

# SECULARISM UNVEILED: A COMPARISON ANALYSIS OF FRENCH *LAÏCITÉ* AND THE AMERICAN FIRST AMENDMENT

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## *Abstract*

*This article will look comparatively at French law and United States law as it relates to the wearing of hijabs in public schools. France and the United States have two of the strongest and most recognized secularist systems in the world, with completely different interpretations of the concept. To categorize the respective systems simply, the United States guarantees freedom of religion, whereas France strives for freedom from religion. In both countries, courts have been asked to determine whether students have the right to wear hijabs or other similar religious garb to school as an expression of their faith. In each of the countries, the federal government (in the American case, the Department of Justice, in the French, the Prime Minister and the Conseil d'Etat interior division) released a statement of their view of how each country's secularity principles should be applied in the respective controversies. This article examines the language used by the respective federal governments when making these statements to analyze each country's vested interest in religious expression. Taking the issue of hijabs in schools as a microcosm of the larger debates over secularism, this article will question how the United States and France justify their vastly different positions on the topic under the same umbrella of "religious freedom." These differences ultimately derive from the origins of each country's current government: the United States started as a haven for a "melting pot" of various religious groups and national origins, whereas France's Third Republic adopted the secular principle of *Laïcité* as a reaction to the once-pervasive influence of the Catholic Church. Despite France's interconnectedness in the geopolitical landscape, its approach to*

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*learning and expression is more nationalist. This nationalist view is expressed not only in the French decision to ban hijabs in public school as contrary to republican values, but also in their extension of that prohibition to the public workplace. In France, religious expression is not a privileged individual right; it is an affront to the secular power of the state. By contrast, the United States takes the position that students have the right to wear their hijabs as an expression of their faith, which leads to an approach to schooling and expression that privileges individual rights over state power.*

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## I. INTRODUCTION

In 1989 and 2003, France and the United States respectively were forced to reckon with religious expression in schools in the face of rising immigration and religious diversity. Controversies in both countries began when public schools suspended Muslim girls for wearing their hijabs to class.<sup>1</sup> The schools alleged that the girls’ hijabs sparked fear in their fellow

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1. See United States’ Memorandum of Law in Support of its Cross-Motion for Summary Judgment and in Opposition to Defendants’ Motion for Summary Judgment, *Hearn v. Muskogee Pub. Sch. Dist. 020*, No. CIV 03-598-S, at ¶¶ 31–33 (E.D. Okla., May 6, 2004), <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/hearnokbrief.pdf> [hereinafter *Hearn DOJ Memorandum*]; see also Conseil d’Etat [CE] [Council of State], Nov. 27, 1989, No. 346.893 (Fr.).

students.<sup>2</sup> Both controversies arose following large events—September 11 in the United States and the Salmon Rushdie Affair<sup>3</sup> throughout Europe—which cast Islam in a negative light and invoked nationalist sentiments. Both France and the United States increasingly viewed Islam as antithetical to the liberal values that each country prides itself on upholding.

Legal battles commenced in both countries, which were ended by a federal advisory body—the Department of Justice in the United States<sup>4</sup> and the Conseil d’Etat’s interior division in France<sup>5</sup>—stepping in to offer grandiose sentiments on free speech, nationalism, religious expression, and the role of public schools.<sup>6</sup> Each demonstrated a strong vested interest in framing the issue along specific lines, indicating that the debate over religious garb in school is important in defining the boundary between church and state.<sup>7</sup> This paper analyzes the language and framing of the Department of Justice and Conseil d’Etat’s statements, offering insights into the meaning of free expression, religious liberty, and secularism in both countries.

Although both countries pride themselves on religious freedom, France and the United States have opposite interpretations of the concept. To categorize the respective secularist ideologies simply, the United States guarantees freedom *of* religion, whereas French laïcité (their word for secularism) strives for freedom *from* religion.<sup>8</sup> Public conflicts over religious topics occur in a variety of spheres in each country—from adoption agencies<sup>9</sup> to public beaches<sup>10</sup>—but one of the most prominent battlegrounds for these

2. See Hearn DOJ Memorandum, at 22 (stating that other students’ reactions “centered around [their] curiosity and concern about seeing an unfamiliar object”); see also Conseil d’Etat, *supra* note 1.

3. The Rushdie Affair was a controversy that led to deaths in several countries because of a book written by Salman Rushdie that portrayed Islam in an offensive light. The Rushdie Affair will be discussed more in depth *infra* Sec. II.B. See Andrew Anthony, *How One Book Ignited a Culture War*, THE GUARDIAN, (Jan. 10, 2009), <https://www.theguardian.com/books/2009/jan/11/salman-rushdie-satanic-verses>; see also James M. Markham, *Fallout Over Rushdie: The Muslim Presence in Western Europe Is Suddenly Starker*, N.Y. TIMES (Mar. 5, 1989), <https://www.nytimes.com/1989/03/05/weekinreview/world-fallout-over-rushdie-muslim-presence-western-europe-suddenly-starker.html>.

4. See generally Hearn DOJ Memorandum, *supra* note 1.

5. See generally Conseil d’Etat [CE] [Council of State], Nov. 27, 1989, No. 346.893 (Fr.).

6. See generally *id.*; Hearn DOJ Memorandum, *supra* note 1.

7. See Hearn DOJ Memorandum, *supra* note 1; Conseil d’Etat, *supra* note 1.

8. See U.S. CONST. amend. I; TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 186 (2003).

9. See, e.g., *Fulton v. City of Philadelphia*, 593 U.S. 522, 542 (2021) (holding that an adoption agency cannot refuse to contract with a Catholic organization because they would not work with same sex couples, which they viewed as against their faith).

10. Some Muslim women wear “Burkinis” (a form of full coverage swimsuit) as a way to remain modest at the beach. France banned Burkinis on public beaches, and the French police enforce these bans in the name of “good morals and secularism.” Many of the Burkini bans are

values is the school, especially in France, which prizes its public elementary and secondary schools as the place where republican values are imparted to students of all faiths and backgrounds.<sup>11</sup>

Demographic researchers indicate that France is one of the strongest assimilationist countries.<sup>12</sup> As a concept, “assimilation” requires that newcomers shed their ethnic identity.<sup>13</sup> By contrast, in the United States “multiple national or ethnic identities” are viewed (at least on a theoretical level) as “positive marks of a diverse heritage.”<sup>14</sup> Patrick Simon at the French Institute of National Demographic Studies defines French assimilation as follows:

The notion of assimilation makes reference to a digestive metaphor . . . . The social body and institutions are supposed to digest the newcomers and transform them into French people. The goal is that they are no longer identifiable in the social structure, that their cultural, religious, or social specificities disappear so that they become similar in all respects to the French people.<sup>15</sup>

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written in a way that discriminatorily focus on Islam. The Nice ban forbids “clothing that ‘overtly manifests adherence to a religion at a time when France and places of worship are the target of terrorist attacks.’” The ban was enacted after the terrorist attack in the city on Bastille day. *See* Ben Quinn, *French Police Make Women Remove Clothing on Nice Beach Following Burkini Ban*, THE GUARDIAN (Aug. 23, 2016, 7:43 PM EDT), <https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach>.

11. *See* David Saville Muzzey, *State, Church, and School in France I. The Foundations of the Public School in France*, 19 SCH. REV. 178, 186 (1911).

12. *See* PATRICK SIMON, FRENCH NATIONAL IDENTITY AND INTEGRATION: WHO BELONGS TO THE NATIONAL COMMUNITY?, 3 (2012).

13. *Id.* (“[A]ssimilationist countries, with France in the lead, tend to insist on exclusive choices and consider the retention of an ethnic identity to be a sign of incomplete assimilation.” (citing Irene Bloemraad, *Unity in Diversity? Bridging Models of Multiculturalism and Immigrant Integration*, 2 DUBOIS REV.: SOC. SCI. RSCH. ON RACE 317, 322-23 (2007))).

14. *Id.* (citing Bloemraad, *supra* note 13); *see* Daniel Greene, *What Does it Mean to be a Land of Immigrants?*, PBS, <https://www.pbs.org/kenburns/us-and-the-holocaust/what-does-it-mean-to-be-a-land-of-immigrants> (last visited Feb. 2, 2025) (illustrating that America identifies as a “nation of immigrants,” due to its founding by immigrants and continued diversity of immigration, but the country still struggles with xenophobic policies aimed at limiting immigration and forcing people to become more “American”).

15. Anne Chemin, *Intégration ou assimilation, une histoire de nuances* [Integration or Assimilation, a Story of Nuances], LA TRIBUNE (Nov. 15, 2016), <https://www.djazairess.com/fr/latribune/122428> (“La notion d’assimilation fait appel à une métaphore digestive, explique Patrick Simon, socio-démographe à l’Institut national d’études démographiques (Ined). Le corps social et les institutions sont censés digérer les nouveaux venus et les transformer en Français. Le but est qu’ils ne soient plus repérables dans la structure sociale, que leurs spécificités culturelles, religieuses, ou sociales disparaissent afin qu’ils deviennent semblables en tout point aux Français.”).

The French “digestive” assimilationist model, in which hijabs serve as a visual indication of a potential disconnect with the French identity, is applicable in all public spaces, but especially in public schools.

The contrast between France and the United States’ approaches to religious expression is attributable to the varying ways in which the nations were primarily founded. Both countries began with profound revolutions. The French responded to the domination of the Catholic Church by instituting sweeping uniformity meant to erase the inequality that had persisted throughout the preceding centuries.<sup>16</sup> Given the link between the Catholic Church and the King, the push against monarchical influence necessarily involved removing religion from the public consciousness.<sup>17</sup> The French took a nationalist approach—defining the nation based on shared “Frenchness” and excluding identities that conflicted with that ideal.<sup>18</sup> Although families “bring up children to respect certain values . . . the State makes it very clear that these so-called private values must be relativized by reference to public values.”<sup>19</sup> Before the revolution, France mainly had private, religious education.<sup>20</sup> Post-revolution, public schools became the mechanism through which children learned the new republican values and what it meant to be “French” and secular.<sup>21</sup> Scholars of French citizenship have found that “[c]itizenship education has traditionally been high on the political agenda in France,” due to the “need to consolidate national support for the Third Republic when democracy was restored in 1871.”<sup>22</sup> In the early

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16. See generally ASAD, *supra* note 8, at 192; Muzzey, *supra* note 11, at 181 (“The moral-social movement out of which the public school in France grew was the French Revolution; the peculiar features which the public school in France shows in all its development are a great tendency to uniformity, almost monotony, in organization and function, strict centralization of authority, uncompromising opposition to influences antagonistic to the revolutionary principle (such as the Catholic church), and firm belief that the faithful pursuit of an elaborately formulated program will make scholars.”).

17. See Sophia H. MacLehose, *Separation of Church and State in France in 1795*, 15 SCOTTISH HIST. REV. 298, 299 (1907).

18. See Muzzey, *supra* note 11, at 179.

19. Audrey Osler and Hugh Starkey, *Citizenship Education and National Identities in France and England: Inclusive or Exclusive?*, 27 OXFORD REV. EDUC. 287, 290 (2001).

20. See Muzzey, *supra* note 11, at 184 (“Before the French Revolution there was practically no such thing as public education. The church . . . made some provision for the training of the youth in some of the dioceses of France; but the object of such training was rather exclusively the recruitment of the clerical order.”).

21. See *id.* at 179-81 (“[T]he great absorbing need for the cause of public education in France . . . has been to build a school which should furnish the youth of the land training in the fundamental principles of the French Revolution: namely, the sufficiency of the human mind, illumined by the sole light of reason, to devise and maintain a social state in which every virtue shall have encouragement for its full perfection and every man find employment for his utmost talent . . . [T]he school is the state in the making.”).

