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Table of Contents

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Introduction

Although the concepts of secularism and the separation of Church and State are common features of modern democracies worldwide, differing cultural histories have produced diverging views on the extent that the freedom to practice the religion of one's choice should limit the State's ability to impose secularism. The United States and France are two democracies that place equal weight on the importance of the separation of Church and State, yet these two nations have vastly different interpretations of how secularism should influence the religious practices of their citizens. On October 7, 2010, the constitutional authorities[1] of France announced that the proposed legislation banning face coverings in public places did not violate the French Constitution.[2] The law bans masks and veils that obstruct the face in all public places. Those wearing face-covering veils will be punished with a fine of 150 Euros and a citizenship course, and those forcing a face-covering veil upon another will be punished with a year in prison or a 15,000 Euro fine.[3] While the law does not refer specifically to Muslim face covering veils—known in France and throughout the world as *hijabs*, *niqabs*, *burqas*, or *voiles*—it is implied that the Muslim community is the primary target of this legislation, as there are few other types of face coverings worn in modern French society. Furthermore, the ban has made exceptions for virtually all other types of face coverings worn in public such as ski and sanitary masks.[4] The ban also does not affect other types of Islamic head coverings such as the *chador*, which covers the top of the head and the body, but not the face.

This ban has sparked worldwide debate and controversy. While several European states approve of the ban, agreeing with the French

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1. *See generally* RENE DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY 29–30 (Michael Kindred trans., Louisiana State University Press 1972) (stating that the role of the Constitutional Council is to review all legislation and to ensure that it is constitutional); *see also* Dominque Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54 AM. J. COMP. L. 337, 377–78 (2006) (discussing the role of the Constitutional Council as the last barrier to a bill's legality in France).

2. *See* CNN Wire Staff, *French Burqa Ban Clears Last Legal Obstacle*, CNN, Oct. 7, 2010, http://articles.cnn.com/2010-10-07/world/france.burqa.ban_1_french-burqa-ban-ban-last-year-full-face-veil?_s=PM:WORLD (announcing that the French ban on head coverings did not violate the French Constitution or the Declaration of the Rights of Man as incorporated into the French Constitution) (last visited December 19, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

3. *See id.* (noting the specificities of the French law).

4. *See* discussion *infra* Part IV.A (discussing the mechanics of the French ban).

government that veils are insulting to the dignity of women, many Muslim women, as well as many Americans, argue that the law goes too far and violates the freedom to exercise one's religion.[5] Opponents of the ban argue that the ban forces Muslim women to choose between obeying their faith, thereby exposing themselves to fines and public embarrassment, and abandoning a practice that is central to many women's connection to and identification with Islam.[6] France, as one of the few true secular republics in the world, is regarded as having the utmost respect for the dignity and liberty of the individual.[7] However, with growing unrest in the French Muslim community and the resulting radicalization of Islam, France has turned to this drastic measure, which, to many Americans, appears impermissible. As Islam continues to be a main feature of the challenges facing the Western world today, this recent development in France begs the question: could this happen here?

This Note will address the constitutionality of a similar hypothetical ban in the United States, focusing on the different analytical approaches used in arriving at the French ban and in striking down a similar ban in the United States. Part I will discuss the cultural and political significance of the veil, as well as its reception in France and in the United States. Part II will point out the similarities between the French and United States constitutional provisions implicating the freedom of religion and will contrast their application in light of differing views of secularism and social norms in the two nations. Part III will explore the development of Free Exercise jurisprudence in the United States and introduce the U.S. Supreme Court case law on the Free Exercise Clause as well as the relevant Federal

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5. *See* CNN Wire Staff, *supra* note 2 ("Some eighty-two percent of people polled approved of a ban, while 17 percent disapproved."). The article continued:

> That was the widest support the Washington-based think tank found in any of the five countries it surveyed. Clear majorities also backed *burqa* bans in Germany, Britain and Spain, while two out of three Americans opposed it . . . .

Id.

6. *See e.g. France's Burqa Ban: Two Women Fined for Covering Faces*, ABC, Sept. 25, 2011, http://abcnews.go.com/International/frances-burqa-ban-women-fined-covering-faces/story?id=14591682 (noting that the *burqa* ban essentially places Muslim women who chose to wear a *burqa* under house arrest because they will be fined if they go out in public wearing a *burqa*) (last visited December 19, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

7. *See* Saskya Vandoorne, *Burqa Ban Opponent Fined by French Court*, CNN, Sept. 22, 2011, http://religion.blogs.cnn.com/2011/09/22/france-hands-down-first-burqa-ban-sentences/ (stating that French authorities argue that the *burqa* ban upholds French values of equality and dignity) (last visited December 19, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

statutes. Part IV will apply U.S. case law and follow the analysis most likely to be employed in deciding a challenge to the hypothetical legislation. Part V will discuss the likely outcomes of challenges over the French ban to the European Court of Justice and to the European Court of Human Rights.

I. Cultural Perceptions of the Islamic Veil

A. The Veil as a Religious and Cultural Symbol

The belief that Muslim women should cover themselves comes primarily from the Hadith, a collection of the Prophet Mohammed's teachings.[8] The Hadith and the Koran both contain passages that have been interpreted to require that a woman should cover herself to prevent men from disrespecting her by leering at her bare face and hair; this guards her modesty and virtue.[9] Different permutations of *hijab* have evolved to include the *chador*—covering only the head and hair—and the completely enveloping *burqa*.

Today, the veil continues to be an important symbol among many Muslims as "the single most obvious marker of faith—even more unambiguous than a beard or a turban—thus a woman who wears *hijab* is often the first choice spokesperson when a community wants to say 'We are serious Muslims.'"[10] Although donning the *hijab* is discussed in the Koran, and is therefore a theological element, the seldom recognized, modern reality is that religion in a broad sense is no longer at the heart of one's

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8. *See* L. Clarke, *Hijab According to the Hadith: Text and Interpretation*, *in* THE MUSLIM VEIL IN NORTH AMERICA: ISSUES AND DEBATES 214, 232 (Sajida Sultana Alvi, Homa Hoodfar & Sheila McDonough eds., 2003) (discussing the purpose of the *hijab* as laid out in the Hadith).

9. *See* THE HOLY QUR'AN 24:31 (Yusuf Ali, trans., 1934) *available at* http://www.sacred-texts.com/isl/quran/index.htm [hereinafter QUR'AN] ("And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their khimar over their bosoms and not display their beauty . . . ."); *see also* QUR'AN 33:59 ("Those who harass believing men and believing women undeservedly, bear a calumny and a grievous sin . . . . "). "Enjoin your wives, your daughters, and the wives of true believers that they should cast their outer garments over their persons: That is most convenient, that they may be distinguished and not be harassed . . . ." *Id.*

10. Pamela K. Taylor, *I Just Want to Be Me*, *in* THE VEIL: WOMEN WRITERS ON ITS HISTORY, LORE, AND POLITICS 119, 123 (Jennifer Heath ed., The University of California Press 2008).

decision to wear or not to wear the veil.[11] As Islam is increasingly politicized worldwide, the veil has taken on new meanings to Muslims and non-Muslims alike.[12] In addition to identifying the faith or culture of the wearer, the veil carries a political message in many Western countries.[13]

Even though Muslims and non-Muslims alike have preconceived notions about women who choose to wear the veil, the *hijab* and similar face coverings can hold different meanings for different women depending on their country of origin, their relationship with Islam, and their desire to be affiliated with or not affiliated with a particular political movement.[14] Due to differing views on womanhood and women's rights, a veiled woman could be perceived in the West as oppressed and dominated by men, while the woman could be choosing to wear the veil to remind herself that she demands respect and behaves in a confident manner.[15]

B. Perceptions of the Veil in France

High numbers of Muslims in France have led to an ideological gap between France and its fellow European states when it comes to acceptance and tolerance of Muslims.[16] Outward signs of Islam—especially the veil—have been blamed for France's modern social problems, including

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11. *See* Aisha Lee Fox Shaheed, *Dress Codes and Modes: How Islamic is the Veil?*, *in* THE VEIL: WOMEN WRITERS ON ITS HISTORY, LORE, AND POLITICS 290, 293 (Jennifer Heath, ed. The University of California Press, 2008) ("Whether Islam requires women to cover their heads and/or faces is perhaps less pertinent to women's lived experiences than whether their families, local religious authorities, and governments require them to cover themselves."). "For this reason, contemporary debates around the veil should begin with politics rather than theology. . . ." *Id.*

12. *See* Taylor, *supra* note 10, at 121 (suggesting that September 11, 2001 was a turning point for Western perceptions of the veil).

