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Freedom of Religion Versus Freedom from Religion: A Case Study on Human Rights Protections and Limitations of Religious Expression in American and French Constitutional and International Law

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I. Abstract

The freedom of religion and the freedom from religion are notably different freedoms that result in different modes of implementation, protection, and limitation. On one hand, the United States focuses on the freedom of religion, or the freedom of an individual to practice their religion in the public sphere. This can easily be seen through the emphasis the United States places on students' right to religious expression in public schools, protected through both judicial decisions and legislation such as the Equal Access Act. On the other hand, France focuses on the freedom of religion, or the freedom of an individual to go about their daily life in a secular space. This can also be seen through the emphasis France places on secularism in public schools, particularly through Law No. 2004-228. This paper focuses on French and American constitutional law, the freedom of religious expression, and human rights law. This paper first focuses on the legislative and constitutional overviews of France and the United States to show the historical differences between French and American treatment of religion in the public sphere. This paper then focuses on religion and expression in the public, specifically comparing the Equal Access Act and Law No. 2004-228. Finally, this thesis places French and American religious law in the context of international human rights law to show that human rights are not absolute, and the implementation and protection of human rights depends on the historical and legal perception of human rights. Overall, this paper answers philosophical and practical questions regarding the role of the principle of the separation of church and state in France and the United States.

II. Key Definitions

Human Rights: Human rights are norms that aspire to protect all people everywhere from significant violations of legal, political, and social rights.[1]

Freedom of Religion: This thesis uses the definition of the freedom of religion according to the United Nations Human Rights Council and Article 18 of the UN Declaration of Human Rights. The freedom of religion "protects theistic, non-theistic, and atheistic beliefs, as well as the right not to profess any religion or belief." The freedom of religion must be broadly construed, and not limited to "traditional religions or to religions and beliefs with institutional characteristics or practices analogous" to those of traditional religions.[2]

Free Exercise Clause: The Free Exercise Clause is a clause in the First Amendment to the United States Constitution which states that "Congress shall make no law… prohibiting the free exercise" of religion. The Clause is commonly understood to mean that Congress is not allowed to pass laws that interfere with religious beliefs and religious practices, to a certain extent, as determined by the Supreme Court.

Establishment Clause: The Establishment Clause is a clause in the First Amendment to the United States Constitution which states that "Congress shall make no law respecting the establishment of religion." The question of what laws 'establish' religion is a highly contentious topic in American politics and law, but the Clause prohibits Congress from passing laws that break down a separation between church and state.

Strict Scrutiny: Strict scrutiny is the highest and most rigorous standard of judicial review in American constitutional law, mainly applied in the analysis of equal protection violations and violations of other fundamental rights, such as voting rights. According to strict scrutiny review, "the state must establish that it has a compelling interest that justifies and necessitates the law in question."[3]

Laïcité: There is no direct translation of *laïcité* into English, but it is commonly translated as either the separation of church and state or secularism. *Laïcité* "refers not simply to separation of church and state but the role of the state in protecting individuals from the claims of religion."[4] The principle of secularity, a bedrock of French law and society, "rests on three inseparable values: freedom of conscience, equality of rights to spiritual and religious options, and neutrality of political power."[5]

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[1] UNPO, "Human Rights," Underrepresented Nations and Peoples Organization, Accessed November 22, 2021, https://unpo.org/section/5/5?section=5&sub=5.

[2] Cole W. Durham and Brett G. Scharffs, *Law and Religion: National, International, and Comparative Perspectives*, 2nd ed. (New York, NY: Wolters Kluwer, 2019), 39.

[3] *Black's Law Dictionary* 746 (5th ed. 2016).

[4] Joan Wallach Scott, *The Politics of the Veil* (Princeton, NJ: Princeton University Press, 2007), 98.

[5] Robert O'Brien, *The Stasi Report: The Report of the Committee on Reflection on the Application of the Principle of Secularity in the Republic* (Buffalo, NY: William S. Hein & Co., 2005), 13.

Conseil d'État: The *Conseil d'État*, translated as the 'Council of State,' is the supreme administrative court in France. In general, the Council acts as a legal advisor for the French government and settles disputes over administrative acts.[6]

III. Introduction

In 1952, one of the United States' most liberal Supreme Court justices in the court's history, Justice William Douglas, wrote that "we are a religious people whose institutions presuppose a Supreme Being."[7] In 2003, the French President Jacques Chirac stated in a speech that secularism "guarantees everyone the possibility of expressing and practising their faith, peacefully and freely, without the threat of the imposition of other convictions or beliefs."[8] These two quotes demonstrate the nexus between religiosity and secularism and the distinction between two countries' methods of protecting one of the most contentious and one of the most important human rights: the right to the freedom of religion.

The existence of the right to the freedom of religion gives rise to numerous philosophical and practical questions. How can a government protect human rights? What constitutes the protection of rights? How can a government limit human rights, and under what circumstances? How can a government reconcile protecting certain human rights at the cost of others? These philosophical questions are at play in the examination of the protection and limitation of the human right to the freedom of religion in the United States and in France in the realm of public schools and students' rights. Public schools in both France and the United States have traditionally been battlegrounds for contentious debates about individual rights and national identity, thus acting as prime examples of the distinction between the two methods of protection of the freedom of religion used in either country. While France and the United States both participate in the human rights enterprise and subscribe to the international body of law regarding human rights, international law does not give specific standards to delineate when human rights can be limited, leaving this up to governmental interpretation and implementation. France and the United States provide prime case studies of how governments' methods of protection are affected by their political, social, legal, and cultural histories.

This thesis will examine how constitutional principles of secularism, free exercise, and free expression play a role in public schools in France and the United States. This thesis focuses on two case studies: the Equal Access Act, which prohibited high schools in the United States from discriminating against student-led religious speech in a limited public form, and Law No. 2004-228, which prohibited the wearing of ostentatious religious symbols in French public schools. These cases demonstrate how American and French protections and limitations of the human right to the freedom of religion differ. This thesis ultimately analyzes French and American perceptions of the right to the freedom of religion and places these perceptions in the

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[6] Conseil d'État, "Les missions du Conseil d'État" [The Missions of the Council of State], Conseil d'État, last modified 2021, https://www.conseil-etat.fr/le-conseil-d-etat/missions.

[7] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[8] "Speech by Jacques Chirac, President of the Republic, on Respecting the Principle of Secularism in the Republic (excerpts)," Présidence de la République, Accessed August 20, 2021, http://www.jacqueschirac-asso.fr/archives-elysee.fr/elysee/elysee.fr/anglais/speeches_and_documents/2003/fi004414.html.

context of international human rights law, showing how history can impact the implementation of these rights.

IV. Methodology

Dr. Lise Schreier's course entitled 'France: Literature, History, and Civilization' introduced me to the topic of secularism in France and provided me with inspiration for conducting this research. In this course, we explored questions of Islamophobia, secularism, and the politics of the *hijab* in France. The readings from this class served as my initial sources for this research. These sources, along with our class discussions, exposed me to the roots of French secularism and how this principle functions in modern France as a historical but extremely controversial constitutional principle. I decided to pursue a topic for this research that would allow me to further my knowledge and understanding of the United States Constitution, since I am attending law school after my undergraduate studies, while crafting an effective and insightful comparison with France.

I selected Law No. 2004-228 regarding religious symbols in French schools and the United States' Equal Access Act regarding religious clubs in public high schools as the case studies for this project to maintain a parallel comparison between students' right to religious expression in French and American public-school systems. There are a variety of important debates regarding the role of religion in schools that can be addressed within this framework, including state-sponsored prayer in schools, religious symbols displayed in schools, or religious curriculum. However, focusing on laws that address *students'* rights to expression and maintaining this theme throughout my analysis of France and the United States was essential. This research therefore focuses on the Equal Access Act and Law No. 2004-228 in order to examine what students can and cannot do to express their religious beliefs in public schools and in order to examine how and why France and the United States have different perceptions of how to protect human rights.

