assumptions about Islam). Also, if the law is truly meant to maintain a strict separation between church and state, perhaps it should be modified to present a brightline, objective standard. This would also help to avoid accusations an anti-Islamic bias. The law could prevent all visible signs instead of merely "ostentatious" ones, which is a subjective standard. Alternately, the law could institute uniforms in the public schools to guard against the wearing of provocative dress, Che Guevara, and rock band t-shirts.

examination, this Report contained many flaws. The Stasi Commission's analysis has been criticized for ignoring the multiplicity of reasons that someone might wear a headscarf and the possibility that some girls wear the headscarf voluntarily.[126] Such a law was, in effect, forcing them to make the painful choice between attending public school and exercising their faith.[127] The Stasi Commission's reasoning was therefore incomplete at best, and full of cultural and patriarchal biases at worst.[128] Also, the Stasi Report's definition of laïcité seemed fundamentally at odds with Islam since Islam is more than just a religion—it is, in itself, a system of law that has rules for how to conduct oneself in life.[129]

The fourth category of criticism posits that the law is in violation of Article Nine of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[130] However, in *Sahin v. Turkey*, the E.U. upheld a similar law restricting religious dress in Turkey, which thus seems to favor the French law's prevailing over any future E.U. challenges.[131]

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126. *See* The Feminist Sexual Ethics Project, Muslim Sexual Ethics: Veiling/Hijab, http://www.brandeis.edu/projects/fse/muslim/mus-essays/mus-ess-veil.html (last visited Nov. 19, 2007) (pointing out that the wearing of the veil has no single meaning and cannot be interpreted in such a sweeping manner). There are many ways to interpret the veil: patriarchal protection of female virtue, feminist decommodification of the body, religious or cultural custom, style of dress, rebellious display, modesty, and economic reasons. *Id.* Thus, if the veil is worn for nonreligious reasons, it would not be a religious symbol, and technically, the law could not prohibit it. *See* Gey, *supra* note 23, at 15–16; Alsowayel, *supra* note 119, at 118–20; Walterick, *supra* note 7, at 256.

127. *France: Bald Protest Against Head-Scarf Ban*, N.Y. TIMES, Oct. 2, 2004, at A4 (reporting that a girl shaved her head in order to respect both French and Islamic law simultaneously).

128. Elizabeth Hope Bordeaux, *Un-Veiling Islamophobia In The Post-9/11 Era: Orientalism In The Veil Debate In France And The United States, December 2003 To June 2004* (Spring 2007), (Ctr. for Global Initiatives, University of North Carolina-Chapel Hill) 15–17 http://gi.unc.edu/research/pdf/Bordeaux.pdf.

129. *See* Hadi Yahmid, *French Muslims Affronted by Stasi Report*, ISLAMONLINE, Dec. 17, 2003, *available at* http://www.islamonline.net/English/News/2003-12/17/article02.shtml.

130. European Convention for the Protection of Human Rights and Fundamental Freedoms art. IX, Apr. 11, 1950, 213 U.N.T.S. 222, 232. *See* Walterick, *supra* note 7, at 259.

131. Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. (2005), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (search by Application

Similarly, many scholars see the French law as violating international norms.[132] However, as of today, the Headscarf law remains on the books.[133] Additionally, the attempts of individuals to overcome the law and successfully wear headscarves in public schools have been mixed.[134]

Number) (upholding the law banning Islamic headwear in institutions of higher education—despite interference with religious practice—due to the legitimate aim of upholding principle of secularism); s*ee* Gey, *supra* note 23, at 55 (discussing the EHCR's decision). Walterick discusses the possibility of distinguishing the French law from the law in *Sahin*, since a central point of the ECJ's reasoning was that Islam is a majority religion in Turkey, and thus could present a greater risk of pressure and proselytism. Walterick, *supra* note 7, at 262. This is not the case in France, where only about ten percent of the population is Muslim. *Id. See generally* C.D. Lovejoy, *A Glimpse into the Future: What Sahin v. Turkey means to France's Ban on Ostensibly Religious Symbols in Public Schools*, 24 WIS. INT'L L.J. 661 (2006) (analyzing the possible effect of European law on France's decision, if challenged, in light of the adjudication of the similar case in Turkey).

132. *See, e.g.*, Beller, note 41, at 621 (arguing that the French law is in violation of the Convention for the Protection of Human Rights and Fundamental Freedoms because freedom of religion can only be limited in cases of a "pressing social need," which the author does not find present in the school context). Art. 9 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms reads: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, *available at* http://conventions.coe.int/treaty/en/Treaties/Html/005.htm. Some also find the Headscarf Law to be in violation of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. *See* Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55 (Nov. 25, 1981), *available at* http://www.ohchr.org/english/law/pdf/religion.pdf (proclaiming that all U.N. Member States shall not allow any form of intolerance or discrimination based on religion or belief).

133. *But see* Gey, *supra* note 23, at 52 (mentioning that Muslim litigants recently challenged similar policies in Turkey, Germany, and Switzerland).

134. *See* Lovejoy, *supra* note 131 at 661 (citing *France: First Students Expelled over Head Scarves*, N.Y. TIMES, Oct. 20, 2004, at A14 (describing a postlaw incident where girls where suspended from school)); *id.* (citing Elizabeth Bryant, *Headscarf Ban Played Down After the Holidays*, UNITED PRESS INT'L, Jan. 3, 2005, http://www.upi.com/International_Intelligence/Analysis/2005/01/03/headscarf_ban_played_down_after_holidays/4607/).

