First Amendment versus *Laïcité*: Religious Exemptions, Religious Freedom, and Public Neutrality

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Introduction

Religious liberty entails both public neutrality toward religion and the protection of the exercise of religion.[1] On one hand, the state should be neutral toward religion by not granting special recognition to certain religions or to religion in general. On the other hand, the state should protect religious practices and other manifestations of religious belief. Yet, by

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1. *See, e.g.*, U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "); COMMITTEE OF REFLECTION ON THE APPLICATION OF THE PRINCIPLE OF SECULARITY IN THE REPUBLIC, REPORT OF THE COMMITTEE OF REFLECTION ON THE APPLICATION OF THE PRINCIPLE OF SECULARITY IN THE REPUBLIC 24 (Robert O'Brien trans. 2005) (2003) [hereinafter STASI REPORT] ("[T]he principle of [*laïcité*] carries a double requirement: the neutrality of the state on the one hand and the protection of the freedom of conscience on the other hand.").

granting special protections for religious practice the state is granting special recognition to religion. Thus, there is a paradox between public neutrality toward religion and religious freedom.

Lawmakers in the United States confront this paradox when granting exemptions from generally applicable laws that burden religious practices. The First Amendment prohibits laws "respecting an establishment of religion, or prohibiting the free exercise thereof;"[2] these provisions are the Establishment Clause and the Free Exercise Clause, respectively.[3] If the government passes laws that aid one religion, or all religions, it violates the Establishment Clause.[4] Religious exemptions, like the exemption in the Patient Protection and Affordable Care Act (ACA) mandate, aid all religions by exempting religious employers from the obligation to provide insurance for contraception.[5] Therefore, religious exemptions may violate the Establishment Clause.

However, if the government substantially burdens a person's free exercise of religion, even if the burden results from a generally applicable law, then it violates the Free Exercise Clause.[6] Thus, if a law substantially burdens one's free exercise of religion, the government should repeal the law or grant an exemption to the law.[7] Therefore, the denial of any religious exemptions may violate the Free Exercise Clause.

Although scholars often emphasize the compatibility between the Establishment Clause and the Free Exercise Clause, lawmakers cannot follow both religion clauses of the First Amendment when deciding whether to grant a religious exemption.[8] In effect, legislators must render either the Establishment Clause or the Free Exercise Clause superfluous. This outcome is in itself undesirable because it eviscerates a core protection of the First Amendment. To make the situation worse, it is unclear which clause is in effect and which is superfluous.[9]

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2. U.S. CONST. amend. I.

3. U.S. CONST. amend. I.

4. Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

5. 42 U.S.C. § 1411(a)(5)(A). *But see* Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 690–91 (1970) (arguing that some exemptions are passive means of advancing religion that do not violate the Establishment Clause).

6. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 218 (1972); Sherbert v. Verner, 374 U.S. 398, 406–07 (1963).

7. *See id.* However, more recently, the Supreme Court has repudiated the interpretation of the First Amendment contained in *Yoder* and *Sherbert*. Employment Div., Dep. of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) ("Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'").

8. *See, e.g.*, Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUS. L. REV. 1, 49 (2005) ("The two religion clauses of the First Amendment implement this understanding [of religion and democracy] in compatible ways."); Andrew Koppelman, *And I Don't Care What It is: Religious Neutrality in American Law*, 39 PEPP. L. REV. 1115, 1120 (2013).

9. Marbury v. Madison, 5 U.S. 137, 174 (1803) ("It cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore such construction is inadmissible unless the words require it.").

Lawmakers in France confront a similar paradox, but within a legal framework based on *laïcité*.[10] Approximately, *laïcité* refers to the official state secularism of the French government, but like "freedom" and "equality," the exact meaning of "*laïcité*" is strongly contested.[11] The term came rather late to French discourse over the role of religion in public life, but some form of public neutrality toward religion has developed since the French Revolution.[12] For example, Article 10 of the 1789 Declaration of the Rights of Man and the Citizen provides: "No one shall be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order."[13] Moreover, the revolutionary government of France took steps to disestablish Catholicism as the state religion.[14]

Contemporary French law regarding *laïcité* commenced with the 1905 Law on the Separation of Church and State, which ensures both public neutrality toward religion and religious freedom.[15] Specifically, Article I, while protecting the freedoms of conscience and of religion, allows restrictions on the freedom of religion in the interest of public order.[16] Moreover, Article II declares that the government does not recognize, employ, or sub-

10. The term "*laïcité*" approximately means "secularism," but it is difficult to determine an exact definition of "*laïcité*." JOHN R. BOWEN, WHY THE FRENCH DON'T LIKE HEADSCARVES 2 (2007). Bowen argues that the significance of *laïcité* lies in its conceptual obscurity; *laïcité* "is useful for political debates because its use conveys the double illusion that everyone knows what *laïcité* means and that this meaning has long been central to French Republicanism." *Id.* at 32.

11. *See* Blandine Chelini-Pont, *Religion in the Public Sphere: Challenges and Opportunities*, 2005 BYU L REV. 611, 612 (2005) ("Although the concept of laïcité defies a precise definition, it embodies the constitutional principle of the State's neutrality.").

12. *See* STASI REPORT, *supra* note 1, at viii-ix.

13. DECLARATION OF THE RIGHTS OF MAN AND THE CITIZEN, Aug. 26, 1789, art. 10. Compare this provision with the text of the First Amendment to the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . " U.S. CONST. amend. I. First, the French Constitution adds an explicit qualification to the right to manifest a religious belief; it must not disrupt the public order. However, the First Amendment does not add an explicit qualification to the right to free exercise of religion. Second, the Declaration of the Rights of Man and the Citizen protects religion as part of a broader freedom of conscience; the First Amendment protects a freestanding right to the free exercise of religion. Third, the First Amendment also prohibits laws that respect an establishment of religion, while the Declaration of the Rights of Man and the Citizen does not address public neutrality toward religion.

14. For example, the Constitution of 1795 provided that no citizen is required to contribute to the expenses of any religion, as the government does not financially support any religion. Constitution of 1795, general provision 7. However, under the reign of Napoleon, the French government signed the Concordat of 1801, which recognized Catholicism as the religion of the vast majority of French citizens. Concordat of 1801, July 15 1801. Moreover, after the 1815 restoration of the monarchy, the French government re-established the Catholic Church as the official state religion of France. Ioanna Tourkochoriti, *The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A.*, 20 WM. & MARY BILL RTS. J. 791, 799–800 (2012).

15. *See* Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat [Law of December 9 Concerning the Separation of Church and State], Dec. 9, 1905.

16. *See id.* at art. I.

sidize any religion.[17] Furthermore, the current Constitution of France provides that France is a *laïque* Republic that ensures the equality of all citizens regardless of religion.[18] Thus, *laïcité* entails both public neutrality toward religion and religious liberty.[19]

However, the current headscarf controversy in France illustrates a tension in French law between public neutrality toward religion and religious freedom.[20] On one hand, the protection of religious belief seems to allow French women to wear a veil or headscarf as a manifestation of their religious belief. On the other hand, a broad interpretation of *laïcité* and public neutrality toward religion seem to restrict a citizen's ability to manifest religious belief in certain contexts, such as in public schools.[21]

Although both the United States and France confront the paradox between public neutrality and religious freedom, the countries resolve this tension in different ways. While the United States prioritizes religious freedom over public neutrality toward religion by giving more protection to religious than to secular beliefs, France antithetically prioritizes public neutrality toward religion over religious liberty by giving more protection to secular than to religious beliefs. Scholars have written historical[22] or descriptive[23] comparisons of the American and French law religious liberty and religious neutrality that focus on the relevant legal doctrine. This Note supplements that conversation by offering a normative account that grounds the legal doctrine in political philosophy.

Although special treatment of religion violates the conditions of public neutrality toward religion, governments can avoid this tension by giving similar protections to secular and religious belief. Governments, including those of the United States and France, should protect a general freedom of conscience that equally protects religious and secular belief.

In Part II, this Note will give a conceptual account of the putative paradox between public neutrality toward religion and religious freedom and

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17. *See id.* at art. II.

18. *See* 1958 CONST. art. 1 (Fr.) ("La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion.") ["France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion."]

19. *See* STASI REPORT, *supra* note 1, at 24.

20. *See* Mukul Saxena, *The French Headscarf Law and the Right to Manifest Religious Belief*, 84 U. DET. MERCY L. REV. 765, 771 (2007).

21. It is unclear whether *laïcité* only restricts state actors, or whether it applies to individuals as well. *See* Michel Troper, *French Secularism, or Laïcité*, 21 CARDOZO L. REV. 1267, 1279 (2000).

22. *See generally, e.g.*, T. Jeremy Gunn, *Religious Freedom and Laicite: A Comparison of the United States and France*, 2004 BYU L. REV. 419 (2004) (analyzing religious freedom and *laïcité* as founding myths).

23. *See, e.g.*, Frederick Mark Gedicks, *Religious Exemptions, Formal Neutrality, and Laïcité*, 13 IND. J. GLOBAL LEGAL STUD. 473, 477 (2006) ("I should also emphasize that my purpose is descriptive, rather than normative."); Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT. REV. 123, 124 (1992) (describing the conflict between broad interpretations of the Establishment Clause and the Free Exercise Clause) [hereinafter *Paradox Redux*].

present a solution to the putative paradox: governments should give similar protections to secular and religious belief. In Part III, this Note will apply the analysis in Part II to public education and private employment in the United States.[24] Similarly, Part IV will apply the analysis in Part II to public education and private employment in France.[25] The conclusion of this Note will reiterate the potential paradox, and emphasize the need for the United States and France to provide similar protection to secular and religious belief.

I. Public Neutrality and Religious Freedom

This section provides an account of the potential conflict between public neutrality toward religion and religious freedom. The first section provides a conceptual analysis of public neutrality toward religion; the second section provides a conceptual analysis of religious freedom; the third section explains the conflict between these two concepts; and the fourth section provides a solution to this putative conflict.

