Article

Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law

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If the claims of two (or more than two) types of liberty prove incompatible in a particular case, and if this is an instance of the clash of values at once absolute and incommensurable, it is better to face this intellectually uncomfortable fact than to ignore it, or automatically attribute it to some deficiency on our part which could be eliminated by an increase in skill or knowledge; or, what is worse still, suppress one of the competing values altogether by pretending that it is identical with its rival—and so end by distorting both.

—Isaiah Berlin[1]

I. INTRODUCTION

Consider the following statutory provision:

> In public schools, students are prohibited from wearing symbols or attire through which they conspicuously exhibit a religious affiliation.

Such a law, now familiar in the wake of the recent *affaire du foulard* in France,[2] appears prima facie to violate the most basic tenets of the right to freedom of religion and belief in international law. Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that everyone has the right to freedom of thought, conscience, and religion, including the freedom "either individually or in community with others and in public or private, to manifest . . . religion or belief in worship, observance, practice and teaching."[3] In most religious traditions, the wearing of religious

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1. ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 1 (1969).

2. The so-called *affaire du foulard* began in October 1989 when three French Muslim girls attended school wearing the Islamic veil. The school authorities ordered the girls to uncover their heads but the girls, supported by their families and the French Islamic community, refused and were expelled. Similar episodes began to occur at other schools, and the controversy soon became widely debated in France. The Minister of Education, Lionel Jospin, sought the opinion of the *Conseil d'état* which in November 1989 issued a formal statement ruling that "French students had the right to express their religious beliefs in public schools, as long as they respected the liberty of others and on the condition that such expression did not hinder normal teaching or order within the school." ANNA ELISABETTA GALEOTTI, TOLERATION AS RECOGNITION 117 (2002). This ruling favoring tolerance was subsequently reinterpreted in September 1994 by the new conservative Minister of Education, François Bayrou, who issued an official directive to all public school principals stating that only discreet and modest religious symbols should be tolerated in schools. *Id.*; Eduardo Cue, *For France, Girls in Head Scarves Threaten Secular Ideals*, CHRISTIAN SCI. MONITOR, Oct. 5, 1994, at 8. Following extensive public consultations by the so-called Stasi Commission, President Jacques Chirac signed Law 2004-228 banning the wearing of ostentatious religious symbols in public schools. Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190. The National Assembly approved the bill by an overwhelming majority vote of 494 to 36 and the Senate by a majority of 276 to 20. T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 422 (2004).

3. International Covenant on Civil and Political Rights, G.A. Res. 2200A, art. 2(1), U.N. GAOR, 21st Sess., U.N. Doc. A/RES/2200 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; *see also* Hudoyberganova v. Uzbekistan, Communication No. 931/2000, U.N. GAOR, Hum. Rts. Comm., 82d Sess., ¶ 6.2, U.N. Doc. CCPR/C/82/D/931/2000 (2004) ("[T]he freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion.").

symbols or attire—for example, the Jewish yarmulke, the Sikh turban, or the Islamic hijab—is not a simple matter of choice but a matter of religious duty, ritual, and observance. Within different traditions, there are a variety of ways in which religious symbols work. In Christianity, for example, the crucifix is worn as an ornament of conviction whereas, in Judaism, the yarmulke is worn as a matter of religious obligation. For certain ethnic, religious, and cultural groups (whether they comprise the majority or a minority), wearing religious or traditional dress is closely bound up with spiritual practices and is a defining element of group identity. For Muslim girls and women the wearing of the hijab may be a form of social obligation that is religiously motivated rather than a matter of religious duty per se. This, in turn, has an intergenerational dimension with the continuity of religious tradition being seen as a critical factor in the survival of specific cultural, religious, and linguistic groups.

While the specific historical reasons for the wearing of religious symbols and attire may vary in different religious traditions, the one common feature is the centrality of such practices to the manifestation of religious belief. Given this widely acknowledged fact, on what possible grounds—and for what reasons—can a state seek to limit this aspect of the freedom to manifest one's religion? Considerable scholarly attention has been paid in recent years to the French law proscribing the wearing of religious symbols in public schools[4] and to the issue of Muslim minorities in European nation-states more generally.[5] This Article responds to a deeper concern. Stepping back from these debates, and from some of the more comfortable philosophical and jurisprudential assumptions upon which they appear to rest, it aims at a more rigorous theoretical treatment of the subject. The Article thus

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4. There is now a voluminous literature on the *affaire du foulard*. *See, e.g.*, Dina Alsowayel, *The Elephant in the Room: A Commentary on Steven Gey's Analysis of the French Headscarf Ban*, 42 HOUS. L. REV. 103 (2005); Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUS. L. REV. 1 (2005) (citing various sources); T. Jeremy Gunn, *French Secularism as Utopia and Myth*, 42 HOUS. L. REV. 81 (2005) (responding to Gey's discussion of the *affaire du foulard*); *see also* Cynthia DeBula Baines, L'Affaire des Foulards—*Discrimination, or the Price of a Secular Public Education System?*, 29 VAND. J. TRANSNAT'L L. 303 (1996); Elisa T. Beller, *The Headscarf Affair: The Conseil d'état on the Role of Religion and Culture in French Society*, 39 TEXAS INT'L L. J. 581 (2004); Sebastian Poulter, *Muslim Headscarves in School: Contrasting Legal Approaches in England and France*, 17 OXFORD J. LEG. STUD. 43 (1997).

5. Just in the last year, see, for example, Elizabeth F. Defeis, *Religious Liberty and Protections in Europe*, 45 J. CATH. LEGAL STUD. 73 (2006) (reviewing international mechanisms monitoring religious freedom in Europe); Karl-Heinz Ladeur & Ino Augsberg, *The Myth of the Neutral State: The Relationship Between State and Religion in the Face of New Challenges*, 8 GERMAN L.J. 143 (2007) (arguing for a reshaping of the principle of state neutrality); M. Todd Parker, *The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and ECHR*, 17 DUKE J. COMP. & INT'L L. 91 (2006) (examining whether restrictions on manifestations of religion are justifiable under international human rights instruments); Ian Ward, *Headscarf Stories*, 29 HASTINGS INT'L & COMP. L. REV. 315 (2006) (discussing, in particular, the cases of Shabina Begum in England and Leyla Sahin in Turkey, as well as the fictional characters Teslime, Ipek, and Kalife in Orhan Pamuk's acclaimed novel *Snow*); and Cees Maris, *Laïcité in the Low Countries?: On Headscarves in a Neutral State* (Jean Monnet Ctr. for Int'l and Reg'l Econ. Law & Justice, Working Paper No. 14/2007), *available at* www.jeanmonnetprogram.org/papers/07/071401.rtf (discussing the 2003 proposal to ban Islamic headscarves in public institutes in the Netherlands). *See generally* REGULATING RELIGION: CASE STUDIES FROM AROUND THE GLOBE (James T. Richardson ed., 2004) (discussing the interaction of various religions and governments around the world).

asks whether there is a coherent notion of religious freedom in international law and, if not, why not? In identifying certain problematic aspects of the extant literature, it advances an argument that seeks to overcome the current impasse in liberal theorizing: the idea of value pluralism as a theoretical basis for religious freedom in international law.

Part II first sets out three potential grounds of limitation on the freedom to manifest religion or belief. In suggesting that these arguments fail adequately to capture what lies at the heart of controversies surrounding the wearing of religious symbols, Part III then considers the background question of the *identity* of the subject of international law—the notion of a "people" or "nation" with a right to self-determination in the legal form of a "state." Within the very concept of "nation-state," the tension between nationalism and liberalism is shown to generate competing conceptions of pluralism, which in turn shape how states seek to accommodate religious, ethnic, and cultural diversity. Part IV illustrates this thesis by considering how challenges to laws proscribing the wearing of religious symbols have been dealt with in four differently situated nation-states: France, Turkey, Germany, and the United States. In arguing that some forms of group difference require certain "group-specific" rights, Part V then addresses how international law seeks to reconcile basic norms of equality and nondiscrimination with equally basic commitments (such as under Article 27 of the ICCPR) to the freedom of minorities to profess and practice their religions and beliefs.

Finally, Part VI argues that, together, these considerations suggest certain limits to the rationalist ambition of advancing a tidy and universally applicable theory of religious freedom in international law.[6] These limits arise by virtue of the doctrine of value pluralism, which takes the plurality of valuable options and ways of life to be ultimate and irreducible.[7] Value pluralism is thus sensitive to the fact that the fundamental rights of liberal thought are subject to disabling indeterminacies, a recognition that compels us to accept that there is a plurality of ways of thinking not just about the good,

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6. My project is similar in inspiration to John Gray's recent attempt to formulate a variety of "agonistic" liberalism which is "grounded, not in rational choice, but in the limits of rational choice—limits imposed by the radical choices we are often constrained to make among goods that are both inherently rivalrous, and often constitutively uncombinable, and sometimes incommensurable, or rationally incomparable." JOHN GRAY, ENLIGHTENMENT'S WAKE: POLITICS AND CULTURE AT THE CLOSE OF THE MODERN AGE 68-69 (1995) [hereinafter GRAY, ENLIGHTENMENT'S WAKE]. The argument thus pursues three lines of critique similar to those advanced by Joseph Raz, as follows: (i) in terms of method, by rejecting the notion of a fixed structure of basic liberties in recognition of the fact that the form of rights that best promotes autonomy is necessarily indeterminate and variable; (ii) by recognizing that intrinsically valuable forms of human flourishing and ways of life enter into the value of autonomy itself such that forms of autonomous choice will vary in different societies; and (iii) in acknowledging that incommensurabilities between ultimate values set a limit to the rationalist ambitions of legal and political philosophy. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 165-216, 321-366 (1986) [hereinafter RAZ, MORALITY OF FREEDOM].

7. For discussion of value pluralism as a moral theory in political philosophy, see JOSEPH RAZ, *Multiculturalism: A Liberal Perspective*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 155 (1994). In summary terms, the central features of value pluralism are its anti-monistic position as an ethical theory and its view that conflicts of values are an intrinsic part of human life, that there is no single right answer in choosing between them, and that conflicts between entire ways of life suggest that not only individuals but also communities may be the principal bearers of rights (and duties) in pluralist political orders. GRAY, ENLIGHTENMENT'S WAKE, *supra* note 6, at 69, 138. *See also infra* Section VI.B.

but also about the right. Different ways of thinking about religious freedom thus lead to a pluralism of conceptions of the right with the result that no single theory of justice emerges as triumphant.[8] International law, as an expression of "international right," should reflect this reality. Integral to this recognition is the intrinsic and undeniable value of communal goods (or what Raz has termed "inherently public goods"[9]) to autonomy. We should therefore expect different models of toleration and compromised conceptions of neutrality. On this basis alone, it is hopeless for international legal theory to avoid communal goods altogether. The communal has mattered historically (especially in the area of religious freedom), and it matters at the theoretical level. While the formal structure of international human rights law reflects this reality by recognizing norms of self-determination and "minority" rights, in general these collective rights have been undertheorized in the literature on religious freedom. This Article is a response to that omission.

II. LIMITATIONS ON THE RIGHT TO WEAR RELIGIOUS SYMBOLS

Let us turn to the first question: what are the possible grounds on which states may seek to limit the freedom to manifest religion or belief? States, in fact, have a number of possible interests in the regulation of religious symbols. One is to control specific environments—for example, parliaments, courts, prisons, or armies—for certain official purposes. In these environments, religious symbols may directly obstruct the regulation of state functions. Another is the incidental interference of religious symbols in fields of regulation where the state has important interests such as public health, safety, and order. Wearing a turban while riding a motorcycle may make an individual more susceptible to head injuries and thus implicate the state's interest in public health; wearing a burka in a driver's license photograph may make it harder to identify people and thus implicate the state's interest in public safety. A third state interest is implicated when religious symbols interfere with public settings, which are themselves highly symbolic of the identity of the state. The presence of religious symbols in courts and police stations in certain states may raise concerns of this kind.

Interests of at least the first two kinds are recognized under Article 18(3) as permissible grounds of limitation on the manifestation of religious belief.[10]

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8. I use the terms "good" and "right" here in the traditional Rawlsian sense of seeking to explain how people adhering to different comprehensive religious, philosophical, and moral doctrines may affirm the same conception of justice on different moral and political grounds. Following Waldron, I argue that Rawls's notion of an "overlapping consensus" cannot resolve the dilemma of "justice-pluralism" and "disagreement about rights." *See* JEREMY WALDRON, LAW AND DISAGREEMENT 149-50, 162 (1999) (arguing that "[s]o long as each conception of the good generates its own conception of justice . . . it is impossible for competing conceptions of the good to be related to a single conception of justice (such as [Rawls's theory of justice as fairness]) in the strong moral relation that Rawls refers to as 'overlapping consensus'").

9. *See infra* note 206 and accompanying text.

10. ICCPR, *supra* note 3, art. 18(3) ("Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."). The third concern raises questions of state endorsement of or entanglement with religion. The ICCPR contains no equivalent of the Establishment Clause in the First Amendment. Theoretically, therefore, international human rights law does not restrict states in either endorsing or cooperating with religions, including through the

The next three sections will discuss three separate grounds of limitation the French government sought to invoke in the *affaire du foulard*. This example will illustrate how various justifications are employed and what their weaknesses are.

A. *Public Order*

The first state interest invoked by France is the protection of public order. According to this argument, the wearing of religious symbols is seen as being linked to an increased risk of threats and violence, whether because of intolerance and xenophobia directed towards an unpopular religious minority, or because of a perceived threat of the rise of religious fundamentalism directed towards the democratic values and institutions of the state. Neither of these justifications withstands close scrutiny, however. In the first case, seeking to minimize differences by limiting the religious freedom of a minority in order to address threats of violence by the majority is a reversal of logic that, in effect, punishes the victim. A more appropriate response would be to foster recognition of difference and toleration by the majority on the basis of respect for the religious freedom of minorities freely to practice their religion.

In the second case, it is not immediately obvious (at least not without considering the history and national identity of specific states, as I explain further below[11]) why the wearing of the yarmulke, turban, or hijab is an indicia either of extremism or of any particular threat to the state. This view raises the illogical implication that any member of a religious tradition who takes her religious obligations seriously and complies with her religion's dress code is, on that basis alone, disloyal to liberal institutions and a threat to the liberal order. Such a position derives more from fear and intolerance than from any sound evidence and is inconsistent with a robust conception of the right to freedom of religion, itself one of the hallmarks of the liberal tradition. Indeed, if the mere wearing of a religious symbol in the public sphere were to be regarded as a threat to the values and institutions of the state, then the scope of the freedom to manifest religion or belief would be so severely curtailed as to be virtually nonexistent. For this reason, limitations based on considerations of public order are not, on their own terms, especially convincing.[12]

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display of religious symbols in official settings or the wearing of religious attire by state officials (provided, of course, the state respects all other human rights norms including the rights to equality and nondiscrimination).

11. My analysis in this Article does not seek, however, to cover more complex sociological questions concerning the current conditions of inter-ethnic relations in European states, relations between local ethnic and religious groups and movements in foreign countries, or the political mobilization of different groups and the nature of their demands with the resulting potential for violence and other rights violations. My discussion is limited to the more modest task of seeking to clarify certain conceptual issues concerning the rights of religious minorities under international human rights norms.

12. The activities of a certain religious community or group of religious communities may be seen to threaten public order simply by virtue of being visible, different, or successful. While this fact alone does not permit the state to suppress such manifestations of religion or belief as a matter of public policy, states may seek more narrowly to impose "reasonable" limitations on such manifestations (of the kind embodied in laws proscribing the wearing of religious symbols) in order to prevent public disorder. As noted by Karl Partsch:

B. *Fundamental Rights and Freedoms of Others*

A second possible ground for limiting the freedom to manifest religion is to protect the "fundamental rights and freedoms of others."[13] The *Conseil d'état* in France has stated that the right to freedom of religion does not include the right of students to display religious symbols that "individually or collectively, or to their ostentatious or demonstrative character, constitute an exercise of pressure, provocation, proselytizing or propaganda."[14] This raises complex arguments regarding the practice of proselytism and its associated difficulties.[15] I do not wish to revisit those arguments here other than to suggest that the reasons for limiting the manifestation of religion in this case are arguably *less* convincing than in instances of overt acts of proselytism given that the wearing of religious symbols does not raise the same degree of concern of coercion and harm to others.[16] It is difficult to see, for example, how a Sikh student wearing a turban or a Jewish student wearing a yarmulke could, on this basis alone, be regarded as exercising "pressure, provocation, proselytizing or propaganda" towards other students.[17] Indeed, if there is an

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> [L]imitations on freedom to manifest one's religion cannot be imposed to protect *ordre public* with its general connotations of national public policy, but only where necessary to protect public order narrowly construed, i.e., to prevent public disorder. A state whose public policy is atheism, for example, cannot invoke Article 18(3) to suppress manifestations of religion or beliefs.

Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 209, 212-13 (Louis Henkin ed., 1981) (footnote omitted). For discussion on the limitations clauses in the ICCPR and European Convention on Human Rights (ECHR), see Parker, *supra* note 5.

13. These are the words used in the ICCPR, *supra* note 3, art. 18(3).

14. *See* L. Elizabeth Chamblee, Note, *Rhetoric or Rights? When Culture and Religion Bar Girls' Right to Education*, 44 VA. J. INT'L L. 1073, 1111 (2004) (quoting KATARINA TOMAŚEVSKI, EDUCATION DENIED: COSTS AND REMEDIES 168 (2003)).

15. *See, e.g.*, Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 6 (1993). For a detailed discussion of this case, see Peter G. Danchin & Lisa Forman, *The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities*, *in* PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE 192, 200-06 (Peter G. Danchin & Elizabeth A. Cole eds., 2002). Proselytism raises complex questions regarding the relationship between individual rights and differing conceptions of collective goods. *See* Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARV. INT'L L.J. (forthcoming 2008) [hereinafter Danchin, *Of Prophets and Proselytes*].

16. The question of whether wearing religious attire on its own constitutes a form of proselytism has been a contentious issue in France. Initially, the *Conseil d'état* ruled that there was no evidence to suggest that donning a religious symbol such as the headscarf amounted to proselytism. *See* David Beriss, *Scarves, Schools, and Segregation: The Foulard Affair*, 8 FRENCH POL. & SOC'Y 1 (1990); Miriam Feldblum, *Paradoxes of Ethnic Politics: The Case of Franco-Maghrebis in France*, 16 ETHNIC & RACIAL STUD. 52 (1993). Subsequently, however, the Bayrou directive in 1994 declared "ostentatious" signs of religious belief to be a form of proselytism. *See* ALEC G. HARGREAVES, IMMIGRATION, "RACE" AND ETHNICITY IN CONTEMPORARY FRANCE 127 (1995).

17. This is not to say, however, that the wearing of religious symbols raises no concerns of coercion or harm to others. The issue may arise in different contexts—for example, in terms of pressure exerted by students' peers both in and out of school—with accordingly varying factors to consider. One particularly contested issue that has arisen is whether teachers in secondary schools or judges in courtrooms may wear the Islamic headscarf. These cases tend to turn on how certain interrelated variables such as the attributes of the actor and the place of the action are understood with respect to the notion of coercion. Unlike in the case of students in public schools, teachers and judges are state officials. This raises questions of state endorsement and entanglement with religion, at least in relation to officials who are members of the dominant or majority religions. Of course, in relation to religious minorities different considerations will apply. *See, e.g.*, Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 429, 449. A teacher in a public primary school, after embracing Islam, sought to wear the hijab in class.

exercise of pressure or proselytizing to be found, it is more likely to exist in the home between parents and their children or emanate more broadly from the surrounding religious community. This suggestion is a heated and divisive issue in France with controversial claims being made that the Islamic headscarf is a symbol of the invisibility and subordination of women—especially of girls who are perceived to be acting under family pressure—and with calls arising for the state to intervene to prevent Muslim parents from harming the autonomy and "life chances" of their children.[18]

C. *Autonomy and Gender Equality*

This last point raises a third possible ground for limiting the freedom to manifest religion: to protect women—especially girls—from discrimination. Some support for this view can be found in Article 2(f) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which requires states to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women."[19] Could it be argued, therefore, that the rationale for laws proscribing the wearing of headscarves may be grounded in concerns for the autonomy and equality of Muslim girls? This argument raises difficult questions to which I shall return below. At this stage of my analysis, I wish only to make two preliminary points.

