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The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A.

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THE BURKA BAN: DIVERGENT APPROACHES TO FREEDOM OF RELIGION IN FRANCE AND IN THE U.S.A.

Ioanna Tourkochoriti*

ABSTRACT

Six years after prohibiting the wearing of headscarves by students in public schools, the French state passed a law prohibiting the wearing of burkas in public places. Compared to France, in the United States there is more tolerance for wearing signs of religious affiliation. The difference in legal responses can be understood in reference to a different background understanding of the fundamental presuppositions of republicanism in the two legal and political orders, which also define their conception of secularism. The law enacted in France can be understood in a general frame of a paternalistic state, which is seen as permitted to dictate the proper exercise of their reason to the citizens. In the United States, the dominant understanding of republicanism attempts to reconcile the natural rights philosophy with the conception of the common good. The trust in the use of collective power and the legislature dominant in France can be opposed to the distrust towards the same elements in the United States.

I.	THE CONFLICTING LEGAL RESPONSES	799
A.	<i>The Total Prohibition of French Law and Its Evaluation from the Point of View of Supranational Law</i>	799
1.	French Internal Law	799
2.	The Case Law of the European Court of Human Rights	804
3.	European Union Law Perspectives	808
B.	<i>The Moderately Restrictive View of American Law</i>	810
II.	UNDERLYING PHILOSOPHY	825
A.	<i>Role of the State</i>	825
1.	The French “Rational” Republic	825
2.	. . . Versus the American Natural Rights Republic	831

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B. <i>The Role of the Law</i>	836
1. The Legislator—Institutor of Civil Society in France	836
2. The American Conception of Checks and Balances	841
III. DOES THE BURKA BAN PROMOTE OR NEGATE LIBERTY?	844
CONCLUSION	850

We must support these women. Only France can do it, as it has a frame for this. Muslim women have a right to the respect and the protection of the Republic.¹

Six years after banning the hijab² for students in public schools,³ France enacted a law banning the burka in public places.⁴ Similar legislation was enacted in Belgium.⁵ In Denmark, according to a recent law, schools and public services are allowed to regulate the wearing of headscarves by employees.⁶ In the Netherlands, new draft legislation is being prepared to ban burkas and other face coverings.⁷ In Italy, a law of

¹ ASSEMBLÉE NATIONALE, RAPPORT D'INFORMATION FAIT EN APPLICATION DE L'ARTICLE 145 DU RÉGLEMENT, No. 2262, at 151 (2010) (Fr.) (statement of Sihem Habchi, President of the association Ni Putes Ni Soumises) [hereinafter RAPPORT D'INFORMATION].

² The hijab covers the head and the neck, the niqab covers the face except for the eyes, and the burka covers the face entirely. *Id.* at 26.

³ Loi 2004-228 du 15 mars 2004, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of March 15, 2004 regulating, in accordance with the principle of secularism, the wearing of symbols or clothing denoting religious affiliation in schools and high schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190.

⁴ Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 prohibiting the concealment of the face in public], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 11, 2010, p. 18344.

⁵ The Belgian Chamber of Deputies approved the law on April 28, 2010. The Senate did not interfere with the law in the fifteen-day deadline. *After France, Belgium Approves Ban on Burqa*, EUR. UNION TIMES, June 6, 2011, <http://www.eutimes.net/2011/06/after-france-belgium-approves-ban-on-burqa/>.

⁶ Under . . . [existing] legislation, schools can require teachers and pupils to make their faces visible and public employers can require the same of home helpers, social workers and educators. Social service caseworkers can require that a client's face is not covered when her case is being attended, and . . . [similarly] for identification procedures, such as entry or exit on public transport.

No Burka Ban Forthcoming, COPENHAGEN POST ONLINE, Jan. 29, 2010, <http://jp.dk/uknews/article1963168.ece>.

⁷ Michael Haggerson, *Netherlands to Propose Burqa Ban*, JURIST, Sept. 16, 2011, <http://jurist.org/paperchase/2011/09/netherlands-to-propose-burqa-ban.php>.

general applicability prohibiting the covering of the face in public places⁸ contains exceptions that apply to coverings for religious reasons,⁹ but members of Parliament are discussing lifting the exception.¹⁰ In Austria, the debate is still open.¹¹ In Spain, the lower chamber of the Parliament rejected a legislative proposal to ban the burka.¹² In Germany, “[e]ight out of 16 Länder introduced a headscarf ban” for teachers in public schools.¹³ The European Court of Human Rights has twice rejected applications concerning headscarf bans for teachers on admissibility basis and has deferred to the authority of the states regarding the regulation of students’ dress.¹⁴ The European Union antidiscrimination legislation regarding access to employment does not provide a legal basis to invalidate legislation banning headscarves to state employees.¹⁵ In the United States, only two states have banned religious apparel worn by teachers.¹⁶

⁸ SCIENTIFIC COUNCIL, MINISTERO DELL’INTERNO, CHARTER OF VALUES CITIZENSHIP AND INTEGRATION para. 26 (2007), available at http://www.interno.it/mininterno/export/sites/default/it/assets/files/14/0919_charter_of_values_of_citizenship_and_integration.pdf.

⁹ Willy Fautré, *Is the Burqa Compatible with Women’s Rights? The “Burqa Issue” in the EU*, available at <http://www.strasbourgconsortium.org/document.php?DocumentID=5170> (citing circular of the ministry of the interior dated July 24, 2004 that headscarves are allowed but have to be removed for identity controls).

¹⁰ Italian local authorities have introduced restrictive regulations, and the Northern League has introduced a bill before Parliament that would outlaw Islamic face veils. See *Police Stop Muslim Woman Wearing Veil in Italy*, BBC NEWS (May 3, 2010), <http://news.bbc.co.uk/2/hi/8658017.stm>.

¹¹ See John Paul Putney, *France Burqa Ban to Take Effect April 11*, JURIST, Mar. 4, 2011, <http://jurist.org/paperchase/2011/03/france-burqa-ban-to-take-effect-april-11.php>. In August 2010, Austria’s conservative Freedom Party called for a special vote in order to prohibit burkas. *Id.*

¹² Alan Clendenning & Harold Heckle, *Spain Parliament Rejects Burqa Ban—for Now*, MSNBC.COM (July 20, 2010), http://www.msnbc.msn.com/id/38332675/ns/world_news-europe/t/spain-parliament-rejects-burka-ban-now.

¹³ Julia von Blumenthal, *Dealing with Religious Pluralism in a Federal System: The Headscarf Debate in Germany*, 10–12 (Apr. 14, 2011) (unpublished manuscript) (on file with author) (presented at the Association for the Study of Nationalities 2011 World Convention at Columbia University). There are four models of legal responses to headscarves for teachers: i) the liberal model, applied in the Eastern Länder except Berlin; in Hamburg, Schleswig-Holstein and Rhineland-Palatinate, where no legislation exists; ii) the model of flexible regulation, dominant in Bremen and Lower Saxony, where legislation bans provocative religious symbols, without mentioning explicitly the headscarf; iii) the Christian model, dominant in Bavaria and Baden-Württemberg; Saarland, North Rhine-Westphalia and Hesse, where symbols which threaten the neutrality of the land and the political, religious and ideological peace in schools are prohibited (Christian and Jewish symbols are explicitly excluded); iv) the secular model, dominant in Berlin, where all religious symbols are prohibited for public servants who come in contact with clients. *Id.*

¹⁴ See *infra* Part I.A.2.

¹⁵ Council Directive 2000/78, 2000 O.J. (L 303) (EC); see *infra* Part I.A.3.

¹⁶ See *infra* notes 206–08 and accompanying text.

These prohibitions have been criticized as contrary to federal antidiscrimination legislation on the access to employment.¹⁷ Bans of the hijab directed at students have not been upheld.¹⁸

This Article aims to present some of the political ideas that led to the two laws in France. Previous studies have focused on specific characteristics of French republicanism, such as universalism and the fear of communalism, according to which signs that indicate religious affiliation should not be allowed in the public sphere because they detract from the collective deliberation on the public good.¹⁹ In opposition, the United States, public visibility of religious affiliation is allowed.²⁰ This Article stresses the role of the state as a key factor in determining a specific understanding of republicanism and secularism in France and the United States, and the visibility, or lack, of signs of religious affiliation. The difference in protection of religious expression lies in the consideration of the role of the state concerning the definition of the content and the limits of liberty: freedom through the state in France, freedom from the state in the United States.²¹ This operates on the level of the imaginary²²: the different constitutive myths on the role of the state in the two legal orders.²³

Secularism, a concept associated with modernity, depends on the context in which it appears.²⁴ Possible meanings of secularism are the absence of reference to religious belief as an interpretative scheme of the origins and the direction of the world, the separation between church and state, or the exit of a situation where religion

¹⁷ See *infra* notes 210–18 and accompanying text.

¹⁸ See *infra* notes 189–96 and accompanying text.

¹⁹ See, e.g., JOHN R. BOWEN, *Introduction* to WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATE AND PUBLIC SPACE 4–5 (2007); Christine T. Sistare, “Conspicuous” Religious Symbols and Laïcité, in FREEDOM OF EXPRESSION IN A DIVERSE WORLD 129–44 (Deirdre Golash ed., 2010).

²⁰ See, e.g., Wilfred M. McClay, *Secularism, American-Style*, 44 CULTURE & SOC'Y 160 (2007).

²¹ See BOWEN, *supra* note 19 (also referencing the role of the state to understanding the visibility of religion in the United States and its absence in France).

²² See CORNELIUS CASTORIADIS, *THE IMAGINARY INSTITUTION OF SOCIETY* (Kathleen Blamey trans., 1987). For an analysis of the philosophy which constitutes the background understanding of republicanism on the imaginary level in France and in the United States, see Ioanna Tourkochoriti, *Freedom of Expression and the Protection of Human Dignity and Privacy in the French Legal Order and the Legal Order of the United States: A Study on Two Different Constitutional Precomprehensions* (Sept. 24, 2010) (unpublished Ph.D. dissertation, École des Hautes Études en Sciences Sociales) (on file with author).

²³ See T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 430 (2004).

²⁴ See José Casanova, *The Secular and Secularisms*, 76 SOC. RES. 1049, 1051 (2009). For a comparison of the different approaches on the separation of church and state between France and the United States, see AHMET T. KURU, *SECULARISM AND STATE POLICIES TOWARD RELIGION: THE UNITED STATES, FRANCE, AND TURKEY* (2009), and James Q. Whitman, *Separating Church and State: The Atlantic Divide*, 34 HIST. REFLECTIONS 86, 86 (2008).

operates in the structure of the state imposing political forms and defining the economy of the social bond.²⁵ In this Article, the concept is used in reference to the latter meaning. Pure secularism is “a counterfactual ideal.”²⁶ Different ex ante understandings concerning the role of the state and the meaning of liberty can lead to different conceptions of the role of the state in implementing this secularism. Does secularism apply only to the state or does it affect the citizen’s freedom of religion as well? The question emerged concerning the permissibility of signs of religious affiliation associated with civil servants and users of public services. For state employees it is easier to justify bans for signs of religious affiliation on the basis of state neutrality towards religion than it is for users of public service. However, even in this case, issues of employment discrimination might emerge. If secularism applies to the state, extending it to users of public service, like students, does not seem justified.

If the dominant conception in the United States reflects a bottom-up secularism that allows expression of difference, the dominant conception in France reflects a top-to-bottom imposition of a negation of these differences in the public sphere to the extent that they do not abide by the official version of human dignity accepted and affirmed by the French state. The burka ban, like the hijab ban, is justified by the need to protect girls who wear it from social pressure when the choice to wear it is not their own.²⁷ It also aims to protect them from themselves when wearing the burka happens to be an authentic choice of the women concerned.²⁸ The difference in the legal responses to headscarves reflects and consolidates an ex ante understanding of the conception of the role of the state in defining the content and the limits of liberty in the two legal orders. Behind the rationale of accommodation of manifestation of religion in the public sphere, versus negation of the same manifestation, lies a rationale on the legitimized degree of state intervention upon civil society. In the United States, the state is permitted to intervene in order to protect negative liberty. In France, the state is permitted to guarantee the very possibility for the exercise of liberty that, is to guarantee that the distinction between formal liberty and real liberty does not exist. In other words, the state assures the very possibility of the concrete exercise of liberty.²⁹ This leads to a slippery slope that disregards individuality in the name of protecting it.

²⁵ MARCEL GAUCHET, *LA RELIGION DANS LA DÉMOCRATIE, PARCOURS DE LA LAÏCITÉ* 11 (1998).

²⁶ Karl-Heinz Ladeur, *The Myth of the Neutral State and the Individualization of Religion: The Relationship Between State and Religion in the Face of Fundamentalism*, 30 *CARDOZO L. REV.* 2445 (2009) (discussing conceptual difficulties surrounding the idea of state neutrality); Michel Rosenfeld, *Introduction: Can Constitutionalism, Secularism and Religion Be Reconciled in an Era of Globalization and Religious Revival?*, 30 *CARDOZO L. REV.* 2333, 2354 (2009).

²⁷ RAPPORT D’INFORMATION, *supra* note 1, at 13, 22, 128.

²⁸ *Id.* at 22.

²⁹ See Patrick Weil, *Why the French Laïcité Is Liberal*, 30 *CARDOZO L. REV.* 2699, 2704–05, 2714 (2009) (noting that in the United States, the individual relies more on the religious group as protector against any intrusion of the state).

By definition, the conception of a right presupposes social interaction and state intervention. Rights are a set of rules that apply to social interaction to the extent that the state allows it by sanctioning their protection.³⁰ Whether rights will be considered as “trump[ing] . . . collective goals,”³¹ or if collective decisions will outweigh the protection of rights, depends entirely on the political philosophy on the role of the state underlying and inspiring the relevant legal rules. There are subtle nuances in the understanding of the content and the limits of a right when the point of departure of every analysis—in other words, the presumption concerning the interpretation of the content and the limits of a right—is in favor of the individual or society. These subtle nuances are visible in freedom of religious expression in France and in the United States. Their origins lie in the political problems the two democracies confronted at their foundation and throughout their evolution. The qualitatively different responses to these problems posed a general frame inside which all evolutions and revolutions have been operating.

The French conception of liberty, as it was enunciated in 1789 and redeveloped during the constitutional continuity of the post-revolutionary period, is marked by the paradox of attempting to find a liberalism of the subject and freedom of conscience, as well as a liberty by the state.³² This conception defines the understanding of the necessary measures of promoting secularism. Although the term “secularism” applies principally to the state, France proposes a paradoxical understanding of secularism, which extends its application to the freedom of religion of the citizens. The case law of the European Court of Human Rights indicates acceptance of the same tendency concerning an extensive role of the state in promoting secularism in Europe.³³

A different conception of republicanism is dominant in the United States. Americans invented a political science that reconciles republicanism with the political philosophy of natural rights.³⁴ According to the conception of American republicanism, private liberty is protected because it promotes this republicanism. As Alexis de Tocqueville notes, what motivates participation in the public sphere is the realization that it is the best way to protect negative liberty according to “self-interest properly understood.”³⁵ This republicanism makes the distinction between

³⁰ See generally CHARLES FRIED, *MODERN LIBERTY AND THE LIMITS OF GOVERNMENT* (2007).

³¹ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xv (1977) (explaining the famous characterization of rights as “political trumps”).

³² LUCIEN JAUME, *L’INDIVIDU EFFACÉ OU LE PARADOXE DU LIBÉRALISME FRANÇAIS* (1997).

³³ See *infra* Part I.A.2.

³⁴ See MICHAEL P. ZUCKERT, *NATURAL RIGHTS AND THE NEW REPUBLICANISM* xv (1994) [hereinafter ZUCKERT, *NATURAL RIGHTS*]; see also MICHAEL P. ZUCKERT, *THE NATURAL RIGHTS REPUBLIC: STUDIES IN THE FOUNDATION OF THE AMERICAN POLITICAL TRADITION* 4–5 (1996) [hereinafter ZUCKERT, *THE NATURAL RIGHTS REPUBLIC*].

³⁵ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 527 (J.P. Mayer ed., George Lawrence trans., 1969).

the private and the public indispensable, whereas for French republicanism, liberty is consubstantial to the public good. American republicanism is founded on a conception of negative liberty as an element that defines national identity and assures the cohesion of the multicultural society of the United States. Thus, if “a peculiarly American conception of the relation between religion and government—one that emphasizes the integrity and diversity of religious life rather than the secularism of the state”³⁶ is dominant, this is precisely due to the natural rights Lockean philosophy, which underlies the American legal order.³⁷

This opposition between trust in the use of collective power dominant in France, versus distrust dominant in the United States, manifests itself as trust or distrust towards the legislator. The French Declaration of the Rights of Man and of the Citizen aims at guiding the legislator towards realizing the content of liberty, whereas the American declaratory texts aim at limiting the legislative power.³⁸ The delay in the institution of constitutionality control in France is a sign of this fascination towards the exercise of collective state power through the legislative branch.³⁹ In the United States, on the contrary, the constitutionality control of the Supreme Court is a very important element of the constitutional equilibrium.⁴⁰ The judiciary is “the least dangerous branch” in a conception of state power organized on the basis of checks and balances.⁴¹

This Article does not propose an originalist approach of constitutional interpretation—rather, it stresses that any understanding of the role of the state is conditioned by our situation in a world of shared meanings.⁴² The ultimate source of the

³⁶ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1416 (1990).

³⁷ This is, however, contrary to McConnell’s basic position, in which he distinguishes between the Lockean philosophy of natural rights and the emphasis on the integrity and diversity of religious life. *Id.* at 1416. McConnell rejects the idea of natural rights as a justificatory basis for the protection of free exercise of religion in order to transcend the division between “liberalism” and “republicanism,” that is individualism and the need to instill civic virtue in the citizens. *Id.* However, if we follow Michael Zuckert’s suggestion that a political philosophy of natural rights is compatible with a political science of republicanism, which was the basis of the American experiment in politics, in opposition to the republican models of antiquity, the division vanishes. ZUCKERT, NATURAL RIGHTS, *supra* note 34. Locke himself does not negate participation in politics, rather, he stresses that politics should have the specific aim of protecting the rights of individuals. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, in POLITICAL WRITINGS 309–24 (David Wootton ed., 1993).

³⁸ See *infra* Part II.B.1–2.

³⁹ See *infra* Part II.B.1.

⁴⁰ See *infra* Part II.B.2.

⁴¹ ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

⁴² See MARTIN HEIDEGGER, BEING AND TIME 188–93 (John Macquarrie & Edward Robinson trans., 1962) (discussing the concepts of understanding and interpretation). For a theory of legal interpretation inspired by Heidegger, see HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimere & Donald G. Marshall trans., 2d ed. 2004).

legitimacy of law is in the understanding of the dominant ideas of political and moral philosophy which underlie the formation of its content and which are submitted to the trial of time and to the variability and evolution of political and social necessities.⁴³ The meaning of a constitutional text is defined by the understanding of its interpreters, which evolves over time.⁴⁴ The sense of a constitutional clause depends on the understanding of its framers at the moment when it was written, as well as on the understanding of all subsequent interpreters who, at a second moment, are trying to respond to the problems that have emerged throughout constitutional history.⁴⁵ Some ideas that existed during the founding era are reinterpreted depending on context and lead to new associations of thoughts by combining old and new elements on the proper meaning of a constitutional term. Even if the current state of the law on freedom of religion is due to “the full flowering of the Warren Court,” it nevertheless expresses elements that are “consonant with [the conception of the framers and] popular notions of religious liberty and limited government that existed at the time of the framing” in the United States.⁴⁶ Although freedom of religion did not always enjoy equal protection, in the United States today, the natural rights philosophy of the founding era justifies a very strong protection of freedom of religion. Although there is disagreement on the meaning of the First Amendment to the Framers before and after its incorporation by the Fourteenth Amendment,⁴⁷ the Federal Bill of Rights contains the common denominator of liberties already protected at the state level. Thus, an *ex ante* understanding of a natural rights philosophy combined with the proper textual elements can lead to severe protection of religious liberty and its manifestations like the one dominant today. As Martha Nussbaum notes, “a tradition of legal argument [can] gradually refine[, deepen[, and extend[] [the] idea of what free exercise requires,”⁴⁸ thanks to the evolution of the interpretation of ideas and terms that already exist in the constitutional text or at the moment of the founding. In France, the trial of history has also led to compromises and alterations of the basic ideas, which shaped the creation of the French Declaration of the Rights of Man and of

⁴³ For a parallel approach, see generally CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE* (2009) (discussing constitutional interpretation and changes in constitutional understandings).

⁴⁴ See LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008); LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* (1991).

⁴⁵ See Olivier Cayla, *La Notion de Signification en Droit: Contribution à une Théorie du Droit Naturel de la Communication* (unpublished manuscript, University Panthéon-Assas Paris II, 1992) (on file with author) (transposing to legal interpretation HENRI GASTON GOUHIER, *LE THÉÂTRE ET LES ARTS À DEUX TEMPS* (1989)).

⁴⁶ McConnell, *supra* note 36, at 1410, 1412, 1414–15.

⁴⁷ For a presentation of the conflicting interpretations, see MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* 106–14 (2008). See also Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 *GEO. WASH. L. REV.* 915, 916 (1992).

⁴⁸ NUSSBAUM, *supra* note 47, at 222.

the Citizen. A hard core of fundamental conceptions of political theory remains intact and finds expression in the legal responses to the exercise of fundamental rights.

