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# FAITH IN THE LAW—THE ROLE OF LEGAL ARRANGEMENTS IN RELIGION-BASED CONFLICTS INVOLVING MINORITIES

OFRIT LIVIATAN\*

**Abstract:** This Article examines the conflict-management role conferred upon the law within Western liberal democracies in the context of cultural tensions involving religious minorities. The Article finds that a threatened hegemonic Christian identity and secular illiberal sentiments disguised in liberal narratives often motivated legislative and judicial actions curtailing the freedom of religious minorities in leading liberal democracies. Based on these findings, this Article challenges the shortcomings of existing liberal scholarship to account for the potential bias presented in the liberal preference to facilitate cultural conflicts through legal means. Yet, the Article suggests that law's limitations as a neutral vehicle in conflict resolution does not necessarily counteract its ability to manage conflicts. The continued attractiveness of law as the principal conflict-resolution device in liberal democracies springs from its political nature, namely the recognition that shifts in political power could translate into legal change.

## INTRODUCTION

Neutrality among competing notions of the good life has been liberalism's formula for peaceful social coexistence.<sup>1</sup> Liberal constitutionalists conferred the implementation of this formula on the law under the assumption that constitutional frameworks and other human rights

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<sup>1</sup> See Ronald Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113, 127 (Stuart Hampshire ed., 1970); see also JOHN GRAY, TWO FACES OF LIBERALISM 69–70 (2000); Charles Taylor, *Cross Purposes: The Liberal-Communitarian Debate*, in LIBERALISM AND THE MORAL LIFE 159, 164 (Nancy L. Rosenblum ed., 1989). The search for neutrality derives from liberalism's notion of "justice," an idea that has been articulated with slight variations by different liberal thinkers, beginning with Kant. See IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 34–35 (John Ladd trans., The Bobbs-Merrill Co. 1965). Its prominent contemporary representative is John Rawls. JOHN RAWLS, A THEORY OF JUSTICE (1971).

instruments would regulate the democratic process and ensure its impartiality among competing values.<sup>2</sup>

This Article explores the law's conflict-management role in the context of religion-based controversies within liberal democracies involving practices of religious minorities. Minorities' religious claims pose a difficult challenge to liberal political thought.<sup>3</sup> Liberalism seeks to guarantee religious liberty and protect minorities who are vulnerable to a majority's encroachment on their rights. Nevertheless, minorities' religious claims are frequently at odds with the values and traditions of the dominant culture in Western democracies. Thus, in an increasingly diversifying world, Western policy-makers and judges must grapple with the task of weighing religious freedom claims—possibly involving patriarchal or otherwise discriminatory practices—against competing claims invoking comparable liberal ideals such as liberty, equality, and autonomy.<sup>4</sup>

Western democracies could hardly be regarded as a single unit. With different histories, Western democracies diverge in key variables including demography, religious heritages, and the legal arrangements regulating the relationship between religion and state. Nevertheless, in an attempt to address growing socio-cultural diversity, Western democracies have converged toward a common pluralistic approach on coexistence, cultivating the perception that they offer a hospitable legal environment for religious minorities.<sup>5</sup>

As illustrated in what follows, discrepancies exist between the *de jure* liberal approach of maintaining neutrality toward competing worldviews by way of rights protection, and its *de facto* legal application in the context of religious minorities. The surveyed legislative and judi-

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<sup>2</sup> See, e.g., BRIAN BARRY, JUSTICE AS IMPARTIALITY 93–94 (1995); RONALD DWORKIN, LAW'S EMPIRE 90–91 (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 147–49 (1977); WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY 6–7 (2007); EDWARD SCHNEIER, CRAFTING CONSTITUTIONAL DEMOCRACIES 3 (2006); CASS SUNSTEIN, DESIGNING DEMOCRACY 6–7 (2007).

<sup>3</sup> See RENÁTA UITZ, FREEDOM OF RELIGION IN EUROPEAN CONSTITUTIONAL AND INTERNATIONAL CASE LAW 169 (2007); Willy Foutré, *Belgium's Anti-Sect War*, 12 SOC. JUST. RES. 277, 377–78 (1999); Danièle Hervieu-Léger, *France's Obsession with the "Sectarian Threat,"* in NEW RELIGIOUS MOVEMENTS IN THE 21ST CENTURY 49, 50 (Phillip Charles Lucas & Thomas Robbins eds., 2004).

<sup>4</sup> See SUNSTEIN, *supra* note 2, at 56–57; Nancy L. Rosenblum, *Introduction to LIBERALISM AND THE MORAL LIFE*, *supra* note 1, at 5–6.

<sup>5</sup> See Benjamin R. Barber, *Liberal Democracy and the Costs of Consent*, in LIBERALISM AND THE MORAL LIFE, *supra* note 1, at 55 ("Western liberal states are in fact all liberal democracies, combining principles of individual liberty with principles of collective self-government and egalitarianism.").

cial actions in Europe and the United States suggest that minorities' religious liberty has been legally curtailed while dressed in the guise of liberal discourse, often stemming from threatened hegemonic Christian identity and secular illiberal sentiments. Based on these findings, this Article scrutinizes the promotion of law in current liberal thought as the primary device for defusing cultural tensions.

Part I of the Article lays out the theoretical approaches establishing the role of legal institutions as primary vehicles in advancing liberal values.<sup>6</sup> Part II surveys clashes between religious minority claims and competing rights and interests. This survey suggests that minorities' religious freedom within Western democracies has been repeatedly restricted using neutral liberal narratives that mask illiberal motivations.<sup>7</sup> Part III evaluates the practicality in assigning the role of facilitating coexistence to the law.<sup>8</sup> The Article concludes that the possibility of manipulating legal arrangements does not necessarily counteract law's conflict-management character.<sup>9</sup> The political character of the law—namely, the intrinsic possibility to change unfavorable legal arrangements by way of political shifts—contributes to preserving law's authority as a mechanism of dispute resolution.

## I. THEORETICAL APPROACHES ON THE ROLE OF LAW IN ADVANCING LIBERAL IDEALS

The perpetual quest within Western political thought to resolve social and cultural tensions prompted the contemporary ascendancy of the liberal project.<sup>10</sup> Liberalism's basic premise is that there is no single best way to live one's life because different people hold differing ideas on the correct ordering of values.<sup>11</sup> As such, peaceful coexistence in multicultural societies necessitates the protection of personal liberty to all and a governmental commitment to cultural neutrality.<sup>12</sup> In modern

<sup>6</sup> See *infra* Part I.

<sup>7</sup> See *infra* Part II.

<sup>8</sup> See *infra* Part III.

<sup>9</sup> See *infra* text accompanying notes 196-211.

<sup>10</sup> See Rosenblum, *supra* note 4, at 4 (“[C]urrent political conditions have had a number of consequences . . . [including] that liberalism has emerged as *the* political theory whose resources are most called upon . . . .”); see also GRAY, *supra* note 1, at 3 (“[L]iberal regimes are often viewed as solutions to a modern problem of pluralism.”); BHIKU PAREKH, *RETHINKING MULTICULTURALISM* 11 (2000) (“Liberalism is rightly assumed to be the most hospitable of all political doctrines to cultural diversity.”).

<sup>11</sup> See Judith N. Shklar, *Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE*, *supra* note 1, at 21.

<sup>12</sup> See sources cited *supra* note 1.

Western democracies these ideas have been channeled through legal instruments institutionalizing constitutional guarantees for fundamental rights and freedoms.<sup>13</sup> These constitutional entrenchments are regarded as facilitating pluralism by protecting minorities from majority encroachment and ensuring that social and cultural conflicts are neutrally managed.<sup>14</sup>

Nonetheless, liberalism does not envision rights as absolute concepts, legitimizing their limitation when they conflict with other fundamental rights or when important competing interests are at stake. As Berlin famously noted, “[t]he world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others.”<sup>15</sup> Because constitutions are often deliberately abstract, in many Western democracies courts have become the primary institutions determining the ultimate result of constitutional conflicts.<sup>16</sup> This process of judicial interpretation gave rise to ample scholarly debate as liberal thinkers sought to discern neutral principles for the limitations of rights.<sup>17</sup>

The “Law as Integrity” jurisprudential position, developed in the scholarship of Ronald Dworkin and John Rawls, advances the utilization of moral criteria in legal interpretation. According to this view, the process of judicial review necessarily considers values and principles that act as moral constraints on judges, leading them to the true meaning of the law.<sup>18</sup> This principle-driven approach has been sharply criticized by

<sup>13</sup> SCHNEIER, *supra* note 2, at 4.

<sup>14</sup> See MURPHY, *supra* note 2, at 9–10; SCHNEIER, *supra* note 2, at 73–75; SUNSTEIN, *supra* note 2, at 6–7. For a critical assessment of the global trend of constitutionalism, see generally Ofrit Liviatan, *The Impact of Alternative Constitutional Regimes on Religious Freedom in Canada and England*, 32 B.C. INT’L & COMP. L. REV. 45 (2009).

<sup>15</sup> ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 168 (1970).

<sup>16</sup> See MURPHY, *supra* note 2, at 466. *But see* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 35 (2d ed. 2008). *See generally* Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INT’L J. CONST. L. 572 (2005) (discussing the role of balancing in courts’ interpretation of constitutional rights).

<sup>17</sup> See BARRY, *supra* note 2, at 3–4; MURPHY, *supra* note 2, at 6–8, 471–72.

<sup>18</sup> See RONALD DWORIN, *A MATTER OF PRINCIPLE* 2 (1985); RONALD DWORIN, *FREEDOM’S LAW* 81–82 (1996); DWORIN, *LAW’S EMPIRE*, *supra* note 2, at 255–58; DWORIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 81. According to Dworkin, principles like justice, equality, political integrity, and the respect for individual rights—often enshrined in constitutional prescriptions—provide the moral foundation for legal judgment and lead judges toward the correct interpretation of the law even in the hardest of cases. Similarly, Rawls argued:

[T]he Justices . . . must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political val-

the Critical Legal Studies (CLS) Movement.<sup>19</sup> CLS scholars dismiss the rational foundation of legal reasoning as masking an overtly biased facilitation of freedoms that reinforces the hegemonic interests and ideologies in society.<sup>20</sup> Nonetheless, the CLS Movement itself has been accused of nihilistic attitudes and circular legal deconstructions, stopping short of offering an alternative political vision for a just society.<sup>21</sup>

Legal Pragmatism attempted to fill this ideological liberal gap by forsaking any grand theory of constitutional adjudication.<sup>22</sup> This approach identified the goal of adjudication in “[helping] society cope with its problems” by applying a flexible “whatever works” criterion as opposed to searching for the “truth, natural law, or some other high-level abstract validating principle.”<sup>23</sup> As such, the pragmatist’s adjudica-

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ues of justice and public reason. These are values that they believe in good faith, as the duty of civility, requires that all citizens as reasonable and rationale might reasonably be expected to endorse.

JOHN RAWLS, *POLITICAL LIBERALISM* 236 (1993).

<sup>19</sup> MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 73 (1987).

<sup>20</sup> See *id.* at 62–63; DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 2 (1997); ROBERTO UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 36 (1986); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 703–04 (1985); Allen C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 208–09 (1984); David Kairys, *Legal Reasoning*, in *THE POLITICS OF LAW* 11, 16–17 (David Kairys ed., 1982); Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 645–46 (1984).

<sup>21</sup> See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 84 (2003); Raymond A. Belliotti, *Is Law a Sham?*, 48 PHIL. & PHENOMENOLOGICAL RES. 25, 38–40 (1987); Hutchinson & Monahan, *supra* note 20, at 213, 227, 238–39; Theodore J. St. Antoine, Book Review, 43 INDUS. & LAB. REL. REV. 142, 142 (1989) (reviewing KELMAN, *supra* note 19).