22. Osler & Starkey, *supra* note 19, at 289.

days of the Third Republic, citizenship education—"moral and civic instruction"—was prioritized ahead of basics such as reading and writing.<sup>23</sup>

The American founders, on the other hand, descended from immigrants from several countries, many of whom had been persecuted for their beliefs. The United States instead instituted a more open policy designed to erase burdens on religious practice and speech, especially burdens that they had experienced under British rule and which their ancestors had endured and fled.<sup>24</sup> Although civic education is an important aspect of children's schooling in the United States, it is not and was never the central purpose of public education as in France. In the United States, anthropological scholars find that "teaching methods that impart the skills and dispositions of democratic citizenship" have been "eclipsed" by teaching methods that are "suited for imparting standardized academic knowledge" and "so-called 'lifelong learning'—arguably a euphemism to train flexible labor for capital."<sup>25</sup> Civic education varies greatly within and between the states with varying degrees of emphasis.<sup>26</sup> One popular citizenship education book in the United States discusses the rights of American citizens substantially more than the responsibilities of American citizens or the obligations of citizens to participate in our democratic system.<sup>27</sup> By contrast, in France, the duties of citizens within the national community are strongly emphasized.<sup>28</sup>

These origins shaped the underlying systems, philosophies, and principles of secularism adopted in each country. Those secularist principles in turn shaped the United States' position that female students have the right to wear hijabs in public schools as an expression of their faith, and the French position that wearing hijabs could disturb the functioning of schools and

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23. *Id.* (stating that "'instruction morale et civique' was put even before reading, writing and literature in terms of national priorities" (citing J. Costa-Lascoux, *L'éducation civique ... trop tard?* [*Civic Education ... too late?*], 16 *LA REVUE ÉDUCATIONS* 53 (1998))).

24. See RUSSELL WEAVER, *FROM GUTENBERG TO THE INTERNET* 18 (2d ed. 2019) (first citing THOMAS PAINE, *COMMON SENSE* (1776) (Dover ed., 1997); and then citing *Everson v. Board of Educ.*, 330 U.S. 1, 8–9 (1947)).

25. Bradley A.U. Levinson, *Citizenship, Identity, Democracy: Engaging in the Political in the Anthropology of Education*, 36 *ANTHRO. & ED. Q.* 329, 329 (2005).

26. See Kara Yorio, *A Look at Civics Education, State by State*, SCH. LIB. J.: NEWS & FEATURES, (Feb. 3, 2020), <https://www.slj.com/story/a-look-at-civics-education-state-by-state>.

27. See SAGE PUBL'NS, *THE SAGE HANDBOOK OF EDUCATION FOR CITIZENSHIP AND DEMOCRACY* (James Arthur et al. eds., 2008).

28. See Osler & Starkey, *supra* note 19, at 296, 299 (first citing QUALIFICATIONS AND CURRICULUM AUTH., *THE NATIONAL CURRICULUM: HANDBOOK FOR PRIMARY TEACHERS IN ENGLAND: KEY STAGES 1 AND 2* (1999); then citing QUALIFICATIONS AND CURRICULUM AUTH., *EDUCATION FOR CITIZENSHIP AND THE TEACHING OF DEMOCRACY IN SCHOOLS: FINAL REPORT OF THE ADVISORY GROUP ON CITIZENSHIP* 49 (1998); and then citing QUALIFICATIONS AND CURRICULUM AUTH., *THE NATIONAL CURRICULUM: HANDBOOK FOR PRIMARY TEACHERS IN ENGLAND: KEY STAGES 3 AND 4* 20 (2004)).

contradict Republican values. This paper will examine each country's response to the question of hijabs in public schools, using the governments' statements as insight into France and the United States' conflicting positions on religious freedom, and into each country's understanding of their own secularist ideologies. Part II will set up *Hearn v. Muskogee Public School District 020*, the American case on hijabs in public schools and will give an overview of American religious freedom. Part III will outline the French equivalent to *Hearn*, titled Opinion: "Wearing an Islamic Headscarf" and will discuss the French revolution and its influence on the French secularist ideology. Part IV will compare and contrast the language the government used in the two cases to illuminate the stark difference between the countries' religious freedoms. Part IV will focus on four particular differences between the countries: (1) Whether the countries view religious garb as a disturbance to public order, (2) how each country's protections for freedom of expression affect students' religious liberties, (3) whether the countries offer religious exemptions from school activities, and (4) whether the countries have to consult with any other bodies or principles in making their decisions.

## II. THE AMERICAN PERSPECTIVE

### A. *History and Principles of American Secularism*

The First Amendment to the United States Constitution sets forth the right to religious expression. That Amendment reads: "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."<sup>29</sup> The Amendment is read to include both an Establishment Clause (prohibiting government from "establishing" an official religion) and a Free Exercise Clause (guaranteeing Americans the right to freely exercise their religions).<sup>30</sup> Together, these clauses are known as the "Religion Clauses."<sup>31</sup>

The Religion Clauses reflect "the memory of the religious persecution from which many colonists fled" and thus sought to enable diversity of religious thought and expression.<sup>32</sup> The protection of the Religion Clauses is bolstered by the strong protection given to freedom of speech, which

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29. U.S. CONST. amend. I.

30. See *Walz v. Tax Commission*, 397 U.S. 664, 667–68 (1969).

31. See *id.*

32. RUSSELL L. WEAVER & CATHERINE HANCOCK, *THE FIRST AMENDMENT: CASES, PROBLEMS, AND MATERIALS* 795 (6th ed. 2020).

provides extra protection for religious actions.<sup>33</sup> In addition to the explicit references to religion in the First Amendment, religious freedoms are also protected by the Equal Protection Clause, which states “nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>34</sup> Individuals can challenge religious discrimination under the Equal Protection Clause when they are treated differently than other religions or their right to free exercise has been burdened.<sup>35</sup>

The principles of free speech and free exercise of religion are generally attributed to the American Revolution and the enlightenment values underpinning that revolution.<sup>36</sup> Many of the post-revolutionary principles that informed the Constitution arose from a mistrust in the British government, which led the Framers of the U.S. Constitution to embrace Baron de Montesquieu’s ideas regarding separation of powers.<sup>37</sup> There are two prevailing reasons for this mistrust’s influence on the Constitution:

First, the new Americans had just revolted against the British empire, and claimed their independence, because of alleged abuses by the British monarch. Second, many of the new Americans had emigrated to the American colonies in order to escape religious persecution in Europe. In particular, they were seeking to escape “established” religions that required everyone to support those religions, and aggressively persecuted those who tried to practice other religions.<sup>38</sup>

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33. See *id.* at 1007.

34. U.S. CONST. amend. XIV, § 1.

35. See Hearn DOJ Memorandum, *supra* note 1, at 10 (first citing *Johnson v. Robinson*, 415 U.S. 375 n.14 (1974); then citing *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004); then citing *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 715 (O’Connor, J., concurring); and then citing *West v. Devby Unified Sch. Dist.*, 206 F.3d 1358, 1365 (10th Cir. 2000)).

36. See WEAVER, *supra* note 24, at 16 (first citing RALPH KETCHMAN, *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES: THE CLASHES AND THE COMPROMISES THAT GAVE BIRTH TO OUR FORM OF GOVERNMENT* xv (1986); then PAINE, *supra* note 24; then citing *THE DECLARATION OF INDEPENDENCE* (U.S. 1776); and then citing *Everson v. Board of Educ.*, 330 U.S. 1, 8–9 (1947)).

37. See generally CHARLES DE SECONDAT BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* (Thomas Nugent trans., Batoche Books Kitchener 2001).

38. See WEAVER, *supra* note 24, at 16 (first citing RALPH KETCHMAN, *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES: THE CLASHES AND THE COMPROMISES THAT GAVE BIRTH TO OUR FORM OF GOVERNMENT* xv (1986); then PAINE, *supra* note 24; then citing *THE DECLARATION OF INDEPENDENCE* (U.S. 1776); and then citing *Everson v. Board of Educ.*, 330 U.S. 1, 8–9 (1947)); see also *Thomas Jefferson and Religious Freedom*, THE JEFFERSON MONTICELLO, <https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/thomas-jefferson-and-religious-freedom/> (“Before the Revolution, Virginia had an official church – the Church of England – and dissenters from that Church (primarily Presbyterians and Baptists) were discriminated against and seriously persecuted. This deeply disturbed Jefferson . . . Jefferson saw religious freedom as essential for a functioning republic.”).



The “abuses” by the British empire in the colonies included not providing equal rights to the colonists as to the British.<sup>39</sup> The rights of the Englishmen, such as freedom of conscience and freedom of speech, were praised as the “apex of human liberty and ingenuity.”<sup>40</sup>

Initially, despite the discrimination and persecution that the colonists feared, the new Americans were not necessarily accepting of the idea of religious diversity. Some of those who fled European religious persecution sought to establish their own enclaves where they could discriminate against those who did not agree with them.<sup>41</sup> Indeed, some of the original thirteen states had established religions.<sup>42</sup> However, over time, a consensus developed that religious tolerance by the government was essential. Some of the founding fathers, in particular Thomas Jefferson and James Madison, were eventually successful in encouraging Virginia, and subsequently the nation, of the importance of religious tolerance.<sup>43</sup>

The Constitution itself makes no reference to the “separation between Church & State” that many believe is the lynchpin to American secularism.<sup>44</sup> This phrase was pulled from Thomas Jefferson’s 1802 Letter to the Danbury Baptists, which is considered an authority for interpreting the First Amendment given his role in crafting the Constitution.<sup>45</sup> In the letter, Jefferson writes:

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church & State.<sup>46</sup>

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39. USCIS, Intermediate Level Establishing Independence, USCIS, [https://www.uscis.gov/sites/default/files/document/lesson-plans/Intermediate\\_establishing\\_independence\\_handouts.pdf](https://www.uscis.gov/sites/default/files/document/lesson-plans/Intermediate_establishing_independence_handouts.pdf) (last visited Mar. 28, 2025).

40. See WEAVER, *supra* note 24, at 32 (stating that enlightenment thinkers such as Voltaire, Diderot, and Montesquieu participated in what was termed “Anglomania” to celebrate the natural rights enshrined in the British Constitution).

41. See John R. Vile, *Established Churches in Early America*, (July 2, 2024) FREE SPEECH CENTER: ARTICLES, <https://www.mtsu.edu/first-amendment/article/801/established-churches-in-early-america>.

42. See *id.*

43. See *id.*

44. Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802) (available at <https://founders.archives.gov/documents/Jefferson/01-36-02-0152-0006#>).

45. See *id.*

46. *Id.*

Jefferson's writings affirm the government's interest in allowing Americans to exercise their religious freedom without interference from the state, notwithstanding the lack of a clear statement in the Constitution about the interaction between the church and the state.

A variety of landmark Supreme Court Cases delineated the border between the church and state in the educational context. In *Engel v. Vitale*, the Court ruled that a school holding a non-denominational and optional prayer is a violation of the Establishment Clause, emphasizing that the First Amendment was "to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support, or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government."<sup>47</sup> Ten years later in *Wisconsin v. Yoder*, the Court ruled that children could be exempted from compulsory education laws if the laws burdened the students' practice of their religion.<sup>48</sup> Throughout these cases, the Court defined the role of the government in religion as one that supports the ability for all to practice freely by not endorsing or financially supporting any one religion over another, and by allowing certain exemptions from federal laws that conflict with religious practices.