First, this argument presupposes the right of the state to judge whether to tolerate or interfere with cultural, religious, or non-conformist dress codes. Even if one accepts this proposition (which, as we shall see, raises serious difficulties for liberal theories of toleration), it is far from evident, and indeed deeply contested both within and outside Islam, whether wearing the hijab

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Under Section 6 of the Public Education Act, she was prohibited as a civil servant from manifesting her religious affiliation while in class. *Id.* at 452. After exhausting all domestic remedies, she took her case to the European Court of Human Rights arguing that the cantonal law was in violation of Article 9 of the ECHR. *Id.* The Court held that her right to freedom of religion had to be balanced against the right of children to receive an education free from any religious influences apart from those decided by parents or legal guardians. *Id.* at 462. The Court thus agreed with the Swiss courts that as a civil servant with the potential to influence young children, the applicant could not continue to wear the veil while in class. *Id.* For the reasons discussed below, I believe this case to be wrongly decided. For a recent case involving a student's attempt to wear the veil, see *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993) (indicating that the refusal of a university to allow the applicant to wear a headscarf in her identity photograph was not a restriction on her right to manifest her religion). For criticism of this decision, see CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 118 (2001) (arguing that the reasoning of the Commission suggests a "level of conceptual confusion").

18. *See, e.g.*, Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression and Women's Equality Under International Law*, 45 COLUM. J. TRANSNAT'L. L. 367, 406-07 (2007) (suggesting that "girls may be especially subject to pressure, including peer pressure, in regards to dress, and need extra protection from religious extremists and coercive family members").

19. Convention on the Elimination of All Forms of Discrimination Against Women art. 2(f), *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13. Article 5(a) of CEDAW further requires states to take appropriate measures:

> To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on the stereotyped roles for men and women.

Id. art. 5(a).

causes harm either to those who wear it or to society in general. The reasons for wearing the hijab are not monolithic. For some Muslim women, the veil is a symbol of living in a Western society, such as France, without foregoing one's Islamic identity and is thus not a statement of oppression but of emancipation.[20] For others, it may have a political meaning expressing solidarity with Muslims worldwide or support for different conceptions of political Islam.[21] For still others, it is more of a religiously inspired social obligation symbolizing piety and chastity and a rejection of the way in which women are sexually exploited and represented in Western society.[22] In reality, these meanings likely overlap for individual Muslim women and between different Muslim communities, creating a range of tensions and forces with women both defending their religion and culture while at the same time struggling against conservative conceptions of gender and sex equality.[23] Given this multitude of meanings and ways in which the hijab actually works as a religious symbol, its blanket restriction by the state on the assumption that it symbolizes women's oppression simply will not do.[24]

Second, this argument is entangled in complex ways with the fraught and unstable public-private divide that characterizes liberal rights discourse. If the true rationale for the law is concern for the autonomy of Muslim girls and discrimination vis-à-vis the cultural impositions of the family, then should not the state ban the Islamic headscarf altogether and not just in public schools? Such an argument opens the way to a wider range of state interference than is generally regarded as acceptable in a liberal democratic state premised on respect for human rights. Conversely, if the headscarf is to be banned only in

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20. By showing that they are participating in the public spheres of work and education without rejecting their Islamic identity, Muslim women may actually open a greater space for emancipation, especially in more conservative communities struggling to redefine their collective identities in sometimes hostile economic and social environments. For a discussion of the position and identity of Islamic communities in Western Europe, see ISLAM AND EUROPEAN LEGAL SYSTEMS (Silvio Ferrari & Anthony Bradney eds., 2000) and ISLAM IN EUROPE: THE POLITICS OF RELIGION AND COMMUNITY (Steven Vertovec & Ceri Peach eds., 1997).

21. *See, e.g.*, Ward, *supra* note 5, at 331 (discussing veil-wearing as a "revolutionary gesture" reflecting a view of Islam in modern Turkey as a "culture of protest" (quoting ORHAN PAMUK, SNOW 116 (Maureen Freely trans., 2004) (2002))); *see also* Norma Claire Moruzzi, *A Problem with Headscarves: Contemporary Complexities of Political and Social Identity*, 22 POL. THEORY 653, 663 (1994) (noting that in a "colonial or a postcolonial situation . . . the cultural representations of feminine identity are as much nationalist political constructions as social ones").

22. *See, e.g.*, Caitlin Killian, *The Other Side of the Veil: North African Women in France Respond to the Headscarf Affair*, 17 GENDER & SOC'Y 567, 575-86 (2003) (noting the full range of reactions of Muslim women to the French headscarf law).

23. The wearing of the hijab by Muslim girls in Europe is, as concluded by Bhikhu Parekh:

> a highly complex autonomous act intended both to remain within the tradition and to challenge it, to accept the cultural inequality and to create a space for equality. To see it merely as a symbol of their subordination, as many French feminists did, is to miss the subtle dialectic of cultural contestation.

Bhikhu Parekh, *A Varied Moral World*, *in* IS MULTICULTURALISM BAD FOR WOMEN? 69, 73 (Joshua Cohen et al. eds., 1999).

24. For a nuanced analysis of the practice of veiling in Muslim societies, see Nancy Hirschmann, *Eastern Veiling, Western Freedom?*, 59 REV. POL. 461 (2001). *See also* Carolyn Evans, *The 'Islamic Scarf' in the European Court of Human Rights*, 7 MELB. J. INT'L. L. 52, 71-72 (2006) (noticing two contradictory stereotypes of Muslim women in debates concerning the Islamic headscarf, one as a submissive victim of a "gender oppressive religion" needing rescue by the state, the other as an aggressor and fundamentalist who imposes values upon the unwilling and who threatens to destabilize the liberal, egalitarian order of the state).

the public sphere (or, more accurately, in specific parts of the public sphere), what are the reasons justifying *this* particular demarcation of spheres (as opposed to others), and are these reasons reconcilable with a robust conception of the right to religious freedom?[25]

It is to concerns such as these that we must now turn in more depth. Before doing so, however, I wish to clarify that my intention in considering these three grounds of limitation, albeit in somewhat cursory terms, is not to suggest that valid arguments cannot be advanced in support of a law prohibiting the wearing of religious symbols in public schools. Rather, what I wish to assert is that analysis of this issue under Article 18 alone fails to capture what lies at the heart of the controversy. Viewing laws proscribing the wearing of religious symbols solely in terms of individual rights (individuals are free to practice their religion provided this does not cause harm to others)[26] obscures the collective religious and cultural implications of symbols such as the Islamic headscarf. Members of different national, cultural, and religious groups have differing national, cultural, and religious identities—that is to say, *collective* identities—that must be carefully factored into interpreting or analyzing rights claims of this kind. Indeed, this Article argues that what gives rise to conflicts between differently situated subjects are not primarily differences among individuals, but differences—and unequal treatment—among groups.

Scholars of international human rights law are beginning to recognize how the divergent claims and interests of majorities and minorities, and the different conceptions of individual and collective goods from which they arise, are inseparably related to individual claims of right. Correspondingly, it is becoming apparent that the "liberal algebra"[27] of rights regimes is unable to resolve such conflicts without considering, at least at some point in the analysis, different conceptions of collective goods in the historical context of particular political communities.[28] In order to illustrate the importance of the collective aspects of claims to religious freedom, we need squarely to confront a generally undertheorized and contested area of international human rights

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25. One possible argument, for example, is that the state has different responsibilities in the sphere of education and that children (at least at a certain age) have lesser rights in the matter than adults. This appears, indeed, to be a significant part of the French defense of the rule. But the point remains that any reason that may be advanced to justify this position will be controversial and contested and that there is no obvious or easy answer as to how to demarcate the public and private spheres consistently with a coherent theory of freedom of religion and belief.

26. Galeotti refers to this as the "naïve liberal view" under which the issue of the Islamic headscarf "appears inexplicable":

> The naive liberal view conceives of toleration as the principle according to which everyone should be free to follow his or her ideals and style of life as long as no harm is done to anyone else. Headscarves do no harm to any third party, and the choice to wear one for whatever reason rests in the proper domain of personal freedom. This simplistic approach to the case suggests that toleration is the obvious solution, but, in doing so, it disguises the *raison d'être* of the controversy.

GALEOTTI, *supra* note 2, at 118.

27. Jeremy Waldron, *Toleration and Reasonableness*, *in* THE CULTURE OF TOLERATION IN DIVERSE SOCIETIES 13, 14 (Catriona McKinnon & Dario Castiglione eds., 2003).

28. *See, e.g.*, *id.* at 14-16, 23. For general discussion on the notion of "common" goods, see WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 220 (2d ed. 2002) (noting that communitarian critiques of liberalism conceive the "common good" in terms of a "substantive conception of the good life which defines the community's 'way of life'").

law known broadly as "group rights." In particular, we need to consider two types of communal claims—the first of so-called "peoples" or "nations" and the second of so-called "religious, cultural or linguistic minorities."

Together these group claims point toward the need for a theory of value pluralism in international law (whether "liberal" or otherwise) and away from classical liberal theories premised exclusively on the idea of individual rights. Indeed, it is only by including in the analysis these two sets of group rights and considering their conceptual interrelationship to individual rights that the issue of the wearing of religious symbols or attire becomes comprehensible, and the need to move beyond traditional liberal accounts of human rights becomes apparent. On this basis, the central argument of this Article is that the need to accord public recognition of group differences and identities requires us to reconsider two central tenets of the liberal rights tradition: first, the idea that comprehensive conceptions of religious and moral value are "private" matters to be excluded from the public sphere; and second, the idea that religious freedom requires no more than noninterference with the individual's imagined sphere of liberty as opposed to public recognition of a plurality of different religious and cultural groups and ways of life.

III. THE RIGHTS OF MAJORITY NATIONS

The primary subject of international law is the nation-state. Implicit in this notion is the idea of a majority group with a distinct (as yet undefined) identity. What are the implications of this background premise for the right to freedom of religion or belief of differently situated groups inhabiting the same state or territory? The argument in this Part develops in three stages. First, in Section III.A, I show how attempts to accommodate religious diversity in nation-states generate two conceptions of pluralism, one premised on the liberal nondiscrimination principle and the other on a plurality of situated subjects asserting collective claims of right. In recognition of this tension, contemporary theorists have sought to combine these narratives in different versions of "liberal nationalism," which I describe in Section III.B. Finally, while the formalism of the "liberal state" may obscure this fact, in Section III.C, I show that such attempts illustrate the complex implications of the tension between pluralism and nationalism for any theory of individual toleration in international law.

Let us begin our consideration of these arguments with the first category of group rights: the claims of "peoples" and "nations." It is a basic axiom of international law that "peoples" have a right to self-determination.[29] It is also

29. The right to self-determination has been recognized in all the major international human rights treaties and declarations, including the U.N. Charter art. 1, para. 2; ICCPR, *supra* note 3, art. 1(1); the International Covenant on Economic, Social and Cultural Rights art. 1(1), G.A. Res. 2200A, U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (Dec. 16, 1966); and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., U.N. Doc. A/8082 (Oct. 24, 1970). It has also been considered and applied in various cases in the International Court of Justice. *See, e.g.*, Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 95 (June 30); Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 31-35 (Oct. 16); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31 (June 21). In the opinion of many jurists and writers, self-

well-known that what constitutes a "people" and what the norm of "self-determination" requires are two of the most controversial and essentially contested questions in international legal theory. I do not intend to discuss either question in detail here. Rather, my focus is on a less controversial proposition, albeit one that is usually either assumed or overlooked in discussions of this kind. Nevertheless, it is a proposition that I believe is critical to our understanding of the nature of the problem that confronts us: the notion that, however the identity of the international legal subject is conceived, it will necessarily include contested conceptions of particular collective goods such as issues of a common history, territory, language, culture, and for present purposes, religion.

Before we can conceive of the concept of a minority group claiming rights, we first need some preexisting conception of a *majority* group. Neither of the concepts "majority" nor "minority" makes sense without the other. In international law, the recognized majority group is the "nation" or "people," usually defined in historical terms and with respect to certain collective notions of nationality, culture, and religion. At the same time, the proper subject of international law is not the nation, but the state.[30] While most existing states are constituted by different ethnicities, religious groups, nationalities, and peoples, in contemporary liberal rights discourse it is tacitly assumed that there is a general correspondence between nation and state—that the political community is coterminous with a dominant majority ethnic, religious, and cultural community.[31] In this sense, the relationship between nation and state—or more precisely the idea that the central subject of international law is the sovereign nation-state—is the "great unexamined assumption of liberal thought."[32]

There are important historical and theoretical explanations for this assumption and for its relative quiescence in contemporary rights discourse. For present purposes, I wish to focus on the supposed rationale for the nation-state. This, I believe, can be stated in rather simple terms: the nation-state embodies the recognition that there is a morally significant connection between human freedom and a collective cultural life. National self-determination is thus a "cultural right" in the sense that national, cultural, and

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determination is not only a binding rule of international law, but enjoys the status of a peremptory norm (jus cogens). *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 133-40 (1995).

30. *See* TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES 43 (1983) (noting that "it is not nations in the sense of ethnic communities that are associated within international society, but 'states'").

31. *See* Will Kymlicka, *Western Political Theory and Ethnic Relations in Eastern Europe*, *in* CAN LIBERAL PLURALISM BE EXPORTED? WESTERN POLITICAL THEORY AND ETHNIC RELATIONS IN EASTERN EUROPE 13, 20 (Will Kymlicka & Magda Opalski eds., 2001) (arguing that liberal political theorists have ignored the historical connection between liberal-democratic states and the "promotion of a common national language and societal culture") [hereinafter Kymlicka, *Western Political Theory*]; MICHAEL WALZER, WHAT IT MEANS TO BE AN AMERICAN 53 (1992) [hereinafter WALZER, WHAT IT MEANS]. Walzer suggests that political theorists have simply assumed the national or ethnic homogeneity of the communities about which they wrote: "Even liberal writers, ready enough to acknowledge a plurality of interests, were strikingly unready for a plurality of cultures. One people made one state." *Id.*

32. JOHN GRAY, TWO FACES OF LIBERALISM 123 (2000) [hereinafter GRAY, TWO FACES OF LIBERALISM].

religious communities seek and require not private but "public spheres" of their own in order to flourish and, ultimately, to survive.[33] The claim is not only legal and political, whether in the form of the right of a nation to a state or, as we shall see, of a minority to sub-state minority rights. The claim is also ethical and cultural, in the form of a collective right to preserve the existence of a unique social group. When these two claims are conjoined—when a cultural or religious group asserts legal autonomy in the form of a state—statehood becomes the means of enhancing or protecting cultural and religious identities. By securing the public space of the state to preserve national customs or traditions, the state therefore assumes a "cultural essence."[34]

What I wish to suggest is that this cultural function of the nation-state has particular importance for our understanding of the question of religious freedom.[35] This is because the culture and historical traditions of national groups have been shaped, to varying degrees, by particular religious traditions. Virtually all national constitutions recognize a distinct relationship between the state on the one hand, and religion in general, or one or more religions or beliefs in particular, on the other.[36] At the same time, constitutions also recognize fundamental human rights norms, including the right to freedom of religion or belief, the right to equality and nondiscrimination on the basis of religion, and the right of religious minorities to practice their own religion. The critical question then is whether the state is able to honor *both* these sets of commitments and the potentially far-reaching conflicts to which they give rise. Recognition of a special relationship between the state and a particular religion may, for example, conflict in various ways with the principle of nondiscrimination. Conversely, constitutional recognition of a belief system of an antireligious or "secular" character may conflict with the full protection of the right to freedom of religion. Is it possible, therefore, for the state successfully both to recognize one or more religious traditions and ensure respect for human rights?

A. *Two Concepts of Pluralism*

The human rights literature on these questions distinguishes between two conceptions or "models" of pluralism that seek to accommodate religious,

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33. YAEL TAMIR, LIBERAL NATIONALISM 8-9 (1993) (arguing that the "demand for a public sphere in which the cultural aspects of national life come to the fore constitutes the essence of the right to national self-determination").

34. Yael Tamir, *The Right to National Self-Determination*, 58 SOC. RES. 565, 585 (1991).

35. For a comprehensive argument that freedom of religion should be "reconstructed" as a special case of the right to culture and should thus be defined as a "minority rights requirement," see Gidon Sapir, *Religion and State—A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 626-45 (1999).

36. For a review of the variety of religion/state relationships as expressed in national constitutions, see Johan D. van der Vyver, *Introduction: Legal Dimensions of Religious Human Rights: Constitutional Texts*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES xi (Johan D. van der Vyver & John Witte, Jr. eds., 1996) [hereinafter LEGAL PERSPECTIVES]. Of course, there are some notable exceptions, such as in the cases of the United States (where the constitution merely enunciates norms of nonestablishment and free exercise without mentioning any specific religion) and of the United Kingdom (which has no written constitution but has an established church).

ethnic, and cultural diversity in democratic states.[37] The first is based on the so-called "nondiscrimination" principle, which derives from the way that religious minorities are treated in liberal states. As Will Kymlicka explains:

> In the sixteenth century, European states were being torn apart by conflict between Catholics and Protestants over which religion should rule the land. These conflicts were finally resolved, not by granting special rights to particular religious minorities, but by separating church and state, and entrenching each's individual freedom of religion. Religious minorities are protected *indirectly*, by guaranteeing individual freedom of worship, so that people can freely associate with other co-religionists, without fear of state discrimination or disapproval.[38]

On this approach, members of religious groups are protected against discrimination and prejudice, and they are free to maintain their religion as they wish, consistent with the rights of others. This is the classical liberal solution to the problem of how to reconcile rights-based conceptions of individual freedom with genuine religious and cultural diversity. This is done through commitment

> in the strongest possible way to individual rights and, almost as a deduction from this, to a rigorously neutral state, that is, a state without cultural or religious projects or, indeed, any sort of collective goals beyond the personal freedom and the physical security, welfare, and safety of its citizens.[39]

From this conception arise the two defining features of the liberal state: first, the "privatization" of religion on the basis of a public/private distinction that separates religion from the state (which may assume a variety of forms); and second, in order to justify the first move, an assertion of a "neutral" public sphere that seeks to maintain its neutrality through commitment to a scheme of individual rights.

The idea of liberal neutrality can take a variety of forms depending on how exactly the separation of religion from the public sphere is understood. Of course, quite apart from conceptions of liberal neutrality, the general relationship between religion and the state can itself assume many configurations.[40] As discussed later in Part IV, a neutral public sphere is a precarious notion in the world of actually existing nation-states.[41] Indeed,

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37. *See, e.g.*, Nathan Glazer, *Individual Rights Against Group Rights*, *in* THE RIGHTS OF MINORITY CULTURES 123, 133-34 (Will Kymlicka ed., 1997); Michael Walzer, *Pluralism: A Political Perspective*, *in* THE RIGHTS OF MINORITY CULTURES, *supra*, at 139, 140-44.

38. Will Kymlicka, *Introduction to* THE RIGHTS OF MINORITY CULTURES, *supra* note 37, at 1, 9 [hereinafter Kymlicka, *Introduction*].

39. Michael Walzer, *Comment*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 99, 99 (Amy Gutmann ed., 1994) [hereinafter Walzer, *Comment*].

40. *See, e.g.*, W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, *in* LEGAL PERSPECTIVES, *supra* note 36, at 1, 120-23 (classifying at least seven forms of religion/state separation).