Banning the burka is certainly a hard case where equally important principles seem to be in conflict: gender equality versus self-definition. Is the state permitted to protect women from themselves under the pretext that they are operating under a false consciousness,⁴⁹ that they do not exercise their freedom properly when they choose to wear a headscarf? Who has the right to decide what people will wear in the public sphere? Who is permitted to interpret the meaning of wearing a headscarf? A closer examination of the question raises doubts as to whether a ban is the proper way to respond to gender inequality and to integrate minority religious communities in a relatively uniform and solid conception of citizenship. These questions will be raised and analyzed in the Part III of this Article.

I. THE CONFLICTING LEGAL RESPONSES

A. *The Total Prohibition of French Law and Its Evaluation from the Point of View of Supranational Law*

1. French Internal Law

The French law separating church and the state dissociates religion from the civil power by abolishing the public status of churches.⁵⁰ The French conception of *laïcité* can only be understood in opposition to the Gallican regime, which preceded it.⁵¹ Gallicanism marked the separation between the authority of the Pope and the authority of the French king,⁵² separating the Catholic religion from one of its political dimensions. It affirmed the independence of the French political sphere from a foreign authority: the French sovereign could control the Gallican Church, which possessed eminent privileges, such as the control of education.⁵³ In Hegelian terms, the French *laïcité* can be understood and defined as a negation of this preeminent position of the Church. According to the Hegelian insight, the negation of a phenomenon operates in the terms of and reproduces the mentality that it tries to negate.⁵⁴

⁴⁹ KARL MARX, *The German Ideology*, in THE MARX-ENGELS READER 146, 146–200 (Robert C. Tucker ed., W.W. Norton & Company, Inc. 2d ed. 1978) (1972).

⁵⁰ Loi du 9 décembre 1905 relative à la séparation des Églises et de l'État [Law of December 9, 1905 on the separation of Church and State] tit. 1, art. 2, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 11, 1905.

⁵¹ GUY HAARSCHER, LA LAÏCITÉ 10 (1996).

⁵² Inaugurated by Philippe le Bel (reigned 1285–1314), who objected to pontifical interference in French internal affairs, Gallicanism was realized by the *Pragmatique Sanction de Bourges* (1438), an edict by Charles VII against the papal authority. *Id.* It was consolidated with Richelieu and attained its peak under Louis XIV. *Id.*

⁵³ J. David Markham, *The Revolution, Napoleon, and Education*, NAPOLEON SERIES, http://www.napoleon-series.org/research/society/c_education.html (last visited Mar. 15, 2012).

⁵⁴ G.W.F. HEGEL, THE PHILOSOPHY OF HISTORY (J. Sibree trans., 2001).

If the state defined religion in all its parameters, the state would from now on take all measures that are negating religion or any kind of manifestation of religion in the public sphere.

The French Revolution, proclaiming freedom of religion in Article 10 of the French Declaration,⁵⁵ affirmed a kind of extreme Gallicanism by radically submitting the Church to the political sphere. The Directory (September 26, 1795–November 9, 1799) established the first separation of church and state,⁵⁶ and Napoleon passed an agreement in 1801 with the Vatican (the Concordat), that established an official recognition of the Church under which the state strictly controlled its organization and its activities.⁵⁷ During the Restoration (1815–1848) Catholicism was reestablished as a state religion and the Church strengthened its influence on education.⁵⁸ During the Second Empire (1852–1870), the political importance of Catholicism grew and the cardinals became de jure members of the Senate.⁵⁹ During the Third Republic (1870–1940) the movement of secularization of the state was renewed.⁶⁰ The law of

⁵⁵ Article 10 reads: “No one may be disturbed, on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the [public order established by the laws].” Declaration of the Rights of Man and of the Citizen, Aug. 26, 1789, *reprinted in* THE FRENCH DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN AND THE AMERICAN BILL OF RIGHTS: A BICENTENNIAL COMMEMORATION 1789–1989, at 1 (1989). Although the decree of December 24, 1789 allowed non-Catholics to be eligible for fixed conditions, this emancipation did not concern the Jews who were emancipated only by the decree of September 27th.

⁵⁶ 1795 CONST. 354 (Fr.), *available at* <http://www.elysee.fr/president/la-presidence/les-textes-fondateurs/les-constitutions-depuis-1791/les-textes-constitutionnels-anterieurs/la-constitution-du-5-fructidor-an-iii-22-aout.8874.html>. According to Article 354 of the Constitution of Year III (1795), elaborated by the Thermidorian Convention, “No one may be prevented from exercising the cult of his choice, in conformity with the laws. No one can be forced to contribute to the expenses of a cult. The Republic does not provide a salary to anyone.” *Id.* (this author’s translation).

⁵⁷ Michel Troper, *Sovereignty and Laïcité*, 30 CARDOZO L. REV. 2561, 2568–69 (2009); *see also* *The Concordat of 1801*, CONCORDAT WATCH, http://www.concordatwatch.eu/showkb.php?org_id=867&kb_header_id=826&kb_id=1496.

⁵⁸ *See* SARAH A. CURTIS, EDUCATING THE FAITHFUL: RELIGION, SCHOOLING, AND SOCIETY IN NINETEENTH-CENTURY FRANCE 21, 23, 24, 89 (2000) (explaining congregational influence on primary schools increased and the period from 1833 to 1850 was marked by the rise in the number of schools established, as well as the passage of the Falloux law in 1850, which increased the Church’s control over education); ALAIN PLESSIS, THE RISE AND FALL OF THE SECOND EMPIRE 1852–1871, at 116 (Jonathan Mandelbaum trans., 1985) (stating that the Falloux law gave the Church the power to open secondary schools); Scott M. Berg, *In the Shadow of Josephinism: Austria and the Catholic Church in the Restoration 1815–1848* (Aug. 2010) (unpublished M.A. thesis, La. State Univ. & Agric. & Mech. Coll.), *available at* <http://etd.lsu.edu/docs/available/etd-07092010-111611/unrestricted/BergThesis.pdf> (explaining the restored power of the papacy and role of religion in French schools during the Restoration).

⁵⁹ PLESSIS, *supra* note 58, at 18.

⁶⁰ Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54 AM. J. COMP. L. 337, 350 (2006).

1905 abolished the public status of churches, by ending public funding for them.⁶¹ The Constitution of 1946 confirmed this principle of neutrality and the Constitution of 1958 reaffirmed it.⁶²

The first headscarf cases appeared in France in 1989, when three students from the Creil Lower Secondary School were expelled for refusing to remove their headscarves in class, despite the request of the school authorities.⁶³ The supreme administrative jurisdiction, the *Conseil d'État* (Council of State), in its first advisory opinion on the issue expressed that: signs of religious affiliation worn by pupils are not incompatible with *laïcité* if wearing them does not constitute, by its ostentatious or protesting character, an act of pressure, provocation, proselytism or propaganda; if it does not violate the dignity or the freedom of the students or of other members of the school community; if it does not endanger their health or security; obstructing teaching activities and the educative role of the instructors; or if it does not disturb order in the school or the normal functioning of the public service.⁶⁴ The Council deferred to school authorities to regulate the conditions of wearing religious signs by the students and to decide when these signs justify disciplinary measures.⁶⁵ Ever since, in the absence of a general law banning headscarves, in its judicial capacity, the *Conseil d'État* gave a number of moderate decisions on the issue.⁶⁶ According

⁶¹ Loi du 9 décembre 1905 relative à la séparation des Églises et de l'État [Law of December 9, 1905 on the separation of Church and State] tit. 1, art. 2, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 11, 1905 (“The Republic ensures freedom of conscience. It guarantees freedom of worship, subject only to restrictions set forth below in the interest of public order” and affirming the principle of separation, “[t]he Republic does not recognize, pay or subsidize any cult.”).

⁶² “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.” 1958 CONST. 1.

⁶³ BOWEN, *supra* note 19, at 83.

⁶⁴ CE Ass., Nov. 27, 1989, No. 346.893, available at <http://www.conseil-etat.fr/cde/media/document/avis/346893.pdf>.

⁶⁵ *Id.*

⁶⁶ See, e.g., CE Sect., Oct. 20, 1999, No. 181486 (upholding expulsions from school based on failure to comply with the duty of assiduity, following students' refusal to remove headscarves during physical education and sports classes); CE Sect., Apr. 2, 1997, No. 173103 (ruling that only acts of pressure or proselytism or of interference with public order in the school can justify disciplinary measures); CE Sect., Nov. 27, 1996, No. 169522 (same); CE Sect., Mar. 10, 1995, No. 159981 (upholding expulsions from school based on failure to comply with the duty of assiduity); CE Sect., March 14, 1994, No. 145656 (invalidating school regulation banning the “covered head” on the grounds that it violates article 2 of the Constitution of October 4, 1958 and article 10 of the law 89-486 of July 10, 1989, which reads: “In schools, students have the right to freedom of expression and to freedom of information in the respect of pluralism and the principle of neutrality. The exercise of these liberties cannot burden educational activities.”); CE Sect., Nov. 2, 1992, No. 130394 (invalidating in one instance for abuse of power school regulations imposing a ban on the wearing of any distinctive religious signs in class or on school premises).

to the doctrine dominant in French administrative law, the *Conseil d'État* is not competent to judge the constitutionality of a law but only the conformity to the law of administrative acts.⁶⁷

The legislation, enacted in 2004, prohibits the display of conspicuous religious symbols,⁶⁸ which violate the “dignity” of the person who bears them according to the dominant opinion in France, by the students of “public elementary and high schools,” and can be understood within the general conception of the state as permitted to define the content and the proper exercise of religious liberty within the context of schools. The law applies to all state schools and educational institutions, including post-baccalaureate courses (preparatory classes for entrance to the *Grandes Écoles* and vocational training courses), but does not apply to state universities.⁶⁹ Recently, the *Conseil d'État* refused to grant French nationality to a woman wearing a niqab on the basis of “absence of assimilation.”⁷⁰

In its advisory role, the *Conseil d'État* prepared a report on the possible “legal grounds for banning the full veil.”⁷¹ In this report, which is not binding, the *Conseil*

⁶⁷ I ANDRÉ DE LAUBADÈRE, JEAN-CLAUDE VENEZIA & YVES GAUDEMET, *TRAITÉ DE DROIT ADMINISTRATIF* 415 (1999). For a critique of this approach from the point of view of legal hermeneutics, see *infra* Part II.B.1.

⁶⁸ Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of March 15, 2004 regulating in accordance with the principle of secularism, the wearing of symbols or clothing denoting religious affiliation in public primary and secondary schools], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 15, 2004, p. 5190. The famous law added article L.141-5-1 to the Education Code which provides: “In schools, colleges, and public high schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited. The rules shall state that the implementation of a disciplinary procedure is preceded by a dialogue with the student.” *Id.* For discussion, see BOWEN, *supra* note 19, and JONATHAN LAURENCE & JUSTIN VAISSE, *INTEGRATING ISLAM, POLITICAL AND RELIGIOUS CHALLENGES IN CONTEMPORARY FRANCE*, ch. 6 (2006).

⁶⁹ Law 2004-228 of March 15, 2004, art. 1 (Fr.); see also LAURENCE & VAISSE, *supra* note 68, at 163.

⁷⁰ CE, June 29, 2008, No. 286798. Despite the fact that the husband of the applicant is a French national, the wife “has adopted a radical practice of her religion, incompatible with the essential values of the French community and in particular with the principle of gender equality; thus she does not fulfill the condition of assimilation posed by Article 21-4 of the civil code” *Id.* (this author’s translation). For commentary, see Katrin Bennhold, *A Veil Closes France’s Door to Citizenship*, *N.Y. TIMES*, July 19, 2008, at A1; Steven Erlanger, *Burqa Furor Scrambles the Political Debate in France*, *N.Y. TIMES*, Sept. 1, 2009, at A6; and Stéphanie Le Bars, *Vivre en France avec le Niqab*, *LE MONDE*, June 23, 2009, available at http://www.lemonde.fr/societe/article/2009/06/23/vivre-en-france-avec-le-niqab_1210261_3224.html.

⁷¹ CONSEIL D’ÉTAT, *ÉTUDE RELATIVE AUX POSSIBILITÉS JURIDIQUES D’INTERDICTION DU PORT DU VOILE INTÉGRAL* REPORT [STUDY OF POSSIBLE LEGAL GROUNDS FOR BANNING THE FULL VEIL] (Mar. 25, 2010). The report was adopted by the full general assembly of the

d'État makes reference to the case *K.A. et A.D. v. Belgium* of the European Court of Human Rights, which emphasized “the protection of [the *liber arbitrium*] as a substantial aspect of the human person” and in consequence of her dignity.⁷² The report foresees the possibility of banning the veil in two instances: in order to protect public security and to assure recognition of the person in specific places.⁷³ The latter instance is bound in particular to the requirements of some public services or to the application of regulations, which include restrictions or distinctions, bound to identity or age.⁷⁴

Despite this report, the French Parliament enacted the law, which bans concealing one’s face in public places.⁷⁵ The law is a *prima facie* law of general

Conseil d'État on March 25, 2010, and prepared following the Prime Minister’s letter of mission dated January 29, 2010. *Id.*

⁷² *Id.* at 21–22 (discussing *K.A. & A.D. v. Belgium*, App. Nos. 42758/98 and 45558/99, Eur. Ct. H.R. (2005), available at <http://www.echr.coe.int>).

⁷³ *Id.* at 41.

⁷⁴ *Id.*

⁷⁵ Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public [Law 2010-1192 of October 11, 2010 prohibiting the concealment of the face in public], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344. Enacted as text no. 524 by the House of Representatives on July 13, and as text no. 161 by the Senate on September 14, 2010, the law reads:

Article 1: No person, in public, [can wear] clothing designed to conceal his face.

Article 2:

I. For the purposes of Article 1, the public space is made up of public roads and places open to the public or posted to a public service.

II. The prohibition in Article 1 shall not apply if the outfit is required or permitted by law or regulations, if justified by health or professional reasons, or if it takes place in the context of sports, festivals, or artistic or traditional events.

Article 3: Ignorance of the prohibition contained in Article 1 is punishable by fines of the second class. The obligation to complete the citizenship course referred to in Article 8 of 131-16 of the Penal Code may be awarded in addition to or instead of the fine.

Article 4: After section 1a of Chapter V of Title II of Book II of the Criminal Code, it is inserted a section 1b, which reads: Section 1b “From the forced concealment of the face Art. 225-4-10. Forcing through threat, violence, coercion, abuse of authority or power a person or persons to conceal their faces because of their sex is punished by one year imprisonment and a fine of €30,000 . When the fact is committed against a minor, the penalty is increased to two years of imprisonment and a fine of €60,000.

applicability.⁷⁶ The French Constitutional Council upheld constitutionality of Articles 1 and 2 of the law.⁷⁷ According to the Council, the legislators were concerned that concealing the face could be a danger to public order and could show a lack of awareness of the minimal requirements of life in society.⁷⁸ The prohibition was justified as promoting the principles of women's liberty and equality.⁷⁹ This is not a disproportional measure in view of protecting the public order, because wearing the burka is not prohibited in places of worship.

2. The Case Law of the European Court of Human Rights

The case law of the European Court of Human Rights (ECHR) regarding headscarf prohibitions reflects an understanding of the role of the state that legitimizes it in limiting freedom of religion rights for teachers and students. By deferring to the judgment of the member states of the European Convention of Human Rights as to the proper way of implementing secularism,⁸⁰ the ECHR created a situation which allows the state to dictate the proper content of religious liberty, even in cases where no harm to others exists.

France is a member of the Council of Europe and has signed⁸¹ and ratified⁸² the European Convention of Human Rights. The Convention constitutes a legal rule of superior value in the hierarchy of the legal rules⁸³ and protects freedom of religious conscience.⁸⁴ The case law of the ECHR creates a *jus*

Article 5: Articles 1 to 3 come into force at the expiration of a period of six months from the date of enactment of this Act.

Article 6: This Act applies throughout the territory of the Republic.

Article 7: The Government submits to Parliament a report on the implementation of this Act eighteen months after its promulgation. This report assesses the implementation of this Act, accompanying measures developed by the public authorities and the difficulties encountered.

⁷⁶ *Id.*

⁷⁷ Conseil Constitutionnel [CC] [Constitutional Court] No. 2010-613DC, Oct. 7, 2010, J.O. 18345.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See infra* notes 87–96 and accompanying text.

⁸¹ France signed the European Convention of Human Rights on Nov. 4, 1950. *See* Chart of Signatures and Ratifications of the Convention for the Protection of Human Rights and Fundamental Freedoms, COUNCIL OF EUR., available at <http://www.conventions.coe.int>.

⁸² France ratified the European Convention of Human Rights on May 3, 1974. *Id.*

⁸³ *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 46, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights].

⁸⁴ Article 9 of the ECHR reads as follows:

Article 9—Freedom of thought, conscience and religion.

*commune*⁸⁵ in the human rights domain in Europe constituting the source of a quasi-constitutional human rights law for the legal orders of the member states. In the famous case *Şahin v. Turkey*,⁸⁶ the ECHR found that a headscarf ban did not violate the freedom of religion of students in Turkish Universities. In coming to this conclusion, the ECHR deferred to the “margin of appreciation” of the state.⁸⁷ Considering the protection of public order, it held that local authorities were in a better position than the court to decide whether the ban was a measure justified in principle and proportionate to the aim pursued.⁸⁸ The judgment of the court certainly reflects the idea that this kind of prohibition is not significant enough, which would legitimize it as an international institution to decide in favor of a violation of freedom of religion. By not considering this violation as important enough, the court reproduces the dominant ideology in Europe in favor of state-imposed secularism to the detriment of religious freedom. By refusing to judge if there was violation, the court de facto creates a situation that justifies the ban. The decision does not reflect a philosophy that gives particular importance to rights as “trumps”⁸⁹ against governmental decisions. Instead, it promotes the philosophy that the state can enforce secularism in the public sphere by limiting religious expression.

1. 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 worship, teaching, practice and observance.

2. 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.”

European Convention on Human Rights, *supra* note 83, art. 9; *see also* MALCOLM D. EVANS, *MANUAL ON THE WEARING OF RELIGIOUS SYMBOLS IN PUBLIC AREAS* 7–24 (2009); JEAN-FRANÇOIS RENUCCI, *ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION* (2005); Isabelle Rorive, *Religious Symbols in the Public Space: In Search of a European Answer*, 30 *CARDOZO L. REV.* 2669, 2672–76 (2009).

⁸⁵ This is particularly true after the implementation of Protocol No. 11, which allows the individual to appeal directly to the court and not only to the Commission. In the past, submitting to the Commission meant that this right is submitted to a declaration of acceptance of the jurisdiction of the Strasbourg Court. Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms pmbl. art. 1, Nov. 5, 1994, E.T.S. No. 155.

⁸⁶ *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 55.

⁸⁷ The court uses the legal term “margin of appreciation” when deferring to the evaluations of the member states of the Council of Europe on whether limitations on the exercise of a right are “necessary” and “proportionate” in a democratic society. *See id.* at 26–30.

⁸⁸ *Id.* at 30 (noting that “university authorities are . . . better placed than an international court to evaluate local needs,” the court found the interference “justified in principle and proportionate to the aim pursued”).

⁸⁹ DWORKIN, *supra* note 31, at xi.

The ECHR has held that headscarf bans in secondary schools are within the “margin of appreciation” of the state to regulate the means that serve the legitimate aim of preserving the neutral and secular character of secondary education.⁹⁰ The measure is proportionate because it applies to all pupils independently from their religious beliefs, and subsequent cases of national jurisdictions have followed this case law.⁹¹ In *Dogru v. France*⁹² and *Kervanci v. France*⁹³ (both cases predating the enactment of the 2004 law), the ECHR held that the expulsion of a student from secondary school for refusing to remove her headscarf during physical education was compatible with the requirement of secularism.⁹⁴ The court deferred anew to the “margin of appreciation” of the national authorities “to ensure that, in keeping with the principle of respect for pluralism and the freedom of others, the manifestation by pupils of their religious beliefs on school premises did not take on the nature of an ostentatious act that would constitute a source of pressure and exclusion.”⁹⁵

The court, although protective of individuality in many respects,⁹⁶ by deferring to the “margin of appreciation” of the state in all cases that concern religious headscarves, accepts and legitimizes a conception of secularism that allows the state to define even the relation that human beings have with themselves.⁹⁷ If this is justifiable

⁹⁰ *Köse v. Turkey*, 2006-II Eur. Ct. H.R. 311 (declaring the application inadmissible).

⁹¹ *See, e.g., Regina (SB) v. Governors of Denbigh High School*, [2007] 1 A.C. 100 (H.L.) 101, 116–17 (U.K.) (holding that restrictions in the freedom to manifest religious belief by school dress codes of a secondary community school are proportionate measures to promote “the value of religious harmony and tolerance between opposing or competing groups and of pluralism and broadmindedness; the need for compromise and balance; the role of the state in deciding what is necessary to protect the rights and freedoms of others”). In the past, the House of Lords had held that the refusal of the headmaster of a private school to admit an orthodox Sikh pupil unless he removed the turban and cut his hair was unlawful discrimination under the Race Relations Act of 1976. *Mandla v. Dowell Lee* [1983] 2 A.C. 548 (H.L.) 548 (U.K.).

⁹² *Dogru v. France*, App. No. 27058/05, Eur. Ct. H.R. (2008), *available at* <http://www.echr.coe.int>.

⁹³ *Kervanci v. France*, App. No. 31645/04, Eur. Ct. H.R. (2008), *available at* <http://www.echr.coe.int>.

⁹⁴ The court found “that the disciplinary proceedings against the applicant fully satisfied the duty to undertake a balancing exercise of the various interests at stake . . . [since] the ban was limited to the physical education class.” *Id.* at 21.