A more recent authority on the meaning of the religion clauses in the context of education is former President Bill Clinton's 1995 memorandum on Religious Expression in Public Schools, written for the Secretary of Education and the Attorney General.<sup>49</sup> He begins by stating that "[r]eligious freedom is perhaps the most precious of all American liberties—called by many our 'first freedom.' Many of the first European settlers in North America sought refuge from religious persecution in their native countries."<sup>50</sup> He goes on to say that students have the right to excusals from religiously objectionable content in class, the right to be free from coercion by any employees of the school, the right to leave school premises to participate in religious instruction, and, most critically for the topic of hijabs, to wear religious messages and religious garb.<sup>51</sup> President Clinton's memorandum emphasizes the amount of flexibility that the United States offers students to ensure that their rights to free exercise of their religion are not burdened.

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47. *Engel v. Vitale*, 370 U.S. 421, 429–30 (1962).

48. *See Wisconsin v. Yoder*, 406 U.S. 205, 234–35 (1972).

49. *See generally* Memorandum from William J. Clinton, President of the U.S., to the Secretary of Education and the Attorney General (July 12, 1995) (on file with Authenticated U.S. Government information), <https://www.govinfo.gov/content/pkg/WCPD-1995-07-17/pdf/WCPD-1995-07-17-Pg1227.pdf>.

50. *Id.*

51. *See id.*

A significant piece of legislation that bolstered the United States' accommodation of religious practice is the Equal Access Act, passed in 1984.<sup>52</sup> The Act emphasized that all student-led groups that meet outside of class time, regardless of religious status, should have access to the same resources and be guided under the same rules.<sup>53</sup> The Act affirmed that it is unlawful for a public school "to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting . . . on the basis of the religious, political, philosophical, or other content of the speech at such meetings."<sup>54</sup> In other words, if a robotics club is allowed to meet during lunch time and has access to meeting spaces and bulletin boards, then a Catholic bible study group must be allowed to meet during lunch time and have access to the same spaces and bulletin boards. The Act's constitutionality was upheld by the Supreme Court in *Board of Education of Westside Community Schools v. Mergens*, which reiterated that allowing religious clubs to function as other clubs minimizes religious discrimination and promotes free exercise.<sup>55</sup>

*B. Hearn v. Muskogee Public School District 020*

*Hearn v. Muskogee Public School District 020*<sup>56</sup> was a test to American secularism generally and the application of that secularism in public schools more specifically. Although expression of religious beliefs on school grounds had been the subject of litigation before,<sup>57</sup> the issue raised in *Hearn*—whether or not students have the right to wear symbols that outwardly convey their religious beliefs<sup>58</sup>—had uneven implications for religions that frequently wear certain garb as part of their faith. The boundaries of religious freedom and equality in schools were put to the test by Nashala Hearn, a student in the Muskogee Public School District in Oklahoma who wore a hijab to school.<sup>59</sup> A hijab is an Islamic headscarf or "veil" for women that wraps

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52. See The Equal Access Act, 20 U.S.C. § 4071 (1984).

53. See *id.*

54. *Id.* § 4071a.

55. See Board of Educ. Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990).

56. See generally Hearn DOJ Memorandum, *supra* note 1.

57. See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 316 (2000) (striking down a school policy allowing for student-led prayer before school football games on the premise that the prayers could be seen as government endorsement of religion).

58. See Hearn DOJ Memorandum, *supra* note 1, at 1.

59. See *id.* at ¶ 21.

around the head but does not cover the face; it is less conservative than some of the other Islamic headscarves.<sup>60</sup>

Nashala began wearing a hijab as part of her Islamic faith during the summer of 2003.<sup>61</sup> She was twelve years old and starting sixth grade.<sup>62</sup> Before she returned to school for the 2003–2004 year, her father asked her homeroom teacher, Ms. Walker, whether or not she would be able to wear her hijab at school.<sup>63</sup> Ms. Walker informed Nashala's father that she could do so.<sup>64</sup> As a result, at the beginning of the school year on August 18, 2003, Nashala began wearing her hijab to school without incident.<sup>65</sup> However, on September 11, 2003, Ms. Walker stopped Nashala in the hall and told her that hijabs were not allowed at school, despite her prior statement that hijabs were permissible.<sup>66</sup> Notably, Ms. Walker had been discussing the September 11 terrorist attacks with another teacher at the time Nashala walked past.<sup>67</sup> The school supported Ms. Walker's decision, asserting that her hijab was "frightening" that it could be construed as a "gang-related symbol," and that it impermissibly brought "religion into the school."<sup>68</sup> Nashala was suspended twice from school over her hijab.<sup>69</sup>

Nashala and her father sued the school district in October 2003, for infringing Nashala's constitutional rights to freely exercise her religion under the First Amendment and to equal protection of the laws under the Fourteenth Amendment.<sup>70</sup> The case was filed in the Eastern District of Oklahoma, and the parties came to an interim agreement allowing Nashala to wear her hijab pending the outcome of the litigation.<sup>71</sup> When the Department of Justice heard of the case, they intervened in the matter, writing a memorandum of law in support of Nashala's right to wear the hijab and helping to broker an agreement.<sup>72</sup> Although the exact motivation behind the Department of Justice's decision to intervene is unknown, it is likely that the growing negative political sentiments towards Islam after the September 11 attacks

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60. See Rachel Payne Gill, *Hijab | Definition, History, & Purpose*, STUDY.COM, <https://study.com/academy/lesson/hijab-definition-and-relation-to-islam.html>.

61. See Hearn DOJ Memorandum, *supra* note 1, at ¶ 21.

62. See Jesse Lee, *Nashala's Story*, THE WHITE HOUSE (June 4, 2009, 3:20 PM), <https://obamawhitehouse.archives.gov/blog/2009/06/04/nashalas-story>.

63. See Hearn DOJ Memorandum, *supra* note 1, at ¶¶ 24–25.

64. *Id.* at ¶ 25.

65. See *id.* at ¶ 27.

66. See *id.* at ¶¶ 28–29.

67. See *id.* at ¶ 28.

68. See *id.* at 16–17.

69. See *id.* at ¶¶ 32–33.

70. See Lee, *supra* note 62.

71. See Hearn DOJ Memorandum, *supra* note 1, at ¶ 35.

72. See Lee, *supra* note 62; Hearn DOJ Memorandum, *supra* note 1, at ¶ 24.

and the burgeoning war with Iraq played a role in the Department of Justice's decision to issue a statement on Nashala's behalf. The U.S. Department of Justice stated that the school's denial of Nashala's choice to wear the hijab violated both her First and Fourteenth Amendment rights.<sup>73</sup>

In its memorandum in *Hearn*, the Department of Justice emphasized that religious liberties are more important than the school's perception that Nashala wearing the hijab would create a "disturbance."<sup>74</sup> The Department of Justice believed that the school did not have a compelling governmental interest<sup>75</sup> in forbidding Nashala from wearing her hijab. Moreover, the memorandum noted that the seemingly neutral law banning head coverings was actually an affront to religious freedom since it provided exemptions for special occasions or circumstances (such as for students undergoing chemotherapy) but not for religious purposes.<sup>76</sup> The school's assertion that it was a religiously neutral institution was at odds with its policies, as they sought to keep religious messages off of school grounds to keep the classroom secular,<sup>77</sup> but, in so doing, they unevenly favored faiths without specific dress requirements. Although the school district expressed concern over students bringing religion into the classroom, the Department of Justice seemed more concerned about the implications of keeping religion *out* of the classroom and thus found that the school had an obligation to support Nashala in wearing her hijab.<sup>78</sup>

Following the Department of Justice's intervention, the Muskogee School District and the Hearn's agreed to a consent order, permitting Nashala and other students to wear hijabs or other religious garb; requiring that the school inform teachers, parents, students, and administrators regarding the new policy; creating a program to ensure that the school complies with the agreement; and providing an undisclosed amount of damages to the Hearn's.<sup>79</sup> Afterwards, the Justice Department's Assistant Attorney General for Civil Rights released a statement saying:

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73. See Hearn DOJ Memorandum, *supra* note 1, at 10, 20–21.

74. See *id.* at 21 (citing *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

75. The school needed to show a "compelling interest" in denying Nashala an exemption to the headgear ban, because the school's system of exemptions made the headgear ban not "generally applicable," which triggered strict scrutiny. To overcome strict scrutiny and continue applying the ban to Nashala, the school needed to show that their policy was "narrowly tailored to further a compelling interest." See *id.* at 7–8, 17.

76. See *id.* at 8.

77. See *id.* at 17.

78. See *id.* at 20–21.

79. See Consent Order, *Hearn v. Muskogee Pub. Sch. Dist.* 020, No. CIV 03-598-S, at 3–5 (E.D. Okla., May 6, 2004) (hereinafter "Hearn Consent Order").

This settlement reaffirms the principle that public schools cannot require students to check their faith at the school house door. . . . The Department of Justice will not tolerate discrimination against Muslims or any other religious group. As the President and the Attorney General have made clear repeatedly, such intolerance is un-American, and is morally despicable.<sup>80</sup>

Because the Department of Justice's intervention in *Hearn* and the ultimate consent order did not have a nationwide effect, at least one other student was prevented from attending school because of her hijab after the decision.<sup>81</sup> She was eventually allowed to return to school following the intervention of the Council on American-Islamic Relations.<sup>82</sup> However, the Department of Justice's statement can nonetheless serve as a guideline to the application of Constitutional principles in the public school setting because it reflects the federal government's stance on religious expression in school.

### III. THE FRENCH PERSPECTIVE

#### A. *History and Principles of French Secularism*

France's republican system began after the French revolution against the then all-encompassing influence of the monarchy and the Catholic Church.<sup>83</sup> The revolution involved a textbook model of secularization: the "'freeing' of property from church hands into the hands of private owners, and thence into market circulation."<sup>84</sup> The revolution also led to creation of the French motto: *Liberté, Égalité, Fraternité* (Liberty, Equality, Fraternity) that has remained central to the French identity throughout the modern Fifth Republic.<sup>85</sup> The Catholic Church, hopelessly entangled with the French monarchy, became a distinct symbol of opposition to republican revolutionary ideals,<sup>86</sup> leading to

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80. DEP'T OF JUST., No. 04-343, JUSTICE DEPARTMENT REACHES SETTLEMENT AGREEMENT WITH OKLAHOMA DISTRICT IN MUSLIM STUDENT HEADSCARF CASE (2004).

81. See Catherine J. Ross, *Accommodating Children's Religious Expression in Public Schools: A Comparative Analysis of the Veil and Other Symbols in Western Democracies*, in WHAT IS RIGHT FOR CHILDREN? THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 283, 289 (Martha Albertson Fineman & Karen Worthington eds., 2009) (describing a school that initially barred a student from wearing a hijab at school in 2005).

82. See *id.*

83. See ASAD, *supra* note 8, at 24.

84. See *id.* at 192 (citing *Säkularisation, Säkularisierung in GESCHICHTLICHE GRUNDBEGRIFFE: HISTORISCHES LEXIKON ZUR POLITISCH-SOZIALEN SPRACHE IN DEUTSCHLAND [Secularization, Secularization in BASIC HISTORICAL TERMS: HISTORICAL LEXICON OF POLITICAL AND SOCIAL LANGUAGE IN GERMANY]* 789 (Otto Brunner et al. eds., 1972)).

85. See *Liberty, Equality, Fraternity*, ELYSEE, <https://www.elysee.fr/en/french-presidency/liberty-equality-fraternity> (last visited Mar. 16, 2025).