<sup>22</sup> See RICHARD A. POSNER, *THE PROBLEMS OF MORAL AND LEGAL THEORY* 240–42 (1999); SUNSTEIN, *supra* note 2, at 50–51; CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 15–16 (1996); Daniel Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1331–32 (1988); Daniel Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 167–69; Thomas C. Grey, *Hear the Other Side*, 63 S. CAL. L. REV. 1569, 1589–95 (1990); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 805–06 (1989); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 11 (1998); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1700–01 (1990). See generally JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927); STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* (1999); RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* (1982); W. Eskridge & Phillip Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

<sup>23</sup> Richard A. Posner, *Pragmatism vs. Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 738 (2002). Posner identifies three core elements of pragmatism:

The first is a distrust of metaphysical entities (“reality,” “truth,” “nature,” etc.) viewed as warrants for certitude whether in epistemology, ethics, or politics. The second is an insistence that propositions be tested by the consequences, by the difference they make—and if they make none, set aside. The third is an

tive approach has been “experimental,” a continuing trial-and-error process of resolving conflict while guided by the aim of generating progressive social and political improvement.<sup>24</sup> Furthermore, ardent pragmatists contend that judicial decision-making should be a process that genuinely considers and seeks to improve the status of the dominated and marginalized groups.<sup>25</sup>

Methodologically, judicial review of constitutional conflicts has been largely performed through a balancing process known as “weighing,” or the “proportionality principle.”<sup>26</sup> The balancing method has been carried out with minor variations<sup>27</sup> as a three-pronged test focusing on fairness and even-handedness standards.<sup>28</sup> This test is described as follows:

The first stage involves establishing the degree of non-satisfaction of, or a detriment to, a first principle. This is followed by a second stage in which the importance of satisfying the competing principle is established. Finally, in the third

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insistence on judging our projects, whether scientific, ethical, political, or legal, by their conformity to social or other human needs rather than to “objective,” “impersonal” criteria.

Richard A. Posner, *What Has Pragmatism to Offer Law?*, in PRAGMATISM IN LAW AND SOCIETY 29, 35–36 (Robert W. Gordon & Margaret Jane Radin eds., 1991).

<sup>24</sup> See POSNER, *supra* note 21, at 9.

<sup>25</sup> See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1532–37 (1988); Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self Government*, 100 HARV. L. REV. 4, 73–77 (1986); Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 14–15 (1987); see also DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 44–46 (2004) (arguing that liberty is better protected by courts where judges reason pragmatically, and dedicating chapter two to a comparative analysis of religious freedom cases).

<sup>26</sup> See BEATTY, *supra* note 25, at 159–60; Frank M. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 17 (1988); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 73–74 (2008); Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT'L J. CONST. L. 468, 468 (2009).

<sup>27</sup> See Stephen Gardbaum, *A Democratic Defense of Constitutional Balancing*, 4 L. & ETHICS HUM. RTS. 73, 83 (2010), available at <http://www.bepress.com/lehr/vol4/iss1/art5>. But cf. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing* 63 U. COLO. L. REV. 293, 294 (1992) (arguing that neither balancing nor the categorization approach solely exemplifies the general constitutional theory in the U.S. context).

<sup>28</sup> See, e.g., Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c.11 (U.K.); S. AFR. CONST. § 36, 1996. These texts specifically prescribe a balancing test for constitutional conflicts. Other texts, however, have provided specific limitations in the context of particular rights. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 221, 230 (prescribing limitations on religious freedom).

stage, it is established whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former.<sup>29</sup>

The nature and scope of the balancing process has been a subject of ample debate. For proponents, balancing is justifiable as a technique that optimizes the reconciliation of rights guarantees with the demands of pluralism in contemporary democracies. Pound, an avid advocate of balancing, wrote in the 1940s:

The law is an attempt to satisfy, to reconcile, to harmonize, to adjust . . . overlapping and often conflicting claims and demands, either through securing them directly and immediately, or through securing certain individual interests, or through delimitations, or compromises of individual interests, so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice to the scheme of interests as a whole.<sup>30</sup>

More recent advocacy has emphasized the normative rationality of balancing, including: (i) the best available method to neutrally reconcile constitutional conflicts;<sup>31</sup> (ii) a method providing the guarantee that political institutions do not exceed their “*intrinsic power*” to override fundamental rights in the interest of public policy objectives;<sup>32</sup> and (iii) a technique that produces order and transparency in the legal decision-making process.<sup>33</sup>

Scholarly critique of the balancing process is abundant, with three primary concerns standing out. The first major criticism centers on the claim that the act of balancing lacks objective and uniform criteria.<sup>34</sup> It is impossible to point toward a common or universal balancing scale that judges could adopt, necessarily transforming the act of balancing into a subjective and unpredictable process that invites judges to rely on personal experiences and preferences.<sup>35</sup> Therefore, this ad hoc process involves a real possibility of error in identifying the competing values as

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<sup>29</sup> Alexy, *supra* note 16, at 574; *see also* AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 167 (2006).

<sup>30</sup> Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 39 (1943).

<sup>31</sup> BEATTY, *supra* note 25, at 159–61.

<sup>32</sup> Gardbaum, *supra* note 27, at 84–85.

<sup>33</sup> BARAK, *supra* note 29, at 164, 173.

<sup>34</sup> T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972–76 (1987).

<sup>35</sup> *Id.*

well as in constructing the just and correct balance between them. The second type of criticism argues that the act of balancing implicitly presupposes the commensurability of all constitutional conflicts and their inevitable resolution, which “necessarily overrides the broader political *question* of its irreconcilability.”<sup>36</sup> Furthermore, once the conflict is staged in legal terms, we presuppose and accept that one principle will trump the other, curbing the prospects of a more accommodative compromise.<sup>37</sup> Finally, critics have warned that balancing substantially expands judicial discretion and thereby replicates “the job that a democratic society demands of its legislature.”<sup>38</sup>

These criticisms were part of a broader call for judicial restraint. Critics of judicial activism argued that the process of judicial review is undemocratic, bestowing far too much authority in the hands of a small group of unelected and unaccountable judges.<sup>39</sup> Critics claimed that the unnecessary involvement of judges in the determination of social values encroaches on the authority of political actors representing the majority.<sup>40</sup> Thus, the facilitation of social conflicts should arguably take place through legislation as opposed to judicial decision-making, with basic rights sorted out through accountable majoritarian processes.<sup>41</sup> The process of legislation entails democratic participation and involves deliberative politics that requires persuasion and reflection upon preferences, generating stronger commitment to “hear the other side.”<sup>42</sup> Legislative outcomes, according to the democratic critics of judicial activism, better ensure the prospects of peaceful coexistence.

To empirically evaluate these theoretical debates, the next section analyzes legal outcomes stemming from legislative measures *and* judicial rulings in circumstances involving the weighing of minority reli-

<sup>36</sup> SCOTT VEITCH, *MORAL CONFLICT AND LEGAL REASONING* 186 (1999).

<sup>37</sup> See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE*, at xi (1991) (discussing the impoverishment of political discourse through judicial decision-making).

<sup>38</sup> See Alcinikoff, *supra* note 34, at 984.

<sup>39</sup> JEREMY WALDRON, *LAW AND DISAGREEMENT* 182–84 (1999); JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 4–5 (1999).

<sup>40</sup> See Ofrit Liviatan, *Judicial Activism and Religion-Based Tensions in India and Israel*, 26 *ARIZ. J. INT'L & COMP. L.* 583, 587 (2009) (summarizing arguments that are critical of judicial activism).

<sup>41</sup> See RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENSE OF THE CONSTITUTIONALITY OF DEMOCRACY*, at viii (2007). There are other notable advocates of the democratic approach. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); WALDRON, *LAW AND DISAGREEMENT*, *supra* note 39; WALDRON, *THE DIGNITY OF LEGISLATION*, *supra* note 39.

<sup>42</sup> STUART HAMPSHIRE, *JUSTICE IS CONFLICT* 8 (2000).

gious practices against competing claims that invoke alternative liberal norms including liberty, equality, and public interest objectives.

## II. THE TREATMENT OF RELIGIOUS MINORITIES IN WESTERN DEMOCRACIES

Scholars attributed the politics of difference emerging during the second half of the Twentieth century to the success of generating “new and more pluralistic forms of democratic citizenship” within “established Western democracies.”<sup>43</sup> Increasingly, these democracies view pluralism and coexistence as their legitimizing model, striving to effectuate them through domestic and international legal instruments.<sup>44</sup> The following analysis does not attempt to provide a comprehensive account of the religious freedom regimes in the Western world. Religious freedom regimes differ greatly as a result of many factors, including varying constitutional structures and context-specific precedents. The following survey provides a brief sketch of selected religion-based issues, in an attempt to identify general patterns in the rhetoric and outcomes of conflicts involving religious minorities.

### A. *Classifying Religions*

Many constitutions and other human rights instruments guarantee protection to religious liberty without defining religion.<sup>45</sup> In deciding disputes concerning religion, liberal courts have shown a general tendency to refrain from value judgment over the nature or appropriateness of a religious claim, recognizing the personal and subjective aspect of such a system of belief.<sup>46</sup> Instead, legal rulings have focused primarily on evaluating whether the specific circumstances warrant derogation

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<sup>43</sup> Bashir Bashir & Will Kymlicka, *Introduction: Struggles for Inclusion and Reconciliation in Modern Democracies*, in *THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES* 2–3 (Will Kymlicka & Bashir Bashir eds., 2008). See generally PAREKH, *supra* note 10 (discussing the effects of the politics of difference).

<sup>44</sup> See Bashir & Kymlicka, *supra* note 43, at 12; T. Jeremy Gunn, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief: A Comparative Perspective*, 19 *EMORY INT'L L. REV.* vii, vii–viii (2005).

<sup>45</sup> T. Jeremy Gunn, *Complexity of Religion and the Definition of Religion in International Law*, 16 *HARV. HUM. RTS. J.* 189, 190 (2003); Nathaniel Stinnett, Note, *Defining Away Religious Freedom in Europe: How Four Democracies Get Away with Discriminating Against Minority Religions*, 28 *B.C. INT'L & COMP. L. REV.* 429, 443 (2005); see T. Jeremy Gunn, *supra* note 44, at vii–viii.

<sup>46</sup> See REX AHDAR & IAN LEIGH, *RELIGIOUS FREEDOM IN THE LIBERAL STATE* 110 (2005). See also UITZ, *supra* note 3, at 24 (European context); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 *STAN. L. REV.* 233, 241 (1989) (U.S. context).

from religious freedom guarantees.<sup>47</sup> A notable exception was the English Court's construction of religion "concerned with man's relations with God."<sup>48</sup> Consequently, the English Court declined to recognize groups such as Scientology and South Place Ethical Society as religions, because they do not worship a Supreme Being but rather emphasize moral and ethical principles in their spiritual approach to life.<sup>49</sup>

Unlike the restrained approach characterizing the attempt to define religion, recognizing and categorizing religious communities for legal purposes has been a widespread European practice, and one that has proven to be particularly discriminatory in relation to minority religious groups. Domestic laws of many European nations dictate a formal recognition process of religious denominations, generally by way of their registration in a designated governmental body.<sup>50</sup> Originating as

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<sup>47</sup> See *Church of New Faith v Comm'r of Pay-Roll Tax* [1982–83] 154 CLR 120, 136 (Austl.). The High Court of Australia illustrated this pattern by recognizing Scientology as a religion for the purposes of charity law. The Court held the criteria of religion to be:

[F]irst, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.

*Id.* The U.S. Supreme Court went even further when examining a conscientious objector's religious objection to war, finding religious belief to be anything that "occupies a place in the life of its possessor parallel to that filled by the Orthodox belief in God." *United States v. Seeger*, 380 U.S. 163, 166 (1965). More recently, the Canadian Supreme Court continued this trend by adopting a "subjective understanding" criterion for religious freedom under the 1982 Canadian Charter of Rights and Freedoms: this criterion states that once an individual demonstrates the sincerity of his or her beliefs, it is irrelevant whether such a belief or practice is "required by official religious dogma or is in conformity with the position of religious officials." *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 580 (Can.).

<sup>48</sup> *In re South Place Ethical Society*, [1980] 1 W.L.R. 1565, [1571] (Eng.).

<sup>49</sup> See *id.*; *R v. Registrar Gen.*, [1970] 2 Q.B. 697 at 707 (U.K.). In 2006 the definition of religion for charity purposes was amended in the Charities Act, defining religion to include a belief in god, belief in many gods or belief in no god. Charities Act, 2006, c. 50, p. 1, § 2(3).