B. UNITED STATES: THE TEN COMMANDMENTS CASES

1. VAN ORDEN

In *Van Orden*, a 2005 plurality opinion, the Supreme Court held that a Ten Commandments monument located on the grounds of the Texas State Capitol did not violate the Establishment Clause.[135] The monument was paid for and donated to the state of Texas by the Eagles, an organization dedicated to national, patriotic, and social values.[136] The District Court found that the display did not violate the Establishment Clause because the state had a valid secular purpose in displaying the monument: the recognition of the Eagles' work against juvenile delinquency.[137] The Fifth Circuit affirmed this holding.[138] After a discussion of the philosophy behind the freedom of religion, the U.S. Supreme Court also upheld the display.[139]

Writing for the plurality and sidestepping the traditional *Lemon* test,[140] Chief Justice Rehnquist looked to the nature of the monument and its history.[141] Citing *Lynch v. Donnelly*,[142] he referred to examples of the state tradition of recognizing the role of religion in American life: celebrating Thanksgiving, allowing the opening of a session of the state legislature to begin with a prayer, and upholding Sunday closing laws.[143] He saw these as deeply embedded American traditions that do not violate the Establishment Clause.[144] Additionally, he cited examples of Moses tablets and other religious displays in various federal

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135. Van Orden v. Perry, 545 U.S. 677, 692 (2005). *Van Orden* was actually released later in same the day as *McCreary County*, but the cases are discussed in reverse order for clarity.

136. *Id.* at 681.

137. *Id.* at 682–83.

138. *Id.*

139. *Id.* at 692.

140. *See supra* notes 79–80 and accompanying text.

141. Van Orden v. Perry, 545 U.S. 677, 685–92 (2005).

142. *Id.* at 686 (citing Lynch v. Donnelly, 465 U.S. 668, 674 (1984)).

143. *Id.* at 686–88.

144. *Id.*

buildings, including the Supreme Court itself, and analogized the Texas display to such monuments.[145]

Chief Justice Rehnquist then analyzed the Ten Commandments and their significance in the history of law to see if they possessed a secular meaning separate from the religious meaning.[146] Rehnquist took pains to distinguish this case from the *Stone*[147] case which judged the Ten Commandments to be presumptively religious, since *Stone* invoked the school context while *Perry* involved the State Capitol.[148]

Justice Scalia, in his concurrence, stated that an Establishment Clause problem only arises when there is a proselytizing component to a religious display.[149] Justice Thomas, in his concurrence, would return to the Framers' notion of "establishment," which, to be held unconstitutional, would have to involve legal coercion to perform some behavior, threat of penalty, or mandatory payment of taxes.[150] He described the Ten Commandments monument as a benign sign whose presence would not be enough to trigger an Establishment Clause violation.[151]

Justice Breyer, in his concurrence, admitted *Van Orden* was a borderline case and stated that all religious symbols do not have to be "purge[d] from the public sphere."[152] He saw the Ten Commandments as having a secular moral message about standards of social conduct as well as having a religious meaning.[153] For him, the fact that forty years had passed without a challenge was more important than any legal test the

145. *Id.* at 688–90.

146. *Id.* at 690.

147. *Id.* at 690–91 (citing Stone v. Graham, 449 U.S. 39, 41–42 (1980)).

148. *Id.* at 691. Chief Justice Rehnquist refers to the Ten Commandments as a "passive" text, as opposed to a "confrontational" text as referred to in *Stone* which was situated in the school context. *Id.* This characterization as "confrontational" is an interesting parallel to the French notion of proselytizing.

149. *Id.* at 692 (Scalia, J., concurring).

150. *Id.* at 693 (Thomas, J., concurring).

151. *Id.* at 694. Note that "benign," if it means nonproselytizing, might be a useful idea to incorporate into the French system.

152. *Id.* at 699–701 (Breyer, J., concurring).

153. *Id.* at 701.

Court might apply.[154] Like Rehnquist, Breyer stressed public schools as a different context due to concerns over the impressionable nature of youth.[155]

In dissent, Justice Stevens, joined by Justice Ginsburg, found that on its face, the monument had no connection to any event in Texas history and was not a work of art, but held only a religious message.[156] Furthermore, given the monument's presence on the State Capitol grounds, the state was officially endorsing the message.[157] He saw this to be in violation of Jefferson's "wall of separation" between church and state.[158]

Justice Stevens found that the Establishment Clause requires a strong presumption against the display of religious symbols on public property.[159] This was due to the fundamental impetus behind the Establishment Clause of avoiding "divisiveness and exclusion in the religious sphere," offending nonmembers and the nonreligious, and preserving neutrality among faiths and towards nonbelievers.[160] He did not support a strict interpretation of the Clause to such an end where an acknowledgement of a religious history could never be made, but in this case, Stevens found that acknowledging history, recognizing religion, and passivity were lacking here.[161] Furthermore, Stevens saw this not only as a religious message,[162] but also as a sectarian message.[163] Because the Ten Commandments are worded and ordered in a specific way, this monument endorses certain religions but not others.[164]

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154. *Id.* at 702–03. Note that Rehnquist similarly stated that another reason to see the display as passive is that *Van Orden* had passed the monument for many years before being bothered by it and bringing suit. *Id.* at 691.