86. See MacLehose, *supra* note 17, at 299.

a push to create unity around a common “French” secular identity, a Republic that would be “one and indivisible.”<sup>87</sup>

Today, an expectation persists that the identity of being “French” comes before all other identities, thus leaving no space for so-called “Hyphenated-identities” (ex: Chinese-French, Egyptian-French, etc.).<sup>88</sup> Scholars emphasize that France differs from other multicultural societies in that this concept of “dual belonging” has been rejected in France, “where many perceive identity as a zero-sum game” as “commitment to a minority culture or a foreign country detracts from the quality of one’s commitment to French identity.”<sup>89</sup> A prominent example of this unity over a common “Frenchness” is the fact that the French census has no questions regarding nationality.<sup>90</sup> In addition, the concept of “community leaders” is not prominent in French culture because “the suggestion that ‘communities,’ in the sense of ethnic or religious groups, exist in France is strongly denied, and indeed resisted, by a number of mainstream political groups and well-known thinkers.”<sup>91</sup>

The education system is the primary method through which this “Frenchness” is socialized. Textbooks emphasize French unity and discourage community building.<sup>92</sup> One study of French education describes French textbooks as making “clear that any attempt to develop a sense of community founded not on citizenship but on a sense of ethnic identity is totally alien to the values of the Republic: ‘The Republic cannot accept an inward-looking communitarianism which is likely to endanger the unity of the nation.’”<sup>93</sup> This is the type of message conveyed in the Conseil d’Etat’s statement, as they emphasized the importance of peaceful coexistence.<sup>94</sup>

The legal basis of French secularism is generally attributed to the Law of December 9, 1905, on the Separation of Churches and the State.<sup>95</sup> This Law, among other things, affirmed that “the Republic ensures freedom of conscience,”<sup>96</sup> ended the recognition and subsidization of religions, outlawed

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87. See *id.* at 303.

88. See SIMON, *supra* note 12, at 1. By contrast, Americans regularly use “hyphenated” identities (Chinese-American, Egyptian-American, etc.).

89. *Id.*

90. See *id.* at 3, 12–13.

91. Osler & Starkey, *supra* note 19, at 299.

92. See *id.* at 301.

93. *Id.* at 302.

94. See Conseil d’Etat, *supra* note 1.

95. Loi du 9 Décembre 1905 concernant la séparation des Eglises et de l’Etat [Law of December 9, 1905 on the Separation of Churches and the State], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 11, 1905, p. 1.

96. “La République assure la liberté de conscience.” *Id.* at art. 1.

religious signs and references in “any public place whatsoever”<sup>97</sup> (with small exceptions), and imposed punishments on individuals who interfere with other individuals’ or a group’s right to exercise their religion.<sup>98</sup> Portions of the Law of 1905 were reinforced by the 1958 iteration of the Constitution’s Article Two, which similarly declared that “France is a secular republic” which “ensures equality before the law of all citizens without distinction of origin, race, or religion.”<sup>99</sup> These dramatic steps resulted in a separation of church and state designed to reject the pre-revolutionary supremacy of the Catholic church in France.

These ideas of “Frenchness,” however, are colored by the French tradition, which was generally Christian. Thus, despite the stated desire to push religion out of the public sphere, there are six Christian public holidays.<sup>100</sup> Some businesses are also prevented from opening on Sundays.<sup>101</sup> Around Christmas, some Frenchmen believe that nativity scenes should be erected at town halls because they are “not religion, but culture.”<sup>102</sup>

Throughout the Constitution and the French code, France emphasizes not only the importance of secularism in public generally but also in schools more specifically. The Jules Ferry Laws of the 1880s established a free and mandatory public education system and required that schools be secular.<sup>103</sup> These laws were enacted as part of a secularization process or “dechristianisation” of France.<sup>104</sup> The fact that state-run public schools

97. “[E]n quelque emplacement public que ce soit . . .” *Id.* at art. 28.

98. *Id.* at art. 31–32.

99. “[L]a France est une république . . . laïque . . . elle assure l’égalité devant la loi de tous les citoyens sans distinction d’origine, de race ou de religion.” Conseil d’Etat, *supra* note 1.

100. France recognizes the following Christian holidays as national holidays: Easter Monday, Ascension Day (the day Jesus went to heaven after his resurrection), Whit Monday (Pentecost Monday), Assumption of the Blessed Virgin Mary, All Saints’ Day, and Christmas Day. Some regions of France also celebrate Good Friday and Saint Stephen’s Day as public holidays, but these are not nationally recognized public holidays. See Stephen Maunder, *French Public Holidays in 2025*, EXPATICA (Nov. 2, 2025), <https://www.expatica.com/fr/lifestyle/holidays/french-public-holidays-103612/>.

101. See Jessica Jones, *What Shops Can Open in France on Sundays and Does it Vary by Region?* CONNEXION FRANCE (June 2, 2024, 7:00 AM), <https://www.connexionfrance.com/practical/what-shops-can-open-in-france-on-sundays-and-does-it-vary-by-region/661160>.

102. See Catherine Fieschi, *Muslims and the Secular City: How Right-Wing Populists Shape the French Debate Over Islam*, BROOKINGS (Feb. 28, 2020), <https://www.brookings.edu/articles/muslims-and-the-secular-city-how-right-wing-populists-shape-the-french-debate-over-islam/>.

103. See *Jules Ferry Laws Establishing Free, Secular, Compulsory Education in France*, CAL. STATE UNIV. SACRAMENTO, <https://www.csus.edu/indiv/c/craftg/hist127/Jules%20Ferry%20laws%20establishing%20free.pdf>.

104. See Gemma Betros, *The French Revolution and the Catholic Church*, HISTORY TODAY (Dec. 2010), <https://www.historytoday.com/archive/french-revolution-and-catholic-church>; see



were free was critical in the effort to further republican education, as poorer areas of the country had previously relied on the Catholic Church for schooling.<sup>105</sup> In 1946, the interest in and commitment to secular education was enshrined in the preamble to the Constitution, which stated that “the organization of free and secular public education is at all levels a duty of the state.”<sup>106</sup>

While the importance of public education in enforcing and modeling secularism is evident throughout these French laws, they are also reinforced by subsequent memos and statements from public officials. The 2003 Stasi Commission Report, issued by an investigative committee established by then-President Jacques Chirac to explore the applications of secularism in France, states: “Many legal obligations for both public services and its users will result from this founding principle [of secularism], starting with the national Education.”<sup>107</sup> The Stasi Commission, based on their investigations, recommended an official ban on religious garb, which was actualized in early 2004.<sup>108</sup> The text of the ban was framed neutrally, without singling out particular faiths. However, a vote for the ban was framed as a “vote against headscarves” that would “support women battling for freedom in Afghanistan, schoolteachers trying to teach history in Lyon, and all those who wished to reinforce the principles of liberty, equality and fraternity.”<sup>109</sup> The 2004 ban brought forth similar debates as those which took place in 1989 when the Conseil d’État was first asked to render its opinion on headscarves in schools.<sup>110</sup>

A memorandum released by the French Government’s Secularism Monitoring Centre, multiple decades after the “Port du Foulard Islamique”

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Giampaola Lecce et al., *Birth and Migration of Scientists: Does Religiosity Matter? Evidence from 19th-Century France*, 187 J. ECON. BEHAV. & ORG., 274, 277 (2021).

105. See *Jules Ferry Laws Establishing Free, Secular, Compulsory Education in France*, *supra* note 103.

106. “L’organisation de l’enseignement public gratuit et laïque à tous les degrés un devoir de l’Etat.” Conseil d’Etat, *supra* note 1.

107. “De ce principe fondateur découlent de nombreuses obligations juridiques aussi bien pour les usagers que pour les services publics, à commencer par l’Education nationale.” COMMISSION DE REFLEXION SUR L’APPLICATION DU PRINCIPE DE LAÏCITÉ DANS LA REPUBLIQUE [COMMISSION FOR REFLECTION ON THE APPLICATION OF THE PRINCIPLE OF SECULARISM IN THE REPUBLIC], RAPPORT AU PRESIDENT DE LA REPUBLIQUE [REPORT TO THE PRESIDENT OF THE REPUBLIC] 19 (2003) [hereinafter Commission Stasi].

108. See JOHN BOWEN, WHY THE FRENCH DON’T LIKE HEADSCARVES: ISLAM, THE STATES, AND PUBLIC SPACE, 1 (2007).

109. *Id.*

110. See *id.* at 4.

opinion by the Conseil d'État, provides an explanation of the reasoning and motivation behind French secularism.<sup>111</sup> The Centre writes that:

France today is characterized by more cultural diversity than before. This is why she needs secularism now more than ever, secularism that guarantees to all citizens, regardless of their religious or philosophical beliefs, to live together with liberty of conscience, liberty to practice a religion or not to practice one, equality of rights and obligations, and republican solidarity.<sup>112</sup>

Although this memorandum postdated Conseil d'État's opinion by a number of years, the principles reflected in it of republican solidarity and living together are emphasized throughout the Conseil d'État's opinion and other interpretations of secularism. These principles existed before the Conseil d'État's opinion and have persisted to the present. Secularism in France is the vehicle through which multiculturalism is managed, one in which an allegiance to the state is supposed to take precedence over individual identities.

### B. Opinion: "Wearing an Islamic Headscarf"

As in *Hearn*, the French suspensions of Muslim schoolgirls were also an influential and groundbreaking test of the country's values. The French equivalent to *Hearn* began when Principal Ernest Chénieres in Creil, a city outside Paris, banned three girls from wearing headscarves at his school in September 1989.<sup>113</sup> Two fourteen-year-old girls, Fatima and Samira, and one fifteen-year-old girl, Leila, wore hijabs to school as part of their Muslim faith.<sup>114</sup> They declined to remove them in the face of the ban.<sup>115</sup> The girls were suspended for not complying with the order, and sisters Fatima and

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111. See *La Laïcité Aujourd'hui, Note D'orientation De L'Observatoire De La Laïcité* [*The Secularism of Today, Guidance from the Observatory for Secularism*], L'OBSERVATOIRE DE LA LAÏCITÉ [OBSERVATORY FOR SECULARISM] (May 26, 2014), <https://www.gouvernement.fr/la-laicite-aujourd-hui-note-d-orientation-de-l-observatoire-de-la-laicite>.

112. "La France se caractérise aujourd'hui par une diversité culturelle plus grande que par le passé. C'est pourquoi elle n'a jamais eu autant besoin de la laïcité, laïcité qui garantit à tous les citoyens quelles que soient leurs convictions philosophiques ou religieuses, de vivre ensemble dans la liberté de conscience, la liberté de pratiquer une religion ou de n'en pratiquer aucune, l'égalité des droits et des devoirs, la fraternité républicaine." *Id.* Some commentators note that this rhetoric and the "newfound prominence" of secularism are a way to discriminate against Muslims. See, e.g., Audrey Pettit, *In France, Secularism Is a Justification for Discrimination Against Muslims*, JACOBIN (June 6, 2023), <https://jacobin.com/2023/06/french-muslim-hijab-ban-laicite>.

113. See Nicky Jones, *Beneath the Veil: Muslim Girls and Islamic Headscarves in Secular France*, 9 MACQUARIE L. J. 47, 49 (2009).

114. See *id.*

115. See *id.* at 50.

Leila's father withdrew them from school.<sup>116</sup> French<sup>117</sup> and American<sup>118</sup> media were quick to comment on the matter. The incident also resulted in demonstrations, with some protesting on behalf of the right to education, some protesting in favor of strict secularism, some advocating for religious freedom, and some asserting that the hijab is "a sign of imprisonment" or an "insult to the principle of women's emancipation."<sup>119</sup> Some other Muslim girls began to wear their hijabs to school in solidarity and then protested the suspensions that resulted.<sup>120</sup>

In response to the protests, Principal Chenières played into the fears of the French people. He warned of a "nightmare" of "thousands and fifty thousands" of girls wearing hijabs to school.<sup>121</sup> Principal Chenières proposed a compromise with Fatima, Leila, and Samira: the girls could wear their hijabs in common areas but would have to wear the scarves on their shoulders in the classroom.<sup>122</sup> The girls held their ground and were suspended for a second time.<sup>123</sup> There were some protests and media coverage before the second suspension, but the second suspension elevated the debate into the controversy that the media began to refer to as the headscarf "affair."<sup>124</sup> Media coverage increased, and protests became more widespread.<sup>125</sup> A group of Muslim women organized a march where women wore chadors (a full-body cloth that covers everything except a woman's face), and another organized a countermarch in favor of secularism.<sup>126</sup>

At this point, legal guidance was sought by several parties. A father of a Muslim girl suspended from school in Lille (a city in northeastern France) said, "if the State decides that the headscarf is prohibited at school, I will agree. It is the State. But the teachers cannot decide that it is forbidden."<sup>127</sup>

116. *Id.*

117. *See id.*

118. *See, e.g.,* Youssef M. Ibrahim, *Arab Girls' Veils at Issue in France*, N.Y. TIMES, Nov. 12, 1989, § 1 at 5, <https://www.nytimes.com/1989/11/12/world/arab-girls-veils-at-issue-in-france.html>.