⁹⁵ *Dogru*, App. No. 27058/05; *see also Kervanci*, App. No. 31645/04, at 21. The court also deferred to the margin of appreciation of the state concerning the proportionality of the definitive expulsion from the school. *Dogru*, App. No. 27058/05, at 20–21; *Kervanci*, App. No. 31645/04, at 21–22.

⁹⁶ Concerning, for example, sadomasochism in the case *K.A. & A.D. v. Belgium*. App. Nos. 42758/98 and 45558/99, Eur. Ct. H.R. (2005), *available at* <http://www.echr.coe.int>.

⁹⁷ Judge Tulkens, in her dissenting opinion in *Şahin*, noted that “European supervision cannot . . . be escaped simply by invoking the margin of appreciation.” *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 55 (Tulkens, J., dissenting). The same judge, however, justified this attitude of judicial restraint by the court in reference to the divergence between the states on the relationship between state and religion. *See* Françoise Tulkens, *The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism*, 30 CARDOZO L. REV.

for physical education classes, it does not seem to be the same for the classroom. If, according to the ECHR, headscarf bans in universities are not significant limitations on religious freedom to justify its intervention, this creates a very strong *a fortiori* argument for bans in schools.

The ECHR also examined the permissibility of teachers' headscarves, discussing the admissibility of the cases, rather than dealing with the merits. The case in which this question emerged concerned a primary education teacher who converted to Islam after she was hired.⁹⁸ The court held that headscarf bans may be considered justified in principle and proportionate to the legitimate aims of ensuring the neutrality of the state primary education system and the protection of the "rights and freedoms of others, of public order and public safety."⁹⁹ Similarly, the court dismissed the application of an associate professor at University of Istanbul who was subjected to disciplinary measures for wearing a headscarf at work.¹⁰⁰ For the court, a democratic state may be entitled to require by its public servants loyalty to the constitutional principles on which it is founded and, since neutrality is a constitutional principle of the Turkish state, university dress rules are consistent with the margin of appreciation that the states possess in enforcing secularism.¹⁰¹ Therefore, "the impugned interference was justified in principle and proportionate to the aim pursued."¹⁰² The famous decision of the German Federal Constitutional Court on the teacher headscarf case decided in between the two ECHR cases is thus compatible with this case law.¹⁰³

2575, 2577–78 (2009). Because the court is only an international judicial body and not a constitutional court, it does not consider that it has the requisite legitimacy to determine this issue. This legitimacy in this specific case could, however, be derived from the role of the court as a human rights court deciding an issue that concerns fundamental decisions of the person, just like sadomasochism in the case *K.A. & A.D. v. Belgium*. See *K.A. & A.D.*, App. Nos. 42758/98 and 45558/99.

⁹⁸ *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 449 (declaring the application inadmissible).

⁹⁹ *Id.* For the court it "appear[ed] difficult to reconcile . . . Islamic headscar[ves] with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils." *Id.* The ban is thus "not unreasonable" and "the Geneva authorities did not exceed their margin of appreciation . . . having regard . . . to the tender age of the children for whom the applicant was responsible as a representative of the State." *Id.*

¹⁰⁰ *Kurtulmuş v. Turkey*, 2006-II Eur. Ct. H.R. 297, 311 (declaring the application inadmissible).

¹⁰¹ *Id.* at 307.

¹⁰² *Id.*

¹⁰³ Bundesverfassungsgericht [BVERFGGE] [Federal Constitutional Court] Sep. 24, 2003, 2 BvR 1436/02, available at http://www.bverfg.de/entscheidungen/rs20030924_2bvr143602.html. The court expressed concerns about the legal medium by which the limitation was imposed. See *id.* The court said that an important individual freedom, which is unconditionally guaranteed when the German Constitution is at stake, its limitations should only be enacted by a decision of Parliament and not by the executive branch. *Id.* at paras. 38, 67. "The crucial decisions in educational policy are to be taken by the legislator, in accordance with the requirements of the *Rechtsstaat* and the principle of democracy in the Constitution: it

It is difficult to predict what would be the opinion of the court for the French law banning the burka in the streets. If the court approaches the topic as a question of secularism, it will defer to the margin of appreciation of the state in promoting it, thus perpetuating its refusal to engage in an active role in favor of religious expression.¹⁰⁴ If it chooses to approach the question as an issue of self-definition then the precedent of *sadomasochism*,¹⁰⁵ which accepts wide liberty for the individual, might lead it to finding a violation of Article 9 of the European Convention of Human Rights.¹⁰⁶ According to Patrick Weil, the French Constitutional Council, by recognizing the possibility to cover one's face in places of religious worship, explicitly recognized the religious character of the burka, thus opening the way to an invalidation of the law by the European Court of Human Rights in reference to Article 9 and the protection of freedom of religion.¹⁰⁷

3. European Union Law Perspectives

Article 6, paragraph 2 of the European Union Treaty¹⁰⁸ provides for accession of the European Union to the European Convention on Human Rights.¹⁰⁹ This accession concerns also the institutions of the EU, so that they act in a way that respects the ECHR.¹¹⁰ So far, there is direct communication between the Court of Justice of

is not to be left to those in charge of the schools." *Id.* para. 69. Official duties which restrict the freedom of belief of officials or applicants for office must be strictly justified and strict equality between the various religions must be observed. *Id.* para. 39. If the legislator, as part of its educational policy regarding the relationship of religion and state, decided to ban the wearing of the hijab in schools this would be an acceptable limitation of the freedom of religion and would not be inconsistent with Art. 9 of the European Convention on Human Rights. *Id.* para. 66.

¹⁰⁴ This is as the *Şahin v. Turkey* precedent indicates. See *supra* notes 86–88 and accompanying text.

¹⁰⁵ *K.A. & A.D. v. Belgium*, App. Nos. 42758/98 and 45558/99, Eur. Ct. H.R. (2005), available at <http://www.echr.coe.int>.

¹⁰⁶ See *supra* note 84 and accompanying text.

¹⁰⁷ See Patrick Weil, *La Loi sur la Burqa Risque l'Invalidation par l'Europe*, LE MONDE, Nov. 23, 2010, <http://www.europe-solidaire.org/spip.php?article19221>; Interview with Patrick Weil.

¹⁰⁸ As amended by the Lisbon Treaty. Consolidated Version of the Treaty on European Union, art. 6, Sept. 5, 2008, 2008 O.J. (C 115) 19 [hereinafter TEU].

¹⁰⁹ So far the ECHR has been considered valid law in the European Union because the member states have individually signed and ratified the treaty. Separate accession to the community is justified for a number of reasons. First, with EU's expansion, the Union's activities moved into "fields where human rights concerns are frequently invoked." DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW: CASES AND MATERIALS 259 (2d ed. 2010). Second, the ECHR acts as a safeguard to the development of a "fundamental rights system" for the EU itself. *Id.* Third, the progressive constitutionalization of the EU raised concerns about whether the EU is "becoming the central locus for questions about fundamental rights rather than national settlements." *Id.*

¹¹⁰ See TEU, *supra* note 108, arts. 6, 9, 13.

the European Union and the European Court of Human Rights on issues pertaining to the protection of human rights.¹¹¹ From the point of view of the secondary legislation of the European Union, which is binding to the member states, the Directive 2000/43/EC “implementing the principle of equal treatment between persons irrespective of racial or ethnic origin”¹¹² is not likely to be applicable to headscarf bans since they are not associated with any specific “racial or ethnic origin” for the purposes of the European Council Directive, unless cases emerge where religious discrimination is absorbed by racial or ethnic discrimination.¹¹³ The preamble to the Directive states that “[t]he European Union rejects theories which attempt to determine the existence of separate human races. The use of the term ‘racial origin’ in this Directive does not imply an acceptance of such theories,”¹¹⁴ which implies that the concept of race itself is a social construct based on other attributes that may include culture or religion.¹¹⁵ The scope of the Directive includes access to education.¹¹⁶ However, it is inapplicable in the case of the burka ban, as many of the women do not have French nationality.¹¹⁷

The European Union legislation is of interest to our topic concerning freedom of religion of state employees like public school teachers. European Council Directive 2000/78/EC against discrimination in access to employment foresees exceptions to the principle against discrimination on the grounds of religion for state and private employers.¹¹⁸ The Directive allows states a wide margin of appreciation in defining

¹¹¹ FRÉDÉRIC SUDRE, *DROIT EUROPÉEN ET INTERNATIONAL DES DROITS DE L’HOMME* (2008); CHALMERS ET AL., *supra* note 109, at 243–46.

¹¹² Council Directive 2000/43, arts. 1–2, 2000 O.J. (L 180) 22, 24 (EC).

¹¹³ The concept of ethnicity could be defined on the basis of socio-cultural characteristics, including religion. The House of Lords in the United Kingdom opted to include two elements in its definition of an ethnic group: first, a long, shared history as a separate group, and second, a cultural tradition, including family and social customs. *See Mandla v. Dowell Lee* [1983] 2 A.C. 548 (H.L.) [549]. For the possibility of absorption of religious discrimination in racial or ethnic discrimination, see the interesting analysis of Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54 AM. J. COMP. L. 337, 384–85 (2006).

¹¹⁴ Council Directive 2000/43, *supra* note 112, 118, pmbl.

¹¹⁵ *See Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (interpreting a person’s “race” in 42 U.S.C. § 1981 as being distinct from the “place or nation of his origin, or his religion,” and insisting on relativity in the understanding of “race” in time and in space).

¹¹⁶ Council Directive 2000/43, *supra* note 112, 118, pmbl., art. 3.

¹¹⁷ According to Article 3.2 of the same Directive:

This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Id. art. 3.

¹¹⁸ Council Directive 2000/78, art. 4, 2000 O.J. (L 303) 16, 19 (EC). According to Article 4, paragraph 1 of the Directive a difference of treatment on the grounds of religion “shall not constitute discrimination where, by reason of the nature of the particular occupational activities

what constitutes a “genuine and determining occupational requirement,” provided that the objective is “legitimate” and the requirement is “proportionate.”¹¹⁹ Under the scope of this Directive, the state can legitimately prevent public teachers from wearing religious symbols.¹²⁰ A similar exemption for “a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise” exists in United States federal antidiscrimination legislation.¹²¹ However, in the European Union Directive there is no reference to the possibility of “reasonable accommodation” for the employee’s religious observance or practice, as exists in the American legislation.¹²²

B. The Moderately Restrictive View of American Law

The different historical background in the United States led to a different understanding of secularism. In the United States, secularism is based on an accommodation of the plurality of various sects, which have existed and been renewed throughout centuries by the waves of immigrants flowing into the country.¹²³ If the dominant conception in France reflects a top-to-bottom imposition of a negation of these differences in the public sphere—to the extent that they do not abide by the official version of human dignity promoted by the French state—the dominant conception in the United States reflects a bottom-up secularism allowing expression of religious differences.

The first religious communities, principally Protestant, were established in New England during the seventeenth century and were intolerant of newcomers.¹²⁴ Legislation against religious minorities existed in many colonial states.¹²⁵ Protection of freedom of religion emerged gradually. By the beginning of the eighteenth century “[t]olerance of dissenters . . . [was] embraced as a matter of principle”¹²⁶ and “[d]uring the Revolutionary era, every colony-turned-state [modified] the Church-State arrangements it had inherited from colonial times.”¹²⁷ During the debates on

concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.” *Id.*

¹¹⁹ CHALMERS ET AL., *supra* note 109, at 562–65.

¹²⁰ *Id.* at 564.

¹²¹ 42 U.S.C. § 2000e-2(e) (2006).

¹²² § 2000(j); *see infra* note 204 and accompanying text.

¹²³ *See infra* notes 125–30 and accompanying text.

¹²⁴ THOMAS CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 21 (1986).

¹²⁵ Legislation against Quakers existed in many New England colonies, such as Connecticut and Massachusetts. *Id.*

¹²⁶ *Id.* at 78. This was a result of the progressive erosion of the “medieval system of religious uniformity” and of the emergence of intellectual currents ranging from “extreme reactionism to religious anarchy.” *Id.* In eighteenth century America, dissenters were “in a happier position than their brethren in England.” *Id.* at 80.

¹²⁷ *Id.* at 134.

the elaboration of the Federal Constitution, there were frequent references to freedom of religion as a right whose explicit protection was indispensable by those who feared that the Federal Constitution would endanger the rights of the states and of the individuals absent a Bill of Rights.¹²⁸ Madison is famous for having noted that the multiplicity of religious sects was itself a guarantee for religious liberty, because no majority could emerge out of this variety, which could “oppress and persecute the rest.”¹²⁹ The multiplicity of sects, as well as the multiplicity of interests, would assure that the federal government would succeed in establishing a system of government where no section of the population would operate as a faction oppressing others: this variety would be reflected in a representative government that would operate on the basis of various checks and balances.¹³⁰ However, this optimism, expressed in the context of the debate between Federalists and Antifederalists for the opportunity to enact a clause protecting free exercise of religion, did not persuade the Antifederalists, who insisted on more definite guarantees.¹³¹ By December 1791, this led to the elaboration of the Bill of Rights, containing the contemporary clause of the First Amendment.¹³² Jefferson was always in favor of a constitutional clause to ensure the protection of religion.¹³³

A federalist-based reading of the First Amendment offers the possibility of seeing the Clause as barring Congress from interfering with state establishment policy.¹³⁴ Inequality of civil rights on the basis of religious belief persisted in the late

¹²⁸ Intervention of Mr. Henry in the Debate of June 12, 1788, in 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 317 (Jonathan Elliot ed., Ayer Co. 1987) (1888) [hereinafter 3 DEBATES]. For Henry, a right as “sacred” as religion “ought not to depend on constructive, logical reasoning.” *Id.*

¹²⁹ 3 DEBATES, *supra* note 128, at 330.

¹³⁰ See McConnell, *supra* note 36, at 1479.

¹³¹ *Id.* at 1480.

¹³² “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

¹³³ See, e.g., Letter from Thomas Jefferson to David Humphreys (March 18, 1798), in POLITICAL WRITINGS 113 (Joyce Appleby & Terence Ball eds., 1999); Letter to James Madison (Dec. 20, 1787), in *id.* at 360–61; Letter to Edward Carrington (May 27, 1788), in *id.* at 364; Letter to James Madison (July 31, 1788), in *id.* at 366; Letter to James Madison (March 15, 1789), in *id.* at 367–69; Autobiography, in *id.* at 355.

¹³⁴ AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32–33 (1998). This reading has been criticized as projecting an anachronistic understanding of the term “establishment,” as the term “establishment” was not understood in the time of the Framers as referring to a merely preferential religious arrangement; therefore, the power to interfere with state religious affairs was not among the delimited powers of the Federal Congress and the non-preferential arrangements of New England were not understood as violating liberty of conscience. See Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 407–11 (2002) (discussing CURRY, *supra* note 124, and the Establishment Clause). Curry stresses that the characterization of the colonial New York church-state system

eighteenth century,¹³⁵ especially depending on the religious affiliation of the new waves of immigrants arriving in the country. Subsequent waves of immigrants caused reactions of intolerance among the existing population, but progressively led to an understanding of secularism as abstention of the State in the exercise of religion.¹³⁶

If the First Amendment initially applied only to Congress, the Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.¹³⁷ It is important to distinguish the activities that can be subsumed to the term “exercise” of religion and thus strongly protected. The Supreme Court has held that ways of life may be interposed as a barrier to reasonable state

as “multiple establishment” is “an understanding that contemporaries did not have.” CURRY, *supra* note 124, at 71. Establishment did not necessarily mean an official religion enjoying a privileged position but rather an “established way of worshipping.” *Id.* at 105–33. South Carolina’s Protestant establishment “amounted only to a method for incorporating churches, and no church received public tax support,” since by 1790 this state’s provisions for freedom of religion protected all religions equally. *Id.* at 150–51. The qualification of “corporated and Established” church was one that many churches sought. *Id.* at 150. “Connecticut continued to assume that Congregationalism was . . . established [, while] Massachusetts, New Hampshire, and Vermont, though they supported religion financially, did not refer to this as an establishment of religion.” *Id.* at 191. Both supporters and opponents of “state support of religion agreed that an establishment of religion . . . constituted a tyrannical intrusion of the government into religious affairs.” *Id.* The New England states (except Rhode Island) continued to provide public support of religion and although scholars refer to this practice as a “multiple establishment,” the citizens of these states did not “describe[] themselves as designing an establishment . . .” *Id.* at 213. For Amar, the First Amendment aims at a division of competences between the federal government and the states, protecting state religious arrangements from infringement by the federal government. AMAR, *supra*, at 32–33. Noah Feldman stresses that the Amendment was aimed at prohibiting establishments in general and assuring that the federal government was not going to reverse any of the guarantees for religious liberty won by the revolutionary states. Feldman, *supra*, at 350. “The framers would never have imagined that *Congress* would possess the power to change state arrangements with respect to religion.” NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 49 (2005). The Amendment “guaranteed two things[. . .] that the government would not compel anybody to support any religious teaching or worship with which [s]he . . . disagreed . . . [and] that the government would not stop anybody from worshipping or practicing [her] religion as [s]he chose.” *Id.*

¹³⁵ Hamburger, *supra* note 47, at 946.

¹³⁶ See, e.g., Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 503, 509–10 (2006); see also John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001) (analyzing jurisprudence of the Establishment Clause from a political perspective); McConnell, *supra* note 36, at 1422–23 (describing the intolerant treatment suffered by new arrivals in Massachusetts and Virginia).

¹³⁷ See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Supreme Court reaffirmed this doctrine in *Engel v. Vitale*, 370 U.S. 421 (1962); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Zorach v. Clauson*, 343 U.S. 306 (1952); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

regulation if they are rooted in religious belief and not only on purely secular considerations.¹³⁸ The rights of the Amish community to educate its members and to instill in them a way of life, which is different from the one taught in public schools, was considered significant enough to outweigh the state interest to compulsory high school education for its citizens.¹³⁹ For the Court, “[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.”¹⁴⁰

The crucial inquiry has always been distinguishing between acts dictated by religious precepts—which can be protected as dictated by a religious normative system competing to the one imposed by the state—and those that other counter-vailing considerations render unjustifiable. What justifies the protection is the idea that religious obligations are a form of imperative moral obligations; in other words, there seems to be a conflict of moral duties in this case.¹⁴¹ Although very sensitive to the protection of freedom of religion, the Supreme Court has not gone as far as accepting polygamy on the basis of religious belief.¹⁴²

¹³⁸ See *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972); see also *Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 833 (1989) (citing *Yoder* and reaffirming that only religious beliefs are protected by the First Amendment); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

¹³⁹ According to the Court, “A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.” *Yoder*, 406 U.S. at 224.

The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.

Id. at 225. Mark Tushnet commented that if the Amish prevailed it is because they are a “good” religion, an acceptable way of education in substitution to the one offered by the state. Mark Tushnet, “*Of Church and State and the Supreme Court*”: *Kurland Revisited*, 1989 SUP. CT. REV. 373, 382 (1989). Geoffrey Stone noted that the Court granted preferential treatment to the Amish “in seeming conflict with the central premise of the Court’s establishment and free exercise jurisprudence.” Geoffrey R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985, 987 (1986). In a comparative perspective, it is unlikely that the Amish would have prevailed in a European legal order. See, e.g., Bundesverfassungsgericht [BVERFGGE] [Federal Constitutional Court] Apr. 29, 2003, 1 BvR 436/03, available at http://www.bundesverfassungsgericht.de/entscheidungen/rk20030429_1bvr043603.html (refusing the right of parents to provide private religious schooling at home to their children for religious objections to state education).

¹⁴⁰ *Yoder*, 406 U.S. at 220.

¹⁴¹ See, e.g., *United States v. Seeger*, 380 U.S. 163, 176 (1965).

¹⁴² See *Reynolds v. United States*, 98 U.S. 145 (1878). The Court had no difficulty rejecting polygamy despite a free exercise claim. *Id.* at 166–67. It held that plural marriages

The Free Exercise Clause of the First Amendment is interpreted in conjunction with the Establishment Clause as creating a very dense net of protection for freedom of religion. According to the test established in *Lemon v. Kurtzman*, state action violates the Establishment Clause if it fails to satisfy one of the following prongs: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”¹⁴³

In *Cantwell v. Connecticut*, which concerned a Jehovah’s Witness convicted for breach of the peace for playing an anti-Catholic record to passersby on the streets of New Haven, Connecticut, the Court, following the distinction between belief and act, held that even for cases concerning action a balancing test should be applied “of the two conflicting interests”: freedom to preach against the interest in “peace and good order.”¹⁴⁴ The power to regulate must be so exercised as not “unduly to infringe the protected freedom”; Cantwell had not made an assault or threat of bodily harm, but had only aroused animosity with his unpopular religious views.¹⁴⁵ The Court insisted that the essential characteristic of religious faith and political belief is that they provide a shield for the development of “many types of life, character, opinion and belief,” and that this shield is all the more necessary in the U.S., “for a people composed of many races and of many creeds.”¹⁴⁶ Only “incite[ment to] violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties” is a transgression that can justify state punishment.¹⁴⁷ Animosity as such cannot justify restrictions to freedom of religion.¹⁴⁸

According to Supreme Court case law, until 1990, when a law discriminated against religion as such it should be submitted to strict scrutiny under *Sherbert v. Verner*.¹⁴⁹ Governmental regulation that imposed a burden upon religious practice

cannot be allowed and religious beliefs cannot serve as an excuse of not abiding by this prohibition as the professed doctrines of religious belief cannot be held superior to the law of the land, “and in effect permit every citizen to become a law unto himself.” *Id.* at 167; *see also* *Davis v. Beason*, 133 U.S. 333, 347 (1890) (affirming the judgment indicting a member of the Church of Jesus Christ of Latter-Day Saints for conspiring to register to vote in the Idaho Territory in violation of territorial law requiring registrants to take oath that they are not bigamists or polygamists, or “member[s] of any order, organization or association which teaches, advises, counsels or encourages its members . . . to commit the crime of bigamy or polygamy.”). The oath requirement could raise concerns concerning the distinction between belief and conduct, as proposed by Chief Justice Waite in *Reynolds*. *See Reynolds*, 98 U.S. at 166; *see also* MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* (3d ed. 2011).