41. *See, e.g.*, Alfred Stepan, *Religion, Democracy, and the "Twin Tolerations,"* J. DEMOCRACY, 37, 43 (2000) (noting that five of the EU's fifteen member states have established churches and arguing that "[f]rom the viewpoint of empirical democratic practice . . . . secularism and the separation of church and state have no inherent affinity with democracy"). Even within a modern European nation-state such as Greece, the Greek Constitution is proclaimed in the name of the Holy Trinity and affirms that the "dominant religion in Greece is that of the Eastern Orthodox Church." *See* Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 11 (1993). As Francois Thual notes, "Caucasian, Balkan, Greek, and Slav Orthodox Christianity has never known secularism based on the separation of

given the specific history of the relationship between nationalism and the rise of the secular liberal state, we might venture that for state neutrality to be feasible, one may first need to assume either the existence of a strongly homogeneous religious, cultural, and linguistic nation—and hence, the absence (or denial) of the claims of significant religious, cultural, and linguistic minorities—or to imagine an entirely immigrant society without a majority nation—which, as we shall see, is problematic even in the one exceptional case of the United States. Where either of these conditions is not present, the liberal conception of church-state separation and strict neutrality will be attenuated.

Unlike the nondiscrimination approach, there is a second conception of pluralism, which is based on a different principle—that of a plurality of *collective* subjects asserting claims of right. Its central premise is the use of public measures to promote or protect the religious or cultural beliefs and identities of specific majority and minority groups. In rejecting the imaginary condition of cultural unity that underlies the individual rights approach (in *either* its conservative or progressive guise),[42] value pluralists argue that this model constitutes a more robust form of nondiscrimination, as it requires the state to provide the same sort of rights to minorities that are taken for granted by the majority. Accordingly, the second approach allows for "a state committed to the survival and flourishing of a particular nation, culture, or religion, or of a (limited) set of nations, cultures, and religions—so long as the basic rights of citizens who have different commitments or no such commitments at all are protected."[43] This is a permissive rather than a determinative view. While the liberal commitments of the first approach may apply at some times, at other times it will be necessary to "weigh the importance of certain forms of uniform treatment [in accordance with a strong theory of rights] against the importance of cultural survival and opt, where necessary to protect cultural or religious integrity, for the logic of the second approach."[44]

The differences between these two conceptions of pluralism go to the heart of the purpose of the state itself. For Nathan Glazer, the choice is between

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Church and State." Francois Thual, *Dans le monde orthodoxe, la religion sacralise la nation, et la nation protège la religion*, LE MONDE, Jan. 20, 1998, at 13.

42. Both conservative conceptions of national unity and progressive conceptions of universal humanity are premised on certain background assumptions. As John Gray notes, "conservative critics of liberalism see political order as serving the Old Right project of restoring, or instituting, an 'integral' or 'organic' culture, and their policy with regard to cultural minorities is one that forces on them alternatives of assimilation or exclusion from the political order." GRAY, ENLIGHTENMENT'S WAKE, *supra* note 6, at 138. This notion of "integralist nationalism" or "national unity" is what underlies conservative conceptions of the liberal model as seen, for example, in states such as France. More "progressive" conceptions seek not to assimilate or exclude cultural or religious diversity, but rather, consistent with the Enlightenment-inspired nondiscrimination principle, seek to relegate such diversity to the "private" sphere of voluntary association consistent with a scheme of individual rights as enforced by a "neutral" state. This progressive conception of the liberal model is premised on a theory of history that posits convergence on a "supposed future condition of the species in which cultural difference has been marginalized in a universal civilization." *Id.*

43. Walzer, *Comment*, *supra* note 39, at 99.

44. *Id.* at 100 (quoting Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM, *supra* note 39, at 61) (alteration in original).

> forming a common national culture, or accepting the permanent existence of two or more national cultures within a single state. . . . [T]he United States has firmly adopted the former as its goal, and indeed it has had enormous success in integrating people of many different races and religions into its common culture. Yet in many parts of the world this sort of integration seems unthinkable, and minority groups are insistent on viewing the larger state as a "confederation of groups."[45]

In considering the different notions of pluralism that underlie these two approaches, Walzer has distinguished between what he terms "New World" and "Old World" pluralism. The success of the nondiscrimination principle in the United States has been due, in Walzer's view, to the fact that minorities there are, by and large, immigrant groups (national minorities and indigenous peoples remaining an important exception). New World pluralism is therefore the result of religious and cultural diversity arising from voluntary decisions of people to uproot themselves and join another society.[46] This can be juxtaposed with Old World pluralism "where minorities are territorially concentrated" and settled in historic territories that may, at some point in time, have been "incorporated within the boundaries" of a larger state.[47]

> This incorporation is usually involuntary, resulting from conquest, or colonization, or the ceding of territory from one imperial power to another. Under these circumstances, minorities are rarely satisfied with non-discrimination and eventual integration. What they desire . . . is "national liberation"—that is, some form of collective self-government, in order to ensure the continued development of their distinct culture.[48]

B. *Liberal Nationalism*

There is a vast academic literature analyzing the relationship between nationalism and liberalism and the seemingly irresolvable contradiction between the nondiscrimination principle and recognition of the claims of situated subjects, which I do not pursue here.[49] It is important to note before proceeding further, however, that a number of contemporary political theorists—so-called "liberal nationalists"—have recognized the ambivalence and, in general, silence of liberal theory towards the claims of majority and minority groups and have sought to find pathways by which to combine liberal individualist and pluralist group doctrines. Their work suggests the need to take more seriously the tensions between liberal and pluralist conceptions of rights such as freedom of religion or belief. Three positions, in particular, have been advanced.

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45. Kymlicka, *Introduction*, *supra* note 38, at 11.

46. For further discussion of the distinction between "Old World" and "New World" pluralism and its impact on minority rights in the U.S. context, see *infra* note 107 and accompanying text.

47. Kymlicka, *Introduction*, *supra* note 38, at 11.

48. *Id.*

49. I thus do not discuss in any depth the complex theoretical questions surrounding the idea of the "nation-state" (for example, whether this is a "mono-national" state, or a state dominated by a single "people," or how exactly the notion of a "territorial-civic" state relates to the broader notion of a nation-state). For a helpful overview and discussion of these more general questions, see CHAIM GANS, THE LIMITS OF NATIONALISM 3-96 (2003).

1. *Individual Autonomy and Encompassing Groups*

The first position, most commonly associated with the work of Joseph Raz, Avishai Margalit, and Yael Tamir, has been to draw a connection between individual liberty and the need for a collective cultural life, which is said to be possible only in a nation-state.[50] The argument has two parts: first, that nationality is morally significant because of its instrumental value for the realization of certain social goods; and second, that nations may accordingly claim a right of self-determination on consequentialist grounds.[51] This approach encounters two difficulties, however: first, respect for liberal rights extends only to national boundaries and thus violates the equal respect that liberal theory supposedly accords to all individuals regardless of nationality; and second, the notion of a "liberal national culture" is inevitably in tension with the illiberal and exclusionary nature of both nationalism and the nation-state.[52] In the case of a largely "New World" immigrant society like the United States, this second difficulty is not obviously apparent. But at times of national emergency or in response to the increasing power or size of religious or ethnic majorities or minorities, the latent tension between liberalism and nationalism becomes exposed.[53]

2. *Democratic Theory and National Self-Determination*

The second approach has been to try to link democratic consent theory to national self-determination. On this view, the rights of nations can be derived from the rights of individuals: the democratic right of individuals to be governed by a government of their choosing is best realized through a right of national groups to statehood.[54] For nationalism to be consistent with consent theory, however, liberal voluntarist demands for separation by regions

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50. The ability to express cultural preferences—an important aspect of individual liberty—is seen as inextricably linked to "encompassing groups," especially nations. Individuals therefore have an interest in being members of nation-states because it is only the state that can ensure cultural expression through, for example, national holidays, languages, symbols, or myths. TAMIR, *supra* note 33, at 85.

51. The need of individuals to live in encompassing groups justifies political legitimacy including matters of territory and citizenship and "makes it reasonable to let the encompassing group that forms a substantial majority in a territory have the right to determine whether that territory shall form an independent state in order to protect the culture and self-respect of the group." Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439, 457 (1990). The philosophical foundations of this argument can be found in JOSEPH RAZ, THE MORALITY OF FREEDOM (1986), and AVISHAI MARGALIT, THE DECENT SOCIETY (Naomi Goldblum trans., 1996).

52. OMAR DAHBOUR, ILLUSION OF THE PEOPLES: A CRITIQUE OF NATIONAL SELF-DETERMINATION 199 (2003). The liberal nation-state that successfully combines liberal and national values would (i) "have a right of exclusion in terms of citizenship—but only on the condition that all other nationalities had at least the right to states of their own; and (ii) accord all persons already present in the nation-state equal rights, including national minorities." *Id.* at 199 (discussing Tamir, *supra* note 33). As Dahbour notes, however, neither of these conditions seem consistent with the idea of a nation-state created to embody a particular national culture. *Id.*

53. The classic example in the American context is the *Japanese Relocation Cases* of the 1940s from which emerged the "compelling state interest" doctrine ("there the state interest deemed 'compelling' was 'self-preservation of a nation at a time of war'"). Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 124 (1976) (discussing *Korematsu v. United States*, 323 U.S. 214 (1944), and related cases in terms of the unwillingness of the courts to recognize social groups under the "highly individualistic" nondiscrimination principle).

54. *See* Harry Beran, *Self-Determination: A Philosophical Perspective*, *in* SELF-DETERMINATION IN THE COMMONWEALTH 23, 25-31 (W.J. Allan Macartney ed., 1988).

or minority groups into separate states (secession) must take precedence over existing nationalist demands to maintain the unity of nation-states. But if this is the case, it is difficult to see how a liberal democratic theory of group self-determination differs in practical terms from a nationalist theory of communitarian attribution of membership on the basis of ascribed national characteristics. Furthermore, if the "self" in self-determination is the "nation," this approach contradicts and ultimately renders incoherent the international legal doctrine of state sovereignty. Once the essentially contested concept of a "nation" is decided on a liberal democratic voluntarist basis, the sovereignty of existing states (especially the territorial integrity of states comprising multiple nationalities) will come indelibly under attack.[55] The strong correlation of Western "liberal" states to a dominant majority nation or people obscures the critical nature of this challenge to theories of sovereignty and international law in general.

3. *Individual Identity and Political Community*

Finally the third approach, often associated with the work of Michael Walzer, has been to view national self-determination not within an essentially individualistic conception of political legitimacy but within a communitarian conception. The nation-state is seen as the "ideal form that a *community* must take in order to create the kind of moral responsibility between its members that would result in a more egalitarian society."[56] This form of political (as opposed to moral)[57] communitarianism is most concerned with the relationship between the state, on the one hand, and communal norms and cultures on the other. What is at issue, therefore, is whether a liberal conception of voluntary association is a sufficient basis for political community or whether some other, nonliberal conception may be required as a form of communitarian "corrective" within the liberal state.[58] Walzer has thus sought to combine

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55. Thus, "sovereignty" is part of the nationalist conception of political autonomy only when it is equivalent to the sovereignty of nation-states, not of states in general. *Id.* at 28. As David Miller argues, a consensual justification of self-determination leads to unstable and anarchic outcomes. On this approach, there is no way of ensuring stable and secure boundaries when changes in the way individuals view their political loyalties could lead to continual rearrangements of state sovereignties and territories. David Miller, *In Defence of Nationality*, 10 J. APPLIED PHIL. 3, 12 (1993).

56. DAHBOUR, *supra* note 52, at 201 (emphasis added). This is because it is only the shared sense of national identity that creates an ethical imperative to sacrifice for others, for example, in relation to military service or redistributive taxation. *See* DAVID MILLER, ON NATIONALITY 96 (1995).

57. "Moral" communitarianism is concerned primarily with the role of communities in determining the moral roles and conduct of individuals. *See, e.g.*, ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2007); MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY (1989). Walzer has argued that the long-standing debate between liberals and communitarians has centered on the psychological bases of morality. For political philosophy, however, "[t]he central issue is . . . not the constitution of the self but the connection of constituted selves, the pattern of social relations." Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 21 (1990).

58. Walzer describes liberalism as a "theory of relationship, which has voluntary association at its center and which understands voluntariness as the right of rupture or withdrawal." Thus, "insofar as liberalism tends toward instability and dissociation, it requires periodic communitarian correction." Walzer, *supra* note 57, at 21.

> adherence to liberal norms of individual rights with a view of communities as providing the basis for these rights through the cultivation of their own distinct characters separately from those of others. While, within a community, liberal rights may be legitimate, between communities, such rights cannot directly apply. It is the pursuit of an international community of separate but equal nation-states that constitutes the only means of eventually ensuring the fullest possible adherence to liberal rights.[59]

In considering the relative virtues of these three conceptions of liberal nationalism, we can see that the first and third versions are rather close; their differences reflect different vantage points from which to consider the same set of questions. While the first version of Raz, Margalit, and Tamir emphasizes the importance of encompassing groups to individual freedom, Walzer's third version emphasizes the importance of individual (ethnocultural) identity to communal autonomy and solidarity. Both may be regarded as perfectionist theories as they regard political freedom not independently from the good, but as aspects of it. In these two versions we see two liberal conceptions of "value pluralism"—the former construing individual freedom in terms of social forms and identities, the latter construing communal freedom in terms of individual forms and identities.[60]

C. *Pluralism and Nationalism*

However we view the merits of these three accounts, it is critical to note that any attempt to combine liberal individualist and pluralist group doctrines will contain an ineradicably communitarian, nonliberal element in justifications of the nation-state, including the liberal nation-state. The formalism of liberal depictions of the "state" in purely individualistic terms—the state as a collection of unsituated abstract individuals—obscures this group-based dimension of the primary subject of international law. Furthermore, the latent ambiguities in the concept of the nation-state suggest that the term "nationalism" describes in fact not one, but two ideas: first, a type of nationalism that is *statist* and *territorial-civic*, and second, a type that is *ethnocultural*.

Statist nationalism views the political values of the state as superior to the national culture, which, if considered relevant at all, is assumed to be homogeneous (along the lines of Mill's "common sympathies"[61]) and to be in

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59. DAHBOUR, *supra* note 52, at 203.

60. To critics of liberal nationalism, however, the attempt to view the nation-state consistently with liberal values remains internally inconsistent and incoherent. Dahbour points to three contradictions: (i) liberal nationalism attempts to combine individual liberty with an authoritarian notion of the importance of the state in the creation of national cultures; (ii) there is a basic contradiction between voluntary association and the communalist nature of nationalist movements and states; and (iii) liberal nationalism gives rise to conflicting tendencies between a liberal, egalitarian conception of justice and a particularist notion of national independence and identity. *Id.* at 204-06.

61. In his *The Law of Peoples*, Rawls cites J.S. Mill for the idea that nationality describes a "people's culture":

> This feeling of nationality may have been generated by various causes. Sometimes it is the effect of identity of race and descent. Community of language, community of religion, greatly contribute to it. Geographical limits are one of its causes. But the strongest of all is identity of political antecedents; the possession of national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past. None of these circumstances, however, are necessarily sufficient by themselves.

service of the political values of the state. In terms of the relationship between specific religious and cultural groups on the one hand, and the legal and political spheres of the state on the other, this is achieved through the public/private divide and thus the privatization and legal disestablishment of religious and cultural traditions. Ethnocultural nationalism, by contrast, views national culture(s) as superior or prior to the state, which, in turn, is valued merely as the instrumental means for preserving the former. This is because "members of groups sharing a common history[, religion,] and societal culture have a fundamental, morally significant interest in adhering to their [religion and] culture and in sustaining [them] across generations."[62]

Hans Kohn first made this distinction in the literature on nationalism after the Second World War. He characterized statist, territorial-civic nationalism as "predominantly a political movement to limit governmental power and to secure civic rights" which developed during the Enlightenment mainly in the "advanced" countries of the West: England, the United States, and France.[63] Conversely, "ethnocultural nationalism was characteristic of less advanced countries, mainly in Central and Eastern Europe (but in Spain and Ireland)" which were said to be inspired not by the "legal and rational concept of citizenship" but by "imagination and emotions, and by the unconscious development of the *Volk* and its primordial and atavistic spirit."[64] On the first view, nationalism is subjective, individualistic, and voluntarist: "individuals give themselves a state, and the state is what binds together the nation . . . . [T]hat concept of nation is subjective since it emphasizes the *will* of individuals. And it is individualistic since the nation is nothing over and above willing *individuals*."[65] On the second view, however, nationalism is objective, collectivist, and lacks individual choice:

> [It] is based on a conception of the nation as the product of objective facts pertaining to social life. These facts are that members of the nation share a common language, culture and tradition. In this type of nationalism, the nation exists prior to the state. It is also a collective that transcends and is prior to the individuals of which it consists.[66]

The divergence between these two types of nationalism—and between their corresponding notions of how best to accommodate religious, ethnic, and cultural diversity in democratic states—goes to the heart of my argument.[67] The excessive formalism of the first approach occludes from rights discourse the very source of controversy in cases such as the prescribing of the wearing of religious symbols in public schools: the conflicting claims of a majority to a particular national culture of its own and of minorities to public recognition of their collective religious and cultural identities and practices. It is to these issues which we must now turn.

JOHN RAWLS, THE LAW OF PEOPLES 23 (1999) (quoting John Stuart Mill).

62. GANS, *supra* note 49, at 7.

63. HANS KOHN, NATIONALISM: ITS MEANING AND HISTORY 29-30 (1955).

64. GANS, *supra* note 49, at 8.

65. Michael Seymour et al., *Introduction: Questioning the Ethnic/Civic Dichotomy*, *in* RETHINKING NATIONALISM 1, 2-3 (Jocelyne Couture et al. eds., 1998).

66. GANS, *supra* note 49, at 9.

67. For example, these two views generate competing approaches to interpreting the religion clauses of the First Amendment. *See infra* Section IV.D.

IV. THE NATION-STATE AND RELIGIOUS FREEDOM

In order to illustrate the implications of these tensions and the competing conceptions of pluralism they generate for our understanding of religious freedom as an international human right, let us briefly consider how laws proscribing the wearing of religious symbols would be regarded in four different nation-states, each with their own unique conceptions and histories of liberal nationalism: France, Turkey, Germany, and the United States.

A. *The French* Affaire du Foulard *and* Laïcité

I have already suggested that viewing the recent *affaire du foulard* solely in terms of the nondiscrimination principle fails to explain why this has become such an intractable question in France. The wearing of a religious symbol or attire is an obvious manifestation of religious belief and is thus protected by the right to religious freedom. Furthermore, as we have seen, none of the recognized grounds of limitation provide convincing reasons for the state to limit the right in this case. How then can we explain the controversy and the fact that Muslim girls wearing a covering over their hair in public schools has been such a serious social and political problem in France?[68] At the deepest level the answer lies, I believe, in the French idea of *laïcité* and the fact that Islam, as symbolized by the headscarf, is seen through the lens of French nationalism (from both the left and right) as a threat to the secular character of the Republic.

Laïcité is an idea that describes a specific conception of the public-private divide and state "neutrality" in strictly secular terms.[69] It also defines the collective, public identity of the French nation. The French national personality is embodied in the secular, rational Jacobin republic that was founded out of the French Revolution.[70] This collective personality is the precondition of French citizenship. The collective narratives that define what

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68. In France, a 1992 poll showed that two-thirds of the population feared the presence of Islam in that country. *See* HARGREAVES, *supra* note 16, at 119. I do not consider in my analysis obvious socio-political factors such as the challenges posed by and effects of the large inflow of formerly colonized Muslim workers into France (especially from Algeria and Morocco), of France's ceding national autonomy to the European Union, or of the various effects of the exigencies of the global economy on French national life.

69. Article 2 of the 1958 French Constitution states that "France is a Republic that is indivisible, *laïque*, democratic, and social. It shall ensure the equality before the law of all of its citizens, without distinction as to origin, race, or religion. It shall respect all beliefs." 1958 CONST. art. 2. (Fr.).