A. Public Neutrality Toward Religion

In nations like the United States and France, religious liberty rests upon two pillars: public neutrality toward religion and the protection of religious practice.[26] Public neutrality toward religion means that the government may not endorse any particular religion or religions, and it may not promote religion above non-religion. In other words, public neutrality toward religion constitutes a wall of separation between church and state.[27] As interpreted by Justice Hugo Black of the United States Supreme Court, the separation of church and state requires, at a minimum:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Govern-

24. Because this Note concerns law and religion, it will not address other aspects of the controversies discussed, such as whether corporations are "persons" within the Religious Freedom Restoration Act (RFRA). *See generally, e.g.*, Mark L. Rienzi, *God and the Profits: Is there Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59 (2013); Steven J. Willis, *Corporations, Taxes, and Religion: The Hobby Lobby and Conestoga Contraceptive Cases*, 65 S.C. L. REV. 1 (2013).

25. This Note will also not address other aspects of these controversies, such as gender equality or cultural integration. *See, e.g.,* Tourkochoriti, *supra* note 15, at 849–50; Mary-Caitlin Ray, *The Intersection of Laicite and American Secularism: The French Burqa Ban in the Context of United States Constitutional Law*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 135, 164–65 (2011).

26. *See* U.S. CONST. amend I.; *see also* 1958 CONST. art. 1 (Fr.).

27. *See* Thomas Jefferson, Letter to Mssrs. Nehemiah Dodge and others, a Committee of the Danbury Baptist Association in the State of Connecticut (1802).

> ment can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.[28]

Justice Black's list is illustrative, but not exhaustive.[29] To provide a more comprehensive account of public neutrality toward religion, this Note will borrow a distinction from the philosophical literature on public neutrality toward conceptions of the good:[30] there are differences among *neutrality of justification*, *neutrality of aim*, and *neutrality of effect*.[31]

The neutrality of justification condition requires that governments enact laws that can be justified on non-religious grounds. As Robert Audi explains, "one should not advocate or support any law or public policy that restricts human conduct unless one has, and is willing to offer, adequate secular reason for this advocacy or support."[32] Once again, an analogy to the philosophical literature on public neutrality toward conceptions of the good is instructive. Charles Larmore connects the neutrality of justification condition to "a universal norm of rational dialogue."[33] Larmore explains:

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28. Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

29. *See id.* (noting that this list is a minimal definition).

30. If the government is neutral toward conceptions of the good, then "political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life." Ronald Dworkin, *"Liberalism," in Public and Private Morality*, reprinted in STEVEN WALL AND GEORGE KLOSKO, PERFECTIONISM AND NEUTRALITY: ESSAYS IN LIBERAL THEORY 32 (eds. Steven Wall and George Klosko) (2003). The analogy between neutrality toward religion and neutrality toward conceptions of the good features prominently in the philosophical literature on the topic. *See, e.g.*, STEVEN WALL AND GEORGE KLOSKO, PERFECTIONISM AND NEUTRALITY: ESSAYS IN LIBERAL THEORY 9 (2003) ("Neutrality is a familiar idea in American constitutional law, although in this area, the idea has been formulated less sharply than in the philosophical literature. As interpreted in a series of U.S. Supreme Court decisions, the guarantees of religious freedom enshrined in the First Amendment were taken to mean that the government must be 'neutral' between religions."); Richard J. Arneson, *Liberal Neutrality on the Good: An Autopsy*, in *id.* at 192 ("For [some political theorists], neutrality is the appropriate generalization of the ideal of religious tolerance.") [hereinafter AUTOPSY]; Gerald Gaus, *The Range of Justice (or, How to Retrieve Liberal Sectual Tolerance)*, Oct. 10, 2011, *available at* http://www.cato-unbound.org/2011/10/10/gerald-gaus/range-justice-or-how-retrieve-liberal-sectual-tolerance ("Liberalism's founding insight was the recognition in the sixteenth and seventeenth centuries that controversial religious truths could not be the basis of coercive laws and public policies. The task is now to apply this insight to philosophizing about justice itself."). However, the analogy between neutrality toward religion and neutrality toward conceptions of the good is controversial. Richard Arneson, *Toleration and Fundamentalism: Comments on Gaus*, Oct. 12, 2011, *available at* http://www.cato-unbound.org/2011/10/12/richard-arneson/toleration-fundamentalism-comments-gaus ("Political liberalism is presented as a generalization of the idea of religious toleration. Just as the state ought to be neutral on religion, by the same logic, the state ought to be neutral on controversial ideas of justice. This analogy, however, is flawed."). T he resolution of the debate about the analogy between public neutrality toward religion and public neutrality toward conceptions of the good is beyond the scope of this Note.

31. *See, e.g.*, AUTOPSY, *supra* note 30, at 193.

32. Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFFAIRS 259, 279 (1989).

33. CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY 53 (1987).

> When two people disagree about some specific point, but wish to continue talking about more general problem they wish to solve, each should prescind from the beliefs that the other rejects, (1) in order to construct an argument on the basis of his other beliefs that will convince the other of the truth of the disputed problem, or (2) in order to shift to another aspect of the problem, where the possibilities of agreement seem greater.[34]

Larmore grounds this conception of neutrality in the idea of a *modus vivendi*, pursuant to which people agree to disagree about conceptions of the good.[35] Analogously, in the context of public neutrality toward religion, neutrality of justification constitutes part of a *modus vivendi*, or agreement to disagree, among people who hold different beliefs about religion.[36] Such an arrangement allows people who live in a religiously diverse society to form common ground to justify government, law, and public policy.

However, neutrality of justification, as applied to public neutrality toward religion, is not sufficient for complete neutrality toward religion. The *modus vivendi* perspective seemingly allows justifications on the basis of religion, as long as people in society agree on religious matters.[37] For example, a government could not justify a law or policy on the basis of Roman Catholic doctrine in a society composed of non-Catholics, but it could justify a law or policy on the basis of Roman Catholic doctrine in a society composed exclusively of Catholics.

Therefore, one can either accept religious justifications in certain situations, or provide different grounds for public neutrality toward religion. If a government uses religious justifications, even if people in the society agree about religious matters, then it violates the minimal conditions of public neutrality toward religion, as laid out by Justice Black in *Everson*.[38] One could avoid this problem by adopting a different perspective toward neutrality of justification, such as the Kantian perspective that Larmore rejects.[39]

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34. *Id.*

35. *See id.* at 70–71. Larmore contrasts the *modus vivendi* perspective with a Kantian perspective that grounds political neutrality in the ideal of autonomy. *See id.* at 77–78. Resolving the dispute between Larmore's conception of neutrality and Kant's is beyond the scope of this Note.

36. *Cf. id.*

37. *Cf. id.* at 67 ("We should first observe that political neutrality, as I have described it, is a relative matter. It does not require that the state be neutral with respect to all conceptions of the good life, but only with respect to those actually disputed in the society.").

38. *See Everson*, 330 U.S. at 15–16.

39. *See* Larmore, *supra* note 34, at 77–85. The Kantian perspective grounds public neutrality in the priority of the right over the good. *See Id.* According to Larmore, Kant believed that the state should be neutral toward the good to reflect personal detachment from particular conceptions of the good. *See id.* The good is an empirical notion based on our desires and experiences, but acting in accordance with the right is unconditional and is based on acting in accordance with universal moral laws. *See id.* Kant believed that people should be acting in accordance with the right and remain detached from particular conceptions of the good. *See id.*; *see also* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS second section (1785) ("By a kingdom I understand the union of different rational beings in a system by common laws. Now since it is by laws that ends are determined as regards their universal validity, hence, if we abstract from

Yet, even then neutrality of justification is an insufficient basis for comprehensive public neutrality toward religion, since a government could provide an ostensibly neutral justification for laws and policies that are not neutral in aim or intention. For example, a government could establish Roman Catholicism as the official state religion but justify this policy as a means of achieving civil peace.[40] However, the establishment of Roman Catholicism would probably have the effect of discouraging people from holding other beliefs. Moreover, even if establishment of Roman Catholicism were to achieve civil peace, many members of the government would likely seek to establish Roman Catholicism primarily out of a desire to promote their personal religious beliefs. Thus, the neutrality of justification condition works in conjunction with neutrality of aim and neutrality of effect to achieve comprehensive neutrality.

The neutrality of aim condition ensures that law or policy not have the intent of furthering or hindering a religion, some religions, or all religions,[41] functioning as a constraint on the motivations of those in government. For example, pursuant to the neutral of aim condition, members of a legislature should not vote in favor of a law that establishes Roman Catholicism as the official state religion if they do so with the intent of promoting Roman Catholicism, even if they could soundly claim that establishment of Roman Catholicism would achieve civil peace.

However, the neutrality of aim condition can be difficult to implement. Members of a government may not even fully grasp all of their own motivations for supporting or opposing a law or policy, making it even harder for outside observers, such as courts, to determine the mental states of lawmakers.[42] Therefore, outsider observers must attempt to infer intent from the circumstances surrounding the law or policy in order to meaningfully evaluate the condition This is the approach taken by courts in the United States in a variety of circumstances. For example, U.S. courts look to "the totality of the relevant facts" to determine whether a law's purpose is racial discrimination.[43] Nonetheless, inferring a law's purpose from the "totality of the relevant facts" can be daunting one must determine which facts are relevant, how much weight to give to these facts, and how these facts bear upon a law's purpose.

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the personal differences of rational beings and likewise from all the content of their private ends, we shall be able to conceive all ends combined in a systematic whole (including both rational beings as ends in themselves, and also the special ends which each may propose to himself), that is to say, we can conceive a kingdom of ends, which on the preceding principles is possible.").

40. *See* AUTOPSY, *supra* note 30, at 194.

41. *See id.* at 193. The neutrality of aim conditions concerns the mental states of government officials and their actual intentions in forming law or policy.

42. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 636 (1987) ("For while it is possible to discern the objective "purpose" of a statute (*i.e.,* the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth (as it was, to no avail, here), discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite.").

43. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976).