155. *Id.* at 703.

156. *Id.* at 707 (Stevens, J., dissenting).

157. *Id.* at 712.

158. *Id.* at 708.

159. *Id.* Perhaps the French system embodies this presumption.

160. *Id.* at 708–10. These ideas resonate in the Iraqi context.

161. *Id.* at 711–12.

162. *Id.* at 716 (arguing that the Ten Commandments have been adjudged to be undeniably a sacred text because they represent the words of God and are not analogous to "In God We Trust").

163. *Id.* at 717.

164. *Id.* at 717–18.

Justice O'Connor's dissent[165] simply refers to her concurrence in *McCreary County*, striking down the display.[166] For her, the two cases present the same issue, and she decided them same way.[167]

Finally, Justice Souter, in his dissent, claimed that neutrality was not respected due to certain physical characteristics of the monument.[168] "I am the LORD" is clearly the first statement, and "LORD" is in all capital letters.[169] Additionally, he found the Ten Commandments to be presumptively religious.[170]

2. MCCREARY COUNTY

McCreary County, decided during the same Court term, had very similar facts to *Van Orden*, the major difference being that the Ten Commandments monuments were located in courthouses in *McCreary County*.[171] In this case, the ACLU sued two counties, Pulaski and McCreary, for their Ten Commandments displays in Kentucky courthouses.[172] The original displays included "large, gold-framed copies of an abridged text of the King James version of the Ten Commandments, including a citation to the Book of Exodus" in highly visible areas of the courthouses, hallways that citizens used in order to complete basic civic tasks such as renewing driver's licenses, registering automobiles, paying local taxes, and registering to vote.[173] In Pulaski County, the display was unveiled during a ceremony presided over by a Judge and his pastor, and the Judge gave an inaugural speech with religious

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165. *Id.* at 737 (O'Connor, J., dissenting).

166. McCreary County v. ACLU of Kentucky, 545 U.S. 844, 885 (O'Connor, J., concurring).

167. *Van Orden*, 545 U.S. at 737 (O'Connor, J., dissenting).

168. *Id.* at 738–39 (Souter, J., dissenting).

169. *Id.*

170. *Id.* at 738. Justice Souter argues that *Stone v. Graham* is on point, regardless of the lack of a schoolroom context. *Id.* at 744–45.

171. *McCreary County*, 545 U.S. 844. *McCreary County* was decided hours before *Van Orden* on June 27, 2005. *See Van Orden*, 545 U.S. at 677, 743 n.6.

172. *McCreary County*, 545 U.S. at 851–52 (majority opinion).

173. *Id.* at 851–52.

overtones.[174] In McCreary County, the county legislative body ordered the display to be placed in a high traffic area of the courthouse.[175] After the ACLU filed a Section 1983 action to enjoin the courthouses from maintaining the displays due to their violation of the Establishment Clause, the displays were modified.[176]

The District Court used the *Lemon* test to judge the display and found that it lacked a secular purpose.[177] The court did not view the display as commemorating the religious history of the county, but saw it as having only religious purposes.[178] The display was not to educate the public, but simply to post the Ten Commandments.[179] The District Court rendered a preliminary injunction mandating removal of the displays, and the counties appealed the injunction and hired a new defense team.[180] Upon the new attorneys' recommendations, the displays were modified a second time.[181] The third display included the Ten Commandments and nine other documents of a legal and historical nature.[182]

174. *Id.* at 851.

175. *Id.*

176. *Id.* at 852–53. The modifications included adding text to the display that explained that the Ten Commandments were the foundations of Kentucky law and included eight other documents of a religious nature. *Id.* at 853–54.

177. *Id.* at 854. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (explaining the *Lemon* test); *see also supra* note 80 (listing various cases that have undercut the *Lemon test*).

178. McCreary County v. ACLU of Kentucky, 545 U.S. 844, 854.

179. *Id.*

180. *Id.* at 854–55.

181. *Id.* at 855.

182. *Id.* Other documents included the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics to the Star Spangled Banner, the Mayflower Compact, the National Motto, and the Preamble to the Kentucky Constitution. *Id.* at 856.

The Sixth Circuit affirmed the District Court, using *Stone*[183] as precedent that the Ten Commandments are presumptively religious unless integrated into a display so as to carry a secular message.[184]

A Supreme Court majority also found the *Stone* case controlling and struck down the display.[185] The Court's main lines of reasoning evoke many Establishment Clause themes. The Court discusses the *Lemon* "purpose" test[186] in the context of other goals of the Establishment Clause, such as neutrality.[187] The government purpose is to be analyzed by an objective observer who will refer to the plain meaning of the display or perform a commonsense analysis.[188] A court can accept the stated government purpose, but this cannot be a sham.[189] In the case at hand, given the original displays, their inaugural ceremonies, and subsequent modifications based on counsel's advice, the original intent behind the display was deemed religious.[190]

As in *Stone*, the Ten Commandments display in McCreary County was presumptively seen as having a religious purpose.[191] However, such displays will not necessarily result in unconstitutionality each time; a court must look to the context and history in each individual case.[192] In *Stone*, the display had no other context, so it was struck down; likewise, in Pulaski County, there was a pastor at the unveiling, which gave it a clear religious purpose: morality with religious sanction.[193] However, the majority took pains to note that a sacred text can

183. In *Stone v. Graham*, the Court deemed Ten Commandments displays posted in the classrooms of Kentucky public schools prima facie religious displays unless integrated into other materials and struck them down. 449 U.S. 39, 41 (1980).