70. Galeotti attributes the neutrality of the public sphere as articulated in the ideal of the secular state in France to the historical tradition of "the Enlightenment, Rousseau, [and] the Jacobin state with the republican tradition revisited." GALEOTTI, *supra* note 2, at 123. The French Revolution denounced religious intolerance and attacked ecclesiastical power under the banner of "humanity." As explained by Talal Asad:

> The political oratory and pamphleteering of the Revolution created a public space that was national in its focus and ambition. By then, of course, the essence of religion had come to be generally defined as consisting essentially of personal belief so that the Church as a public body appeared simply as a rival for political authority. The result was nearly a century of bitter conflict between the state and its internal competitor for sovereignty, a conflict finally resolved under the Third Republic that was dedicated to a civilizing mission in the name of the Revolutionary ideals of humanity and progress.

Talal Asad, Keynote Address at the Beirut Conference on Public Spheres: Reflections on *Laïcité* and the Public Sphere 1 (Oct. 22-24, 2004), http://www.ssrc.org/publications/items/v5n3/index.html.

it means to "be French" and the practices that they authorize construct French citizens as carriers of a secular heritage that, in the words of Talal Asad,

> cannot be de-essentialized. This view, shared by left, center, and right, rejects the notion that the citizen is identical only with himself or herself, that he or she therefore essentially represents an abstract quantity that can be separated from his or her social identity, added up and then divided into groups that have only numerical value.[71]

Given the strength of this national identity, both the conservative and progressive responses to the issue of the wearing of the Islamic headscarf are broadly predictable. For both camps, the perceived need for a law proscribing the hijab in public schools derives from the majority's claim to realize its national identity (*laïcité*) in the public sphere of the state—i.e., the majority's right to be French in their own country. For the right, the majority has the right to protect its distinctive national character against the influence of minority difference through a conception of integralist nationalism.[72] Under this view, minorities must either assimilate and accept the requirements of French citizenship (and thus ultimately cease to belong to a distinct minority group) or, if "inassimilable" (which, in France, is a term usually applied to members of North African Muslim communities[73]), be encouraged or required to leave the country once their labor is no longer needed.

For the left, the question is viewed as one of neither assimilation nor exclusion. Rather, *laïcité* is understood as a doctrine of toleration defined in terms of the public-private divide and state neutrality. This requires the state not to interfere in individual choices regarding the conception of the good in the private realm of civil society (and wearing the headscarf clearly belongs to this sphere). In the public sphere, however, *laïcité* requires the state to be neutral, blind, and indifferent to diversity in order to honor the nondiscrimination principle and treat everyone equally. Of course, what "difference-blind" neutrality actually requires in this context is contested. A weak form would require officials to disregard differences as the proper grounds of action, whereas a stronger form would require all differences to be kept out of the public sphere.[74] Given that the public school system is the

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71. TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 176 (2003) (emphasis removed).

72. As Jean Le Pen stated in 1982, "[w]e not only have the right but the duty to defend our national personality . . . and we too have our right to be different." *Id.* at 175-76. For a discussion of the idea of "integralist nationalism," see *supra* note 42.

73. "[M]ore than half the inhabitants of French prisons are young Muslims of North African origin." Asad, *supra* note 70, at 1 n.2.

74. As noted by Galeotti, however, this notion of state neutrality is open to at least two objections:

> First, how can public officials and authorities draw the line between public statements and private values, given that they are also supposed to be neutral and blind to differences? Neutrality seems to preclude an evaluation of the content of differences. . . . The result is that the prohibition of the headscarf in school for the sake of neutrality would derive from an argument which infringes the very principle of neutrality. Second, not all behavior which can be classified as a public statement receives the same treatment.

GALEOTTI, *supra* note 2, at 126. Galeotti contrasts a statement of fashion—for example, "punk style"—that is accepted in French schools even though it is an "ostentatious" symbol in the public sphere, with a manifestation of religion—the Islamic veil—that is not. The difference here is between fashion or lifestyle, on the one hand, and a religiously-inspired practice on the other. Again, state officials are

primary means by which the civic spirit of future secular citizens of the Republic is to be fostered, the prohibition of all religious symbols is a "reaffirmation of the boundaries of the secularized public sphere against any religious interference."[75] This is not regarded as intolerance by the majority, but rather as a "limit to liberal tolerance in order to preserve the neutrality of the public school and the equality of the students as would-be citizens, beside and beyond any particular memberships."[76]

The difficulty with this understanding of liberal toleration is that it defines neutrality in terms of the "essential" collective identity of the majority, while denying public recognition of the "essential" collective identities of minorities. As Asad argues:

> To insist in this context that Muslim groups must not be defined in terms they regard as essential to themselves is in effect to demand that they can and should shed the narratives and practices they take to be necessary to their lives as Muslims. The crucial difference between the "majority" and "minorities" is, of course, that the majority effectively claims the French state as its national state. In other words, to the extent that "France" embodies the Jacobin narrative, it *essentially* represents the Christian and post-Christian citizens who are constituted by it.[77]

Even the progressive understanding fails, then, to resolve the tension between ensuring respect for individuals and fostering the conditions that will nurture collective ways of life. Religious and cultural diversity will indeed be respected but only on terms that conform to the majority's conception of the good. The French state's right to defend its essential or "inviolable" secular personality thus trumps the right to freedom of religion or belief to the extent that the latter is interpreted to conflict with the former.

As already noted, this raises doubts about the specific meaning of the concept of neutrality employed here.[78] The public-private divide does not require the majority of French citizens to change their way of life or manifestation of religious beliefs. For growing numbers of North African Muslims in France, however, as for many Pakistanis in Britain and Turks in Germany, neutrality means accepting alien notions of privatization and disestablishment of Islam in ways that can violate the very essence of their religious convictions and way of life.[79] The *real* problem, as Asad notes, is

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deciding what constitutes fashion and what constitutes religion (i.e., assessing the meaning and validity within the public sphere of private concerns, commitments, and sentiments). In this sense, the public sphere cannot be said to be "neutral" between secular and religious expression. *Id.*

75. *Id.* at 123.

76. *Id.* at 123-24.

77. ASAD, *supra* note 71, at 175. "If the wearer regards the veil as her religious duty, it becomes an integral part of herself . . . not a sign that can be shed at will but part of a presence that indexes an embodied doctrine." Asad, *supra* note 70, at 2 (emphasis omitted).

78. As Galeotti notes, "[b]efore the headscarf case broke out, no one was even aware of whether religious symbols were present in school or not. This might suggest that, as the critics of liberalism have remarked, neutrality is not so neutral after all, and the secular state not so thoroughly secularized." GALEOTTI, *supra* note 2, at 124. For discussion of the French position on minority rights issues in particular, see *infra* note 113.

79. I use the term "disestablishment," here, in the general sense that legal and political neutrality "demands the legal disestablishment of any common culture, in so far as that incorporates—as inevitably it must—specific conceptions of the virtues, and of the good life." GRAY, ENLIGHTENMENT'S WAKE, *supra* note 6, at 78.

that it is the attachment to Islam that many believe commits Muslims to values that challenge the modern secular state.

> The de-essentialization of Islam is paradigmatic for all thinking about the assimilation of non-European peoples to European civilization. The idea that people's historical experience is inessential to them, that it can be shed at will, makes it possible to argue more strongly for the Enlightenment's claim to universality: Muslims, as members of the abstract category "humans," can be assimilated or (as some recent theorists put it) "translated" into a global ("European") civilization once they have divested themselves of what many of them regard (mistakenly) as essential to themselves. The belief that human beings can be separated from their histories and traditions makes it possible to urge a Europeanization of the Islamic world. And by the same logic, it underlies the belief that the *assimilation* to Europe's civilization of Muslim immigrants who are—for good or for ill—already in European states is necessary and desirable.[80]

There is, however, a further set of concerns with the French notion of *laïcité* and state neutrality. This involves a deeper question of how European identity and experience have evolved within a Christian, and later Enlightenment, narrative and how this identity has acquired a distinctive "civilizational character." This identity has been constructed, at least in part, in opposition to what is today commonly called "Islamic civilization."[81] I do not intend to pursue this complex series of arguments further here other than to suggest that, despite the strongly secular character of the state, the doctrine of *laïcité* is by no means uniformly applied in France, either as regards specific religions or religion in general. (Of course, much of my point would remain *even if* it were uniformly applied.)

In Christian and Jewish schools across the country, crosses and yarmulkes can be worn, and religious texts are taught. Not only are the graduates of these schools regarded as "good French citizens," the schools themselves are subsidized by the state as "private establishments under contract to the government."[82] In the region of Alsace-Moselle, the state pays the salaries of priests, pastors, and rabbis and owns all church property.[83] The Roman Catholic Church also occupies a special position according to the *modus vivendi* put in place from 1922 to 1924 between France and the Holy See that allows the Republic to recognize "diocesan associations" within the framework of the Act of 1905 on the Separation of the Churches and the

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80. *Id.* at 169-70.

81. *See, e.g.*, HUGH TREVOR-ROPER, THE RISE OF CHRISTIAN EUROPE (1965) (noting, for example, that although Spain is geographically part of Europe, Arab Spain in medieval times is seen as being "outside Europe" despite the complex relationships and exchanges between Muslims, Christians, and Jews in the Iberian peninsula during that period).

82. Asad, *supra* note 70, at 8.

83. The Stasi Report discusses the historical reasons for this exception to the principle of *laïcité* and the 1905 Law and suggests that the arrangement be retained on the ground that it is part of a "regional identity" and that the people in the area are especially attached to them. *See* LAÏCITÉ ET RÉPUBLIQUE, COMMISSION PRÉSIDÉE PAR BERNARD STASI [LAÏCITÉ AND THE REPUBLIC: COMMISSION PRESIDED BY BERNARD STASI] 113 (2004).

State.[84] There are many other examples of state support and reinforcement of individual attachment to religious communities.[85]

France, in reality, is not the neutral, secular state envisioned under the nondiscrimination principle in which individual citizens with universal rights engage in strictly rational discourse in the public sphere. French citizens have particular rights by virtue of their belonging to certain, predominantly Christian, religious groups and the power to assert those rights in the public sphere. With some caution then, we may draw two conclusions regarding religious freedom in the country. The first is that any exception to the general rule of *laïcité* will be determined by the majority—i.e., by the class of French citizens whose collective identity is either Christian or post-Christian—typically out of deference to the historical relationship between the nation and its dominant religion.[86] The second is that this exercise of national sovereignty will be neutral neither towards religion in general, nor to minority religions such as Islam in particular. So-called "Judeo-Christian" values will remain as the historical and conceptual background—the now invisible baseline—for France's secular public sphere and will contribute to shaping a uniquely French form of liberal nationalism.

B. *Turkish Secularism*

Having considered the case of France in some detail, let me now turn more briefly to the three nation-states of Turkey, Germany, and the United States. I do so not to provide a comprehensive treatment of the question of the wearing of religious symbols in public schools in these countries, but rather to illustrate how different histories and understandings of the relationship between nation and state will lead to different conceptions of the right to religious freedom. In the case of Turkey, I wish to suggest two broad similarities and one major difference with the French case. The first similarity is that in Turkey there is a strongly homogenous, religiously and culturally defined majority nation. The second similarity is that, since its founding by Mustafa Kemal Atatürk as a "modern" Western-style state out of what remained of the Ottoman Empire, Turkey has been a republic with a strongly *laicist* tradition. In this respect, French and Turkish secularism are broadly similar, although with obvious historical and constitutional differences, and both have broadly similar justifications. The major difference, however, is that the struggle in Turkey is not between majority and minority groups but within the majority itself.

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84. Section 1 of the Act provides that the "Republic shall ensure freedom of conscience. It shall guarantee free participation in religious worship, subject only to the restrictions laid down hereinafter in the interest of public order." Law on the Separation of Churches and State of Dec. 9, 1905, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 11, 1905, p. 7205.

85. Chaplains in the army, schools, prisons, and hospitals are provided and paid for by the state. Jewish and Islamic funerary rites are permitted in public cemeteries owned and operated by the state. Under a 1987 law, gifts to religious associations that provide public services benefit from tax concessions. *See* Asad, *supra* note 70, at 8.

86. *Id.* at 9 ("Varieties of remembered religious history, of perceived political threat and opportunity, define the sensibilities underpinning secular citizenship and national belonging in a modern state. The sensibilities are not always secure, they are rarely free of contradictions, and they are sometimes fragile. But they make for qualitatively different forms of secularism.").

Turkey, like France, has a law regulating dress in public schools and universities.[87] In 1988, fearing a backlash amongst religious middle-class Turks, which make up its support base, the center-right government amended the law to allow wearing the veil for reasons of religious belief in public schools and universities. The following year, the Constitutional Court annulled that amendment, "on the grounds that it was a breach of the principle of secularism and threatened the unity of the state, security and public order."[88] That decision, and the continued validity of the law, were subsequently confirmed in November 2004 by the Grand Chamber of the European Court of Human Rights, which held in *Leyla Şahin v. Turkey* that the law did not violate Article 9 of the European Convention on Human Rights (ECHR).[89]

The *Şahin* case involved a medical student at the University of Istanbul who was denied enrollment on the grounds that she was wearing the Islamic headscarf. The applicant came from a traditional family of practicing Muslims and regarded it as her religious duty to wear the headscarf. The Court accepted that the regulations at issue interfered with her right to manifest her religion under Article 9(1) but held that they constituted a valid limitation under Article 9(2) because, as they pursued the legitimate aims of protecting the "rights and freedoms of others" and "public order," they could be regarded as "necessary in a democratic society."[90] This was especially the case given the margin of appreciation left to Contracting States.[91] The "necessity" of the interference was held to be based on two principles—secularism and equality—which reinforced each other. The Turkish constitutional principle of

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87. Since the earliest days of the Republic, Turkey has had laws and decrees requiring "contemporary costume" in the public sphere. Atatürk himself signed a 1923 decree on dress and the Hat Law of 1925, and the Law Relating to Prohibited Garments of 1934 required religious clothing not to be worn outside of times of worship and laid down dress guidelines for students and civil servants.

> Article 6 of the Regulation Concerning the Dress of Students and Staff in Schools under the Ministry of National Education and Other Ministries No. 8/3349 of July 22, 1981, as amended on November 26, 1982, requires that students dress according to the code laid down for civil servants. In universities, this code is administered by the HEC [Higher Education Council].

HUMAN RIGHTS WATCH, MEMORANDUM TO THE TURKISH GOVERNMENT ON HUMAN RIGHTS WATCH'S CONCERNS WITH REGARD TO ACADEMIC FREEDOM IN HIGHER EDUCATION, AND ACCESS TO HIGHER EDUCATION FOR WOMEN WHO WEAR THE HEADSCARF 27 (2007), *available at* http://hrw.org/backgrounder/eca/turkey/2004/ (also observing that since 1997, the HEC has forbidden women wearing closefitting headscarves from studying or teaching in higher education).

88. *Id.* Despite some uncertainty on the strict legal position during the 1990s, at least since a 1997 military ultimatum delivered to the government at a meeting of the National Security Council, the headscarf ban has been widely enforced both inside and outside universities.

89. Leyla Şahin v. Turkey, App. No. 44774/98 Eur. Ct. H.R. (2005).

90. *Id.* ¶¶ 100-23.

91. The doctrine of a "margin of appreciation" is an interpretive principle designed to balance a state's sovereignty with the need to ensure observance of the Convention and thereby avoid damaging confrontations between the European Court of Human Rights and Contracting Parties. It is based on the idea that the primary responsibility for the implementation of the Convention lies with the parties themselves and thus encompasses a discretion afforded by the Court to member states to employ varying national standards of conventional protections. *See* R. St. J. Macdonald, *The Margin of Appreciation*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 83, 123 (R. St. J. Macdonald et al. eds.,1993); *see also* Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L. L. & POL. 843, 850 (1999) (arguing that the European Court of Human Rights grants a wide margin of appreciation to majority-dominated national institutions as opposed to "democratically challenged" minorities).

secularism was held to be necessary for the protection of the democratic system in Turkey.[92] The principle of gender equality recognized in both the Turkish constitution and the ECHR provided a further justification. Unsurprisingly, the decision has been criticized for uncritically endorsing religious intolerance, tacitly relying on a paternalistic and static conception of gender equality, and advancing a weak conception of religious freedom.[93]

In order adequately to explain both the Turkish position and the decision of the European Court, we need to note a major difference with the French case. In Turkey, it is not a marginalized or distinct religious or cultural minority seeking public recognition of their differences from the majority. The struggle here is not between competing majority and minority notions of collective goods as it is in the *affaire du foulard* (majority *laïcité* and minority Islam) or in a case such as *Kokkinakis v. Greece* (majority Greek Orthodoxy and minority beliefs of Jehovah's Witnesses).[94] Here, the struggle is *within* the majority nation itself over two competing conceptions of the collective good, one religious (Islam) and the other secular (Turkish republicanism or Kemalism).[95] A closer parallel in the French case would be if a conservative Catholic student seeking to wear a Christian crucifix challenged the French law proscribing the display of religious symbols in public schools. Conversely, a closer parallel in Turkey to the French case would be a challenge by the Kurdish minority to laws dating back to Atatürk restricting the teaching of the Kurdish language or prohibiting the very existence of Kurdish schools and associations (i.e., laws requiring all Turkish citizens—the

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92. Viewing the regulations as intended to preserve "pluralism in the university," the Court pointed in particular to "extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts." *Şahin*, App. No. 44774/98 Eur. Ct. H.R. ¶ 109.

93. *See, e.g.*, Evans, *supra* note 24, at 61-71; Ward, *supra* note 5. These criticisms were also powerfully expressed in the dissenting judgment of Judge Tulkens who criticized the majority for refusing to allow Ms. Şahin to act in accordance with her personal choice on the basis of an essentialized and unexamined set of assumptions regarding the "connection between the ban and sexual equality." *Şahin*, App. No. 44774/98 Eur. Ct. H.R. ¶ 12 (Tulkens, J., dissenting).

94. For discussion on the relationship in *Kokkinakis* between individual rights and competing conceptions of collective goods, see Danchin, *Of Prophets and Proselytes*, *supra* note 15.

95. The conflict is of course more complex than this simple opposition would suggest. As Murat Akan suggests, the Kemalism/Islam opposition is actually a "political dichotomy representing an elite conflict." Murat Akan, *Contextualizing Multiculturalism*, 32 STUD. IN COMP. INT'L DEV. 57, 71 (2003). Secular elites in Turkey have traditionally sought to use and control Islam in utilitarian terms to "bind the majority to the nation-building project." *Id.* Article 24 of the 1982 Turkish Constitution provides that "teaching and education in religion and morals is conducted under the guidance of the state." TÜRKIYE CUMHURIYETI ANAYASASI [Constitution] art. 24 (Turk.). Founded in 1924, the Ministry of Religious Affairs has the authority to instruct citizens on "correct Islamic practices" in the face of the divergent interpretations and local practices of Islamic sects. Akan, *supra*, at 70. Christian and Jewish minorities have largely been left outside of this process. In this respect, Turkish secularism does not entail a mutually exclusive sphere separate from Islam. The founding elite made religion subject to the Republican state in order both to build a uniform nation-state and to eliminate religion as a rival autonomous source of legitimacy. In the 1980s, however, "the monopoly of the Kemalist state elite on capital and political power was challenged by a rising Islamist elite" which made a "counter-claim on the very religious sphere which the republicans have striven to control and monopolize as a source of legitimacy." *Id.* at 71. The conflict, in other words, is over the *locus* of Islam as a source of political legitimacy as between different elite groups.

majority and minorities—to speak Turkish and attend Turkish public schools).[96]

My point is that the rationale for the nondiscrimination principle derives from the type of conflict we see in the Turkish case—the conflict between the religious and secular spheres set against a background of broadly assumed cultural and religious unity—and proposes a solution to that conflict based on the twin principles of a public-private divide and state neutrality. We can see this in the endorsement, albeit in different ways, by the European Court and the Turkish Constitutional Court of the principles of secularism and equality.[97] In a state such as France this is relatively unproblematic, at least among the French majority. *Laïcité* is today well entrenched after centuries of struggle between religious and secular forces within the French nation. The ideas of religious belief as a "personal" matter in the private sphere and secular rationality in the public sphere are now part of the national collective identity.[98] In Turkey, however, Kemalism is less securely anchored in a majority nation that is overwhelmingly Muslim and that has a different historical understanding of the public-private divide. In both cases, however, the real dispute is over how the two principles are to be interpreted in contrast to the two more extreme or "nonliberal" positions of secular republicanism on the one hand and religious establishment on the other. In this sense, the liberal nondiscrimination principle represents *one* means of seeking to ensure the peaceful coexistence in one nation of two values: the religious and the secular. *As between these two values*, the nondiscrimination principle should therefore be understood as a form of value pluralism.