Consider a hypothetical law that requires businesses to close on Sundays. Legislators could have any number of plausible motivations for passing such a law, including the promotion of church attendance or a desire to create a uniform day of rest. The United States Supreme Court considered one such law and inferred the latter purpose of establishing a uniform day of rest.[44] Justice Douglas's dissent noted the similarity between the Sunday Closing Laws in question and historic Sunday Closing Laws that had the explicit purpose to "secure the observance of the Lord's day."[45] Both the majority and Justice Douglas presented plausible arguments to support their conclusions, illustrating the difficulty of determining neutrality of aim. Nonetheless, neutrality of aim works in conjunction with neutrality of justification and neutrality of effect to ensure comprehensive public neutrality toward religion.

Finally, the neutrality of effect condition ensures that laws do not have the consequence of advancing or hindering a religion, some religions, or all religions. Strictly interpreted, this condition is overbroad because it prohibits laws that even have the incidental effect of promoting certain religions. As Richard Arneson points out, even basic religious tolerance violates the neutrality of effect condition.[46] If a government practices basic religious tolerance, it will allow members of various religious sects to proselytize on behalf of any religious belief they care to defend.[47] However, some religious beliefs are more plausible than others, and this environment of religious tolerance and diversity would disproportionately aid religions with plausible beliefs.[48] Therefore, basic religious tolerance has the nonneutral effect of promoting religions with plausible beliefs.[49]

As a limiting principle, one could amend the neutrality of effect condition to only prohibit laws whose *primary effect* is to advance or hinder a religion, some religions, or all religions. This principle would bring the neutrality of effect condition in line with the second prong of the American *Lemon* test for the establishment of religion.[50] However, determining the primary effect of the day, as opposed to a secondary or incidental effect, remains empirically difficult.

Consider a law that forbids employers from requiring employees to work on their Sabbath. The law's effects include, but are not limited to, allowing some employees a day off from work and encouraging religions that feature as a tenet an observation of the Sabbath or holy day. In *Estate*

44. *See* McGowan v. Maryland, 366 U.S. 420, 445 (1961). The Court acknowledged the "strongly religious origins of these laws," but determined that "the present purpose and effect of most [Sunday Closing Laws] is to provide a uniform day of rest for all citizens[.]" *Id.* at 433, 445.

45. *Id.* at 568–69 (DOUGLAS, J., dissenting).

46. *See* AUTOPSY, *supra* note 30, at 193–94.

47. *See id.*

48. *See id.*

49. *See id.* An implicit premise in this argument is that people choose more plausible religious beliefs over less plausible religious beliefs, at least holding all else equal, but this is not a very controversial assumption.

50. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (explaining that a law must have a "primary effect" that neither advances nor hinders religion).

of Thornton v. Caldor, the United States Supreme Court struck down a law that forbade employers from requiring employees to work on their Sabbath.[51] The Court noted that the law did not take into account the interests of those who do not observe the Sabbath; rather, the law gives an unqualified right to not work on the Sabbath.[52] Therefore, the law has more than an "incidental or remote effect of advancing religion."[53] Rather, its primary effect is to advance religion, so it is impermissible.[54]

Overall, neutrality of justification, aim, and effect constitute the three conditions of public neutrality toward religion. The neutrality of justification condition ensures that the justification of law and public policy is not religious in nature; the neutrality of aim condition ensures that the intention of law and policy is not to further or hinder religion; and the neutrality of effect condition ensures that the results of law and policy do not aid or hinder religion. Yet governments often supplement neutrality of effect with a specific protection of religious liberty.

B. Religious Freedom

The other pillar of liberal law and policy concerning religion is a guarantee of religious freedom. Religious freedom refers to the *protection of religious belief*, and the *protection of the manifestation of religious belief*.

The protection of religious belief ensures that, because the right to hold religious beliefs is absolute, governments may not legislate citizens' beliefs about religion.[55] If the government were to regulate or legislate beliefs directly, it would deprive citizens of a basic element of freedom, freedom of thought, and therefore establish tyranny.[56] Furthermore, enforcing such legislation would prove difficult from an epistemological perspective. Even if governments could directly determine the beliefs of its citizens, they could not directly change these beliefs through coercion.[57] Since such legislation is tyrannical or futile, disputes over religious free-

51. *See* Estate of Thornton v. Caldor, 472 U.S. 703, 703–04 (1985).

52. *See id.* at 708.

53. *Id.* at 710.

54. *See id.*

55. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute."); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) ("The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed."); Reynolds v. United States 98 U.S. 145, 164 (1878) ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.").

56. *See* JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689) ("In the second place, the care of souls cannot belong to the civil magistrate, because his power consists only in outward force: but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God. And such is the nature of the understanding, that it cannot be compelled to the belief of any thing by outward force. Confiscation of estate, imprisonment, torments, nothing of that nature can have any such efficacy as to make men change the inward judgment that they have framed of things.") [hereinafter LOCKE].

57. *Se id.*

dom generally focus on disputes over the protection of the manifestation of religious belief.

The protection of the manifestation of religious belief is, however, more controversial. The manifestation of a religious belief constitutes an action in furtherance of that belief, which is less protected than the belief itself.[58] There is a danger that governments will abuse their right to regulate the conduct of their citizens to prevent the manifestation of religious belief and thereby infringe upon religious liberty.[59] If there is a putative violation of religious freedom, citizens may demand a repeal of the law in its entirety, or they may demand an exemption from the law.[60]

In some circumstances, a religious exemption would defeat the aim of the law; therefore, the law should be repealed. For example, in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, the United States Supreme Court struck down a series of city ordinances that banned animal sacrifice.[61] In that case, a Florida city, Hialeah, had enacted those ordinances shortly after a religious sect that practiced ritual animal sacrifice moved into the city.[62] While the laws were facially neutral toward religion—banning animal sacrifice in any religious or secular context—the Court found that the circumstances surrounding the ordinance suggested an antagonistic and impermissible animus toward the religious sect.[63] As a result, the Court went even further than just providing a statutory exception for the sacrificial practices of the Church of Lukumi Babalu Aye; it struck down the ordinance in its entirety.[64]

In other circumstances, religious exemptions from generally applicable law sufficiently protect religious freedom. However, while such exemptions are a prominent means of protecting claims of conscience,[65] they conflict with the ideal of the rule of law, which requires that laws be generally applicable and impact all citizens equally.[66] Thus, governments must carefully balance religious liberty with rule of law considerations when granting exemptions. If a government grants too many exemptions, individual citizens' religious beliefs may become "superior to the law of the land, [permitting] every citizen to become a law unto himself."[67]

There are justifications for granting religious exemptions in at least some cases. Léonid Sirota identifies three categories of justifications: pru-

58. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) ("Thus the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").

59. *See* LOCKE, *supra* note 56.

60. *See* LOCKE, *supra* note 56.

61. *See* Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 547 (1993).

62. *See id.* at 526.

63. *See id.* at 542. Note that these laws also violate the neutrality of aim condition of public neutrality toward religion because their motivation is animus toward a particular religion. *See id.*

64. *See id.* at 547.

65. *See, e.g.*, *id.*

66. *See* Léonid Sirota, *Storm and Havoc: Religious Exemptions and the Rule of Law*, 47 REVUE JURIDIQUE THÉMIS DE L'UNIVERSITÉ DE MONTRÉAL 247, 317 (2013).

67. Reynolds v. United States, 98 U.S. 145, 167 (1878).

dential justifications, utilitarian justifications, and dignitarian justifications.[68] A prudential justification is one for which the government grants exemptions for the purpose of maintaining order among divergent religious sects and social groups.[69] Pursuant to the utilitarian justification, governments allow religious exemptions because of the value of religious beliefs in the well-being of citizens.[70] Finally, the dignitarian justification comprehends a government's provision of religious exemptions in order to fulfill a commitment to human dignity.[71]

Governments must carefully balance these justifications with the concern for the rule of law when determining whether to grant exemptions. However, governments must consider public neutrality toward religion in addition to the rule of law when granting exemptions from generally applicable laws. There is some tension between religious liberty and public neutrality toward religion, and the conjunction of religious liberty and public neutrality toward religion leads to a paradox at the heart of the law of religion in public life.

C. Public Neutrality and Religious Freedom: A Paradox

Ideally, public neutrality toward religion and religious freedom would play a mutually supportive role in a tolerant society, whereby a government neither endorses religion nor inhibits its people from the free practice of their own religions. In many cases, public neutrality and religious freedom do work in harmony. For example, both provide reasons to reject a law that mandates that all citizens join the Roman Catholic Church.[72] In other instances, public neutrality and religious freedom seem to support opposing outcomes to legal controversies. Consider religious exemptions from generally applicable laws; more specifically, consider the property tax exemptions for religious institutions.[73] A government truly neutral toward religion would not grant any tax exemptions to religious institutions that it

68. *See* Sirota, *supra* note 66, at 281–92.

69. *See id.* at 283–84. However, Sirota concludes that the prudential justification is "a not entirely satisfactory justification for religious freedom." *Id.* at 284. If the prudential justification is the sole justification, then governments would only grant religious exemptions when doing so would serve social order and reduce conflict. *See id.* However, protecting religious freedom may not be an effective means of securing civil peace.

70. *See id.* at 284–86. However, this justification faces two potential objections. First, it would allow the majority to deny exemptions to the minority, as long as the benefit to the majority outweighs the harm to the minority. *See id.* Furthermore, it is not clear how religious belief, or the manifestation of belief, contributes to well-being in such a manner as to justify religious exemptions. *See id.*

71. *See id.* at 286–92.

72. Such a law inhibits the free exercise of religion by hindering the exercise of religions besides Catholicism. Moreover, it would have the effect of promoting Catholicism above all other religions, so it violates the neutrality of effect condition of public neutrality toward religion. Furthermore, while there could be a neutral aim for the establishment of the Catholic Church, like achieving civil peace, it is more likely the aim is to promote Catholicism.