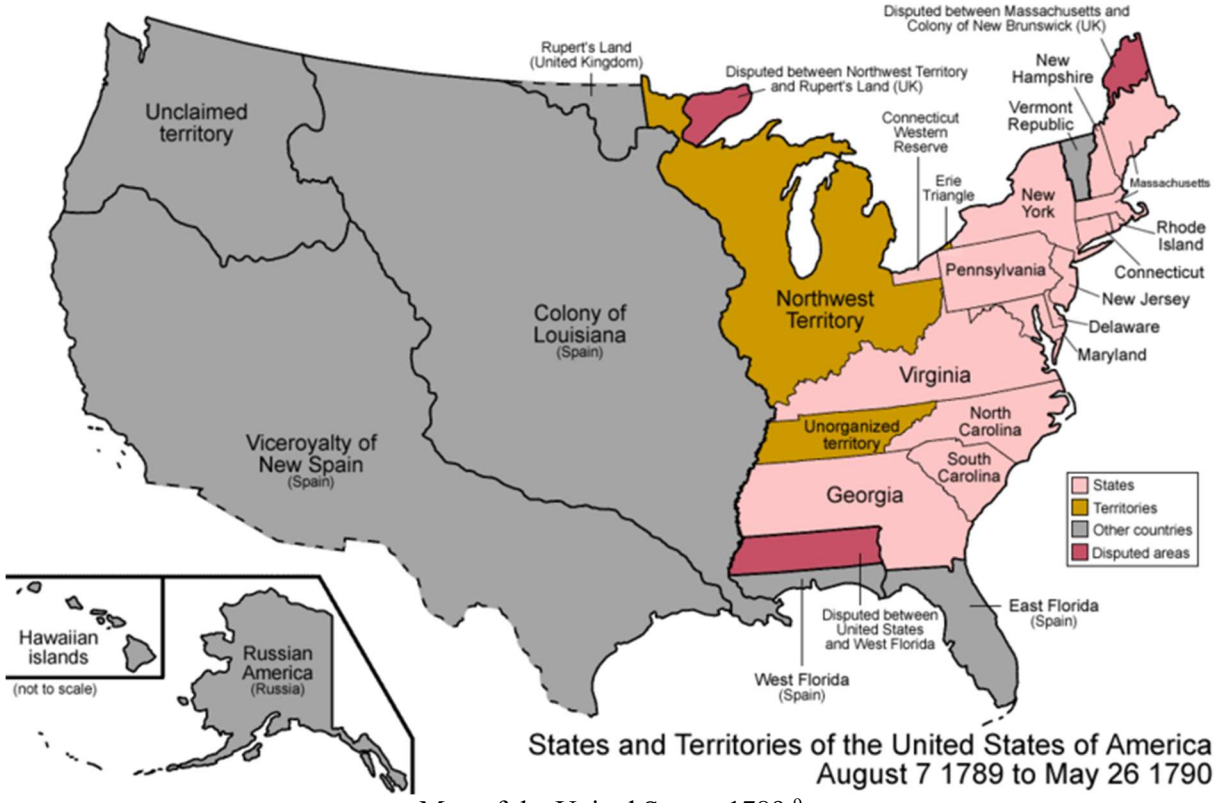
In conducting this research, I initially focused on what accounts for the difference in the perception of what constitutes freedom of religion in France and the United States. I focused on French constitutional and governmental history in the eighteenth and nineteenth centuries and on the drafting and early interpretations of the United States Constitution and its amendments. However, I found that applying a specific modern issue to this research, particularly the issue of religion in public schools, limited the scope of the project and made my research more applicable to modern societal debates. After making this decision, I consulted primary and secondary sources on public schooling in France and the United States, along with American court cases and French controversies on what religious symbols are permitted in public schools.

Through researching my selected case studies, I realized that French and American law place interesting limitations or restrictions on the freedom of religion, and I wanted to see whether international treaties and resolutions that France and the United States subscribe to allow for these limitations. I decided to analyze my case studies through the lens of human rights law since the freedom of religion is one of the most contentious and enduring human rights. By looking at the texts of various international treaties, I was able to examine the limitations in French and American law and compare them to the limitations provided in international treaties

and resolutions. This led me to understand that much of human rights law is open to interpretation, and this interpretation is commonly affected by countries' histories.

V. Protecting and Limiting the Freedom of Religion in the United States

A. Legislative and Constitutional Overview



Map of the United States, 1789.[9]

The history of the constitutional principle of free exercise of religion in the United States begins with religious debates during the Founding Era (1774-1779). State constitutions, speeches, and ratifying documents show that individuals in the Founding Era were concerned with the freedom of conscience and the freedom to act according to religious beliefs. In general, "Americans in the Founding Era agreed that persons ought to be free to act according to their religious convictions in private."[10] For instance, James Madison declared in 1785 that the religion "of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right."[11] There is also significant evidence that points to the fact that some individuals, such as Quaker and other religious leaders, saw the free exercise of religion as an inalienable right. For

[9] *United States 1789-1790,* Illustration, Accessed December 9, 2021, https://commons.wikipedia.org/wiki/File:United_States_1789-08-1790.png.

[10] Howard Gillman et al., *American Constitutionalism* (New York, NY: Oxford University Press, 2015), 111.

[11] Ibid., 113-114.

example, William Penn "devoted his life to securing liberty of conscience as a God-given right beyond the dominion of government."[12] Penn, along with individuals such as Roger Williams, drawing on Lockean theories of inalienable rights and toleration, argued that "state control of religion corrupted faith."[13] According to this argument, the right to free exercise of religion has a more intrinsic root, less dependent on human and governmental decisions. Notably, the agreement that people have the freedom to exercise their religious beliefs did not preclude the state from invoking religious principles, evidenced by the fact that, for example, the Continental Congress invoked legislative chaplains before sessions.[14] Overall, Founding Era Americans viewed religious liberty as an "essential cornerstone of free speech,"[15] and provided the foundations of key beliefs surrounding religious liberty that have influenced modern legislation and jurisprudence on the topic.

The meaning and intent of the First Amendment to the United States Constitution is key to understanding how free exercise functions in modern American society, specifically in public schools. The original Constitution ratified in 1788 only mentions religion once, in Article VI, which outlawed religious tests as qualifications for public office.[16] There are no records of the deliberations that resulted in the First Amendment Americans know today. However, historians have some evidence as to how the wording of the First Amendment evolved during ratification debates. For instance, the state of New Hampshire proposed an amendment that read: "'Congress shall make no laws touching religion, or to infringe the rights of conscience.'"[17] Because of multiple disagreements surrounding the precise wording of the Amendment, Congress sent the debate to a joint committee, which resulted in the ratified First Amendment.[18] The First Amendment states that "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."[19]

It is important to note first that, contrary to popular belief, the Founders did not list these rights first because they believed these rights were the most important; Congress had included two proposed amendments enumerated before the First Amendment, but they were not ratified.[20]

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[12] Arlin M. Adams and Charles J. Emmerich, "A Heritage of Religious Liberty," *University of Pennsylvania Law Review* 137 (May 1989): 1559-671, NexisUni, 1566.

[13] Ibid., 1562. Other Founders, such as Thomas Jefferson, drafted important documents relating to religious freedom. For instance, Harvard historian Bernard Bailyn recognizes Jefferson's Statute for Religious Freedom, drafted in 1777, as one of the most important documents in the history of the founding of the United States. The document outlawed government compulsion to support religion and barred civil penalties for religious opinions and beliefs. See Durham and Scharffs, *Law and Religion*, 21.

[14] Adams and Emmerich, "A Heritage of Religious Liberty," 1571.

[15] Ibid., 1599-1600.

[16] U.S. Const. art. VI.

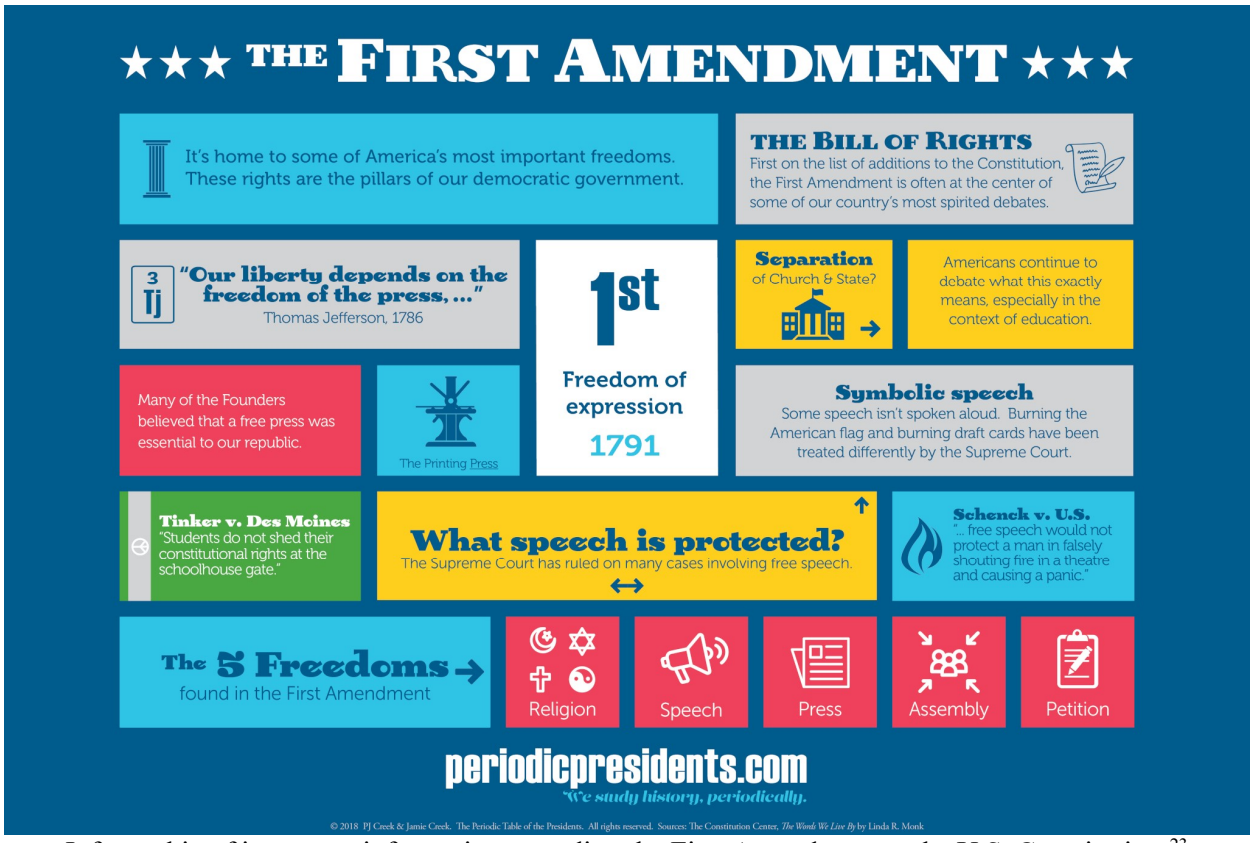
[17] Adams and Emmerich, "A Heritage of Religious Liberty," 1579.