13. *See id.* at 125 (discussing the relationship between the Islamist movement, political Islam, and the *hijab*).

14. *See id.* ("I believe that hijab should mean only what it means to the individual wearing it. . . ."); *see also* Shaheed, *supra* note 11, at 293 (referring to women in Central Asia who chose to veil purely to identify with Middle Eastern communities following the collapse of the Soviet Union).

15. *See* Sigrid Nokel, *Islam, Gender and Dialogue: On Body Politics and Bio-Politics*, *in* ISLAM AND THE NEW EUROPE: CONTINUITIES, CHANGES, CONFRONTATIONS 178, 183 (Sigrid Nokel & Levent Tezcan eds., 2006) (pointing out that, for many Muslim women, the veil is not a sign of oppression but a sign of dignity and respect for the wearer).

16. *See Muslims in Europe: Country Guide*, BBC, Dec. 23, 2005, http://news.bbc.co.uk/2/hi/europe/4385768.stm (demonstrating France's higher Muslim population compared to other European countries) (last visited December 19, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

communalism, sexism, and Islamism.[17] Islamism in particular is thought to pose a threat to the French way of life and the foundational concept of secularism.[18] Islamism is seen as a danger to French society because it is not viewed as a religion but as "a political project to reshape public life around Islamic norms. Because it takes religion out of its proper, private domain, Islamism violates French political ideals and social norms."[19] In the French view, the preservation of French ideals requires that public displays of religion appearing to support Islamism be removed from the public sphere.[20] Contrary to the true reasons that many Muslim women wear veils, it is a commonly held belief in French society that women wear veils to publicly identify themselves as Muslim, and to send a religious message amounting to proselytism.[21] Under the French interpretation of secularism known as *laicite*, an aspect of French culture that will later be discussed in detail, this type of public message is not permitted.[22] Furthermore, many French citizens are simply put off by what they see as a public and ostentatious display of difference that many types of *hijab* often inflict.[23]

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17. *See* JOHN R. BOWEN, WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE 155 (2007) ("By early 2002, many French journalists, intellectuals, and officials increasingly linked the problem of scarves in schools with three other problems in society: communalism, Islamism and sexism."). "Many in France became deeply worried and frightened about these problems, and therefore about the social effects of the voile." *Id.*

18. *See* Eleanor Beardsley, *France's Burqa Ban Adds to Anti-Muslim Climate,* NPR, Apr. 11, 2011, http://www.npr.org/2011/04/11/135305409/frances-burqa-ban-adds-to-anti-muslim-climate (discussing the French sentiment that the *burqa* isolates and separates Muslim women from society) (last visited December 19, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

19. BOWEN, *supra* note 17, at 182.

20. *See id.* at 182 ("Public signs of Islam must be pushed back into the private sphere, in order to 'send a message,' as legislators often said in the February 2004 debates, that the Republic values its *laicite*.").

21. *See id.* at 193 (noting that those in opposition to the banning of veils in public schools disapproved of the government's assumption that women veil themselves to send a message to others, rather than as part of their faithful observance of their religion).

22. 1958 CONST. art. 1 (Fr.) ("France shall be an indivisible, secular, democratic and social Republic."). The Constitution continues:

> 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.

Id.

23. *See* BOWEN, *supra* note 17, at 211–12 (quoting an excerpt from a conversation with a French woman who feels that women wearing the *hijab* in public are aggressors: "It was that they were throwing their difference right at me, that they had these principles, and

The French perception of the veil goes beyond the concern with public religious affiliation and political movements. Much of the animosity against the *hijab* in France stems from the French interest in upholding the dignity and equality of all citizens, including women.[24] Those supporting the 2004 ban on headscarves in state schools identified three gender related problems the veil caused: "school girls were pressured by men and boys to wear the voile; the voile intrinsically attacked the dignity and the equal status of women; and, because it did so, it encouraged violence against women living in the poor suburbs."[25] In a society in which the high population of poor, frustrated young Muslims is seen to result in the radicalization of Islam,[26] the veil is perceived as the most public and tangible symbol of a dangerous movement threatening republicanism.[27]

C. Perceptions of the Veil in the United States

Although American society does not ail from the same widespread and often systemic conflict between the Muslim community and the general population that marks France, prejudice and animosity towards Muslims still exists, especially towards those who publicly display their faith by donning religious garments such as the *hijab*.[28] Like in many other countries with a sizeable Muslim community, "many Diaspora Muslims have difficulty harmonizing their belonging to a religious (and often visible) minority with their citizenship in countries that harbor residual colonial ideas even while they try to make sense of the rise of political Islam in the Muslim world."[29] After the September 11th attacks, tension surrounding Islamic veils has increased in America because they are often seen as symbols of violence against the West and of discrimination against

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were making me notice them").

24. *See id.* at 208 ("The sexism argument strongly appealed to French principles and emotions concerning the equality and dignity of women.").

25. *Id.*

26. *See* Custos, *supra* note 1, at 398 ("The working-class extraction or unemployed status coupled with the socio-cultural ghettoization and the experience of racism by many Muslims in France offers an ideal breeding ground for [destabilization of secularism] . . . .").

27. *See id.* ("In such a context, the wearing of the Islamic veil . . . [is] interpreted not so much in light of its religious dimension as in light of its political significance.").

28. *See id.* at 121 (discussing prejudices in American society against women who wear veils).

29. THE MUSLIM VEIL IN NORTH AMERICA xv (Sajida Sultana Alvi, Homa Hoodfar & Sheila McDonough eds., Women's Press 2003).

women.[30] As the United States does not adhere to France's strict interpretation of secularism, it is not considered offensive to wear symbols of one's religion in public.[31]

II. Relevant Constitutional Provisions

A. The Constitutions of the United States and France

Both the United States and the French constitutions contain provisions protecting the freedom of religion and upholding the secular nature of the state: Article VI of the U.S. Constitution guarantees the freedom to hold public office without regard to religious affiliation;[32] Article 6 of the French Declaration of the Rights of Man proclaims that all citizens are eligible to participate in the representative government.[33] Both U.S. and French legal traditions also emphasize the absence of a state religion.[34] The Free Exercise clause of the U.S. Constitution mirrors the First Article of the French Constitution, which requires the state to respect all religious beliefs.[35] Applying the texts of the constitutions of France and of the

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30. *See id.* ("Non-Muslim Americans in general . . . are often quick to judge Muslim women who wear the head scarf . . . as oppressed, in need of liberation and empowerment . . . . "). "Thus, the hijab is, more and more, being associated with violence and intolerance." *Id.*

31. *See* Thomas S. Kidd, *Religious Freedom Under Assault,* USA TODAY, Aug. 21, 2011, http://www.usatoday.com/news/opinion/forum/2011-08-21-religion-freedom-persecution_n.htm (discussing the value of America's various religious freedoms and alleged threats to those freedoms) (last visited December 19, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

32. *See* U.S. CONST. art. VI ("[N]o religious Test shall ever be required as a Qualification to any office or public Trust under the United States.").

33. *See* THE DECLARATION OF THE RIGHTS OF MAN § 6 (Fr. 1789) ("All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.").

34. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."); *see also* Law of Dec. 9, 1905, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 11, 1905, p. 7205 (declaring the absence of an official state religion in France and the separation of Church and State).

35. *See* U.S. CONST amend. I (establishing that Congress may not prohibit the free exercise of religion); *see also* 1958 CONST. art. I (Fr.) ("France shall be an indivisible, secular, democratic and social Republic."). The French Constitution continues:

> It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.