184. *McCreary County*, 545 U.S. 844, 857–58.

185. *Id.* at 867–69 (citing *Stone*, 449 U.S. at 39).

186. *Id.* at 859 (explaining the purpose cannot be to advance religion).

187. *Id.* at 860 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

188. *Id.* at 862.

189. *Id.* at 864.

190. *Id.* at 868–71, 881.

191. *Id.* at 867.

192. *Id.* at 866 (citing Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in judgment)).

193. *Id.* at 851, 867–69.

be integrated into a display of U.S. history and withstand constitutional analysis.[194]

In O'Connor's concurrence, which has undertones that mimic the French point of view, religion must be an individual matter in order to avoid the consequences of mixing government and religion.[195] For her, this is the goal of religious liberty in a pluralistic society.[196] Even if Americans are a religious people and attend church more than people in other developed nations, there must be a separation of religion and government.[197] For her, the main themes of the freedom of religion are: no religious incursions by the state, no coercion, no preference or promotion of one religion over another, and no threatening or impeding of religious worship.[198] The display in *McCreary County* was deemed religious to the reasonable observer, and thus not allowed.[199]

3. Comparing Van Orden and McCreary County

Some contradictions arise when examining the two cases side-by-side. While both interpret the Establishment Clause in the context of Ten Commandments monuments located in public buildings, *McCreary County* analogizes to *Stone*,[200] while *Van Orden* does not. Likewise, *McCreary County* uses the *Lemon* test and *Van Orden* simply refuses to apply it, with only a casual mention that it is not relevant.[201] The reasoning in *Van Orden*, a borderline contentious case, is meant to sidestep precedent and

194. *Id.* at 874.

195. *Id.* at 882–83 (O'Connor, J., concurring).

196. *Id.* at 882.

197. *Id.* at 882 (citing ROBERT B. FOWLER ET AL., RELIGION AND POLITICS IN AMERICA 28–29 (2d ed. 1999); PEW RESEARCH CTR., *Among Wealthy Nations . . . U.S. Stands Alone in its Embrace of Religion* 1 (2002), http://pewglobal.org/reports/pdf/167.pdf).

198. *Id.* at 882–83 (summarizing the basic holdings of the Court over time).

199. *Id.* at 883.

200. *Id.* at 868.

201. *Id.* at 859.

avoid overruling the restrictive *Lemon* test.[202] However, given the divergent outcomes on such similar cases decided the very same day, this seems arbitrary.

V. ANALYSIS

A. DIFFERENT GOALS

Broadly speaking, both the French and American legal systems have the same goals: the freedom of religion, with its two subparts, freedom of religious expression and the separation of church and state.[203] Yet, when stated more narrowly and less abstractly, the policies and goals are different: the American system looks to protect religion from the state, and the French system looks to protect the state from religion.[204] The American system strives to find a compromise between the two clauses of the First Amendment freedom of religion, often favoring the free exercise component, whereas in the French system, the Establishment Clause concept is supreme.[205] As a result, the approaches employed by the two legal systems are different.

French notions of secularism strive to create a religion-free civic zone.[206] The system embodies the idea that the danger of perceiving religious signs as proselytizing is high.[207] Even a seemingly benign or nonproselytizing display would not pass muster. Religious signs are not acceptable as a mark of a religious history or past.[208]

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202. Van Orden v. Perry, 545 U.S. 677, 685–86 (2005).

203. *See Freedom*, *supra* note 34, at 428, 430–31 (suggesting that the phrases "free exercise of religion" and "establishment of religion" of the U.S. Constitution are comparable to the French doctrine of laïcité).

204. *Id.* at 421 n.2.

205. *See id.* at 420–21, 420–21 n.2 (explaining that the United States features freedom of religion from state interference, whereas in France, the prevailing doctrine of laïcité shields citizens from excessive religion).

206. *See id.* at 421, 424 (noting that France's desire to avoid religious expression is apparent from measures such as banning schoolchildren from expressing religion in their clothing choices).

207. *See id.* at 422, 474 (illustrating that France went so far as to ban children in public schools from adorning evidence of religious affiliation in an effort to assuage religious conflicts).

208. *Id.* at 428 (discussing Chirac's rhetoric on secularism's central position in

Additionally, the French system is more focused on the institutional aspect of the law and values the separation of church and state over any free exercise rights.[209] Also, the French system adheres more to general philosophical notions of secularism rather than a fact specific analysis of each case.[210] Because in the French context there is more concern with the separation of church and state, religion in the public sphere is always treated with skepticism or a presumption of proselytism.[211]

Part of the problem in analyzing the Headscarf Law is due to the fact that French law, unlike the American law, is not so cleanly divided between the two subcomponents of the freedom of religion—free exercise and the Establishment Clause.[212] This lack of clarity creates an inner tension in the concept of laïcité and is the source of the debate over the law.[213] While some find that there is a clear supremacy of the principle of separation of church and state, others see that both exist in the founding documents and that both must be balanced, as in the Conseil d'Etat's decision.[214]

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republican values). *But see* Van Orden v. Perry, 545 U.S. 677 (2005) (holding that the Ten Commandments monuments located on the grounds of the Texas State Capitol were acceptable because they helped comprise Texas's identity).