119. *Id.*

120. *See* Jones, *supra* note 113, at 50.

121. *Id.* (citing Jean-Francois Guyot, *Creil: le "défi permanent"* [*Creil: the "permanent challenge"*], LE FIGARO, Oct. 21, 1989 (Fr.)).

122. *See id.*

123. *See id.* at 51.

124. *See id.*

125. *See id.*

126. *See id.* at 51–52 (citing FRANÇOISE GASPARD & FARHAD KHOSROKHAVAR, LE FOULARD ET LA RÉPUBLIQUE (1995); and then Elisabeth Chikha, *September to December 22, 1989: an Autumn in France and Around the World*, 1129–1130 HOMMES ET MIGRATION [MEN AND MIGRATION] 101 (1990)).

127. *Id.* at 52 (citing Monique Gladberg et al., *Le choc de l'Islam sur l'école de la République* [*The shock of Islam on the School of the Republic*], LIBÉRATION, Oct. 21, 1989).

The father's statement showed deference to the state's interpretation of secularism and an acceptance of the fact that he might be required to subordinate his religious beliefs to adhere to the state's decision. This respect for the state's interpretations of secularism is common in France, where social cohesion and respect for the public sphere are ingrained as pivotal values from a young age.<sup>128</sup> An Islamic students' association in Montpellier and the teachers at the school in Creil joined the father's call to the Minister for National Education and the Prime Minister for a statement on the matter, and the ministers in turn reached out to the Conseil d'Etat on November 4.<sup>129</sup> The amount of national and international attention that the controversy had attracted between the first suspension in September and the Conseil d'Etat taking up the case in November put a particularly intense spotlight on the Conseil as they considered the issue.

The Conseil d'Etat has two functions: first, it is a legal advisory body that oversees lawmaking and answers legal or policy questions upon request; second, it serves as the nation's highest court and final arbiter on certain legal questions, similarly to the U.S. Supreme Court.<sup>130</sup> The interior division of the Conseil d'Etat, which works in an advisory capacity on legal matters in a similar manner to the Department of Justice, was the one tasked with answering the call for an opinion on the issue.<sup>131</sup>

As the Conseil d'Etat considered the place of religious garb in schools and the lives of the three Muslim schoolgirls in Creil, they drew from the laws and principles about secularism that had preceded the "affair."<sup>132</sup> The Conseil issued its statement on November 27, 1989, concluding that the female students could not wear hijabs in school over their school's ban, but that schools could make exceptions for this religious practice if they wished.<sup>133</sup> The Conseil ultimately found that "equality before the law" meant that students could not visually impose their religious beliefs on others by wearing "ostentatious" religious apparel.<sup>134</sup> The freedom of conscience required by the Law of 1905, amongst others, is viewed as just that—freedom

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128. See generally Osler & Starkey, *supra* note 19.

129. See Jones, *supra* note 113, at 52 (citing Conseil d'Etat [CE] [Council of State], Nov. 27, 1989, No. 346.893 (Fr.)).

130. See *Council of State of France*, EUROPEAN LAW INSTITUTE, <https://www.europeanlawinstitute.eu/membership/institutional-members/council-of-state-of-france/> (last visited Jan. 6, 2025).

131. See *id.*

132. See Conseil d'Etat, *supra* note 1.

133. *Id.*

134. *Id.*

of conscience, not freedom to demonstrate your conscience to anyone else.<sup>135</sup> In the Conseil's view, "equality before the law" requires that French people approach the public sphere as citizens of the republic rather than as members of a particular faith.<sup>136</sup> France thus views individual community factions as antithetical to the long-term success of the French republic: "According to the Republican way of thinking, living together in a society requires agreement on basic values . . . . To do so means adhering to a certain brand of political philosophy, one that emphasizes general interests and shared values over individual interests and pluralism."<sup>137</sup>

After the decision, the Prime Minister declared that "[t]he French community has its rules, and in these rules the fight for equal rights between men and women. The entire French community, its legislative system, and its public authorities, no longer accept signs of male domination over women on French soil."<sup>138</sup> There was significant discourse about 'male domination' during the headscarf discourse in France.<sup>139</sup> The hijab, according to one

135. See *id.*; see also Loi du 9 Décembre 1905 concernant la séparation des Eglises et de l'Etat [Law of December 9, 1905 on the Separation of Churches and the State], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 11, 1905, p. 1.

136. See Conseil d'Etat, *supra* note 1.

137. BOWEN, *supra* note 108, at 11.

138. "La communauté française a ses règles, et dans ses règles est inscrit le combat pour l'égalité des droits entre les hommes et les femmes. L'ensemble de la collectivité française, son système législatif, ses autorités publiques, n'acceptent plus sur le sol français des signes de domination de l'homme sur les femmes." "La laïcité n'est pas seulement une affaire de religion" déclare M. Michel Rocard [ "Secularism is not just a matter of religion" declares Mr. Michel Rocard], LE MONDE (Nov. 30, 1989), [https://www.lemonde.fr/archives/article/1989/11/30/la-laicite-n-est-pas-seulement-une-affaire-de-religion-declare-m-michel-rocard\\_4162103\\_1819218.html](https://www.lemonde.fr/archives/article/1989/11/30/la-laicite-n-est-pas-seulement-une-affaire-de-religion-declare-m-michel-rocard_4162103_1819218.html); see also Angelique Chrisafis, *Nicolas Sarkozy says Islamic Veils are not Welcome in France*, THE GUARDIAN (June 22, 2009, 2:35 PM), <https://www.theguardian.com/world/2009/jun/22/islamic-veils-sarkozy-speech-france> ("The problem of the burka is not a religious problem, it's a problem of liberty and women's dignity. It's not a religious symbol, but a sign of subservience and debasement. I want to say solemnly, the burka is not welcome in France. In our country, we can't accept women prisoners behind a screen, cut off from all social life, deprived of all identity. That's not our idea of freedom."). It is worth noting that hijab bans can sometimes have the effect of furthering "male domination" if girls who are forced to wear hijabs are kept at home or fall behind in school because of the bans. See Sandra Feder, *Stanford Scholars Report French Headscarf Ban Adversely Impacts Muslim Girls*, STAN. SCH. HUMANS. & SCIS. (Aug. 25, 2020), <https://humsci.stanford.edu/feature/stanford-scholars-report-french-headscarf-ban-adversely-impacts-muslim-girls>.

139. The debate on whether headscarves are intrinsically a symbol of oppression continues to the present across the world, furthered by non-Muslims and Muslims alike. Some Muslim women find that the debate is "another way of policing a minority community." Iman Amrani, *I Didn't Want to Wear my Hijab, and Don't Believe Very Young Girls Should Wear Them Today*, THE GUARDIAN (Feb. 2, 2018, 12:58 PM), <https://www.theguardian.com/commentisfree/2018/feb/02/hijab-girls-ofsted-headscarves-british-values>. Others find that "[T]he hijab . . . isn't about feminism. It isn't an empowering rejection of being judged by your appearance. It is a form of submission: the chaining up of women to the

analysis, became throughout the affair a “convenient, and prominent, symbol of external and internal dangers to France.”<sup>140</sup> With an understanding that Islam was a threat to French values in general and French secularism in particular, the Conseil d’Etat’s decision came at a critical and high-stakes moment for the future of the French understanding of religious freedom.

Like the American case with September 11, the French case closely followed a dramatic event in which Islam was pitted against national values. The Rushdie affair began in England in early 1989 and centered around a book titled *The Satanic Verses*, written by Salman Rushdie.<sup>141</sup> The *Satanic Verses* portrayed Islam and the Prophet Muhammad in a post-modern, satirical style.<sup>142</sup> Some Muslims viewed the book as blasphemous and insulting, which led to protests and to a fatwa (a religious decree) by Ayatollah Khomeini, the religious leader of Iran.<sup>143</sup> Khomeini’s fatwa condemned both Rushdie and those who published his book to death.<sup>144</sup> The fatwa urged followers of Islam to carry out its decree.<sup>145</sup> Protests turned violent, and several people involved with the book were killed.<sup>146</sup> Like the September 11 attacks, although on a different scale, the actions of certain Muslims became unjustifiably associated with the general community. Although the Rushdie affair began in England, the French right capitalized on the fallout.<sup>147</sup> For example, Jean-Marie Le Pen, leader of a far-right political party, told a crowd that “Islam is a religion of intolerance.”<sup>148</sup>

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mullahs who promulgate this nonsense. For women who have been forced to wear a hijab, World Hijab Day is an insult. It’s an open attempt to portray oppressors as victims, and to overlook the feelings of women who have been taught to believe throughout their lives that they are second-class beings.” Soutiam Goodarzi, *There’s Nothing Liberating About Being Forced to Wear a Hijab*, THE SPECTATOR (Feb. 17, 2019, 12:00 AM), <https://www.spectator.co.uk/article/there-s-nothing-liberating-about-being-forced-to-wear-a-hijab/>. Activist Malala Yousafzai argues that women can choose either path: “Years ago I spoke against the Taliban forcing women in my community to wear burqas — and last month I spoke against Indian authorities forcing girls to remove their hijabs at school. These aren’t contradictions — both cases involve objectifying women. If someone forces me to cover my head, I will protest. If someone forces me to remove my scarf, I will protest.” Malala Yousafzai, *Please Stop Telling Us How to Dress*, MEDIUM (Dec. 20, 2022), <https://medium.com/@MalalaYousafzai/please-stop-telling-us-how-to-dress-2ae92f2a1eb1>.

140. BOWEN, *supra* note 108, at 4.

141. See Anthony, *supra* note 3.

142. See *id.*

143. See *id.*

144. See *id.*

145. See *id.*

146. See *id.* (noting deaths of several publishers and translators for the Rushdie Affair who were killed or injured).

147. See Fieschi, *supra* note 102.

148. James M. Markham, *Fallout Over Rushdie: The Muslim Presence in Western Europe Is Suddenly Starker*, N.Y. TIMES: THE WORLD, Mar. 5, 1989, § 4 at 2,

The timing of the Conseil's decision was also important because 1989 marked an anniversary in France: the 200th anniversary of the French revolution.<sup>149</sup> Large parades, conversations regarding the price of liberty, and passionate renditions of the French Anthem—*La Marseillaise*—took place throughout the year, particularly in the summer during the July 14 Bastille day celebrations.<sup>150</sup> These celebrations likely stimulated an increased awareness of the values of the republic and the fight for liberty as well as a heightened consciousness regarding what it means to be “French.”