Id.

United States to the French ban, it appears that neither document, on its face, would permit the state to ban a practice so closely connected to the faithful exercise of certain religions.

B. Laicite *and the French Constitution*

Although, among Western nations, the United States and France are the only secular republics, the French interpretation of secularism differs greatly from the American interpretation due to the principle of *laicite*.[36] This principle renders otherwise comparable provisions of the United States and French constitutions divergent.[37] *Laicite* is embedded in Article I of the French Constitution; the concept emphasizes that religion is a strictly private matter not to enter the public or political sphere.[38] While, in the American view, adherence to *laicite* may seem to counter the free exercise of religion, France believes that it actually protects freedom of religion.[39] When religion does enter the public realm, it is secondary to legal, secular norms, and the State may restrict the public exercise of religion if the action contradicts State law.[40] Due to this hierarchy, the French government may legally prevent public employees, such as teachers in State schools, from wearing religious garb to work or from praying conspicuously during the

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36. *See* Custos, *supra* note 1, at 339 ("[T]he United States and France are said to be the only true secular republics.").

37. *See id.* at 340 (stating that, although the French and U.S. constitutions appear to provide the same protections for religious freedom, the French concept of *laicite* causes the French provisions to be interpreted differently).

38. 1958 CONST art. 1 (Fr.) ("France shall be an indivisible, secular, democratic and social Republic."). The Constitution continues:

> 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.

Id.

39. *See* John L. Allen, Benedict Makes a Case for 'Healthy Secularism', Nat'l Cath. Rep., Sept. 12, 2008, http://ncronline.org/node/1798 ("[I]t is fundamental . . . to insist upon the distinction between the political realm and that of religion in order to preserve both the religious freedom of citizens and the responsibility of the state toward them. . . .") (quoting Pope Benedict XVI) (last visited December 19, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

40. *See* Custos, *supra* note 1, at 341 ("[T]he protection of religious norms must yield to the legal norms because of the hierarchy between the State and religions' respective normative orders . . . ."). "Because State order supersedes religious order, the State may restrict the expression of the religious order whenever it runs counter to State rules." *Id.*

workday.[41] Prior to the ban on head coverings, the French government banned the conspicuous display of religious signs in public schools.[42] Like the statute in question, the 2004 ban was enacted in defense of *laicite*.[43] The State emphasized that the ban, like the concept of *laicite*, was not meant to trample on religious freedom, but to uphold it.[44] Unlike under U.S. law and jurisprudence, any form of religious expression that threatens *laicite* may be regulated or banned by the State under French law.[45]

III. Applicable United States Case Law and Statutes

A. Early Free Exercise Decisions

United States case law in the area of religious freedom in the public sphere is both extensive and evolving. The Supreme Court considered this issue in 1961 with *Braunfeld v. Brown*,[46] a case involving a Pennsylvania law requiring that all businesses close on Sundays.[47] Petitioners were Orthodox Jewish merchants alleging that the Sunday closing requirement impaired the group's ability to earn a livelihood because they observed the Friday Sabbath.[48] Whereas non-Orthodox Jews were able to work six days a week, while observing the Sabbath on Sunday, Orthodox Jews could only work five days a week in order to keep the Sabbath and obey the state

41. *See id.* at 342 (discussing religious restrictions placed on State employees and on students in State schools).

42. *See* Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5109 (prohibiting the wearing of conspicuous religious symbols in public schools, including overly large crosses and veils).

43. *See* Custos, *supra* note 1, at 343 ("[T]he new law is meant to be an act of defense of French secularism, or *laicite*, for this fundamental principle was deemed to be under attack."). "It was argued that, given the central place of *laicite* in the French politico-legal system, the protean contest which had developed, threatened one of the bases of the social fabric and had to be neutralized." *Id.*

44. *See id.* at 360 (linking the prohibition of wearing conspicuous religious symbols in public schools with ensuring equal opportunity and ending societal discrimination).

45. *See id.* at 363 ("[A] hierarchy was established that ranked laicite as supreme whenever it was threatened by certain forms of religious expression.").

46. Braunfeld v. Brown, 366 U.S. 599, 609 (1961) (finding that Pennsylvania's Sunday closing law did not violate the Free Exercise rights of members of the Orthodox Jewish faith).

47. *See id.* at 601 (describing the statute at issue in the case).

48. *See id.* (introducing appellants as Orthodox Jews who were unable to work on Sundays).

statute.[49] The statute, in effect, forced petitioners to give up a "basic tenet of the Orthodox Jewish faith" or be rendered unable to continue in their trade.[50] The Court acknowledged that the government could not restrict religious exercise in any way, but that the freedom *to act,* "even when the action is in *accord* with one's religious convictions, is not totally free from legislative restrictions."[51] The Court relied on an earlier case, *Reynolds v. United States,*[52] in which the Court upheld the polygamy conviction of a member of the Mormon Church, even though the man's religion commanded him to engage in polygamy.[53] This case is distinguished from the veil ban because polygamy had a longstanding status as a criminal offense in the United States before the accused challenged the law.[54] The Court determined that allowing citizens to avoid criminal liability due to religious belief would "make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[55] *Reynolds* also made no distinction between religious beliefs and personal beliefs based on non-religious motivations.[56] This case established the rule that, if a religious practice conflicts with the public interest, the government may constitutionally proscribe the activity.[57] The Court construed the public interest fairly broadly, determining that because marriage is a cornerstone of Western civilization, the government may "determine whether polygamy or monogamy shall be the law of social life under its dominion."[58] This interpretation of public interest leaves open to government regulation any religious practice that conflicts with a value

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49. *See id.* (". . . Sunday closing will result in impairing the ability of all appellants to earn a livelihood . . . .").

50. *Id.* at 601–02.

51. *Id*. at 603 (emphasis added).

52. Reynolds v. United States*,* 98 U.S. 145, 168 (1878) (finding that religious duty is not a defense to a criminal indictment).

53. *See id.* at 168 (finding that religious duty is not a defense to a criminal indictment).

54. *See id.* at 161–65 (discussing the history of polygamy in the United States and in other nations).

55. *Id.* at 167.

56. *See id.* ("It matters not that his belief was a part of his professed religion: it was still belief, and belief only.").

57. *Id*. at 165–66 (finding that marriage is a cornerstone of society that deeply affects the public interest).

58. *Id.* at 166.

that goes to the foundation of American society. This rule would be refined and narrowed in subsequent free exercise cases.[59]

In holding that Pennsylvania's Sunday closing law did not violate the free exercise of the Orthodox Jewish faith, the *Braunfeld* Court generated the principle that a generally applicable rule aimed at restricting a secular activity is not per se unconstitutional simply because it produces an incidental effect on certain religious groups. Due to the immense religious diversity of the United States, to hold such legislation as per se unconstitutional due to the incidental adverse effect on a certain group would unreasonably restrict the legislature.[60] Justice Brennan's reasoning in his concurring and dissenting opinion is especially applicable to the French ban on head coverings. Brennan's analysis focused on the protection of individual liberty, as opposed to the collective goals and public interest of the community at large.[61] Brennan also focused on the fact that the effect of the law was that no one could be an Orthodox Jew *and* be competitive in a market that included those who observed the Sunday Sabbath.[62] Perhaps most importantly, Brennan pointed out that the Court failed to evaluate the level of the state's interest.[63] While having the entire community rest on the same day is convenient, it does not reach the level of a compelling state interest.[64]

Following *Braunfeld* in Free Exercise jurisprudence is *Sherbet v. Verner*,[65] a case involving a similar set of facts as *Braunfeld*. A South Carolina statute denied appellant, a Seventh-Day Adventist, unemployment benefits due to her inability to work on Saturday, the Sabbath Day of her faith.[66] The Court reiterated the *Braunfeld* dicta that the Free Exercise

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59. *See* discussion *infra* Part III.B (discussing modern case law on point).

60. *See Braunfeld*, 366 U.S. at 605–07 (stating that the legislature cannot be expected to refrain from enacting laws that have incidental effects on the unique practices of certain religious groups).