Both the *affaire du foulard* and my example of Kurdish minority rights claims in Turkey, however, reveal a deeper sense in which the liberal approach is insufficiently pluralist. The conflict is not between two values (the secular and the religious) within *one* religious and cultural group, but rather between different understandings of how to reconcile these values as between *two or more* religious and cultural groups—between, that is, the collective conceptions of the good and the ways of life of two or more such groups. The rationale for the move to some form of "group-based pluralism" becomes evident in response to this latter conflict. In order to illustrate this, let us consider the case of Germany.

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96. *See* Dilek Kurban, *Unravelling a Trade-Off: Reconciling Minority Rights and Full Citizenship in Turkey*, 4 EUR. Y.B. MINORITY ISSUES 341 (2004).

97. These principles have even been invoked by both the Turkish and European courts to justify the dissolution of the Islamist Turkish Welfare Party. *See* Refah Partisi (The Welfare Party) v. Turkey, App. No. 41340/98, 41342/98, 41343/98, 41344/98 Eur. Ct. H.R. 267 (2003) (upholding the dissolution as compatible with the ECHR despite the Refah Party being in government at the time, its leader being the prime minister, and the party having 4.3 million members). As I argue below, however, the Court's use of the margin of appreciation in order to accommodate the plurality of conceptions of liberal nationalism that characterize *European* (i.e., non-Muslim) nation-states suggests a tacit move from a liberal towards a value pluralist approach.

98. In discussing Rousseau's conception of the relationship between religion and citizenship, for example, McConnell suggests that "Rousseau envisioned a society of much deeper and thicker solidarity, making difference of religion—or even deep commitment to religion as a locus of truth and loyalty—a threat." Michael W. McConnell, *Believers as Equal Citizens*, *in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES 90, 98 (Nancy L. Rosenblum ed., 2000).

C. *German Cooperationism*

Unlike in France and Turkey, there is no rigid separation of church and state in Germany.[99] The constitution is based instead on a cooperationist model of "religious freedom, tolerance and the right to a religious education."[100] Against this background, the issue of the wearing of the Islamic headscarf in public schools has nevertheless been a divisive social and political issue in Germany, especially given the large number of Turkish Muslims living in the country. The response of the legislature and courts has been different, however. The German legislature has enacted no laws or regulations like those in France and Turkey prohibiting students from wearing the headscarf in public schools or universities. Most of the cases that have arisen have involved Muslim girls seeking exemptions from compulsory gym and swimming classes on the grounds that the wearing of the headscarf makes such activities impossible.[101]

The most controversial case in Germany has involved not a student, but a public school teacher of Afghani origin, Fereshta Ludin, who was denied a teaching position because she refused to remove her headscarf in the classroom.[102] The Board of Education in the state of Baden Württemberg argued that the wearing of the headscarf violated the state's "neutrality" on religion. In September 2003, however, the Federal Constitutional Court (BVG) rejected this argument, ruling that neutrality should not be understood as requiring a strict separation of religious symbols from the public sphere and that any restrictions under state law would need to treat all religions equally.[103] Given that the German government sponsors courses in religious

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99. While church and state were formally separated in 1918, both the Catholic and Protestant churches retain privileged positions in the German state. They are both accorded the status of public-law corporations under the 1949 constitution and thus have a similar status to religions under concordatarian systems in which agreements are made between the state and various established religious communities. *See* Silvio Ferrari, *The Emerging Pattern of Church and State in Western Europe: The Italian Model*, 1995 BYU L. REV. 421, 422. The Basic Law provides for a "church tax" levied on all persons who claim religious affiliation with one of the established churches. The government then allocates funds to church-sponsored schools and hospitals, training teachers for religious instruction in public schools, and other social services provided by the churches.

100. Katherine Pratt Ewing, *Legislating Religious Freedom: Muslim Challenges to the Relationship Between Church and State in Germany and France*, *in* ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES 63, 71 (Richard A. Shweder et al. eds., 2002). Under Article 7(3) of the constitution, religious education in state schools is a constitutional duty for most states and must be provided in accordance with the principles of the religious communities. GRUNDGESETZ [GG] [Constitution] art. 7(3) (F.R.G.).

101. For a useful background discussion on the headscarf issue in German constitutional law, see Matthias Mahlmann, *Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the* Headscarf Case, 4 GER. L.J. 1099 (2003).

102. Ewing, *supra* note 100, at 71 (discussing Bundesverfassungsgericht [BVerfG] [federal constitutional court] Sept. 24, 2003, 108 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 282 (F.R.G.) [hereinafter *Ludin*]).

103. The arguments advanced by the state in *Ludin* were as follows: (i) as a state official, wearing the headscarf violated her duty of neutrality and objectivity; (ii) her actions violated the religious freedom of children who are especially vulnerable in a classroom setting; and (iii) allowing the wearing of the headscarf was not neutral because it expressed a state preference for a political view that represses women and is intolerant. *See id.* at 73. It is interesting to note that, following the Federal Constitutional Court's decision, legislators in Baden Württemberg enacted a law banning the wearing of the headscarf in public schools. This law is likely to be subject to challenge before Germany's Supreme

instruction and allows the wearing and display of crucifixes and other religious symbols in the classroom,[104] the decision affirms a conception of equality based not on individual but on group rights: i.e., public recognition of the wearing of the hijab accords with the equality of treatment constitutionally required as between different religious groups.[105] This position has been supported by Dieter Grimm, a former judge on the German Constitutional Court, on the basis that the rights to individual freedom and self-determination—both of which are recognized under Germany's Basic Law—must be interpreted together so as to protect the autonomy of different *collective* ways of life.[106] Of course, such a position immediately raises difficult questions regarding both how to ensure equality *between* religious groups and how to protect individual rights *within* such groups. My general point here is that the particular theory of liberal nationalism underlying the German Basic Law—especially its recognition of the rights of religious and cultural minorities and its accommodationist conception of state neutrality—leads to a different, more "group-based" understanding and interpretation of the right to religious freedom as compared to the prior cases of France and Turkey.

D. *American Pluralism*

My final example is the case of the United States, which displays certain similarities to the German case but also one critical difference. The United States is often held up as a strong counterexample to my argument that there is an inherent relationship between liberalism and nationalism in sovereign states. This is because the history of American nationalism differs in important respects from that of any of the three countries considered so far. As Walzer has argued, the United States is not a "'nation of nationalities'" or a "'social union of social unions,'" but rather an "association of citizens."[107]

Court. For analysis, see Axel Frhr. Von Campenhausen, *The German Headscarf Debate*, 2004 BYU L. REV. 665, 682.

104. It should be noted that in some of the German *Länder*, Catholic nuns teach in public schools, many of them in full religious dress. The Constitutional Court ruled in 1995 that a law in the formerly Catholic state of Bavaria requiring a crucifix to be displayed in every state school classroom was unconstitutional. *See* Bundesverfassungsgericht [BVerfG] [federal constitutional court] May 16, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.). Following the decision there was a public campaign to keep the crosses, and this resulted in a new law confirming the obligation to display the cross but setting up an appeal system. *See* FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT 309 (Kevin Boyle & Juliet Sheen eds., 1997).

105. For analysis of this question from a group rights perspective, see William Barbieri, *Group Rights and the Muslim Diaspora*, 21 HUM. RTS. Q. 907 (1999).

106. *See* Ewing, *supra* note 100, at 72. Ewing notes two features of Grimm's argument: first, that the history of national socialism has made Germans more sensitive to the need for group rights; and second, that recognition of minority rights allow for a more tolerant middle ground between the two extremes of compulsory assimilation to the German way of life on the one hand, and religious fundamentalism on the other. *Id.* at 72-73. Referring to recent research showing that young women often start to wear the hijab to lead self-chosen lives without foregoing their culture of origin, the Constitutional Court in the *Ludin* case explicitly rejects the categorical presumption that wearing the hijab is symbolic of women's oppression. *See Ludin*, 108 BVerfGE 282 (333).

107. WALZER, WHAT IT MEANS, *supra* note 31, at 27. Thus, "[i]t never happened that a group of people called Americans came together to form a political society called America. The people are Americans only by virtue of having come together. And whatever identity they had before becoming Americans, they retain (or, better, they are free to retain) afterward." *Id.*

The American constitutional framework for the coexistence of diverse citizens severs Old World links between citizenship and nationality—or, at least, between citizenship and any *single* nationality. Citizenship in the New World requires commitment only to the abstract ideals of "'liberty, equality and republicanism.'"[108] These abstract ideals separate not only religion from politics, but also culture or "all the particular forms in which religious and national culture was, and is, expressed." In this sense, American politics is "relatively unqualified by religion or nationality or, alternatively, . . . qualified by so many religions and nationalities as to be free from any one of them."[109]

This conception of a liberal society imagines unity in the political and economic spheres, but diversity in the "private" spheres of culture and religion (the "political one and the cultural many").[110] By not requiring cultural or religious homogeneity in politics (the political sphere resting instead on democratic citizenship and individual rights), the hope is that the religious and cultural diversity of the Old World can be maintained in a single state without persecution or repression—a country composed of many "peoples," or a "'nation of nationalities.'"[111] The state is therefore "neutral" in the sense that it cannot take on the identity or character of any of the groups that it includes—it is not a "nation-state of a particular kind and it isn't a Christian republic."[112] The primary *political* commitment of citizens is therefore to uphold the democratic framework within which they pursue their substantive conceptions of the good.

Like France, America then is a constitutional democracy based on respect for individual liberty as entrenched in a bill of rights. Not possessing the Old World nation-state character of France, however, New World American pluralism has no equivalent suspicion of ethnic or religious diversity (although like France, *national* diversity is viewed with suspicion).[113] Republicanism in this immigrant conception does not reflect

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108. *Id.* at 30 (quoting P. Gleason, *American Identity and Americanization*, *in* HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS 32 (Stephen Thernstrom, ed., 1980)). This mirrors Hans Kohn's statist, territorial-civic view of nationalism as being essentially subjective, individualistic, and voluntarist. *See supra* note 63 and accompanying text.

109. WALZER, WHAT IT MEANS, *supra* note 31, at 30-31.

110. Walzer notes that the United States lacks "intense political fellowship" because culture and religious belief are not interwoven, as Rousseau insisted, with political activity. *Id.* at 66-67. "Americans are communal in their private affairs, individualist in their politics. Civil society is a collection of groups; the state is an organization of individual citizens. And society and state, though they constantly interact, are formally distinct." *Id.* at 67.

111. *Id.* at 62 (attributing the coined term, "'nation of nations'" originally to Horace Kallen). Walzer notes that this conception of pluralism was designed as an alternative political program to the creation of a national cultural identity and to legitimate the "manyness" of nationalities and to make it permanent such that this "would leave those individuals who were Americans and nothing else permanently anonymous, assimilated to a cultural nonidentity." WALZER, WHAT IT MEANS, *supra* note 31, at 29.

112. *Id.* at 38.

113. It is well-known that France is hostile to the concept of "group" or "minority" rights and has entered an express reservation to Article 27 of ICCPR: "In the light of article 2 of the Constitution of the French Republic, the French Government declares that Article 27 is not applicable so far as the Republic is concerned." Accession of France to the ICCPR ¶ 8, Nov. 4, 1980, 1202 U.N.T.S. 395; *see also* 1958 CONST. art. 2 (Fr.). See also the recent decision of the *Conseil constitutionnel* on this issue. CC decision no. 2004-505DC, Nov. 19, 2004, Rec. 173 (Fr.). Given the discussion in Part IV.C, *supra*, it is interesting to note the declaration made by the Government of the Federal Republic of Germany on April 23, 1982 in response to the French declaration on Article 27:

assimilation towards a single national *collective* identity, but rather reflects social disunity more than unity—a "straining after oneness where oneness doesn't exist."[114] Under this view, one would expect a law on the wearing of religious symbols in public schools to be unconstitutional. While I do not argue the point here, the Free Exercise Clause of the First Amendment has generally been interpreted to provide a robust conception of the freedom to manifest religious belief, including in public schools.[115] The banning of students wearing yarmulkes, crucifixes, hijabs, or turbans from public schools—even under a "neutral and generally-applicable" law or regulation—would accordingly be open to challenge under the First Amendment absent a compelling state interest to the contrary.[116]

The reasons why such a law would be unconstitutional, however, remain deeply contested in American constitutional jurisprudence. This is because, unlike the case of France where *laïcité* is accepted as defining the collective

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> The Federal Government refers to the declaration on article 27 made by the French Government . . . and stresses in this context the great importance attaching to the rights guaranteed by article 27. It interprets the French declaration as meaning that the Constitution of the French Republic already fully guarantees the individual rights protected by article 27.

Declaration Relating to the Declaration Made by France upon Accession with Respect to Article 27, Apr. 23, 1982, 1275 U.N.T.S. 563.

114. This tension is nicely captured in the famous flag-salute case of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). The Pledge of Allegiance is a republican oath regarded as central to national unity. Nevertheless, here the First Amendment was held to prohibit compulsion by the government requiring an individual to profess a belief whether religious or not.

115. The cases in this area involve both the Free Speech and Free Exercise Clauses. *See, e.g.*, Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (upholding on the basis of a free speech rationale the Federal Equal Access Act requiring secondary schools receiving federal aid to allow religious student groups use of school premises on the same terms as other student groups); Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting Amish children on free exercise grounds from public schooling after the eighth grade). As discussed below, the more controversial question under the First Amendment has not been the free exercise of religion in the public sphere by individuals, but rather free exercise by the majority through the means of government. Compare the line of cases on the display of religious symbols or messages in public schools. *See* Stone v. Graham, 449 U.S. 39 (1980) (Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom held to be unconstitutional); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (school prayer held unconstitutional); Engel v. Vitale, 370 U.S. 421 (1962) (school prayer held unconstitutional). These cases were decided under the Establishment Clause which, under the pluralist "group rights" approach discussed below, can be seen as raising questions regarding the free exercise of religious beliefs by the "majority nation."

116. This would apply to laws that ban the wearing of a particular religious symbol, religious symbols generally, or all symbols. In the case of a law that prescribed a uniform that left no room for symbols, however, such a restriction might well be deemed to be constitutional (for example, in the case of the military as upheld in *Goldman v. Weinberger*, 475 U.S. 503 (1986), *superseded by statute*, National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, Div. A, Title V, § 508(a)(2), 101 Stat. 1019 (1987), *as recognized in Cutter v. Wilkinson*, 544 U.S. 709 (2005)). I am grateful to Kent Greenwalt and Gerald Neuman for this point. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that the "'compelling governmental interest'" test in *Sherbert v. Verner* did not apply in the case of "an across-the-board criminal prohibition on a particular form of conduct." *Id.* at 884. Thus, the Oregon criminal law in question was neutral because it did not "target" religion and its "incidental effect" on religious worship did not violate the Free Exercise Clause. *Id.* at 878. Prior to *Smith*, however, the Court consistently held that the strict scrutiny standard of review applies to the enforcement of formally neutral, general laws that burden the free exercise of religion. *See, e.g.*, Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 384-85 (1990); Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398, 403 (1963); Braunfeld v. Brown, 366 U.S. 599, 606-07 (1961); Cantwell v. Connecticut, 310 U.S. 296 (1940).

identity of the nation-state, the religion clauses in the First Amendment have been interpreted according to not one but two conceptions of liberal nationalism that lie in tension with each other. These conceptions mirror the basic characteristics of the liberal and value pluralist approaches we have been considering. Under the first conception sketched above by Walzer, there is no "nation" as such other than the ethnically and religiously diverse individuals who are all, equally, American citizens. This diversity can only be respected under a liberal theory of state neutrality premised on a public-private divide and individual rights. The difficulty here is that the meaning of the concept of "neutrality" is essentially contested. To this question the first conception provides a decisively non-neutral answer, albeit one that it seeks to mask through a formalist rights discourse or, as Waldron has termed it, a fixed "liberal algebra." Liberal neutrality is equated with rationality or "secular reason."[117]

Once this move is made, the only question to ask is what secular reason or rationality requires in maintaining its control over (the irrationality of) religion and religiously inspired beliefs and practices. Does it require "*laïcité*" in the French or Turkish conception of a rigid separation of the public (political) and private (religious and cultural) spheres? Does it require a more "accommodationist" approach in the sense of adopting a stance of "benign neglect" neither favoring nor opposing religion and religious practices (on a nonpreferentialist basis) and thus permitting, for example, public displays of "ceremonial deism"? Or does it perhaps require a more "cooperationist" approach in the German conception of a less rigid separation where the state does not officially endorse any particular religion but is actively committed to equal treatment and support of all religions (on a nondiscriminatory basis)? As we shall see, each of these approaches yields different conceptions of, and difficulties concerning, the right to freedom of religion or belief and, accordingly, of the relationship between religious groups and the state.

These are not only legal or philosophical questions. They are also *political* questions regarding how to resolve the struggle between two incommensurable values—the religious and the secular—in particular political communities. Given the immigrant nature of American nationalism and its difference from the nationalisms of Old World nations, it is not surprising that—despite its depth and maturity—First Amendment jurisprudence has not produced a settled constitutional doctrine on the relationship between state neutrality and religious freedom. The case law of American courts over the last century reflects instead a formal liberal commitment to individual liberty and a series of pragmatic attempts to realize that ideal in a religiously and culturally diverse society. In this respect, First Amendment jurisprudence tells the story of various political struggles and

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117. The literature on post-Enlightenment accounts of reason, rationality, and neutrality is vast. In the present context, this is most closely associated with the philosophical method of Rawls and his heuristic device of an "original position." JOHN RAWLS, A THEORY OF JUSTICE (1971). Gray refers to this species of philosophical thought as comprising the "liberal ideals of the European Enlightenment project. . . . [which] subject[s] all human institutions to a rational criticism and of convergence on a universal civilization whose foundation is autonomous human reason." GRAY, ENLIGHTENMENT'S WAKE, *supra* note 6, at 15; *see infra* note 204 and accompanying text.

pragmatic compromises by both legislatures and courts in the absence of agreement regarding what reason requires in the conditions of New World pluralism.

This has included struggles not only between religious and secular views *within* the mainstream majority, but also parallel struggles between the fluctuating views of the majority and various minorities. To the extent that the majority view has adopted the nondiscrimination principle, the first set of struggles has been resolved by limiting religion in the public sphere, while the second set of struggles has been resolved by limiting recognition of the collective identities and ways of life of minorities other than to the extent that they can be recognized as falling within the majority's conception of what individual religious freedom requires. The political and legal hermeneutics of the First Amendment, in other words, may be said to represent a *modus vivendi* conception of value pluralism in the conditions of a largely immigrant society not consciously based on an historically and territorially situated religious or cultural majority, and where the claims of religious minorities are understood through the lens of individual, as opposed to collective, rights.[118]

Competing with this narrative, however, is a second conception of liberal nationalism, which, particularly in recent years, has sought to displace the former.[119] Whereas the first conception sees only a political community of diverse individuals, the second conception is premised on the existence of a majority defined, despite its heterogeneous character, in ethnic, cultural, and religious terms. This is an Anglo-Saxon, Christian (or "Judeo-Christian") people with a cultural heritage grounded in the values of Western civilization. Under this second view, state neutrality requires something closer to an accommodationist approach that takes into account not only the role of religion generally, but also the role of the religion of the majority in particular, in the public life and history of the nation and its institutions of government.