[18] Ibid., 1581.

[19] U.S. Const. amend. I.

[20] Saul Cornell and Gerald Leonard, *The Partisan Republic: Democracy, Exclusion, and the Fall of the Founders' Constitution, 17803-1830s* (N.p.: Cambridge University Press, 2019), 35. Congress sent twelve amendments to the states for ratification, and the states denied the first two amendments, but ratified the final ten, which became the Bill of Rights. The first amendment proposed to the states addressed legislative apportionment and the second amendment addressed congressional salaries (which was adopted 200 years later as the 27th Amendment).

In addition, although religious freedoms and speech-related freedoms appear in the same amendment, there is no evidence to suggest that there was any particular philosophical or legal reasoning for this other than linguistic convenience.[21] Scholars have adequately described that the religion clauses of the First Amendment recognize the separation of church and state "while also recognizing the historical and cultural importance of accommodating religious freedom."[22] In considering the meaning of the First Amendment today, it is evident that it is important to understand its philosophical underpinnings and historical context.



Infographic of important information regarding the First Amendment to the U.S. Constitution.[23]

Finally, many constitutional scholars argue that the exercise of religious freedom in the United States in the decades following the ratification of the Bill of Rights shed light on the intended meaning of the First Amendment. While it is controversial in the legal community whether these actions should dictate how the Supreme Court interprets the First Amendment today, the Court has frequently looked to these practices to help them answer constitutional debates about religious exercise. George Washington, for instance, added the concluding words 'so help me God' to the Presidential oath, and John Marshall opened Supreme Court sessions

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[21] Walter Berns, *The First Amendment and the Future of American Democracy* (Chicago, IL: Gateway Editions, 1970), 80.

[22] Ali Farida, "Students' Religious Liberty: Religious Attire and Symbols in American Public Schools," *Rutgers Journal of Law and Religion* 15 (2013): 1-46, NexisUni, 12.

[23] *The First* Amendment, March 9, 2021, Illustration, https://www.carnegielibrary.org/the-first-amendment-and-censorship/.

with 'God save the United States and this Honorable Court.'[24] The First Congress also commenced legislative sessions with prayer.[25] These interactions planted the seeds of a complex relationship between the Establishment Clause, the Free Exercise Clause, and the role of government. Essentially, "the Founders affirmed the importance of religion to the new republic and would have rejected the use of the establishment clause to eradicate the religious leaven from public life," showing that instances in which the early American government sanctioned religious involvement may be consistent with the First Amendment.[26]

B. Religion and Expression in Public Spaces

The American Civil Liberties Union's checklist of what types of religious exercise and expression is allowed in American public schools.[27]

The role of religion in public spaces in the United States today shows how the constitutional principle of free exercise functions. First, the principle of separation of church and state holds that the government must remain neutral regarding religion. This principle "requires neither a secular society, nor the exclusion of religion from the public arena."[28] The separation of church and state in the United States does not obligate the government to play a role in ensuring secularity, and, according to modern jurisprudence, it does not require that the government be blind to religious needs of the American public. The complexity of this doctrine and the constitutional principle of free exercise of religion can best be understood by analyzing the various ways in which religion mingles with public life in the United States. For instance, as in the first decades of the United States, presidents today continue to use 'so help me God' in the presidential oath and the Court begins proceedings with the phrase 'God save the United States

[24] McCreary County v. American Civil Liberties Union, 545 U.S. 844, 886 (2005).
[25] Ibid.
[26] Adams and Emmerich, "A Heritage of Religious Liberty," 1615-1616.
[27] *Religion in Schools: What's Allowed*, January 12, 2018, Illustration, https://www.aclund.org/en/news/do-you-know-your-religious-freedom-rights-school.
[28] Adams and Emmerich, "A Heritage of Religious Liberty," 1644.

and this Honorable Court.'[29] Legislatures also continue to open sessions with prayer.[30] There are also numerous references to the "religious heritage" of the United States, including 'In God We Trust' on printed money, the phrase 'One nation under God" in the Pledge of Allegiance, and the symbol of Moses with the Ten Commandments in the Supreme Court.[31] These examples provide important context in understanding how the First Amendment functions in society and in government.

C. Students' Right to Free Exercise of Religion in U.S. Public Schools

In general, students in American public schools enjoy free exercise of religion and free speech rights, even while on schools' campuses. The Supreme Court enumerated the role and purpose of the American public school system in *Bethel School District v. Fraser* (1986), a 1986 Supreme Court case considering students' free speech rights in public schools. The Court held that the role and purpose of the system was to "'prepare pupils for citizenship in the Republic'" and "'inculcate the habits and manners of civility,'" including religious and political tolerance.[32] The public school system is seen as a way of transmitting values and preparing productive citizens.[33]

The role of religion in public schools is a hotly debated topic in American politics. The most important distinction regarding the constitutionality of religious expression in public schools is the distinction between impermissible governmental religious speech and constitutional private religious speech. Impermissible governmental religious speech, often struck down by the federal courts, occurs "when the regulation or practices uses the public school system to grant state-sponsored benefits solely to religion."[34] For example, the 1963 Supreme Court case *Abington School District v. Schempp* (1963) struck down a Pennsylvania state law that required the school day to begin with the reading of the Ten Commandments and a Maryland state law that required the school day to begin with the reading of the Lord's Prayer.[35] The Supreme Court has also struck down public schools teachers' holding moments of silence for voluntary prayer[36] and posters containing the Ten Commandments.[37] The Supreme Court has made enormous efforts to ensure religious neutrality in schools and to find a balance between impermissible religious speech and constitutional private exercises of religion.

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[29] McCreary County v. American Civil Liberties Union, 545 U.S. 844, 888 (2005).

[30] Ibid. For example, the Supreme Court upheld the Nebraska state legislature's chaplaincy practice in the 1983 case *Marsh v. Chambers* and the Court allowed the Town of Greece, New York to continue using chaplains to open legislative sessions with prayer in the *Town of Greece v. Galloway* (2014).

[31] Lynch v. Donnelly, 465 U.S. 668, 676-677 (1984).

[32] Bethel School District v. Fraser, 478 U.S. 675, 681 (1986).

[33] Adams and Emmerich, "A Heritage of Religious Liberty," 1648.

[34] Timothy M. Gibbons, "The Equal Access Act and *Mergens*: Balancing the Religion Clauses in Public Schools," *Georgia Law Review* 24 (Summer 1990): 1141-79, NexisUni, 1145.

[35] Gillman et al., *American Constitutionalism*, 553.

[36] Wallace v. Jaffree, 472 U.S. 38 (1985).

[37] Stone v. Graham, 449 U.S. 39 (1980). Teachers and public-school officials also cannot, while acting in official capacity, lead prayer, read the Bible, or attempt to persuade students to participate in religious activities. U.S. Department of Education, *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, January 16, 2020, https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

Even though the federal courts have gone through lengths to minimize religious speech in schools, particularly speech that appears as state endorsement of religion, students enjoy expansive freedom to exercise their religious views. In examining these rights, it is first necessary to evaluate students' rights to free speech in schools, since the nexus between free exercise of religion and free speech is highly complex. Proponents of students' religious expression in schools often argue that "the constitutional monitoring of students' speech entangles school officials in the unconstitutional censorship and control of students' religious beliefs and expressions."[38] Importantly, the Supreme Court has stated that students' constitutional rights do not disappear when they enter school property. One of the most notable cases of students' free speech rights is the 1969 Supreme Court case *Tinker v. Des Moines Independent Community School District* (1969). *Tinker* considered whether school officials could punish students for wearing armbands as an anti-war protest when there was no evidence that the armbands were disrupting education.[39] The Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[40] Essentially, the Supreme Court affirmed students' rights to free speech, which provided grounding for later cases, particularly *Keyishian v. Board of Regents* (1967), in which Justice Abraham Fortas wrote that the classroom "must function as a 'marketplace of ideas.'"[41] The notion of free speech in schools is integral to understanding free exercise of religion in schools.

The distinction between establishment and exercise results in students' ability to exercise their religious beliefs in schools. Constitutionally protected religious expressions in public schools mainly exist through student religious expression, which poses "a significantly different constitutional question than state-sponsored religious programs in public schools."[42] There are necessary distinctions between religious speech that happens to take place in public schools and state-sponsored religious speech.[43] It is also important to note that "an individual's contribution to a government-created forum" is not necessarily "government speech."[44] Because of this distinction, there are various ways in which students can express their religious beliefs consistent with the Constitution. For instance, students can distribute religious literature in school and "students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages."[45] In fact, students across the United States have indicated that certain religious expressions are relatively common in public school, including praying before sporting events or wearing religious symbols.[46] Overall, while there is a clear legal struggle between student interests, particularly with regard to free speech and exercise rights, and state interests, particularly with regard to preventing state sponsorship of religion, there are certain rights of expression that students enjoy while on school grounds.