61. *See id.* at 610 (Brennan, J., concurring and dissenting) ("I would approach this case differently . . . [and] look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals.").

62. *See id.* at 613 ("Their effect is that no one may at one and the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen.").

63. *See id.* at 614 (arguing that the state interest is "the mere convenience of having everyone rest on the same day").

64. *See id.* (comparing the asserted state interest in having all citizens rest simultaneously to the genuine interest in protecting marriage or protecting children).

65. Sherbet v. Verner, 374 U.S. 398, 410 (1963) (holding that South Carolina's denial of unemployment benefits to a Seventh-Day Adventist violated the Free Exercise Clause of the First Amendment).

66. *See id.* at 399–400 (describing the appellant and the issue before the Court).

Clause prohibits the government from regulating religious beliefs, but again acknowledged that in instances in which such regulations are upheld, "the conduct or actions so regulated have invariably posed some substantial threat to public safety, peace, or order."[67] The Court laid out the test, followed in subsequent cases, that in order for a regulation to pass muster, it must either impose no unconstitutional burden on the freedom of religion, or there must be a compelling state interest in regulating the area that overrides any affect on Free Exercise.[68] The Court went on to apply *Braunfeld*'s test of general applicability, determining that, although the statute was generally applicable, the appellant's ineligibility derived solely from her religious beliefs.[69] This is a test that would be clarified in subsequent Supreme Court cases.[70] In effect, the statute forced the appellant to either follow her religion and not receive vital unemployment benefits, or abandon a central tenet of her faith and accept work.[71] This was a choice that the Court believed to be fundamentally unacceptable in light of the Constitution. Conditioning the availability of benefits on one's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties and can only be justified by a compelling state interest.[72] It is important to note that the *Sherbet* Court clarified Justice Brennan's emphasis on evaluating the compelling state interest in his concurring and dissenting opinion in *Braunfeld*.[73] Taking into consideration the State's asserted interest in preventing fraudulent claims for unemployment benefits, the Court determined that mere convenience does not rise to the level of a compelling state interest, and South Carolina's interest therefore did not override the

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67. *See id.* at 403 (pointing out the actions evaluated under *Braunfeld* have posed a threat to public order).

68. *See id.* (discussing the requirements that South Carolina's statute must meet in order to withstand a constitutional challenge).

69. *See id.* at 404 ("[A]ppellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable.").

70. *See* discussion *infra* Part III.B (discussing *City of Boerne v. Flores* and *Employment Division v. Smith*).

71. *See Sherbet*, 374 U.S. at 404 (1963) ("The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.").

72. *See id.* at 406 ("Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.").

73. *See id.* at 407 (assessing the legitimacy of the asserted state interest).

appellant's right to free exercise of religion.[74] From this decision emerged what would come to be known as the *Sherbet* test: the first prong asks whether the state's actions substantially burden a religious practice; if it does, the second prong asks whether the burden is justified by a compelling government interest.[75] Justice Douglas's concurring opinion is especially relevant to the regulation at issue in this Note. Justice Douglas points out that the United States is a religiously diverse nation, and that many of these religions, such as Islam, require followers to adhere to practices that differ from those of the majority of society; these practices are "protected by the *First Amendment* but could easily be trod upon under the guise of 'police' or 'health' regulations reflecting the majority's views."[76]

B. Modern Applications of Free Exercise Jurisprudence

Following *Braunfeld* and *Sherbet*, the Court was confronted with several cases that challenged the applicability of the *Sherbet* test. *Employment Division v. Smith*[77] involved a state statute that imposed criminal sanctions for the ceremonial use of peyote.[78] Respondents were members of the Native American Church who were fired from their jobs for the religious use of peyote and, as a consequence, denied unemployment benefits because the state criminalized peyote use.[79] Respondents urged that the proper standard of review was the *Sherbet* test, asking whether there was a substantial burden on the practice of religion, and if so, whether there was a compelling government interest justifying that burden.[80] As a threshold matter, the Court declined to apply the *Sherbet* standard of review, determining that *Sherbet* is limited to unemployment cases.[81]

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74. *See id.* (finding that the asserted state interest does not reach a compelling level).

75. *See id*. at 403–06 (outlining and discussing the two prongs).

76. *Id*. at 411 (Douglas, J., concurring).

77. Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (deciding that the state may prohibit peyote use, and therefore may also deny unemployment benefits to those convicted of peyote use under the state statute).

78. *See id.* at 874–75 (summarizing the facts and posture of the case).

79. *See id.* (explaining the events that led to respondents being denied unemployment benefits).

80. *See id.* at 882–83 ("Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbet v. Verner* . . . .").

81. *See id.* at 883–84 (declining to apply the *Sherbet* balancing test outside the scope of unemployment compensation).

Although *Smith* does involve a claim for unemployment benefits, the issue before the Court was limited to whether the state could constitutionally prohibit the religious use of peyote, rendering the *Sherbet* test inapplicable.[82] This case is also distinguished from the *Sherbet* line of cases because the conduct at issue in the unemployment cases was not illegal, unlike the use of peyote.[83] The Court reasoned that application of the *Sherbet* test in this case would result in a constitutional anomaly: It would allow citizens to claim religious conviction to avoid following properly promulgated laws, making "'professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.'"[84] The Court also declined to require a compelling state interest, determining that that particular requirement should be limited to upholding equality of treatment (equal protection cases) and free speech, and it should not be used to create a private right to be immune from generally applicable laws.[85] The Court appeared to address Justice Douglas's concurring opinion from *Sherbet*, but comes to the opposite conclusion that religious scruples, such as the obligation to use peyote, do not relieve one of the duty to obey generally applicable laws.[86] Furthermore, because this case did not implicate other constitutional rights, such as the right to raise children according to one's own beliefs, the Court determined that it was not a hybrid case and should not receive strict scrutiny.[87] Instead, the Court subjected the statute to a far more lenient review, asking only whether the burden on exercise of religion was merely an incidental effect of a generally applicable and otherwise valid law. If so, the First Amendment would not be implicated.[88]

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82. *See id*. at 876 (limiting the Court's inquiry to whether Oregon may constitutionally prohibit the use of peyote).

83. *See id.* at 877–78 (emphasizing the significance of the legality of the conduct at issue in assessing the applicability of the *Sherbet* test).

84. *Id*. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)).

85. *See id.* at 885–86 (drawing a distinction between the types of situations requiring a compelling state interest and the situation in *Smith*).

86. *See id*. at 878–79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

87. *See id*. at 881–82 (listing precedent involving hybrid situations and indicating that *Smith* does not trigger other constitutional rights).

88. *See id*. at 878 ("[I]f prohibiting the exercise of religion is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.").

In direct response to the Court's holding in *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).[89] The RFRA restored the compelling interest test used in *Sherbet*, prohibited the government from interfering with the free exercise of religion, even if the government action is of general applicability, without demonstrating a compelling state interest, and made the legislation applicable to all federal and state laws.[90] This legislation restored the compelling interest test and required courts to analyze Free Exercise claims under strict scrutiny.

The Court's decision in *City of Boerne v. Flores*[91] reflected its reaction to the RFRA. *Flores* involved a challenge under the RFRA to a zoning ordinance as applied to a church.[92] To express dissatisfaction with RFRA, the Court did not consider the merits of the case, but determined that the threshold issue was the constitutionality of the RFRA itself.[93] In passing RFRA, Congress relied on § 5 of the Fourteenth Amendment, which allows Congress to enact appropriate legislation to enforce the substantive provisions of the Amendment.[94] While the government argued that Congress' power under § 5 is not limited to remedial or preventative legislation, the Court reasoned that the power is limited to enforcing the substantive measures of the amendment.[95] Allowing Congress to enact such legislation would upset the balance of the separation of powers, as "Congress does not enforce a constitutional right by changing what the right is"; it is the Court's duty to determine whether a constitutional violation has occurred.[96] The Court formulated a test for determining the validity of enforcement legislation: In order to pass muster, the legislation must be congruent and proportional to the injury to be prevented or

89. *See* Religious Freedom Restoration Act, 42 U.S.C § 2000bb (1993) (restoring the application of strict scrutiny to any action burdening the free exercise of religion).