#### IV. COMPARATIVE ANALYSIS OF THE CONSEIL D'ETAT AND THE DEPARTMENT OF JUSTICE'S STATEMENTS

This section will detail four key differences between France and American secularism, as illuminated by the statements by the Department of Justice and the Conseil d'Etat. The first of these differences is each country's opinion on whether signs of religious affiliation disturb public order, and, if so, whether or not such a disturbance is a valuable tradeoff for the price of religious liberty. France found the hijab to be both a disturbance and an act of proselytization,<sup>151</sup> whereas the United States indicated that the hijab does not disturb public order but would be allowed even if it did.<sup>152</sup> The second difference is the extent of the bounds of freedom of expression. While France offered caveats for their right to freedom of expression, indicating that students' expression must respect pluralism amongst other things,<sup>153</sup> the United States emphasized that freedom of expression is a preferred right

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<https://www.nytimes.com/1989/03/05/weekinreview/world-fallout-over-rushdie-muslim-presence-western-europe-suddenly-starker.html>.

149. See *id.*

150. See Stanley Meisler, *As 200th Anniversary Nears, French Still Fret Over Revolution*, LA TIMES (Oct. 13, 1987, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1987-10-13-mn-13768-story.html>.

151. “[L]e port par les élèves de signes par lesquels ils entendent manifester leur appartenance à une religion . . . par leur caractère ostentatoire ou re-vendicatif, constitueraient un acte de pression, de provocation, de prosélytisme ou de propagande, porteraient atteinte à la dignité ou à la liberté de l'élève ou d'autres membres de la communauté éducative, compromettraient leur santé ou leur sécurité, perturberaient le déroulement des activités d'enseignement et le rôle éducatif des enseignants, enfin troubleraient l'ordre dans l'établissement ou le fonctionnement normal du service public.” Conseil d'Etat, *supra* note 1 (describing the wearing of “ostentatious” religious garb as “an act of pressure, provocation, proselytism or propaganda” which “would violate the dignity or freedom of the student or other members of the educational community, would compromise their health or their safety, would disrupt the progress of teaching activities and the educational role of teachers, and finally would disturb order in the establishment or normal operation of the public service”).

152. See Hearn DOJ Memorandum, *supra* note 1, at 21 (citing *Tinker v. Des Moines Indep. Cnty. Sch. Dist.* 393 U.S. 503, 508 (1969)).

153. Conseil d'Etat, *supra* note 1.

within the Constitution and should be protected when possible.<sup>154</sup> The third difference is the acceptance of religious exemptions from school activities. The Conseil d'Etat's statement linked the concept of religious exemptions to the permission to wear a headscarf, rejecting both as biased and opposed to French unity.<sup>155</sup> The United States, on the other hand, did not mention religious exemptions, as they were a previously acknowledged right in multiple Supreme Court cases and acts of Congress.<sup>156</sup> The final difference is who has the final decision in these controversies: in France, European bodies such as the European Court of Human Rights can influence or change French decisions, whereas there is no such international body at play in the United States.

*A. Signs and Demonstrations of Religious Affiliation: A Disturbance to Public Order?*

The statements by both France and the United States explicitly reference the need to balance between liberty of expression against the possibility for disturbances in educational settings. In *Hearn*, the Department of Justice wrote, quoting the seminal free speech case *Tinker v. Des Moines*, that “[m]ore than mere speculation about disruption and interference are required: ‘undifferentiated fear or apprehension of disturbance’ is not enough to overcome the right to freedom of expression.”<sup>157</sup> Despite the school's assertion that students were frightened by Nashala's hijab, the Department of Justice emphasized that such fears did not disturb public order.<sup>158</sup> Additionally, even if her hijab did disrupt public order, the U.S. Supreme

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154. See Hearn DOJ Memorandum, *supra* note 1, at 16 (“The Supreme Court has consistently held that religious speech is entitled to the same protection under the Free Speech Clause as secular speech.” (citing Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (plurality opinion))).

155. Conseil d'Etat, *supra* note 1.

156. See *Yoder*, 406 U.S. 205, 234 (1972) (allowing Amish parents to take their children out of school earlier than the state requirement to accommodate Amish culture); *Zorach v. Clauson*, 343 U.S. 306, 319–20 (1952) (upholding a New York City program where students could leave during the school day for religious instruction or exercise); see, e.g., *Parents for Privacy v. Barr*, 949 F.3d 1210, 1239–40 (9th Cir. 2020) (allowing a school to accommodate transgender students despite objections from religious parents); *Brown v. Hot, Sexy, and Safer Prods.*, 68 F.3d 525, 540–41 (1st. Cir. 1995) (allowing a school to provide AIDS education which was viewed as indecent for some religions); see also *Moody v. Cronin*, 484 F. Supp. 270, 275–77 (C.D. Ill., 1979) (allowing students who were members of the United Pentecostal Church to decline participation in school physical education classes because they would see members of the opposite sex in “immodest” dress, which was against their faith). See generally Hearn DOJ Memorandum, *supra* note 1.

157. See Hearn DOJ Memorandum, *supra* note 1, at 21 (quoting *Tinker*, 393 U.S. at 508).

158. See *id.* at 17, 22 (stating that Nashala had worn her hijab for the whole school year after the original suspension without notable disturbances) (citing *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000)).



Court had ruled over sixty years prior to her case in *Cantwell v. Connecticut* that, while maintenance of public order is a valid state interest, it could not be used to justify the suppression of “free communication of views, religious or other.”<sup>159</sup> Only a “substantial disruption” is sufficient to justify limiting students’ free expression rights.<sup>160</sup>

On the question of public order, the Conseil d’État offered a more convoluted answer which strongly contrasts the message of the Department of Justice:

[I]n educational establishments, the wearing by students of signs by which they intend to manifest their religious membership is not in itself incompatible with the principle of laïcité, to the extent that it constitutes an exercise of liberty of expression and an expression of religious beliefs, but that this liberty would not allow students to display the signs of religious membership which, by their nature, by the conditions in which they are worn individually or collectively, or by their ostentatious or protesting character, would constitute an act of pressure, of provocation, of proselytization, or of propaganda, would violate the dignity or the liberty of the pupil or other members of the educational community, jeopardize their health or safety, would disrupt the course of teaching activities and the educational role of teachers, and would disturb the order in the establishment or the normal functioning of the public service.<sup>161</sup>

In other words, the French Conseil D’État found that the sole act of wearing overt religious garb, even without any accompanying statements, constitutes an act of proselytization which would disturb not only the learning environment but also the liberties of other students. By expressing concern for the “dignity” or “liberty” of “other members of the educational community” and by referring to the hijab as an act of “pressure,” the French response demonstrates their long-held philosophy towards a religious-free public sphere. This is a key difference from the American system: France

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159. *Canterwell v. Connecticut*, 310 U.S. 296, 308 (1940).

160. See Hearn DOJ memorandum, *supra* note 1, at 22 (quoting *Tinker*, 393 U.S. 514).

161. Translation by author. Original text in French states: “[D]ans les établissements scolaires, le port par les élèves de signes par lesquels il entendent manifester leur appartenance à une religion n’est pas par lui-même incompatible avec le principe de laïcité, dans la mesure où il constitue l’exercice de la liberté d’expression et de manifestation de croyances religieuses, mais que cette liberté ne saurait permettre aux élèves d’arborer des signes d’appartenance religieuse qui, par leur nature, par les conditions dans lesquelles ils seraient portés individuellement ou collectivement, ou par leur caractère ostentatoire ou revendicatif, constitueraient un acte de pression, de provocation, de prosélytisme ou de propagande, porteraient atteinte à la dignité ou à la liberté de l’élève ou d’autres membres de la communauté éducative, compromettraient leur santé ou leur sécurité, perturberaient le déroulement des activités d’enseignement et le rôle éducatif des enseignants, enfin troubleraient l’ordre dans l’établissement ou le fonctionnement normal du service public.” Conseil d’Etat, *supra* note 1.

strives for freedom *from* religion and the United States strives for freedom *of* religion.

Both France's *laïcité* and American secularism proudly boast freedom of conscience, allowing individuals to believe what they wish. However, America couples that freedom with freedom of expression and freedom of practice of that religion, whereas France resigns that expression to the private sphere to protect the public order. Students learn this at school from course materials and from the bans on "ostentatious" religious garb. A textbook designed for French citizenship education programs depicted a group of Muslims praying on the street in Paris with the caption:

To be a citizen is to be able to exercise one's rights freely. Practicing the religion of one's choice is a fundamental right. However, exercising this right implies not offending other people's religious convictions; there is no place for acts of worship in public places. Consequently all religions should have available properly appointed places of worship.<sup>162</sup>

This caption captures the essence of France's "freedom from religion:" although people have the "fundamental right" to hold religions and to practice them, that right does not exist in the public sphere. Once that belief is visible in the public sphere, it is viewed as encroaching on the beliefs of your fellow Frenchmen.<sup>163</sup>

The word "ostentatious,"<sup>164</sup> used in the Conseil's description of the girls' scarves, has been pivotal in the French debate about religious garb. The ban on wearing signs of religious affiliation applies solely to signs viewed as ostentatious (i.e. attention grabbing/conspicuous), such as the Jewish kippah or the Islamic hijab, rather than to signs that are more modest, such as a cross necklace (although large crosses are allegedly banned as well).<sup>165</sup> Of course, the question of what is "ostentatious" is a subjective one, and the answer is colored by French tradition, which has no religious garb. Whereas some Muslims view the hijab as an essential part of their faith, as the kippah is for orthodox Jewish men, wearing a large cross carries no such significance for Christians. The idea behind the ban on "ostentatious" garb is that wearing visible signs of religion creates tension in the public space and creates division among the national community.<sup>166</sup> This French national community

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162. Osler & Starkey, *supra* note 19, at 302 (quoting JEAN-PIERRE LAUBY, *ÉDUCATION CIVIQUE*, 3E [CIVIC EDUCATION, 3RD] (2017)).

163. See *id.* (citing GASPARD & KHOSROKHAVAR, *supra* note 126).

164. "[O]stentatoire." Conseil d'Etat, *supra* note 1.

165. See William J. Kole, *French Ban Religious Symbols in Public Schools*, NBC NEWS (Dec. 15, 2004, 1:18 PM), <https://www.nbcnews.com/id/wbna6707664> (describing how overt symbols of religion can include hijabs, kippahs, large crosses, and even Christmas chocolates, but noting that mainly Muslim, Jewish, and Sikh children have been affected by the ban on religious symbols).

166. See generally SIMON, *supra* note 12.

is supposed to be centered around a common French identity, rather than multiple religious identities or other dividing characteristics.<sup>167</sup>

These French arguments over the place for religious garb in the public sphere and the relative ostentatiousness of that garb, as discussed in the Conseil d'Etat's statement, contrast significantly with the American view. As Justice Brennan stated in 1986, a ban on religious symbols without strong reasoning would divide religion into those "with visible dress and grooming requirements and those without . . . . [t]he practical effect of this categorization is that, under the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority faiths . . . . [u]nder the Constitution there is only *one* relevant category—*all* faiths."<sup>168</sup> Although Justice Brennan was dissenting in that particular case, his sentiment is echoed throughout the Department of Justice's Memorandum on the *Hearn* case and other debates about neutrality in the public sphere.<sup>169</sup> In order to avoid favoring one religion over another, the United States has generally taken a stance of leniency towards religious exemptions, religious garb, and religious speech. An example of such openness regarding religious garb in public spaces is reflected in the fact that a Massachusetts woman was allowed to wear a spaghetti strainer in her driver's license photo after claiming that wearing it was mandated by her religious beliefs.<sup>170</sup>

This divergence between France and the United States on religious exemptions illustrates the difference between freedom *of* and *from* religion which can be traced to the founding of each country's current governmental system. France's system began with the overthrow of a monarchical hierarchy under which those who were not of the ruling class were discriminated against or sometimes killed (as with the case with the Huguenots, a group of French Protestants who were persecuted by the government).<sup>171</sup> The monarchy was entangled with the Catholic Church, and the Revolution fought against both as symbols contrary to republican

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167. See *id.* at 3 (noting that the French view "identity as a sort of finite stock: any sense of belonging to another country must necessarily weaken an individual's sense of being French").