¹⁴³ 403 U.S. 602, 612–13 (1971) (citations omitted).

¹⁴⁴ 310 U.S. 296, 307 (1940).

¹⁴⁵ *Id.* at 304, 310.

¹⁴⁶ *Id.* at 310.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 311; *see also* *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

¹⁴⁹ 374 U.S. 398, 402–03 (1963). “Disqualification of appellant for unemployment compensation benefits, solely because of her refusal to accept employment in which she would

must be narrowly tailored to advance a compelling state interest.¹⁵⁰ If a plaintiff can show that a law or governmental practice burdens the free exercise of religious beliefs, the burden shifts to the government to prove that the law or practice is important to the accomplishment of some important or “compelling” secular objective and that it is the least restrictive means for attaining that objective.¹⁵¹ For the Supreme Court, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”¹⁵²

In these cases, the Court protected religiously motivated choices more severely than other personal philosophical choices, an opinion that was moderated in *Employment Division v. Smith*,¹⁵³ in which the Court eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion in reference to a compelling state interest.¹⁵⁴ Under the Free Exercise Clause, neutral laws of general applicability criminalizing behavior may be applied to religious practices even when they are not supported by a compelling governmental interest.¹⁵⁵

The First Amendment

does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons.¹⁵⁶

have to work on Saturday contrary to her religious belief, imposes an unconstitutional burden on the free exercise of her religion.” *Id.* at 398. In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), the Court held for a Jehovah’s Witness who resigned because he was transferred to a department that fabricated turrets for military tanks because Indiana’s denial of unemployment compensation benefits violated “his First Amendment right to free exercise of religion.” *Id.* at 709. “Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.” *Id.* at 717–18. In *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 832–35 (1989), the Supreme Court held that “denial of unemployment compensation benefits . . . on the ground that [appellant’s] refusal to work on Sunday was not based on tenets or dogma of an established religious sect violated the Free Exercise Clause of the First Amendment as applied to the States through the Fourteenth Amendment.”

¹⁵⁰ *Sherbert*, 374 U.S. at 403.

¹⁵¹ McConnell, *supra* note 36, at 1416–17.

¹⁵² *Thomas*, 450 U.S. at 714.

¹⁵³ 494 U.S. 872, 886 n.3 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 107 Stat. 1488, *as recognized in* *Sossamon v. Texas*, 131 S. Ct. 1651 (2011).

¹⁵⁴ *Smith*, 494 U.S. at 873.

¹⁵⁵ *Id.* at 872.

¹⁵⁶ *Id.*

In this case, the use of forbidden substances in religious rituals could not be protected in reference to the First Amendment.¹⁵⁷ The case appears to reaffirm the principle of equal treatment between religion and non-religion, unless, as the Court insists, the religiously motivated action involves “the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press”¹⁵⁸

Congress, by enacting the Religious Freedom Restoration Act of 1993 (RFRA), tried to circumvent the application of *Smith* by imposing anew the compelling interest test for any violation of freedom of religion by all state and federal laws “neutral” toward religion.¹⁵⁹ The Supreme Court subsequently ruled that the RFRA cannot be applied to the states, developing an analysis in favor of the remedial rather than substantive nature of the Enforcement Clause of the Fourteenth Amendment.¹⁶⁰ The RFRA does, however, still apply to the federal government.¹⁶¹ Even though the RFRA was struck down with regard to state and local laws, many states passed laws applying the *Sherbert/Yoder* compelling interest test to their own acts.¹⁶²

In *City of Boerne v. Flores*, the Court repeated that *Smith* and following cases in which a neutral generally applicable law had failed to pass constitutional muster, were “cases in which other constitutional protections were at stake” as well.¹⁶³ The Court cited *Wisconsin v. Yoder*, showing that the case concerned the right to the free exercise

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 881.

¹⁵⁹ 107 Stat. 1488, *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997). The RFRA prohibited “government” from “substantially burdening” a person’s exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest.” *Id.* § 3. The RFRA’s mandate applies to any branch of federal or state government, to all officials, and to other persons acting under color of law. *Id.* § 5. Its universal coverage includes “all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of [the RFRA].” *Id.* § 6.

¹⁶⁰ *Boerne*, 521 U.S. 507. The Supreme Court held that under Section 5 of the Fourteenth Amendment, the power of the Congress to enforce this Amendment is remedial and not substantive. *Id.* at 519–20. For the Court, Congress “has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.” *Id.* at 519.

¹⁶¹ Carolyn N. Lung, *The Battle for Religious Freedom*, in *LAW AND RELIGION: CASES IN CONTEXT* 107 (Leslie C. Griffin ed., 2010) (noting that the statute still applies to federal government). *But see* MCCONNELL ET AL., *supra* note 142, at 193–94 (expressing concerns about the RFRA’s scope).

¹⁶² *See, e.g.*, ALA. CONST. amend. 622 (1998); ARIZ. REV. STAT. ANN. §§ 41-1493, 41-1493.01 (2011); CONN. GEN. STAT. ANN. § 652-571b (West 2011); FLA STAT. ANN. §§ 66 761.01–.05 (West 2011); IDAHO CODE ANN. § 73-4 (West 2011); 77 ILL. COMP. STAT. ANN. § 35/1–/15 (West 2011); MO. REV. STAT. § 1.302 (West 2011); N.M. STAT. ANN. §§ 28-22-1 to -5 (West 2011); 51 OKLA. ST. ANN. §§ 251–258 (West 2011); R.I. GEN. LAWS ANN. § 42-80.1 (West 2011); S.C. CODE ANN. §§ 1-32-10 to -40 (2011); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–.012 (West 2011).

¹⁶³ *Boerne*, 521 U.S. 514.

of religion as well as “the right of parents to control their children’s education.”¹⁶⁴ For the *Smith* Court, “where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”¹⁶⁵ However, “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.”¹⁶⁶

In a posterior case, *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, the Court ruled that laws that are not neutral or of general application and that burden a religious practice must undergo the most rigorous scrutiny: they “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”¹⁶⁷ That case indicates disapproval of animus against a specific religious view or practice. Therefore, ordinances prohibiting religious killings of animals “for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed,”¹⁶⁸ but excluding almost all other animal killings, must meet this criterion. The crucial element for the Court was whether “the object or purpose of a law is the suppression of religion or religious conduct.”¹⁶⁹ For the Court, “[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.”¹⁷⁰ The Court further recognized that “[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.”¹⁷¹ The ordinances under examination could not withstand strict scrutiny, as they were not narrowly tailored to accomplish the asserted governmental interests of protecting public health and preventing cruelty to animals.¹⁷² They were overbroad or under-inclusive.¹⁷³ “[W]here . . . government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the governmental interests given in justification of the restriction cannot be regarded as compelling.”¹⁷⁴ The Free Exercise Clause still “forbids subtle departures from neutrality”¹⁷⁵ and “covert suppression of particular religious beliefs.”¹⁷⁶

¹⁶⁴ *Id.*

¹⁶⁵ *Emp’t Div. v. Smith*, 494 U.S. 872, 884 (1990).

¹⁶⁶ *Boerne*, 521 U.S. at 514 (discussing *Smith*).

¹⁶⁷ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

¹⁶⁸ *Id.* at 527.

¹⁶⁹ *Id.* at 533.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 542.

¹⁷² *Id.* at 542–46.

¹⁷³ *Id.* at 546–47.

¹⁷⁴ *Id.* In this case, with regard to preventing cruelty to animals, “the ordinances [were] drafted with care to forbid few killings but those occasioned by religious sacrifice.” *Id.* at 543. With regard to the city’s interest in public health, the statute was underinclusive because it did not prohibit nonreligious killing or disposal after killing. *Id.* at 544–45. The statute was also underinclusive with regard to the health risk posed by consumption of uninspected meat. *Id.* at 545.

¹⁷⁵ *Id.* at 534 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)).

¹⁷⁶ *Id.* (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986)).

The French law banning the covering of one's face in public places, although enunciated as a law of a general applicability and seems to be a *prima facie* neutral law, was construed and aimed at a specific religious practice. It is reminiscent of the facts of the *Church of Lukumi* case: animus against a specific religion.¹⁷⁷ Therefore, a justification of the protection of a compelling interest would be indispensable. In *Abington School District v. Schempp*, the Supreme Court ruled that whether a law constitutes an establishment of religion or a violation of religious freedom is largely a function of whether the legislature intended to aid or hinder religion.¹⁷⁸ For John Hart Ely, what justifies control of the courts is whether the majority of the decision makers of the legislative body "were moved by an unconstitutional criterion of selection in making the choice in issue."¹⁷⁹ The French law aims at specific religious beliefs, whose religious character the decision-makers negate describing them as "political."¹⁸⁰ As a federal court ruled following the *Church of Lukumi* case, "A finding of mere facial neutrality, does not end the inquiry. To pass constitutional muster a governmental law or policy must also be neutral in purpose and effect."¹⁸¹ For a similar law in the United States clearly aiming to limit the practices of a specific religion, courts would have to examine if other countervailing considerations would justify it. The protection of national security for very narrowly defined circumstances and identity control would most likely be the only justifications that federal courts in the United States would accept to uphold it.

The law would be very likely considered by United States courts under the doctrine of "hybrid rights." According to this doctrine, "two constitutional claims, each of which would be insufficient on its own, require strict or at least heightened scrutiny when combined in a single action."¹⁸² Freedom of expression weighs heavily in this case. The *Smith* Court allowed for this possibility, citing numerous cases in which

¹⁷⁷ *Id.* at 579.

¹⁷⁸ 374 U.S. 203, 222 (1963); *see also* Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968) (discussing and quoting *Schempp*).

¹⁷⁹ John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1268 (1970). Ely notes, however, that "in discretionary choice situations . . . when an unconstitutionally motivated choice can be . . . defended in terms of a legitimately defensible difference, motivation should not be considered." *Id.* at 1274. An apparel regulation in schools for example, even if it might be motivated by an unconstitutional motivation, if it "can be justified in terms of health[, it] is amenable to rational evaluation and defense . . ." *Id.* Thus, finding "a rational and . . . inoffensive explanation for a choice . . . render[s] impossible a judicial finding of unconstitutional motivation." *Id.* at 1275.

¹⁸⁰ RAPPORT D'INFORMATION, *supra* note 1, at 89. For a presentation of the relevant debates inside French civil society, see ANNA KORTEWEG & GÖKCE YURDAKUL, *THE HEADSCARF DEBATE: CONFLICTS OF BELONGING IN NATIONAL NARRATIVES* (2012).

¹⁸¹ *Rader v. Johnston*, 924 F. Supp. 1540, 1553 (D. Neb. 1996) (citing *Church of Lukumi*, 508 U.S. at 531–32).

¹⁸² MCCONNELL ET AL., *supra* note 142, at 174. The doctrine was criticized in *Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993).

the Court held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action when the Free Exercise Clause is at stake in conjunction with other constitutional protections, such as freedom of speech and of the press.¹⁸³ The promotion of gender equality is certainly an important interest, however, because dress choice as self-expression is concerned, the expressive elements would likely outweigh other governmental interests. In *Cohen v. California*, the general interest for security and the authority of the military did not outweigh the expressive interest of the person wearing the jacket criticizing both the Vietnam War and the draft.¹⁸⁴ The fact that the burka is often self-imposed relativizes the justification that the prohibition aims to protect women from the physical or psychological violence of men.¹⁸⁵

Concerning the right of litigants to wear religious headscarves in courtrooms, a federal district court referred to the *Smith* precedent to dismiss a damages action against a judge who had asked the plaintiff to take off her veil during the hearing of a small claim action.¹⁸⁶ The court held that “the right to free exercise of religion does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.”¹⁸⁷ In a more recent decision the same court did not consider the free exercise of religion claim of the plaintiff, because the headscarf “could have been mistaken for a fashion accessory” and the plaintiff removed her hijab without hesitation when asked—thus, her conduct and comments undermined her ability to meet the plaintiff’s burden to show an injury in fact.¹⁸⁸

¹⁸³ *Emp’t Div. v. Smith*, 494 U.S. 872, 881 (1990); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school); *Follett v. McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (acknowledging the right of parents to direct the education of their children). The Court also cited “cases prohibiting compelled expression, decided exclusively upon free speech grounds, [which] have also involved freedom of religion. *Cf. Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943) (invalidating compulsory flag salute statute challenged by religious objectors).” *Smith*, 494 U.S. at 882.

¹⁸⁴ 403 U.S. 15 (1971).

¹⁸⁵ Steve Hendrix, *The Few U.S. Muslim Women Who Choose Full Veil Face Mix of Harassment, Sympathy*, WASH. POST, Apr. 13, 2011, http://www.washingtonpost.com/local/the-few-us-muslim-women-who-choose-full-veil-face-mix-of-harassment-sympathy/2011/04/13/AFLrwzYD_story.html.

¹⁸⁶ *Muhammad v. Paruk*, 553 F. Supp. 2d 893, 900 (E.D. Mich. 2008).

¹⁸⁷ *Id.*

¹⁸⁸ *Council on Am.-Islamic Relations, Mich. v. Callahan*, No. 09-13372, 2010 WL 1754780, at *4–5 (E.D. Mich. Apr. 29, 2010).

A law, like the one adopted in France, banning the hijab for students in schools would most likely be considered unconstitutional in the United States.¹⁸⁹ A district court issued a consent order in the case of a sixth-grade girl who had been barred from wearing her hijab to school.¹⁹⁰ The court held that the girl was allowed to wear her hijab at school and the school district was obligated to accommodate the religious needs of other children and amend its dress code.¹⁹¹ According to federal case law, bans on religious symbols on school premises violate students' First Amendment rights of free speech and free exercise.¹⁹² The Supreme Court has held that "students or teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁹³ "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression . . . [since] [a]ny variation from the majority's opinion may inspire fear."¹⁹⁴ For the Court, only conduct that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," would sustain a prohibition on speech.¹⁹⁵ Although federal courts have upheld the constitutionality of dress codes and "no hats" policies for students in schools submitting them to intermediate scrutiny,¹⁹⁶

¹⁸⁹ See Jennifer M. Westerfield, *Behind the Veil: An American Legal Perspective on the European Headscarf Debate*, 54 AM. J. COMP. L., 637, 661–62 (2006).

¹⁹⁰ Consent Order, *Hearn v. Muskogee Pub. Sch. Dist.* 020, No: CIV 03-598-S (E.D. Okla. 2004), available at http://www.justice.gov/crt/spec_topics/religiousdiscrimination/hearn_consent_decree_final.pdf.

¹⁹¹ *Id.*

¹⁹² *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997) (holding that the school district's dress code regulation barring rosaries worn on the outside of clothing violated the First Amendment).

¹⁹³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). However, schools can prohibit "sexually explicit, indecent, or lewd speech." *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986). Schools can also regulate school-sponsored speech. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–73 (1988). In *Morse v. Frederick*, the Court determined that schools can prohibit speech "advocating illegal drug use." 551 U.S. 393, 410 (2007) (Alito, J., concurring).

¹⁹⁴ *Tinker*, 393 U.S. at 508.

¹⁹⁵ *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966) (internal quotation marks omitted)).

¹⁹⁶ So long as the regulation is viewpoint- and content-neutral, courts will assess whether the dress code "furthers an important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on [free speech] are no more [restrictive] than . . . necessary to [further] that interest." *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2001) (citation omitted).

Because (1) choice of clothing is personal expression that happens to occur on the school premises and (2) The School Board's uniform policy is unrelated to any viewpoint, a level of scrutiny should apply in this case that is higher than the standard in *Kuhlmeier*, but less stringent than the school official's burden in *Tinker*.

Id.; see also *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1055 (2010). The *Palmer* court noted that "*Canady* has been followed by

they have also held that in cases of headgear, which constitutes speech and represents exercise of religion, students have “‘hybrid’ constitutional protection arising out of both the free speech and free exercise,” thus meriting strict scrutiny.¹⁹⁷ Conspicuous religious symbols are protected, whereas political conspicuous messages on T-shirts, for example, are not protected in schools.¹⁹⁸ Prohibition of covering the face in schools could be justified only if proven that it bars the “‘personal intercommunication among students’ necessary to an effective educational process,”¹⁹⁹ as well as to ensure order in a school with concrete demonstration of fears of disorder (e.g., from gangs), provided that the students have other means of individual expression.²⁰⁰

The question of whether state employees are authorized to wear signs of religious affiliation while in service is still open in the United States. In some cases the question appeared as an issue of discrimination on the grounds of religion in the access to employment forbidden under 42 U.S.C. § 2000e, in accordance with Title VII of the 1964 Civil Rights Act.²⁰¹ The law applies to the federal government and anticipates

three other circuits . . .” *Id.* at 508; *see, e.g.*, *Bar-Navon v. Brevard Cnty. Sch. Bd.*, 290 F. App’x 273, 276–77 (11th Cir. 2008); *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 428–32 (9th Cir. 2008); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 390–93 (6th Cir. 2005). Further, *Canady* “has effectively become the national standard for analyzing content-neutral student speech.” *Palmer*, 579 F.3d at 508.

¹⁹⁷ *Isaacs v. Bd. of Educ. of Howard Cnty.*, 40 F. Supp. 2d 335, 338 (D. Md. 1999). For a commentary, see Anita L. Allen, *Hijabs and Headwraps: The Case for Tolerance*, in *FREEDOM OF EXPRESSION IN A DIVERSE WORLD* 115–27 (Deirdre Golash ed., 2010). *Canady* also allows for a different outcome in case of interference with the right to free exercise of religion. *Canady*, 240 F.3d at 444 n.5.

¹⁹⁸ *See* *Sistare*, *supra* note 19, at 142 (highlighting these inconsistencies).

¹⁹⁹ *Lowry v. Watson Chapel Sch. Dist.*, 508 F. Supp. 2d 713, 720 (E.D. Ark. 2007) (quoting *Canady*, 240 F.3d at 443).

²⁰⁰ Federal courts have upheld the constitutionality of a school uniform policy if it “does not foreclose all means of individual expression” such as bracelets wristbands and armbands. *Lowry*, 508 F. Supp. 2d at 719. “[S]o long as a dress code . . . provides [students] with some means to communicate their speech during school,” it is a restriction that is no greater than is essential to the furtherance of the school’s interests. *Palmer*, 579 F.3d at 513.

²⁰¹ The statute provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2006) (alteration in original).

its effect on state laws.²⁰² The statute foresees an exemption to its application for “a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”²⁰³ Employees have a right to have their religious needs accommodated if this does not create an “undue hardship” on the employer.²⁰⁴ For police departments, a federal court of appeals ruled that reasonable accommodation can be obligatory under Title VII.²⁰⁵ For teachers in public schools, only two states—Pennsylvania and Nebraska—maintain laws that ban religious

²⁰² § 2000e-7 provides:

Effect on State laws.

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Despite the holding in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court has held that Congress has more authority under Section 5 of the Fourteenth Amendment when issues of discrimination and rights submitted to heightened scrutiny are at stake such as issues of discrimination. *See Tennessee v. Lane*, 541 U.S. 509 (2004); *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003). For further analysis of this, see ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 233–35 (4th ed. 2011).

²⁰³ § 2000e-2(e).

²⁰⁴ § 2000e(j). (“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”). The European Union Directive, on the other hand, does not contain an explicit reference to the possibility of reasonable accommodation of religious practices. *See Council Directive 2000/78, supra* note 118.

²⁰⁵ *See, e.g., Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (holding that the police department is obliged to tolerate the beard of Muslim police officers). *But see Webb v. City of Philadelphia*, 562 F.3d 256, 260 (2009) (holding that the requested religious accommodation posed undue hardship to the police department and distinguishing *Fraternal Order of Police*). An intermediate level of scrutiny applied in *Fraternal Order of Police*, compared to *Smith* and *Church of Lukumi* which require a compelling reason, because it arose in the public employment context. *Fraternal Order of Police*, 170 F.3d at 366 n.7. As for accommodation in the military, the Court has held that “[i]n instinctive obedience, unity, commitment and esprit de corps” are goals of the military, which differentiate it from the civilian state. *Goldman v. Weinberger*, 457 U.S. 503, 507 (1986). Without rendering the guarantees of the First Amendment entirely nugatory, these aspects of military life justify “deference to the professional judgment of military authorities concerning the importance of military interest”; thus, dress regulations that do not permit the wearing of religious apparel, such as a yarmulke, are not prohibited by the First Amendment. *Id.* In 1987, however, Congress amended Section 774 of Title 10 of the United States Code allowing the wearing of items of religious apparel while in uniform with two exceptions: “(1) in circumstances with respect to which the Secretary determines that the wearing of the item would interfere with the performance of the member’s military duties; or (2) if the Secretary determines, under regulations under subsection (c), that the item of apparel is not neat and conservative.” 10 U.S.C. § 774(b) (2006).

garb²⁰⁶ and similar regulations have been sustained in two others—New York²⁰⁷ and New Mexico²⁰⁸—while challenges to the toleration of religious dress in the classroom, rather than to rules forbidding such dress, have been rejected in five other states.²⁰⁹ The more recent federal case law indicates a split on the issue. For instance, the Court of Appeals for the Third Circuit ruled, in *United States v. Board of Education*, that Pennsylvania’s Garb Statute banning religious attire for teachers was “important to the maintenance of an atmosphere of religious neutrality in the classroom.”²¹⁰ More recently, however, the District Court for the Western District

²⁰⁶ NEB. REV. STAT. § 79-898 (2011); PA. STAT. ANN. 24 § 11-1112 (2011). However, the General Assembly of Pennsylvania has proposed an amendment to section 11-1112, which would repeal that section; the amendment was referred to the Committee on Education in May 2011. H.B. 1581, 2011 Leg., Reg. Sess. (Pa. 2011).