90. *See id*. § 2000bb-1(b)(1) (requiring a compelling state interest to interfere in the free exercise of religion).

91. City of Boerne v. Flores, 521 U.S. 507, 512 (1997) (finding that RFRA was not appropriate enforcement action under § 5 of the Fourteenth Amendment because it contradicted the doctrine of separation of powers).

92. *See id.* at 511–12 (introducing the facts and posture of the case).

93. *See id.* at 511 (limiting the Court's inquiry to the constitutionality of the RFRA).

94. *See* U.S. CONST. amend. XIV, § 5 (giving Congress the power to enact proper legislation to enforce the substantive provisions of the amendment).

95. *See Flores,* 521 U.S. at 518–19 (finding that Congress' power under the enforcement clause is limited to enforcing the substantive provisions of the amendment).

96. *See id.* at 519 (stating that Congress may not enact enforcement legislation that changes the substance of the right itself).

remedied.[97] Applying this rule to the facts in *Flores*, the Court considered the legislative history behind the rule and whether there had been a history of unconstitutional religious discrimination.[98] In deciding whether the statute was proportionate to a legitimate end, the Court looked for a termination date and mechanism, and limitations on the statute's implementation.[99] After making these inquiries, the Court determined that because RFRA was not proportional or responsive to an unconstitutional behavior, it was not appropriate legislation under § 5.[100]

The Church of Lukumi Babalu Aye, Inc. v. City of Hialeah[101] is particularly applicable in this case because the Court dealt with an ordinance that seemed to target a specific religious group, just as the headscarf ban targets Muslims.[102] This case also relied and expanded upon the *Smith* line of analysis.[103] *The Church of Lukumi Babalu Aye* involved the Santeria religion and an ordinance prohibiting animal sacrifice under certain circumstances.[104] A vital part of Santeria is the practice of animal sacrifice.[105] When a Santeria Church leased land in the city of Hialeah with the intention of building a museum and a cultural center, the community became alarmed and held an emergency council meeting.[106] This meeting resulted in several ordinances prohibiting religious practices adverse to the public morality, peace, and safety, including the unnecessary slaughter of animals.[107] The ordinances were drafted such that few sacrifices and

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97. *See id.* at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

98. *See id*. at 530 (determining that the legislative history lacked any evidence of generally applicable laws being passed to prevent unconstitutional religious discrimination).

99. *See id*. at 532–33 (finding that the RFRA lacked proportionality).

100. *See id.* at 536 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

101. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (determining that the city's ordinance was unconstitutional because it was discriminatory and the city lacked a compelling interest to justify the burden on the Santeria religion).

102. *See id.* at 538 (finding that the ordinance inappropriately targeted the Santeria religion).

103. *See id.* at 531–32 (applying the *Smith* requirements).

104. *See id.* at 524–30 (summarizing the facts and posture of the case).

105. *See id.* at 524–25 (explaining the role of animal sacrifice in the Santeria religion).

106. *See id*. at 526 (describing the events leading up to the creation of the ordinance).

107. *See id.* (indicating that the ordinance addressed practices believed to be adverse to public welfare, including the unnecessary slaughter of animals).

killings were prohibited except for those by the Santeria church.[108] Following the *Smith* framework, the Court first determined whether the series of ordinances were facially neutral by first looking at the text; a rule lacks facial neutrality "if it refers to a religious practice without a secular meaning discernible from the language or context."[109] After determining that the ordinances were facially neutral, the Court noted that facial neutrality on its own is not conclusive, as the "Free Exercise Clause protects against governmental hostility which is masked, as well as overt."[110] The Court then looked at the object of the ordinance and its effect.[111] Because the operation of the ordinances exclusively burdened the Santeria religion, the ordinances were collectively discriminatory in application.[112] The Court then considered the ordinances' general applicability, noting that neutrality and general applicability were closely related; absence of one is strong evidence of the absence of the other.[113] Because the ordinances were broad, prohibiting animal sacrifice even when it does not affect public health and safety, and because nondiscriminatory alternatives would have achieved the alleged government interest, the Court determined that the ordinances were clearly not generally applicable.[114] The Court also noted that an Equal Protection type of analysis would be useful in determining the neutrality of the ordinances.[115] Although the failure of the ordinances to meet neutrality and general applicability ends the analysis, the Court did mention that, had that not been the case, the alleged government interest would not have justified the burden on Santeria.[116] The ends were under-inclusive and clearly not narrowly

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108. *See id.* at 535–36 (allowing an exception for numerous types of slaughter, including kosher slaughter under the Jewish faith).

109. *Id.* at 533.

110. *Id.* at 534.

111. *See id*. at 535 ("Apart from the text, the effect of a law in its real operation is strong evidence of its object.").

112. *See id.* at 535–38 (finding that the ordinances exclusively burden the Santeria religion, negating any genuine government interest in preventing the slaughter of animals).

113. *See id.* at 542–43 (analyzing whether the ordinances are generally applicable as required by *Smith*)

114. *See id.* at 543 ("Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice."). "Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision." *Id.*

115. *See id.* at 540 (suggesting that the Court may look at legislative history, as in an equal protection analysis, to determine the neutrality of the ordinances).

116. *See id*. at 546 ("[E]ven were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests.").

tailored; "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."[117]

IV. Application of United States Law to a Potential Ban on Head Coverings

A. Application of Case Law

It is unlikely that a ban similar to the French veil ban would survive a challenge under the First Amendment of the United States Constitution. The compelling state interests of ensuring public safety and upholding secularism asserted in the French case would not outweigh the burden imposed on the free exercise of religion under any modern American jurisprudence.[118] Case law in the area of the free exercise of religion has established that:

> [T]he general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice . . . . A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.[119]

Part III of this Note introduced *Church of the Lukumi Babalu Aye* as a landmark case in freedom of religion jurisprudence.[120] Because the ordinances were found to clearly target a specific religious group, *Church of the Lukumi Babalu Aye* is an apt case to apply to a potential ban of head coverings.[121] Application of the *Church of the Lukumi Babalu Aye* analysis begins with an examination of the legislation's neutrality.[122] Facial neutrality can be ascertained by simply looking to the legislation's text; "[a] law lacks facial neutrality if it refers to a religious practice without a secular

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117. *Id.* at 547 (citations omitted).

118. *See* discussion *infra* Part IV.A (weighing the French government's asserted interest in enacting the statute against the burden imposed on the free exercise of religion).

119. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531–32 (1993) (citing Employment Div. v. Smith, 494 U.S. 872 (1990)).

120. *See* discussion *supra* Part III.B (summarizing *Church of the Lukumi Babalu Aye* in relation to the French statute at issue).

121. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 535 (showing that the ordinance specifically targeted Santeria sacrifice).

122. *See* discussion *supra* Part III.B (discussing the first step in the Court's analysis).

meaning discernible from the language or context."[123] Article 1 of the Law Prohibiting the Concealment of the Face in Public Spaces forbids all citizens from wearing clothing in public spaces that conceals the face.[124] Article 2 states that the ban does not apply to veils otherwise permitted by law or to veils worn for health or professional reasons, or to veils worn as part of a sporting event or an artistic or traditional festival.[125] The remaining substantive portions of the regulation, Articles 3 and 4, impose a fine of over $40,000 on those who, through violence or abuse of power, force a woman to wear a face-covering veil.[126] Following *Church of the Lukumi Babalu Aye*'s analysis, it must be concluded that the French ban is facially neutral under U.S. jurisprudence. There is no reference to Islam, the *hijab* or any other type of Islamic head covering.[127] While Article 4 could be interpreted to target Muslim families that require female members to veil themselves, the law takes a secular approach to this circumstance.[128] Therefore, while the text of the law is "consistent with the claim of facial discrimination . . . the argument is not conclusive."[129] It should be noted that, although the majority in *Church of the Lukumi Babalu Aye* was focused mainly on the facial neutrality of the legislation, Justice Souter's concurring opinion discusses the possibility of examining substantive neutrality as well.[130] Souter concedes that substantive neutrality was not at issue in *Church of the Lukumi Babalu Aye*, as the ordinance clearly lacked facial neutrality.[131] The majority also acknowledges that legislation targeting "religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."[132] This is an

123. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 533.

