Washington University School of Law

In Secularism We Trust

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Daniel Salmon
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"I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."[1] Justice Alito's concern for an individual's right to express himself or herself without fear of reprimand is not limited to support of traditional marriage or the scope of *Obergefell*. Justice Alito's apprehension broadly applies to secularism. Diverse populations demand a calculated infrastructure to ensure fair treatment of all. However, secularism, promoted as a means to protect minorities, often does little more than reassign minority status to those that do not buy into the ever-evolving state-sponsored value system.[2] By discussing varying degrees of both secularism and establishment of religion in different countries, this paper argues that the more rigidly[3] and the more broadly[4] a government enforces secularism, the more secularism simply supplants the role of state-sponsored religion.

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[1] Obergefell v. Hodges, 135 S. Ct. 2584, 2642-43 (2015) (Alito, J., dissenting).

[2] As Justice Alito so eloquently phrased the idea, with respect to the United States: "[V]ilify Americans who are unwilling to assent to the new orthodoxy." *Id.* at 2642.

[3] *Compare* Jesse Lee, *Nashala's Story*, THE WHITE HOUSE PRESIDENT BARACK OBAMA BLOG (June 4, 2009, 3:20 PM), https://obamawhitehouse.archives.gov/blog/2009/06/04/nashalas-story (describing U.S. court-ordered accommodations prohibiting a public school from preventing a student from wearing religious attire), *with* AHMET T. KURU, SECULARISM AND STATE POLICIES TOWARD RELIGION, 107-08 (2009) [hereinafter SECULARISM] (describing the legislated prohibition against religious attire, namely hijabs, in public schools in the more rigidly secularly France).

[4] *See Obergefell*, 135 S. Ct. at 2643 (Alito, J., dissenting) (explaining that leaving the decision to the states would prevent "the marginalization of the many Americans who have traditional ideas").

First, this paper forms a notion of what religion and religious liberty are. Second, this paper does the same with secularism and secularization. Third, this paper analyzes how the United States has ruled in various First Amendment cases to get an understand of the notion "passive" secularism.[5] Fourth, this paper discusses the legislated "assertive" secularization of France.[6] Fifth, this paper demonstrates that assertive secularism is inherently less inclusive than passive secularism. Finally, building on the assertion above this paper argues that in order to achieve the goals of secularism, which is ultimately to provide dignitary protections to all, broad solutions should not be premised on community goals, but rather individual protections.

RELIGION AND RELIGIOUS LIBERTY

Religion means many things to many people and thus, courts have been reluctant to define religion.[7] In the *Adelaide* case, the High Court of Australia,[8] contrasted traditional European

[5] *See* SECULARISM, *supra* note 3, at 11 (describing passive secularism as a system that "prioritizes state neutrality" toward religion by allowing public visibility of religion).

[6] *See Id.* (defining assertive secularism as a system that "requires the state . . . to exclude religion from the public sphere and confine it to the private domain").

[7] Adelaide Company of Jehovah's Witnesses v. The Commonwealth, 67 CLR 116, 124 (1943) (Austl.) (explaining that "[i]t is not for a court, upon some *a priori* basis, to disqualify certain beliefs as incapable of being religious in character.").

[8] Australia's Constitution has language very similar the United States' First Amendment' sfree exercise clause and its establishment clause, making the High Court's analysis of religion very relevant in this paper as this paper has a strong focus on the United States whose Supreme Court has not as eloquently defined the scope of religion. Australia's Constitution states: "The

notions of religion with Buddhism and highlight the differing stance on the existence of a "Supreme Being".[9] The High Court went as far as to say that "it is not an exaggeration to say that each person chooses the content of his religion."[10] In its analysis, the High Court credited as religion beliefs held by those "who regard religion as consisting principally in a systems of beliefs or statement of doctrine", by those "who regard religion as prescribing a code of conduct", and by those "who pay greater attention to religion as involving some prescribed form of ritual or religious observance."[11] Thus, while pinning religion down to a neatly defined concept may be impossible, the general precepts likely include a combination of one or more of the above described beliefs, actions, and rituals. With such diversity in the forms that religion can take, it's no wonder that non-religious governments have long considered pluralistic measures to balance religion and governance.[12]

Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, of for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any public office or trust under the Commonwealth." *Australian Constitution* s 116.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 123.

[12] *See* VOLTAIRE, LETTERS ON ENGLAND 20 (David Price ed., n.p., Cassell & Co. 1894) (stating: "If one religion only were allowed in England, the Government would very possibly become arbitrary; if there were but two, the people would cut one another's throats; but as there are such a multitude, they all live happy and in peace.").