<sup>50</sup> See, e.g., *Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften* [Federal Statute Concerning the Legal Status of Religious Communities] Jan. 9, 1998, *BUNDEGESETZBLATT [BGBl I]* at 485, § 3 (Austria) [hereinafter *Austrian Religious Communities Act*]; *Religisko Organizaciju Likums* [Law on Religious Organizations] § 8(1) (1995) (Lat.); *Lei da Liberdade Religiosa* [Law on Religious Freedom] No. 16/2001, art. 33 (2001) (Port.), available at <http://spcp.prf.cuni.cz/dokument/portugal.htm> (translation by The Church Law Society, Prague, Czech Republic) [hereinafter 2001 Portuguese Law on Religious Freedom]; *Zákon č. 308/1991 Zb. o slobode náboženskej viery a postavení cirkví a náboženských spoločností* [Law on the Freedom of Religious Faith and the Position of Churches and Religious Societies] No. 308/1991, art. 10, § 1 (1991) (Slov.), available at <http://spcp.prf.cuni.cz/aj/308-91en.htm> (translation by The Church Law Society, Prague, Czech Republic) [hereinafter 1991 Slovak Act on Freedom of Religious Beliefs]; *General Act of Religious Liberty art. V, § 1* (B.O.E. 1980, 177) (Spain).

cooperative arrangements between church and state, the purpose of this recognition process is to acquire a legal personality, giving rise to different benefits including financial support, tax privileges, advantages under military laws, and the ability to insert religion as part of the general curriculum of educational institutions funded by the state.<sup>51</sup> From the government's perspective, this process serves the goals of supervision and control and furthers the orderly relationship between the state and religious movements.<sup>52</sup> Arguably, this inquisitive procedure averts the dangers that "fleeting beliefs, or ones which are believed to present a threat to other human rights and values," will enjoy the status of recognized religions.<sup>53</sup>

Nevertheless, this system of recognition often evolved into a de facto multi-tiered discriminatory apparatus, enabling the classification of religious movements into different categories with differing rights.<sup>54</sup> Thresholds, including sizable membership, visibility, organizational requirements, and mandatory waiting periods have effectively preserved the privileged status of the established religions, blocking the registration of newer religions.<sup>55</sup> This reality is ever more problematic considering the historically privileged status of the Christian Churches in many European countries.<sup>56</sup> Under this system, recognized religions have typically included leading Christian denominations, Islam, and Judaism. Religious communities newer to Europe, namely Jehovah's Witnesses, Scientology, the Unification Church, and in some instances even Mormonism were repeatedly denied recognition.<sup>57</sup> Although domestic courts and the European Court of Human Rights (ECtHR) routinely intervened to alleviate discrimination against religious minorities, the

<sup>51</sup> See, e.g., 2001 Portuguese Law on Religious Freedom, *supra* note 50, arts. 12, 24, 33 (establishing such benefits for recognized religions).

<sup>52</sup> See UITZ, *supra* note 3, at 93–94.

<sup>53</sup> ANN-MARIE MOONEY COTTER, HEAVEN FORBID 14 (2009).

<sup>54</sup> See James T. Richardson, *Regulating Religion: A Sociological and Historical Introduction*, in REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE 1, 6 (James T. Richardson ed., 2004).

<sup>55</sup> See COTTER, *supra* note 53, at 10; Stinnett, *supra* note 45, at 430.

<sup>56</sup> See UITZ, *supra* note 3, at 94. As noted by Uitz, "the intensity of legal recognition (and its consequences) tends to favour those churches which are understood (at least by an elite of a majority) to have contributed to the formation of the history, identity, culture or other underlying values of the polity." *Id.*

<sup>57</sup> See, e.g., Organization for Security and Cooperation in Europe Review Conference, Sept. 1999, *Freedom of Religion or Belief: Laws Affecting the Structuring of Religious Communities* at 21, 32–33, OSCE/ODIHR Background paper 1999/4, available at <http://www.osce.org/odihr/documents/16698> (discussing a case which dealt with discrimination against Jehovah's Witnesses).

institutional discrimination generated by this system of classifications remains present throughout Europe.<sup>58</sup>

The 1998 Austrian Act on the Legal Status of Registered Religious Communities (Religious Communities Act) illustrates the discriminatory apparatus entailed by the recognition procedure.<sup>59</sup> This legislation was enacted in response to the ruling by the Austrian Court requiring the government to provide a legislative solution to the prolonged struggle of Jehovah's Witnesses for legal recognition.<sup>60</sup> This legislation substantially toughened the criteria for registration and recognition of religious groups. The threshold for recognition includes a twenty-year proven existence in Austria, a membership of 0.2% of the Austrian population, and a vague requirement of a positive basic attitude toward society and state.<sup>61</sup> These harsh prerequisites did not affect the already recognized groups, which continue to enjoy the benefits of recognition regardless of their ability to fulfill the criteria of the Religious Communities Act.<sup>62</sup> The legislative history of the Religious Communities Act reveals a political and cultural consensus on the necessity to act against certain minority religious denominations widely perceived as "inherently dangerous" for being "antifamily and even anti-Christian."<sup>63</sup>

### B. *Islamic Dress in Educational Institutions*

In recent decades Islam rapidly grew into Europe's largest religious minority.<sup>64</sup> This demographical transformation generated increased social distrust, with a growing number of Europeans identifying Islam as a threatening force to Europe's Christian heritage and secular legal ar-

<sup>58</sup> See U.S. Dep't of State, 2009 Annual Report on International Religious Freedom, [www.state.gov/g/drl/rls/irf/2009/index.htm](http://www.state.gov/g/drl/rls/irf/2009/index.htm) (last visited Nov. 30, 2010) (noting that many countries, including Austria, France, Germany, Greece, and England, do not recognize Scientology as a religion).

<sup>59</sup> Austrian Religious Communities Act, *supra* note 50, at 485, § 3.

<sup>60</sup> See Christopher J. Miner, *Losing My Religion: Austria's New Religion Law in Light of International and European Standards of Religious Freedom*, 1998 BYU L. Rev. 607, 615; Reinhard Kohlhofer, *Away with Legal Discrimination—Serbia Shouldn't Follow Austria*, WORLDWIDE RELIGIOUS NEWS (Sept. 2, 2004), <http://www.wwrn.org/articles/8300/>.

<sup>61</sup> See Austrian Religious Communities Act, *supra* note 50, § 11(1).

<sup>62</sup> See U.S. Dep't of State, 2009 Annual Report on International Religious Freedom: Austria (Oct. 26, 2009), <http://www.state.gov/g/drl/rls/irf/2009/127298.htm>; see also Miner, *supra* note 60, at 617 (noting that out of the twelve recognized religions, only Catholic, Lutheran, Islam, and Old Catholic would qualify under the new standards of the 1998 Act).

<sup>63</sup> Miner, *supra* note 60, at 616, 620. Among those perceived as dangerous groups Miner listed Scientology, the Unification Church, Transcendental Meditation, Yoga, Hare Krishna, and others.

<sup>64</sup> See THE LEGAL TREATMENT OF ISLAMIC MINORITIES IN EUROPE, at vii (Roberta Aluffi B.-P. & Giovanna Zincone eds., 2004).

rangements.<sup>65</sup> The most prevalent manifestation of this cultural anxiety has been the growing resistance throughout Europe toward the visibility of traditional Muslim female attire in educational institutions.<sup>66</sup> The opposition to the Muslim attire in public schools united two normally atypical allies in European politics:<sup>67</sup> (i) The feminist-liberal position, which views the headscarf as a mark of political extremism and the defiance of gender equality;<sup>68</sup> and (ii) Christian-conservatives, which view the visibility of the Islamic headscarf as a threat to Christian-European identity.<sup>69</sup>

There is no unified European approach with regard to Islamic attire in schools, and many states do not forbid students (and in some cases teachers) from wearing Islamic attire in public schools. Yet, when this matter came under legal consideration—whether under legislative or judicial proceedings—the right to manifest Islamic beliefs by wearing Islamic attire within European educational institutions was systematically denied.<sup>70</sup>

France has the highest percentage of Muslim population in Western Europe.<sup>71</sup> There, the Islamic female attire has been generating considerable controversy since the late 1980s.<sup>72</sup> Debates revolving

<sup>65</sup> See José Casanova, *Religion, European Secular Identities, and European Integration*, in RELIGION IN AN EXPANDING EUROPE 65, 78–80 (Timothy A. Byrnes & Peter J. Katzenstein eds., 2006); Silvio Ferrari, *Islam in Europe: An Introduction to Legal Problems and Perspectives*, in THE LEGAL TREATMENT OF ISLAMIC MINORITIES IN EUROPE, *supra* note 64, at 1, 3–4; Sami Zemni, *Islam, European Identity and the Limits of Multiculturalism*, in RELIGIOUS FREEDOM AND THE NEUTRALITY OF THE STATE: THE POSITION OF ISLAM IN THE EUROPEAN UNION 158, 159 (W.A.R. Shadiq & P.S. van Koningsveld eds., 2002). See generally András Sajó, *Preliminaries to a Concept of Constitutional Secularism*, 6 INT'L J. CONST. L. 605 (2008) (discussing religion and constitutional secularism).

<sup>66</sup> See Valérie Amiraux, *The Headscarf Question: What is Really the Issue?* in EUROPEAN ISLAM: CHALLENGES FOR SOCIETY AND PUBLIC POLICY 124–26 (Samir Amghar et al. eds., 2007).

<sup>67</sup> See JOAN WALLACH SCOTT, THE POLITICS OF THE VEIL 125–27 (2007); Hans Michael Heinig, *The Headscarf of a Muslim Teacher in German Public Schools*, in RELIGION IN THE PUBLIC SPHERE: A COMPARATIVE ANALYSIS OF GERMAN, ISRAELI, AMERICAN AND INTERNATIONAL LAW 181, 186 (Winifred Brugger & Michael Karayanni eds., 2007).

<sup>68</sup> See SCOTT, *supra* note 67, at 125–27.

<sup>69</sup> See Heinig, *supra* note 67, at 186.

<sup>70</sup> See, e.g., R v. Governors of Denbigh High School (*Begum*), [2006] UKHC 15, [2007] 1 A.C. 100, [H.L.] 100–101 (appeal taken from Eng.); *Dogru v. France*, App. No. 27058/05, 49 Eur. H.R. Rep. 179, 179 (2009); *Sahin v. Turkey*, App. No. 44774/98, 41 Eur. H.R. Rep. 109, 109–10 (2005).

<sup>71</sup> See THE PEW FORUM ON RELIGION & PUBLIC LIFE, MAPPING THE GLOBAL MUSLIM POPULATION: A REPORT ON THE SIZE AND DISTRIBUTION OF THE WORLD'S MUSLIM POPULATION 21 (Oct. 2009), [http://pewforum.org/uploadedfiles/Topics/Demographics/Muslim population.pdf](http://pewforum.org/uploadedfiles/Topics/Demographics/Muslim%20population.pdf)

<sup>72</sup> Patrick Weil, *Why the French Laïcité Is Liberal*, 30 CARDOZO L. REV. 2699, 2701 (2009).

around the impact of Islam's visibility in the public sphere have focused on France's fundamental constitutional principle of *laïcité*, the French version of secularism.<sup>73</sup> This public debate culminated in the enactment of a 2004 law by an overwhelming majority—494 for, 36 against, 31 abstentions<sup>74</sup>—banning overtly religious symbols or dress in public schools as a necessary step for securing the secular nature of the Republic.<sup>75</sup> Although the law prohibited conspicuous religious symbols generally, its primary motivation was to ban the public display of Islamic headscarves.<sup>76</sup> The circumstances leading to the ban are widely documented:<sup>77</sup> (i) an emerging political coalition of secular and religious streams connecting the visibility of Islamic headscarves in France's public sphere to contemporary social and political problems, including immigration challenges, racism and gender-based concerns; (ii) extensive media coverage inflaming public agitation over Islam's public presence; and (iii) the appointment of the Stasi Commission, a government-appointed commission tasked with investigating the application of *laïcité* in France, which found the Islamic headscarf to be unjustifiably coercive and victimizing of Muslim girls. In this public atmosphere Islam came to be regarded as an imminent threat to France's secular tradition, repudiating any real possibility to consider the Islamic headscarf as the expression of a genuine religious belief.<sup>78</sup>

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<sup>73</sup> See JOHN R. BOWEN, WHY THE FRENCH DON'T LIKE HEADSCARVES 1–4 (2007).

<sup>74</sup> Weil, *supra* note 72, at 2701.

<sup>75</sup> Loi 2004–228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004–228 of March 15, 2004 concerning, as an application of the principle of the separation of church and state, the wearing of symbols or garb which show religious affiliation in public primary and secondary schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190; see T. Jeremy Gunn, *Under God but Not the Scarf: The Founding Myths of Religious Freedom in the United States and Laïcité in France*, 46 J. CHURCH & ST. 7, 7 (2004).