124. Law No. 2010-1192 of Oct. 11, 2010, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Oct. 12, 2010, p. 18344.

125. *See id.* (providing exceptions for face covering veils otherwise permitted by law, veils worn for health reasons, sporting events, and traditional festivals).

126. *See id.* (imposing different levels of sanctions for violating the ban).

127. *Id.*

128. *See id.* (applying Article 4 generally, with no reference to Muslims or Islam).

129. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534.

130. *See id.* at 561–62 (Souter, J., concurring) ("[O]ur common notion of neutrality is broad enough to cover not merely what might be called formal neutrality . . . but also what might be called substantive neutrality, which . . . would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws.").

131. *See id.* at 563 ("That proposition is not at issue in this case, however, for Hialeah's animal-sacrifice ordinances are not neutral under any definition, any more than they are generally applicable.").

132. *Id.* at 534.

important distinction in the headscarf case, as the legislation appears neutral on its face.[133] However, an examination of the legislation's effect indicates that it is not substantively neutral. While the text bans clothing disguising the face in public spaces in general, it effectively curtails the rights of Muslims.[134] This is because neither Christianity nor Judaism requires followers to cover their faces.[135] Therefore, the law would produce a disparate impact by constricting the ability of Muslims to practice their religion, while having little or no effect on followers of other widely practiced religions.

The *Church of the Lukumi Babalu Aye* Court then examined the general applicability of the ordinance.[136] Assuming that the government interest in the hypothetical American legislation mirrors that of the French government, national security and the protection of secularism, the headscarf ban is under-inclusive and therefore lacks general applicability. As to national security, the ban is under-inclusive because it provides exceptions to almost all circumstances in which a veil would be worn, excluding a veil worn for religious purposes.[137] If the government truly wanted to further the interest of national security through this legislation, it would not have provided exceptions for sporting events and festivals. The legislation is also under-inclusive with regard to the government's interest in promoting secularism. The legislation does not apply to garments worn by nuns, priests, or other religious figures in public places, but only to those garments that would cover the face.[138] Secularism is no more threatened by the donning of headscarves in public places than it is by religious figures

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133. *See* discussion *supra* Part IV.A (discussing the neutrality of the French legislation).

134. *See* Law No. 2010-1192 of Oct. 11, 2010, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Oct. 12, 2010, p. 18344 (providing exceptions for most other types of face covering veils worn in modern French society).

135. *See* Custos, *supra* note 1, at 381 (distinguishing between contemporary Muslim interpretations that instruct female Muslims to cover their faces and contemporary Christianity's lack of such a requirement).

136. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 542 (1993) ("We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability." (citing Employment Div. v. Smith, 494 U.S. 872 (1990))).

137. *See* Law No. 2010-1192 of Oct. 11, 2010, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Oct. 12, 2010, p. 18344 (allowing veils to be worn for health reasons, sporting events, festivals, and all otherwise permissible purposes).

138. *See id.* (describing exceptions to the French law that prohibits face concealment in public).

wearing their official robes in public. Due to its under-inclusive nature, the legislation cannot be said to satisfy the general applicability requirement.[139]

Following Supreme Court jurisprudence, a law imposing a burden on the exercise of religion that is neither neutral nor of general applicability must undergo a strict scrutiny analysis.[140] This standard requires that such a law advance compelling state interests and "be narrowly tailored in pursuit of those interests."[141] To determine whether a compelling state interest exists, we must look to whether the state attempted to enact measures to regulate other types of conduct threatening that interest.[142] In this case, it has already been established that the government failed to regulate other types of religious conduct or non-religious conduct in furtherance of national security and the promotion of secular values.[143] Therefore, the government cannot claim that a headscarf ban would further these interests. Due to the under-inclusive nature of the legislation, it is unlikely that a U.S. court would find that it is narrowly tailored. There are other, more narrow, options to further the same interests without imposing such a burden on religion. The government could implement plans that target violent and radical groups regardless of ideology, or programs that assist women who suffer from gender-related oppression regardless of the source. As to the promotion of secularism, the government could require civics classes in schools that address the importance of the separation of Church and State. The veil ban is not narrowly tailored to further a compelling state interest, and would not survive a challenge under the Free Exercise Clause.

B. Application of the Religious Freedom and Restoration Act

Because the hypothetical headscarf case involves a federal regulation, it is also subject to the RFRA.[144] The RFRA restored the compelling

139. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 542 (concluding that under inclusion that is substantial does not advance a legitimate government interest and fails the test of general applicability).

140. *See id.* at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

141. *Id.*

142. *See id.* at 546–47 (stating the test for determining whether a compelling state interest exists).

143. *See* discussion *supra* Part IV.A (showing that the ban does not mention religious conduct other than covering one's face and does not seek to regulate non-religious conduct to promote national security or secularism).

144. *See* City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997) (holding that RFRA is invalid only as it applies to local and state regulation).

interest test set forth in *Sherbet* in all cases where the free exercise of religion is substantially burdened.[145] The key difference between application of the RFRA and application solely of *Church of the Lukumi Babalu Aye* is that neutral laws substantially affecting the free exercise of religion are subject to strict scrutiny under the RFRA.[146] Under this analysis, the fact finder must first ask whether the regulation "imposes any burden on the free exercise of appellant's religion."[147] In this case, the face-covering ban clearly places a substantial burden on the free exercise of Islam for those who believe they must cover their faces as part of their religion. The hypothetical appellant's penalty is derived solely from her choice to cover her face in the practice of her religion, and there is enormous pressure upon her to abandon this aspect of her faith.[148] She is forced to choose between faithfully practicing her religion and continuing to pay large punitive fines. Under the *Sherbet* analysis, we must then ask whether a compelling government interest justifies the burden on appellant's practice of her religion.[149] While national security and the separation of Church and State are compelling interests, the government must show that there are no alternatives that could further these interests without infringing on the appellant's First Amendment rights.[150] As discussed above, there are alternative possibilities that could further these interests without burdening the free exercise of religion. Applying the *Sherbet* test, the hypothetical headscarf ban would not survive a First Amendment challenge under the RFRA.

V. Possible Challenge to European Union Judicial Bodies

This Note will now return to the veil ban's operation in France and explore the potential outcomes to a suit challenging the ban's

145. *See* Religious Freedom and Restoration Act, 42 U.S.C. § 2000bb (2010) (restoring the *Sherbet* test for all cases in which the free exercise of religion is substantially burdened).

146. *See id.* (subjecting all laws to strict scrutiny, regardless of the neutrality of the legislation).

147. Sherbet v. Verner, 374 U.S. 398, 403 (1963).

148. *See id.* at 404 (pointing out that the regulation created an "unmistakable" pressure upon the appellant to give up an important religious practice).

149. *See id.* at 406 (turning to the question of whether a compelling state interest justified the substantial infringement of the appellant's right to the free exercise of religion).