73. *Cf.* Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970).

would not also grant to their secular counterparts.[74] First, tax exemptions violate the neutrality of effect condition by giving religious institutions a special tax advantage.[75] Second, tax exemptions probably violate the neutrality of aim condition, since the likely aim is to accommodate religious belief.[76] Third, tax exemptions often violate the neutrality of justification condition, unless there is a plausible secular justification for tax exemption for religious institutions.[77]

Yet a broad interpretation of religious freedom seems to require tax exemptions for religious institutions.[78] Taxation financially burdens religious institutions in the same way taxation burdens any other body; the more money a religious body pays in taxes, the less money it has to devote to worship or other functions.[79] Substantial taxation of religious institutions may even amount to a substantial burden on the ability of a religious institution, and the members thereof, to exercise its religious beliefs. Thus, religious freedom seems to demand religious exemptions for churches.

When faced with the religious taxation question, the United States Supreme Court noted the difficulty in finding "a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[80] In *Walz v. Tax Commission*, the Court upheld the tax exemption for religious institutions as part of "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[81] Because the Court considered the tax exemptions as part of a broader exemption for "nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups[,]"[82] it did not single out religion for special treatment. Moreover, the Court considered tax exemptions as a mere "passive" means of aiding religious institutions, and therefore, as permissible despite the Establishment Clause.[83]

The Court's arguments in *Walz* have not always impressed scholars.[84]

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74. This is not to say that the government cannot deny religious institutions any tax exemptions, it just cannot give religious exemptions to religious institutions *qua* religious institutions. It could give exemptions to religious institutions *qua* non-profit organization, for example. The complication arises when "the church *qua* nonprofit, charitable organization is intertwined with the church *qua* church." *Id.* at 709.

75. *See id.* at 700–16 (Douglas, J. dissenting).

76. *See id.*

77. *See id.*

78. *See id.* at 668–69.

79. *See id.* at 673.

80. Walz, 397 U.S. at 668–69.

81. *Id.* at 669.

82. *Id.* at 673.

83. *See id.* at 691.

84. *See* Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 18 (1978) ("How, for example, can a law which exempts churches from taxes that others must pay be justified as without the purpose or effect of advancing religious interests and without avoiding entanglement? Yet, that was the Court's conclusion in *Walz v. Tax Commission*. A more tortured opinion would be hard to find.").

This Note offers another means of obviating the conflict between public neutrality toward religion and religious freedom.

D. Public Neutrality and Religious Freedom: Resolving the Paradox

If the government were to give a general protection for freedom of conscience and protect secular and religious beliefs equally, then it could meet the three conditions of public neutrality while still protecting freedom of religion.[85] Relevant secular beliefs worthy of protection include, among others, beliefs grounded in moral philosophy, such as utilitarianism[86] or deontology.[87]

First, protection for a broader freedom of conscience would meet the neutrality of justification condition. The justification for freedom of conscience is that it protects individuals from the obligation to obey laws that infringe upon their beliefs.[88] This justification is not grounded in religion or theology, but rather in the secular desire to protect individuals from the potential of governmental authority to limit individual freedom.[89]

Second, protection for freedom of conscience would meet the neutrality of aim condition. Members of the legislature, and other government officials, could grant general protections to claims of conscience without the intent to further religion. Moreover, courts engaging in judicial review of laws that protect claims of conscience would be able to determine the secular nature of the intent of the lawmaker without considerable difficulty.[90]

Third, protection for freedom of conscience would meet the neutrality of effect condition. The effect of such a broad protection would be to allow those with secular or religious objections to generally applicable laws to exempt themselves from compliance with these laws. It is possible that

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85. While this solution entails expanding the protection of religious freedom to include secular belief, it does not necessarily entail expanding public neutrality toward religion to include public neutrality toward secular beliefs. Whether the state should be neutral toward secular beliefs is beyond the scope of this Note. For sources discussing public neutrality toward the good and public neutrality toward secular beliefs, *see generally* CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY (1987); JOHN RAWLS, POLITICAL LIBERALISM (1993); STEVEN WALL AND GEORGE KLOSKO, PERFECTIONISM AND NEUTRALITY: ESSAYS IN LIBERAL THEORY (2003); Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963 (1993); Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013).

86. *See generally* JOHN STUART MILL, UTILITARIANISM (1861).

87. *See generally* IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON (1788).

88. *See generally* JOHN STUART MILL, ON LIBERTY (1869) (arguing for the protection of individuals' liberty).

89. *See id.* Of course there are limits to this justification: if the government were to grant an exemption from a generally applicable law to every citizen who demands an exemption, then the government would undermine the rule of law. *See* Reynolds v. United States, 98 U.S. 145, 167 (1878).

90. It is very unlikely that a legislature would give a broad protection to claims of conscience in order to advance religion because protection to freedom of conscience is overbroad as a means of promoting religion. Of course, the usual difficulty with determining the intent of a legislature still applies. *See* Edwards v. Aguillard, 482 U.S. 578, 636 (1987).

those who have religious objections to generally applicable laws would be more likely to object, so freedom of conscience may incidentally advance religion. However, this would be an incidental or secondary effect because everyone with a "sincere and meaningful" objection could object; whether those with secular or religious objections are more likely to object is not a matter for the state to decide.[91]

This Note thus joins the works of scholars who have advocated similar protections for religious and secular claims of conscience. Brian Leiter, for example, identifies utilitarian, deontological, and epistemic arguments for the toleration of religion, and argues that these arguments support protection for claims of secular conscience as well as claims of religious conscience.[92] Moreover, Christopher Eisgruber and Lawrence Sager, who focus on religious freedom in the United States, view "fairness as lying at the very heart of free exercise exemption controversies."[93] Thus, Eisgruber and Sager advocate Equal Liberty, pursuant to which no member of the political community is to be devalued on account of religious belief, and all persons have basic rights such as freedom of speech and freedom of association.[94] This Note provides an additional argument for granting similar protections to secular and religious conscience—special treatment of religion violates the conditions of public neutrality toward religion.

One potential objection to expanding religious freedom to encompass a general freedom of conscience is that anyone could claim a conscientious objection to any law and request an exemption.[95] However, the government could limit objections to those who have "sincere and meaningful" beliefs comparable to religious belief.[96] If a government believes that it would grant too many exemptions by expanding religious freedom to include a general freedom of conscience, it could still remain neutral toward religion by reducing the overall number of exemptions.

Thus far, this Note has provided a theoretical account of the conflict between religious liberty and public neutrality toward religion. Next, this Note will apply this theoretical account to recent controversies in the United States and France.

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91. This Note borrows the "sincere and meaningful" language from *Seeger*. *See* United States v. Seeger, 380 U.S. 163, 166 (1965).

92. *See* BRIAN LEITER, WHY TOLERATE RELIGION? 15 (2013).

93. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 15 (2007).

94. *See id.* at 52–53. Pursuant to Equal Liberty, religion may receive special solicitude, but only because of its vulnerability to hostility and not because religious belief is inherently more valuable or worthy of respect or protection than secular belief. *See id.*

95. Courts have long been reluctant to grant too many exemptions, since doing so would make any citizen "superior to the law of the land, and in effect to permit every citizen to become a law unto himself." Reynolds v. United States, 98 U.S. 145, 167 (1878).

96. *Seeger*, 380 U.S. at 166.

II. Public Neutrality and Religious Freedom in the United States

This section applies the analysis in Part I to law and religion in the United States. This Note will first address the conflict between public neutrality and religious freedom in American public education and then describe this conflict in American private employment. The United States currently provides more protection to religious belief than to secular belief, and could resolve these conflicts by providing similar protections to religious and secular belief.

A. Public Neutrality and Religious Freedom in American Public Education

Public education in the United States is a prominent forum for the conflict between public neutrality toward religion, as embodied in the Establishment Clause, and religious freedom, as embodied in the Free Exercise Clause.[97] Religious exemptions to mandatory formal schooling illustrate this tension.[98] On one hand, if formal schooling hinders the free exercise of religion, the Free Exercise Clause seems to mandate religious exemptions to formal schooling.[99] Yet, since religious exemptions constitute special recognition for religion, the Establishment Clause seems to prohibit religious exemptions for formal schooling.[100] The United States may resolve this tension by providing equal treatment to religious and secular objections to formal schooling.

Courts have often used the Establishment Clause to safeguard religious neutrality in public schools. The Supreme Court has invalidated state laws that require the Ten Commandments to be posted on the walls of public school classrooms,[101] authorize public school teachers to hold one-minute periods of silence for meditation or voluntary prayer,[102] and require public schools that teach evolution to also teach "creation science."[103] Moreover, in *Lee v. Weisman*, a majority found clergy-delivered prayers at public high school graduation ceremonies unconstitutional because of the subtle coercive pressure to attend graduation ceremonies and remain silent during the prayer.[104] The jurisprudence on public aid to parochial schools

97. *See* U.S. CONST. amend. I. Other scholars have advocated a more pluralistic account of the religion clauses of the First Amendment to the United States Constitution than an interpretation grounded in public neutrality toward religion and the protection of religious practice. *See, e.g.*, 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 6–13 (2008); STEVEN H. SHIFFRIN, THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS 2041 (2009). This Note does not necessarily contradict pluralist accounts, but this Note does emphasize the importance of public neutrality toward religion and the protection of religious practice for the First Amendment.

98. *Paradox Redux*, *supra* note 24, at 123.

99. *See* Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

100. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

101. *See* Stone v. Graham, 449 U.S. 39, 42–43 (1980).

102. *See* Wallace v. Jaffree, 472 U.S. 38, 50 (1985).

103. *See* Edwards v. Aguillard, 482 U.S. 578, 593–94 (1987).