²⁰⁷ *O’Connor v. Hendrick*, 77 N.E. 612 (N.Y. 1906) (holding that control over the habiliments of teachers is essential to the proper management of public schools).

²⁰⁸ *Zellers v. Huff*, 236 P.2d 949, 964–65 (N.M. 1951) (noting that if religious persons are “employed as teachers in . . . public schools they must not dress in religious garb or wear religious emblems”).

²⁰⁹ See e.g., *City of New Haven v. Town of Torrington*, 43 A.2d 455, 458–59 (Conn. 1945) (holding that the wearing of religious garb by teachers does not affect nonsectarianism of school if the school is under public control and “free from secular instruction.”); *Johnson v. Boyd*, 28 N.E.2d 256, 266 (Ind. 1940) (“[M]embership in any particular church can neither legally qualify nor disqualify a teacher” from teaching in public school, even if they wear the dress of their religious orders because it does not belong to “the courts to decide [if] the cut of a man’s coat or the color of a woman’s gown is sectarian teaching, because they indicate sectarian belief.”); *Rawlings v. Butler*, 290 S.W.2d 801 (Ky. 1956). In *Rawlings*, the court stated that while the dress and emblems worn by these Sisters proclaim them to be members of certain organizations of the Roman Catholic Church and that they have taken certain religious vows, these facts do not deprive them of their right to teach in public schools, so long as they do not inject religion or the dogma of their church. The garb does not teach. It is the woman within who teaches. The dress of the Sisters denotes modesty, unworldliness and an unselfish life

Rawlings, 290 S.W.2d at 804.

The court also noted that “[i]f they were prevented from teaching in the public schools because of their religious beliefs, then they would be denied equal protection of the law in violation of the Fourteenth Amendment of the Federal Constitution.” *Id.* (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940)); see also, e.g., *Gerhardt v. Heid*, 267 N.W. 127 (N.D. 1936) (noting that the wearing of religious habit and contributing a large portion of earnings to the order of which the teachers are members does not convert the school into a sectarian school, provided that the teachers do not seek to impress their own religious beliefs while acting as teachers); *Moore v. Bd. of Educ.*, 212 N.E.2d 833, 841 (Ohio Misc. 1965) (providing that in the absence of statute or regulation religious garb may be worn by teachers in public schools “so long as they do not inject religion or the dogma of their church” (quoting *Rawlings*, 290 S.W.2d at 804)).

²¹⁰ 911 F.2d 882, 894 (3d Cir. 1990). For the court, reasonable accommodation would impose “an undue hardship [to] require [the] school board to violate an apparently valid criminal statute [banning the religious attire,] thereby exposing its administrators to criminal prosecution and the possible consequences thereof.” *Id.* at 891. The mandatory Garb Statute provided

of Pennsylvania held that “it is unlikely that the Garb Statute would withstand the heightened scrutiny and endorsement analysis to which it now must be subjected” under the First Amendment.²¹¹ Distinguishing its ruling, the district court noted that the court in *Board of Education* “was not faced with, and did not address, any Establishment Clause challenge”: the “subsequent doctrinal developments” in the First Amendment precedent of the Supreme Court following *Employment Division v. Smith* impose state neutrality between religious and non-religious symbolic expression.²¹² “A proper respect for both the Free Exercise and the Establishment Clauses [imposes state] neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over non-adherents”²¹³; the statute violated the neutrality policy, discriminating between religion and non-religion, because secular “employees may publicly display and express other secular messages through jewelry, dress, insignia and emblems while [teaching].”²¹⁴ Balancing the interest of the employee as a citizen in commenting upon matters of public concern with the interest of the state as an employer, in promoting the efficiency of the public services, the court found that the plaintiff’s wearing of a cross was not been disruptive, distracting or confusing to students.²¹⁵ If this judgment applies to the Christian cross, the principle of equal treatment among religions makes it applicable also to headscarves. The degree of visibility of the religious sign is not a factor that should affect the exercise of a fundamental right. The debate of whether the free exercise of religious expression would justify a reasonable accommodation or a ban for signs of religious affiliation for teachers is still open.²¹⁶

In 2006, a federal court ruled in favor of reasonable accommodation for identity control for a Muslim woman wearing a burka in narrowly defined circumstances.²¹⁷ The requirement to remove the burka from obstructing the view of the face while having one’s picture taken for driver’s license was found not to be a “substantial

a Title VII defense to the religious discrimination and failure to accommodate. *Id.* at 886. The case was criticized as being in tension with antidiscrimination legislation. See Holly M. Bastian, Case Comment, *Religious Garb Statutes and Title VII: An Uneasy Coexistence*, 80 GEO. L.J. 211 (1991).

²¹¹ *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 555 (W.D. Pa. 2003) (granting a preliminary injunction).

²¹² *Id.*

²¹³ *Id.* at 549 (citations and internal quotation marks omitted).

²¹⁴ *Id.* at 552.

²¹⁵ *Id.* Although “[e]lementary school children as a group are more impressionable than high school or college students, . . . [this] is not a sufficient reason for discriminating against the First Amendment rights of [elementary school] employees unless the employees are doing something that is likely to influence the students by exploiting their impressionability.” *Id.* at 553.

²¹⁶ For further discussion of this debate generally, see KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? (2005).

²¹⁷ *Freeman v. Dep’t. of Highway Safety & Motor Vehicles*, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006).

burden,” provided that the Department of Highway Safety “would accommodate [the applicant’s] veiling beliefs by using a female photographer with no other person present.”²¹⁸ Identity control is a legitimate reason for not allowing covering of the face: the United States Department of State requires that hats and headcoverings be removed for passport photos, unless worn daily for a religious purpose, provided that they allow visibility of the face.²¹⁹

II. UNDERLYING PHILOSOPHY²²⁰

A. Role of the State

1. The French “Rational” Republic . . .

The Report of the French National Assembly justifies the necessity of the burka ban in order to guarantee the authenticity of the will of the women wearing it.²²¹ Referring to *Discours sur la Servitude Volontaire* by Étienne de la Boétie,²²² the Report stresses the need to protect the women from themselves, seeing their will to wear the burka as “alienated” from a normative conception of what this will should be.²²³ However, this normative conception of what constitutes the “proper” exercise of one’s liberty is imposed by the state. Is this a satisfactory justification of the legitimacy of the state to define whether a specific exercise of the liberty of self-definition associated with the freedom of conscience is “real” or not? At the origins of understanding religious freedom, which have led to the burka ban, is the doctrine of the reason of the state, a specific conception of French republicanism, and the role of the state concerning the definition of the content of liberty.

The burka ban, like the hijab ban in public schools in France, is justified by the need to protect the girls wearing a burka from social pressure when the choice to wear it is not authentically theirs.²²⁴ It also aims at protecting them from themselves when wearing the burka happens to be an authentic choice of the women concerned.²²⁵ This exercise of human liberty is considered as inappropriate, as based on the “wrong”

²¹⁸ *Id.* at 56.

²¹⁹ *Frequently Asked Questions, Photo Requirement*, DEP’T OF STATE, http://travel.state.gov/passport/pptphotoreq/photofaq/photofaq_5291.html (last visited Mar. 15, 2012).

²²⁰ For preliminary analysis of the philosophy which constitutes the background understanding of republicanism on the imaginary level in France and in the United States, see Tourkochorit, *supra* note 22.

²²¹ RAPPORT D’INFORMATION, *supra* note 1, at 22.

²²² See ÉTIENNE DE LA BOÉTIE, *THE POLITICS OF OBEDIENCE: THE DISCOURSE OF VOLUNTARY SERVITUDE* (Harry Kurz trans., 1975) (1574).

²²³ RAPPORT D’INFORMATION, *supra* note 1, at 43. The Report refers to the hearing of Abdennour Bidar, a philosopher, using the terms “alienated subjectivities or liberties.” *Id.*

²²⁴ *Id.* at 13, 22, 128.

²²⁵ *Id.* at 22.

reasons. The state is permitted to intervene in order to protect what constitutes the “real” liberty of the individuals. State intervention is based on the paradoxical assumption that only the state can define the proper content of religious liberty. That assumption indicates trust towards the state as the competent agent *par excellence* to assure that liberty is real and does not remain an empty form. Ever since the French Revolution, the metaphysic universalism of the French Declaration of the Rights of Man and of the Citizen went together with a conception of the role of the state as charged with the mission to guarantee the effective exercise of liberty. According to this conception, the state is trusted with the mission to guarantee not only the protection of negative liberty, but also the protection of positive liberty.²²⁶ Positive liberty is understood here in the political sense: from the point of view of the ability of the actor to participate in the political sphere and in political decision making, as well as a social right, as the necessity for the state to guarantee the preconditions and presupposition of positive and negative liberties, so that liberty becomes substantive and does not remain an empty form, a fiction deprived of essential content according to the famous Marxist critique.²²⁷ The mission of the state would thus be to guarantee negative liberty, as well as the preconditions for the exercise of negative liberty. There is also another meaning of positive liberty, a moral meaning²²⁸ associated to the power of self-determination; in this sense, dominating oneself means exercising one’s reason in conformity with one’s superior and autonomous self. All of these conceptions of “positive” liberty were omnipresent at the moment of the French Revolution. The idea of rights, which were later called “social,” was omnipresent at the moment of the foundation, as was the idea that the state has a moralizing role and is the agent *par excellence* that can guarantee that citizens exercise their reason in conformity with their superior and autonomous self.

The justification of the burka ban—to protect the women wearing it from themselves—begs the question of whether the reason of the state is superior to the reason of the individual. According to the French conception, the state is permitted to impose the “proper” use of reason. This conception has its origins in the older doctrine of the “reason of the state”: the semantic proximity corresponds to a specific conception of the role of the state, which emerged during the religious wars.²²⁹ The political structure of the contemporary French state towards religion emerged out of the need of the monarchy to affirm itself upon religious disagreements.²³⁰ The

²²⁶ For a general discussion on negative and positive liberty, see ISAIAH BERLIN, *Two Concepts of Liberty*, in LIBERTY 166, 169–81 (Henry Hardy ed. 2002) (1969).

²²⁷ There are numerous instances where Marx discusses the distinction between real and formal liberty. See, e.g., KARL MARX, *On the Jewish Question*, in THE MARX-ENGELS READER, *supra* note 49, at 27–52; KARL MARX, THE CAPITAL (Ben Fowkes trans., 1976).

²²⁸ See BERLIN, *supra* note 226, at 178–79.

²²⁹ Marcel Gauchet, *L’État au Miroir de la Raison d’État: La France et la Chrétienté*, in RAISON ET DÉRAISON D’ÉTAT: THÉORICIENS ET THÉORIES DE LA RAISON D’ÉTAT AUX XVII^e ET XVII^e SIÈCLES 193–244 (Yves Charles Zarka ed., 1994).

²³⁰ *Id.*

emergence of the doctrine of the “reason of the state,” just like the doctrine of the “divine right” of kings, is the state response to the irrationality of religious conflict,²³¹ which led to the Thirty Years War. A similar program of strict separation of church and state was realized by the Constituent Assembly in 1790 with the civil constitution of the clergy, which, although abolishing monarchy, accomplished the monarchy’s designs.²³² The separation of church and state is accomplished through the attribution of a strong spiritual power upon the temporal power: the state should have a morality independent from religion and at the same time it should have moral supremacy towards all religions.²³³ “Theocracy is reborn as ideocracy.”²³⁴

Another important factor is the fascination concerning the collective power in France, which has been marked by the heritage of absolutism. The French legal and political order is dominated by an *ex ante* understanding of an organic unity between the state and civil society, which has its origin in the metaphysical conception of the same unity between the royalty and its subjects. At the moment the Revolution took place, there was only a reconceptualization of the role of power without any qualitative change in the extent of its authority upon society.²³⁵ Although the exercise of individual rights is recognized, in parallel the content and the limits of these rights will be defined by the new political authority, the Parliament, which substitutes itself in place of the royal authority.²³⁶ The Parliament expresses from now on the impartial point of view, the idea of the general will that Rousseau talks about. Public authority, far from being a threat to liberty, according to the Anglo-Saxon model, is trusted to realize the possibility of men to constitute themselves as human beings and citizens.²³⁷ Citizenship and independence, instead of being contradictory, validate each other and a human being is elevated to the dignity of a human being through being a citizen.²³⁸ By distancing oneself from the details that define one’s existence and elevating oneself to the point of view of universality, a citizen leads a meaningful and liberating life.

²³¹ GAUCHET, *supra* note 25, at 32–33; Michel Troper, *Sovereignty and Laïcité*, 30 CARDOZO L. REV. 2561, 2566 (2009).

²³² GAUCHET, *supra* note 25, at 36.

²³³ *Id.* at 39–45.

²³⁴ *Id.* at 59.

²³⁵ For more history and analysis of the French Revolution, see generally FRANÇOIS FURET, *INTERPRETING THE FRENCH REVOLUTION* (Elborg Forster trans., 1981) (translating FRANÇOIS FURET, *PENSER LA REVOLUTION FRANÇAISE* (1978)); JAUME, *supra* note 32; LUCIEN JAUME, *LE DISCOURS JACOBIN ET LA DÉMOCRATIE* (1989); and PIERRE ROSANVALLON, *LA DÉMOCRATIE INACHEVÉE: HISTOIRE DE LA SOUVERAINETÉ DU PEUPLE EN FRANCE* (2000).

²³⁶ FURET, *supra* note 235, at 199–200.

²³⁷ *Id.* at 200.

²³⁸ “[W]e do not . . . begin to become men [but only after having] been Citizens.” JEAN-JACQUES ROUSSEAU, *Geneva Manuscript (First Version of Social Contract)*, in 4 *THE COLLECTED WRITINGS OF ROUSSEAU* 81 (Roger D. Masters et al. eds., Judith R. Bush et al. trans., 1994) (translating JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL, MANUSCRIT DE GENÈVE, OEUVRES COMPLÈTES* (1967)). Therefore, it is being a citizen that makes one a man according to Rousseau. *Id.*

The dignity associated with the quality of being a citizen meant that particular interests can be heard only if they can be reformulated in the language of the general interest. The Chapelier Law, prohibiting associations,²³⁹ can be understood as preventing the formation of collectivities, which form strong social authorities giving way to a competing legitimacy in opposition to the legitimacy of the political authority and thus constituting a threat of partiality. Religious affiliations are particularly threatening due to the intense allegiance of religious beliefs, which can lead to strong collectivities in opposition to the political authority. Today, this version of republicanism has been modified and politics in search of its own legitimacy must legitimize religion in view of the search of meaning.²⁴⁰

Another element that defined the conception of the state in France was the struggle against inequality of wealth and privilege during the French Revolution. This struggle led to the emergence of the idea (also operating upon the ideological presupposition of an organic unity between the state and its citizens) that a society that wants to think of itself as composed of individuals cannot remain indifferent to the absence in one of its members of the autonomy which constitutes her as individual.²⁴¹ In this way, society conflicts with its own aim to produce individuals with potential for independence.²⁴² The French Revolution aimed at consecrating not only the proclamation of negative liberty but also the consecration of positive liberty, in the sense of “effective” liberty. The need to establish a new “political sociability,”²⁴³ abolishing a hierarchically organized society and establishing true equality, was another cause of the French Revolution, which aimed at abolishing a morally corrupt society organized in concentric spheres around the king and had a profoundly moralizing role aiming at regenerating humanity. The French revolutionaries were led to the impasse of the Terror, in attempting to impose an a priori ideal of morality upon a civil society, which was not ready for it.²⁴⁴ The integral democracy as applied by the Jacobins led to the antithesis of what it pretended to be, to a totalitarian regime, which completely absorbed the private man in the citizen²⁴⁵ in its attempt to assure moral transparency and to resolve the social question. The destruction of individuality and the absorption of the individual in the citizen in the attempt to establish the domination of truth on earth and to guarantee effective equality of all indicate the failure to solve

²³⁹ *Le Chapelier Law*, GEORGE MASON UNIV., ROY ROSENZWEIG CTR. FOR HISTORY & NEW MEDIA, <http://chnm.gmu.edu/revolution/d/370/> (last visited Mar. 15, 2012) (citing JOHN HALL STEWART, A DOCUMENTARY SURVEY OF THE FRENCH REVOLUTION 165–66 (1951)) (enacted by the French National Assembly on June 14, 1791, the law was repealed partially in 1864 and 1884.).

²⁴⁰ GAUCHET, *supra* note 25, at 103–10.

²⁴¹ MARCEL GAUCHET, LA RÉVOLUTION DES DROITS DE L’HOMME 99–100 (1989).

²⁴² *Id.*

²⁴³ FURET, *supra* note 235, at 37.

²⁴⁴ G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT 355–63 (A.V. Miller trans. 1977). For an analysis, see Robert Legros, *Hegel Entre Lumières et Romantisme*, 16 CAHIERS DE PHILOSOPHIE POLITIQUE ET JURIDIQUE 143, 156 (1989).

²⁴⁵ JAUME, *supra* note 235.

this problem. The difficulty in responding to the social question and the necessity to provide for the equal dignity of all led to political instability in France throughout the nineteenth century.²⁴⁶

The text of the French Declaration of the Rights of Man and of the Citizen is marked by a universalist idealism with a fascination for collective power that should be redistributed and recomposed.²⁴⁷ The need to transcend the oppressive immanence of the *Ancien Régime* rendered indispensable the idealistic point of view of the French revolutionaries.²⁴⁸ The sanction of the positive law in the Declaration of Rights was indispensable to this effort of regeneration and radical inversion of any value of the *Ancien Régime*. This high level of idealization basically meant that liberty was understood in the metaphysical sense as the foundation of the empirical determination of rights, including all the different meanings of rights, which evolved in the later distinction of “negative” and “positive,” that is “political” and third generation “social” rights.²⁴⁹ The French Revolution led to the elevation on the level of the law of the liberty that a human being has to be a human being, but it is the affirmation of being a citizen that leads to affirm oneself as being human.²⁵⁰ The fact that the rights of man were declared at the same time as the rights of the citizen is not a simple coincidence. It affects their declaration and the meaning of the state’s engagement to provide for them: the Declaration of the Rights of Man and of the Citizen is essentially a civic or political act, which means that the essential realm of their affirmation is the political realm.²⁵¹ The French Declaration safeguards natural rights, which are seen by definition as social, defined in reference to equality.²⁵² Therefore, although the French Declaration is inspired by the individualist current that stresses the need to guarantee the imprescriptible rights of the individual, it simultaneously associates them with political expression that stresses their social basis: rights do not exist outside society, they are bound to the person as a political subject.²⁵³ The logic of the French Declaration assures a correspondence between the rights of the individual and social authority,

²⁴⁶ ROSANVALLON, *supra* note 235.

²⁴⁷ GAUCHET, *supra* note 241, at 46–47.

²⁴⁸ The ideality and universality of the human rights discourse in France comes, for Hegel, from the necessity to negate the particular “non-law” of privileges. *See, e.g.*, BERNARD BOURGEOIS, *PHILOSOPHIE ET DROITS DE L’HOMME, DE KANT À MARX* 82 (1990); HEGEL, *supra* note 54, at 447; Bernard Bourgeois, *Hegel*, in *DICTIONNAIRE DE PHILOSOPHIE POLITIQUE* 267–74 (Philippe Raynaud & Stéphane Rials eds., 1996).

²⁴⁹ Although the conceptual distinction between the three categories of rights emerged later, the question of “assistance” to those in need was key in the revolutionary era. LUC FERRY & ALAIN RENAULT, *PHILOSOPHIE POLITIQUE 3 DES DROITS DE L’HOMME À L’IDÉE REPUBLICAINE* 185–86 (1984).

²⁵⁰ *See supra* note 236 and accompanying text.

²⁵¹ BERNARD BOURGEOIS, *LA RAISON MODERNE ET LE DROIT POLITIQUE*, 121–22 (2000).

²⁵² HEGEL, *supra* note 54, at 463. For further analysis, see JOACHIM RITTER, *HEGEL AND THE FRENCH REVOLUTION* 26 (Richard Dien Winfield trans., 1982). *See also* BOURGEOIS, *supra* note 248; Simone Goyard-Fabre, *Les Lumières Ont-Elles Préparé la Révolution?*, 16 *CAHIERS DE PHILOSOPHIE POLITIQUE ET JURIDIQUE* 23 (1989).

²⁵³ HEGEL, *supra* note 54, at 463.

rather than a sharing between the two.²⁵⁴ For the French, the rights of society are the ones by which the rights of the individual exist and not the other way around.

Thus, in opposition to the dominant spirit in American political development, private liberty is, for the French, to be affirmed and realized through mediation by public authority. The realization of liberty takes place through the state because, according to the French conception, the relation that each person maintains with herself is mediated by the state. The concern to provide for the “realization” of rights combined with the conception of the “rational republic” leads to the acceptance of over-determination, by the state, of the conditions of the realization of liberty. If collective power is in itself something positive, once liberated by its usurpers, it can have only a positive impact upon society. The French conception of liberty makes the absorption of powers, in the unity of the collective sovereign, the instrument of the positive enlargement of the rights of the individual.²⁵⁵ The substitution to the royalty of another imaginary and transcendent entity, the General Will, supposed to be expressing reason, is equivalent to accepting the role of this will as *par excellence* competent to define the limits and the content of liberty, and to define the relation that each person has with herself, according to an inversed conception of the autonomy of the subject. This realization of “real” liberty seems to be somehow antinomical, because the agent of realization of rights is the authoritative and constraining structure of the state. The organic association between the state and society, which marked the political imaginary in France, justifies the oppression of a part of the members of society in order to impose this “real” conception of the proper sense of a “human being,” this “dignity” that is conceived as transcending the human beings whose quality it is.