150. *See id.* at 407 (noting that—to show a compelling interest—the state would be required to demonstrate that no alternative forms of regulation address the same issue without also infringing on the free exercise of religion).

constitutionality. Because the French Constitutional Council has determined that the veil ban is constitutional, it is unlikely that a French litigant would be able to obtain favorable verdict in response to a challenge to the ban's constitutionality. However, were French petitioners to exhaust all judicial challenges within France, they would have two causes of action available at the supra-national level: A challenge to the European Court of Justice in Luxembourg (ECJ) and a challenge to the European Court of Human Rights in Strasbourg, France (ECHR).[151]

A. Challenge to the European Court of Justice

A potential challenger to the French statute could bring her case to the ECJ on the grounds that the statute violates the principle of equality embedded in Article 10 of the European Union Charter of Fundamental Rights or in the Race Discrimination directive.[152] Article 10 provides for the freedom of thought, conscience, and religions; the language implies that the European Union (E.U.) recognizes the general principle of equality.[153] The ECJ handles discrimination cases based on the principles that "comparable situations are not to be treated differently" and "different situations are not to be treated alike unless such treatment is objectively justified."[154] The French statute falls within the second of these two principles because of the difference between religions that require followers to cover their heads and religions that do not.[155] Christianity does not require its adherents to cover their faces, so its practitioners are not forced to choose between following their religion and obeying the law. This application of the law is reminiscent of Justice Douglas's concurring

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151. *See* Custos, *supra* note 1, at 377 (naming the ECJ and the ECHR as two possible forums for causes of action against legislation enacted by E.U. member states).

152. *See id.* at 379 (identifying Article 10 of the European Union Charter of Fundamental Rights as the provision under which a claim could be brought before the ECJ).

153. *See* Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 10 ("Everyone has the right to freedom of thought, conscience and religion."). The Charter continues:

> This right includes freedom to change religion or belief and freedom, either alone or in community with others in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

Id.

154. Custos, *supra* note 1, at 380.

155. *See id.* at 381 ("To the extent that the new legislative provision applies the same rule, namely the ban on conspicuous signs to different categories of subjects, it constitutes a uniform treatment of differently situated persons.").

opinion in *Sherbet v. Verner*: those with religious scruples that differ from the majority should not have to choose between remaining faithful to an important tenet of their religion and being loyal to the laws of their state.[156] This juxtaposition creates a situation in which differently situated persons are treated the same. Based on the ECJ's previous decisions, this amounts to discrimination.[157]

Under the Treaty of Lisbon, ratified in 2009, a challenge under the E.U. Charter could be brought before the ECJ.[158] While the E.U. Charter of Fundamental Rights has been binding on E.U. member states since 2009, the E.U. Constitution also contains a broad adoption of the Aristotelian view of equality.[159] However, the ECJ is unlikely to find in favor of a potential challenge to the French statute due to the Court's interpretation of the E.U. Charter and the European Constitution in relation to the constitutions of member states.[160] Article II-112 of the European Constitution gives significant deference to the traditions of member states when they conflict with the fundamental rights laid out in the constitution or in the E.U. Charter.[161] Furthermore, Article II-112 also fully recognizes the legitimacy of national statutes and case law.[162] Because the French

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156. Sherbet v. Verner, 374 U.S. 398, 411 (1963) (Douglas, J., concurring) ("[M]any people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of 'police' or 'health' regulations reflecting the majority's views.") (emphasis added).

157. *See* Custos, *supra* note 1, at 381 ("To the extent the new legislative provision applies the same rule . . . to different categories of subjects, it constitutes a uniform treatment of differently situated persons.").

158. *See* Treaty of Lisbon: Amending the Treaty on European Union and the Treaty Establishing the European Community 2007 O.J. (C 306) 13 *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0010:0041:EN:PDF (recognizing the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union).

159. *See id.* (stating that the European Constitution's approach to equality could be applicable to the French statute); *see also* Treaty Establishing a Constitution for Europe, 2004 O.J. (C 310) 1 ("Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law . . . .").

160. *See* Custos, *supra* note 1, at 384 ("[T]he ECJ seems, in final analysis, unlikely to impose the Aristotelian conception of equality or to enforce equality rights of religious minorities in France.").

161. *See* Treaty Establishing a Constitution for Europe, art. II-112, 2004 O.J. (C 310) 53 ("Insofar as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.").

162. *See id.* at 54 ("Full account shall be taken of national laws and practices . . . .").

statute is based on the uniquely French cultural notion of *laicite*, the ECJ is likely to give deference to this important member state tradition and to uphold the statute.

While a challenge based on the E.U. Charter is unlikely to be successful, the Race Discrimination directive could provide adequate foundation upon which the ECJ could find in favor of the potential challenger.[163] The directive's purpose is to engrain the concept of equal treatment in all E.U. member states; equal treatment meaning that "there shall be no direct or indirect discrimination based on racial or ethnic origin."[164] The directive further imposes a standard of review more lenient than that used in U.S. courts, requiring that indirect discrimination through a facially neutral action be justified by a *legitimate* state interest and that the chosen means be appropriate.[165] Indirect discrimination is at play in the French statute. Though the statute is neutral on its face, in practice, it subjects those whose religion requires them to cover their head to unequal treatment by forcing them to choose between staying faithful to their beliefs or breaking the law. The statute does not subject those without this particular religious scruple to this choice, and—in a modern context—affects Muslims exclusively. The ECJ would be faced with three issues in determining whether the directive applies to this case. First, as a threshold matter, the court would have to determine whether Muslim face coverings implicate race or ethnicity as discussed in the directive.[166] If the answer is no, the court would need to determine whether a discrimination case alleging indirect discrimination based on religion could be assimilated to discrimination based on race or ethnicity.[167] This would not be an easy task. As previously discussed, the *hijab* can indicate religious affiliation, cultural and ethnic affiliation, or both depending on the individual.[168]

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163. *See* Custos, *supra* note 1, at 384 (indicating that the Race Discrimination Directive could aid a potential challenger).

164. Council Directive 2000/43, art. 2, 2000 O.J. (L 180) 22 (EC).

165. *See id.* at art. 2(2)(b) ("[I]ndirect discrimination shall . . . occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless . . . objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.").

166. *See* Custos, *supra* note 1, at 385 (presenting the threshold questions facing the ECJ.).

167. *See id*. (presenting the threshold questions facing the ECJ in order to determine that the statute is discriminatory in practice despite being facially neutral).

168. *See* discussion *supra* Part I.A (discussing the various meanings the *hijab* can have for individuals).

Second, the court would have to determine whether the preservation of *laicite* is a legitimate aim and whether the banning of all head coverings is an appropriate means of achieving that aim.[169] Because of the high level of deference afforded the traditional values of member states previously discussed, it is likely that this prong of the analysis would focus mostly on the suitability of the ban to preserving *laicite*.[170] Third, and most critically, the court would need to make a policy judgment on how to resolve the divergence between the concept of equality inherent in the E.U. Charter and the French principle of *laicite*.[171]

B. Challenge to the European Court of Human Rights

A potential challenger to the French headscarf ban could also bring a suit alleging that the statute violates freedom of religion or the principle of equality.[172] Such a challenge would be brought under Article 9 of the European Convention of Human Rights. This article guarantees the right to freedom of religion in public or in private, subjecting this freedom only to legal limitations necessary to protect democracy and public welfare.[173] The ECHR has upheld the freedom to follow a particular faith and the freedom to practice one's faith or absence of faith in the case law that has emerged

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169. *See id.* (presenting the second prong necessary for the ECJ to analyze).

170. *See id.* (identifying *laicite* as a likely focus for the ECJ in determining whether the government has demonstrated a legitimate aim for enacting the ban); *see also* discussion *supra* Part II.B (discussing the importance of *laicite* in French culture).

171. *See* Custos, *supra* note 1, at 385 ("The crucial question is whether the ECJ would choose to invoke its Aristotelian approach to equality and contradict a national universalist approach under the Race discrimination directive . . . .").

172. *See id.* at 386 (identifying freedom and religion and the principle of equality as two possible grounds for a challenge before the ECHR).

173. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 211 (outlining the article's clause on freedom on thought, conscience and religion).

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protections of the rights and freedoms of others.

Id.

in this area since the 1990s.[174] The court has gone so far as to conclude that Article 9's guarantee of "freedom of thought, conscience and religion is one of the foundations of a 'democratic society.'"[175] However, the ECHR has allowed freedom of religion to be restricted to protect the religious pluralism inherent in many European states.[176] The ECHR imposes a significantly lower burden of proof on the state than the modern Supreme Court imposes in Free Exercise cases in the United States.[177] Similar to the *Sherbet* balancing test, the ECHR requires that the statute in question satisfy a compelling government interest and that it be proportionally related to that interest.[178] Were the court to determine that the genuine purpose of the statute is to protect the principle of *laicite* and that the banning of head-scarves in public serves this purpose, it is likely that the ECHR will uphold the ban on the grounds that secularism is at the very foundation of democratic societies in European states.