104. 505 U.S. 577, 598–99 (1992).

has been even more contentious,[105] and in *Mitchell v. Helms*, which had no majority opinion, the Court held that the government may give instructional equipment to parochial schools as long as the equipment is used for secular instruction.[106]

However, courts seem less inclined to safeguard religious neutrality when doing so infringes upon the free exercise of religion. Notably, in *Wisconsin v. Yoder*, the Court considered the free exercise claims of members of conservative Amish denominations who refused to enroll their children in high school because they viewed such education as contrary to their religious beliefs and way of life.[107] Although the Amish challengers refused to comply with Wisconsin's compulsory education law, the Supreme Court held that compelling parents to send their children to formal high school to age sixteen violated the Free Exercise Clause.[108] The Court acknowledged that while a formal schooling law does not, on its face, discriminate against religions or against a particular religion, even facially neutral laws may violate the Free Exercise Clause.[109] The Court conceded that the government has an interest in the universal education of its citizens; that interest, however, balanced against the free exercise rights of individuals, was not strong enough to justify the law, and the Court ultimately granted the exemption.[110]

Yet in granting the religious exemption in *Yoder*, the Court prioritized freedom of religion over public neutrality toward religion. Thus, the religious exemption in *Yoder* violates the three conditions of public neutrality toward religion.[111] First, the religious exemption violates the neutrality of justification condition. The Court could have justified the exemption as a vindication of general claims of conscience, which would constitute a nonreligious justification. Instead, the Court explicitly denied exemptions to those whose objections to formal schooling are "philosophical and personal rather than religious[.]"[112] The Court was quite clear that a "way of life, however virtuous and admirable, may not be interposed as a barrier to

105. The Court initially held that the government may not pay teachers' salaries in parochial schools, because the supervision necessary to ensure that they do not teach religious material would constitute excessive government entanglement with religion. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 414 (1985); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 397–98 (1985). However, more recently the Court held that it is permissible for the government to pay for the salaries of teachers on the campuses of parochial schools. *See* Agnostini v. Felton, 521 U.S. 203, 207 (1997).

106. 530 U.S. 793, 835 (2000).

107. 406 U.S. 205, 216 (1972).

108. *See id.* at 234.

109. *See id.* at 221.

110. *See id.* In other words, the Court balanced "the state's interest in social reproduction through education–that is, society's interest in using the educational system to perpetuate its collective way of life among the next generation–and the parents' interest in religious reproduction–that is, their interest in passing their religious beliefs on to their children." Josh Chafetz, *Social Reproduction and Religious Reproduction: A Democratic-Communitarian Analysis of the* Yoder *Problem*, 15 WM. & MARY BILL RTS. J. 263, 264 (2006).

111. *See supra* Part I.A.

112. *Yoder*, 406 U.S. at 216.

reasonable state regulation of education if it is based on purely secular considerations[.]"[113] Thus, the Court gave a religious justification for the exemption, which violates the neutrality of justification condition.

Second, the religious exemption in *Yoder* violates the neutrality of aim condition of public neutrality toward religion. Since the Court limited exemptions to religious objections, instead of to "philosophical and personal" objections,[114] the most plausible aim of the Court in *Yoder* was to accommodate religious beliefs.[115] If the Court sought to accommodate claims of conscience, it would have granted exemptions to "philosophical and personal" objections in addition to religious exemptions.

Third, the religious exemption in *Yoder* violates the neutrality of effect condition of public neutrality toward religion. The Court's denial of exemptions to those with "philosophical or personal"[116] objections to formal schooling has the effect of advancing certain religious practices that are inconsistent with formal schooling. Moreover, American law on religion even incorporates the neutrality of effect condition as part of the *Lemon* test for violations of the Establishment Clause.[117] The Court's rule has the effect of hindering the exercise of philosophical or personal beliefs that are inconsistent with formal schooling.[118] This is not merely an incidental or secondary effect of religious exemption in *Yoder*; it is its primary effect. Since the *Lemon* test incorporates the neutrality of effect condition of public neutrality toward religion,[119] the religious exemption in *Yoder* is inconsistent with *Lemon* as well.[120]

The conflict between *Yoder* and public neutrality toward religion did not escape the Court, which acknowledged that religious exemptions may "run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise."[121] Yet, even if the Free Exercise Clause requires an exemption in cases like *Yoder*, the Court's decision to limit the exemption to religious objections violates the Establishment Clause.

This issue is not only limited to judicially crafted exemptions but also extends to legislative exemptions. Iowa, Kansas, South Dakota, and Virginia all have explicit statutory exemptions from mandatory education laws for those with religious objections to formal schooling.[122] A Virginia statute goes the furthest by not requiring any education at all for children receiving religious exemptions, which itself raises constitutionality concerns

113. *Id.* at 215.
114. *Id.* at 216.
115. *See Paradox Redux*, *supra* note 24, at 127.
116. *Yoder*, 406 U.S. at 216.
117. *Se* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
118. *See Paradox Redux*, *supra* note 24, at 127.
119. *See Lemon*, 403 U.S. at 612.
120. *See Paradox Redux*, *supra* note 24, at 127.
121. *Yoder*, 406 U.S. at 220–21.
122. CHRISTINE TSCHIDERER ET AL., 7,000 CHILDREN AND COUNTING: AN ANALYSIS OF RELIGIOUS EXEMPTIONS FROM COMPULSORY SCHOOL ATTENDANCE IN VIRGINIA 10 (2012).

under the Virginia Constitution.[123] However, the exemption also raises concerns about public neutrality toward religion. Such statutes' justifications are religious, not secular. The statutes aim to advance certain religious claims; their primary effect is to give protection to those whose objection to formal schooling is religious rather than secular. Accordingly, in the United States, some state legislatures are following the lead set by the federal courts, granting religious exemptions that prioritize religious freedom over public neutrality toward religion.

It is possible to protect religious freedom without violating public neutrality toward religion in the public education context. If the courts or legislatures want to grant religious exemptions from formal schooling, they should expand these exemptions to include objections that are "philosophical and personal rather than religious."[124] This paradigm, if implemented, would have the benefit of protecting religious beliefs without giving special preferential status to religion.

B. Public Neutrality and Religious Freedom in American Private Employment

At first glance, private employment in the United States does not appear to implicate issues of public neutrality toward religion. The First Amendment forbids public entities, not private entities, from establishing laws respecting an establishment of religion.[125] However, some of the most prominent contemporary controversies regarding the religion clauses of the First Amendment have concerned private employment;[126] this was most recently highlighted by the controversy surrounding the decision in *Burwell v. Hobby Lobby Stores*.[127]

The Patient Protection and Affordable Care Act (ACA) mandates that employers provide health insurance that covers the use of contraceptives.[128] However, subsequent regulations have exempted religious

123. *See* VIRGINIA CONST. art. VIII. ("The General Assembly shall provide for the compulsory elementary and secondary education of every eligible child of appropriate age, such eligibility and age to be determined by law."). *See also* TSCHIDERER, *supra* note 123, at 5.

124. *Yoder*, 406 U.S. at 216. This Note does not take a position on the proper institutional means of granting such exemptions, though there is literature on the subject. *See, e.g.*, Chafetz, *supra* note 111, at 293–95 ("This [democratic-communitarian] position holds that *Yoder* was wrongly decided because it took educational decision-making power away from the democratic people and gave it to individual parents and to the courts, which were tasked with weighing the competing interests of the parents and the state.") Moreover, this Note will not comment on the wisdom of exemptions from formal schooling. Rather, this Note focuses on the scope of such exemptions, given their existence; insofar as exemptions exist, they should encompass both secular and religious objections to formal schooling.

125. *See* U.S. CONST. amend. I.

126. *See generally* Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981); Employment Div., Dep. of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

127. Burwell v. Hobby Lobby Stores, Inc.,134 S.Ct. 2751, 2759 (2014).

128. Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg-13 (2010).

employers from that obligation.[129] Thus, religious employers who oppose contraception do not need to provide health insurance that covers it, but non-religious employers who oppose contraception must deliver those benefits. Such an exemption for religious but not secular employers violates the conditions of public neutrality toward religion. However, if the ACA mandate were to provide identical exemptions for religious and secular employers, it would not violate the conditions of public neutrality toward religion or the Establishment Clause.

The ACA's exemption from the contraception mandate gained considerable prominence in the *Hobby Lobby* case. In this case, for-profit corporations, such as Hobby Lobby and Mardel, claimed an exemption from the ACA mandate requiring employers to provide insurance coverage for contraceptives because paying for contraceptives would violate the Christian principles under which they operate. Despite the corporations' arguments, the government declined to extend its contraception exemption to for-profit organizations.[130] In the subsequent lawsuit, *Hobby Lobby Stores v. Sebelius*, Hobby Lobby and Mardel claimed that the denial of an exemption from the ACA mandate for coverage of abortifacients, or substances that cause abortions, constituted a violation of their rights under the Religious Freedom Restoration Act (RFRA).[131] RFRA established that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a law of general applicability," unless such a burden is the "least restrictive means of furthering [a] compelling governmental interest."[132]

The District Court for the Western District of Oklahoma held that Hobby Lobby and Mardel are not "persons" exercising religion for RFRA purposes, and even if they were, compliance with the ACA mandate would not constitute a substantial burden on their exercise of religion.[133] On appeal, the Tenth Circuit reversed the lower court's decision, and held that Hobby Lobby and Mardel are "persons" for the purposes of RFRA,[134] and the ACA mandate did in fact constitute a substantial burden on their exercise of religion under RFRA.[135]

The Supreme Court then considered the Tenth Circuit's decision on appeal and held that the ACA mandate violated RFRA as applied to those entities.[136] After declaring that for-profit, closely-held corporations are "persons" under RFRA,[137] the Court held that the contraception mandate substantially burdened their "sincere religious belief that life begins at con-

129. 45 C.F.R. § 147.130(a)(1)(iv)(A) (2013).
130. *See id.*
131. *See* Hobby Lobby Stores, Inc. v. Sebelius, 870 F.Supp.2d 1278, 1284–85 (D. Okla. 2012).
132. Religious Freedom Restoration Act, 42 USCA § 2000bb-1 (1993).
133. *See* Hobby Lobby Stores, Inc. v. Sebelius, 870 F.Supp.2d 1278, 1296 (D.Okla. 2012).
134. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1128 (10th Cir. 2013).
135. *See id.* at 1142.
136. *Hobby Lobby*, 134 S.Ct. at 2759.
137. *See id.* at 2769.

ception."[138] Moreover, the Court stated, this burden was not the least restrictive means of furthering a compelling governmental interest.[139]

However, the ACA mandate's exemptions for religious but not secular employers violate the neutrality of justification, aim, and effect conditions of public neutrality toward religion.[140] First, there is no plausible secular justification for the special treatment of religious employers. Under the ACA, secular employers who object to contraception would receive no exemption from the law, and there is no plausible justification for this difference in treatment that does not entail special treatment for religion.