This approach is evident in the recent opinion of the Supreme Court upholding the display of a monument of the Ten Commandments on the Texas State Capitol grounds as not violating the Establishment Clause. Chief Justice Rehnquist, writing for the plurality, endorses the idea that American "national life reflects a religious people who, in the words of Madison, are 'earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his [blessing . . . .]'"[120] Avoiding altogether the traditional test set forth in *Lemon v. Kurtzman*,[121] the Chief Justice proceeds to state that the Court's analysis in

118. For a discussion of "*modus vivendi* conceptions of pluralism," see *infra* note 200 and accompanying text.

119. I refer here, in particular, to increasing attempts by Christian groups to assert their influence and values in the public sphere on issues as far-ranging as homosexual sex, gay marriage, medical research, the Pledge of Allegiance, and the presence of the Ten Commandments in courthouses. *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844 (2005) (Ten Commandments on court grounds); Van Orden v. Perry, 545 U.S. 677 (2005) (Ten Commandments in the courtroom); Elk Grove United Sch. Dist. v. Newdow, 542 U.S. 1 (2004); Lawrence v. Texas, 539 U.S. 558 (2003) (sodomy laws).

120. Van Orden v. Perry, 545 U.S. 677, 683 (2005) (Rehnquist, C.J., plurality) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 212-13 (1963)) [alterations in the original].

121. 403 U.S. 602 (1971). *Lemon* sets out a three-prong test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor

this case is driven "by the nature of the monument,"[122] which "bespeaks the rich American tradition of religious acknowledgements."[123] Thus, the fact that the display of the Commandments included a religious message does not infringe the First Amendment.[124]

This constitutes an attempt by the conservative justices of the Court to portray America as an Old World nation-state despite the New World character of its society and constitution, including its Enlightenment-inspired Bill of Rights. Public recognition of the Christian religion and Judeo-Christian symbols springs from a desire to galvanize and define a national identity. As has been the experience in so many other societies, "the alignment of nationality with a dominant religion" plays an integral "mobilizing role" in nation-building.[125] To do so, however, requires a reconsideration of the nondiscrimination approach's conception of neutrality as equated solely with secular rationality in the public sphere. Religious commitments, symbols, and practices must be reconceived as having a legitimate place in the public sphere. As in the German case, the state is now permitted actively to acknowledge and protect religious belief and practices in the public sphere.[126]

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inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion (citation omitted).'" *Id.* at 612-13.

122. *Van Orden*, 545 U.S. at 686.

123. *Id.* at 690.

124. *Id.* (noting that the monument has both "religious significance" and "undeniable historical meaning" and concluding that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause"). See also the dissenting opinion of Justice Scalia in *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 885 (2005), stating that the governmental invocation of God is not an establishment and raises legitimate *competing* interests:

> On the one hand, the interest of that minority in not feeling "excluded"; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority.

Id. at 900.

125. Peter G. Danchin, *Religion, Religious Minorities and Human Rights: An Introduction*, *in* PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE 1, 2 (Peter G. Danchin & Elizabeth A. Cole eds., 2002) (noting the rise of this phenomenon in the ideological vacuum that existed at the end of socialism).

126. It should be noted that there is a divergence of views in the Court on this question. Chief Justice Rehnquist and Justice O'Connor, for example, appear to hold to the position that the display of religious symbols is constitutional to the extent that the state does not endorse their religious message explicitly. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 25-44 (2004) (Rehnquist, C.J., & O'Connor, J., concurring). Justice Scalia, however, appears to hold to a stronger position, allowing the state explicitly to recognize and endorse religious messages. Concurring with the opinion of the Chief Justice in *Van Orden*, Justice Scalia articulated his position in the following terms:

> I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.

Van Orden, 545 U.S. at 692 (2005) (Scalia, J., concurring). For Scalia, there is no constitutional violation where the state favors religion over nonreligion. *See* McCreary County v. ACLU of Ky., 545 U.S. 844, 885-94 (2005) (Scalia, J., dissenting); *see also* Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1098 (2006) (suggesting that Justice Scalia's dissent in McCreary County "may represent the beginnings of a revolution in Establishment clause jurisprudence—a wholesale rethinking of the constitutional relationship between church and state").

While the relationship between the religious and secular spheres is unspecified, it is clear that the nondiscrimination principle's banishment of religion to the private sphere in the name of neutrality is no longer acceptable. A different *modus vivendi* conception of value pluralism is thus demanded—one that challenges the first model's conception of the public-private divide and correspondingly, as we shall see, of individual rights.

What is striking in this conception is the shift from a statist to a situated understanding of nationalism. The state is to be valued as an instrument for preserving the common history, religion, and societal culture of a majority group or number of groups on the grounds that "members of [such] groups . . . have a fundamental, morally significant interest in adhering to their [religion and] culture and in sustaining [them] across generations."[127] Having thereby substantively challenged the concept of neutrality in the public sphere, the difficulty now becomes how to fulfill the first model's commitments to equality and nondiscrimination, as demanded by its scheme of individual rights. This applies not only to all persons regardless of their religious or cultural identity (including nonbelievers), but also to relationships between different religious and cultural groups and identities. In relation to the latter groups, this proposition is immediately made precarious by the existence (and direct or indirect endorsement by the state) of a majority religious and cultural nation. For even if one were to accept the accommodationist view (i.e., that the Establishment Clause "bars nothing more than governmental preference for one religion over another"),[128] how does one treat all religious traditions equally in a religiously diverse society? As the majority opinion pointed out in *McCreary*, even if Christianity itself is not specifically recognized as the national religion, the identification of God as the "God of monotheism," "apparently means that government should be free to approve the core beliefs of a favored religion over the tenets of others, a view that should trouble anyone who prizes religious liberty."[129]

The inescapable consequence of an ethnocultural understanding of nationalism is the need for a theory of collective rights. The nondiscrimination principle is simply unable on its own to address concerns of this kind and neither the majority in *Van Orden* nor traditional accounts of rights in American jurisprudence can provide us with such a theory. As in the case of rights discourse in France, recognition in the United States of the rights of individuals freely to practice and realize their own ways of life and beliefs in different ethnic and religious communities does not include collectivities as having any corporate form or constitutional rights *qua* groups. American

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127. GANS, *supra* note 49, at 7.

128. *McCreary County*, 545 U.S. at 879 (citing Wallace v. Jaffree, 472 U.S. 38, 98-99 (1985) (Rehnquist J., dissenting)).

129. *McCreary County*, 545 U.S. at 880. Justice Souter, writing for the majority, notes that the identification of religion with "monotheism with Mosaic antecedents" flatly contradicts the framers' specific concern with Christianity: "Justice Story probably reflected the thinking of the framing generation when he wrote in his Commentaries that the purpose of the [Establishment] Clause was 'not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects.'" *Id.* at 880 (quoting R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 13 (1988)).

pluralism is thus premised on the rights of the individual and does not include any conception of the rights of ethnic or religious groups.

In conclusion, I have argued that the liberal nondiscrimination principle is unable to deal with the collective claims of ethnic and religious groups. Increasingly, recognition of the importance of collective goods for individual freedom is thus leading contemporary legal and political theorists to argue that cultural and religious differences can only be accommodated through special legal or constitutional measures over and above the traditional civil and political rights of citizenship.[130] As we have seen, public respect of the private integrity of faith and the ability to participate in the public sphere as equal citizens have not been sufficient for Muslim minorities in European democratic states to live as autonomous individuals according to their collective ways of life. My claim, then, is that some forms of group difference require certain "group-specific" rights. If this is correct, the question to address is how the defining idea of rights discourse—the principles of equality and nondiscrimination—are to apply to a diverse spectrum of religious and secular subjects embedded in overlapping communities for whom politics and religion cannot be easily separated. It is to this set of questions we now turn.

V. THE RIGHTS OF RELIGIOUS MINORITIES

Issues of ascriptive identity and group-specific claims generate notoriously difficult conceptual questions for rights discourse. My argument in this Part is that, despite these difficulties, the normative and practical demands of strong religious and cultural pluralism are better confronted than avoided. Doing so requires us to take more seriously the collective interests and values at stake in a right, such as the freedom of religion and belief.

We have seen that, under the nondiscrimination principle, nothing should distinguish Muslims from non-Muslims as citizens of a European democratic state other than their lesser numbers. But as Talal Asad has suggested, the concept of a minority in Europe is not a purely quantitative concept but instead arises from "a specific Christian history: from the dissolution of the bond that was formed immediately after the Reformation between the established Church and the early modern state. *This* notion of minority sits uncomfortably with the secular Enlightenment concept of the abstract citizen."[131] The Reformation doctrine of *cuius regio, eius religio* (the religion of the king is the religion of the people) was critical to the formation of the early modern state.[132] Later Enlightenment theory, however, as reflected in revolutionary documents such as the French *Declaration of the Rights of Man and the Citizen* criticized the religious inequality of the absolutist state

130. The most prominent of these has been Kymlicka. *See* Kymlicka, *Western Political Theory*, *supra* note 31; Kymlicka, *Introduction*, *supra* note 38. For a useful discussion by contemporary "multiculturalist" political theorists, see MULTICULTURALISM RECONSIDERED: CULTURE AND EQUALITY AND ITS CRITICS (Paul Kelly ed., 2002).

131. ASAD, *supra* note 71, at 174.

132. For a critique of religious liberty in the early modern period, see Peter G. Danchin, *The Emergence and Structure of Religious Freedom in International Law Reconsidered*, 23 J.L. & RELIGION 101(forthcoming 2007-08).

and proposed instead that the "political community consists of an abstract collection of equal citizens."[133]

A direct consequence of this Enlightenment philosophy and the gradual separation of church and state was the emergence of "minority rights" as characteristic of national politics. Members of minorities became at once equal citizens as members of the body politic (the state) while, at the same time, unequal to the majority as a minority group requiring special protection.

> The political inclusion of minorities has meant the acceptance of groups formed by specific (often conflicting) historical narratives, and the embodied memories, feelings, and desires that the narratives have helped to shape. The rights that minorities claim include the right to maintain and perpetuate themselves as groups. "Minority rights" are not derivable from general theories of citizenship: status is connected to membership in a specific *historical* group, not in the abstract class of citizens. In that sense minorities are no different from majorities, also a historically constituted group.[134]

While the nondiscrimination approach does not envisage minority rights, these are nevertheless explicitly recognized in international human rights instruments. In particular, Article 27 of the ICCPR provides as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[135] A considerable corpus of human rights jurisprudence and scholarly comment has been generated under this provision.[136] For the purposes of my analysis, there are three questions to address relating specifically to the protection of religious minorities: first, what exactly is an "ethnic, religious or linguistic minority"; second, how does Article 27 differ from other rights (such as Article 18) recognized under the ICCPR; and third, if Article 27 entitles minority groups to "special measures" over and above the claims of individual rights, whether and how this can be reconciled with demands for equality and nondiscrimination in Articles 2 and 26. I focus in the discussion that follows on the first two questions, leaving for Part VI the question of how best to reconcile the nondiscrimination approach with a pluralist conception of group-differentiated rights.

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133. ASAD, *supra* note 71, at 174.

134. *Id.* at 174-75.

135. ICCPR, *supra* note 3, art. 27. For other provisions in international instruments concerning the rights of minorities, see Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Annex art. 1(1), G.A. Res. 47/135, U.N. GAOR, 47th Sess., 92d plen. mtg, U.N. Doc. A/RES/47/135 (Dec. 18, 1993); Framework Convention for the Protection of National Minorities art. 8, *opened for signature* Feb. 1 1995, C.E.T.S. No. 157, *available at* http://conventions.coe.int/treaty/en/Treaties/Html/157.htm; and Conference on Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension, ¶ 32 (June 5-29, 1990).

136. For an excellent overview of commentary in relation to Article 27, see UNIVERSAL MINORITY RIGHTS (Alan Phillips & Allan Rosas eds., 1997). On the broader issue of minority rights under international law, see MINORITY RIGHTS IN THE 'NEW' EUROPE (Peter Cumper & Steven Wheatley eds., 1999); Joel E. Oestreich, *Liberal Theory and Minority Group Rights*, 21 HUM. RTS. Q. 108 (1999); and THE PROTECTION OF MINORITIES AND HUMAN RIGHTS (Yoram Dinstein & Mala Tabory eds., 1993).

A. *What is a "Religious Minority"?*

Article 27 recognizes the rights of "persons belonging to" minority groups. Although these rights are collective in the sense that they shall be enjoyed "in community with the other members of their group," they are not expressed nor have they been interpreted as belonging to the group itself.[137] Felix Ermacora has described Article 27 as a right of individuals premised on the existence of a community, or as an individual right collectively exercised—a "group protection instrument."[138] In this respect, the article reflects the basic orientation of the ICCPR towards individual rights while simultaneously recognizing the importance of community to the realization of those rights.

Like the meaning of the terms "people" and "nation," the concept of a "religious minority" is an essentially contested term and cannot therefore be conclusively defined. As discussed in Part III, however, it is increasingly recognized that belonging to "encompassing groups" with cultures of self-recognition and identifying and being identified as belonging to such groups is essential to many people's well-being.[139] Nevertheless, how exactly to recognize the subjectivity and demarcate the boundaries of such "sub-communitarian identities" remains a controversial question in political philosophy and practice.[140] Steven Lukes has referred to these as problems of "inclusion-exclusion," "vested interests," and "deviancy."[141] Similarly, Walzer has suggested that while a state committed to pluralism such as the United States should "defend collective as well as individual rights," the idea that national, ethnic, and religious groups are not merely voluntary associations but have some political standing and legal rights encounters a major difficulty:

> [G]roups cannot be assigned rights unless they are first assigned members. There has to be a fixed population with procedures for choosing representatives before there can be representatives acting officially on behalf of that population. But ethnic groups in the United States do not have, and never have had, fixed populations (American Indian tribes

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137. U.N. High Comm'r for Human Rights [UNHCR], *General Comment No. 23: The Rights of Minorities (art. 27)*, ¶ 5.1, 50th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.5 (April 8, 1994) [hereinafter *General Comment on Article 27*].

138. Felix Ermacora, *The Protection of Minorities Before the United Nations*, *in* 182 RECUEIL DES COURS 247, 308, 321 (1983).

139. *See* Margalit & Raz, *supra* note 51, at 441-61.

140. *See, e.g.*, Leslie Green, *Two Views of Collective Rights*, 4 CANADIAN J.L. & JURISPRUDENCE 315, 315 (1991) (distinguishing rights of "collective agents" and rights to "collective goods" and arguing that "although both have a place in moral, political, and legal argument, only the second can fulfil [sic] the political function generally assigned to collective rights, and even it can do so only partially").

141. Lukes describes the "inclusion-exclusion" problem as being how to decide which sub-communities are included in the overall framework and which are not. The problem of "vested interests" is that "once on the official list, sub-communities want to stay there forever and keep others out. Moreover, to get on the list, you have to be, or claim to be, an indigenous people or the victims of colonialism, and preferably both." Finally, the problem of "deviancy" is that not all individuals ("rootless cosmopolitans") fit into the sub-communitarian categories, thus creating various "non-, ex-, trans- and anti-Identifiers." STEVEN LUKES, LIBERALS AND CANNIBALS: THE IMPLICATIONS OF DIVERSITY 154, 157-58 (2003) [hereinafter LUKES, LIBERALS AND CANNIBALS].

> are a partial exception). Historically, corporatist arrangements have only been worked out for groups that do.[142]

In the face of these conceptual uncertainties, international lawyers have simply tended to assert that the existence of a "minority" (which may be defined according to indigenous as well as national, ethnic, religious, cultural, and linguistic characteristics) is a question of fact and does not depend upon any political or legal determination by the state.[143] Likewise, the identity of a person belonging to a minority is said to be *voluntary*, i.e., the decision is one for the individual to make and not the minority group itself. Therefore, although a person will be protected from discrimination on the basis of membership in an ethnic, religious, or linguistic minority, the choice to avail himself of any special protection afforded by Article 27 is left to the individual, and that choice may not be vitiated by the determination of the minority group.[144]

But, of course, such conceptions of the relationship between the individual and the collective are fiercely contested. As noted by Thornberry:

> Just as individuals may be destroyed by exclusion from community, so are communities destroyed by excessive exercises in self-identification by those claiming membership of particular communities. If we believe in the principles of individual self-identification, can anyone join the Yanomami, or the Gypsies or the Sami? If we believe in the right of a community to continue in existence, or communal as opposed to individual self-identification and self-determination, can the community expel individuals who disturb and disrupt? Can the individual reject the community?[145]

To say in formalistic terms that the existence of a (minority) community is a question of fact or that communal identity is a question of self-identification is merely to beg the question. It is clear that, while international human rights instruments expressly recognize collective rights to self-determination and minority protection, there is a distinctly liberal discomfort in the jurisprudence with such norms. As the discussion above on liberal nationalism argued, the idea that the existence of a collective legal subject

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142. WALZER, WHAT IT MEANS, *supra* note 31, at 69-70. The idea of a group having a given territory and fixed population is regarded as being what distinguishes "national" from "ethnic or linguistic" minorities. Ermacora, *supra* note 138, at 295. A similar point has been made by Partha Chatterjee in the context of Muslim minorities in India. *See* Partha Chatterjee, *Fasting for Bin Laden: The Politics of Secularization in Contemporary India*, *in* POWERS OF THE SECULAR MODERN: TALAL ASAD AND HIS INTERLOCUTORS 57, 57 (David Scott & Charles Hirschkind eds., 2006) (noting that debate in India was at an impasse because, "even though sections of Indian citizens were legally demarcated as belonging to minority religious communities following their own personal laws and possessing the right to establish and administer their own educational institutions, there was no procedure to determine who would represent these minority communities in their dealings with the state").

143. *See General Comment on Article 27*, *supra* note 137, ¶ 5.2; *see also* ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples Convention in Independent Countries, art. 1, ¶ 2, adopted June 27, 1989, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169 ("Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.").

144. Such considerations explain why the rights recognized in Article 27 are regarded as belonging to individual minority members. *See* Francesco Capotorti, *Are Minorities Entitled to Collective International Rights?*, *in* THE PROTECTION OF MINORITIES AND HUMAN RIGHTS, *supra* note 136, at 505, 508-09.

145. Patrick Thornberry, *Introduction: In the Strongroom of Vocabulary*, *in* MINORITY RIGHTS IN THE "NEW" EUROPE, *supra* note 136, at 1, 4-5.

such as a nation or a minority is solely a question of "fact" reflects a view that avoids rather than justifies the existence and identity of the subject. In so doing, it obscures two points: (a) that distinctive ethnocultural features of groups cannot be recognized unproblematically by the law as objective "facts";[146] and (b) that a solely liberal account of communal groups as voluntary associations formed to realize shared (but individual) desires or preferences cannot provide a basis for drawing the boundaries between groups and collective identities.[147] A similar tension exists in international law in terms of recognition of nation-states, with scholars unable to reconcile the dichotomy between the declaratory and constitutive views.[148]

Similarly, the idea that one's communal identity is a matter of personal choice—or as Asad put it above, the "belief that human beings can be separated from their histories and traditions"—is closely tied up with Enlightenment notions of individual self-realization and autonomy.[149] In many (perhaps most) parts of the world, this is not, however, the way people understand their collective identities. Ascriptive characteristics of ethnicity, religion, and language are regarded as integral to the identity of many peoples. Recognition of collective rights thus raises conceptual difficulties not only in terms of how boundaries are to be drawn between majority and minority groups, but also in terms of how such boundaries shape our view of human rights. Despite these uncertainties, and whether or not we can better manage them through distinctions such as Kymlicka's division between "polyethnic immigrant societies" and "multination states," my argument is that the demands of religious and cultural pluralism require us to confront—rather than avoid—the collective dimensions of individual rights such as the freedom of religion or belief.

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146. In order to assign "objective" significance to certain factual characteristics of groups such as ethnicity, religion, or language, the law must first have an agreed theory of norms which can specify which facts have objective significance and what rights, competences, and spheres of action such legal subjects objectively possess. But these normative questions are deeply contested in international law. It is this lack of consensus which prompts the move of saying that the recognition of the group is a matter of (objective) "fact." But this does not rescue us from the charge that such facts are subjective and apologist because they are based on contested norms—i.e., by basing the "objectivity" of the law on facts, the charge of normative "subjectivity" and utopianism is not thereby avoided. For a discussion of this dilemma in international legal theory, see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 40-49 (1989).