209. *Freedom*, *supra* note 34, at 420–21 n.2.

210. This can also be seen as an outcome of the civil law tradition in which facts in decisions are distilled to their bare minimum.

211. *See Freedom*, *supra* note 34, at 421, 474.

212. *See* Gey, *supra* note 23, at 16.

213. *See Utopia*, *supra* note 41, at 88–90 (arguing that France is only relatively secular because laïcité is not entirely clearcut with respect to separation of church and state, as noted by many general exceptions). *But see* Gey, *supra* note 23, at 78 (arguing that France is strictly secular such that religion is wholly confined to the private sector).

214. *See* Gey, *supra* note 23, at 16 (explaining the controversial interpretation of the Headscarf Law). Some commentators accept that the right to the free exercise of religion can be limited in the case of a compelling state interest, such as public order, but they do not find one present in the French headscarf cases. *See, e.g.*, Baines, *supra* note 124, at 303, 315–16, 323–24 (explaining that the ban on headscarves is more of a polarizing issue than the actual wearing of the scarves).

In terms of the policy behind the laws, the headscarf decision is a triumph of certain cultural values: the collective over the individual.[215] The girls' right to wear their scarves was balanced against the fact that the symbols could not be of a proselytizing, pressure-inducing, or provocative nature, or else this would infringe on the rights of others.[216] The girls' rights were thus seen as subordinate to those of the collective.[217]

As for the American perspective, some bedrock principles emerge regarding the First Amendment. First, there is a neutrality principle: the Constitution strives to be neutral among faiths and between religion and nonreligion.[218] Furthermore, the danger of burdening religious practice is equal to the risk of exposing the general public to proselytism.[219] Finally, religious signs are acceptable as a mark of a religious past, even in settings that constitute the heart of public life, such as a courthouse or capitol building.[220]

Furthermore, in the United States, the focus is more on the free exercise component of the freedom of religion, whereas in France, the focus is more on the separation of church and state, which falls under the Establishment Clause in American law.[221] Again, these respective emphases mimic the larger social and cultural values that dominate in each culture: the focus on individual liberties in the United States versus the French focus

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215. *See Freedom*, *supra* note 34, at 466–67 (explaining that in France, the state may limit the expression of religious freedom if for the purpose of promoting the "public order;" the headscarf decision promotes the public order by protecting Muslim girls who are coerced to wear headscarves and relieving pressure on school administrators).

216. Walterick, *supra* note 7, at 256, 258–59.

217. *See* discussion *supra* Section II (showing how historical and cultural trends influenced French laws restricting religious dress in the public sector).

218. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a university's policy excluding religious groups from using school space for meeting violates the fundamental principle that a state regulation of speech should be content-neutral).

219. *See* Good News Club v. Milford Cent. School, 533 U.S. 98, 112–18 (2001) (holding that the denial of a religious organization from holding an event in a public school amounted to discrimination, in violation of the Free Speech Clause of the U.S. Constitution).

220. Van Orden v. Perry, 545 U.S. 677, 681 (2005). *But see* McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005).

221. *See*, *e.g.*, Baines, *supra* note 124, at 310–11 (discussing the secular tradition in France); *McCreary County*, 545 U.S. at 875–76.

on institutional rules and procedures and the utilitarian notion of the importance of the collective over the individual.[222]

The United States has two clearly defined subcomponents of the freedom of religion, the Free Exercise Clause and the Establishment Clause, and these two clauses often conflict with each other, resulting in jurisprudence that is confusing, unpredictable, and fact specific.[223] When conflicts arise between the two portions of the freedom of religion, the Supreme Court seems to favor rights granted by the Free Exercise Clause of the First Amendment over those granted by the Establishment Clause.[224] Furthermore, the "traditional" *Lemon* test, considered by many to be unhelpful, is not consistently utilized and appears close to being renounced.[225] In this vacuum, uncertainty is created until a new standard or methodology comes to take its place.

In American law, just as in French law, there is a concern for removing proselytizing influences, especially in the public school context.[226] However, this concern is balanced with the Free Exercise component, which tends to weigh more heavily on

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222. *See*, *e.g.*, Baines, *supra* note 124, at 311–12, 316–17 (representing the French approach that focuses on institutional rules); Wallace v. Jaffee, 472 U.S. 38, 52–53 (1985) (representing the American, individualistic approach). The Conseil d'Etat's decision seems to contradict this formulation, instead giving discretion to the institution to decide when the compelling state interest exists, embodying a compromising, balancing approach. In essence, the Conseil d'Etat applied a more American approach—by weighing the two components and rendering judgments for the students in 41 out of 49 cases. Beller, *supra* note 41 at 584.

223. *See Van Orden*, 545 U.S. at 683 ("Our cases, Janus like, point in two directions in applying the *Establishment Clause*. One face looks toward the strong role played by religion . . . [in] our Nation's history [, and] . . . [t]he other face looks toward the principle that governmental intervention . . . can itself endanger religious freedom.").

224. *See id.* at 694 (holding that the religious monument display is not coercive and therefore does not violate the Establishment Clause). *But see* Stone v. Graham, 449 U.S. 39, 40–41 (1980) (stating that exceptions to the general rule occur in the context of public schools).