Adopted in 1948, Article 18 of the Universal Declaration on Human Rights, "UDHR", includes religion among its fundamental human rights, stating:

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[13]

This enumeration of rights describes an individual liberty that is very personal in its practice. However, the UDHR does not limit the practice to the individual. The UDHR tolerates the manifestation of religious observation to occur in public and in a community with others.

SECULARISM AND SECULARIZATION

Secularism has developed in direct response to religion as a means to respect diverse religious backgrounds existing under a single government. This can take various forms including However, as an inherently communal system, secularism demands the participation of the whole community, regardless of religion.

Since the UDHR is not binding, however, adopters of the UDHR are free to tailor their adaptations in manner that may not give the full freedom to religious adherents that the UDHR suggests. For example, adopted in 1953, the European Convention on Human Rights, "ECHR", tends to undermine the religious freedoms enumerated in the UDHR, by including the exact language quoted above[14] from the UDHR followed by a limitation clause. That clause states:

> "Freedom to manifest one's religion of or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the

[13] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948).

[14] *Supra* note 11.

> protection of public order, health or morals, or for the protection of the rights and freedoms of others."[15]

In other words, as long as one's manifestation of his or her religion does not interfere with European-legislated secularism, then that manifestation is allowed. However, the broad and vague language in the limitation clause provides little or no real protection the religious groups without the political power to prevent legislation.[16] The government's ability to silence religious dissent is without bound, so long as the legislation does not explicitly discriminate against a particular group.[17]

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[15] Convention for the Protection of Human Rights and Fundamental Freedoms, § 1 art. 9(2), (Nov. 4, 1950) [hereinafter ECHR].

[16] Moreover, Article 18 of the United Nations' International Covenant on Civil and Political Rights, "ICCPR", initially adopted in 1966, includes a clause similar to the UDHR's Article 18 as well as a limitation clause as seen in the ECHR's Article 9(2). International Covenant on Civil and Political Rights, arts. 18(2), (Dec. 16, 1966) [hereinafter ICCPR]. In addition to those clauses, the ICCPR includes a clause that states: "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." *Id.* This language on its face tends to simply bolster the concept found in the clause shared by the UDHR and the ECHR, but if a court accept the framing of secularism as a belief system, this clause may reinforce some of the protections undone by the ECHR's limitation clause.

[17] ECHR, *supra* note 13, § 1 art. 14 (stating that "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.")

RELIGIOUS LIBERTY IN THE UNITED STATES

The United States approaches religious liberty in passively secular manner. The First Amendment of the Constitution neither cites a particular religion, nor establishes a purely secular state, but instead states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof".[18] Both the establishment clause and the free exercise clause have permitted the Court to err on the side of religious liberty when making its decisions.

The Supreme Court has protected against broad legislative attacks on religious liberty through the free exercise clause.[19] Moreover, the Court defends religious liberty when legislation only detrimentally impacts a single group.[20] The Court even protects religious liberty in cases where legislation to promote arguably legitimate governmental interests is simply not tailored specifically enough so as to not be "overinclusive" or "underinclusive" when promoting those

[18] U.S. CONST. amend. I.

[19] *See* Cantwell v. Conn., 310 U.S. 296, 303-04 (1940) (holding that legislation conditioning solicitation of funding on the grant of a license constituted an unconstitutional prior restraint when the condition was limited to those acting on behalf of a religious organization).

[20] *See* Wisconsin v. Yoder, 406 U.S. 205, 218, 234, 236 (1972) (holding that requiring Amish children to follow a Wisconsin compulsory school attendance law "affirmatively compel[led] them . . . to perform acts undeniably at odds with the fundamental tenets of their religious beliefs", that "accommodating the religious objections . . . would not impair the . . . health of the child" and that the state failed to show that its interest in compulsory education was so compelling so as to prevent accommodation of Amish religious practices).

interests.[21] Additionally, the Court has allowed Congress to shape religious liberty through legislation in specific instances.[22] In *Holt v Hobbs,* the Court looked to the Religious Land Use and Institutionalized Persons Act of 2000, "RLUIPA", to hold that a state prison policy preventing

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[21] *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 542 (1993) (invalidating four Florida ordinances which prohibited religious animal sacrifice on the ground that the prohibitions and exemptions in the ordinances in question were "gerrymandered with care to proscribe religious killings of animals . . . but to exclude almost all other animal killings.").