Second, the ACA mandate's religious exemption violates the neutrality of effect condition. One potential secular purpose of the exemption is protecting the freedom of conscience of employers who oppose contraception. However, the exemption is under-inclusive because it excludes nonreligious employers that oppose contraception, as only religious employers receive the exemption. Another potential secular purpose is protecting religious people from the burden of violating a religious belief. Some people believe that providing health insurance that covers contraception constitutes a violation of a serious religious obligation.[141] If they believe that the penalty of violating this religious obligation is eternal damnation, then violating this religious obligation may be even more serious than violating a secular claim of conscience.[142] Even if their belief in eternal damnation is mis-

138. *Id.* at 2775. The court also refused to question the validity of these beliefs; the inquiry ends after determining that the belief is honest. *Id.* at 2779.

139. *See id.* at 2780.

140. While this Note's argument is not necessarily that the accommodation of religion in the *Hobby Lobby* case is unconstitutional, other scholars have made such arguments, and they are generally consistent with this Note. *See generally* Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. 51 (2014) [hereinafter *Invisible Women*]; Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 344 (2014); Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 1, 40 (2014) ("As the analysis below reveals, each side of the Court (majority and principal dissent) may have dealt with all four issues in an internally coherent way. There is room for deep doubt, however, as to whether either side's approach is fully consistent with past decisions under RFRA or the Free Exercise Clause, pre-*Smith*. More troubling by far, the relevant questions are sufficiently vague that any and all answers to them are equally persuasive; that is, they do not cabin judgment in ways consistent with a rule of law."). Moreover, although the constitutionality of RFRA is beyond the scope of this Note, one could also argue that RFRA violates the conditions of public neutrality toward religion. *Cf.* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 453 (1994) ("Supreme Court decisions make clear that the constitutional power to accommodate religious practice does not license the state to confer privileges upon religious believers indiscriminately. . . . The state must not, however, proceed beyond neutrality to favoritism. When purported accommodations have given preference to religious commitments at the expense of comparably serious secular commitments, the Court has been understandably uneasy.").

141. *See Hobby Lobby*, 134 S.Ct. at 2775.

142. *Cf.* Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1366 (2013) ("A second and related argument for religious accommodation is that when religious believers are forced to choose between their religious and legal duties, they experience greater suffering than nonbelievers faced with similar moral conflicts.

taken, the belief will cause them considerable unhappiness. Therefore, the argument goes, Congress should provide a religious exemption but not a secular exemption.

However, this argument is both under-inclusive and over-inclusive.[143] It is under-inclusive because the exemption protects religious employers who do not believe in eternal damnation, as well as those who believe in eternal damnation but do not believe salvation depends on acts.[144] Moreover, it is over-inclusive because it could justify allowing religious employers or employees who have certain kinds of mental illnesses to have an exemption from the ACA mandate.[145]

Third, the ACA mandate's religious exemption violates the neutrality of effect condition by providing an incentive to develop religious, as opposed to secular, objections to contraception.[146] One may object that the primary effect of the exemption is not to further religion, but rather to provide certain employers with a means of avoiding paying for services that fundamentally conflict with their religion. Since the primary effect of the exemption is not to favor religion but rather the religiously oriented conscience of the person that would invoke the exemption, as the argument goes, the exemption does not violate the conditions of public neutrality toward religion.[147] However, even if the primary effect of the exemption is not to further religion itself, the primary effect of granting the exemption only to religious objections and not secular exemptions is to further religion insofar as the exemption promotes religious over secular values.

Congress or the courts could resolve this problem by eliminating the exemption altogether.[148] Alternatively, if Congress and the courts want to

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Because believers affirm the existence of a transcendent authority and fear extratemporal punishments, they are anguished in ways that nonbelievers are not.").

143. *See* Michael Dorf, *Should Mental Illness Count as Religion*, DORF ON LAW (Jan. 15, 2014, 8:00 AM), http://www.dorfonlaw.org.

144. *See id.*

145. Imagine a man who believes he must attend each home game of the Green Bay Packers or he will experience damnation, and suppose that this belief is the product of a mental illness. If the employer requires him to work on Sunday, then he will miss the home games and experience considerable unhappiness. However, he would not be able to claim a religious exemption, as his beliefs are the result of mental illness. *See id.*

146. Similarly, one may argue that RFRA (as well as its successor, the Religious Land Use and Institutionalized Persons Act (RLUIPA)) violates the neutrality of effect condition. *See* Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699, 703 (2005) ("The trouble is that RLUIPA has the effect of advantaging religion and therefore is not substantively neutral."). Moreover, some have argued that the ACA mandate's religious exemption constitutes impermissible burden shifting that violates the Establishment Clause and the neutrality of effect condition. *See generally Invisible Women*, *supra* note 141. *Cf.* Estate of Thornton v. Caldor, 472 U.S. 703, 709–10 (1985) ("Moreover, there is no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers.").

147. *Cf.* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (explaining that a law must have a "primary effect" that neither advances nor hinders religion).

148. Eliminating the exemption would not violate the First Amendment, because "the right of free exercise does not relieve an individual of the obligation to comply with a

preserve the religious exemption to the ACA mandate, they should expand the exemption to secular employers who oppose contraception. In doing so, they could apply the same test that the Court used in *United States v. Seeger*, where it determined the scope of religious exemptions as applied to personal exemptions to conscription into the military.[149] In *Seeger*, the Court expanded its conception of religious belief to include a "sincere and meaningful" belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God[.]"[150] The Court here did not give protection to all those who hold beliefs inconsistent with the law; it restricted its protection to those who have sincere and meaningful beliefs analogous to those sincerely held in a religious context.[151] Therefore, if the ACA mandate maintains the exemption, but the courts use the logic applied in *Seeger*, then all employers who have a meaningful and sincere opposition to abortion would receive an exemption from the ACA contraception mandate.

III. Public Neutrality and Religious Freedom in France

This section applies the analysis in Part I to law and religion in France. This Note will first address the conflict between public neutrality and religious freedom in French public education and then describe this conflict in French private employment. France currently provides more protection to secular beliefs than to certain religious beliefs, and could resolve these conflicts by providing similar protections to religious and secular beliefs.

A. Public Neutrality and Religious Freedom in French Public Education

In the context of public education, France is the mirror image of the United States; while the United States overprotects religious belief at the expense of secular belief, France provides insufficient protection for certain types of religious expression, like headscarves worn by Muslims for religious reasons.[152]

'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Employment Div., Dep. of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990). The ACA is generally applicable, so the Free Exercise Clause does not require a religious exemption. *See also Invisible Women*, supra note 141, at 63.

149. *See Seeger*, 380 U.S. at 166.

150. *Id.*; Bruce Ledewitz, *Experimenting with Religious Liberty: the Quasi-Constitutional Status of Religious Exemptions*, Duquesne University School of Law Research Paper No. 2014-07 at 108 (2014) ("In [*Seeger*], the traditional religious believer and the seemingly nonreligious claimant were treated more or less the same for purposes of a statutory religious exemption to the draft that was considered against the backdrop of Free Exercise.").

151. *See Seeger*, 380 U.S. at 166. For example, the Court did not extend its protections to insincere objections to laws that one develops opportunistically in order to claim an exemption.

152. For an account of why some Muslim women wear headscarves, or hijabs, *see generally* Abdullah Galadari, *Behind the Veil: Inner Meanings of Women's Islamic Dress Code*, 6 INT'L J. INTERDISC. SOC. SCI. 115 (2012).

French law on religion is grounded upon the principle of *laïcité*, which contains two pillars: public neutrality toward religion and religious freedom.[153] On one hand, *laïcité* protects freedom of conscience, as applied to freedom of religion and the manifestation of religious beliefs.[154] Wearing a headscarf for religious reasons constitutes the manifestation of a religious belief. Therefore, *laïcité* seems to protect the right to wear headscarves in public schools.

However, *laïcité* also aims to ensure the state's neutrality toward religion,[155] with the usual application in the context of public administration and public service, including public education.[156] At a minimum, *laïcité* requires that public employees display strict neutrality toward religion.[157] Under a broad interpretation of the public neutrality pillar of *laïcité*, public schools should provide a secular environment that precludes the display of conspicuous religious symbols.[158] Because wearing a headscarf for religious reasons is a conspicuous display of a religious symbol, *laïcité* seems to permit or even require the prohibition of wearing headscarves in public schools.

French courts first encountered these conflicting pillars of *laïcité* in 1989, after three Muslim headscarf-donning female students were expelled from a public high school because their attire infringed on "the *laïcité* and neutrality of the public school."[159] In an advisory opinion, the *Conseil d'État* concluded that the display of religious symbols "is not in itself incompatible with the principle of *laïcité*, insofar as it constitutes the exercise of freedom of expression."[160] However, this freedom 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.[161] Thus, according to the *Conseil d'État*, toleration of headscarves is the rule, and prohibition of headscarves is the exception that must be decided on a case-by-case basis.[162] Overall, this ruling suggests tolerance for headscarves while expressing concern about the detrimental effect of headscarves on the secular environment of the classroom.

However, in 1994, François Bayrou, then Minister of Education, issued a memorandum that distinguished between ostentatious symbols, which

153. *See* STASI REPORT, *supra* note 1, at 28–29.

154. *See* 1985 CONST. art. 1 ("France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.") [hereinafter FRENCH CONSTITUTION]; STASI REPORT, *supra* note 1, at 25.

155. *See* FRENCH CONSTITUTION, *supra* note 156, at art. 1; STASI REPORT, *supra* note 1, at 24.