225. *See Van Orden*, 545 U.S. at 686 (noting the unknown fate of the *Lemon* test); *McCreary County*, 545 U.S. at 900–02 (Scalia, J., dissenting) (urging the abandonment of the *Lemon* purpose prong).

226. *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring); Beller, *supra* note 41, at 584.

its end of the scale, except in the actual classrooms of public schools.[227]

Writing for the plurality in *Van Orden*, Chief Justice Rehnquist described the Court's approach to the Establishment Clause as "Janus-like" because there were two distinct responsibilities under the Constitution, both of which must be respected: on one hand, a recognition of the strong role played by religion in U.S. history from the Mayflower Compact to the Constitution, which reflected a belief in God, and on the other hand, the awareness required by the First Amendment that government intervention endangers religious freedom.[228] Thus, the Constitution must protect religion from government, cannot press religion on its citizens,[229] and must be neutral.[230] According to the Rehnquist plurality opinion, the best face of this tradition is when the government encourages religious instruction and cooperates with religious authorities to adjust the public schedule to sectarian needs.[231] Additionally, there is no requirement in the Constitution that the government is hostile towards religion or stop organized religions from widening their influence.[232] Instead, the Establishment Clause requires neutrality, not hostility.[233]

Some similar concerns to the French context emerge. First, the public school is seen to be an arena with heightened scrutiny.[234] The Court in *Van Orden* also mentions the *Stone* case, which involved Ten Commandments displays in classrooms.[235] Reference was made to the impressionable nature of youth and the heightened scrutiny under which public school

227. *See Van Orden*, 545 U.S. at 703 (Breyer, J., concurring) (referencing the malleability of young minds and the necessity of protecting them).

228. *Id.* at 683.

229. *Id.*

230. *Id.* at 684.

231. *Id.* Such a statement regarding the accommodation of religion by the government would be highly unlikely under French law.

232. *Id.*

233. *Id.*

234. *See* Gey, *supra* note 23 at 18–20 (discussing other religious garb cases where teachers' religious dress was banned by law). Statutes banning religious dress have been upheld by American courts with only one reported exception. *Id.* at 18–19.

235. Van Orden v. Perry, 545 U.S. 677, 690–91 (2005).

cases would be analyzed.[236] Second, the idea of proselytizing is seen to be the biggest danger.[237] Maintaining neutrality—how to neither endorse nor burden the exercise of religion—is the main point of contention among the Justices.[238]

In *McCreary County*, adopting a broader analysis of the freedom of religion, the Justices address the idea that the constitutionally-given freedom of religion is complex and, at times, self-contradictory.[239] The two clauses can oppose each other.[240] For example, the Establishment Clause would prohibit giving money to military chaplains, but in a military context, doing so would be to deprive service members of their free exercise rights.[241] However, the principle of neutrality can help override these contradictions.[242] Neutrality can help protect individual choice and also prevent the civic divisiveness that follows government intervention into religious debate.[243] European settlers came to America to escape religious persecution, so neutrality is important.[244]

B. COMPARISON: UNDERSTANDING THE LAWS AND POLICIES FROM OPPOSITE VIEWPOINTS

Van Orden and the Headscarf Law analyzed under French law and American law, respectively,[245] would produce very different results.[246] The American result on the headscarf

236. *Id.* at 691 (referencing Stone v. Graham, 449 U.S. 39, 42 (1980)).

237. *Id.* at 692 (Scalia, J., concurring).

238. *Id.* at 708–09 (Stevens, J., dissenting).

239. McCreary County v. ACLU of Kentucky, 545 U.S. 844, 875–76 (2005).

240. *Id.* at 875; *see also* Locke v. Davey, 540 U.S. 712, 718–19 (2004) (describing the "play in the joints" concept).

241. *McCreary County*, 545 U.S. at 875.

242. *Id.*

243. *Id.* at 875–76.

244. *Id.* at 876.

245. *See* Walterick, *supra* note 7, at 263–77 (comparing religious garb restrictions between France, the United States, and other European countries).

246. *McCreary County* would probably stand under French law. *See* Jennifer Westerfield, *Behind the Veil: An American Legal Perspective on the European Head-Scarf Debate*, 54 AM. J. COMP. L. 637, 660 n.95 (citing Justice Scalia's reference to the Constitution of France, which describes the country as a secular republic, meaning that religion is excluded from the public forum).

decision would probably resemble the opinion of the Conseil d'Etat.[247] Furthermore, a way for an American to understand the goals of the French law, other than a suppression of religious freedom, is through the lens of the *Goldman* case,[248] and by an understanding of the preeminence of the separation of church and state over the free exercise component of the freedom of religion in France.

On the other hand, for the French to understand the American approach to secularism, especially as evidenced in *Van Orden*, it is necessary to appreciate the concept of commemorating history and the American emphasis on the other component of the freedom of religion—the Free Exercise Clause.

1. Separation of Church and State and Compelling State Interests: The Goldman Case

For an American to understand the French outcome in the headscarf affair, it is useful to look to the reasoning of the Supreme Court in *Goldman*.[249] Although it may seem extreme to analogize the public school context to a military environment, this is often the type of rhetoric employed by French politicians to defend the idea of laïcité.[250] In *Goldman*, an orthodox Jew and rabbi was an officer in the Air Force.[251] He claimed that Air Force regulations preventing him from wearing his yarmulke were an infringement on his First Amendment free exercise rights.[252] In upholding the Air Force policy of uniforms, the

247. Indeed, many American commentators find the Conseil d'Etat decision to be equitable and nuanced. *See* Beller, *supra* note 41, at 610–11, 613–15 (explaining the balance the Conseil d'Etat decision attempts to achieve between allowing religious expression in schools while simultaneously promoting a unified French culture); *Utopia*, *supra* note 41, at 99–101.