<sup>76</sup> BOWEN, *supra* note 73, at 1 (“Although worded in a religion-neutral way, everyone understood the law to be aimed at keeping Muslim girls from wearing headscarves in school”); SCOTT, *supra* note 67, at 1–2 (“[T]he law . . . was aimed primarily at Muslim girls wearing headscarves . . . . The other groups were included to undercut the charge of discrimination against Muslims and to comply with a requirement that such laws apply universally.”).

<sup>77</sup> See BOWEN, *supra* note 73, at 1; OLIVIER ROY, SECULARISM CONFRONTS ISLAM I (George Holoch trans., Columbia Univ. Press 2007); SCOTT, *supra* note 67, at 74; Gunn, *supra* note 75, at 18. See generally Eva Brems, *Above Children's Heads: The Headscarf Controversy in European Schools from the Perspective of Children's Rights*, 14 INT'L J. CHILD RTS. 119 (2006) (providing background information on France's 2004 law banning headscarves, with an emphasis on the rights of the child).

<sup>78</sup> See BOWEN, *supra* note 73, at 31–32; SCOTT, *supra* note 67, at 90; Gunn, *supra* note 75, at 17–18.

The German debate on headscarves erupted with the *Ludin* case, brought by a public school teacher who was denied employment for wearing the Islamic headscarf.<sup>79</sup> The Federal Court framed the question as a clash between the right of a government official in her public role to manifest her religion and the right of students and parents to abstain from religion.<sup>80</sup> The Court concluded that although there is an “abstract danger” to the school’s neutral environment, a ban on Islamic headscarves could only be implemented by a state law and not by administrative decisions.<sup>81</sup> Without the necessary statutory basis, denying the teacher her right to religious freedom was unconstitutional.<sup>82</sup>

At the same time, the Court stressed that the German states have full discretion to arrive at different outcomes, taking “into account school traditions, the composition of the population by religion, and whether it is more or less strongly rooted in religion.”<sup>83</sup> The ruling generated an immediate stream of German Land (State) Laws banning public school teachers from wearing headscarves, with some laws even exempting displays of Christian and Jewish symbols.<sup>84</sup> The court’s headscarf anxiety has been explained as a distinct German “assumption that Christian culture occupies a privileged place in German public life, and is, indeed, a postulate of German political identity and social cohesion. Consequently its explicit affirmation in the public school context is a compelling state interest.”<sup>85</sup>

In England, the House of Lords held that a public school’s denial to allow its student, Shabina Begum, to wear the Muslim jilbab did not violate her right to religious freedom under Article 9 of the European

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<sup>79</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 24, 2003, docket number 2 BvR 1436/02, para. 1 (Ger.), available at [http://www.bverfg.de/entscheidungen/rs20030924\\_2bvr143602en.html](http://www.bverfg.de/entscheidungen/rs20030924_2bvr143602en.html).

<sup>80</sup> *Id.* at para. 46.

<sup>81</sup> *Id.* at para. 72.

<sup>82</sup> See Oliver Gerstenberg, *Germany: Freedom of Conscience in Public Schools*, 3 INT’L J. CONST. L. 94, 96 (2005); Christine Langenfeld & Sarah Mohsen, *Germany: The Teacher Headscarf Case*, INT’L J. CONST. L. 86, 89 (2005).

<sup>83</sup> BVerfG, at para. 47.

<sup>84</sup> Heinig, *supra* note 67, at 194 n.34. Of Germany’s sixteen states, legal restrictions on Muslim dress have been imposed by the following states: *Baden-Württemberg*, Bavaria, Bremen, Lower Saxony, North-Rhine Westphalia, and Saarland have enacted headscarf bans for teachers in public schools; Berlin and Hesse have enacted headscarf bans for all civil servants. See U.S. Dep’t of State, 2009 Annual Report on International Religious Freedom: Germany (Oct. 26, 2009), <http://www.state.gov/g/drl/rls/irf/2009/127312.htm>. On the laws of *Baden-Württemberg*, Bavaria, and Lower Saxony, see David W. Hendon & Jeremiah Russell, *Notes on Church-State Affairs*, 47 J. CHURCH & ST. 189, 191 (2005).

<sup>85</sup> See Gerstenberg, *supra* note 82, at 96–7.

Convention on Human Rights (ECHR).<sup>86</sup> The school had a mandatory dress code, but created a Muslim dress option (shalwar kameeze) for its majority of Muslim students.<sup>87</sup> It denied Begum's request to wear the very traditional jilbab out of fear that this would pressure other students to conform to more extreme versions of Islam.<sup>88</sup> The school further suspected that Begum's decision was unduly influenced by her brother, who belonged to a radical Islamic group.<sup>89</sup> The House of Lords found the school's decision justified, and concluded that the school was in a better position than the Lords to assess external threats on its students.<sup>90</sup> The House of Lords' narrative is characterized by a stark contrast between sheer praise of the school and its headmaster's civility as compared to the characterization of Begum and her brother, who was depicted as possessing a confrontational and threatening attitude.<sup>91</sup>

Baroness Hale's opinion is a telling example of a widely held European approach to the clash between claims to religious freedom that entrench patriarchal practices and women's rights to equality and non-discrimination.<sup>92</sup> Baroness Hale seemed unconvinced of Begum's ability, given Begum's young age, to reach comprehensive decisions about the extent of her belief and its manifestation in her chosen attire.<sup>93</sup>

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<sup>86</sup> See *Begum*, [2007] 1 A.C. at 119. Article nine of the ECHR prescribes the following:

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

European Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 221, 230.

<sup>87</sup> See *Begum*, [2007] 1 A.C. at 108.

<sup>88</sup> *Id.* at 111.

<sup>89</sup> *Id.* at 109.

<sup>90</sup> Gareth Davies, *The House of Lords and Religious Clothing in Begum v. Head Teacher and Governors of Denbigh High School*, 13 EUR. PUB. L. 423, 426 (2007) (noting this problematic line of reasoning, arguing that even excellent school authorities can sometimes err in judgment).

<sup>91</sup> See *Begum*, [2007] 1 A.C. at 108–09, 117, 119–22, 127–30.

<sup>92</sup> See *id.* at 134 (Baroness Hale). For a comprehensive discussion of this clash, see generally Frances Raday, *Culture, Religion, and Gender*, 1 INT. J. CONST. L. 663 (2003), quoted in *Begum*, [2007] 1 A.C. at 134–35 (Baroness Hale).

<sup>93</sup> *Begum*, [2007] 1 A.C. at 132 (Baroness Hale) (“The child is on the brink of, but has not yet reached, adolescence. She may have views but they are unlikely to be decisive. More importantly, she has not yet reached the critical stage in her development where this particular choice may matter to her.”).

Concerned with the dominating effect of the Muslim dress on young women, Baroness Hale relied on scholarship alerting of the dangers that religious coverings entail for the continued gender discrimination in patriarchal religions, noting:

Strict dress codes may be imposed upon women, not for their own sake but to serve the ends of others. Hence they may be denied equal freedom to choose for themselves. They may also be denied equal treatment. A dress code which requires women to conceal all but their face and hands, while leaving men much freer to decide what they will wear, does not treat them equally.<sup>94</sup>

Furthermore, in Baroness Hale's view the school has a transformative liberal duty. She explained that this task entailed "educat[ing] the young from all the many and diverse families and communities in this country in accordance with the national curriculum."<sup>95</sup> As such, Hale concluded:

Like it or not, [England] is a society committed, in principle and in law, to equal freedom for men and women to choose how they will lead their lives within the law. Young girls from ethnic, cultural or religious minorities growing up here face particularly difficult choices: how far to adopt or to distance themselves from the dominant culture. A good school will enable and support them. This particular school is a good school . . . .<sup>96</sup>

Guided by its "margin of appreciation" doctrine, the ECtHR in all of its cases concerning the Islamic headscarf has systematically deferred to the policies of national authorities and the expertise of domestic courts.<sup>97</sup> The ECtHR's leading holding on the issue, *Sahin v. Turkey*, endorsed the view that the Islamic headscarf became a political symbol undermining secularism, a principle that was claimed by the Turkish government to serve as the guarantor of its democratic system.<sup>98</sup> A similar rationale led the ECtHR to uphold the expulsion of students from a public secondary school in France. In particular, the ECtHR found that student expulsion following a refusal to remove their headscarves dur-

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<sup>94</sup> See *id.* at 134.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.*

<sup>97</sup> See *Sahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. 99, 126–27 (2007).

<sup>98</sup> See *Sahin v. Turkey*, App. No. 44774/98, 41 Eur. H.R. Rep. 109, 119, 134 (2005).

ing sports classes was compatible with the French core principle of *laïcité*.<sup>99</sup>

In *Dahlab v. Switzerland*, the ECtHR held that prohibiting a primary school teacher from wearing a headscarf in class was “necessary in a democratic society,” accepting the Swiss Federal Court’s opinion that such prohibition furthered principles of denominational neutrality and gender equality protected by the Swiss Constitution.<sup>100</sup> The ECtHR acknowledged that there was no evidence of any impact on the children and “no complaints from parents or pupils to date.”<sup>101</sup> Nevertheless, the ECtHR considered the headscarf a powerful external symbol that “*might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which . . . is hard to square with the principle of gender equality.*”<sup>102</sup> Therefore, the ECtHR concluded that it “appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others, and, above all, equality and non-discrimination.”<sup>103</sup>

### C. Monitoring Religious Movements

The arrival of Islam in Europe coincided with the surfacing of religious movements previously unknown in the European religious landscape, commonly referred to as New Religious Movements (NRMs).<sup>104</sup> Since the early 1970s, groups such as Jehovah’s Witnesses, the Church of Scientology, Seventh Day Adventists, and the Unification Church

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<sup>99</sup> See e.g., Dogru 49 Eur. H.R. Rep. at 179–81; *Kervanci v. France*, App. No. 31645/04 (Eur. Ct. H.R. Apr. 3, 2009) <http://www.echr.coe.int/echr/en/hudoc/> (follow “HUDOC database” hyperlink; then check “Judgments” box on left side; then type “31645” in “Application Number Field”; then click “Search” hyperlink; then click hyperlink to result in French); see also *Kelaliv v. Turkey*, App. No. 67585/01 (Eur. Ct. H.R. Jan. 24, 2006) <http://www.echr.coe.int/echr/en/hudoc/> (follow “HUDOC database” hyperlink; then check “Judgments” box on left side; then type “67585” in “Application Number Field;” then click “Search” hyperlink; then click hyperlink to only result in English) (finding no violation of Article 9); *Karaduman v. Turkey*, App. No. 16278/90, 1993 Y.B. Eur. Conv. H. R. 66 (upholding the denial of a graduation certificate from a student who refused to take off her headscarf for a required picture on the certificate).

<sup>100</sup> *Dahlab v. Switzerland*, App. No. 42393/98 (Eur. Ct. H.R. Feb. 15, 2001), at \*9, <http://www.echr.coe.int/echr/en/hudoc/> (follow “HUDOC database” hyperlink; then check “Decision” box on left side; then type “42393” in “Application Number Field;” then click “Search” hyperlink; then click hyperlink to only result).

<sup>101</sup> *Id.* at \*3.

<sup>102</sup> *Id.* at \*9 (emphasis added).

<sup>103</sup> *Id.*

<sup>104</sup> See Silvio Ferrari, *New Religious Movements in Western Europe*, RELIGIOSCOPE, 2 (Oct. 2006), [http://religion.info/pdf/2006\\_10\\_ferrari\\_nrm.pdf](http://religion.info/pdf/2006_10_ferrari_nrm.pdf) (noting that the term “New Religious Movement” is misleading, because some of these movements existed for many years).

have become noticeably successful in attracting followers among the young and the middle class.<sup>105</sup> The visible growth of NRMs throughout Europe prompted hegemonic anxieties by the Christian churches and suspicion by anti-cult secularists. This translated into an ongoing clash between the state's view of its role in protecting public safety and the expectations of NRMs to freely associate and practice their religion.<sup>106</sup>

National and pan-European investigative commissions were established with an expansive mandate to assess the potential threat of NRMs, particularly in relation to accusations of brainwashing, psychological manipulations, and financial exploitation.<sup>107</sup> The work of these commissions generated publications that were critical of NRMs, including lists classifying them according to "danger level" along with recommendations to monitor their activities.<sup>108</sup> These developments motivated considerable exertion of control over NRMs in Europe, notably in France, Belgium, and Germany. Such exertion has been categorized as excessive and unnecessarily burdensome on religious liberty.<sup>109</sup>

Two primary trajectories characterize the regulatory campaign against NRMs in Europe. First, specific laws were enacted to implement

<sup>105</sup> See JAMES A. BECKFORD, *CULT CONTROVERSIES* 122 (1985); Mikael Rothstein, *Regulating New Religions in Denmark*, in *REGULATING RELIGION*, *supra* note 54, at 221, 226; Nathalie Luca, *Is There a Unique French Policy of Cults?*, in *REGULATING RELIGION*, *supra* note 54, at 53–54.