147. In order to assign "objective" significance to certain norms such as the right of peoples to self-determination, the law must first have an agreed theory about what class of beings constitutes a "people." But again, this is deeply contested as a factual matter. This is what prompts the move of saying that the recognition of the group is a matter of (objective) "norms." But this does not rescue us from the charge that such norms are subjective and utopian because they are based on contested facts—i.e., by basing the "objectivity" of the law on norms, the charge of factual "subjectivity" and apologism is not thereby avoided. *Id.* at 192-263.

148. Under the declaratory view, recognition of a state is a "mere declaration or acknowledgement of an existing state of law and fact, legal personality having been conferred previously by operation of law." Under the constitutive view, the "political act of recognition is a precondition of the existence of legal rights: in its extreme form this is to say that the very personality of a state depends on the political decision of other states." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 87-88 (6th ed. 1998).

149. *See supra* note 78 and accompanying text. Thus, many discussions on minority rights focus on the question of the "right of exit" from indigenous and ethnic, religious, and linguistic communities.

B. *Article 27 and "Special Measures"*

If religious freedom is protected under Article 18, what then is the need for Article 27? The answer to this question turns on certain perceived limitations in the nondiscrimination principle's conception of religious and cultural pluralism. Article 27's rationale is to provide *additional* protection of the rights of persons belonging to minority communities. It is not clear, however, what this means in practice. In what ways can Article 27 be said to provide any additional protection for persons belonging to religious minorities to profess and practice their religion other than that provided to all persons under the general provisions covering the rights to freedom of religion and to equal protection of the laws (i.e., under Articles 2, 18, and 26)?[150] Indeed, Capotorti has argued that this perceived lack of independent substance is particularly evident with respect to the rights of religious as opposed to ethnic or linguistic minorities.[151]

International legal scholars have sought to answer this question by drawing a distinction between two conceptions of equality: one a "negative" conception requiring the prevention of discrimination on the basis of membership in a minority group, and the other a "positive" conception requiring the protection of the distinct characteristics that distinguish minorities from the majority. As is often noted, these two conceptions are in tension with each other—one seemingly requiring equal or uniform treatment of all individuals and the other requiring differential treatment or "special measures" in favor of members of a minority group.[152] Moreover, because the rights protected under Article 27 depend "on the ability of the minority group to maintain its culture, language or religion," positive measures "may also be necessary to protect the identity of a minority."[153] Kymlicka has referred to such measures as "external protections." They describe a situation where a

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150. *See General Comment on Article 27*, *supra* note 137, ¶ 1 ("[Article 27] establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.").

151. *See* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, ¶ 227, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78.XIV.1 (1979) (*prepared by* Francesco Capotorti) [hereinafter *Capotorti Study*].

152. *See, e.g.*, LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 319-22 (1973). The U.N. report on discrimination describes a fundamental difference between the protection of minorities on the one hand (requiring "positive action" to maintain differences of religion, language, and culture), and the prevention of discrimination on the other (focusing on inequality of treatment on certain prohibited grounds). The Secretary-General, *The Main Causes and Types of Discrimination*, ¶¶ 6-7, U.N. Doc. E/CN.4/Sub.2/40/Rev.1, U.N. Sales No. 49.XIV.3 (June 7, 1949). Guided by this distinction, the Human Rights Committee has determined that Article 27 requires states to enact "positive measures" of protection. *General Comment on Article 27*, *supra* note 137, ¶ 6.1. Positive action in furtherance of the protection of minorities is also endorsed by U.N. Special Rapporteur Capotorti in his study on Article 27. *Capotorti Study*, *supra* note 151, ¶ 217 (discussing the need for specific cultural, linguistic, and educational institutions). Such positive measures must, however, be taken consistently with the general obligations against discrimination. *See General Comment on Article 27*, *supra* note 137, ¶ 6.2.

153. *General Comment on Article 27*, *supra* note 137, ¶ 6.2; *see also id.* ¶ 9 ("The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.").

minority group demands rights against the larger society to protect it from the economic or political decisions of the majority. The concern is the "relationship *between groups* and the claim is that justice between the minority and majority cultures requires [legal and political recognition] of group rights which reduce the minority's vulnerability to the decisions of the majority."[154] For Kymlicka, external protections for minority groups need not conflict with a liberal theory of individual freedom.[155]

The obligation of the state to enact special measures of protection thus emphasizes the possibility that conditions may exist in fact—if not in law—that prevent members of minority groups from realizing the full protection of their rights. This may result from the existence of social or cultural prejudice against minority groups and the state's inability to respond to such prejudice by virtue of the concentration of political and legislative power in the hands of the majority.[156] There is disagreement, however, on the exact nature of the state's obligation of minority protection. The Human Rights Committee, for example, has not expressly addressed the question whether there is an obligation on the state to act in a positive fashion to protect the identity of a religious minority from destruction or assimilation. On one view, the obligation to protect minority identity requires the state to accord minority religions privileges and benefits similar to the dominant religion where the minority is otherwise inhibited in the exercise of their right to freedom of religion. However, on a different view, which regards adherence to a religious tradition more as a matter of personal choice than of ascriptive characteristics, the state will not be regarded as being under an obligation to intervene to protect the identity of religious minorities (for example, where members are freely choosing to leave the community).[157]

The Human Rights Committee appears to have favored the latter view and has been suspicious of attempts to use Article 27 to justify preferential treatment of a minority in comparison to the majority, such as in the case of

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154. Kymlicka, *Introduction*, *supra* note 38, at 14. This is to be distinguished from "internal restrictions" where a minority religious group demands rights against its own members, most often to protect its own historic and established traditions and practices against individual dissent. Here, the concern is the "relationship *between the group and its own members*, and the claim is that cultural self-preservation requires certain 'collective' rights which limit the freedom of individual members to reject or rebel against traditional religious norms." *Id.* (emphasis added).

155. A liberal theory of minority rights is, however, highly skeptical about internal restrictions. *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 7 (1995). Note, however, that some minority rights theorists have argued in favor of internal restrictions (subject to an adequately defined right of exit from the group) but against external protections (which artificially fix the constantly changing boundaries between groups and also the power relations within each group). *See* Chandran Kukathas, *Are There Any Cultural Rights?*, *in* THE RIGHTS OF MINORITY CULTURES, *supra* note 37, at 228.

156. *See, e.g.*, Asbjørn Eide, *Minority Protection and World Order: Towards a Framework for Law and Policy*, *in* UNIVERSAL MINORITY RIGHTS, *supra* note 136, at 87-88 (arguing that underlying the concept of minority rights is "the assumption that the majority constitutes a hegemonical force which, unless checked, is likely to cause difficulties to the minor group").

157. As noted above by Walzer, religious and ethnic (but not national and racial) groups function in the United States as voluntary associations, and thus their survival depends not on state support or protection but on the "vitality of their centers." WALZER, WHAT IT MEANS, *supra* note 31, at 74. Accordingly, if that "vitality cannot be sustained, pluralism will prove to be a temporary phenomenon, a way-station on the road to American nationalism." *Id.*

the Québécois minority in Canada.[158] The key factor in the Committee's decisions has been to identify some coercive condition that is truly threatening to the existence or way of life of the minority,[159] or to the ability to exercise minority rights.[160] The difficulty with this approach is that it overlaps virtually completely with the Committee's interpretation of a state's positive obligation to intervene under Articles 2(1) and 26. It is for this reason that the rights of persons belonging to religious minorities under Article 27 to profess and practice their own religion has not been considered to add significant independent substance to the nondiscrimination provisions of the ICCPR.

We can conclude by noting that, while Article 27 requires majority nations to enact special measures of protection towards minorities, this obligation is in tension with the norms of equality and nondiscrimination in Articles 2 and 26. This raises a series of related questions: How is it possible for the state to treat individuals equally by treating groups differently on the basis of religion or belief? Alternatively, how is it possible for the state to treat differently situated religious groups equally? Once one adopts a group-differentiated rights paradigm, the nondiscrimination model's conception of equality becomes more complex by several orders of magnitude.

VI. VALUE PLURALISM AS A THEORY OF RELIGIOUS FREEDOM

The discussion above has illustrated how the very ideas of "majority" and "minority" rights raise unsettling questions for liberal accounts of the right to freedom of religion and belief. In this final Part, I argue that these considerations suggest certain limits to the rationalist ambition of advancing a tidy and universally applicable theory of religious freedom in international law. This argument rests on three interrelated claims. First, Section VI.A illustrates that a proper appreciation of the complex relationship between individual autonomy and communal goods leads us away from rights discourse in classical Lockean and Kantian formulations towards value pluralism. Second, Section VI.B argues that the doctrine of value pluralism is a coherent and attractive conceptual position in moral and political thought as between the extremes of monism or "moral universalism" on the one hand and antiuniversalism or "cultural relativism" on the other. And third, the

158. *See* Ballantyne v. Canada, Communications Nos. 359/1989 and 385/1989, U.N. GAOR, Hum. Rts. Comm., 47th Sess., Annex at ¶ 11.4, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (May 5, 1993) (rejecting the argument that limitation on the right to freedom of expression—through Quebec law prohibiting use of the English language in commercial signs—was necessary in order to protect the French-speaking linguistic minority because the prohibition was not considered a necessary or particularly effective method of protection).

159. *See* Ominayak v. Canada, Communication No. 167/1984, U.N. GAOR, Hum. Rts. Comm., 38th Sess., Annex at ¶¶ 32.2, 33, U.N. Doc. CCPR/C/38/D/167/1984 (March 26, 1990) (finding that state development plans that threaten to destroy subsistence patterns of a Canadian Indian group violated the right "to engage in economic and social activities which are part of the culture of the community to which they belong" and which were protected under Article 27).

160. *See* Lovelace v. Canada, Communication No. 24/1977, U.N. GAOR, Hum. Rts. Comm., 13th Sess., ¶ 15, U.N. Doc. CCPR/C/13/D/24/1977 (July 30, 1981) (national law that deprived applicant of her right to remain on tribal reserve violated her right under Article 27 to access to her native culture and language in community with others because the reserve was the only place she could have access to those things); Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1999 BYU L. REV. 251, 274.

implications of this position are evident in the two faces of the history of liberal toleration set out in Section VI.C.

A. *Communal Goods and Individual Rights*

As a set of normative claims, collective claims of right force us to justify, reject, or at least explain liberal theory's blindness to the value of communal goods. However such questions are approached, the connection between individual autonomy and collective goods raises difficult and contested questions about the role of autonomous choice in different forms of human flourishing. This has two dimensions: one questioning the abstract conception of a "free" liberal self denuded of any definite cultural or communal identity or historical inheritance (complete with all their conflicting demands); another asserting that the subject of agent-relative moralities is often collective rather than personal. On the first point, value pluralists such as Joseph Raz have emphasized the collective aspects of liberal rights and the limits of rational choice by showing that while rights protect the well-being of individuals, autonomous choice will only have value in a context of choice-worthy options and cultural environments possessing a range of inherently public goods. On the second point, the well-known communitarian critics of liberalism such as Michael Sandel, Alasdair MacIntyre, Charles Taylor, and Michael Walzer have questioned the exclusive subjectivity of the individual in political theory. As John Gray has noted, whether we look to Rawls's "basic liberties," Nozick's "side constraints," or Dworkin's "rights as trumps," the assumption is that the "subject matter of justice cannot, except indirectly, be found in the histories of peoples, and their often tragically conflicting claims; it must always be a matter of individual rights."[161] Value pluralists seek to recognize and understand the claims of subjects characterized by collective identities (peoples, nations, and minorities) and the complex role played by collective values in any theory of justice.

In the case of cosmopolitan theories of rights, value pluralism calls into question the exaltation of individual autonomy as the single, overarching meta-value to the exclusion of all other values. In light of the discussion above, we may now pause to ask: Can such a moral theory defend itself against the claims of other comprehensive (especially religious) views consistently with the premises of liberalism? What is it that is lost in the pursuit of such a one-dimensional moral theory? Conversely, even in the case of Rawls's later political liberalism, the rigid distinction between "public" (objective) and "private" (subjective) spheres suggests a further conceptual narrowing in pursuit of a universally justifiable notion of human rights. Value pluralism points in precisely the opposite direction. Rather than seeking a narrowed-down list of rights capable of being supported by both liberal and "nonliberal" peoples (rights whose foundations remain mysteriously elusive all the same), value pluralism encourages a broadening of the field of contesting values while at the same time accepting the fact of their

161. GRAY, ENLIGHTENMENT'S WAKE, *supra* note 6, at 5. "The consequence is that the diverse claims of historic communities, if they are ever admitted, are always overwhelmed by the supposed rights of individuals." *Id.* at 6.

incommensurability. As suggested by value pluralists such as Michael Walzer and Charles Taylor,[162] this approach opens up new pathways and dynamic possibilities for rights discourse between diverse points of view—a process which, rather than imposing one, totalizing outlook, is capable of transforming each of them. A corresponding point applies to the public/private distinction, which, in political liberalism, isolates in practice large spheres of social life (such as the family, the workplace, religious institutions, and privately funded schools) from the lens of rights-based analysis, thus indirectly sanctioning restrictions on human freedom. Value pluralism, as we shall see, offers a contrary and potentially transformative means of approaching the question of human rights in the "private sphere."

In both cases, the difficulty derives from classical liberal theory's starting assumptions. Individual liberty is held to be the paramount "sacred" value to the exclusion of all others. This is justified by a range of assumptions whether related to the individual in a hypothetical state of nature, to human nature, or to the relationship between the individual and sociopolitical order. But, in the end, it is the freedom of the *individual* that is the relevant ethical measure. This ignores, ab initio, another constant and powerful necessity in human existence: our relationship to one another—the importance to human dignity of community, of collective values, and of "group rights." Value pluralism asks us to take seriously the ethical nature of collective claims, not to judge whether they are better than or equal to claims to individual liberty, but to recognize them as objective (albeit incommensurable) ends that must be taken into account in any conception of human rights or more general theories of justice.

As we have seen in the context of laws proscribing the wearing of religious symbols, the value of communal aims and forms of life has particular and challenging implications in the area of religion and religious freedom. Religions encompass "a world view or set of beliefs, along with a value system and way of life embodying and expressing these beliefs."[163] Religious traditions thus provide their adherents with a comprehensive understanding of the world and identify the place and role of human beings and other sentient beings within that world. These traditions

> attempt to provide answers to the most basic [epistemological and ontological] questions: the origin and meaning of existence; the nature of life and death; the meaning of suffering and the ways to overcome it; the nature of evil and ways to overcome it; and the ultimate destiny of human life and of all life. . . . Religion[s] call[] on [their] adherents to live according to [their] values through a prescribed set of practices and relationships that may affect many aspects of personal and social life. [They are n]ot merely a matter of belief or doctrine, . . . [but actually] constitute[] an integral *culture*, which can form

162. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENCE OF PLURALISM AND EQUALITY (1983); MICHAEL WALZER, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD (1994) [hereinafter WALZER, THICK AND THIN]; CHARLES TAYLOR, *The Politics of Recognition*, *in* MULTICULTURALISM, *supra* note 39, at 44.

163. THE PROJECT ON RELIGION AND HUMAN RIGHTS, RELIGION AND HUMAN RIGHTS iv (John Kelsay & Sumner B. Twiss eds., 1994).

> personal and social identity and can influence experience and behavior . . . significantly.[164]

These three interrelated characteristics—(i) the fact that people worship in groups and communities; (ii) the fact that religious practice is an integral part of certain ways of social life and "cultures"; and (iii) the fact that religious freedom thus requires a communal atmosphere—call into question whether a purely individualistic approach is going to work without causing great violence to this sphere of human existence.

One of my primary contentions, then, is that classical liberal theory's blindness to collective values and insensitivity to intermediate forms of association variously situated between the abstract individual and universal humanity are the products of a series of conceptual assumptions, which are themselves a response to contingent historical developments. Liberalism should, in this sense, be understood as "culturally embedded," and the concept of rights in classical liberal theory should not be seen as a completely "free-standing" or "impartial" morality. Rather, in Walzer's words, liberal rights discourse "simply designates some reiterated features of particular thick or maximal moralities."[165] This partiality has been well-captured by Bhikhu Parekh in his argument that Millian (comprehensive) liberalism

> linked diversity to individuality and choice, and valued the former only in so far as it was grounded in the individualist conception of man. This ruled out several forms of diversity. It ruled out traditional and customary ways of life, as well as those centred on the community. It also ruled out ethnically grounded ways of life, as well as those limited to a 'narrow mental orbit' or 'not in tune' with the dominant trend of the age. Although it may not entirely rule them out, Millian liberalism also takes a low view of ways of life that stress contentment and weak ambition rather than a go-getting character, or are centred on religion, or place little value on worldly success and material abundance. As one would expect, Millian liberalism cherishes not diversity *per se* but *liberal* diversity, that is, diversity confined within the narrow limits of the individualist model of human excellence.[166]

The unwillingness of classical liberalism to recognize collective values as being of moral concern has created enduring incoherence in Western

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164. These are the main features of the definition of "religion" suggested by The Project on Religion and Human Rights. *Id.* (emphasis added). See also the definitions proposed by U.N. Economic and Social Council [ECOSOC], Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, ¶ 19, U.N. Sales No. E.89.XIV.3 (Dec. 1989) (*prepared by* Elizabeth Odio Benito) ("an explanation of the meaning of life and how to live accordingly"). *See also* Danchin, *Of Prophets and Proselytes*, *supra* note 15.

165. WALZER, THICK AND THIN, *supra* note 162, at 10. Thus, the "hope that minimalism, grounded and expanded, might serve the cause of a universal critique is a false hope. Minimalism makes for a certain limited, though important and heartening, solidarity. It doesn't make for a full-blooded universal doctrine." *Id.* at 11.

166. Bhiku Parekh, *Superior People: The Narrowness of Liberalism from Mill to Rawls*, TIMES LITERARY SUPPLEMENT, Feb. 25, 1994, at 11. Interestingly, Walzer, too, notes the connection between the domination of the liberal "self" by a "single set of interests and qualities" and "certain sorts of worldly success." WALZER, THICK AND THIN, *supra* note 162, at 38. Thus, there is a price to be paid for "complex equality" and a "many-sided development of the self":

> [The] refusal to assign the full range of social goods on the basis of a single talent or a single achievement, in the state or the market or the arts and sciences, would deprive us of some great and glorious achievements. But it would also free us from the domination of tyrannical selves.

Id.

political theory and, by extension, international legal theory.[167] Once it is recognized that complex debates over concepts such as "sovereignty" and "statehood" presuppose the liberal structure of international legal argument, it quickly becomes apparent that a coherent account cannot be developed without taking more seriously collective claims of the self-determination of "nations" and "peoples."[168] Similarly, once it is recognized that human rights discourse in international law presupposes liberal assumptions, it is apparent why debates over multiculturalism and the so-called "politics of difference" are today so intractable. Collective values embedded in concepts of nationality, ethnicity, class, race, gender, sexuality, the family, and, of course, religion are largely invisible to classical liberalism's sphere of moral concern.[169]

Comprehensive liberalism in the Millian mold is best viewed, then, as a "fighting creed," which has only a weak claim to cultural neutrality. It envisages a kaleidoscopic future of ever more permeable cultural spaces and "mongrel selves" in which "each individual constructs an identity in the wider society and, if the society is multicultural, will do so out of a multiplicity of cultural fragments, bits and pieces of various cultures from here and there."[170] To some, such a detribalized and unbounded future promises an attractive utopia.[171] My concern in this Article, however, is more limited. I seek only to consider the implications of this view for religion and religious freedom. Viewed solely as an individual right in societies where religion is considered largely a matter for the private sphere of "conscience" (that is, in "liberal" societies), the classical liberal conception of religious freedom appears prima facie unproblematic. As recognized by Rawls, however, even in modern democratic societies—characterized as they are by the presence of a "pluralism of incompatible yet reasonable comprehensive doctrines"—this approach raises serious questions of social stability and doubts concerning the compossibility of rights.[172]

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167. *See supra* note 31 and accompanying text.