In France, the state is invested with the task of realizing the reason of the citizens, because they are considered incapable of realizing it by themselves. The conception of the state in France is, as an entity charged with the moral duty of purifying and rendering human beings into citizens, that is, helping them attain the dignity which is in conformity to their “nature.” This legitimizes the state to intervene in order to define the positive content of liberty in the sense that Isaiah Berlin attributes to the term in his essay, *Two Concepts of Liberty*,²⁵⁶ associating it to the power of self-determination; here, dominating oneself means exercising one’s reason in conformity to one’s superior and autonomous self. In France, the conception of the need to protect human dignity as a guarantee of the necessities of human existence, as well as the proper moral status inside society, is often associated with the positive moral role of the state which would liberate individuals from their poverty as well as from their own “irrationality.” The French Revolution reveals a conflicting structure of rationality—an authoritarian rationality—that, by assigning to the idea of liberty an “objective” value, negates the fundamental philosophical presuppositions of modernity: the possibility of the subject to judge for herself and by herself. The

²⁵⁴ GAUCHET, *supra* note 241, at 124.

²⁵⁵ *Id.* at 46–47.

²⁵⁶ BERLIN, *supra* note 226.

state, seen as incarnating reason and prudence, integrally absorbs the rationalism of the individual.²⁵⁷ In other words, echoing Rousseau, citizens can be “forced to be free” if they disagree with what the impartial point of view dictates or the point of view of the general will.²⁵⁸ However, as the burka ban shows, the impartial point of view is expressed by the will of the power holders at the moment, the representative democracy and its majoritarian decision-making processes, which can be to the detriment of the protection of minorities.

2. . . . Versus the American Natural Rights Republic

If the French Revolution aimed to regenerate humanity and establish a new idea of reason and justice among men, the American Revolution aimed to constitute a new form of independent government in rupture of the bond of allegiance to the British Crown and not to modify the existing social structure. The only important innovation of the American Revolution took place on the international level through the establishment of the new republic through the “illocutionary force”²⁵⁹ of the fundamental texts. In the United States, the basic political problem was the guarantee of the negative aspect of self-government against laws enacted by the British Parliament in which the American colonies were not represented.²⁶⁰ In France, the fascination with collective power means that it is seen as the agent *par excellence* in position to realize effective liberty and equality. In the United States, on the contrary, the definition of the utility of power is associated with the determination of its limits. Power is considered to be an instrument that society needs in order to preserve security and negative liberty. This power is limited by not having the possibility to intervene if society is capable of accomplishing a task by itself.

The Declaration of Independence aimed to defend the negative aspect of the liberty of self-government and to remind the English that it was violating the traditional English liberties of the colonies.²⁶¹ The import of the American Framers consisted

²⁵⁷ The “cult of reason” during the Jacobin era confirms this general attitude. See FRANÇOIS ALPHONSE AULARD, *LE CULTE DE LA RAISON ET LE CULTE DE L'ÊTRE SUPRÊME* (1793–1794), *ESSAI HISTORIQUE* (1975) (1892).

²⁵⁸ ROUSSEAU, *supra* note 238, at 141.

²⁵⁹ J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 100 (1962) (using “illocutionary force” as the force of a speech act in the specific context of communication).

²⁶⁰ JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 83 (1993). The Continental Congress noted that lack of representation in the British Parliament was “in violation of their undoubted rights and liberties.” *Id.*; see also 1 BERNARD SCHWARTZ, *Colonial Charters and Laws Commentary*, in *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 50 (1971) (noting that the colonists were clearly “subject to the overriding authority of the British government” and that the laws of the colonies “were weak bulwarks behind which to defend the rights of Americans against the mother country”).

²⁶¹ The intellectual antecedents of these rights can be found in the Magna Carta, where “the germ of the root principle that there are fundamental rights . . . which the State . . . may not infringe.” 1 SCHWARTZ, *Magna Carta 1215, Commentary*, in *THE BILL OF RIGHTS, supra*

of foreseeing mechanisms ensuring the enforcement of the documents consecrating the protection of fundamental rights and limiting the action of the government.²⁶² By

note 260, at 4. As Schwartz notes, although the Magna Carta was initially “directed against specific feudal abuses committed by the King against his tenants-in-chief, its important provisions are cast in broader terms,” independently from the intentions of its framers. *Id.* at 6. It thus obtained the meaning of “protect[ing] the personal liberty and property of all therein by giving security from arbitrary imprisonment and arbitrary spoliation.” *Id.* at 7 (internal quotation marks omitted). The Petition of Right enacted by the Parliament in 1628 also contained similar protections. The Agreement of the People of 1649 laid down limits to the Parliament, which “anticipated directly the prohibitory provisions of the American Constitutions” consolidated in the Federal Bill of Rights. 1 SCHWARTZ, *Agreement of the People, 1649 Commentary*, in THE BILL OF RIGHTS, *supra* note 260, at 22. The Agreement of the People also sets forth a principle of freedom of religion. *Id.* at 23. The “sections of the Bill of Rights which deal with the perversions of justice by the last Stuart Kings . . . were to serve as the models for” the Eighth Amendment in the American Bill of Rights. 1 SCHWARTZ, *Bill of Rights 1689 Commentary*, *supra* note 260, at 41.

²⁶² 1 SCHWARTZ, *Agreement of the People, 1649 Commentary*, in THE BILL OF RIGHTS, *supra* note 260, at 23. “[T]he Colonial Charters played an important part in the constitutional training of Americans.” 1 SCHWARTZ, *Colonial Charters and Laws, Commentary*, in THE BILL OF RIGHTS, *supra* note 260, at 49. “[T]he rights enumerated in [the Bill of Rights] are enforceable by the Courts . . . [a] development [which came] during the latter part of the Colonial period and [which] culminate[d] in the movement to set up enforceable Constitutions that characterized the Revolutionary period.” 1 SCHWARTZ, *First Charter of Virginia, 1606 Commentary*, in THE BILL OF RIGHTS, *supra* note 260, at 54. The Charter of Virginia protected for the residents of the Colony “all Liberties, Franchises, and Immunities . . . to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England,” 1 SCHWARTZ, *Colonial Charters and Laws, Commentary*, in THE BILL OF RIGHTS, *supra* note 260, at 49. Although the Charters “were accorded as a matter of privilege and grace,” the colonists “looked upon [them] as the written source of their basic institutions and freedoms and were quick to oppose any infringements upon their Charter rights.” *Id.* at 50–51. A core of negative liberties which should be protected against the Executive were present in the Colonial Charters. The Massachusetts Body of Liberties of 1641 contained many of the fundamental liberties, which were later to be protected in the Federal Bill of Rights, such as the Equal Protection Clause of the Fourteenth Amendment (Section 2 guaranteeing that every person “shall enjoy the same justice and law”). MASSACHUSETTS BODY OF LIBERTIES (1641), *reprinted in* THE BILL OF RIGHTS, *supra* note 260, at 72. Maryland was the first American colony to recognize freedom of conscience with the Act Concerning Religion in 1649. 1 SCHWARTZ, *Maryland Act Concerning Religion, 1649 Commentary*, in THE BILL OF RIGHTS, *supra* note 260, at 90. Although in 1692 “Maryland became a royal province and the Church of England was officially established in 1702[,] . . . religious toleration [was practiced widely and progressively became] one of the cornerstones of the American system.” *Id.* at 91. The first time religious liberty was guaranteed in the organic law of a colony was in the *Charter of Rhode Island and Providence Plantations, 1663*. 1 SCHWARTZ, *Charter of Rhode Island and Providence Plantations, 1663 Commentary*, in THE BILL OF RIGHTS, *supra* note 260, at 93. A core of negative liberties, including freedom of religion and worship, were protected by the *Fundamental Constitutions of Carolina, 1669* drafted by John Locke, the *Concessions and Agreements of West New Jersey, 1677*, the *New York Charter of Libertyes and Priviledges, 1683*, and the *Pennsylvania Charter of Priviledges, 1701*, in 1 SCHWARTZ, THE BILL OF RIGHTS, *supra* note 260, at 108, 126, 162, 170.

extension, the liberties that the American Framers aimed at protecting against the action of the local governments and, at a later moment against the federal government were the negative liberties, those they saw threatened by democracy itself.²⁶³ Intimidated by the turbulent circles lived by the republics of the city-states of antiquity, of medieval Europe and of the modern times, they composed the constitutions of their states in order to protect their own system of government from this self-refutation.²⁶⁴ In parallel, this libertarian conception of rights was considered perfectly compatible with republicanism and the pursuit of the common good; the exercise of negative rights was seen as facilitating the common good.²⁶⁵ However, the common good is understood as protection and promotion of negative liberties. The American conception of government stresses the need to protect the negative aspect of self-government, because this is seen as a guarantee among others to protecting negative liberties.²⁶⁶ According to American republicanism, private liberty is protected exactly because it promotes this republicanism and makes indispensable the distinction between the private and the public.²⁶⁷ The innovation of America's establishment of a *novus ordo seclorum*²⁶⁸ consisted of combining a republican political science with a political philosophy of natural rights: this conception of power does not legitimize the transfer of a sufficient "quantum of power" in view of legitimizing a strong central power.²⁶⁹ Contrary to Rousseau's conception of the moralizing reason of the state, Locke opposes his idea of justification (from the point of view of natural law) of political power as being the transfer to it of the natural executive power to conserve oneself but for strictly limited aims.²⁷⁰ The political

²⁶³ Richard Hofstadter, *The Founding Fathers: An Age of Realism*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 73, 80 (Robert H. Horwitz ed., 1977).

²⁶⁴ For the relevant debates around the Massachusetts Declaration of Rights, 1780, see *ESSEX RESULT* (1778), in 1 SCHWARTZ, *THE BILL OF RIGHTS*, *supra* note 260, at 350.

²⁶⁵ See James H. Hutson, *The Emergence of the Modern Concept of a Right in America, The Contribution of Michel Villey*, in *THE NATURE OF RIGHTS IN THE AMERICAN FOUNDING AND BEYOND* 25, 53 (Barry Alan Shain ed., 2007).

²⁶⁶ See generally TOCQUEVILLE, *supra* note 35. Tocqueville had also noted that the dominant civic spirit in America is closely bound to self-interest properly understood, that is to the idea that negative liberty can be more efficiently protected by participating in the public sphere, especially locally (Tocqueville develops extensively on administrative decentralization, dominant in the American political structure), and therefore by making oneself heard in political decision making.

²⁶⁷ See, e.g., Thomas K. Lindsay, *Defending Liberalism Book Review of Stephen Holmes, Passions and Constraint: On the Theory of Liberal Democracy* (1995), 82 *IOWA L. REV.* 943, 950 (1997) (noting that Jefferson thought participation in local government was essential to maintaining private liberty).

²⁶⁸ See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985).

²⁶⁹ ZUCKERT, *NATURAL RIGHTS*, *supra* note 34, at 233; ZUCKERT, *THE NATURAL RIGHTS REPUBLIC*, *supra* note 34 (discussing American innovation of the "natural rights republic" and the country's development of political science that supported this political philosophy).

²⁷⁰ LOCKE, *supra* note 37, at 326–27 (noting that these limited aims are the "peace, safety, and public good of the people").

power thus instituted would have as its only aim to guarantee the qualities which are “proper” to every human being, his rights and his property, a concept used by Locke *lato sensu*, to signify life, liberty, and the individual state proper to each person.²⁷¹ The American *jus naturalist* discourse is permeated by the language of “natural” rights.²⁷² “Constitutional” rights are interpreted through the prism of “natural rights.”²⁷³ If for the French Declaration, the rights of man have meaning only as rights of the citizen, the American revolutionary declarations and constitutions aimed at guaranteeing the rights conceived as pre-political, as qualities given by the creator.²⁷⁴

This *jus naturalism* was also dominant in the debate between Federalists and Antifederalists on the opportunity of the promulgation of a Bill of Rights during the elaboration of the Federal Constitution.²⁷⁵ Thinking that it would be impossible to make a list of all possible natural rights, the Federalists saw any attempt to make natural liberty positive as an approach that would be not only “unnecessary,” but also “dangerous”²⁷⁶ to the extent that it could create the impression that only the enumerated rights are protected to the exclusion of the non enumerated rights.²⁷⁷ Only an enumeration of the powers delegated to the federal government would be necessary.²⁷⁸

²⁷¹ *Id.* at 324–25. The Rights of the Colonists and a List of Infringements and Violations of Rights of 1772 (prepared in Boston by a Committee of Correspondence at the suggestion of Samuel Adams) refers directly to Locke developing a natural rights theory concerning the origins of civil and political society. 1 SCHWARTZ, *The Rights of the Colonists and a List of Infringements and Violations of Rights, 1772 Commentary*, in THE BILL OF RIGHTS, *supra* note 260, at 199. The text contains an enunciation of rights in affirmative form as well as in negative form. *Id.* The text enumerates among the Rights of the Colonists as Subjects, “personal security[,] personal liberty and private property.” *The Rights of the Colonists and a List of Infringements and Violations of Rights 1772, reprinted in* 1 SCHWARTZ, THE BILL OF RIGHTS, *supra* note 260, at 202. It also refers especially to “just and true liberty, equal and impartial liberty in matters spiritual and temporal.” *Id.* at 200 (internal quotation marks omitted). The text contains explicit limitations of the legislative power upon “lives and fortunes of the people.” *Id.* at 203. The same liberties were stressed in the Declaration and Resolves of the First Continental Congress of 1774. SCHWARTZ, *Declaration and Resolves of the First Continental Congress, 1774 Commentary*, in THE BILL OF RIGHTS, *supra* note 260, at 219.

²⁷² See, e.g., ZUCKERT, THE NATURAL RIGHTS REPUBLIC, *supra* note 34, at 116.

²⁷³ *Id.*

²⁷⁴ See *infra* Part II.B.2.

²⁷⁵ Thomas Jefferson insisted on the necessity to elaborate a Bill of Rights. See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in POLITICAL WRITINGS, *supra* note 133, at 360–61.

²⁷⁶ THE FEDERALIST NO. 84 (Alexander Hamilton); see also CORNELIA GEER LEBOUTILLIER, AMERICAN DEMOCRACY AND NATURAL LAW 110 (1950).

²⁷⁷ James Madison, SPEECH TO THE HOUSE EXPLAINING HIS PROPOSED AMENDMENTS WITH NOTES FOR THE AMENDMENTS SPEECH, in THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 51, 60 (Randy E. Barnett ed., 1989).

²⁷⁸ Randy E. Barnett, *Introduction to James Madison’s Ninth Amendment*, in THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 277, at 4–5.

The Ninth Amendment to the Federal Constitution²⁷⁹ is the result of a compromise reached by the American founders, so that the Federal Constitution would be .²⁸⁰

According to the Federalist reading of Akhil Reed Amar, both the Ninth and the Tenth Amendments²⁸¹ were initially aimed at protecting self-government on the level of the states, preventing Congress from going beyond the powers enumerated in the Federal Constitution.²⁸² It protected the negative aspect of political liberty, of local self-government against infringement from the federal state.²⁸³ “[B]y the 1860s [this reading] of the Ninth Amendment had faded considerably.”²⁸⁴ However, even if, according to the Federalist reading, the American Bill of Rights initially aimed to ensure structural equilibriums of the organization of the federal state—such as state’s rights and majority rights as well as the protection of various intermediate associations—it also aimed to protect individuals and minorities.²⁸⁵ Even if considerations of federalism weighed heavily in the elaboration of the Amendments, the philosophy of natural rights inevitably marked the Founders’ understanding of liberty on all levels, federal and state.

According to the Federalist reading, the First Amendment initially aimed to moderate attenuated representation in the Congress, as Congress was considered less likely to reflect majority will.²⁸⁶ Following the Fourteenth Amendment and according to the new interpretation of the First Amendment through the Fourteenth Amendment, no limitation of freedom of expression is acceptable, whether coming from the federal government or the states. The textual foundation, which aimed to protect the autonomy of the states concerning religious questions, became a foundation for federal limitations against any policy of the states, which would violate the individual rights of their citizens concerning any act of manifestation of freedom of religious conscience in terms of equality.²⁸⁷ The history of the Bill of Rights in the United States was

²⁷⁹ U.S. CONST. amend. IX. The Ninth Amendment reads: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” *Id.*

²⁸⁰ Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152–53 (1928).

²⁸¹ U.S. CONST. amend. X. The Tenth Amendment reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” *Id.*

²⁸² AMAR, *supra* note 134, at 124.

²⁸³ *Id.* at 123.

²⁸⁴ *Id.* at 124.

²⁸⁵ Amar also notes that the protection of the people against self-interested government, the distrust against government, weighed as importantly as the protection of minorities against majorities. *Id.* at xiii.

²⁸⁶ AMAR, *supra* note 134, at 22. For a critique of Amar’s argument, see *supra* note 134 and accompanying text.

²⁸⁷ Akhil Reed Amar, *The Creation, Reconstruction, and Interpretation of the Bill of Rights*, in *THE NATURE OF RIGHTS IN THE AMERICAN FOUNDING AND BEYOND*, *supra* note 265, at 166. For Amar, Madison’s vision—the protection of individual liberty and minority rights against

affected by the American Revolution and the Reconstruction following the Civil War. The natural rights philosophy, which implies the necessity to protect minority rights, is centered around the power of the judges against the abuses of local governments, which existed in the founding era and was reaffirmed when Americans realized that they ought to strengthen the federal government in this direction.²⁸⁸ Certainly, the strong protection for freedom of religion was the result of the case law of the “full flowering” of the Warren Court,²⁸⁹ which ruled that a strong protection of freedom of religion fit better in the general narrative of the ideas of the American founding, the “natural rights” philosophy.²⁹⁰ This new reading won because ideas that had been present throughout the history of the Republic manifested themselves in the new circumstances with greater intensity.

B. The Role of the Law

1. The Legislator—Institutor of Civil Society in France

The opposition between trust in the use of collective power dominant in France versus the distrust dominant in the United States manifests itself in the organization of the two constitutional orders as a trust or distrust towards the legislator. The French Declaration shows trust towards the legislator to define the content and the limits of liberty. If the relation that each person maintains with herself is mediated by the state and liberty is defined by the state, then the law is the medium par excellence which defines this relation guaranteeing the “real” and “effective” exercise of liberty. In the French political order, the law reflecting the doctrine of integral absolutism, which Bodin²⁹¹ developed to the profit of the monarchy, was a political operator to reconstruct reality. A quasi-unlimited trust towards the legislator is omnipresent, which means assigning to it the task to liberate human beings by constituting them into citizens and to provide for their happiness. The law is not considered as being in anti-nomic relation to liberty as it is the case in the United States.

the intolerance of the majority—was very progressive for its time, whereas a local spirit was largely dominant. AMAR, *supra* note 134, at 172. The historical irony exists in the fact that the vision of Madison, a slaveholder, in favor of freedom of expression, was enacted as valid law by the generation of the Reconstruction, which insisted on the idea that the right interpretation of the Bill of Rights should imply the limitation of the abusive power of the states. *Id.* at 174.

²⁸⁸ See, e.g., Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War*, 92 AM. HIST. REV. 45, 47 (1987).

²⁸⁹ McConnell, *supra* note 36, at 1412.

²⁹⁰ McConnell insists on the fact that “the movement towards more expansive notion of religious liberty would gain momentum in the wake of the American Revolution and shape the framing of state and federal constitutions.” *Id.* at 1435.

²⁹¹ See JEAN BODIN, *THE SIX BOOKS OF A COMMONWEALTH* (1583), reprinted in *THE SIX BOOKS OF A COMMONWEALTH* (Richard Knulles, trans. 1606) (translating JEAN BODIN, *LES LIVRES SUR LA RÉPUBLIQUE* (1583)) (describing Bodin’s views on absolutism and sovereignty).

This political culture is associated with the perspective of a legislator creator, a sovereign institutor, of a total seizure of society by a regulating power.²⁹² The French Declaration affirms the rights of a politically constituted society, crucial for the physiocrats, the rights of liberty, property, and security.²⁹³ However, the protection of these rights is associated with the need of an omnipotent state entrusted with realizing these rights. Paradoxically, the idealism of the French declaration becomes a positivism concerning the understanding of the protection of liberty.²⁹⁴ It is basically Sieyès who makes the association between the general will and the will of the nation.²⁹⁵ The Parliament in France usurped the sovereign power of the nation in the name of the “General Will” which it claims to represent.²⁹⁶

The French Declaration shows trust towards the legislator to define the content and the limits of the natural and imprescriptible rights of man. This quasi-unlimited trust seems to be limiting the guarantees of the rights of man, reducing the pre-eminence of the law to the pre-eminence of the legislator. Articles 4, 5 and 6 of the Declaration refer to the positive law and not the natural law.²⁹⁷ The French Framers

²⁹² PIERRE ROSANVALLON, *THE DEMANDS OF LIBERTY: CIVIL SOCIETY IN FRANCE SINCE THE REVOLUTION* 55–57 (Arthur Goldhammer trans., 2007) (translating *LE MODÈLE POLITIQUE FRANÇAIS, LA SOCIÉTÉ CIVILE CONTRE LE JACOBINISME DE 1789 À NOS JOURS* 93 (2004)).

²⁹³ STÉPHANE RIALS, *LA DÉCLARATION DES DROITS DE L’HOMME ET DU CITOYEN* 352–54 (1988).