[22] *See* Holt v. Hobbs, 135 S.Ct. 853, 860 (2015) (quoting 42 U.S.C. § 2000cc-1(a)) (explaining that RLUPIA provides that "[n]o government shall impose a substantial *burden on the religious exercise of a person residing in or confined to an institution* . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.") (emphasis added), *but see* City of Boerne v. Flores 521 U.S. 507, 535-36 (1997) (overturning the Religious Freedom Restoration Act of 1993, "RFRA", on the ground that that statute was exceeded Congress' power and overbroad in that RFRA required too demanding of a standard on government entities in the event that a complainant could establish a substantial burden on his or her free exercise). "RFRA provided that '[g]overnment shall not substantially *burden a person's exercise of religion* even if the burden results from a rule of general applicability,' unless the government 'demonstrates that application of the burden to the person - -(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *Holt,* 135 S.Ct. at 860 (quoting 42 U.S.C. §§ 2000bb-1(a), (b)) (emphasis added).

inmates from growing beards in accordance with religious beliefs was not the "least restrictive means of furthering a compelling governmental interest."[23]

On the other hand, the Court has not allowed criminal conduct to pass muster, even in the name of religion.[24] In *Employment Division v. Smith*, terminated employees of a private drug rehabilitation organization were denied unemployment benefits on the ground that "they had been discharged for work-related misconduct."[25] The employees "ingested peyote for sacramental purposes at a ceremony of the Native American Church" in violation of Oregon law prohibiting the "knowing or intentional possession of a 'controlled substance. . . .'"[26] The terminated employees asserted that the ingestion of peyote for religious purposes was "beyond the reach of criminal law that [was] not specifically directed at their religious practice. . . ."[27] The Court held that the denial of benefits did not violate the petitioners' constitutional rights as "an individual's

[23] *Holt*, 135 S.Ct. at 859.

[24] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (quoting Braunfield v. Brown, 366 U.S. 599, 603 (1961) (explaining that "the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.'")

[25] Employment Div. v. Smith, 494 U.S. 872, 874 (1990).

[26] *Id.*

[27] *Id.* at 878.

religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[28]

The Supreme Court looks to the establishment clause when considering questions of government-sponsorship of religion. In *Everson v. Board of Education*, the U.S. Supreme Court affirmed a lower court decision upholding legislation which permitted parents of students attending religious schools to participate in a taxpayer-funded program that reimbursed parents of students for bus fares used to get to non-public schools.[29] Seventy years later, the Court demonstrated its commitment to the same principle. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court reversed the 8th Circuit's decision which allowed the Missouri Department of Natural Resources, "MDNR", to deny to religious-affiliated organizations a grant offered to non-profit organizations that bought a specific type of recycled playground surfaces on the ground that MDNR "could not provide financial assistance directly to a church", rather than simply allowing the government organization to continue excluding religious organizations from a grant created for a general public benefit.[30]

However, when it seems that a government entity favors one religious group over another, over a non-religious group, or the opposite of the latter, the establishment clause works to ensure that the government promotes equality among ideologies rather than liberty of one.[31] In *Stone v.*

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[28] *Employment Div.*, 494 U.S. at 878-79.

[29] Everson v. Bd. Of Educ., 330 U.S. 1, 18 (1947).

[30] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2014 (2017).

[31] *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (establishing a three-part test to determine permissibility of a challenged state statute, wherein the three parts state: "First, the

Graham, the Supreme Court enjoined a Kentucky statute which required that the Judeo-Christian Ten Commandments be displayed in every public school classroom.[32] In its holding, the Court rejected the that state's argument that the display had a secular purpose by addressing the solely religious aspects of the Ten Commandments, such as "worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day" in spite of the secular values prescribed such as "honoring one's parents, killing or murder adultery, stealing, false witness, and covetousness."[33] In *McCreary County v. ACLU*, the Court also rejected a secular purpose behind the display of the Ten Commandments in Kentucky courtrooms.[34] In *McCreary County*, the counties displayed the Ten Commandments in several different contexts. The first displayed the Ten Commandments in isolation, the second displayed the Ten Commandments with other significant historical documents "whose references to God were highlighted as their sole common element" and the third display contained the Ten Commandments as well as "other documents the [c]ounties deemed especially significant in the historical foundation of American government."[35] The Court held that the first two displays had a clearly religious purpose and dismissed the purpose of the third as being a litigating position as its creation did not undergo the

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statute must have a secular legislative purpose; second, its primary effect must be one that neither advances nor inhibits religion . . . ; finally the statute must not foster 'an excessive government entanglement with religion.'").