248. Goldman v. Weinberger, 475 U.S. 503, 504 (1986) (holding that an Orthodox Jew Air Force member does not have the right to wear yarmulke on duty in violation of regulations).

249. *Id.* at 509–10.

250. *See, e.g.*, *Freedom*, *supra* note 34, at 453 (stating "[t]he 'greatest function' of the French school was not academic training, but the teaching of patriotism" and noting that the Consiel d'Etat used *insignia* when discussing headscarves).

251. *Goldman*, 475 U.S. at 504–05.

252. *Id.* at 506.

Court made many arguments reminiscent of the reasoning in the headscarf affair.[253] For example, the Court stated that there is freedom of religious expression, but only insofar as it does not butt up against a compelling state interest.[254] The Court noted that the review here was much more deferential to the military than to that of civilian society.[255] The Court reasoned that, while tolerance is required by the civilian state, "to accomplish its mission[,] the military must foster instinctive obedience, unity, commitment, and esprit de corps."[256] The Court further described the essence of military service as "the subordination of the desires and interests of the individual to the needs of the service."[257] Also, the Court drew a line between visible and hidden apparel, just as the French law attempted to do using the word "ostentatious."[258] In his concurrence, Justice Stevens referred to visibility as an objective standard, for which no exceptions can be made.[259]

There is an analogy to be made, given the place of the public schools in French society and culture,[260] between the U.S. military setting and the French public school system. Also, the yarmulke is akin to the headscarf. Like in *Goldman,* the Conseil d'Etat had similar reasoning: eliminating visible signs had the benefit of creating cohesion of the unit and instilling republican values.[261] The French public school system is likewise seen as

253. Note that *Goldman* was superseded by statute, permitting servicemen to wear religious garb that does not interfere with the fulfillment of duties. 10 U.S.C § 774 (2000), *cited in* Walterick, *supra* note 7, at 510. Thus, even in a military context, concessions to religion are made as much as possible.

254. *Goldman*, 475 U.S. at 507.

255. *Id.* at 506–07.

256. *Id.* at 507.

257. *Id.* (quoting Orloff v. Willoughby, 345 U.S. 83, 92 (1953)).

258. *Goldman*, 475 U.S. at 510.

259. *Id.* at 513 (Stevens, J., concurring).

260. *See* Beller, *supra* note 41, at 589, 593, 610, 612 (discussing the vital role education has played in French society since the implementation of mandatory education in 1882).

261. *See* Henri Astier, *The Deep Roots of French Secularism*, BBC NEWS, Sept. 4, 2004, http://news.bbc.co.uk/1/hi/world/europe/3325285.stm.

the place where the instilling of patriotism and national values occurs.[262]

2. McCreary County: History and Free Exercise

In the same Supreme Court term, indeed on the same day, another case dealing with a Ten Commandments display was adjudicated.[263] In order to explain the difference between the two cases, without seeing them as completely contradictory and as giving an incoherent precedent, it is necessary to look to *McCreary County*, which provides an interesting counterpoint to the *Van Orden* decision and shows the limits and contradictions of Establishment Clause litigation.[264] A typical French observer may not understand the *McCreary County* decision over the *Van Orden* decision. However, to reconcile the two American religious display cases, it is necessary to look to history and the preeminence of the Free Exercise Clause in American law. The Court allowed the display in *Van Orden*, which spoke to the religious history of the nation (referred to as a "passive" monument by Rehnquist), but not the monument in *McCreary County*, which could be seen to have a living religious, as opposed to historically religious, significance.[265] This idea is potentially useful in the French context—to frame religious garb as passive as opposed to active.

VI. CONCLUSIONS: RESULTS AND GOALS

In conclusion, the freedom of religion in France and the United States is similar on a worldwide scale, and what differences do exist are historically and culturally based. Both the French Headscarf Law and the American Ten Commandments cases represent contentious issues that test the limits of each system and expose the contradictions within murky areas of the law. The French approach attempts to be

262. *See Freedom*, *supra* note 34, at 453–54 (explaining the importance of education in nineteenth century France as a method of instilling national values in children from an early age).

263. Van Orden v. Perry, 545 U.S. 677 (2005).

264. McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005).

265. *Van Orden*, 545 U.S. at 681, 686; *McCreary County*, 545 U.S. at 868–69, 873–74.

more brightline (although the vague "ostentatious" standard does not measure up) and institutional, and it stresses the Establishment Clause aspect of the freedom of religion. The American approach is harder to define, which leads to less predictable results. Thus, cases are very fact specific, turning on details (like how long a monument has been in existence), and the outcomes are contradictory. American case law focuses on the personal freedom aspect embodied in the Free Exercise component of the freedom of religion, which reinforces larger cultural values of individualism.