156. STASI REPORT, *supra* note 1, at 24.

157. *See* Conseil d'État [Council of State], May 3, 1950, *Miss Jamet.*

158. *See* FRANCOIS BAYROU, BAYROU CIRCULAR (1994), reprinted in STASI REPORT 1–3 [hereinafter BAYROU CIRCULAR].

159. BOWEN, *supra* note 11, at 83.

160. Conseil d'État [Council of State], Nov. 27, 1989, Avis no. 346.893.

161. *Id.*

162. *See* CHRISTIAN JOPPKE, VEIL: MIRROR OF IDENTITY 38 (2009).

were to be banned in public schools, and discrete symbols, which were to be tolerated.[163] Citing concerns about social integration, Bayrou sought to prevent the "splintering of the nation into separate communities that are indifferent to one another[.]"[164] Bayrou wished to promote a secular national identity and viewed public education as a prominent means of achieving that end.[165] Ostentatious symbols, according to Bayrou, constitute forms of proselytization and as such hinder the development of a secular national identity.[166]

Thus, Bayrou expanded the prohibition on religious items in public schools to include ostentatious symbols. While the *Conseil d'État* struck the balance between religious freedom and public neutrality in favor of religious freedom, Bayrou struck the balance in favor of public neutrality. However, Bayrou's justification for the ban on ostentatious symbols relied more on the importance of cultural integration in France than on the concept of *laïcité*.

Bayrou's ban on ostentatious symbols was only the beginning of the movement in favor of public neutrality toward religion at the expense of religious freedom. Approximately a decade after Bayrou issued his memorandum, President Jacques Chirac commissioned the Stasi Report on *laïcité* and the headscarf controversy, which ultimately recommended the prohibition of headscarves in public schools.[167] The report noted the tension between the public neutrality and freedom of conscience pillars of *laïcité*,[168] outlining the conflict as especially apparent in public service and public administration settings, including in education, prisons, public hospitals, and the military.[169] On one hand, citizens retain at least some rights to freedom of religion and religious expression even in the context of public education.[170] However, under French law, the right to express religious convictions is limited in each context, including in education, because of the demands of public neutrality toward religion.[171]

The Stasi Report seems principally concerned with the detrimental effect of religious expression in public schools on public neutrality toward religion. According to the report, pupils in public schools are "subject to external influences and to pressures[,]" including religious influences;[172] thus implying that the existence of headscarves in schools would exert an impermissible influence on public school pupils' religious views.[173] If this observation is correct, then pursuant to the freedom of effect condition of public neutrality toward religion, the government should ban the wearing

163. *See* BAYROU CIRCULAR, *supra* note 159, at 1–2.
164. *Id.* at 1.
165. *See id.*
166. *See id.* at 1–3.
167. *See* STASI REPORT, *supra* note 1, at 54–55.
168. *See id.* at 28–29.
169. *See id.*
170. *See id.* at 29–30.
171. *See id.*
172. STASI REPORT, *supra* note 1, at 29.
173. *See id.*

of headscarves in schools. Therefore, while a ban would inhibit religious freedom, the report suggests that the sacrifice is worth it.[174] Consequently, the Stasi Report included a recommendation that public schools ban clothing and symbols that demonstrate a religious preference.[175]

As a result, in 2004, the French government prohibited clothing that manifests religious belief in public schools.[176] Subsequently, in 2010, the French government prohibited the practice of wearing facial coverings in public.[177] With these two rules in mind, the French government has clearly chosen to prioritize public neutrality toward religion over religious freedom in public education.

While there may be arguments in favor of the headscarf ban grounded in cultural integration or gender equality concerns,[178] the arguments from *laïcité* are not persuasive.

The Stasi Report argued that many girls who wear headscarves do so because of coercive pressure.[179] If this were true, then wearing headscarves would not constitute a true expression of religious belief. However, the Stasi Commission failed to adequately support its contention of coercion because it did not conduct a thorough study of why female students wore the headscarf, and because it did not conduct a conscientious review of the relevant social science literature.[180] The only evidence that the Stasi Commission adduced to support its claim of coercion came from interviews with unnamed witnesses, some of whom were interviewed behind closed doors.[181]

If the practice of wearing headscarves is not coerced, then it is an expression of religious belief and therefore should be protected by *laïcité*. The headscarf ban represents the opposite of the problem present in the United States. While the United States protects certain religious beliefs more than secular beliefs,[182] France protects certain religious beliefs less than secular beliefs. The Stasi Report justifies the ban on headscarves by appealing to the detrimental effect of proselytization on children given their susceptibility to external influences.[183] This justification for the headscarf ban is under-inclusive. If children were impressionable as to religious matters, they would probably be impressionable as to political

174. *See id.*

175. *See id.* at 54–55.

176. Loi 2004-228 du 15 mars 2004 [Law 2004-228 of March 15, 2004], Mar. 15, 2004.

177. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 banning the covering of one's face in public], Oct. 11 2010.

178. *See, e.g.*, BAYROU CIRCULAR, *supra* note 159, at 1–2; STASI REPORT, *supra* note 2, at 40.

179. *See* STASI REPORT, *supra* note 1, at 38.

180. *See* T. Jeremy Gunn, *Religious Freedom and Laicite: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 469–70 (2004).

181. *See id.*

182. *See supra* Part I.

183. *See* STASI REPORT, *supra* note 1, at 29.

matters as well.[184] Yet the Commission was silent on the danger of expressing controversial secular beliefs, such as political beliefs in schools. Were the Commission only worried about undue influence on children, it would have also encouraged a ban on ostensive political symbols, such as clothing that expresses support for a political party. Perhaps the Commission was more worried about the spread of religious belief, or more specifically Islam, than it was about the spread of controversial political doctrine, thereby effecting a violation of the neutrality of aim condition.

Advocates of the headscarf ban, however, argue that the headscarf controversy is a matter of public order, not a matter of freedom of conscience.[185] The Stasi Report cites only minor instances of class disruption relating to the role of religion in schools. For example, the report notes that some pupils and their parents challenge the authority of female teachers, and implies that students' religious convictions cause this challenge to teachers' authority.[186] Moreover, the report notes that some female students refuse to accept regulations regarding identification or refuse to face a male examiner, thereby disrupting examinations due to religious convictions.[187]

However, the Stasi Report did not explain the relationship between such instances of disruption and the practice of wearing headscarves. It is not clear how the practice of wearing headscarves causes disruptions in schools, or how it leads to challenges to the authority of female teachers.[188] Even if some students disobey female teachers for religious reasons, it is highly unlikely that the presence of headscarves among the student body actually causes these students to disobey female teachers. More plausibly, it is the underlying religious beliefs, and not the practice of wearing headscarves, that causes such disruptions, and it is unlikely that the headscarf ban will change the underlying religious beliefs of the students. Furthermore, while the practice of wearing headscarves may disrupt the standard practices for identifying students, schools may develop alternative means of identification.[189] Thus, absent evidence that the practice of wearing headscarves disrupts the public order, the government should not use public order as a justification for the headscarf ban.[190]

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184. *See generally* ROBERT D. HESS & JUDITH V. TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN (2006)[hereinafter Hess]; Roger Mortimore & Claire Tyrrell, *Children's acquisition of political opinions*, 4 J. PUB. AFFAIRS 279 (2004) [hereinafter *Children's Acquisition of Political Opinion*].

185. *See* Mukul Saxena, *The French Headscarf Law and the Right to Manifest Religious Belief*, 84 U. DET. MERCY L. Rev. 765, 777 (2007).

186. *See* STASI REPORT, *supra* note 1, at 40.

187. *See id.*

188. *See id.*

189. *See id.*

190. *See* Jacques Robert, *Religious Liberty and French Secularism*, 2003 BYU L. Rev. 637, 646 (2003) ("In summary, the state—secular, neutral, respectful of all opinions and beliefs, guarantor of freedom of religion and worship, and propagandist for no faith or ideology—cannot oppose religious movements that prosper in its territory using as its reason only the policy of protecting the public order.").

Overall, France faces the opposite problem of the United States. While the United States protects religious belief more than nonreligious belief, France provides insufficient protection to certain types of religious belief, such as wearing headscarves. France could resolve this problem by lifting the ban on headscarves in schools, or by maintaining the ban but providing similar restrictions on nonreligious symbols.[191]

B. Public Neutrality and Religious Freedom in French Private Employment

Recently, the tension between public neutrality toward religion and religious freedom arose in the French private employment context as well. As was the case with public education, recent French law and policy has tended to give insufficient protection to religious belief in a similar but opposite manner to recent American law and policy, which has tended to give excessive protection to religious belief.

Traditionally, people believed that religion was a matter of private life and not a part of the workplace.[192] However, in the 1970s, France saw an increase in its Muslim population because of immigration from the Mediterranean Basin, and Muslim employees began to request special accommodations for their religious practices.[193] Among other requests, these employees sought specialized prayer rooms and the possibility of observing Ramadan during work time.[194] Employers could accommodate some requests with religion-neutral provisions, such as allowing Muslims to use their cigarette breaks for their daily prayers, but fulfilling other requests required religion-specific accommodation.[195]

When considering a request for a religious accommodation, employers must consider the French legal framework for religion in the workplace. French law prohibits discrimination based on religion in the workplace.[196] However, employers may place limits on the manifestation of religious belief in the workplace.[197] Employees cannot use claims of conscience to refuse to perform a job task, except by citing an express provision of an employment contract or by invoking a claim of conscience of legal origin.[198] Thus, absent a contractual provision, employees do not have a legal right to accommodation when they refuse to submit to medical appointments for religious reasons,[199] refuse to handle pork while working in a

191. For example, schools could restrict the ability of students to wear ostensive political symbols, such as clothing that expresses support for a political party.

192. *See* Franck Frégosi & Deniz Kosulu, *Religion and religious discrimination in the French workplace: Increasing tensions, heated debates, perceptions of labour unionists and pragmatic best practices*, 13 INT'L J. DISCRIMINATION & L. 194, 196 (2013).