<sup>106</sup> See, e.g., UITZ, *supra* note 3, at 177–78; Hervieu-Léger, *supra* note 3, at 55–56; James T. Richardson & Massimo Introvigne, *Brainwashing Theories and Administrative Reports on Cults and Sects*, in *REGULATING RELIGION*, *supra* note 54, at 151, 172–74. Sociologists of religion explained the extreme reaction to NRMs within Western Europe as a combination of factors, including: (i) NRMs' religious alternative is perceived as a threat to the historical hegemony of Christianity in Europe; (ii) a rise of nationalism attributing the rising popularity of NRMs in Europe to American imperialism; (iii) anti-religion sentiments in a secularizing Europe; and (iv) mass media amplification of NRMs' controversies. See BECKFORD, *supra* note 105, at 239–40, 271–74; BRYAN WILSON, *THE SOCIAL DIMENSION OF SECTARIANISM* 46–47, 66–68 (1990); Eileen Barker, *Types of Sacred Space and European Responses to New Religious Movements*, in *CLASHES OF KNOWLEDGE* 155, 165, 167 (Peter Musburger et al. eds., 2008); James A. Beckford, *The Mass Media and New Religious Movements*, in *NEW RELIGIOUS MOVEMENTS* 103, 116 (Bryan Wilson & Jamie Cresswell eds., 1999); Bryan Wilson, *Absolutes and Relatives: Two Problems for New Religious Movements*, in *CHALLENGING RELIGION* 12, 12 (James A. Beckford & James T. Richardson eds., 2003).

<sup>107</sup> See Ferrari, *supra* note 104, at 10–16 (describing how various European states investigated "NRMS"); see also James T. Richardson & Massimo Introvigne, "Brainwashing" Theories in *European Parliamentary and Administrative Reports on "Cults" and "Sects,"* 40 *J. SCI. STUDY RELIGION* 143, 144 (2001) (criticizing the reports produced by the commissions).

<sup>108</sup> See *NEW RELIGIOUS MOVEMENTS IN THE 21ST CENTURY* 346–48 (Philip Charles Lucas & Thomas Robbins eds., 2004).

<sup>109</sup> See UITZ, *supra* note 3, at 170–78; Barker, *supra* note 106, at 167–68; cf. Richardson & Introvigne, *supra* note 107, at 144 (Richardson and Introvigne note a wide consensus among scholars that NRMs "represent neither a danger to their members or to the state").

recommendations to ban and dissolve NRMs.<sup>110</sup> One notable example is the 2001 French law, known as the “About-Picard Law,” designed to repress cults and facilitate the prosecution of their leaders.<sup>111</sup> These types of laws attracted wide criticism both for their lack of definition of what constitutes a “dangerous cult” and for their expansive language, broad enough to authorize a ban of *any* legal entity that is construed as engaging in psychological subjection.<sup>112</sup> The incentive to legislate such expansive powers to ban NRMs has been explained as a “broad consensus . . . that the fight against sects should be a necessary aspect of the protection of individual liberties and that this fight should prevail, in the final analysis, over the defense of the right of each individual to freedom of religion.”<sup>113</sup>

The second type of legal action taken against NRMs consisted of establishing governmental bureaucracies with an expansive mandate devoted to identifying and combating the influence of sects. Notable examples include the establishment of the French Interministerial Mission of Vigilance and Combat Against Sectarian Aberrations,<sup>114</sup> Belgian agencies responsible for gathering information and monitoring the harmful activities of NRMs,<sup>115</sup> Germany’s Office for the Protection of

<sup>110</sup> See, e.g., Act No. 3/2002 on the Freedom of Religious Expression and the Status of Churches and Religious Societies and Amendments to Certain Acts, § 5 (Czech) (2005); Osservatorio delle libertà ed istituzioni religiose [OLIR], <http://www.olir.it/documenti/?documento=682/>; CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 515, n. 3 (Spain) (added to dissolve destructive cults and criminalize the association with them). For an analysis of the amendments to the Spanish Criminal Code, see Richardson & Introvigne, *supra* note 107, at 148–49.

<sup>111</sup> Loi 2001-504 du 12 juin 2001 tendent à renforcer la prévention et la répression des mouvements sectaires portant atteinte aux droits de l’homme et aux libertés fondamentales [Law 2001-504 of June 12, 2001 Intended to Reinforce the Prevention and Repression of Sects that Infringe on Human Rights and Fundamental Freedoms], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jun. 13, 2001, p. 9337. This law has been criticized by the Council of Europe, which invited the French government to reconsider it, to no avail. See U.S. Dep’t of State, 2009 Report on International Religious Freedom: France (Oct. 26, 2009), <http://www.state.gov/g/drl/rls/irf/2009/127310.htm>.

<sup>112</sup> See Ferrari, *supra* note 104, at 14–15.

<sup>113</sup> Hervieu-Lèger, *supra* note 3, at 50 (describing France’s reasons for fighting NRMs).

<sup>114</sup> See MISSION INTERMINISTÉRIELLE DE VIGILANCE ET DE LUTTE CONTRE LE DÉRIVES SECTAIRES, <http://www.miviludes.gouv.fr> (last visited Nov. 27, 2010).

<sup>115</sup> See U.S. Dep’t of State, 2009 Report on International Religious Freedom: Belgium (Oct. 26, 2009), <http://www.state.gov/g/drl/rls/irf/2009/127301.htm> (discussing Belgium’s two government agencies established for this purpose, the Center for Information and Advice on Harmful Sectarian Organizations (CIAOSN) and the Interagency Coordination Group on “harmful sects”); see also Willy Faturé, *Belgium’s Anti-Sect War*, 12(4) SOC. JUST. RES. 377, 387–92 (1999).

the Constitution (OPC),<sup>116</sup> and the Austrian Society Against Sect and Cult Dangers (GSK).<sup>117</sup> The work of these bureaucracies generally involves NRM surveillance, advising authorities and the general public of the potential risks of NRMs, coordinating the appropriate responses against NRM activities, and helping victims of cult abuses.<sup>118</sup> These administrative measures have been criticized as overly intrusive, contributing to an overall climate of stigmatization and intolerance toward NRM communities and their individual members.<sup>119</sup>

Thus far, the ECtHR has not shielded NRMs within Western Europe from these drastic domestic monitoring measures. In the two cases coming under its review, the ECtHR did not lay down a substantive holding on NRM monitoring. It rejected the admissibility of Jehovah's Witnesses' complaint against the French Law banning dangerous sects, finding that the law had not been directly invoked against them.<sup>120</sup> Another petition by a Jehovah's Witness against the surveillance of Greek authorities ended in an out-of-court settlement.<sup>121</sup>

#### D. *Treatment of Indigenous Religions*

The special nature of indigenous religions has often come in direct conflict with Western policies designed to protect important public in-

<sup>116</sup> See UITZ, *supra* note 3, at 167–72; U.S. Dep't of State, 2009 Report on International Religious Freedom: Germany, *supra* note 84 (noting that the OPC routinely monitors the activities of the Scientology Movement as a possible threat to Germany's democratic order).

<sup>117</sup> See U.S. Dep't of State, 2009 Report on International Religious Freedom: Austria, *supra* note 62 (claiming that the State of Lower Austria funds the GSK, which actively works against sects and cults).

<sup>118</sup> See Willy Fautré, *Legal Regulation of Religious Communities in EU Member States*, WILLY FAUTRÉ (2009), <http://www.willyfautre.org/publications/2009/0314%20Article%20Odessa.pdf>.

<sup>119</sup> See *id.* (documenting the acts of discriminatory measures against NRMs in Europe); see also UITZ, *supra* note 3, at 173–74 (quoting Special Rapporteur on Freedom of Religion or Belief, *Civil and Political Rights, Including the Question of Religious Tolerance, 2d Addendum*, U.N. Comm'n on Human Rights, U.N. Doc. E/CN.4/2006/5 (Mar. 8, 2006) (by Asma Jahangir)); Eileen Barker, *Why the Cults? New Religious Movements and Freedom of Religion or Belief*, in FACILITATING FREEDOM OF RELIGION OR BELIEF 571, 584–91 (Tore Lindholm, et al. eds., 2004) (discussing discriminatory acts of states against NRMs, in the form of reports, lists, and laws, among others); Stinnett, *supra* note 45, at 434–38.

<sup>120</sup> See *Fédération Chrétienne des Témoins de Jéhova de France v. France*, App. No. 53430/99 (Eur. Ct. H.R. Nov. 6, 2001), <http://www.echr.coe.int/echr/en/hudoc/> (follow “HUDOC database” hyperlink; then check “Decisions” box on left side; then type “53430” in “Application Number Field;” then click “Search” hyperlink; then follow hyperlink to only result).

<sup>121</sup> *Tsavachidis v. Greece*, App. No. 28802/95, at paras. 21–24 (Eur. Ct. H.R. Jan. 19, 1999), <http://www.echr.coe.int/echr/en/hudoc/> (follow “HUDOC database” hyperlink; then check “Judgments” box on left side; then type “28802” in “Application Number Field;” then click “Search” hyperlink; then follow hyperlink to result in English).

terests such as environmental policies, drug prevention, and economic development.<sup>122</sup> Considering the discriminatory treatment that indigenous societies have often been exposed to, liberal ideals promote strong and comprehensive protection to indigenous peoples. One such example is the international construction of the right to self-determination in international law as including the protection for religious freedom.<sup>123</sup> Nevertheless, the religious freedom of Native Americans in the United States exemplifies the discrepancy between this liberal ideal and its execution in practice.

The systematic discrimination against the Native American culture in the United States has been widely documented. Being America's "smallest, poorest and weakest minority group," Native Americans suffered a long and shameful history of government religious suppression "in ways unprecedented for other religions."<sup>124</sup> These suppressive measures included outright prohibitions on tribal religious rituals, dances, dress, hairstyle, language, and access to religious sites.<sup>125</sup>

Beginning in the 1960s Congress passed a number of bills designed to protect religious freedom of Native Americans. The Bald and Golden Eagle Protection Act (BGEPA) exempted Native Americans from the general prohibition on the use and possession of eagles and eagle parts.<sup>126</sup> However, this religious exemption was narrowly construed by the judiciary to include only those individuals who are Native Americans by blood *and* belong to federally recognized Tribes.<sup>127</sup> An additional challenge to protecting Native American religions has been a lack of enforcement mechanisms accompanying protective legislation. The American Indian Religious Freedom Act (AIRFA) is one such example.<sup>128</sup> This legislation is notable in its recognition of and sensitivity to Native American culture. It prescribes:

[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the

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<sup>122</sup> See Daniel K. Inouye, *Discrimination and Native American Religious Rights*, 23 UWLA L. REV. 3, 13–14 (1992).

<sup>123</sup> International Covenant on Civil and Political Rights arts. 1, 27, Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>124</sup> Inouye, *supra* note 122, at 3–4, 7.

<sup>125</sup> *Id.* at 13–14.

<sup>126</sup> See 16 U.S.C. § 668a (2006).

<sup>127</sup> See *United States v. Dion*, 476 U.S. 734, 740–45 (1986); *United States v. Antoine*, 318 F.3d 919, 922 (9th Cir. 2003); *United States v. Hardman*, 297 F.3d 1116, 1123 (10th Cir. 2002).

<sup>128</sup> See 42 U.S.C. § 1996 (2006).

American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites.<sup>129</sup>

Notwithstanding, this legislation amounts only to the expression of general policy, but lacks “any intent to create a cause of action or any judicially enforceable individual rights.”<sup>130</sup> Thus, “AIRFA requires federal agencies to consider, but not necessarily to defer to, Indian religious values.”<sup>131</sup>

There are several marked differences between the Western systems of belief and Native American spirituality. Whereas Western religions focus on existential questions about the meaning of life, Native American belief springs from the sanctity of nature.<sup>132</sup> As such, Native American worship is inextricably linked to the use of certain lands, animals, and hallucinogenic plants. Native American worship is also manifested quite differently than its Western counterparts, in discrete and remote places and with no accepted canonical texts or universal truths.<sup>133</sup> The contrast between Native American spirituality, on the one hand, and Western concepts of religion and public order, on the other, came to the fore in two Supreme Court decisions dealing with principal elements of Native American worship.