²⁹⁴ This positivism is particularly visible in Articles 4 and 5. Article 4 states:
 Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law.

Article 5 states: “The Law has the right to forbid only those actions that are injurious to society. Nothing that is not forbidden by Law may be hindered, and no one may be compelled to do what the Law does not ordain.” *Id.* These two articles, as Stéphane Rials shows, seem to exclude the references to natural law, expressing the idea that in order to claim a harm before a judge, it must be taken into consideration by the law. *Id.*

²⁹⁵ Emmanuel-Joseph Sieyès, *Qu’Est-ce que le Tiers État?*, in *ÉCRITS POLITIQUES*, 162 (1985); see also Emmanuel-Joseph Sieyès, *Lois*, in *id.* at 87–88; Stéphane Rials, *Sieyès ou la Délibération Sans la Prudence, Eléments pour une Interprétation de la Philosophie de la Révolution et de l’Esprit du Légicentrisme*, in *UNE PRUDENCE MODERNE?* 45–73 (Philippe Raynaud & Stéphane Rials eds., 1992).

²⁹⁶ RAYMOND CARRÉ DE MALBERG, *LA LOI, EXPRESSION DE LA VOLONTÉ GÉNÉRALE* 20–21 (1931).

²⁹⁷ The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents.

Declaration of the Rights of Man and of the Citizen, *supra* note 55, art. 6.

could not politically accept the idea of “natural rights” transcending the determination of positive law.²⁹⁸ Article 10, which guarantees freedom of religion, foresees its limits: “the [public order established by] the law[s].”²⁹⁹ The meaning of the public order will be determined by competent state agents and principally by the legislature. Article 11, which guarantees freedom of expression, similarly foresees its limits in cases of “abuse,” which is also defined by the legislative.³⁰⁰ The influence of Rousseau is visible: national sovereignty can produce good laws, not threatening but effectively protecting liberties.³⁰¹ Trusting the law to define the content and the limits of liberty in order to create values and define what is just or unjust is associated with the political theology surrounding the role of the legislator: omnipotent and omniscient, qualities attributed by theology to divine power, the positive law is an analogue to the divine law.³⁰² This extraordinary role of the legislator means that liberty is not what the law leaves undetermined, but only what the law authorizes. Liberty must be defined by the state in opposition to the American legal order where an opposite presumption operates in favor of liberty, where liberty is what the law leaves undetermined.

The omnipotence of the law as expression of the general will, and essentially expression of the will of the representatives of the people, goes together with a distrust towards the judges and the control of the constitutionality of the law, institutions which, in the American legal order, constitute “checks and balances.” This centrality of the law in the French constitutional equilibrium is visible in the *sui generis* separation of powers, characterized by a hierarchy consecrating the supremacy of the legislative function.³⁰³ In the revolutionary torment the debates in favor of establishing a control of constitutionality faded.³⁰⁴ A control of constitutionality of the law is established only by the Fifth Republic, which still suffers from Parliamentary “paternalism.”³⁰⁵ The Parliament in France was for a long time the only judge of the constitutionality of its own laws.³⁰⁶ The control of constitutionality of the law instituted in the Fifth

²⁹⁸ See LUCIEN JAUME, *LA LIBERTÉ ET LA LOI: LES ORIGINES PHILOSOPHIQUES DU LIBÉRALISME* 30 (2000).

²⁹⁹ Declaration of the Rights of Man and of the Citizen, *supra* note 55, art. 10.

³⁰⁰ “The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law.” *Id.* art. 11.

³⁰¹ See ROUSSEAU, *supra* note 238.

³⁰² JEAN-MARC TRIGEAUD, *2 HUMANISME DE LA LIBERTÉ ET PHILOSOPHIE DE LA JUSTICE* 56–57 (1990).

³⁰³ MARC SADOUN, *1 LA DÉMOCRATIE EN FRANCE: IDÉOLOGIES* 97 (2000); Jacques Chevallier, *La Séparation des Pouvoirs*, in *LA CONTINUITÉ CONSTITUTIONNELLE EN FRANCE DE 1789 À 1989*, at 113, 128–29 (Louis Favoureaux ed., 1990).

³⁰⁴ See generally MARCEL GAUCHET, *LA RÉVOLUTION DES POUVOIRS: LA SOUVERAINETÉ, LE PEUPLE ET LA REPRÉSENTATION 1789–1799* (1995).

³⁰⁵ Georg Nolte, *European and U.S. Constitutionalism: Comparing Essential Elements*, in *EUROPEAN AND U.S. CONSTITUTIONALISM* 3–20 (Georg Nolte ed., 2005).

³⁰⁶ See generally CARRÉ DE MALBERG, *supra* note 296, at 113–14.

Republic and assigned to the *Conseil Constitutionnel* (Constitutional Council) moderates Rousseau's conception of infallibility of the law. The recent Constitutional Law of July 23, 2008 brings significant modifications concerning referral to the Council.³⁰⁷ However, the history of the Council shows that the control of constitutionality takes place by an organ, which was initially destined at protecting the independence and the prerogatives of the executive power.³⁰⁸ Establishing an *a priori* control until the Constitutional Law of July 23, 2008, the referral to the Council had the form of an inter-institutional deliberation limited to the institutional actors who were cooperating in the production of the law—that is, the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, and a group of sixty members of the Parliament and sixty senators;³⁰⁹ it was not the citizens, who could refer to the control of constitutionality of the Council *a propos* the application of a law in a specific case. This was an incomplete system, because laws older than the Fifth Republic had escaped control. Even for new laws on which the Council had already given its opinion *a priori*, new cases could appear in the course of their interpretation where they could be proved *a posteriori* in their *ad hoc* application contrary to the constitution. In the hermeneutic process that takes place in each attempt to define the applicable legal rule all judges implicitly make inevitable claims of constitutional validity of the rules that they apply. This was obvious in reference to the European Convention of Human Rights. A de facto diffuse control of constitutionality was imposed via conventionality because every judge, even ordinary, controlled the compatibility of a law to the Convention,³¹⁰ thus promoting the establishment of a rule of law, of an effective control of the compatibility of the law with the protection of an individual liberty. This control always remained marked by the ex ante understanding of the role of the state and the law as realizing the content of liberty, as the case law accepting limitations of freedom of expression proves.³¹¹ The case law of the European Court of Human Rights in the cases concerning headscarves does not deviate from this conception either.³¹²

³⁰⁷ Loi 2008-724 du 23 juillet 2008 de modernisation des institutions de la V^o République [Law 2008-724 of July 23, 2008 to Modernize the Institutions of the Fifth Republic], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 24, 2008, p. 890.

³⁰⁸ The aim of the Framers was not to establish an institution in order to guarantee rights and liberties, but to strengthen the Executive to the detriment of the National Assembly. See FRANÇOIS LUCHAIRE, 1 LE CONSEIL CONSTITUTIONNEL: ORGANISATION ET ATTRIBUTIONS 21 (1997). On constitutional justice, see Mauro Cappelletti, *Montesquieu Abandonné? Développement et Légitimité de la "Justice Constitutionnelle,"* in LE POUVOIR DES JUGES 249–79 (1990). For a comparison of models of constitutional review, see VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 464–547 (2d ed. 2006).

³⁰⁹ 1958 CONST. 61.

³¹⁰ Olivier Cayla, *Le Coup d'État du Droit*, LE DÉBAT, May–Aug. 1998, at 111.

³¹¹ See *supra* Part I.A.1.

³¹² See *supra* Part I.A.2.

Following the Constitutional Law of July 23, 2008 the referral to the court was enlarged. Article 29 consecrates the possibility of a citizen referring to the *Conseil Constitutionnel* in a case pending before a court in which he claims violation of a right protected by the French Constitution.³¹³ However, the *Conseil Constitutionnel* only examines the case once the *Conseil d'État*, the supreme jurisdiction of the administrative branch of the French judiciary, or the *Cour de Cassation*, the supreme jurisdiction of the civil branch, have referred the case.³¹⁴ This revolutionary modification of the referral went into effect on March 1, 2010.³¹⁵ However, even in this case, citizens cannot appeal directly to the *Conseil Constitutionnel*. The law establishes a procedure of incidental control of constitutionality in order to resolve a “prejudicial question” emerging in a case pending before civil or administrative jurisdictions, like the one practiced by the Italian Constitutional Court, according to which the judge *a quo* orders the transmission of the case to the Constitutional Court.³¹⁶ The *Conseil d'État* or the *Cour de Cassation* can still filter the citizens’ request of control of constitutionality.³¹⁷ The *Cour de Cassation* and the *Conseil d'État* can refer the law to the Council if it “has not already been declared in conformity with the Constitution (by the *Conseil Constitutionnel*), unless circumstances have changed.”³¹⁸ The *Conseil Constitutionnel* has already given its opinion on the burka ban thus excluding the possibility of future referral.³¹⁹ It has not, however, given an opinion on the 2004 law banning the headscarf in public schools, which can now happen upon referral of the *Conseil d'État*, if a new case emerges.

³¹³ Loi 2008-724 du 23 juillet 2008 de modernisation des institutions de la V^o République [Law 2008-724 of July 23, 2008 to Modernize the Institutions of the Fifth Republic], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 24, 2008, p. 890.

³¹⁴ See 1958 CONST. 61-1 (Fr.).

³¹⁵ Loi 2009-1523 du 10 décembre 2009 relative à l’application de l’article 61-1 de la Constitution [Law 2009-1523 of December 10, 2009 on the Application of Article 61-1 of the Constitution], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 11, 2009, p. 21379.

³¹⁶ *Id.*

³¹⁷ Ordonnance 58-1067 du 7 novembre 1958 portant loi organique sur le Conseil Constitutionnel [Ordonnance 58-1067 of November 7, 1958 organic law on the Constitutional Council], amended by Law 2009-1523 of Dec. 10, 2009.

³¹⁸ *Id.* § 23-2. According to Article R 771-6 of the Code of Administrative Justice, as modified,

[C]ourt[s] [are] not required to pass a constitutional priority involving, for the same reasons, a law which the Council of the State or the Constitutional Council is already seized. In the absence of transmission for this reason, postpone a decision on the merits, until it is informed of the decision of the State Council or, where appropriate, the Constitutional Council.

CODE ADMINISTRATIF [C.ADM] art. R 771-6 (Fr.); see also *id.* art. R 771-18 (for the *Conseil d'État*); CODE DE PROCÉDURE CIVILE [C.PR.C.] art. 126-5 (for the *Cour de Cassation*).

³¹⁹ Conseil Constitutionnel [CC] [Constitutional Court] No. 2010-613, Oct. 7, 2010 (Fr.).

2. The American Conception of Checks and Balances

If the French Declaration shows what the law should be, the American declaratory texts show what the law cannot be. The declarations of the ancient British colonies are situated in a classical contractual perspective, favorable to the American spirit, which pose firmly the persistence of the natural rights of man in the social state and exalts less the role of positive law. The American Declarations indicate a concern for more specific guarantees, especially by the courts than the French, which ignore the distinction between the declaration of rights and the guarantee of rights. The American Bill of Rights, which includes the common denominator of liberties protected in the various states, is marked by the procedural conception of law of the English. The American Bill of Rights, which preceded the constitutions of the American states enacted between 1776–1789, had different aims in relation to those of the French Declaration: pragmatism versus metaphysical proclamation. The Declarations of the United States are conceived in a way as to be able to be invoked before the courts, whereas the French Declaration aimed at proclaiming incontestable truths.³²⁰ Unlike the French Declaration, which trusts the law to assure its application, the American Bill of Rights expose the domains of human activity, which are covered by liberty and cannot be touched by the law.

The will to limit the legislative power is already visible in the first constitutions of the states, dating back to the American Revolution, when declarations of rights were imposed to the legislatures.³²¹ It is enunciated again in the first eight Articles of

³²⁰ Emile Boutmy, *La Déclaration des Droits de l'Homme et du Citoyen et M. Jellinek*, in 17 ANNALES DES SCIENCES POLITIQUES 415, 424 (Félix Alcan, ed., 1902) (criticizing GEORGE JELLINEK, LA DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN, CONTRIBUTION À L'HISTOIRE DU DROIT CONSTITUTIONNEL MODERNE (Georges Fardis trans., 1902) for understating the differences of the two texts despite some influence of the one upon the other).

³²¹ The reference to the “natural rights” philosophy, which by its nature concerns the legislative power as well as the executive power, exists in the Virginia Declaration of Rights of 1776, the Pennsylvania Declaration of Rights of 1776 (which had Thomas Paine as one of its makers), the Delaware Declaration of Rights of 1776, the Vermont Declaration of Rights of 1777, the Massachusetts Declaration of Rights of 1780, and the New Hampshire Bill of Rights of 1783. Texts reprinted in SCHWARTZ, *supra* note 260, at 179–375. Explicit protection of freedom of religion exists in the Declarations of Rights of Virginia (para. 16), Pennsylvania (art. II), Delaware (sec.2), Maryland (art. XXXIII), Connecticut (para. 2), Vermont (art. III), Massachusetts (art. II), New Hampshire (art. V), and the Constitutions of New Jersey of 1776 (art. XVIII), Georgia of 1777 (art. LVI), New York of 1777 (art. XXXVIII) and South Carolina of 1778 (art. XXXVIII). *Id.* Many of these texts explicitly protect freedom of the press: the Virginia (para. 12), Maryland (art. XXXVIII), Vermont (art. XIV), Massachusetts (art. XVI) Declarations and the Georgia (art. LXI) and South Carolina (art. XLIII) constitutions. *Id.* Many of the same texts contain guarantees against cruel and unusual punishments: the Virginia (para. 9), the Maryland (art. XIV) Declarations, and the South Carolina Constitution refers to proportionality in criminal punishment (art. XL). *Id.* A reference to property in association to security and happiness exists in the Pennsylvania (art. I), Virginia (para. 1), Vermont (art. I), Massachusetts (art. I), Declarations and the New

the Constitution of Philadelphia, before the assurance of a control of constitutionality of the laws largely practiced on the local level.³²² The comparison of the French Declaration and the American Bill of Rights shows the absence in the latter of the equivalent of Articles 4,³²³ 5,³²⁴ and 6³²⁵ of the French text, which show the trust of the Framers in the reason of the legislator to realize the imperatives of natural law. If the French deputies did not have the experience of modern constitutionalism, the American colonies had had the habit of an elaborated political practice and had already experienced the harmful potentialities of the law.

In 1776, Americans were concerned with the protection of their rights in terms of representation.³²⁶ When the Confederation proved to be institutionally insufficient

Hampshire Bill of Rights (art. II). *Id.* Protection against ex post facto criminal laws exists in the Maryland (art. XV), and Massachusetts (art. XXIV) Declarations. *Id.* The Virginia Declaration refers to a general conception of limited government and to the separation of powers (para. 5) and the Pennsylvania Declaration refers to the right “to apply to the legislature for redress of grievances, by address, petition, or remonstrance” (art. XVI). *Id.*; see also Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. U. L.J. 251, 261 (1992). Madison elaborated a list of rights containing the “common denominator” of rights protected by state governments. The idea of a Bill of Rights just as the content of the Federal Bill of Rights appeared on the level of the states first. See JOHN PHILIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* (1986) (presenting the debates in states Assemblies); see also John P. Kaminski, *Liberty Versus Authority: The Eternal Conflict in Government*, 16 S. ILL. U. L.J. 213, 222 (1992) (providing similar insights on the debates).

³²² PENNSYLVANIA DECLARATION OF RIGHTS (1776), reprinted in SCHWARTZ, *supra* note 260, at 265–67.

³²³ See *supra* note 290 and accompanying text. Considerations of Federalism are at the origin of the absence of a similar clause in the Federal Bill of Rights. However, even in state Declarations the relevant clauses are much less limiting liberty and indicating greater distrust towards the legislator than the French Declaration. For example, Article XII of the Massachusetts Declaration of Rights, 1780, reads:

And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate; but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

MASSACHUSETTS DECLARATION OF RIGHTS (1780), reprinted in SCHWARTZ, *supra* note 260, at 342.

³²⁴ See *supra* note 290 and accompanying text.

³²⁵ See *supra* note 293 and accompanying text

³²⁶ Because the British Parliament limited the liberties of the American colonies, while they were not represented in it, the dominant idea was that once the problem of representation was resolved, the Parliaments of the States would not constitute a source of potential danger. Many Americans like John Adams in 1775 saw in the concept of “democratic despotism” a *contradictio in terminis*. Barry A. Shain, *Rights Natural and Civil in the Declaration of Independence*, in *THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND* 116, 131 (Barry Alan Shain ed., 2007) (explaining that the communitarian spirit of the American

to enforce its commands and the necessity to create a federal state emerged, the debate on the Federal Constitution brought up again the discussion on the control of the Parliamentary majority on all levels.³²⁷ The decade before adoption of the Federal Constitution judicial review was practiced by states' courts, which were considered the authority that would enforce the protection of rights against the legislature.³²⁸ The debate between Federalists and Antifederalists indicates the same distrust towards state power. The opposition to the Federal Constitution was founded on the fear of a central power violating liberties protected by the states.³²⁹ The realization of the necessity to construct a federal government went together, especially for Madison, with the recognition of the capacity of the governments of the states to protect better the rights of the citizens against abuses of authorities.³³⁰

Madison was thus led to conceive the role of the judiciary power as limiting the majoritarian will and guaranteeing the liberty of minorities. If in France the generality of the law was the response to the privileges and the abuses of political power of the ancient regime, in the United States the principal political problem for Madison was the tyranny of the generality of the law resulting from social and political majorities threatening minorities.³³¹ In addition to the Bill of Rights, these guarantees in favor of liberty would be made effective by a federal legislative veto concerning the laws of the federal government and the establishment on the federal level of a council of revision, with limited veto on federal laws and a role of participation in the federal control of the laws of the states.³³² Although the process of the establishment of the federal "judiciary hegemony" was itself a victory in the fight to promote the federal union and to establish the supremacy of the Federal Constitution upon the states,³³³ the tendency to limit the powers of the legislative branch is obvious on the federal and state level.

cities commonly led to limitations on liberty); Gordon S. Wood, *The Origins of the American Bill of Rights*, in XIV *LA REVUE TOCQUEVILLE* 33, 39 (1993) (quoting John Adams, *Novanglus*, in *THE WORKS OF JOHN ADAMS* 79 (Charles F. Adams ed., Bos. 1850–56, IV)). The idea that democratic despotism was possible was spread throughout the 1780s.

³²⁷ Carl J. Friedrich & Robert G. McCloskey, *Introduction* to *FROM THE DECLARATION OF INDEPENDENCE TO THE CONSTITUTION: THE ROOTS OF AMERICAN CONSTITUTIONALISM* li (C.J. Friedrich & Robert G. McCloskey eds., 1954).

³²⁸ SCHWARTZ, *supra* note 260, at 435.

³²⁹ *Id.* at 443–44.

³³⁰ AMAR, *supra* note 134, at 4 (describing Madison's development of these ideas in *THE FEDERALIST* NOS. 10 and 46, respectively).

³³¹ See *THE FEDERALIST* NO. 10 (James Madison); Letter of June 8, 1789: Amendments to the Constitution, in *12 PAPERS OF JAMES MADISON* (Robert A. Rutland & Charles F. Hobson eds., 1978). If Jefferson, as representative of the United States in France, enunciated the problem of rights in traditional terms of the protection of the citizens against the government, Madison was more worried about the dangers inherent in political decision-making on behalf of popular majorities to the detriment of minorities.

³³² James T. Barry III, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 *U. CHI. L. REV.* 235, 249–53 (1989).

³³³ ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 52 (Sanford Levinson, ed., 4th ed. 2005) (1960).

III. DOES THE BURKA BAN PROMOTE OR NEGATE LIBERTY?

The burka ban is a hard case. Guaranteeing the preconditions for the exercise of liberty and assuring that negative liberty does not degenerate into an empty form is a legitimate cause. Protecting women from domination, if we suppose that the headscarf has negative meaning for gender equality, is an equally important goal.³³⁴ Has France perhaps gone too far? Is this kind of prohibition the best possible measure for promoting gender equality? Is the state permitted to use its coercive power in order to change the worldviews of citizens and residents in its territory, or are there different measures which might be preferable and which would assure the respect of dignity and autonomy of women? These are delicate questions concerning the hard core of self-definition. To what extent is the state permitted to intervene in the relation that a person has with herself expressed in her dress choices? Is the state permitted to protect women from themselves, under the pretext that they are operating under a “false consciousness,” that they do not exercise their freedom properly when they wear a headscarf? Who is permitted to decide what people will wear in the public sphere? Who is permitted to interpret the meaning of wearing headscarves? Is the ban the proper integration policy? Deontological as well as consequentialist justifications of the prohibition do not withstand closer scrutiny.

According to the dominant conception in France, the state is permitted to regulate the school community and to impose special rules concerning the manifestation of beliefs, which should belong to the private sphere, in order to prevent influence of one student upon another.³³⁵ One can respond that being in a special relation of domination, participating in a specific public community as the school community does not necessarily mean that the person cannot enjoy the exercise of her fundamental rights. The fact that minors are at issue, rather than adults does not deprive them of the possibility of exercising a fundamental freedom. This cannot be conditioned upon the status of a minority or adulthood. Just like a person cannot be tortured, her religious freedom and manifestation of her religious freedom cannot be limited in school either.

One of the principal justifications advanced by the French state in favor of the ban consists in attributing a meaning to it, which totally ignores the meaning that it has for the women-bearers themselves. The burka may be interpreted as having a “cultural” and political significance and not religious, preexisting the appearance of Islam, imposed by some intellectuals in the beginning of the twentieth century in Saudi Arabia.³³⁶ This argument is invalid because any symbol can obtain a religious significance after the appearance of a religious dogma. The sign of the cross preexisted Christianity.³³⁷

³³⁴ See Weil, *supra* note 29, at 2706.