193. *See id.*

194. *See id.*

195. *See id.*

196. C. TRAV. Article L122-45.

197. *See* STASI REPORT, *supra* note 1, at 27–78.

198. Cour de Cassation, Soc. [Court of Cassation, Social Division], Mar. 24, 1998.

199. Cour de Cassation, Soc. [Court of Cassation, Social Division], May 29, 1986.

butcher department,[200] or request additional payment instead of a lunch break if an employer provides a free lunch while the employee is fasting for religious reasons.[201] While an employer can restrict an employee's manifestation of religion, such restrictions must be justified by the nature of the task performed and must be proportionate to a legitimate aim.[202] For example, a saleswoman in a clothing store does not have a right to wear a full body veil in the workplace.[203] Thus, there is a tension between the employee's interest in the free exercise of religion and the employer's interest in the advancement of the purpose of a business.

However, within the last few years, courts have had to balance the interests of the employees and employers with the interest of the state in public neutrality of religion. At first glance, this appears implausible, since *laïcité* seems to apply to public employers and not to private employers.[204] However, recent developments in French law suggest that *laïcité* has expanded beyond its origins as a restriction on governmental involvement with religion. In 2010, the French government prohibited the practice of wearing facial covering in public.[205] The ban applies to public roads and places open to the public or used for a public service.[206] Yet, the ban allows women to continue to wear the veil in a private context.[207] Delineating the boundaries between the public and the private spheres, however, has been a matter of great controversy, as exemplified by the Baby Loup affair.

In 2008, Fatima Afif, an employee of a private nursery in Paris called "Baby Loup," was fired for refusing to take off her headscarf.[208] However, on March 19, 2013, the *Cour de Cassation*, an appellate court, invalidated Afif's dismissal from employment.[209] Baby Loup claimed that *laïcité*, or at least its public neutrality prong, applied and that religious neutrality had priority over religious freedom in that context.[210] Therefore, Baby Loup claimed, Afif's dismissal was just an enforcement of *laïcité*. However, the court declared that *laïcité*, embodied in Article 1 of the Constitution, does

200. Cour de Cassation, Soc. [Court of Cassation, Social Division], Mar. 24, 1998.

201. Cour de Cassation, Soc. [Court of Cassation, Social Division], Feb 16, 1994.

202. C. TRAV. Article L121-1. However, some argue that the "interest of the business" is more important than the "nature of the task" for the jurisprudence on this provision. *See* Frégosi & Kosulu, *supra* note 194, at 210.

203. *See id.* at 198. Part of the job of a saleswoman in a clothing store is to wear the store's products, and a full body veil would inhibit that function. *See id.*

204. The French Constitution identifies France as a secular republic, but does not identify any non-governmental entities as secular. *See* 1958 CONST. art. 1 (Fr.).

205. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 banning the covering of one's face in public space], Oct. 11 2010.

206. *Id.*

207. *See id.*

208. *See French veil sacking case goes back to court*, FRANCE 24, Oct. 18, 2013, *available at* http://www.france24.com/en/20131017-french-veil-sacking-case-goes-back-court/.

209. Cour de Cassation, Soc. [Court of Cassation, Social Division], Mar. 19, 2013.

210. *See id.* ("the principle of freedom of conscience and religion of each member of staff may impede compliance with the principles of *laïcité* and neutrality that apply in performance of all activities developed by Baby Wolf.")

not apply to private employers like Baby Loup.[211] As a result, Baby Loup could only have justified the dismissal, pursuant to French labor and employment law, in relation to the nature of the task at hand and as proportional to a legitimate aim.[212] The court did not find such a justification in this case and invalidated Afif's dismissal.[213]

An appeals court in Paris reversed, upholding Afif's dismissal in the name of *laïcité*.[214] The court held that Baby Loup has a "public service mission," so it has the right to "impose neutrality on its personnel."[215] The court noted Afif's contact with children in the nursery, suggesting that the court's concern was the non-neutral impact of allowing her to wear the veil.[216] This concern clearly parallels those addressing veils in public schools cited in the Stasi Report.[217]

Afif's lawyer disagreed, however, and claims that the court "invented an obligation to protect young children's freedom of conscience, which does not exist in the law[.]"[218] Similarly, the recent *Cour d'Appel* decision did not explain where the right to impose neutrality on private employees exists in the law.[219] The French labor code does allow employers to place restrictions upon the employees' exercise of religion, but only if these restrictions are justified by the nature of the task performed and only if they are proportionate to a legitimate aim.[220] However, it is unclear how the practice of wearing a headscarf interferes with Afif's task in the nursery.[221]

One may claim that children are especially susceptible to external influence, but this concern is under-inclusive as a justification for banning headscarves in private employment. An employee could have controversial secular beliefs, such as controversial political beliefs. These would influence children as much as religious beliefs would influence them,[222] yet there is no comparable ban on controversial beliefs in general. As in the public school context, this disparity in treatment of religious and secular beliefs may express a general suspicion of religious belief as potentially

211. *See id.*
212. *See id.*
213. *See id.*
214. Cour d'Appel de Paris (Court of Appeal of Paris), Nov. 27, 2013.
215. *Id.*
216. *See id.*
217. *See* STASI REPORT, *supra* note 1, at 60–61.
218. *See* Thomas Hubert, *French veil ban upheld in controversial court case*, FRANCE 24, Nov. 27, 2013, *available at* http://www.france24.com/en/20131127-islamic-veil-baby-loup-european-court-human-rights-france-secular-muslim-burqa-niqab/.
219. *See id.*
220. C. TRAV. Article L121-1. However, some argue that the "interest of the business" is more important than the "nature of the task" for the jurisprudence on this provision. *See* Frégosi & Kosulu, *supra* note 193, at 210.
221. Compare this case with a case in which a woman in a clothing store wore a full-body veil. *See* Frégosi & Kosulu, *supra* note 193, at 198. In this case, wearing certain clothing was part of the employee's task, so it made sense for the court to require the employee to not wear the veil. *See id.*
222. *See generally* HESS, *supra* note 185.

corrupting to youth. However, such a suspicion would violate the neutrality of aim condition.

Advocates of Afif's dismissal may claim that the nursery is utilizing its right to impose neutrality on its personnel. The Constitution states that France is "une République [. . .] laïque,"[223] but it is not clear how this provision could require private employers to be neutral toward religion, as the Constitution establishes the government and not private employers.[224] Furthermore, if private employers do have a right to impose neutrality on their employers, then the reasoning in previous court decisions is redundant; employers could always justify the restriction of the right to exercise religion as an enforcement of *laïcité*.[225]

Moreover, it is not clear how neutrality could apply in the private context without violating one's freedom to express religion. While one may sacrifice the right to express religious belief to an extent when working for the government—banning public employees from wearing headscarves might be justified to enforce public neutrality[226]—applying such a restriction to private employees would curtail religious freedom without adequate justification. Therefore, the previous *Cour de Cassation* ruling that *laïcité* does not apply to private employers like Baby Loup was correct.[227] *Laïcité* does not justify the headscarf ban in private employment.

As in the realm of public education, the French government has provided insufficient protection for religious beliefs in private employment. If the government were concerned with the improper influence of French youth, it would have placed similar restrictions on the ability of nursery employees to wear secular symbols of expression, such as political symbols or any clothing that expresses support for a political party. Neutrality toward religion commands that a government not single out religious belief or expression for more or less protection than secular belief or expression, and the implementation of the veil ban has violated this condition. Therefore, France should either provide similar bans on secular and religious expression, or it should lift the ban altogether.

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223. Roughly translated to "a secular republic."

224. 1958 CONST. art. 1 (Fr.).

225. *See, e.g.*, Cour de Cassation, Soc. [Court of Cassation, Social Division], Mar. 24, 1998; Cour de Cassation, Soc. [Court of Cassation, Social Division], Feb. 16, 1994; Cour de Cassation, Soc. [Court of Cassation, Social Division], May 29, 1986.

226. Even previous cases on the headscarf ban in the context of public employees have been ambiguous. *Compare* Cour d'Appel de Paris (Court of Appeal of Paris), Mar. 16, 2001, *Mrs. Charni v. SA Hamon* (upholding the dismissal of a public employee for wearing a headscarf) *with* Arbitrations Board, Dec. 17, 2002, *Tahri v. Teleperformance France* (overturning the dismissal of a public employee for wearing a veil because the dismissal was discriminatory). *See also* STASI REPORT, *supra* note 1, at 28 (noting the possible tension between these two cases and suggesting that judges have made these decisions on a case-by-case basis).

227. Cour de Cassation, Soc. [Court of Cassation, Social Division], Mar. 19, 2013.

Conclusion

Considered in isolation from each other, public neutrality toward religion and religious freedom seem like solid foundations for law and public policy toward religion. However, as this Note has argued, there is tension between these two pillars of law and public policy in the religious context. Religious freedom seems to require special accommodation of religious belief, but public neutrality toward religion forbids special accommodation for religion.

Fortunately, this conflict is not inevitable. Governments may protect religious freedom without violating public neutrality toward religion by granting freedom of religion as part of a broader freedom of conscience. Thus, if the government grants a religious exemption from a generally applicable law, then it must also grant an exemption from the law for nonreligious objections. Otherwise, it would be privileging religion over nonreligion, and would thus violate public neutrality toward religion.

Recent controversies in the United States and in France illustrate this tension between public neutrality toward religion and religious freedom. The United States has been inclined to grant religious exemptions from generally applicable laws while denying exemptions from those whose objection to a law is not religious in nature. Thus, the United States privileges religious freedom over public neutrality toward religion. In order to obviate this conflict, the United States should expand its religious exemptions to include objections to generally applicable laws based on secular concerns.

On the other hand, the recent headscarf controversies in France illustrate a preference for public neutrality toward religion over religious freedom. The recent headscarf bans have given less protection to certain religious beliefs than they do to certain secular beliefs. Thus, France should broaden its protection of secular belief to include religious belief.

Giving equal protection to secular and religious belief would resolve a putative paradox between religious liberty and public neutrality toward religion, and it would resolve recent controversies in the United States and France.