168. *Goldman v. Weinberger*, 475 U.S. 503, 521 (Brennan, J., dissenting).

169. See *Hearn* DOJ Memorandum, *supra* note 1, at 17–18, 20; see, e.g., *Menora v. Illinois High Sch. Ass'n*, 527 F. Supp. 637 (N.D. Ill. 1981), *vacated*, 683 F.2d 1030 (7th Cir. 1982) (holding a public school's athletic association's interest in prohibiting wearing headgear during a basketball game was insufficient to overcome First Amendment rights of plaintiffs to exercise their beliefs by wearing yarmulkes while playing basketball).

170. See Samantha Grossman, *Woman Wins Right to Wear Colander on Her Head in Driver's License Photo*, TIME MAGAZINE (Nov. 16, 2015, 11:50 AM), <https://time.com/4114369/pastafarian-colander-license-photo/>.

171. See *Huguenots*, HISTORY.COM, <https://www.history.com/topics/european-history/huguenots> (Oct. 31, 2022).

values.<sup>172</sup> Post-revolution, the French united under the banner of being “French,” with the idea that everyone would be equal in the eyes of the law.<sup>173</sup> The Church was thus removed from daily affairs.<sup>174</sup> “Hyphenated identities,” such as being a French Muslim, are viewed by some Frenchmen as threatening this banner of unity,<sup>175</sup> with headscarves being viewed as a visual reminder of that “threat.” Americans, on the other hand, had come from different countries around the world, and engaged in a wider variety of religious practices.<sup>176</sup>

### *B. Freedom of Expression, With Caveats*

Both France and the United States use the phrase “freedom of expression”<sup>177</sup> throughout their statements, with different effects. The Conseil d’État almost always immediately adds a qualifier, within the same paragraph or even sentence, which limits that freedom. The Conseil quotes a law from July 10, 1989, which states that students have “freedom of expression” but that “these freedoms may not affect teaching activities” and that students must exercise these freedoms “while respecting pluralism and the principle of neutrality.”<sup>178</sup> The Conseil also adds five qualifiers to its discussion of freedom of expression, indicating that students can be prohibited from wearing signs of their religious membership if it would: (1) “disrupt the course of teaching activities”<sup>179</sup>; (2) “disturb the order in the establishment or the normal functioning of the public service”<sup>180</sup>; (3) “constitute an act of pressure, provocation, proselytization, or

172. See MacLehose, *supra* note 17, at 299.

173. See *id.* at 303.

174. See *id.* at 299.

175. See SIMON, *supra* note 12, at 3.

176. See WEAVER, *supra* note 24, at 29.

177. “[L]iberté d’expression.” Conseil d’Etat, *supra* note 1 (quoting Loi No. 89-486 du 10 Juillet 1989 D’Orientation Sur L’Education [Law of Orientation on Education], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 14, 1989, p.8861 (Fr.)); see Hearn DOJ Memorandum, *supra* note 1, at 21, 23.

178. Text of law translated by author. Original text of the opinion and the law reads: “Dans les collèges et les lycées, les élèves disposent, dans le respect du pluralisme et du principe de neutralité, de la liberté d’information et de la liberté d’expression. L’exercice de ces libertés ne peut porter atteinte aux activités d’enseignement . . . .” Conseil d’Etat, *supra* note 1 (quoting Loi No. 89-486 du 10 Juillet 1989 D’Orientation Sur L’Education [Law of Orientation on Education], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 14, 1989, p.8861 (Fr.)).

179. “[P]erturberaient le déroulement des activités d’enseignement . . . .” *Id.*

180. “[T]roubleraient l’ordre dans l’établissement ou le fonctionnement normal du service public.” *Id.*

propaganda”<sup>181</sup>; (4) “would violate the dignity or the liberty”<sup>182</sup> of the student or their peers; or (5) “would jeopardize their health or safety.”<sup>183</sup>

The Department of Justice’s statement on freedom of expression is more absolute, the only qualifiers being that expression cannot cause “substantial disruption” or “material interference” with school activities, which are both viewed in a limited manner.<sup>184</sup> The memorandum emphasizes that “[p]ublic school students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”<sup>185</sup> The Department of Justice makes it clear that wearing religious garb, such as a hijab, is a protected form of *speech* in addition to protected religious exercise, and it characterizes the school’s actions as “suppression of speech.”<sup>186</sup> The combination of free speech and free exercise is referred to as “hybrid rights.”<sup>187</sup> Beyond the hybrid right of free speech and free exercise, religious speech is also characterized as speech in itself.<sup>188</sup>

This is a key difference between French and American secularism: France has less protection for speech and expression, which in turn affects their protection of religion. France’s protections for speech are contained in

181. “[C]onstituteraient un acte de pression, de provocation, de prosélytisme ou de propagande . . .” *Id.*

182. “[P]orteraient atteinte à la dignité ou à la liberté de l’élève ou d’autres membres de la communauté éducative . . .” *Id.*

183. “[C]ompromettraient leur santé ou leur sécurité . . .” *Id.*

184. See Hearn DOJ Memorandum, *supra* note 1, at 21 (citing *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 666 (S.D. Tex. 1997)).

185. *Id.* (quoting *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 506 (1969)) (holding that wearing black armbands to school to protest the Vietnam war is protected speech).

186. *Id.* at 22.

187. *Id.* at 15 (“[T]he dress code policy, as applied to [plaintiff], violates her free speech and free exercise rights under the ‘hybrid rights’ principle. When a free exercise claim is coupled with some other constitutional claim, such as free speech, strict scrutiny is triggered . . . [C]ourts have found the wearing of rosaries and hair exceeding a certain length to be protected student speech.”) (first citing *Employment Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 881 (1990); then citing *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004); then citing *Chalifoux*, 976 F. Supp. at 664–65; then quoting *Alabama & Coushatta Tribes of Tex. v. Trs. of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1334 (E.D. Tex. 1993); and then citing *Isaacs v. Bd. of Educ. of Howard County, Md.*, 40 F. Supp. 2d 335, 338 (D. Md. 1999)).

188. See *id.* at 15–16 (“Defendants attempt to dismiss the free speech claim as simply derivative – ‘the purported speech, wearing a religious scarf, derives directly from the fact that the scarf is a religious symbol.’ . . . The short answer to this contention is that religious speech is still speech. The Supreme Court has consistently held that religious speech is entitled to the same protection under the Free Speech Clause as secular speech.” (first citing *Capitol Square Review and Advisory Bd. v. Pinnette*, 515 U.S. 753, 760 (1995) (plurality opinion); then citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111–12 (2001); and then citing *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993))).

the 1789 Declaration of the Rights of Man.<sup>189</sup> While that document declares that freedom of speech is a fundamental right, it does not treat free speech as a preferred right, indicating that those rights can be limited “when the exercise of those rights intrudes upon another’s right to enjoy his rights.”<sup>190</sup> That “intrusion” is viewed broadly in France. France regularly criminalizes speech, notably sending people to prison for periods of around a year for denying the Holocaust<sup>191</sup> and fining comedian Dieudonné M’bala M’bala 10,000 euros for anti-Semitic hate speech.<sup>192</sup> By contrast, the United States treats free speech as a preferred right that usually prevails over competing interests.<sup>193</sup> Thus, religious expression is a doubly protected right in the United States—as speech and as an exercise of religious belief—but not in France.

### *C. Religious Exemptions and the Ideals of Equality and Neutrality in Schools*

The Conseil d’État repeatedly mentions religious-based exemptions from school attendance requirements, which are notably absent from the Department of Justice’s statement. In the United States, the right to waive attendance requirements for religious purposes was recognized before *Hearn*: American students can both leave public school during the day to receive outside religious education and leave school in some circumstances to avoid content viewed as objectionable to their religious beliefs (i.e. evolution or sexual education).<sup>194</sup> These rights evolved out of a concern for

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189. See Russell Weaver et al., *Holocaust Denial and Governmentally Declared ‘Truth’: French and American Perspectives*, 41 TEX. TECH. L. REV. 495, 507 (2009) (citing *Declaration of the Rights of Man* – 1798, YALE L. SCH.: THE AVALON PROJECT, [https://avalon.law.yale.edu/18th\\_century/rightsof.asp](https://avalon.law.yale.edu/18th_century/rightsof.asp)).

190. See *id.* (citing French Declaration of the Rights of Man and of the Citizen, Art. IV (1789)).

191. See Marcy Oster, *French Holocaust Denier Sentenced to Prison for Publishing Denial Material on Website*, JEWISH TELEGRAPHIC AGENCY (Apr. 2019), <https://www.jta.org/quick-reads/french-holocaust-denier-sentenced-to-prison-for-publishing-denial-material-on-website>.

192. See Dan Bilefsky, *Court Rules Against French Comedian Dieudonné in Free-Speech Case*, N.Y. TIMES (Nov. 10, 2015), <https://www.nytimes.com/2015/11/11/world/europe/dieudonne-mbala-mbala-france-european-rights-court.html>; see also U.S. DEP’T OF STATE, France 2021 International Religious Freedom Report 4, 9 (2021) (noting that private hate speech is a criminal offense with up to a \$1,700 fine and that the French government has banned the Boycott, Divestment, and Sanction movement against Israel).

193. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Snyder v. Phelps*, 562 U.S. 443 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

194. See *Yoder*, 406 U.S. 205, 234 (1972) (allowing Amish parents to take their children out of school earlier than the state requirement to accommodate Amish culture); *Zorach v. Clauson*, 343 U.S. 306, 319–20 (1952) (upholding a New York City program where students could leave during the school day for religious instruction or exercise); see also *Moody v. Cronin*, 484 F. Supp. 270, 275–77 (C.D. Ill., 1979) (allowing students who were members of the United Pentecostal Church

the government infringement on religious beliefs.<sup>195</sup> The fact that attendance requirements are not mentioned in *Hearn* suggests that such a right is not at issue with the principles of secularism discussed within the opinion.

By contrast, the Conseil d'État emphasizes the importance of student attendance over religious freedom, stating that "[t]he freedom thus recognized for pupils includes for them the right to express and manifest their religious beliefs within educational establishments, while respecting pluralism and the freedom of others, and without prejudice to teaching activities, the content of the programs, and the attendance requirement."<sup>196</sup> Given the importance that France assigns to schools as the place where French citizens are molded, this focus is perhaps expected. One study notes that France's citizenship education is

Crucial to the whole notion of state schooling. The school is the Republic's primary institution for socialising its citizens . . . . The view of successive Republican governments, which finds expression in the education legislation in France, is based on the premise that there is a danger of society fragmenting into ghettos or ethnic minority or religious communities, referred to as *communautés*. Such a tendency would undermine the very basis of the French State which is to integrate all citizens into a single Republic.<sup>197</sup>

Through this lens, the relationship between allowing hijabs in school and excusing attendance requirements can be viewed in the same light: as ways to visually perpetuate the "fragmenting" of society into *communautés*. An educational environment free of religion is regarded as a way to prevent these *communautés* from taking hold.<sup>198</sup>

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to decline participation in school physical education classes because they would see members of the opposite sex in "immodest" dress, which was against their faith). Note, however, that students do not have an absolute right to avoid all religiously objectionable content. See, e.g., *Parents for Privacy v. Barr*, 949 F.3d 1210, 1239–40 (9th Cir. 2020) (allowing a school to accommodate transgender students despite objections from religious parents); *Brown v. Hot, Sexy, and Safer Prods.*, 68 F.3d 525, 540–41 (1st. Cir. 1995) (allowing a school to provide AIDS education which was viewed as indecent for some religions).