³³⁵ See, e.g., LAURENCE & VAISSE, *supra* note 68, at 55 (noting the secular nature of French schools and the concomitant effects on Muslim students).

³³⁶ RAPPORT D'INFORMATION, *supra* note 1, at 27.

³³⁷ JOHN GARNIER, THE WORSHIP OF THE DEAD 226 (1904).

Freedom of religion means the possibility to assign religious significance and carry signs that preexisted the emergence of the religion that assigned them this meaning. The state is not permitted to put forward a specific interpretation of the meaning of the burka in order to justify the ban. The report of the French Parliament attempts to minimize the religious importance of the burka by insisting on the fact that it is based on a minority and contestable interpretation of the Coranic texts and the Muslim traditions.³³⁸ This is an unacceptable projection of an interpretation by the state of the significance of the scarf. It is another sign of the dominant paternalistic conception in France aiming at defining the content of religious liberty, which belongs to the subject of the liberty. Islam is a historically decentralized culture: there is not one “single Muslim ‘culture’ which [would] [] correspond to the sociological and demographic profiles of the immigrant populations now residing in Europe.”³³⁹ Attributing to Muslims one single identity is a kind of unacceptable objectification.³⁴⁰

Another justification advanced by the French state is a conception of human dignity, because in Christianity the face has become the “quintessence of the person,” the “noble part of the body.”³⁴¹ Hiding the face is thus a sign of an “undignified” existence. It is not acceptable for the state to use the internal perspective of one religious worldview to criticize the internal perspective of another. Offense to mores is not a sufficient justification to ban a practice, which is an expression of freedom of self-definition. This is a conception of human dignity, which transcends the individuals who are its bearers and imposes obligations as to how they should treat themselves. The concept of dignity has been associated throughout the history of ideas with many meanings and the reference to it in order to limit a person’s liberty with regard to her dress choices is open to critique. We can distinguish between an empirical and a normative conception of dignity.³⁴² An empirical understanding of dignity associates it with social status and recognition.³⁴³ A normative conception of dignity, like the one proposed by Immanuel Kant, associates the concept with humanity.³⁴⁴ Human beings are dignified as having the possibility to be rational autonomous beings.³⁴⁵ For Kant, dignity is a supreme value without equal that assigns to the person the quality of an end in itself; as morality is the only condition which can make a reasonable being, an end in itself—for Kantian thought it is only by morality that someone can be

³³⁸ RAPPORT D’INFORMATION, *supra* note 1, at 36.

³³⁹ JOAN WALLACH SCOTT, *THE POLITICS OF THE VEIL* 6 (2007).

³⁴⁰ *Id.* at 7.

³⁴¹ RAPPORT D’INFORMATION, *supra* note 1, at 32.

³⁴² See Alan Gewirth, *Human Dignity as the Basis of Rights*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 10, 11–14 (Michael J. Meyer & William A. Parent eds., 1992) (proposing this distinction).

³⁴³ *Id.* at 11–12.

³⁴⁴ *Id.* at 12–13.

³⁴⁵ IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 73 (Robert Paul Wolff ed., Lewis W. Beck trans., 1969); see also ZIVIA KLEIN, *LA NOTION DE DIGNITÉ HUMAINE DANS LA PENSÉE DE KANT ET DE PASCAL* (1968).

autonomous—only humanity, capable of morality possesses dignity.³⁴⁶ For Kant, man as a reasonable being constitutes an end in itself by virtue of his autonomy, for it is only a will that legislates for itself that can be considered an end in itself: however, it is only in conditions of morality that the reasonable “man” can develop his autonomy, legislating the rules which satisfy the criterion of universality.³⁴⁷ According to this moral sense, human dignity is uncompromisable and cannot be enforced by the state. Human dignity today means that everyone has the right to equal attention and equal respect on behalf of the government.³⁴⁸ The right from which all rights logically emanate is the right to self-definition, of the choice of ends and plans of life.

For the French state, the burka violates the right to dress oneself as one wishes: the ban thus liberates women.³⁴⁹ This is another example of an interpretation of the content of a liberty coming from the state. The burka can be a choice liberating women from the social constraints of fashion, which they see as elements of moral corruption belonging to a materialistic way of life. And in any case, freedom contains the possibility of some “voluntary servitude.”³⁵⁰

Another argument of the French state is that the principle of *laïcité* means that the Republic respects all beliefs, but in parallel the citizens must also respect a duty of discretion concerning the exteriorization of their religious beliefs.³⁵¹ According to the Report, the dominant conception of *laïcité* in France is associated with social integration and cohesion, which means that the ban is based on the need to guarantee liberty and the respect of the opinions of others.³⁵² To the extent that manifestation of religious belief does not imply harm to others it is difficult to see why this discretion is required.

Another argument stresses incivility, the refusal of fraternity of the very possibility of social coexistence associated with the will to hide oneself.³⁵³ However, one of the basic axioms of the philosophical discourse of modernity is individual consensus concerning the degree of adherence to society. The use of state punitive mechanisms against adopting an “anti-social” behavior cannot be justified if this behavior does not harm others. The burka is a means of guaranteeing women’s privacy in the public sphere. The impossibility to tolerate this behavior has its origins in the values

³⁴⁶ See KANT, *supra* note 345, at 76.

³⁴⁷ KANT, *supra* note 345, at 76; THOMAS DE KONINCK, *DE LA DIGNITÉ HUMAINE* (1995); Thomas E. Hill, Jr., *Dignité*, in *DICTIONNAIRE D’ÉTHIQUE ET DE PHILOSOPHIE MORALE* 438–40 (Monique Cantö-Sperber ed., 2001).

³⁴⁸ See DWORKIN, *supra* note 31, at 201.

³⁴⁹ RAPPORT D’INFORMATION, *supra* note 1, at 95.

³⁵⁰ Étienne Balibar, *Dissonances dans la Laïcité*, in *LE FOULARD ISLAMIQUE EN QUESTIONS* 15, 24 (Charlotte Nordmann ed. 2004).

³⁵¹ See Blandine Chalini-Pont, *Is Laïcité the Civil Religion of France?*, 41 *GEO. WASH. INT’L L. REV.* 765, 771 (2010) (noting the grand importance in France of maintaining a secular society).

³⁵² RAPPORT D’INFORMATION, *supra* note 1, at 94 (citing the hearing of Hubert Sage, member of the administration of the Association des Libres Penseurs de France, Sept. 16, 2009).

³⁵³ *Id.* at 118 (citing the hearing of Élisabeth Badinter, Sept. 9, 2009).

of the Republic: the contradictory goals of the French Revolution which were the refutation of authorities, that is the refutation of the absorption of the individual subject in the harmony of the cosmos, according to the ancient conception of natural law, while conserving in parallel the idea of the ancients of a social nature of man in order to respond to the social question of mass poverty. The possibility to judge for oneself, the claim of the enlightenment, was seen as inseparable from the necessity to assure this existence. However, this overestimation of the role of the state in order to guarantee human existence had as consequence to legitimize its role in order to define the opinions, which are worthy of being heard towards the formation of individual personality. In other words, if it is citizenship that dignifies human beings, if it is being a citizen that makes one a man as far as all aspects of existence are concerned, this leads to accepting a particularly extensive role for the state in order to define all the components of human existence, opinions and ideas included. According to the French conception civil society coincides with the political society. If it is belonging to a community, which thanks to language contributes to moralization and to the development of the discursive, reasonable faculties of man, the nexus between the importance of this membership to the community and the overdetermination on behalf of the community of spheres, which should belong to the judgment of the subject, becomes obvious. This is equivalent to the limitation of the very possibility of reflexivity for the subject. If it is society that conditions and makes possible through socialization this reflexivity, the individual should preserve the possibility of critical appreciation of the norms of society. If it is membership in a community that makes a human being dignified, this dignity, at the same time, imposes the possibility for a withdrawal from the community and the recognition of the possibility of the subject to appreciate for herself under a critical and reflective vision this very membership in the community.

Apart from these reasons of principle, the prohibition does not seem justified on consequential grounds either as the proper political response to religious fundamentalism. A quarter of the 1,900 women actually wearing the burka in France³⁵⁴ have recently converted to Islam or were born in a non-Muslim religion and culture, while two-thirds of them already possess the French nationality and half of them belong to third and second generations of immigrants.³⁵⁵ The Report of the French Parliament notes that women who wear the burka see it as a sign of membership to an “elite, to a religious avant-garde called to guide the stray Muslim community.”³⁵⁶ Philosophers describe the phenomenon as the “zeal of the converted,”³⁵⁷ expressing the distance of the freshly converted from their origins including their family

³⁵⁴ Stéphanie Henneville-Vauchez, *La Burka, la Femme et l'État, Réflexions Inquiètes sur un Débat Actuel*, (May 12, 2010), available at <http://www.raison-publique.fr/article317.html>.

³⁵⁵ RAPPORT D'INFORMATION, *supra* note 1, at 42.

³⁵⁶ *Id.* at 44 (citing the hearing of Samir Amghar, Researcher at L'École des Hautes Études en Sciences Sociales–Paris, of November 4, 2009).

³⁵⁷ *Id.* at 45 (citing Abdennour Bidar, hearing of July 8, 2009).

surrounding,³⁵⁸ which is not approved by the wider Muslim community. In many cases it is a sign of “religious hyperindividualism”³⁵⁹ of women who would like to take some distance from a wider society that they judge as corrupt. Contemporary fundamentalisms are not univocal or linear: the re-activation of faith serves the role of self-definition of the individual in relation to the traditions to which she belongs.³⁶⁰ They are substituting personal conviction to the domination of custom and community. The radicalism on behalf of the Muslims inhabiting contemporary France, in particular the youth of Parisian suburbs, is due to what they perceive as the perpetuation of the mentality of colonialism on behalf of the French state.³⁶¹ Headscarf bans are not the appropriate political response, because it is impossible to do away with a social phenomenon of radicalism by avoiding seeing it. In this sensitive context, bans are seen as attacks to one’s identity. They seem to be disproportionate measures to assure the envisioned aims, introducing violence and running the risk to stir more reaction in the long term.

The question concerns the larger issue of immigration and the colonial past of France.³⁶² The influx of Muslim immigrants from the colonies to the metropolis was initially encouraged by the French state because they were indispensable to the construction of public works of infrastructure in the country.³⁶³ If immigrants enter a country and remain, this means that they are needed in the society that receives them and that they fulfill an essential economic role. Otherwise, the difficulties in surviving would have forced them to leave. This economic reality leads to a moral argument in favor of respecting these immigrants. If their presence and their work contributes to the everyday well-being of the citizens of the society of reception, as their work force is indispensable to the economy of the country that receives them, then that country has the moral obligation to treat them as equal members in everyday deliberations about political action. They should be offered the possibility to reflect upon the practice of wearing the burka. It is persuasion, and not coercion, that respects them as equal deliberating members in a conception of the population as open, fluid and reflective.³⁶⁴ The public sphere starts in our everyday communicative practices

³⁵⁸ *Id.* (citing the historian Benjamin Stora’s use of the terms “challenge towards the parents” and “challenge towards the school,” hearing of November 18, 2009).

³⁵⁹ *Id.* at 46 (according to the expression of Samir Amghar).

³⁶⁰ GAUCHET, *supra* note 241, at 38.

³⁶¹ RAPPORT D’INFORMATION, *supra* note 1, at 55 (detailing observations of Benjamin Stora). Events like the 2005 riots are also certainly associated with this perception of the youth of the suburbs. See LAURENCE & VAISSE, *supra* note 68, at 2 (noting the participation of Muslim youth in the 2005 Parisian riots).

³⁶² Pierre Bourdieu, *Un Problème Peut en Cacher un Autre*, in LE FOULARD ISLAMIQUE EN QUESTIONS, *supra* note 350, at 45.

³⁶³ LAURENCE & VAISSE, *supra* note 68, at 16–17.

³⁶⁴ See SEYLA BENHABIB, ANOTHER COSMOPOLITANISM 35–36 (2006) (explaining that the demos must engage in reflexive acts of self-constitution submitted to the inevitable global movement of populations).

on matters of public concern.³⁶⁵ It is composed of a wide and fluid network of interpersonal communications on matters of public concern, and immigrants are an important part of these practices. These everyday interactions seem to be the best medium that societies of reception have to express to women and members of their family their ideas about wearing the burka. Dialogue, and not prohibition, respects women's dignity.

Whether the burka ban is seen as a late expression of feelings of guilt towards these immigrants or as a fear of the differences threatening the French republican model, it constitutes a serious violation of liberty. The power of the "reason of state"³⁶⁶ of the colonial era is transformed into paternalistic power with the benevolent aim of protecting women from themselves and from the members of their communities. Networks of power are dense and heterogeneous; thus, the claim to speak in the name of these women runs the risk of misunderstanding the circumstances that define their behavior and of leading to distortions of their situation.³⁶⁷ That French lawmakers claim to speak for these women sounds like a benevolent intervention motivated by the need to make up for colonial domination. Recently the French Parliament attempted to include in a legal text a clause for the French school programs to "recognize the 'positive role' of the French presence overseas."³⁶⁸ This proposal to consecrate an official truth on the colonial past in a law that aimed at compensating inequalities and injustices among repatriated officers of the French army and harkis—local collaborators of the colonial regime—was suppressed following the intervention of the President of the French Republic after the request of five historians.³⁶⁹ Accepting women as equal interlocutors participating in the public sphere is the proper way to

³⁶⁵ JÜRGEN HABERNAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 365–66 (Thomas McCarthy ed., William Rehg trans., 1996).

³⁶⁶ PIERRE VIDAL-NAQUET, *FACE À LA RAISON D'ÉTAT, UN HISTORIEN DANS LA GUERRE D'ALGÉRIE* (1989); see also FRANTZ FANON, *THE WRETCHED OF THE EARTH* (Constance Farrington trans., 1963) (discussing the psychic effects of colonial violence on the colonized).

³⁶⁷ See Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271–313 (Cary Nelson & Lawrence Grossberg eds., 1988). Spivak notes how the protection of the woman from the men of her own kind has been operating as a key element of imperialism's image as the establisher of the good society in the colonial world. Using Spivak's insight we could note that the constitution of the female subject is a *différend* (in the sense that Jacques Derrida attributes to the word in *L'ÉCRITURE ET LA DIFFÉRENCE*), an undefined element projected to the future. The constitution of the female subject should be open to the self-definition of the women in their own terms and not to the interpretation of benevolent saviors of women from themselves.

³⁶⁸ See Farid Laroussi, *Le Nouveau Révisionnisme*, *LE MONDE*, May 12, 2005, available at <http://www.ldh-toulon.net/spip.php?article633> (detailing the proposed Law of February 23, 2005); see also Pierre Nora, *Liberté pour l'Histoire!*, *LE MONDE*, Oct. 11, 2008 (similarly discussing the legislation).

³⁶⁹ Laetitia Van Eeckhout, *Une Disposition Adoptée avec l'Aval du Gouvernement Français*, *LE MONDE*, June 11, 2005, available at <http://www.ldh-toulon.net/spip.php?article686>; Raphaëlle Branche et al., *La Responsabilité des Historiens Face à l'Histoire Coloniale*, *LE MONDE*, Sept. 20, 2005.

the respect of their dignity. It is also promising as to the possibilities of change of beliefs that violate gender equality. Respecting some elements, which seem unacceptable from our point of view might be a better measure towards encouraging participation of Muslims in the public sphere. Certainly the creation of the French Council of the Muslim Religion³⁷⁰ by the French state was a step that should be applauded.

If a general burka ban is compatible with individual liberty, some regulation of the covering of the face in schools can be justified if it is proved that it seriously impedes the educational process. However, the hijab, which does not cover the face, is very unlikely to have a similar effect. The state can be permitted to intervene in order to protect individuals against other powerful actors of civil society, the members of the families, who are forcing women to wear headscarves. Power does not operate only on a top-to-bottom scheme, but is omnipresent in all social relations.³⁷¹ Penalties upon the members of the families who force women to cover their faces can be justified. The difficulties in assuring that wearing the burka is a manifestation of free will, and not the result of physical or psychological force, led to the general ban in the French law. In case of doubt as to whether the burka is the result of free exercise of one's will or imposed by force the presumption should be in favor of liberty and against state intervention rather than the other way around.

CONCLUSION

This Article aims to present the conflicting legal responses in France and the United States on a hard case: headscarf bans and religious symbols, which seem to be incomprehensible and violating gender equality and human dignity. In France, a paternalistic vision of the state, together with a conception of a secularism imposed from top-to-bottom legitimizes state intervention for banning religious symbols.³⁷² In the United States, a conception of secularism founded upon the need to accommodate religious differences leads to a more tolerant attitude towards religious symbols even if they seem incomprehensible to the majority of the population.³⁷³

³⁷⁰ See French Council of the Muslim Religion Brochure, http://www.lecfcm.fr/wp-content/uploads/2009/08/cfcm_brochure.pdf (last visited Mar. 15, 2012) (stating that the Council has the object to "defend the dignity and the interests of the Muslim religion in France, to facilitate and organize the sharing of information and services between religious communities, to encourage dialogue between religions and to assure the representation of the Muslim religious communities and the public authorities.") (this author's translation).

³⁷¹ See, e.g., MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF PRISON* (Alan Sheridan trans., 1995); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., 1990).

³⁷² See LAURENCE & VAISSE, *supra* note 68, at 163–64 (explaining the importance of French secular society, particularly within the school system).

³⁷³ See, e.g., Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 123–24 (2002) (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)) (noting that religious accommodation should be granted to different religions).

For Marcel Gauchet, the concept of secularization fails to express a transmutation of the religious element that has taken place: our world is only recomposed, on new different metaphysical foundations, on the belief in democracy and human dignity.³⁷⁴ The world is in some sense disenchanting: we do not have recourse to comprehensive theories about the origins and the movement of the world. However, our societies are enchanted by reason and by a belief that we can reasonably change the world.³⁷⁵ The crucial question then becomes: Who incarnates the best possible expression of reason? The state or its citizens? The metaphysical foundation of the French legal order lies in the idea of a state-imposed secularism. France was the “cradle” of a specific conception of radical democracy. Guaranteeing the preconditions of the exercise of liberty and seeing the state as having a moralizing role can lead to dangerous slippery slopes of overprotection of individuals from themselves. In France, the reason of the state is permitted to liberate individuals from their immaturity.³⁷⁶ The need to guarantee the “real” and “dignified” exercise of liberty is in this case associated with the guilt of the colonial era as well as the fear of the other inspired by the invisible, yet existent, Catholic heritage. Behind the negation of state religion, which reproduces in its extreme form the negation of all manifestation of religion in the public sphere, also lies a Christian majority. Something from the old is preserved in the new.

In the United States the widespread religiosity³⁷⁷ makes the American legal order more respectful to religious differences. The religiosity of Americans is obvious even in the United States’ Pledge of Allegiance,³⁷⁸ and has been recognized by the Supreme Court.³⁷⁹ Tocqueville also noted that in America, religion furnishes the moral bond which substitutes for the loosening of the political bond.³⁸⁰ Marx criticizing the separation of church and state as an unsatisfactory measure, if not an impediment, to human emancipation, which presupposes the disappearance of religion itself, cited the example of the United States as a profoundly religious country due

³⁷⁴ GAUCHET, *supra* note 25, at 7–9 (underlining that we are democrats in a metaphysical sense: a hidden conversion has changed the relation between believers and non-believers).

³⁷⁵ See ÉMILE DURKHEIM, *L’INDIVIDUALISME ET LES INTELLECTUELS* (2002) (stressing that our contemporary societies operate under the cult of reason and the belief in human dignity).

³⁷⁶ See SCOTT, *supra* note 339, at 2 (explaining the importance of secularism and equality in French society).

³⁷⁷ ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 1, 2–4 (2010).

³⁷⁸ See *Newdow v. United States Congress*, 292 F.3d 597, 609 (9th Cir. 2002), *rev’d*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (stating that the reference to one nation ““under God’ w[as] intended to recognize a Supreme Being, at a time when the government was publicly inveighing against atheistic communism”).

³⁷⁹ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 213 (1963) (“[W]e are a religious people whose institutions presuppose a Supreme Being.”) (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)). For an analysis, see also John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847 (1984).

³⁸⁰ TOCQUEVILLE, *supra* note 35, at 273–74.

to this separation.³⁸¹ This religiosity makes the American legal order more open to accepting manifestations of religion in the public sphere. In parallel, the natural rights philosophy, which permeates the American legal culture, makes the American legal order overall more tolerant of religious expression. Although American law is far from being totally consistent in its protection of individuality and its understanding of human dignity as protection of individual autonomy, it results for a better protection of religious expression. The natural rights philosophy, which has its origins in a negative reflex towards the use of collective power at the moment of the foundation of the American democracy and which went through various reinterpretations throughout history in relation to the contingency of the moment, seems to be consolidated after the civil rights era towards protecting minorities.

In a sensitive general context full of prejudice and bilateral misunderstandings, it would be preferable not to use the mechanism of state constraint against dress decisions that seem to be so profoundly bound with the expression of religious convictions. The best medium to change perceptions is public dialogue on the necessity of specific religious garbs. The use of state constraint only perpetuates and accentuates prejudice on both sides. It is a disproportionate measure, which introduces violence, whose justification and effectiveness is questionable. A belief in a collaborative elaboration of a reasonable solution towards eliminating prejudice against differences based on gender or religion is more compatible with a commitment to human dignity.

³⁸¹ MARX, *supra* note 49, at 35.