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[38] Gilbert A. Holmes, "Student Religious Expression in School: Is It Religion or Speech, and Does It Matter," *University of Miami Law Review* 49 (Winter 1994): 377-429, NexisUni, 401.

[39] Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 504 (1969).

[40] Ibid., 506.

[41] Gibbons, "The Equal Access Act and *Mergens*," 1150.

[42] U.S. Department of Education, *Guidance on Constitutionally Protected Prayer.*

[43] U.S. Department of Education, *Guidance on Constitutionally Protected Prayer.*

[44] Santa Fe Independent School District v. Doe, 530 U.S. 290, 302 (2000).

[45] U.S. Department of Education, *Guidance on Constitutionally Protected Prayer.*

[46] Pew Research Center, "Religion in the Public Schools," Pew Research Center, last modified October 3, 2019, https://www.pewforum.org/2019/10/03/religion-in-the-public-schools-2019-update/.

D. Equal Access and Students' Expression in School Clubs

The question of whether extracurricular student clubs should receive equal access to funds and facilities based on the content of their speech first appeared before the Supreme Court with *Widmar v. Vincent* (1981). The issue in *Widmar* was whether a state university "which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion."[47] The subject of *Widmar* was the University of Missouri at Kansas City (UMKC). In 1977, UMKC notified the registered religious group, Cornerstone, that the group would no longer be permitted to meet in UMKC's buildings since a certain regulation at the university "prohibits the use of University buildings or grounds 'for purposes of religious worship or religious teaching.'"[48] The case originated in the Federal District Court for the Western District of Missouri, where students argued that the regulation violated their rights to free exercise of religion, equal protection, and freedom of speech, guaranteed by the First and Fourteenth Amendments to the Constitution.[49]

The Supreme Court ruled in an 8-1 opinion written by Justice Lewis Franklin Powell Jr. that "'an open-forum policy including nondiscrimination against religious speech, would have a secular purpose,' and would in fact avoid entanglement with religion."[50] According to the Court's jurisprudence, UMKC was required to show that the regulation was "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end" in order to justify discrimination from the public forum based on the religiosity of Cornerstone's speech.[51] The Court was sympathetic to UMKC's argument that the University's interest in complying with the Establishment Clauses of the federal and Missouri Constitutions was a compelling state interest, but the Court determined that "it does not follow… that an 'equal access' policy would be incompatible with this Court's Establishment Clause cases."[52] The Court stated that an equal access policy can be consistent with the Establishment Clause because it has a secular legislative purpose, it neither advances nor inhibits religion, and because it does not foster excessive government entanglement with religion.[53] Based on this reasoning, the Court evaluated not whether the existence of the religious group violated the Establishment Clause, but whether the University could discriminate against the group based on their speech. The Court thus invalidated UMKC's regulation.

The Equal Access Act of 1984 further guaranteed students' rights to express religious preferences by inhibiting high schools from discriminating against religious speech. The Act was

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[47] Widmar v. Vincent, 454 U.S. 263, 264 (1981).

[48] Ibid., 265.

[49] Ibid., 266.

[50] Westside Community Board of Education v. Mergens, 496 U.S. 226, 248 (1990).

[51] Widmar v. Vincent, 454 U.S. 263, 269-270 (1981).

[52] Ibid., 270-271.

[53] Westside Community Board of Education v. Mergens, 496 U.S. 226, 270-271, 274 (1990). The Court in *Mergens* used the *Lemon* Test to evaluate whether an equal access policy would violate the Establishment Clause. In this case, the Court paid particular attention to whether an equal access policy would advance religion, writing that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy 'would no more commit the University… to religious goals' than it is 'now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,' or any other group eligible to use its facilities." Lemon v. Kurtzman, 403 U.S. 602 (1971).

enacted to prevent "high schools from discriminating against student-initiated and student-led religious, political, or philosophical speech when the high school has established a limited open forum."[54] The text of the act states:

> "It shall be unlawful for any public secondary school which receives Federal financial assistance, and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of the speech at such meetings."[55]

Based on the language of the Act, Congress was addressing expressive activities in public schools, and students' abilities to engage in these activities. According to legal scholars, the Equal Access Act was intended to address an extremely volatile religious issue regarding rights of students in schools,[56] to address discrimination against religious speech in schools,[57] and to more properly balance students' free exercise of religion, free speech, and free association rights with non-establishment rights.[58] The Act is extremely important in evaluating free exercise rights of students in the United States, especially in the context of contrasting constitutional principles of secularism in France.

The 1990 Supreme Court case *Westside Community Board of Education v. Mergens* (1990) challenged the constitutionality of the Equal Access Act. In January of 1985, Bridget Mergens, a student at Westside High School, which received federal funds, requested permission from the school principal to form a Christian club.[59] The proposal for the club stated that the club would not have a faculty advisor, but it would "permit the students to read and discuss the Bible, to have fellowship, and to pray together," and membership would be optional and "open to all students regardless of religious affiliation."[60] Westside High School denied the proposed club from meeting on school grounds because of the content of their speech. The case was appealed to the Supreme Court, and the Court considered "whether the Equal Access Act prohibits Westside High School from denying a student religious group permission to meet on school premises during noninstructional time, and if so, whether the Act, so construed, violates the Establishment Clause of the First Amendment."[61] The Court concluded that the Equal Access Act constitutionally prevented schools that received federal funds from discriminating against after-school clubs based on the content of their speech. Justice Sandra Day O'Connor, writing for the eight-justice majority, held that the Equal Access Act does not violate the Establishment Clause, writing that "under the Act, a school with a limited open forum may not lawfully deny access to a Jewish students' club, a Young Democrats club, or a philosophical club devoted to the study of Nietzsche. To the extent that a religious club is merely one of many different student-initiated

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[54] Gibbons, "The Equal Access Act and *Mergens*," 1141.

[55] 20 USC 4071(a).

[56] Adams and Emmerich, "A Heritage of Religious Liberty," 1647.

[57] Westside Community Board of Education v. Mergens, 496 U.S. 226, 239 (1990).

[58] Gibbons, "The Equal Access Act and *Mergens*," 1179. The Court in *Mergens* wrote that "Congress' avowed purpose—to prevent discrimination against religious and other types of speech—is undeniably secular." Westside Community Board of Education v. Mergens, 496 U.S. 226, 249 (1990).

[59] Vincent Phillip Muñoz, *Religious Liberty and the American Supreme Court: The Essential Cases and Documents* (Plymouth, UK: Rowman & Littlefield Publishers, 2013), 371-372.

[60] Muñoz, *Religious Liberty and the American Supreme Court*, 372.

[61] Westside Community Board of Education v. Mergens, 496 U.S. 226, 231 (1990).

voluntary clubs, students should perceive no message of government endorsement of religion."[62] The Court importantly declared that the Act was constitutional because of its secular purpose in preventing speech-based discrimination.

Contrastingly, in France, as will be explored extensively in the next section, protecting a separation of church and state in public schools reveals a completely different conception of expression in relation to students' rights on school grounds. Overall, this case study shows that the United States' history and legal traditions have created a perception of what the freedom of religion means that contrasts with France's apparent protection of a right to the freedom *from* religion.

VI. Protecting and Limiting the Freedom of Religion in France

A. Legislative and Constitutional Overview

Map of Europe in 1789.[63]

[62] Ibid., 252.

[63] Bryan Rutherford, Map of Europe in 1789, September 29, 2017, Photograph, https://en.wikipedia.org/wiki/French_Revolution#/media/File:Europe_1783-1792_en.png.

Contemporary discussions of *laïcité* in France should begin with the role of religion during the end of the *Ancien Régime* and the French Revolution of 1789. Before the Revolution, France had a Catholic majority population[64] and "the Catholic Church was heavily involved in state affairs."[65] However, leading up to the Revolution "the clergy was viewed as complicit with the monarchy in causing social unrest," and there was a desire among common people "to separate religion and the government… because they believed they had been denied many rights due to the union of powerful political and religious leaders."[66] Revolutionary republicanism became the direct antithesis to clericalism, and revolutionaries advocated for constitutionalism over divine right. French revolutionaries "ended the exclusive privileges of the Roman Catholic Church in the Bourbon monarchy" and diminished the Catholic Church's political authority.[67] The Revolution also affirmed the "autonomy of conscience, including spiritual and religious choices" particularly through certain articles of the 1789 Declaration of the Rights of Man and of Citizens ("Declaration of Rights").[68] For instance, Article 10 of the Declaration of Rights states that "Nobody should be disquieted because of his opinions, including religious views, provided that their expression does not disturb public order established by the law."[69] The last phrase of this article is pivotal in modern debates of *laïcité* because it provides grounds for the government to limit the freedom of expression of religious beliefs.[70] In addition, Article 11 states that "the free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law."[71] The Declaration of Rights, evidence of the liberal political and social reform in France during the eighteenth century, enumerated fundamental rights and freedoms. Overall, the Revolution planted seeds for larger oppositions to religious influence in public life.

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[64] "Interview Granted by French President Emmanuel Macron to Al-Jazeera (31 October 2020)," France Diplomacy - Ministry for Europe and Foreign Affairs, Accessed August 20, 2021, https://www.diplomatie.gouv.fr/en/coming-to-france/france-facts/secularism-and-religious-freedom-in-france-63815/article/president-macron-interviewed-by-al-jazeera-30-oct-2020.