A challenge to the ECHR on the grounds of the principle of equality would be very similar to such a challenge before the ECJ. The challenge would be brought under Articles 14 and 9 of the European Convention of Human Rights, which provide for the enjoyment of the freedoms of the convention without discrimination on numerous grounds, including religion.[179] Again, so long as the court finds that the true purpose of the ban is to protect *laicite*, it is unlikely that the ECHR will strike down the statute

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174. *See* Kokkinakis v. Greece, App. No. 14307/88, Eur. Ct. H.R. (ser. A) 18 (1993) (upholding religious freedom of faith or absence of faith).

175. *Id.*

176. *See* Custos, *supra* note 1, at 387 (explaining the considerations taken by the ECHR when evaluating religious equality and protection). Custos further stated:

> Due consideration (by the ECHR) for the indissociable pluralism component of . . . democracy makes it possible for states in which several religions coexist to place restrictions on the manifestation of faith in order to reconcile the respective interests of the different religious groups and ensure protection of all religious beliefs.

Id. *See also Kokkinakis*, App. No. 14307/88, Eur. Ct. H.R. (upholding religious freedom of faith or absence of faith).

177. *See* discussion *supra* Part III (discussing the evolution of the standard of proof used by the Supreme Court in Free Exercise Clause cases).

178. *See Kokkinakis*, App. No. 14307/88, Eur. Ct. H.R., §§ 36–50 (laying out the three-prong test the ECHR uses in assessing the legitimacy of statutes that allegedly infringe in the free exercise of religion).

179. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 211 ("The enjoyment of the rights and freedoms set forth in this 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.").

because of the deference given to the traditions of member states in determining whether the state's objective is a reasonable justification for the discrimination.

The ECHR recently confronted this issue in *Sahin v. Turkey*.[180] Ms. Sahin challenged a Turkish university policy banning Islamic scarves on the grounds that it violated her rights under several Convention articles, including her freedom to manifest her religion under Article 9.[181] The court undertook a two-step analysis, first asking whether the State interfered in Ms. Sahin's right to practice her religion, and second asking whether the interference was prescribed by law.[182] After deciding that the prohibition amounted to interference, the court conceded to Turkish domestic law in deciding that so long as the prohibition had a basis in domestic law and was written with reasonable foreseeability, it was properly prescribed by law.[183] As this case is somewhat similar to a potential challenge to the French ban, a study of it adds to the certainty that the ECHR is likely to uphold the French ban.

VI. Recommendations

The implementation of the veil ban in France has already received extensive criticism abroad.[184] Because the French veil ban is based on upholding *laicite*, the French Constitutional Council should reevaluate the concept of *laicite* in the face of France's changing demographics. *Laicite*, though standing for the complete secularization of the French state, is nonetheless grounded in the Catholic tradition.[185] The Constitutional

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180. *See* Sahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 5 ¶ 115 (2005) (holding that a Turkish University's ban on Islamic scarves was not a violation of the Convention).

181. *See id.* (holding that there was no violation of Ms. Sahin's Article 9 rights).

182. *See id.* ¶ 75 ("The Court must consider whether the applicant's right under Article 9 was interfered with and, if so, whether the interference was 'prescribed by law', pursued a legitimate aim and was 'necessary in a democratic society' within the meaning at Article 9 § 2 of the Convention.").

183. *See id.* ¶ 81 (determining that there was an interference, but that the interference was properly prescribed by Turkish law).

184. *See Parliament Approves Ban on Full Veil in Public*, FRANCE 24, Sept. 15, 2010, http://www.france24.com/en/20100914-french-parliament-approves-ban-full-veil-public-senate-law-fine-sarkozy-islam (indicating that international leaders, including President Obama, have condemned the implementation of the veil ban).

185. *See* Custos, *supra* note 1, at 395 (discussing Catholicism's former status as the state religion in France, and its substantial role in shaping the concept of *laicite*).

Council's narrow interpretation of *laicite* was more relevant and plausible when the largest distinction in French society was between Catholics and Protestants, and not between entirely different religious traditions. As it stands, the government's use of *laicite* constitutes a "failure to fully account for religious diversity."[186] By limiting how followers practice their faith, the French government is attempting to use religions that do not require apparent displays of affiliation, such as Christianity, to inform followers of other religions and to transform the religious landscape of the nation.[187] In this case, the veil ban "implicitly relies upon one of the characteristics of Catholicism, namely, the normalcy of discrete sartorial signs of religious affiliation to proclaim a ban on conspicuous sartorial signs."[188] If the government's goal is to integrate Muslims more fully into French society, it would be beneficial for lawmakers to redefine what secularism means in a multicultural state and to change the way *laicite* informs the political landscape of the nation. Given the international concern that the veil ban has created, it is likely that the law, and the continued application of *laicite* as it stands, will alienate many Muslims who see the *hijab* as an integral part of their faith. If the concept underlying the veil ban were broadened to allow voluntary expression of religious faith, the ban itself would no longer be seen as a constraint on the religious rights of the Muslim community.

It would be beneficial for the French government to preserve Article 4 of the statute, which forbids forcing a woman to wear a veil in public.[189] Although this Note has primarily focused on Article 1, Article 4 is likely to be a source of tension among Muslims who believe their female relative should be veiled without regard to the woman's personal convictions. Unlike Article 1, which forbids voluntary face covering, Article 4 does not infringe on the right to voluntarily practice one's faith.[190] If the true motive behind the ban is to protect the dignity of women who could potentially be forced to wear the veil against their will, Article 4 is more appropriately suited to a government interest than Article 1. Upholding Article 4 of the statute would send the message that the French government intends to

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186. *Id.*

187. *See id.* at 397 ("[T]he majority religion is set up as a model which not only informs the drafting of the law but also serves as the reference for a process of uniformization of the manifestation of religious belief in the public sphere.").

188. *Id.*

189. Law No. 2010-1192 of Oct. 11, 2010, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Oct. 12, 2010, p. 18344.

190. *See id.* (detailing the punishment for forcing another person to conceal his or her face in public).

uphold the dignity of women and is prepared to address a practice that is of serious concern to the Muslim community and to women worldwide. This choice would also serve the purpose of integrating Muslims more fully into French society, since it does not require Muslim women to abandon what many feel is an important tenet of their faith; it instead allows women to choose how they manifest their faith.

VII. Conclusion

While a ban on Islamic head coverings in the United States is not likely to pass muster at the Supreme Court level, it is clear that, in light of the principle of *laicite*, the ban will be upheld in France. While it seems counterintuitive to those accustomed to the American sense of liberty that banning a religious symbol in public actually serves to protect the freedom of religion, this is just the purpose that *laicite* serves. Even though the French ban technically does not violate the French Constitution or the Declaration of the Rights of Man, the French government has failed to address the disparate impact this ban will have on its citizens, particularly the female Muslim minority. While the government argues that the ban will treat everyone equally, it is not acknowledging the fact that "the enjoyment of religious freedom by those faithful to [the Catholic] majority religion is de facto facilitated" while Muslims are forced to choose between their faith and their country.[191] *Laicite* ensures that all religions are treated equally, and yet the principle itself is a product of the majority religion.[192] This requires growing communities of non-Christians to discard certain religious practices that are not customary in historically Christian societies. Many Muslims and non-Muslims alike agree that forcing a woman to wear the veil is a violation of her personal dignity.[193] The French ban confronts this serious issue plaguing the Middle East and—increasingly—Western societies. However, the French government has failed to account for the citizens who, in genuine religious conviction, choose on their own accord to wear the veil as a manifestation of Islam.

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191. *Id.*

192. *See id.* ("[T]he majority religion is set up as a model which not only informs the drafting of the law but also serves as the reference for a process of uniformization of the manifestation of religious belief in the public sphere.").

193. *See generally* Taylor, *supra* note 10.