[32] Stone v. Graham, 449 U.S. 39, 42-43 (1980).

[33] *Id.* at 41-42.

[34] McCreary County v. ACLU, 545 U.S. 844, 869-74 (2005).

[35] *McCreary County*, 545 U.S. at 852-56.

same process as the first two.[36] The Court, however, noted that it was not establishing a *per se* prohibition on religious displays in public buildings, only those that clearly had no secular purpose.[37]

SECULARIZATION IN FRANCE

In describing France as an assertively secular state, one can look to both France's Constitution and its enforcement of legislation. France's Constitution states: "France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis."[38] This paper next discusses France's legal history on religious freedom and secularization to help study the context of French legislation. From there, this paper will analyze a specific instance of French promotion of secularism and then analyze the same issue through the lens of the U.S. law discussed above.

At the beginning of the French Revolution, on August 27, 1789, the National Constituent Assembly adopted the Declaration of the Rights of the Man and of the Citizen of 1789. This document originally laid out seventeen articles to support the equality of all citizens and to overturn

[36] *Id.* at 869-73.

[37] *Id.* at 874. (explaining that the U.S. Supreme Court's own courtroom had a frieze including "the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments; in the company of 17 other lawgivers, most of them secular figures . . . .").

[38] 1958 CONST. 1 (Fr.).

the special privileges of the aristocratic classes.[39] With respect to religion, the document primarily did two things. First, since the document was established to declare the rights of citizens generally, as a whole it prevented clergy from enjoying certain liberties not enjoyed by the common citizen. Second, Article 10 stated: "No one may be disturbed for his opinions, even religious ones, provided their manifestation does not trouble the public order established by the law." Upon a close reading, Article 10 acts to simultaneously promote religious freedom, while relegating it to second-class status behind secularism. On August 22, 1795, the Constitution of 1795 was introduced. It was the third constitution introduced in the First Republic of France, and it introduced the separation of church and state within France.[40] Article 354 of that constitution states: "No one may be prevented from exercising, in accordance with the law, the worship he has chosen. - No one may be forced to contribute to the expenses of worship. The Republic does not pay anyone."[41] In 1905, France

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[39] *Declaration of the Rights of the Man and of the Citizen of 1789*, WIKIPEDIA (last visited May 3, 2018), https://en.wikipedia.org/w/index.php?title=Declaration_of_the_Rights_of_the_Man_and_of_the_Citizen_of_1789&oldid=837399729 (citing DARIUS VON GUTTNER, THE FRENCH REVOLUTION 85-88 (2015) (stating: "All the citizens, being equal in the eyes of the law, are equally admissible to all public dignities, places, and employments, according to their capacity and without distinction other than that of their virtues and of their talents . . .").

[40] *Separation of Church and state (1795 – 1905)*, CONCORDAT WATCH (last visited May, 3, 2018) http://www.concordatwatch.eu/showtopic.php?org_id=867&kb_header_id=849.

[41] *Church-state separation in Constitution of 1795 and Law of 1905: Excerpts*, CONCORDAT WATCH (last visited May, 3, 2018) http://www.concordatwatch.eu/kb-1525.834.

enacted the 1905 French law on the Separation of the Churches and State.[42] This legislation created the most defined approach to government and religion since the French revolution in France to date. The law both enumerated rights and limitations on religious entities and defined how the government would conduct itself with regard to religious entities.[43]

On March 15, 2004, the president of France signed the French law on secularity and conspicuous religious symbols in schools into law.[44] While this law applied to all religious

[42] Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État, [Law of December 9, 1905 on the Separation of the Churches and State], Périodique et critique [D.P. IV] [PERIODIC AND CRITICAL], December 11, 1905, p. 7205.

[43] *Id. See also 1905 French law on the Separation of the Churches and the State*, WIKIPEDIA (last visited May 3, 2018), https://en.wikipedia.org/w/index.php?title=1905_French_law_on_the_Separation_of_the_Churches_and_the_State&oldid=834300792.