In *Lyng v. Northwest Indian Cemetery Protective Assoc.* the Court examined a religious freedom challenge by Native Americans to a planned use of public land for economic and recreational purposes.<sup>134</sup> Specifically, the Court reviewed whether the Free Exercise Clause was violated by building a road and harvesting timber in a forest traditionally used by Native Americans for religious worship.<sup>135</sup> Although the Court recognized that the proposed plan would devastate Native American religious practices that were intimately and inextricably connected with the

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<sup>129</sup> *Id.*

<sup>130</sup> *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988).

<sup>131</sup> *Wilson v. Block*, 708 F.2d 735, 747 (D.C. Cir. 1983); see also Martin C. Loesch, *The First Americans and the “Free” Exercise of Religion*, 18 AM. INDIAN L. REV. 313, 367 (1993) (“Although AIRFA established a governmental *policy* of protecting Native American religious practice, it did nothing to affect the *practice* of federal land management.”).

<sup>132</sup> See *Lyng*, 485 U.S. at 460–461 (Brennan, J., dissenting).

<sup>133</sup> See Loesch, *supra* note 131, at 359–64 (describing the difference between Native American systems of belief and the Judeo-Christian tradition); see also Inouye, *supra* note 122, at 15–16. See generally VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* (2d ed. 1994) (providing general information on Native American religion).

<sup>134</sup> See *Lyng*, 485 U.S. at 441–42.

<sup>135</sup> *Id.*

concerned land, the Court nevertheless concluded that the planned construction did not coerce Native Americans to act contrary to their religious beliefs.<sup>136</sup> By holding that the government has no duty to accommodate Native American religious practices, the Court endorsed the Anglo-American concept of land as property.<sup>137</sup> In doing so, the decision effectively foreclosed the possibility of using the Free Exercise Clause of the First Amendment to protect Native American religious sites.

Subsequently, the Native American practice of using peyote for sacramental purposes came under the review of the Supreme Court in *Employment Division, Department of Human Resources v. Smith*.<sup>138</sup> *Smith* involved the denial of unemployment compensation to two Native Americans who were fired from their jobs as drug rehabilitators after they ingested peyote during a Native American religious ceremony.<sup>139</sup> Prior to *Smith*, the long-established judicial approach to Free Exercise matters consisted of a balancing test which allowed laws to burden religion only when they were narrowly tailored to protect compelling governmental interests by the least restrictive means.<sup>140</sup> *Smith* abruptly abandoned this strict scrutiny test by interpreting the Free Exercise Clause as permitting a neutral law of general applicability to have incidental burdens on religious freedom.<sup>141</sup> Under the *Smith* rule, the government is no longer required to make exceptions for religious practices or show a compelling governmental interest to justify a neutral policy that indirectly burdens religious freedom.<sup>142</sup> In a separate concurring opinion, Justice O'Connor held that even if the compelling state interest test was applied, the State interest of fighting the war on drugs would be suffi-

<sup>136</sup> See *id.* at 449.

<sup>137</sup> See Stephen McAndrew, *Lyng v. Northwest: Closing the Door to Indian Religious Sites*, 18 Sw. U. L. REV. 603, 604–05 (1989); Marcia Yalbon, *Property Rights and Secret Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623, 1629 (2004); see also BRIAN EDWARD BROWN, *RELIGION, LAW, AND THE LAND* 169–70 (1999); William Bradford, “With a Very Great Blame on Our Hearts”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 27 (2003); Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49, 83 (2002); Howard J. Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflicts Over Native American Sacred Sites on Public Land*, 41 SANTA CLARA L. REV. 757, 771 (2001).

<sup>138</sup> 494 U.S. 872, 874 (1990).

<sup>139</sup> See *id.*

<sup>140</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 214–15 (1972); *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963).

<sup>141</sup> See *Smith*, 494 U.S. at 879–90.

<sup>142</sup> *Id.*

ciently compelling to prohibit or regulate peyote use.<sup>143</sup> Once more, the Court gave primacy to the proclaimed public interest over the Native American religious practice.<sup>144</sup>

The Court's decision generated a backlash from religious groups, legislatures, and scholars who interpreted *Smith* as the abandonment of constitutional protection to free exercise.<sup>145</sup> Congress responded with the enactment of the Religious Freedom Restoration Act (RFRA).<sup>146</sup> The RFRA was designed to restore the compelling governmental interest test by codifying it as the statutory standard for evaluating Free Exercise concerns.<sup>147</sup> Nevertheless, its actual contribution to religious freedom has proven malleable because either courts adopted a narrow interpretation for RFRA, or RFRA could not restore what was not judicially protected under the compelling government interest test in the first place.<sup>148</sup> In the context of Native Americans, this resulted in limiting key elements of their religious practice.

<sup>143</sup> *Id.* at 905–06 (O'Connor, J., concurring).

<sup>144</sup> *See id.* at 878–79 (stating that the Court has never held an individual's religious beliefs to excuse him or her from complying with a valid law prohibiting conduct that a State is free to regulate).

<sup>145</sup> *See* Inouye, *supra* note 122, at 17–18; William K. Kelley, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. 403, 438 (2000) (“In the wake of *Smith*, a broad coalition—even a consensus—emerged that it would be appropriate to pass a statute to protect religious liberty more broadly than the Court had interpreted the Free Exercise Clause to require.”).

<sup>146</sup> *See* Kelley, *supra* note 145, at 438 n. 163 (“The vote on RFRA was unanimous in the House; in the Senate it passed by a vote of 97–3.”).

<sup>147</sup> *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2006). RFRA provides that:

(a) . . . Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) . . . .

(b) . . . Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

*Id.* § 2000bb-1.

<sup>148</sup> *See* Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 265, 274–76 (1994) (arguing that RFRA's language, particularly the compelling interest test, is amorphous enough to allow judges to adopt a restrictive interpretation of the Act and arrive at similar conclusions to pre-RFRA cases); Eric Alan Shumsky, *The Religious Freedom Restoration Act: Postmortem of a Failed Statute*, 102 W. VA. L. REV. 81, 104 (1999) (suggesting that some courts held the substantial burden test could only be satisfied if the government prevented a practice mandated by a religion). *See generally* Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993) (argu-

### III. EVALUATING LAW'S ROLE AS A PRIMARY VEHICLE IN ADVANCING LIBERAL IDEALS

This Part cautiously evaluates Part II's survey in terms of the basic quest within political liberalism to promote peaceful coexistence. This is a guarded attempt because, as previously noted, the above examples concerning minority religions discussed outcomes and rhetoric in a diverse group of liberal systems without accounting for their internal differences. Nevertheless, we trust that this analysis would benefit further inquiry and discussion into the role that law could, should, and does play in contemporary multicultural tensions.

Amid growing diversification of the Western world, two rival responses within liberal political thought rose to prominence. These responses proposed competing notions as to the best mechanism for facilitating cultural diversity in modern democracies.<sup>149</sup> The first response, *liberal integrationism*, advanced the vision of a common public identity.<sup>150</sup> Although respecting differences as a private matter, integrationists argued that the most promising basis for political stability is the homogenization of ethno-cultural difference in the public sphere.<sup>151</sup> Criticisms of this view suggested that integrationism disregarded demands of diversity<sup>152</sup> and camouflaged the continued dominance of the majority interests.<sup>153</sup> These criticisms prompted the rise of a second approach to political diversity known as *multicultural liberalism*.<sup>154</sup> This

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ing that restoring constitutional concepts that courts have abandoned reveals problems of statutory interpretation).

<sup>149</sup> See John McGarry et al., *Integration or Accommodation? The Enduring Debate in Conflict Regulation*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES 41, 41 (Sujit Choudhry ed., 2008).

<sup>150</sup> See *id.*

<sup>151</sup> See *id.* at 49; cf. BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 68–71 (2001) (discussing the liberal ideal of assimilation). See generally Cynthia V. Ward, *The Limits of "Liberal Republicanism": Why Group-Based Remedies and Republican Citizenship Don't Mix*, 91 COLUM. L. REV. 581, 584 (1991) (discussing the "communo-generative" characteristics of contemporary republicanism).

<sup>152</sup> See MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 50–53 (1982). See generally STEPHEN L. CARTER, THE CULTURE OF DISBELIEF (1993); MICHAEL WALZER, SPHERES OF JUSTICE (1983); Taylor, *supra* note 1; Nicholas Wolterstorff, *The Role of Religion in Decision and Discussion of Political Issues*, in RELIGION IN THE PUBLIC SPHERE 67 (Robert Audi & Nicholas Wolterstorff eds., 1997).

<sup>153</sup> Cf. Jeff McMahan, *The Limits of National Partiality*, in THE MORALITY OF NATIONALISM 107, 123–4 (Robert McKim & Jeff McMahan eds., 1997) (arguing that "national identity" suppresses cultural pluralism, and that a shift to more complex self-identities would be preferable).

<sup>154</sup> See McGarry et al., *supra* note 149, at 41–42, 51–53 (referring to multicultural liberalism as "accommodation" as opposed to "integration"). Representative examples of "ac-

view justified liberalism through the promotion of multiple identities and cultural rights, viewing the respect for cultural difference as essential to long-term social and political stability.<sup>155</sup>

In its pursuit of social coexistence, liberalism mandated the protection of a series of fundamental rights and values including equality and the guarantees to freedoms of speech, association, and religion. Specifically, the liberal commitment to religious liberty stemmed from:<sup>156</sup> (i) liberalism's moral commitment to choice and personal autonomy,<sup>157</sup> and (ii) liberalism's instrumentalist capacity, which envisioned religion as a vehicle to advance desirable social ends.<sup>158</sup> Considering the centrality of religious freedom in liberal thought, the legal balancing between religious freedom claims and other liberal values and interests could, in principle, have invoked greater accommodation for religious beliefs than the restrictive legal approach discussed in the previous section.<sup>159</sup>

One possible explanation for these unfavorable outcomes in connection with minority religious practices may be attributed to liberalism's "built-in" commitment to secularism, which by its nature translates into a less responsive attitude toward religious practices.<sup>160</sup> Religion poses difficult challenges to liberal thought. In general, religions single out their version of the good life in an absolute manner, which often entails the exclusion of alternative worldviews. Many, if not all, religions also contain aspects of social control, restrictions on freedom of choice, ine-

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commmodation," can be found in a number of works. *See generally* JOSEPH A. CARENS, *CULTURE, CITIZENSHIP AND COMMUNITY* (2000); CHANDRAN KUKATHAS, *THE LIBERAL ARCHIPELAGO* (2003); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* (1995); CHARLES TAYLOR ET AL., *MULTICULTURALISM* (expanded ed. 1994); JAMES TULLY, *STRANGE MULTIPLICITY* (1995); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

<sup>155</sup> *See* TAYLOR ET AL., *supra* note 154, at 87–88.

<sup>156</sup> *See* Rosenblum, *supra* note 4, at 5 ("Liberalism has also been seen as inseparable from security for religious faith . . .").

<sup>157</sup> *See* AHDAR & LEIGH, *supra* note 46, at 57–59.

<sup>158</sup> *See id.* at 52 (claiming that some "consequentialist or instrumentalist theories" view religious liberty as furthering a desirable social end).

<sup>159</sup> *See* WILLIAM E. CONNOLLY, *WHY I AM NOT A SECULARIST* 91–96 (1999). The centrality of religious freedom in liberal thought is a topic discussed by several authors. *See generally* STEPHEN L. CARTER, *GOD'S NAME IN VAIN* (2000); Michael W. McConnell, *Believers as Equal Citizens, in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH 90 (Nancy L. Rosenblum ed., 2000); Wolterstorff, *supra* note 152.