[65] Fiona Deshmukh, "Legal Secularism in France and Freedom of Religion in the United States: A Comparison and Iraq as a Cautionary Tale," *Houston Journal of International Law* 30 (Fall 2007): 111-55, 120-121.

[66] Deshmukh, "Legal Secularism in France and Freedom of Religion in the United States," 120-121.

[67] Nigel Aston, *Religion and the Revolution in France 1780-1804* (Washington, DC: Catholic University of America Press, 2000), x.

[68] O'Brien, *The Stasi Report*, 14.

[69] Declaration of the Rights of Man and Citizen, 26 August 1789.

[70] In a 2003 speech, President Chirac stated: "Like all freedoms, freedom of expression of religious beliefs can be limited only by the freedom of the Other and observance of the rules of life in society. Religious freedom, which our country respects and protects, cannot be hijacked. It cannot undermine the common rule. It cannot impinge on the freedom of conviction of others. It is this subtle, precious and fragile balance, patiently built up over decades, which respect for the principle of secularism endures." "Speech by Jacques Chirac," Présidence de la République.

[71] Declaration of the Rights of Man and Citizen, 26 August 1789. In many countries in Europe at this time, writers would need permission from the government to publish criticism. In England, and according to the French Declaration of Rights, writers would not need permission, but writers could be punished for publishing slander. This principle is called 'no prior restraint.' Interestingly, this principle was key to political debates in the United States in the late eighteenth and early nineteenth centuries. Legislators at this time questioned whether the First Amendment right to free speech was a recognition of the principle of no prior restraint, or if it was protecting a broader right.

Poster displaying the motto of the French Republic, 1793. This poster translates to: "Unity, Indivisibility of the Republic, Liberty, Equality, and Fraternity or Death."[72]

Religious privilege and clericalism re-emerged and continued during the nineteenth century. Numerous leading scholars on the French Revolution argue that the Revolution "led not only to a decade-long schism within the Catholic Church, but also, for a time, to state-sponsored assault on Christianity itself."[73] However, religious revival in the nineteenth century countered the reforms made during the Revolution. Napoleon's Concordat of 1801 resolidified Catholicism in France, and the Bourbon Restoration attempted to undo revolutionary progressive efforts. However, memory of revolutionary progress persisted and divisions between the Church and politics lingered. Despite the revival, the Church's relationship with the French government in the nineteenth century was seen as a subordinate relationship rather than a partnership and religious influences moved slowly to the private sphere.[74] Revolutionary reforms and attitudes toward the Church's influence in the government and public life have proved vital in thinking about *laïcité* in modern France.

The debate over the political status of the Church in France continued throughout the nineteenth century, but the Law on the Separation of Church and State, or the law of 1905, codified the principle of *laïcité*.[75] Although a statute rather than a constitutional provision, the

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[72] *Unité, indivisibilité de la République,* 1793, Illustration, http://classes.bnf.fr/laicite/grand/lai_103.htm.

[73] Timothy Tackett, "The French Revolution and Religion to 1794," in *The Cambridge History of Christianity*, edited by Stewart J. Brown and Timothy Tackett, 536-55, vol. 7 (Cambridge: Cambridge University Press, 2006), 536.

[74] Aston, *Religion and the Revolution,* x.

[75] It is worth noting that the law of 1905 does not apply to Alsace-Moselle. Alsace-Moselle was under German occupation from 1871 through 1919, so the law of 1905 does not apply to this region of France. For example, "the University of Strasbourg has two religion departments, one Protestant and one Catholic, with faculty

law "has a place in French thought similar to the place of the First Amendment in American thought."[76] Most political and legal scholars writing about this law emphasize the significance of the 1789 Revolution in the adoption and formation of the law, stating that the historical concept of *laïcité* and the principle of secularism have roots in the Revolution.[77] These scholars recognize the importance of revolutionary opposition to the Church's involvement in public affairs but ultimately state that the legal separation between the Church and the state occurred with the adoption of the law of 1905, which "was seen as the triumph of progress and democracy over conservative ideology and church hierarchy."[78] Broadly, the law of 1905 guarantees the freedom to practice religion of one's choosing,[79] guarantees the freedom of conscience,[80] and definitively seals the separation between the Church and the state.[81] For example, Article 2 states that the Republic "neither acknowledges, nor pays for nor subsidizes any form of worship."[82] In addition, although this law guarantees the freedom of religious belief, it also states that this right is not absolute or unqualified. The first article clearly states that the freedom of worship can be limited by laws pursuing the interest of the public order,[83] similar to the qualifications of religious freedom in the 1789 Declaration of the Rights. Overall, the law of 1905 guaranteed French citizens' right of freedom of belief and freedom of religious expression, but importantly noted that this right is not absolute. These ideas and provisions are important in analyzing the students' rights to express their religious beliefs in public schools.

France now operates under the Constitution of the Fifth Republic, or the 1958 Constitution. Individual rights enumerated in the 1958 Constitution stem from the Declaration of the Rights and the preamble to the Constitution of 1946. The 1958 Constitution states that "the French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of Rights, confirmed and complemented by the Preamble to the Constitution of 1946."[84] The 1946 preamble lists rights that evolved from the Declaration of Rights, including the right to work, the right to social welfare, the right to education, and the right to political asylum.[85] Importantly, the 1946 Constitution guarantees "equal access of the child and the adult to education, professional training and culture," and

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appointed by the national Minister of Education." O'Brien, *The Stasi Report*, xxiii. In addition, religious instruction is still part of the public-school curriculum. Scott, *The Politics of the Veil*, 101.

[76] O'Brien, *The Stasi Report*, viii.

[77] Deshmukh, "Legal Secularism in France and Freedom of Religion in the United States," 33.

[78] Sophie Boyron, *The Constitution of France: A Contextual Analysis* (Oxford: Hart Publishing, 2013), 33.

[79] Walter Cairns and Robert McKeon, *Introduction to French Law* (London: Cavendish Publisher, 1995), 117.

[80] "Secularism and Religious Freedom," France Diplomacy - Ministry for Europe and Foreign Affairs, Accessed August 20, 2021, https://www.diplomatie.gouv.fr/en/coming-to-france/france-facts/secularism-and-religious-freedom-in-france-63815/article/secularism-and-religious-freedom-in-france#sommaire_4.

[81] Ibid.

[82] Law on the Separation of Churches and State of Dec. 9, 1905, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Dec. 11, 1905, p. 7205, http://www.legifrance.gouv.fr/texteconsolide/MCEBW.htm.

[83] The text of Article I of the law of 1905 reads: "The Republic ensures freedom of conscience. It guarantees the free exercise of religion only under the restrictions hereafter adopted in the interest of public order." Arthur Kutoroff, "First Amendment versus Laïcité: Religious Exemptions, Religious Freedom, and Public Neutrality," *Cornell International Law Journal* 48, no. 1 (Winter 2015): 247-78, 249.

[84] 1958 Const. pmbl.

[85] Boyron, *The Constitution of France*, 41.

states that the "establishment of a free, secular, public education… is a duty of the State."[86] In addition, the first article of the 1958 Constitution acknowledges France as an "indivisible, secular, democratic and social Republic."[87] Secularism is evidently a cornerstone of French law and society. President Chirac even stated in a speech that secularism, a pillar of the French Constitution, "expresses our resolve to live together in mutual respect, dialogue and tolerance."[88] The derivation and evolution of the principle of secularism in French constitutional and legislative history are essential in understanding how secularism plays a role in modern French society.

B. Religion in the Private Sphere and Free Expression

The role of religion in the French public sphere today shows how the principle of *laïcité* functions. First, contrary to American society, French society sees religion as a private matter particularly because France strives to prevent religion from impinging on state affairs.[89] Religion is also seen as a private matter because of the French emphasis on "the rights of others to exist in a neutral, nonproselytizing space."[90] Proponents of the French model of *laïcité* argue that in order to protect the freedom of conscience and in order to keep France a unified and secular state, religion must be private.[91] Finally, France views religion as a private matter because of its prioritization of a cohesive French national identity. French politicians such as Presidents Nicolas Sarkozy and Emmanuel Macron have joined commentators in warning "that tolerating displays of Islamic affiliation," for example, "would lead France down the disastrous path of American multiculturalism: ethnic conflict, affirmative action which put race above merit, social fragmentation, and political correctness."[92] French political theory attempts to achieve equality by placing social, religious, ethnic, and other identities below a French national identity in the public sphere.[93] For instance, the Ministry of Europe and Foreign Affairs recently stated that the greater cultural diversity in France today displays the need for secularism.[94] The government argues that secularism allows citizens "to live together, enjoying freedom of conscience, [and]

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[86] 1946 Const. pmbl.

[87] 1958 Const. art. I.

[88] "Speech by Jacques Chirac," Présidence de la République.

[89] Michael Barbaro, "France, Islam and Laïcité, February 12, 2021, in *The Daily* produced by Asthaa Chathurvedi, Rachelle Bonja, and Rachel Quester, Podcast, audio, 32:55, https://www.nytimes.com/2021/02/12/podcasts/the-daily/france-secularism-laicite-samuel-paty.html.

[90] Deshmukh, "Legal Secularism in France and Freedom of Religion in the United States," 123.