The majority of French citizens seem satisfied with the outcome of the controversial Headscarf Law: not only did it garner wide support from the entire political spectrum, but also, eighty percent of teachers and forty two percent of French Muslims approve of it.[266] The official government line was that the law has been accepted by the majority of the population and is even responsible for a lessening of violence.[267]

Regardless of the official statistics and the government's point of view, what are the social ramifications of the law on religious practice in France? Individuals have been forced to take drastic measures in order to comply with the dictates of their religions and while simultaneously not sacrificing their education.[268] Despite popular approval, the Headscarf Law may lead to greater feelings of alienation on the part of the minority religious groups, and it may actually hamper the desired integration of such groups.[269] Additionally, some still fear that the Headscarf Law discriminates against Islam.[270] In France, in the fall of 2005, there was an extended period of rioting by the largely Muslim and immigrant populations who lived in housing projects outside the mainstream, lacking access to decent

266. Gey, *supra* note 23, at 13. Similarly, seven out of ten Americans find religious displays similar to the Ten Commandments to be proper. Blumenthal, *supra* note 27, at A17.

267. *See* Walterick, *supra* note 7, at 261.

268. *See also id.* at 260–61 (noting that Sikhs were forced to wear hairnets and that a Muslim girl shaved her head).

269. *See id.* at 261–62.

270. *See id.* at 252 ("The new French law . . . reflects . . . an increase in anti-Muslim sentiment and discrimination in France . . . .").

jobs.[271] This reinforced and perpetuated the national debate over whether legislation like the Headscarf Law actually encourages marginalization and discrimination of Muslims and other immigrant or minority groups.[272]

As for the future, there seems to be a lingering controversy across Europe. Recent incidents in the United Kingdom, for example, have made headlines. An English employment tribunal upheld the firing of a Muslim teacher from a public school for wearing a full-face veil as "without discrimination."[273] This also came in the context of comments made by former British Home Secretary Jack Straw, and echoed by former Prime Minister Tony Blair, that most Westerners see the veil as a sign of separation.[274] These occurrences demonstrate the ongoing relevance of the topic internationally.

Finally, this issue will undoubtedly surface again in debates over the proposal to admit Turkey, a secular country with a large Muslim population, into the European Union, of which France is a member.[275] Even in the United States, religious display issues continue to arise, proving that there are no clear answers.[276]

Does France favor the nonreligious over the religious? On the other hand, is the United States becoming more and more of a religious society? Does the United States favor the religious

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271. Editorial, *While Paris Burns*, N.Y. TIMES, Nov. 8, 2005, at A26 (attributing Arab immigrant riots to failed French integration model).

272. *See* Walterick, *supra* note 7, at 252 (discussing how the Headscarf Law "has been extremely controversial and has been met with anger and protests from Muslim communities, human rights groups and others throughout the world.").

273. *Minister 'reckless' over veil row*, BBC NEWS, Oct. 15, 2006, http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/6053298.stm; Alan Cowell, *Britain: Veiled Muslim Loses Discrimination Case*, N.Y. TIMES, Oct. 20, 2006, at A6.

274. Editorial, *Behind the Veil*, N.Y. TIMES, Oct. 19, 2006, at A26; Alan Cowell, *Blair Criticizes Full Islamic Veils as 'Mark of Separation'*, N.Y. TIMES, Oct. 18, 2006, at A3; Alan Cowell, *British Leader Stirs Debate with his Call to Raise Veils*, N.Y. TIMES, Oct. 7, 2006, at A8.

275. *See* Sahin v. Turkey, 330 Eur. Ct. H.R. 1, 8 (2005) (describing the historical development of Turkey as a secular country).

276. *See* William Yardley, *A Lawsuit Threat is Gone And Christmas Trees Return*, N.Y. TIMES, Dec. 13, 2006, at A28 (demonstrating the continued uncertainty over religious display issues).

over the nonreligious?[277] The French focus on secularism and the American focus on free exercise lead some to believe this is so.[278]

Perhaps the ideal system of freedom of religion would combine the most rigorous elements of each system: a strong separation of church and state from the French model with a strong free exercise concept from the American model. In light of the situation in Iraq, separation serves democracy well as it protects values like the equality of each citizen before the law.[279] Any foray by the government into religion is seen as favoring one sect over another, which has negative repercussions on the citizenry.[280] However, in an ideal system, the government's intrusion into religion must coexist with the preservation of the individual's right to worship as he sees fit when no compelling state interest is compromised.

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277. *See* Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 9, 17–18 (2004) (holding that an atheist, noncustodial father does not have standing to challenge the mandatory recitation of the Pledge of Allegiance, which includes the phrase "under God," in his daughter's public school on religious indoctrination grounds).

278. Astier, *supra* note 261; Allegheny v. ACLU, 492 U.S. 573, 574 (1989).

279. *Cf.* Edd Doerr, *The Importance of Church-State Separation*, in TOWARD A NEW POLITICAL HUMANISM 1, 10 (Barry F. Seidman & Neil J. Murphy eds., 2004), *available at* http://arlinc.org/pdf/doerrimportance305.pdf (exploring the principles behind freedom of religion in the United States, including the right of similarly-situated individuals to not be treated differently simply for attending or not attending a particular church); John D. Thomas, *Word for Word/We the Peoples; Awaiting the Iraqi Framers, A World of Constitutional Lessons*, N.Y. TIMES, Aug. 10, 2003, at A47.

280. Nathan A. Adams, *A Human Rights Imperative: Extending Religious Liberty Beyond the Border*, 33 CORNELL INT'L L.J. 1, 3 (2000) (citing numerous examples of state-sponsored persecution of religious minorities).

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