[44] Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of March 15, 2004, concerning, as an application of the principle of the separation of church and state, the wearing of symbols or garb which show religious affiliation in public primary and secondary schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE OF FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190.

symbols, such as Muslim headscarves, Christian crosses, and Jewish skullcaps, its disproportionate impact on the Muslim community caused it to become commonly known as the "headscarf ban."[45]

SECULARISM AS A STATE-SPONSORED IDEOLOGY

On October 11, 2010, France went a step further and enacted the Law of 2010-1192: Act prohibiting concealment of the face in public places.[46, 47] This law banned the wearing of articles that covered the face, regardless of religious affiliation. Since this law disproportionately impacted the Muslim community this paper will refer to it as the "burqa ban", since that is what

[45] *French law on secularity and conspicuous religious symbols in schools*, WIKIPEDIA (last visited May 3, 2018), https://en.wikipedia.org/w/index.php?title=French_law_on_secularity_and_conspicuous_religious_symbols_in_schools&oldid=837502678.

[46] Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010, Act prohibiting concealment of the face in public space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE OF FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344 [hereinafter "Act prohibiting concealment"].

[47] S.A.S. v. France, App. No. 43835/11, HUDOC, at 9 https://hudoc.echr.coe.int/eng#{"itemid":["001-145466"]} [hereinafter S.A.S. v. France]. The law defined "public places" as "the public highway and any places open to the public or assigned to a public service". *Id.* The S.A.S. case is officially reported at S.A.S. v. France, 2014-III Eur. Ct. H.R. 341. However, the judgment in Reports of Judgments and Decisions is incomplete, so this paper will cite to a PDF version of the case retrieved from HUDOC through the hyperlink listed above in this footnote.

it has come to commonly be known as.[48] Unlike the earlier headscarf ban, which was limited to public schools, the burqa ban applied to individuals in nearly all public places, with limited exceptions for those women in private cars or worshipping in a religious place.[49] While the bill's explanatory memorandum mentioned public security as a rationale for this law's adoption, this seemed to be an afterthought.[50] Much more weight was given to the promotion of "liberty, equality, and fraternity" promoted by the ban.[51] To fully understand the scope of authority the law claimed, an examination of the language and concepts presented in the explanatory memorandum is required. That memorandum, among other things, stated:

> The voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of 'living together' in French society.
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> The defence of public order is not confined to the preservation of tranquillity, public health or safety. It also makes it possible to proscribe conduct which directly runs counter to rules that are essential to the Republican social covenant, on which our society is founded.

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[48] *See France: Face-Veil Ruling Undermines Rights*, HUMAN RIGHTS WATCH (Jul. 3, 2014, 12:00AM), https://www.hrw.org/news/2014/07/03/france-face-veil-ruling-undermines-rights.

[49] Jennifer Wade, *France's face veil ban to take effect next month*, THEJOURNAL.IE (last visited May 3, 2018), http://www.thejournal.ie/france-face-veil-ban-to-take-effect-next-month-2011-03/

[50] *See* S.A.S. v. France, at 9 (stating in the next to last paragraph quoted from the explanatory memorandum: " The practice of concealing one's face, which could also represent a danger for public safety in certain situations, thus has no place within French territory. The inaction of the public authorities would seem to indicate an unacceptable failure to defend the principles which underpin our Republican covenant.").

[51] S.A.S. v. France, at 7-9.

> The systematic concealment of the face in public places, contrary to the ideal of fraternity, also falls short of the minimum requirement of civility that is necessary for social interaction.
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> Moreover, this form of public confinement, even in cases where it is voluntary or accepted, clearly contravenes the principle of respect for the dignity of the person. In addition, it is not only about the dignity of the individual who is confined in this manner, but also the dignity of others who share the same public space and who are thus treated as individuals from whom one must be protected by the refusal of any exchange, even if only visual.
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> Lastly, in the case of the full veil, worn only by women, this breach of the dignity of the person goes hand in hand with the public manifestation of a conspicuous denial of equality between men and women, through which that breach is constituted.[52]

Unlike the United States, which secularly protects the religious liberty of the individual, France's take on secularism values the interactivity of individuals. By categorizing geographical commonality over all, France justifies its ability to pry the religious adherent from his or her religion. First, the memorandum reads "defence of public order" as the authority to prohibit conduct that "falls short of the minimum requirement of civility that is necessary for social interaction" as defined by the state.[53] The memorandum next explicitly undermines individual dignity for the sake of "other" individuals' dignity. It does so by assuming that "other" individuals' dignity would be infringed upon by not being able to see the face of a religious adherent.[54]

[52] S.A.S. v. France, at 8.