<sup>160</sup> *See* JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 17 (William Popple trans., Bobs-Merrill Educational Publishing 1955) (1689) ("[T]he whole jurisdiction of the magistrate reaches only to those civil concernsments. . . . [This cannot] be extended to men's souls."). *But cf.* SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* (1999) (including a variety of essays on the conflicts between religion and liberal thought, such as whether France can prohibit Muslim girls from wearing traditional headscarves to school).

quality, intolerance, and discrimination toward some of their members (such as women) and non-members (such as homosexuals).<sup>161</sup> As such, religion potentially conflicts with key principles of liberal ideology—including liberty, autonomy, and equality—and potentially jeopardizes liberalism’s endeavor to sustain social and cultural neutrality. Religion also poses a challenge to liberal thought by offering possible antidotes to liberalism’s moral deficiencies and the inability of modern structures to overcome blights such as poverty, violence, and decadence.<sup>162</sup>

In view of these challenges, the entire spectrum of the liberal paradigm, including multicultural liberalism, has maintained political secularism as its philosophical foundation, and expected some level of assimilation by minority religious communities.<sup>163</sup> Consequently, demarcations of religion-state boundaries have produced political regimes ranging from French *laïcité* to the U.S. model of normative non-establishment, where the institutional relegation of religion to the private sphere may have generated some level of unintended bias against religious minorities.<sup>164</sup>

Nevertheless, this explanation about the unfavorable legal outcomes for religious minorities seems far from comprehensive. Apart from conceptual criticisms portraying liberalism as a power-driven doctrine as opposed to one seeking neutrality,<sup>165</sup> this argument cannot account for the unresponsive attitudes prevalent in multicultural liberal

<sup>161</sup> See Mary E. Becker, *The Politics of Women’s Wrongs and the Bill of “Rights”: A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 458–486 (1992) (offering a detailed discussion of the inferior rights secured by women in various religions).

<sup>162</sup> Rosenblum, *supra* note 4, at 7; Nicholas Wolterstorff, *Why We Should Reject What Liberalism Tells Us About Speaking and Acting in Public for Religious Reasons*, in RELIGION AND CONTEMPORARY LIBERALISM 162, 178 (Paul J. Weithman ed., 1997).

<sup>163</sup> See Dominick McGoldrick, *Multiculturalism and Its Discontents*, 5 HUM. RTS. L. REV. 27, 31 (2005) (claiming that throughout the Twentieth Century, states have followed an assimilationist policy because they feared that minority groups would demand self-determination and thereby destroy the state); see also PAREKH, *supra* note 10, at 333–35 (suggesting that “religiously sensitive secularism” welcomes religions in political life as long as the state “guard[s] against its dangers”); Sajó, *supra* note 65, at 610 (arguing that the liberal state should permit religious activity, but religious bodies should relinquish “political aspirations”).

<sup>164</sup> See AHDAR & LEIGH, *supra* note 46, at 50 (discussing the “in-built liberal bias against religion” in the context of religion’s general exclusion from the public realm). See generally PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002) (questioning the applicability of the doctrine of the separation of church and state in the U.S. context).

<sup>165</sup> See CARTER, *supra* note 152, at 230; Stanley Fish, *Mission Impossible: Setting the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2262 (1997); Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 672, 678–81 (1992); cf. Robert P. George, *A Clash of Orthodoxies*, FIRST THINGS, Aug./Sept. 1999, at 34 (providing examples of liberal beliefs that undermine a position of neutrality).

regimes like England and Germany, both of which regard religion as an integral part of the public sphere.<sup>166</sup> Thus, a deeper look into the source of reluctance to apply more generous protection to religious minorities is necessary. Moreover, such an inquiry is further dictated by the principles of multicultural liberalism, which advances the protection of religious minorities as a principal liberal ideal.<sup>167</sup>

The balancing tests incorporated within existing legal frameworks—such as RFRA’s “compelling governmental interest”<sup>168</sup> or the “necessary in a democratic society” test reflected in international and European instruments<sup>169</sup>—provide a flexible interpretive margin for the process of balancing rights. As discussed above, both the principled approach to rights protection and legal pragmatism entrust—for different reasons—the judicial process to provide protection for minority interests by way of weighing competing values.<sup>170</sup> This position was memorably articulated by Justice Jackson in *West Virginia State Board of Education v. Barnett*, where he explained that “the very purpose of [the] Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”<sup>171</sup> Nevertheless, as is evident from the analysis of Native Americans’ religious practices, their free exercise was predominantly protected in legislative acts of Congress, with RFRA as a primary example. In subsequent developments the Supreme Court continued to encroach on RFRA’s scope, ultimately declaring RFRA unconstitutional as applied to state and local governments for exceeding Congress’s authority under section five of the Fourteenth Amendment.<sup>172</sup> This legal exchange contributed to extensive debates in the United States over

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<sup>166</sup> See STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, *THE CHALLENGE OF PLURALISM* 203–06 (2d ed. 2009) (discussing the cooperation between religion and state in various aspects of German society); Liviatan, *supra* note 14, at 64–69 (discussing continuing legal developments in England regarding protections afforded to religious groups).

<sup>167</sup> See McGarry et al., *supra* note 149, at 51–52.

<sup>168</sup> See 42 U.S.C. § 2000bb–1 (2006).

<sup>169</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9(2), Nov. 4, 1950, 213 U.N.T.S. 221.

<sup>170</sup> See Alexy, *supra* note 16, at 580. See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

<sup>171</sup> 319 U.S. 624, 638 (1943).

<sup>172</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Shortly thereafter, Congress enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc–1 (2000), intended to overrule the Court’s holding in *Flores*.

the appropriate government branch to assume the responsibility for free exercise protection, with strong advocates on both sides.<sup>173</sup>

Nonetheless, the above survey on the treatment of minority religions in Europe takes the sting away from this philosophical debate. Examples concerning the treatment of NRMs and Muslims in the European public sphere demonstrate just how unresponsive and at times exclusionary the attitudes of *both* legislatures *and* judicial arms can turn out to be.<sup>174</sup> An international legal approach may advocate the defeat of domestic biases by employing international and supranational human rights instruments. Nevertheless, the above analysis does not leave much doubt that supranational bodies have proved unhelpful in addressing the inadequacies of the domestic legal systems, exemplified by the ECtHR's rulings on the Islamic headscarf and state monitoring of NRMs.<sup>175</sup> Moreover, although the European framework protecting reli-

<sup>173</sup> See Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 444–45 (1994) (warning against the hazardous constitutional effects of RFRA's statutory attempt to "upset[] the appropriate division of authority between the states and the federal government"). Compare Ira C. Luptu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 600–02 (1998) (arguing that the judiciary possesses the capability "to assess the competing equities and protect religion when it is suffering a significant harm and the state's interest in inflicting that harm is weak"), and Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 3–8 (1999) (contending that RFRA undermines Article V of the Constitution by allowing Congress to overtake the role of the Court), with Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 895–97 (1994) (finding RFRA within Congress's power as a statutory guarantee of free exercise), and Michael W. McConnell, *The Influence of Cultural Conflict on the Jurisprudence of the Religious Clauses of the First Amendment*, in LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT 100, 122 (Peter Cane et al. eds., 2008) (analyzing developments in U.S. Supreme Court jurisprudence and concluding that the legislature, rather than the Court, is becoming the decision-maker in areas of religious conflicts). See generally JEREMY WALDRON, LAW AND DISAGREEMENT, *supra* note 39 (advocating for legislation as the most representative forum for addressing disagreement within a community); JEREMY WALDRON, THE DIGNITY OF LEGISLATION, *supra* note 39 (promoting legislation as acknowledging and respecting inevitable differences of opinion in a community); Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 CARDOZO L. REV. 415 (2000) (defending both federal and state religious freedom legislation); Kelley, *supra* note 145 ("In the wake of *Smith*, a broad coalition—even a consensus—emerged that it would be appropriate to pass a statute to protect religious liberty more broadly than the Court had interpreted the Free Exercise Clause to require.").

<sup>174</sup> See BOWEN, *supra* note 73, at 1 (discussing the 2004 French law banning public school pupils from wearing clothing indicating religious affiliation and its primary effect on Muslim girls who wear headscarves); WILSON, *supra* note 106, at 67 (discussing the court battle between the Exclusive Brethren and the Charity Commissioners in England in the 1970s).

<sup>175</sup> See PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE 344 (2005) ("[T]he European Court is more willing to accommodate

gious minorities is much broader than the rulings by the ECtHR, the actual impact of existing European legislative instruments has been ineffective because they lack enforcement mechanisms to follow-up on the non-binding recommendations produced by their monitoring bodies.<sup>176</sup>

Moreover, “[n]o society is as liberal as liberals would like [and] none fully realizes the principles and aspirations of liberalism.”<sup>177</sup> Nevertheless, the evidence suggests that religious minorities face an insurmountable challenge to guarantee their rights when their beliefs are perceived as challenging the socio-cultural mainstream within their states. In these situations, the law—whether legislative or judicially-based—has been utilized time and again in a manner that is contrary to the liberal ideals of pluralism and coexistence. Observers of European politics note that “[r]eligion continues to lurk underneath the veneer of European secularization.”<sup>178</sup> As illustrated above, Christian forces were pivotal in the campaign to monitor NRMs, generating mechanisms that severely encroached on the rights of hundreds of religious groups where those groups were often much less harmful than their original portrayal.<sup>179</sup> The widespread legislative European system of recognition cultivated and entrenched the supremacy of Christian Europe.<sup>180</sup> The extreme Austrian system resulted in broad exclusion of religious latecomers.<sup>181</sup> The lingering Christian supremacy was also evident in *Ludin*, which subsequently generated legislative exemptions for Judeo-Christian symbols from the ban on religious symbols in German schools.<sup>182</sup> Finally, the legislative history of the French headscarf ban revealed the central role played by the Christian Right in propagating the threat of Islamic headscarves to France’s future.<sup>183</sup>

Nevertheless, Christian dominance within liberal societies is not the sole force generating challenges to religious liberty for religious

State interference with religious freedom than affirm and uphold the measures of protection that have been entrusted to it.”)

<sup>176</sup> See Lauren C. Baillic, Comment, *Protection of Religious Minorities in Europe: The Council of Europe’s Successes and Failures*, 23 AM. U. INT’L L. REV 617, 632 (2008).

<sup>177</sup> Stephen Holmes, *The Permanent Structure of Antiliberal Thought*, in LIBERALISM AND THE MORAL LIFE, *supra* note 1, at 227, 230.

<sup>178</sup> Peter J. Katzenstein, *Multiple Modernities as Limits to Secular Europeanization?*, in RELIGION IN AN EXPANDING EUROPE, *supra* note 65, at 1, 33.

<sup>179</sup> See BECKFORD, *supra* note 105, at 224, 263.

<sup>180</sup> See Casanova, *supra* note 65, at 65–67.

<sup>181</sup> See U.S. Dep’t of State, 2009 Report on International Religious Freedom: Austria, *supra* note 62.

<sup>182</sup> See Heinig, *supra* note 67, at 194–95.

<sup>183</sup> See BOWEN, *supra* note 73, at 1–4; SCOTT, *supra* note 67, at 125–27; ROY, *supra* note 77, at 1; Gumm, *supra* note 75, at 7.

minorities. Religious minorities plead for their rights before legislatures and judges who often come from fundamentally different religious and nonreligious backgrounds compared to that of the minority group, which impinges upon understanding and toleration. The case of Native Americans is particularly illustrative. In the early encounters between whites and Native Americans, the whites assumed that Native Americans “knew no religion” because their spirituality was so fundamentally different compared to the prevailing Judeo-Christian tradition.<sup>184</sup>

But even if one remains skeptical that religio-cultural hegemonic thrust underpins the legal limitation of minorities’ religious liberty, and opts to explain the evidence by way of a sincere secular-neutral endeavor to protect competing liberal values, an important liberal aspect remains noticeably absent of such an explanation. Whereas reasoning offered by courts and legislatures for sanctioning infringements on minorities’ religious liberty has been articulated in liberal terms, it is striking that the process has underemphasized religious freedom claims. In this instance, the example of Islamic dress is particularly illustrative: “when it comes to Islam, secular Europeans tend to reveal the limits and prejudices of modern secularist toleration.”<sup>185</sup> Permissible limitations on religious freedom were authorized in *Dahlab* on the basis of cultural neutrality.<sup>186</sup> In *Begum*, such limitations were justified based on equality and autonomy.<sup>187</sup> Similarly, the protection of secularism provided the liberal justification for the French statutory ban and for the ECtHR’s ruling in *Sahin*.<sup>188</sup> Yet, these examples hardly paid lip service to the possibility that Islamic dress may be a true manifestation of a religious belief. Throughout these proceedings, the Muslim attire is “not understood as a religious symbol, but as a primarily political one . . . [thus] being taken as a source of danger.”<sup>189</sup>

Liberal states assign the public education system the role of inculcating liberal values.<sup>190</sup> In principle, attributing this role to public

<sup>184</sup> See Loesch, *supra* note 131, at 360.

<sup>185</sup> Casanova, *supra* note 65, at 78.