[91] Scott, *The Politics of the Veil*, 15.

[92] Ibid., 23. *See* Norimitsu Onishi, "Will American Ideals Tear France Apart? Some of Its Leaders Think So," *New York Times*, Feb. 9, 2021, https://www.nytimes.com/2021/02/09/world/europe/france-threat-american-universities.html. *See* Celestine Bohlen, "France Fears Becoming Too 'Anglo-Saxon' in Its Treatment of Minorities," *New York Times*, Sept. 19, 2016, https://www.nytimes.com/2016/09/20/world/europe/france-minorities-assimilation.html.

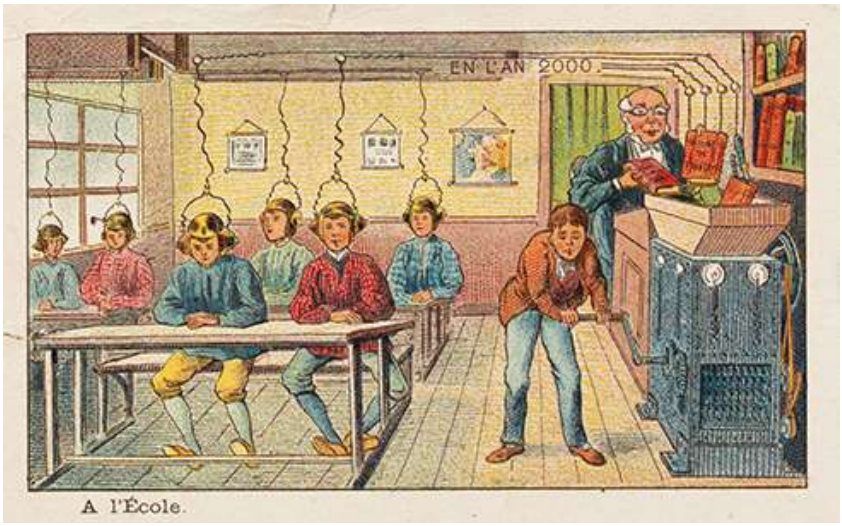
[93] Scott, *The Politics of the Veil*, 11. Under Napoleon, France becomes a singular and unitary state, and this idea starts with the Revolution when the nation replaces the king. This impacts modern France's idea of nationality identity, and contrasts with the American model of federalism. In the early 1800s, France saw two major revolutions, grounded in the same principles as the French Revolution of 1789. Louis-Philippe became the King of the French, notably not the King of France, during the July Monarchy in 1830, when France was a constitutional monarchy. The 'King of the French' title implied the expression of popular sovereignty, distinguishing the nation from the monarchy.

[94] "Secularism and Religious Freedom," France Diplomacy - Ministry for Europe and Foreign Affairs.

freedom to practice a religion or to choose not to."[95] This rhetoric and the goals of the principle of *laïcité* help explain why religion is a private function in France.

C. Secularism and Religious Expression in French Public Schools

The Jules Ferry laws of 1882 enumerated the role and purpose of the French public school system and set the foundation for what role the public school system is perceived to play in modern France. In 1882, Jules Ferry, the Minister of Education, established free, obligatory, and secular public education and cemented *laïcité* into the education system.[96] Ferry believed that "the school was to be the agent of assimilation" and the goal of the public schools was to "instill a common republican identity in children from a diversity of backgrounds."[97] Thus, the laws of 1882 removed religious instruction from schools and made lay persons responsible for schools.[98] Notably, the laws did not obligate children to conceal their religious beliefs,[99] but the laws did secularize classrooms. This background is essential in understanding how the government considers public schools in modern France. Like United States schools, French schools often act as battlegrounds for contentious debates about individual rights and national identity. However, the French government believes that maintaining schools as a neutral space allows for the development of students' conscience and the teaching of national values.[100] It maintains that "the presence of symbols and of behavior which demonstrate that they are neither able [to] conform to the same obligations, nor take the same courses, nor follow the same programs" would negate the goals of the French public school system.[101]



Artwork from 1910 in Jean-Marc Côté's *En L'An 2000* ('In the Year 2000') collection, depicting children in school in the year 2000, where a teacher puts books into a dissemination machine.[102]

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[95] Ibid.
[96] Ibid.
[97] Scott, *The Politics of the Veil*, 99.
[98] Abdelgadir and Vasiliki, "Political Secularism and Muslim Integration in the West," 709.
[99] Scott, *The Politics of the Veil*, 99.
[100] "Interview Granted by French President," France Diplomacy - Ministry for Europe and Foreign Affairs.
[101] O'Brien, *The Stasi Report*, 1.
[102] En 1910 Villemard imagine l'école de l'an 2000, 1910, Illustration, http://classes.bnf.fr/laicite/expo/salle4/01.htm.

Regarding religious speech in public education, the main distinction in United States law is the distinction between impermissible governmental religious speech and constitutional private religious speech. The federal courts in the United States have minimized religious speech in schools to a certain extent, such as prohibiting state endorsement of religion, but students generally enjoy expansive freedoms in exercising their religious views in school. Contrastingly, there is a notable distinction in French law between exercising freedoms of religion and expression and disturbing public order. Two of the most important documents in French legal history, the 1789 Declaration of Rights and the 1905 separation of church and state law, recognize these qualifications. Article 10 of the Declaration of Rights guarantees the freedom of speech and expression, but states that it cannot disturb the public order.[103] Today, the freedom of speech in France can be limited more easily than it can be in the United States. The freedom of speech in French law must be reconciled with other rights, which is an idea that stems from the Declaration of Rights. In addition, the 1905 law recognizes qualifications on the freedom to exercise religion, stating that there can be restrictions "adopted in the interest of public order."[104] While *laïcité* guarantees the liberty of belief, the liberty not to believe, and the liberty to change beliefs, these rights must be practiced "in the spirit of tolerance and respect for others."[105] Overall, the nexus between freedoms of religion and expression and the public order play an important role in the rights of students in France.

The French education system has embraced principles outlined in the Declaration of Rights and the 1905 law, placing strict limits but not complete prohibitions on religious expression in French schools. In July 2021, the Ministry of National Education, the Youth, and Sports published guidelines on secularism in the schools, enumerating students' rights, teachers' rights, and providing instruction on how to enforce secularity in the classroom and how to discuss secularity with parents. The guidelines state that students have the right to free expression, but the expression cannot impede on teaching.[106] It also mentions that students can also wear discrete religious signs to schools.[107] Overall, while students in France enjoy some rights to express their religious preferences in public schools, these rights are much more limited than in the United States, showing each countries' respective goals in maintaining a separation between church and state.

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[103] Marc-Olivier Bherer et. al., "Free Speech in France and America: A Constitutional Dialogue," lecture presented at National Constitution Center, June 1, 2021, National Constitution Center, https://constitutioncenter.org/interactive-constitution/town-hall-video/free-speech-in-france-and-america-a-constitutional-dialogue. The freedom of speech is also protected by different French statutes, decisions from the French constitutional court, and the European Court of Human Rights.

[104] Law on the Separation of Church and State of Dec. 9, 1905.

[105] Ministry of National Education, Youth and Sports, "La laïcité à l'école" [Secularism at the school], Strengthen Respect for Secularism and the Transmission of the Values of the Republic to Schools, last modified July 2021, https://eduscol.education.fr/1618/la-laicite-l-ecole, 7, 22.

[106] Ibid., 22.

[107] Ibid., 25.

Charter of Secularism to be displayed in French public schools, according to the Ministry of Education.[108]

[108] For the French version, please visit: https://www.education.gouv.fr/bo/13/Hebdo33/MENE1322761C.htm.

Charter of Secularism in Schools used to explain secularism to children.[109]

[109] Milan Presse et la Ligue de l'enseignement, *La charte de la laïcité expliquée aux enfants*, http://classes.bnf.fr/laicite/expo/salle4/05.htm.

D. Law No. 2004-228 and Ostentatious Religious Symbols

The question of whether students can wear 'ostentatious' symbols of religious preferences in public schools first arose out of an incident outside of Paris in 1989. In the fall of 1989, three Muslim girls, Samira, Fatima, and Leila, were suspended from Gabriel-Havez School in Creil for wearing Islamic veils in school.[110] The situation, commonly called '*L'Affaire des Foulards*,' or the 'Headscarf Affair,' became a national controversy. The school principal, Eugène Chenière, claimed that he was enforcing the principle of *laïcité*, and more schools followed Chenière's actions when the French government took notice of the incident.[111] The Minister of Education, Lionel Jospin, requested an opinion from the *Conseil d'État* in 1989, inquiring whether wearing of religious clothing, particularly Islamic veils, violates the principle of *laïcité*.[112] The *Conseil d'État* responded stating:

> According to recognized constitutional and legislative texts, as well as the international obligations of France, the principle of *laïcité* in state education… requires that teaching be conducted with respect for the freedom of conscience of the students… Such freedom for the students includes the right to express and to manifest their religious beliefs inside the schools, while respecting pluralism and the freedoms of others… The wearing of signs by students in which they wish to express their membership in a religion is not by itself incompatible with the principle of *laïcité*.[113]

According to the Council's response, the display of religious symbols could be consistent with *laïcité*, but the Council was careful to qualify this freedom stating that it "does not permit acts of 'pressure, provocation, proselytizing, or propaganda,' acts that 'compromise a student's dignity or freedom,' or acts that disturb health, safety, and order in public schools"[114] Clearly, the *Conseil d'État* embraced the distinction outlined in the Declaration of Rights and the 1905 law, enumerating rights but qualifying the rights with the necessity of public order.