195. See Ursula Kilkelly, *The Child's Right to Religious Freedom in International Law: The Search for Meaning*, in WHAT IS RIGHT FOR CHILDREN? 243, 257–59 (Martha Albertson Fineman & Karen Worthington eds., 2009). Note, however, that the religious speech being protected is *student* speech. Schools cannot themselves sponsor or endorse religious speech. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39, 42 (1980).

196. Text translated by the author. Original text in French reads: "La liberté ainsi reconnue aux élèves comporte pour eux le droit d'exprimer et de manifester leurs croyances religieuses à l'intérieur des établissements scolaires, dans le respect du pluralisme et de la liberté d'autrui, et sans qu'il soit porté atteinte aux activités d'enseignement, au contenu des programmes et à l'obligation d'assiduité." Conseil d'Etat, *supra* note 1.

197. Osler & Starkey, *supra* note 19, at 290.

198. See *id.*

The fact that the French stand firm in their statement that the attendance requirement overrides “the right to express and manifest”<sup>199</sup> religious beliefs illuminates one of the central divides between American secularism and French *laïcité*. American secularism creates accommodations to enable students to maintain their religious practices according to their belief systems (within reason).<sup>200</sup> This is why the *Hearn* decision concludes that the Muskogee school’s headgear ban was not “neutral towards religion,” because it “singled out [plaintiff] based on her faith” in not offering her an accommodation.<sup>201</sup> In theory, the ban on headgear applied to all students and religions, but Nashala (the plaintiff in the case) was not given an exemption from the ban where other students, such as a student with cancer, had been given one.<sup>202</sup> Under the American system, this demonstrates bias against exercise of Nashala’s faith. Requirements on headgear and attendance, while recognizably important, are subordinate to the American government’s interest in allowing people to practice their faith as they wish.

Additionally, the French idea of using the school system as a method of socialization into the national community does not carry as much weight in the American system, which perhaps contributes to the United States’ openness towards religious accommodation. Throughout the 1900s and early 2000s, a variety of cases disputed the role of public schools to “Americanize immigrant children.”<sup>203</sup> In these cases, the rights of parents to make choices on behalf of their children and to enforce their belief systems prevailed over any government interest in citizenship education.<sup>204</sup> For example, in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, the Court

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199. “La liberté ainsi reconnue aux élèves comporte pour eux le droit d’exprimer et de manifester leurs croyances religieuses à l’intérieur des établissements scolaires . . .” Conseil d’Etat, *supra* note 1.

200. See *Yoder*, 406 U.S. 205 (1972) (allowing Amish parents to take their children out of school earlier than the state requirement to accommodate for Amish culture).

201. *Hearn* DOJ Memorandum, *supra* note 1, at 9.

202. See *id.* at 14.

203. See Ross, *supra* note 81, at 290 (first citing STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993); then citing David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74 (1968); and then citing Barbara Bennett Woodhouse, “Who Owns the Child?”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY 995 (1992)); see also *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (overruling a Nebraska state law which required children’s education to be in English out of a fear of foreign subversion: “[n]o emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.”).

204. See *Meyer*, 262 U.S. at 403.



emphasized parents' rights to control the education of their children by allowing them to enroll their children in parochial schools.<sup>205</sup>

Despite the similar phrasing of Article Two of France's 1958 Constitution ("equality before the law")<sup>206</sup> and America's Fourteenth Amendment ("equal protection of the laws"),<sup>207</sup> the countries' respective understandings of what "equal" means differ significantly, which is clear from the way in which Conseil d'État and the Department of Justice apply the idea of "equal" to opposite groups. In the *Hearn* case, the Department of Justice applies it to Nashala as she seeks to wear her hijab.<sup>208</sup> The Department of Justice noted that her equal protection rights had been violated in two ways: first, in that the equal protection clause applies to the freedom to exercise her religion; and second, in that she was intentionally discriminated against on the basis of her faith and, thus, not treated equally with those who are "similarly situated."<sup>209</sup>

In contrast, France makes no accommodations on the basis of faith, prioritizing educational conformity over individual religious exemptions. Although in stark contrast to the American model, the theoretical aim of state neutrality and equality for students is the same. While the United States applied the concept of equality to the student wearing a hijab, France applied it to her *peers*.<sup>210</sup> The fact that France provides no exemptions from educational requirements means, under their view, that all students are on equal footing. As far as the French are concerned, there is no conflict in offering one religious group an exemption from class (for example, providing Muslim students wearing a hijab an exemption from gym class or Catholic students an exemption from science class) and not another when there are no exemptions in the first place. By not acknowledging the individuality of religious groups, France affirms the notion of an undivided French national community: "the principle of the secularity of public education . . . requires that education be provided with respect on the one hand for this neutrality by

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205. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

206. "[L]'égalité devant la loi . . ." Conseil d'Etat, *supra* note 1 (quoting 1958 CONST. art. II (Fr.)).

207. U.S. CONST. amend. XIV, § 1.

208. See *Hearn* DOJ Memorandum, *supra* note 1, at 1.

209. See *id.* at 10 (quoting *Buckley Constr., Inc. v. Shawnee Civic & Cultural Dev. Auth.*, 933 F.2d 853, 859 (10th Cir. 1991)).

210. See Conseil d'Etat, *supra* note 1.

the programs and by the teachers and on the other hand for the freedom of conscience of the students.”<sup>211</sup>

These conflicting views on religious exemptions can be traced back to the founding of the countries’ current governmental systems. France, for an extended period of time, was completely under the control of the Catholic church: most wealth was held by the church, education was controlled by church officials, and baptism was a necessity to hold civil rights.<sup>212</sup> However, as enlightenment ideas spread across the world and in France, the French came to realize that “[s]uch domination was inconsistent with the theories of Liberty and Equality promulgated by the Declaration of the Rights of Man.”<sup>213</sup> This declaration, written in consultation with Thomas Jefferson,<sup>214</sup> outlined the rights of French men and citizens, including “liberty, property, security, and resistance to oppression” and being “free and equal,”<sup>215</sup> helped inspire the push for the U.S. Constitution which eventually led to religion being “pitted against” new ideas of patriotism towards the Republic.<sup>216</sup>

Throughout the French revolutionary period, the Catholic church and the monarchy were regarded as interchangeable. People protested the “compact between the throne and the altar,” which led to a push to remove religious sentiment from certain groups and events.<sup>217</sup> The rapid villainization and degradation of the Catholic Church in favor of more liberalized ideas of logic and reason contributed to the revolutionary fervor in France.<sup>218</sup> These values are reflected in the French secularist mentality that was enshrined after the revolution. From the French perspective, inequality means that one faith (Catholicism, during the pre-revolutionary days) receives special exemptions and rewards at the expense of all others. Equality, on the other hand, means that all faiths are placed on a neutral playing field with no room for special treatment for one group over another.

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211. Translation provided by the author. Original text of the opinion reads: “[L]e principe de la laïcité de l’enseignement public . . . impose que l’enseignement soit dispensé dans le respect d’une part de cette neutralité par les programmes et par les enseignants et d’autre part de la liberté de conscience des élèves.” *Id.*

212. See MacLehose, *supra* note 17, at 298–99.

213. *Id.* at 299.

214. See Harrison W. Mark, *Declaration of the Rights of Man and of the Citizen*, WORLD HIST. ENCYCLOPEDIA: ARTICLE (June 8, 2022), <https://www.worldhistory.org/article/2012/declaration-of-the-rights-of-man-and-of-the-citizen/>.

215. *Declaration of the Rights of Man – 1798*, *supra* note 190.

216. MacLehose, *supra* note 17, at 299.

217. *Id.* at 300.

218. See *supra* Sec. III.A.

*D. Who Decides What is Secular and What is Appropriate in Schools?*

Although an in-depth discussion of the role of international laws and bodies in France and the United States is beyond the scope of this paper, it is worth noting briefly that France's legal system is more internationally connected than that of the United States—a fact reflected in both countries' statements. France, like many other European countries, adheres to European and international conventions and even subjects itself to international courts in relation to these conventions. International laws are quoted or referenced both throughout the Conseil d'Etat's opinion and more recent government reports on secularism.<sup>219</sup> The Conseil d'Etat's opinion begins with a list of both French laws and international conventions of which they are a part, presenting them together with equal weight.<sup>220</sup> French domestic law, including the 1989 immigration law referenced by the Conseil, also makes reference to international conventions.<sup>221</sup> More recently, French organizations and citizens have petitioned the United Nations<sup>222</sup> and the European Court of Human Rights<sup>223</sup> regarding the treatment of Muslims in France.

The United States, on the other hand, is significantly more hesitant to be bound to international law, typically avoiding signing these laws, adding conditions to our signing, or designating them as interpretive guides rather than authoritative requirements.<sup>224</sup> International bodies also have limited enforcement power against the United States to ensure compliance to international laws and norms.<sup>225</sup> Perhaps unsurprisingly, then, there is no

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219. See Conseil d'Etat, *supra* note 1; Commission Stasi, *supra* note 107, at 20–21 (referencing the Universal Declaration of Human Rights, the European Convention on the Rights of Man and Fundamental Liberties, and a United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention against Discrimination in Education).

220. See Conseil d'Etat, *supra* note 1.

221. See *id.*

222. See U.S. DEP'T OF STATE, *supra* note 192, at 20 (“[I]n January, a coalition of 36 civil society and religious organizations from 13 countries, including the Strasbourg-based European Initiative for Social Cohesion, wrote to the United Nations Human Rights Committee to request that it open formal infringement procedures against the government for ‘entrenching Islamophobia and structural discrimination against Muslims.’ The 28-page document stated that the country’s actions and policies in relation to Muslim communities violated international and European laws.”).

223. See *S.A.S. v. France*, App. No. 43835/11, (July 1, 2014), <https://hudoc.echr.coe.int/eng?i=001-145466>.

224. See Doug Cassel, *The United States and Human Rights Treaties: Can We Meet Our Commitments?*, 41 HUM. RTS. 5, 5 (2015).

225. See Frederic L. Kirgis, *Enforcing International Law*, AM. SOC. INT’L L. (Jan. 22, 1996), <https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law#:~:text=is%20used%20sparingly,-Frederic%20L.,failure%20to%20pay%20assessed%20dues>.

mention of international law in the Department of Justice's memorandum in *Hearn*.<sup>226</sup>

## V. CONCLUSION

The secular ideologies of France and the United States play out in schools in a similar, if not more intense, way as they do in the general public sphere. Because schools are a pivotal place where students are introduced to the values of their country, governments have a vested interest in framing students' experiences. This is especially the case in France, where schools have been used as a way to consolidate the French Republic and create a national French identity for over two hundred years. When a female student with a hijab entered the academic environment, each country's ideas of secularism were tested as they responded to this manifestation of religious belief.

The statements by the Conseil d'État in the Headscarf Opinion and the Department of Justice in *Hearn* provide perspectives on the relationship between each country's secular ideology and their system of education. As seen by the results in the French and American controversies, these differing perspectives yielded vastly different results even though the countries purport to share common goals regarding the separation of church and state, the protection of human rights, and the freedom of religious expression. At a time when prejudice towards Muslims is on the rise<sup>227</sup> and concerns about "globalization" are fueling far-right populist parties,<sup>228</sup> the opinions presented by the Department of Justice and the Conseil are as relevant today as they were decades ago.

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226. See generally Hearn DOJ Memorandum, *supra* note 1.

227. See Shibley Telhami, *Prejudice Toward Muslims is Highest Amongst All Religious and Ethnic Groups*, BROOKINGS (Aug. 27, 2024), <https://www.brookings.edu/articles/prejudice-towards-muslims-is-highest-among-all-religious-and-ethnic-groups/>.

228. See Fieschi, *supra* note 102.