<sup>186</sup> *Dahlab v. Switzerland*, App. No. 42393/98 (Eur. Ct. H.R. Feb. 15, 2001), at \*9, <http://www.echr.coe.int/echr/en/hudoc/> (follow “HUDOC database” hyperlink; then check “Decision” box on left side; then type “42393” in “Application Number Field;” then click “Search” hyperlink; then follow hyperlink to only result).

<sup>187</sup> See *R v. Governors of Denbigh High School (Begum)*, [2006] UKHC 15, [2007] 1 A.C. 100, [H.L.] 116–17 (Lord Bingham of Cornhill) (appeal taken from Eng.).

<sup>188</sup> See *Sahin v. Turkey*, App. No. 44774/98, 41 Eur. H.R. Rep. 109, 128 (2004).

<sup>189</sup> UTTZ, *supra* note 3, at 129; cf. C. Evans, *The “Islamic Scarf” in the European Court of Human Rights*, 7 MELB. J. INT’L L. 52, 55 (2006) (discussing the court’s assumption that the regulation of clothing interferes with the manifestation of religion).

<sup>190</sup> See *Begum*, [2007] 1 A.C. at 134–5 (Baroness Hale of Richmond).

schools could have generated the exact opposite approach to that exercised by European courts regarding Islamic attire. Instead of excluding Shabina Begum or Lucia Dahlab from school, permitting Islamic attire may have actually generated an inclusive atmosphere fostering tolerance and respect for others. In *Dahlab*, the judges seemed oblivious to this possibility and completely preoccupied by the threat of Islam to gender equality.<sup>191</sup> In *Begum* the Lords seemed deeply impressed by the school's willingness to allow a "light" Islamic option as part of its dress code, notwithstanding the fact that this alternative should have been the natural development in an English school composed of a Muslim majority.<sup>192</sup>

Similarly, in the context of NRMs, discriminatory practices were justified as liberal states acting on their duty to protect desirable interests. Justified state's duties were construed to impose prerequisites for registration of religious communities (Austrian Religious Communities Act),<sup>193</sup> and also for the legal surveillance of religious movements suspected to be dangerous, exemplified by the different monitoring agencies operating in France, Germany, Austria, and Belgium.<sup>194</sup> Yet these steps were repeatedly found to be unnecessarily extreme and disproportionate.<sup>195</sup>

## CONCLUSION

Religious liberty, like any other fundamental right, is not absolute. Situations may arise where the manifestation of religious belief should give way to the protection of other rights or public interests.<sup>196</sup> Never-

<sup>191</sup> *Dahlab*, App. No. 42393/98, at \*9.

<sup>192</sup> See *Begum*, [2007] 1 A.C. at 116–7 (Lord Bingham of Cornhill), 125 (Lord Hoffman), 129–30 (Lord Scott of Foscote).

<sup>193</sup> Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften [Federal Law on the Legal Status of Religious Communities] Jan. 9, 1998, BUNDESGESETZBLATT I [BGBl. I] No. 19/1998, § 11 (Austria).

<sup>194</sup> See UTTZ, *supra* note 3, at 170–78.

<sup>195</sup> See *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, App. No. 40825/98, 48 Eur. H.R. Rep. 439–46 (2008) (holding that the application of the Austrian procedure of recognition toward Jehovah's Witnesses was in violation of the ECHR, while refraining from invalidating the law itself); see also Brigitte Ohms, *Recognizing Jehovah's Witnesses as a Religious Society: A Case Winding Its Way Through the Courts*, 3 INT'L CONST. L.J. 210, 216 (2009), available at <http://www.internationalconstitutionallaw.net/download/e3fb8bd44ebc76c7ff8b2e3433110ccb/Ohms.pdf> (discussing the holding of the *Zeugen Jehovas* case).

<sup>196</sup> See, e.g., Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, being Schedule B to the Canada Act, c. 11 (U.K.) (guaranteeing rights and freedoms subject only to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"); International Covenant on Civil and Political Rights, art. 18, § 3, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (subjecting "[f]reedom to manifest one's religion . . . only to such limitations as are prescribed by law

theless, the surveyed data suggests that an unreceptive social climate resulting from a perceived threat to the dominant culture—whether motivated by a lingering hegemonic religion or by illiberal narratives—can and does utilize liberal categories and discourse as justifications for legal barriers to the manifestation of minorities' religious beliefs.

The opportunity for manipulation casts a shadow on the proclaimed neutrality of legal means and should be accounted for in current liberal deliberations. Debates between legal pragmatists and the Dworkinian approach, as well as those between constitutionalists and democratic theorists, should address these limitations in a model that assigns the primary role of conflict resolution to the law. Notably, Professor Rosenberg has constructed an empirical argument against the ability of courts to generate change without the support of the larger political system.<sup>197</sup> But this Article suggests an additional dimension for this line of criticism. As long as unpopular religious minorities are presumed threatening to the dominant cultural mainstream, they remain external to the arena of legal possibilities. As outsiders, they are often barred from obtaining judicial protection and the support of the greater political system.

Considering the failure by the above formal and doctrinal approaches to focus on the law's ability to mask illiberal attitudes, legal discourse is left with the CLS's position on the law's inherent subjectivity, alongside those critiquing CLS discourse as unable to provide an alternative political vision for a just society.<sup>198</sup> Multicultural liberalism currently represents the preferred approach to social and cultural diversity.<sup>199</sup> Nevertheless, the surveyed data reveals the limitations of this theory in its treatment of religious minorities within liberal societies. In effect, multicultural liberalism failed precisely where it attempted to rectify integrationist incarnations of liberal ideas, namely in offering a viable alternative to situations where minority practices should be protected against a majority's encroachment because of the minority's intrinsic vulnerability. In the end, the assimilationist thrust seems to remain quite viable even among Western democracies.<sup>200</sup>

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and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others"); European Convention on Human Rights art. 9, § 2, Nov. 4, 1950, 213 U.N.T.S 221 (providing for similar limitations on freedom of religion).

<sup>197</sup> See ROSENBERG, *supra* note 16, at 35.

<sup>198</sup> See Hutchinson & Monahan, *supra* note 20, at 236.

<sup>199</sup> See McGarry et al., *supra* note 149, at 52–53.

<sup>200</sup> See AHDAR & LEIGH, *supra* note 46, at 50–51.

A legal realist approach may choose to recommend an executive and administrative approach for facilitating social conflicts. This approach places the protection of minorities in the hands of local governmental agencies that may be better acquainted with the religions of their locale.<sup>201</sup> Recently, this possibility resurfaced in Quebec, Canada, in the recommendations by the Consultation Commission on Accommodation Practices Related to Cultural Differences, known also as the Bouchard-Taylor Commission.<sup>202</sup> This Commission favored the “citizen route,” defined as “less formal and relies on negotiation and the search for a compromise” over the legal route to resolving conflicts, which “ultimately decree[s] a winner and a loser.”<sup>203</sup> Notwithstanding its promise of dejudicialization for Quebec, this model seems to raise several challenges for a more universal implementation. A clear trend characterizes the politics of contemporary democracies, where those who feel injustice systematically turn to judicial proceedings as their preferred mechanism for effectuating change.<sup>204</sup> It is unclear how this trend could be reversed, particularly in societies replete with cultural conflicts more intense than those in the Canadian context.<sup>205</sup> Moreover, the flexibility offered by an executive-based arrangement also entails a disadvantage because such arrangements often culminate in a more ad-hoc protection than the documented, prescriptive, and generally applicable guarantees offered via legal standards. “Belonging,” it has been noted, “is about full acceptance and feeling at home.”<sup>206</sup> Thus, the formality presented by legal measures remains an important element of recognition and accommodation, evident in the experience of religious minorities within Western democracies.<sup>207</sup>

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<sup>201</sup> See Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land* 113 YALE L. J. 1623, 1638–39 (2004) (arguing that governmental agencies have offered real protection for Native American sacred sites).

<sup>202</sup> See Gerard Bouchard & Charles Taylor, *Building the Future: A Time for Reconciliation*, 19, Commission de Consultation sur les Pratiques d’accommodement Reliées aux Différences Culturelles [Consultation Commission on Accommodation Practices Related to Cultural Differences] (June 18, 2008), <http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf>.

<sup>203</sup> *Id.*

<sup>204</sup> See Liviatan, *supra* note 40, at 585–86.

<sup>205</sup> See *id.* at 590–92, 608–13 (discussing the use of courts by religious minorities in India and Israel).

<sup>206</sup> PAREKH, *supra* note 10, at 237.

<sup>207</sup> See Alberto de la Hera, *Relations with Religious Minorities: The Spanish Model*, 1998 BYU L. REV. 387, 394–96 (arguing that the 1992 legal arrangements between Spain and its non-Catholic minorities provided much more than communal rights, serving also as an act of recognition by a state whose history is replete with intolerance toward non-Catholics).

For those envisioning law as the watchdog of social, political, and economic abuses, its failure as liberalism's main vehicle in promoting neutrality among competing worldviews is understandably frustrating. Nevertheless, a legal resolution to conflicts seems to offer practical advantages. As Professor Hampshire has argued, "[a]lmost every organized society requires an institution and also a procedure for adjudicating between conflicting moral claims."<sup>208</sup> Legal scholarship has highlighted the role of legal devices as strategies enabling coexistence, noting federalism, burden of proof, trial by jury, and the public/private divide as helpful strategies to manage and defuse cultural tensions.<sup>209</sup> The analysis above revealed the preference among the politically powerful for legal resolutions to cultural conflicts because legal resolutions enable creative strategies and orderly procedures by which the powerful can impose their dominant views while dressed in liberal rhetoric.

Nevertheless, the lure of the law seems to hold for weaker sections of society as well, particularly in the context of enduring cultural tensions. A political interest institutionalized as a binding law provides unparalleled opportunities for social conformity because the political interest immediately becomes authoritative and enforceable. When the struggle over the public sphere is perpetual, as is generally the case with religion-based conflicts, legal measures are particularly appealing as opportunities for the opposing parties to mold the public sphere in accordance with their political and moral preferences.<sup>210</sup>

Nonetheless, because law enshrines political preferences, it remains authoritative pending shifts in the distribution of political power. Therefore, weak social actors retain the prospects of changing legal arrangements by way of demographic growth, creative legal or political maneuvering, or any other enabling adjustment to the distribution of political power. The wider scope of religious freedom enjoyed by U.S.-based NRMs compared with their European counterparts is due to

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<sup>208</sup> HAMPSHIRE, *supra* note 42, at 7.

<sup>209</sup> See Martha Minow, *Is Pluralism an Ideal or a Compromise?* 40 CONN. L. REV. 1287, 1309–13 (2008); see also HAMPSHIRE, *supra* note 42, at 6–8 (discussing the necessity of political and judicial procedures in cities and states).

<sup>210</sup> See generally GREGG IVERS, *TO BUILD A WALL: AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE* (1995) (discussing the efforts of American Jews and the organizational structures representing their interests to influence church-state jurisprudence); THOMAS L. KRANNAWITTER & DANIEL C. PALM, *A NATION UNDER GOD? THE ACLU AND RELIGION IN AMERICAN POLITICS* (2005) (exploring the ACLU's efforts to preserve religious liberty by eliminating public expressions of faith); Hans J. Hacker, *Defending the Faithful: Conservative Christian Litigation in American Politics*, in *THE INTEREST GROUP CONNECTION* 365 (Paul S. Herrnson et al. eds., 2d ed. 2005) (discussing the litigation tactics of the conservative Christian movement in the United States).

U.S.-based NRMs' successful recruitment of powerful players within the U.S. legal and political system.<sup>211</sup> Prior to involving "friends in high places," U.S.-based NRMs usually lost their legal battles. Nevertheless, once key organizations—such as the ACLU—and scholars studying NRMs joined their cause, NRMs experienced greater responsiveness by the U.S. legal system. This produced a dramatic broadening of their religious liberty guarantees compared to European-based NRMs.

Enduring cultural conflicts amplify law's political character. In these contexts legal arrangements seem no more than temporary *modus vivendi* that reshuffle once shifts in political power are ripe. Nevertheless, law's political nature does not seem to counteract its ability to facilitate cultural conflicts. Heraclitus of Ephesus famously coined the phrase "nothing is permanent except change." The true appeal of law is being unveiled by our infinitely expanding universe of social and cultural conflicts: these conflicts give the impression that changing unfavorable legal arrangements in liberal societies always remains within a feasible reach.

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<sup>211</sup> See James T. Richardson, *Legal Dimensions of New Religions*, in THE OXFORD HANDBOOK OF NEW RELIGIOUS MOVEMENTS 163–83 (James R. Lewis ed., 2004).