In the mid-1990s, François Bayrou, France's then-newly appointed Education Minister, reignited the Headscarf Affair. In 1994, Bayrou issued an order "prohibiting 'ostentatious' signs that 'divide our youth' in public schools," arguing that the display of religious symbols, regardless of students' behaviors, was proselytizing.[115] The *Conseil d'État* reaffirmed its 1989 ruling when it considered Bayrou's memorandum by overturning his memorandum, but this ruling did not end the controversy.

Bayrou's order contributed to the creation of the Commission to Reflect on the Application of the Principle of Secularism in the Republic, commonly referred to as the Stasi Commission. In July of 2003, President Chirac established the commission composed of

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[110] Cynthia DeBula Baines, "L'Affaire des Foulards - Discrimination, or the Price of a Secular Public Education System?" *Vanderbilt Journal of Transnational Law* 29 (March 1996): 303-27, NexisUni, 304. Baines 304; O'Brien, *The Stasi Report*, xvi.

[111] Baines, "L'Affaire des Foulards," 304; Scott, *The Politics of the Veil*, 22.

[112] Jeremy T. Gunn, "Religious Freedom and Laïcité: A Comparison of the United States and France," *Brigham Young University Law Review* 2004 (2004): 419-506, NexisUni, 455.

[113] Gunn, "Religious Freedom and Laïcité," 455.

[114] Kutoroff, "The First Amendment Versus Laïcité," 270.

[115] Baines, "L'Affaire des Foulards," 305; Scott, *The Politics of the Veil*, 27.

intellectuals and politicians and appointed Bernard Stasi to head the commission.[116] The purpose of the Commission was to reflect on the application of *laïcité* in the country. The Stasi Report had numerous functions and recommendations, including addressing the condition of the poor, labor discrimination, state holidays for religions, and religious symbols in public.[117] The Report was perhaps most controversial because it "ultimately recommended the prohibition of headscarves in public schools."[118] The Report stated that certain types of religious expression in public schools had detrimental effects on neutrality, particularly because "the existence of headscarves in schools would exert an impermissible influence on public school pupils' religious views."[119] Overall, the Commission and its Report were both influential in the way the government enforces the principle of *laïcité* in public schools to this day.

The Commission presented its recommendations and findings to President Chirac, and it eventually resulted in the passage of a crucial law addressing religious expression in public schools. Law No. 2004-228 was passed on March 15, 2004 and was sponsored by a French conservative political party, the Union for a Popular Movement, but also endorsed by the opposing Socialist Party.[120] The law passed in the National Assembly with a vote of 494 to 36 and in the Senate with a vote of 276 to 20.[121] It states that "in public elementary schools, junior high schools, and high schools, students are prohibited from wearing signs or attire through which they exhibit conspicuously a religious affiliation."[122] The law defines large crosses, veils, and skullcaps as 'conspicuous' signs, whereas discrete signs such as medallions, small crosses, stars of David, hands of Fatima, and small Korans are permitted.[123] The *Conseil d'État* affirmed the law in October of 2004, stating that the "infringement of freedom of thought, conscience, and religion by the Law [of 2004]... was proportionate to the general interest pursued."[124] Thus, Law No. 2004-228 represents a major restriction on students' right to religious freedom in schools and, in the views of the French government, a significant protection of *laïcité*. Overall, this case study and its contrast with the United States case study shows, first, how the perception of the freedom of religion differs between France and the United States, and second, what accounts for the differences in these perceptions.

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[116] Abdelgadir and Vasiliki, "Political Secularism and Muslim Integration in the West," 710.

[117] John R. Bowen, *Why the French Don't Like Headscarves* (Princeton, NJ: Princeton University Press, 2007), 113; Scott, *The Politics of the Veil*, 34.

[118] Kutoroff, "The First Amendment Versus Laïcité," 710.

[119] Ibid., 710.

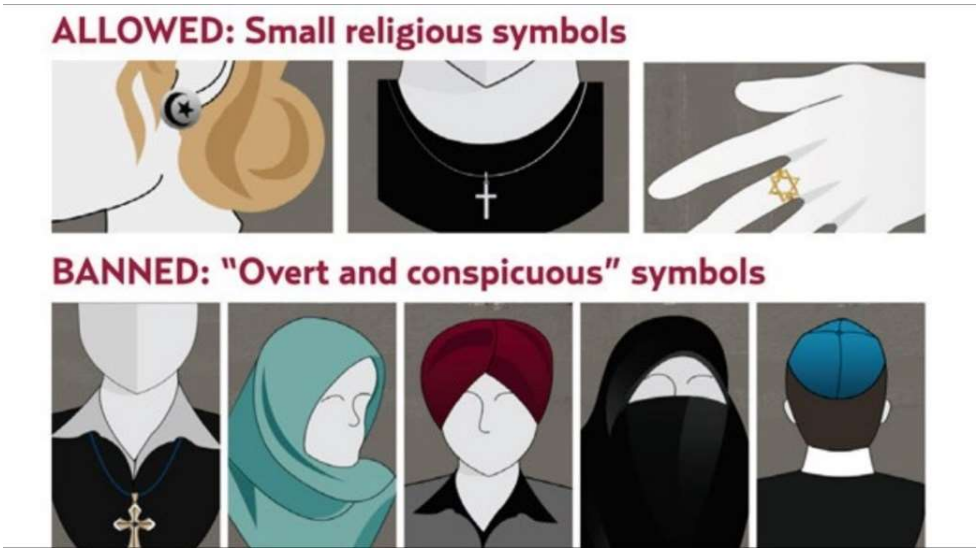
[120] Gunn, "Religious Freedom and Laïcité," 422.

[121] Ibid.

[122] Deshmukh, "Legal Secularism in France and Freedom of Religion in the United States," 132.

[123] Scott, *The Politics of the Veil*, 1.

[124] Jennifer Heider, "Unveiling the Truth behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights," *Indiana International and Comparative Law Review* 22 (2012): 93-129, 95, NexisUni.



Religious symbols allowed and banned in French public schools, according to Law No. 2004-228.[125]

E. Analysis: Human Rights and Interpretation

A. Treaties, Resolutions, and International Human Rights Law

The case studies provide examples of how differing perceptions of the freedom of religion in French and American law affect public schooling and display the roots of these perceptions, showing how French and American law has developed around these perceptions. To fully analyze these differences, it is necessary to understand French and American involvement in the human rights enterprise.

Both France and the United States participate in the human rights enterprise domestically, regionally, and internationally.[126] Domestically, France has promulgated human rights in its Declaration of Rights, as discussed in previous sections, as well as through its Constitution and various laws. In the United States, human rights, commonly called civil rights or constitutional rights, are protected through the Bill of Rights of the U.S. Constitution, various court cases, and legislation. While the United States is not involved in any regional human rights treaties, France has ratified the 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[127] Internationally, the Universal Declaration of Human Rights (UDHR) elaborates on the principles of human rights mentioned in the United Nations Charter.[128] The UN General Assembly adopted the non-binding resolution on December 10, 1948. The 1966

[125] "French People's New Religion – 'Secular Fundamentalism,'" Video, 13:48, YouTube, https://www.youtube.com/watch?v=RzEeUBqrh7s.

[126] Both the United States and France notably do not have perfect track records of human rights. The United States has been heavily criticized for its actions in Guantánamo Bay, for example. France has been heavily criticized for its deportations of Roma people.

[127] OHCHR, "Regional Human Rights Treaties," United Nations Human Rights Office of the High Commissioner, accessed November 22, 2021, https://www.ohchr.org/en/issues/escr/pages/regionalhrtreaties.aspx.

[128] United Nations, "UN Documentation: Human Rights," Dag Hammarskjöld Library, accessed November 22, 2021, https://research.un.org/en/docs/humanrights/undhr.

International Covenant on Civil and Political Rights (ICCPR) commits signatories to the protection of civil and political rights enumerated in the covenant. France ratified the ICCPR on November 4, 1980, and the United States ratified it on June 8, 1992.

Broadly, it is important to note that an institutional separation between the state and religious institutions is enumerated in numerous countries' constitutions and/or laws, including France and the United States, but contrastingly, "international norms protecting freedom of religion or belief lack a requirement of institutional separation of religion and state, and provide only 'free exercise'-type protections presumably because many of the world's legal systems do not insist on institutional separation of church and state."[129] Regardless, regional and international human rights treaties list the freedom of religion as an inherent human right. In addition, it is important to note that the freedom of religion is inherently distinct from and supplemental to the freedom of expression and the freedom of speech. This is evidenced by the fact that international resolutions and treaties, as well as many countries' laws and constitutions, enumerate the freedom of religion, the freedom of speech, and the freedom of expression as distinct rights.

First, the UDHR acknowledges the freedom of religion as a human right in Article 18, stating that "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 in public or private, to manifest his religion or belief in teaching, practice, worship, and observance."[130] The UDHR also has a general limitations clause concerning what limitations the freedom of religion can be subjected to:

1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.[131]

The UDHR is non-binding, and the United Nations Human Rights Commission initially planned to follow up with a binding, universal convention, but "ideological differences between the Western states and the Soviet bloc prevented progress on a single covenant."[132] Nonetheless, the UDHR still provides substantial guidance and has affected the development of other binding international human rights treaties.