[53] *Id.*

[54] *Id.*

Furthermore, in an ironically paternalistic move, the legislature cites gender equality as a reason for prohibiting women from voluntarily donning a veil.[55]

A careful inspection of the burqa ban brings light to the fears referenced in Alito's *Obergefell* dissent.[56] On April 11, 2011, a Muslim, "unwilling to assent to the new orthodoxy"[57], brought a case against the French Republic in the European Court of Human Rights, "ECtHR", claiming that the law violated various Articles of the ECHR.[58] The most relevant for this paper's purposes are Article 9,[59] which both permits and limits religion and Article 14,[60] which prohibits discrimination against particular groups. The applicant in the case was a young Muslim woman who wore a burqa and niqab for religious purposes. She claimed that the burqa ban was overbroad since it prevented her from both "express[ing] her religious, personal and cultural faith" and

[55] *See* S.A.S. v. France, at 38 (explaining that "the Government expressed surprise at the applicant's statements to the effect that the practice of wearing the fullface veil often denoted the woman's emancipation, self-assertion and participation in society, and they did not agree with the highly positive presentation of that practice by the applicant and the intervening nongovernmental organisations.").

[56] *See supra* note 1.

[57] *See supra* note 2.

[58] S.A.S. v. France, at 1.

[59] *See supra* notes 14, 15.

[60] *See supra* note 17.

"feel[ing] inner peace with herself."[61] Additionally, the applicant did not seek authority to refuse to show her face when requested for security purposes nor for identification purposes.[62]

The ECtHR ultimately upheld the law. the French government made public safety its primary argument in *S.A.S.*, even though public safety was the last purpose mentioned and given the least attention in the bill's explanatory memorandum.[63] While noting that it had previously ruled that, "personal choices as to an individual's desired appearance, whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of private life"[64], while noting that it "may admittedly be wondered whether the Law's drafters attached much weight to [public safety] concerns"[65], and while cautioning against "resulting risk of abuse"[66], the ECtHR used Articles 8 and 9(2) to justify the law under the public safety consideration.[67] The ECtHR limited the scope of its justification holding by stating "that the

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[61] S.A.S. v. France, at 3.

[62] *Id.*

[63] *Id.* at 37.

[64] *Id.* at 45.

[65] *Id.* at 47.

[66] *Id.* at 49.

[67] S.A.S. v. France, at 58. Article 8(1) grants individual liberty for private life by stating that: "Everyone has the right to respect for his private and family life, his home and his correspondence." *Id.* at 33. Article 8(2) limits the liberties of Article 8(1) by stating that: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national

impugned ban can be regarded as justified in its principle solely in so far as it seeks to guarantee the conditions of 'living together'".[68] The Court next analyzed the proportionality between the ban and its aim.[69] Here the Court looked to breadth of the ban, considering favorably both the fact that any garment was not limited by anything other than full-face veil, and the fact that the criminal sanctions were minimal.[70] In finding no violation of Article 14, the ECtHR found the law had both a "legitimate aim" and a "reasonable relationship of proportionality", but also acknowledged the "specific negative effects on the situation of Muslim women who, for religious reasons, wish to wear the full-face veil in public[.]"[71]

It is likely that the U.S. Supreme Court would allow a "burqa ban"; however, it is unlikely that the Court would use the ECtHR's analysis achieve the same end. The establishment clause would likely inhibit the Court's ability to justify the ban solely under the principle that it "seeks to guarantee the conditions of 'living together'".[72, 73] On the other hand, had the legislation lacked the history of its purpose, no analysis of explicit discrimination would be necessary, and thus the

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security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." *Id.*

[68] S.A.S. v. France, at 55.

[69] *Id.*

[70] *Id.* at 57.

[71] *Id.* at 59.

[72] *Id.* at 55.

[73] *See supra* notes 19, 20.

government would more easily overcome the questions of whether the action was "necessary and proper."[74]

While many of the same ends can be achieved by a government that values individual religious liberty that can be accomplished by a government that values communal secular living, erring on the side of individual religious liberty helps to reduce the number of tools in the government's tool box when it seeks to find reason to infringe on an otherwise protected right. France's take on secularism inhibits the freedom of not only individuals, but marginalized groups as well, and thus effectively justifies promoting secularism solely for its ideology alone. This is in direct contrast to the protection that Article 18 of the UDHR sought to provide.[75] Though the Constitution has its own built-in limitations, the First Amendment's focus on individual rights tends to provide greater protection to religious adherents than the promotion of secular society found in the French Constitution.

[74] *See* CONST. art 1 § 8 cl. 18.

[75] *See supra* note 13.