Second, the ICCPR, a binding treaty, has numerous articles relevant to the freedom of religion. Article 18 Clause 1 copies the language of Article 18 of the UDHR. Article 20 Clause 2

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[129] Durham and Scharffs, *Law and Religion*, 138-139.

[130] United Nations, 1948, *Universal Declaration of Human Rights*, Article 18. An interesting fact about the drafting of Article 18 of the UDHR is that "the original draft, created by John Humphrey, provided simply that 'there shall be freedom of conscience and belief and of private and public religious worship.'" See Durham and Scharffs, *Law and Religion*, 82.

[131] United Nations, 1948, *Universal Declaration of Human Rights*, art. 29.

[132] Durham and Scharffs, *Law and Religion*, 84.

and Article 27 also provide specific protections based on religion, but these protections stem from the general right to religious freedom stated in Article 18. Lastly, Article 18 Clause 3 provides a general limitations clause, similar to the UDHR, stating that the "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[133]

Finally, the European Convention on Human Rights (ECHR) commits European signatories to the rights enumerated in the treaty and deals significantly with the freedom of religion. Article 9 Clause 1 copies the language of Article 18 of the UDHR and Article 18 Clause 1 of the ICCPR, stating that everyone has the right to freedom of thought, conscience, and religion. Article 9 Clause 2 copies the limitation language of Article 18 Clause 3 of the ICCPR, stating that the freedom to manifest one's religion or beliefs can be subject to certain limitations. The ECHR, similar to the ICCPR, also mentions that the rights enumerated in the Convention "shall be secured without discrimination."[134]

B. Protecting the Freedom of Religion

While the treaties and resolutions list notable and necessary human rights, they provide little to no instruction on how individual countries can protect these rights. They leave open to interpretation the question of how to protect human rights, and countries determine how to protect human rights based on their political and social histories, as evidenced by the French and American case studies. The case study of the Equal Access Act shows the American tradition of prioritizing free exercise of religion over secularity, even in public schools. The Equal Access Act case study also displays the role of the American government in shaping how the freedom of religion is protected in public schools, and how the government works to ensure the right to manifest religious preferences. Law No. 2004-228 shows the French government's role in advancing secularity in public schools, a markedly distinct and different method of attempting to protect the freedom of religion. President Macron demonstrated this method in a speech, stating that the principle of *laïcité* "is a freedom to believe or not to believe" and a principle "which makes France a country in which we hope that everyone feels equally a citizen, regardless of one's religion, and where everybody enjoys the same political and civic rights irrespective of their religion."[135] Political histories, including French and American constitution drafting, revolutionary wars, and how religion has played a role in contentious political debates throughout history on issues from the implementation of Enlightenment ideals to foreign policy to abortion. France and the United States display an important distinction in the methods of protection of the right to the freedom of religion.

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[133] United Nations (General Assembly), 1966, "International Covenant on Civil and Political Rights," Treaty Series 999 (December): 171, art. 18 cl. 3.

[134] Council of Europe, 1951, *The European Convention on Human Rights*, art. 14.

[135] "Interview Granted by French President," France Diplomacy - Ministry for Europe and Foreign Affairs. President Chirac similarly stated that secularism "expresses our resolve to live together in mutual respect, dialogue and tolerance." "Speech by Jacques Chirac," Présidence de la République.

C. Limitations on the Freedom of Religion

In addition, these treaties provide little to no guidance on when the freedom of religion can be limited, if at all. The general limitations articles provide broad instances in which certain freedoms can be limited, but these broad statements can be open to interpretation, especially when nuanced and complex legal arguments arise, such as the rights of students to organize religious clubs in public schools or the rights of students to wear religious symbols in public schools. The UDHR, the ICCPR, and the ECHR all state that the freedom of religion can be subject to limitations to protect public safety, order, health, morals, the general welfare in a democratic society, or the fundamental rights and freedoms of others.

In France, the Declaration of Rights and the 1905 Law recognize qualifications on the freedom to exercise religion, stating that expression cannot disturb the 'public order.' The French government also maintains that the principle of *laïcité* helps to protect the rights of others. For example, in schools, "pupils are asked to wear only discreet religious symbols to keep primary and secondary schools as neutral spaces and to avoid influencing others."[136] Generally, exercising religious preferences in public is commonly seen as infringing on the "rights of others to exist in a neutral, nonproselytizing sphere."[137] In maintaining the principle of *laïcité*, France limits the freedom of religion seemingly to protect the public order and the fundamental rights and freedoms of others. While some argue that these limitations have deleterious consequences, the rhetoric used to limit the freedom of religion seems to coincide with the allowed limitations according to the international treaties and resolutions France subscribes to, showing that these limitations do not necessarily result in the best interests of all individuals living in a particular country. The revolutionary push-back on an intertwined clergy and government, the traditional argument of religion as a solely private matter, and the government's understanding of the role of public schools as places that instill a common republican identity in children has affected the way France treats religious expression today.

In the United States, the free exercise of religion can be limited if the state has a compelling interest to do so. The compelling state interest test is part of strict scrutiny review, the highest and most rigorous standard of judicial review in American constitutional law. The compelling state interest test particularly applies to individual constitutional rights. In *Sherbert v. Verner* (1963), the Supreme Court considered when the government violates the right to the free exercise of religion, writing that the "door of the Free Exercise Clause stands tightly against any governmental regulation of religious *beliefs*."[138] Importantly for this discussion, the Court stated that the government must have a compelling state interest to justify the limitation placed on an individual's right to the free exercise of religion and the government must display that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[139] The test was curtailed in *Employment Division v. Smith* (1990) when the Supreme Court held that if a limitation on the free exercise of religion was an unintended result of generally applicable laws, the limitation did not have to pass the compelling state interest test.

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[136] Nicolas Cadène, "French Secularism Isn't Illiberal," *Foreign Policy*, April 7, 2021, https://foreignpolicy.com/2021/04/07/french-secularism-isnt-illiberal/.

[137] Deshmukh, "Legal Secularism in France and Freedom of Religion in the United States," 123.

[138] Sherbert v. Verner, 374 U.S. 398, 402 (1963).

[139] Ibid., 407.

However, *Smith* still requires laws and government actions intended to limit free exercise to pass the compelling state interest test, showing that restrictions on constitutional rights are met with high scrutiny. Applying strict scrutiny to constitutional rights shows the United States' interest in ensuring that constitutional rights, most of which are also considered human rights, can rarely be limited by the government.[140] The accommodation of religious freedom, the traditional use of religion in public spaces (such as on money, in the courts, and in legislatures), the Founding Era belief that state control of religion corrupted faith, and the Supreme Court's acknowledgement of the role of public schools as places where children learn religious tolerance has affected the way the United States treats religious expression today, particularly its application of strict scrutiny to limitations on the exercise of religion.

D. Freedom of and Freedom from Religion

Both France and the United States participate in the human rights enterprise domestically, regionally, and internationally, but their protection of and limitation of the human right to the freedom of religion is markedly different. The evidence provided in this thesis shows that France protects a freedom *from* religion. More specifically, France prioritizes protecting a right to exist in a neutral, nonproselytizing space, and therefore, in public schools, France limits the ostentatious expression of religious beliefs. The evidence provided in this thesis shows that the United States seems to protect a freedom *of* religion. More specifically, the United States prioritizes the individual right to display and exercise religion, even in the public sphere, and therefore, in public schools, the United States attempts to ensure students' right to the free exercise of religion, as long as the speech is not impermissible governmental religious speech. Rather than limiting the individual right, the United States focuses more on inhibiting the federal government's ability to limit the freedom of religion. Overall, the fascinating distinction between the freedom *of* religion and the freedom *from* religion sheds light on overarching differences between French and American legal systems and provides a lens through which one can analyze the effects political history has on the current state of law in the countries.

VIII. Conclusion

France and the United States provide great examples of how the human right of religious freedom differs based on a country's perception of how to protect it and the extent to which the government can limit it. This thesis analyzed French and American perceptions of religious freedom in the context of the United States' Equal Access Act and France's Law No. 2004-228, both of which address students' right to religious expression in public schools. These laws demonstrate the difference between religiosity in the United States and secularism in France, showing how perceptions of religious freedom differ. The case studies analyzed the roots of French and American protections and limitations on religious freedom and put the Equal Access Act and Law No. 2004-228 in the context of international human rights law, concluding that history and cultural traditions can deeply affect how a country protects and limits human rights today. The case studies and analysis show that freedom *of* religion and the freedom *from* religion are markedly different freedoms.

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[140] David Souter stated in *City of Los Angeles v. Alameda Books* that "strict scrutiny leaves few survivors." City of L.A. v. Alameda Books, 535 U.S. 425, 455 (2002).

The freedom of religion and the freedom from religion display the ways in which France and the United States address the question of how to protect a fundamental human right. This thesis broadly shows the effect governments and places have on people. The way individuals' right to religious freedom is protected and limited varies based on a variety of factors: where the individual lives, their religious preferences, how they choose to display their preferences, the constitutional history of their country, and their country's involvement in the international human rights enterprise. This idea is not solely limited to France and the United States but applies to countries around the world.

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