168. I am not suggesting that these concepts are themselves free from controversy, merely that they are not a sufficiently serious part of liberal rights discourse.

169. *See, e.g.*, MARTHA C. NUSSBAUM ET AL., FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 133 (Joshua Cohen ed., 1996) ("[T]o count people as moral equals is to treat nationality, ethnicity, class, race and gender as 'morally irrelevant'—as irrelevant to that equal standing . . . ."). Lukes regards Nussbaum's liberal cosmopolitanism as "extremist." LUKES, LIBERALS AND CANNIBALS, *supra* note 141, at 22. "There is a convincing case for a more moderate cosmopolitanism that combines egalitarian justice with the recognition of underived special responsibilities within particular relationships and communities." *Id.*

170. Jeremy Waldron, *Minority Rights and the Cosmopolitan Alternative*, *in* THE RIGHTS OF MINORITY CULTURES, *supra* note 37, at 93.

171. For a recent discussion on the merits of cosmopolitanism in legal and political theory, see Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1022 (2007).

172. *See* JOHN RAWLS, POLITICAL LIBERALISM 140 (1996). It was for this reason that Rawls shifted from his prior *comprehensive* to later *political* conception of liberalism:

> [The latter view seeks] to present an account of [certain] values as those of a special domain—the political—and hence as a freestanding view. It is left to citizens individually—as part of liberty of conscience—to settle how they think the values of the political domain are related to the values in their comprehensive doctrine. For we always assume that citizens have two views, a comprehensive and a political view; and that their overall view can be divided into two parts, suitably related.

Id. at 140. On the question of stability, see *id.* at 140-44.

But more importantly, we need to ask whether liberal cosmopolitanism can exist at all without presupposing the existence of communal and ethnocentric forms of cultural and social life. In other words, do liberal cosmopolitan values intrinsically rely on the existence of "parochial or devout others" without whose presence it will not be possible to "resist the encroachment of a homogenized global culture?"[173] If the current mosaic of, if not windowless boxes, at least culturally and religiously defined communal spheres (nations, peoples, minorities), were to splinter successively over time into the myriad fragments of individually chosen identities, would this be the realization of the possibility of a "final solution" of which Berlin once spoke—"the prospect that mankind could be made 'just and happy and creative and harmonious for ever', for which no price could be too high to pay?"[174] If so, what exactly is the price to be paid, how is it to be exacted, and what, if any, are the possible alternative futures? In a future liberal cosmopolitan world where every person has an equal individual right to freedom, what finally is the justification for the state itself?

Furthermore, if comprehensive liberalism raises problems of stability in liberal democratic states, its projection into international law is likely to generate far greater tensions and conflicts as between diverse values and ways of life. This indeed was one of the reasons why Rawls, in his *The Law of Peoples*, rejected the cosmopolitan position in international law—it denies "a due measure of respect" between peoples and "wound[s] the self-respect of decent nonliberal peoples *as peoples*, as well as their individual members, and may lead to great bitterness and resentment."[175] The denial of such respect requires strong reasons, and Rawls clearly does not regard cosmopolitanism as providing such an overriding rationale. But here we need to ask: why not, exactly? Remarkably for a liberal theorist, Rawls's reply relies on the idea of a *people's right to self-determination* and the fact that

> peoples (as opposed to states) have a *definite moral nature*. This nature includes a certain proper pride and sense of honor; peoples may take a proper pride in their histories and achievements, as what I call a "proper patriotism" allows. The due respect they ask for is a due respect consistent with the *equality of all peoples*. The interests that move peoples (and distinguish them from states) are congruent with a fair equality and a due respect for other peoples.[176]

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173. LUKES, LIBERALS AND CANNIBALS, *supra* note 141, at 23. For a helpful discussion on this point, see MICHAEL WALZER, POLITICS AND PASSION: TOWARD A MORE EGALITARIAN LIBERALISM 14-18 (2004). Walzer considers, as a thought experiment, whether we can "really imagine individuals without any involuntary ties at all, unbound by class, ethnicity, religion, race, or gender, unidentified, utterly free?" *Id.* at 14. He concludes that "free choice depends on the experience of involuntary association and on the understanding of that experience, and so does egalitarian politics." *Id.* at 18.

174. Isaiah Berlin, *The Pursuit of the Ideal*, *in* THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS 15 (Henry Hardy ed., 1990), *cited in* LUKES, LIBERALS AND CANNIBALS, *supra* note 141, at 90. Recall that in rejecting *perfection*—the possibility of "universal, timeless solutions of problems of value"—Berlin warned that monists are likely to become "single-minded"—"ruthless fanatics, men possessed by an all-embracing coherent vision" who "do not know the doubts and agonies of those who cannot wholly blind themselves to reality." ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY, at lv (1969).

175. *See* RAWLS, *supra* note 61, at 61 (emphasis added).

176. *Id.* at 61-62 (emphasis added) (internal cross-references omitted).

Rawls justifies his rejection of cosmopolitanism in favor of political liberalism on the basis of a *collective* value—self-determination—which he regards as having not only a *moral* quality, but an *equal* moral quality as between all "peoples." In so doing, he rejects any reliance on the concept of the "State" as traditionally conceived.

Rawls's reliance on the concept of "peoples" rather than "states" reveals the primary source of confusion in his conception of political justice in international law. For how, given our discussion in Section III.B above, can Rawls defend the Romantic and communitarian notion of a people's *moral* right to self-determination consistently with the individualistic and consensual premises of liberalism? If a "people" has moral standing under international law, how is that status to be determined, what rights or duties flow from it, and on what basis can self-determination be asserted or denied within municipal legal systems? The answers to these and related questions cannot be found within the resources of classical liberal theory itself. For answers, we need to look *beyond* liberalism to value pluralism, and to confront openly the possibility of the incommensurability of values within diverse social, cultural, and religious ways of life. Either that, or we need to join the cosmopolitans in their crusading faith in individual autonomy in a world of contending comprehensive religious, philosophical, and moral doctrines.

Of course, nothing I have said so far suggests that value pluralism leads naturally to liberal conclusions. Indeed, the anti-liberalism of various thinkers of the Counter-Enlightenment and modern variants of illiberal nationalism provide evidence of the dangerous seductions of value pluralism.[177] And while ultimate values may well be incommensurable, difficult choices nevertheless need to be made between them in situations of real conflict such as in the *affaire du foulard*. It is for these reasons that I argue for an account of value pluralism that, while taking seriously the nature of collective claims, rejects the extreme positions of illiberal nationalism and religious fundamentalism. For value pluralism not to lapse into the subjectivism of utopian universalism (religious or secular fundamentalism) on the one hand, or apologetic relativism (illiberal nationalism) on the other, it must strive for *objectivity* by continually seeking an overlapping consensus on the conflicting ends that divide cultures, groups, and individuals.[178] A more nearly objective "liberal" pluralism can therefore be achieved only by incorporating *both* strands of the argument—by mediating between certain abstract individual and collective norms and the many, diverse concrete social practices of different peoples and groups. The rejection of an exotic, and today arguably extinct, relativism for the possibility of an objective plurality of values thus rests on this ascending-descending dialogic and intersubjective form. If this is correct, then, as Lukes

177. Lukes observes, for example, that Weber's liberalism is "far from unambiguous" while Schmitt's "decisionist anti-liberalism" creates a "hostility to liberal democracy . . . probably unequalled by any other major modern thinker." LUKES, LIBERALS AND CANNIBALS, *supra* note 141, at 94. Kymlicka argues that the distinction between "liberal nation-building" and "illiberal nationalism" is "not the absence of any concern with language, culture, and national identity, but rather the content, scope, and inclusiveness of this national culture, and the modes of incorporation into it." Kymlicka, *Western Political Theory*, *supra* note 31, at 59.

178. In this sense, pluralists "take the values that divide cultures, groups and individuals to be objective, whereas relativists do not." LUKES, LIBERALS AND CANNIBALS, *supra* note 141, at 103.

has suggested, the case to be argued is: "Pluralism for the liberals; relativism for the cannibals."[179]

B. *Beyond Univeralism and Relativism*

How does the idea of value pluralism relate to and distinguish itself from the closely related notions of universalism and relativism? In his recent illuminating analysis of the implications of diversity for liberal theory, Lukes has distinguished between three conceptual positions in contemporary moral and political thought. The first is *moral universalism*, which Lukes sees as characterized by three basic ideas: (1) "universal reason" or the idea that the focus and scope of reason and reasoning are "inherently universal" and thus "followable by all (anyone anywhere) for whom it is to count as reasoning;" (2) "common humanity" or the view that there exists a common human nature shared cross-culturally and trans-historically; and (3) "cosmopolitanism" or the Enlightenment idea that the "scope of moral concern extends to the whole of humanity, licensing, indeed requiring, cross-cultural judgments: all human beings have equal moral status."[180]

A second, opposing, position is a strong form of antiuniversalism or *cultural relativism*. This is the idea that "we cannot make judgements across cultural boundaries (and that to do so is ethnocentric)—a doctrine unforgettably summed up in Martin Hollis's formula: 'Liberalism for the liberals, cannibalism for the cannibals.'"[181] Lukes suggests that this view is best captured by the famous sentence at the conclusion of Ruth Benedict's *Patterns of Culture*: "We shall arrive then at a more realistic social faith, accepting as grounds of hope and as new bases for tolerance the coexisting and equally valid patterns of life which mankind has created for itself from the raw materials of existence."[182] Cultural relativism is, in this sense, commonly associated with various forms of particularistic ideology and anticosmopolitanism, including variants of nationalism.

Expressed in such general and polarizing terms, these two positions have, over time, led to a seductive and illusory assumption: that it is contradictory to seek to defend universalism while at the same time recognizing cultural and religious diversity. However, a third position has also been asserted—one that denies that relativism is the only alternative to universalism—and that posits instead the idea of *value pluralism*. This view

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179. *Id.* at 105.

180. *Id.* at 13-14. For Lukes, the last idea in particular has three distinct implications: (i) "it implies a pan-human or global egalitarianism: a view about the proper scope of justice, and indeed of morality in general;" (ii) "it implies anti-particularism, denying the Herderian thesis that individuals can only flourish under homogeneous cultural conditions;" and (iii)

> it implies a visionary social and political ideal, most powerfully expressed in the Enlightenment by Kant and by Condorcet, who ended his *Esquisse*, written while fleeing the Jacobins, by finding consolation in a "view of the human race, emancipated from its shackles, released from the empire of fate and from the enemies of its progress, advancing with a firm and sure step, along the path of truth, virtue and happiness."

Id. at 14.

181. *Id.* at 16 (citing Martin Hollis, *Is Universalism Ethnocentric?*, *in* MULTICULTURAL QUESTIONS 27, 36 (Christian Joppke & Steven Lukes eds., 1999)).

182. *Id.* at 17 (citing RUTH BENEDICT, PATTERNS OF CULTURE 278 (1934)).

seeks to defend universalism, but only "in a way that takes seriously what motivates the charge that it is ethnocentric."[183]

Associated with various thinkers of the Counter-Enlightenment and German Romanticism,[184] the idea of value pluralism is best captured in Isaiah Berlin's nonhierarchical notion of the "incommensurability and, at times, incompatibility of objective ends"[185]—the view that life affords "a plurality of values, equally genuine, equally ultimate, above all equally objective: incapable, therefore, of being ordered in a timeless hierarchy, or judged in terms of some one absolute standard."[186] By *incommensurability of values*, Berlin meant not "non-additivity on some cardinal scale nor incompatibility nor non-substitutability nor irreplaceability nor uncompensatability,"[187] but rather that two alternatives are "*incomparable*: that is, . . . *neither is better than nor equal to the other*."[188] This pluralist view is distinguishable from "relativism" and "subjectivism" and the "allegedly unbridgeable differences of emotional attitude on which some positivists, emotivists, existentialists, nationalists, and indeed, relativistic sociologists and anthropologists found their accounts."[189] Thus:

> The fact that the values of one culture may be incompatible with those of another, or that they are in conflict within one culture or group or in a single human being at different times—or, for that matter, at one and the same time—does not entail relativism of values, only the notion of a plurality of values not structured hierarchically.[190]

When we speak of moral universalism and cultural relativism, we assume that while cultures are inherently variable, certain norms—separate from any or all cultures—are rationally and universally ascertainable. Neither view is convincing on its own. Morality is finally agent-relative, while all cultures share conceptions of norms which we may view as agent-independent. In what follows, I argue that while "moral universalism" is a utopia that, by definition, is beyond reach, "cultural universalism" can (be made to) exist. But cultures are plural, and if universal norms are genuinely to reflect that diversity, as opposed to reflecting only one or a small number of

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183. *Id.* at 12.

184. Lukes notes that while writers such as Burke, de Maistre, and Herder attacked the cosmopolitan ideals of the Enlightenment, they remained "largely committed to universalism." Thus, Vico and Herder "insist on our need to transcend the values of our own culture or nation or class, or those of whatever other windowless boxes some cultural relativists wish to confine us to." *Id.* at 16 (citing Isaiah Berlin, *Alleged Relativism in Eighteenth-Century European Thought*, *reprinted in* BERLIN, CROOKED TIMBER OF HUMANITY, *supra* note 174, at 70, 85).

185. Berlin, *supra* note 184, at 87.

186. *Id.* at 79.

187. LUKES, LIBERALS AND CANNIBALS, *supra* note 141, at 63.

188. *Id.* (emphases added). The suggestion is not that choices don't have to be made, but rather that "choosing between alternatives is not the same as making a judgment about their comparable worth . . . . even if the decision is part of a systematic pattern of such decisions and is not arbitrary." *Id.* at 66.

189. Berlin, *supra* note 174, at 87. It should be noted that one persistent criticism of Berlin was that his account of value pluralism was indistinguishable from relativism. *See, e.g.*, Gerald C. MacCallum, *Berlin on the Compatibility of Values, Ideals, and "Ends,"* 77 ETHICS 139 (1967); Leo Strauss, *Relativism*, *in* RELATIVISM AND THE STUDY OF MAN 135 (Helmut Schoek & James W. Wiggins eds., 1961); Arnaldo Momigliano, *On the Pioneer Trail*, N.Y. REV. BOOKS, Nov. 11, 1976, at 33-38; *see also* GEORGE CROWDER, ISAIAH BERLIN: LIBERTY AND PLURALISM 114-24 (2004) (concluding that "Berlin does succeed in showing that Vico and Herder are pluralists, not relativists").

190. Berlin, *supra* note 184, at 80.

cultural conceptions of the universal,[191] an unforced consensus must constantly be sought through an intersubjective hermeneutics and philosophy of critical praxis that seeks to mediate between moral maximalism and minimalism—i.e., between thickly developed comprehensive views and mutually recognized minimal norms.[192] Viewed in this way, value pluralism posits a different dialectic of the relationship between diverse values, one which is at once neither fully universal nor fully particular. It seeks not to defend strong antiuniversalism by proposing a senseless ethnocentrism, a view of cultures as sealed "windowless boxes."[193] Rather, it seeks to defend a view of "universalism that makes sense, not only of the differences that divide cultures from one another, but also of the incoherences and contests within them and of the very many different ways people relate to their cultural backgrounds."[194]

Applying this *ethos* of engagement to the three dimensions of moral universalism referred to above, value pluralism has the following implications: (1) while "universal reason is an indispensable presupposition of mutual interpretation, a bridgehead within and across cultures," we should not "assume *they* even largely share *our* judgments about what is true, plausible or reasonable;" (2) value pluralism implies a "similarly nuanced approach to the question, what is human?"; and (3) in relation to any defense of the three features of cosmopolitanism, we need to "take adequate account of the significance of the particular (call them 'cultural') differences that have led thinkers, ever since the early Romantics, to denounce cosmopolitanism as 'uniformitarian', bland and abstract."[195]

C. *Value Pluralism and Liberal Toleration*

Having set out the basic contours of value pluralism, let us then turn to the implications of this idea for contemporary accounts of the right to freedom of religion. In this final Section, I argue that the tension between liberal rights and value pluralism can be seen in theorizing on the concept of toleration. John Gray has suggested that the tradition of liberal toleration has in fact not one but two faces: one seeking an ideal form of life through a rational consensus on universal principles of right and justice; the other seeking peaceful coexistence between intractably different ways of life. For Gray, the political implications of strong value pluralism are potentially profound. In *Enlightenment's Wake*, he argued that the insights of value pluralism suggest that the proper task for liberal theory is to reconcile the demands of a liberal

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191. *See, e.g.*, IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 59 (1990) (defining "cultural imperialism" as the "universalization of a dominant group's experience and culture, and its establishment as the norm" and as "representative of humanity as such").

192. *See* WALZER, THICK AND THIN, *supra* note 162, at 17.

193. The phrase is Berlin's. *See* Berlin, *supra* note 184, at 85. To the contrary, pluralism sees cultures as "always open systems, sites of contestation and heterogeneity, of hybridization and cross-fertilization, whose boundaries are inevitably indeterminate." LUKES, LIBERALS AND CANNIBALS, *supra* note 141, at 34 (citing Seyla Benhabib, 'Nous' et 'Les Autres': *The Politics of Complex Cultural Dialogue in a Global Civilization*, *in* MULTICULTURAL QUESTIONS 44 (Christian Joppke & Steven Lukes eds., 1999).

194. LUKES, LIBERALS AND CANNIBALS, *supra* note 141, at 20.

195. *Id.* at 20-21 (emphasis added).

form of life with the particularistic character of human identities and allegiances. In the pluralist spirit of Isaiah Berlin, he thus advanced an "agonistic" conception of liberalism, which asks us to recognize the contingency of both selfhood and community, and to recognize that liberal selves and cultures are themselves particular social forms and cultural traditions.[196]

The central characteristics of this view suggest three lines of critique. First, agonistic liberalism is premised on the thesis of the incommensurability of values and argues that, rather than leading to some version of relativism, subjectivism, or moral skepticism, this in fact generates a species of moral realism or "objective pluralism."[197] Agonistic liberalism thus acknowledges the existence of substantive comprehensive conceptions of the good but denies that there can be any comprehensive theory that might rationally arbitrate their conflicts. Second, agonistic liberalism does not claim universal authority in reason or rely on abstract or universalizable principles. Instead, it relies on a particular common culture and concrete historical forms of life. As Raz and other value pluralists have argued, the content of and grounds for fundamental rights cannot be determined until their contribution to the protection of vital human interests has been specified.[198] If conflicts among incommensurable values break even within the idea of liberty itself—as my discussion of laws proscribing the wearing of religious symbols has shown—the formalism of rights discourse will be unable to insulate it from the need to make radical choices among disputed conceptions of the human good. In such situations of conflicting liberties, we will have no option but to seek to settle their conflict by assessing the impact of rights on human interests and well-being. And third, agonistic liberalism has an ineliminably communitarian dimension in that it views both human identity and political allegiance in terms of participation in common forms of life. In our world, these are most obviously "nations" or the common forms of life that national cultures encompass and shelter. As we saw in the case of the four nation-states discussed in Part IV, this has the result that all forms of comparatively stable political allegiance,

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196. This argument appears in chapter six of GRAY, ENLIGHTENMENT'S WAKE, *supra* note 6, at 64. The word "agon" means a contest or rivalrous encounter. *Id.* at 68.

197. *Id.* at 70. Gray makes three claims concerning the relationship between the universal minimum content of morality and liberal forms of life: (1) because the values that go to make up the universal minimum may conflict with one another and may be incommensurables (requiring radical choices that reason alone is unable to determine), the conception of the universal minimum in agonistic liberalism differs sharply from that of the classic natural law tradition; (2) conflicts among incommensurable elements within the moral minimum will be resolved in different ways in accordance with the different cultural traditions of different (and not necessarily "liberal") regimes or ways of life; and (3) liberal regimes may actually satisfy the minimum universal requirements of morality less well than some nonliberal or postliberal regimes. *Id.* at 81-84.

198. *See* RAZ, MORALITY OF FREEDOM, *supra* note 6; *see also* Joseph Raz, Human Rights Without Foundations (2007) (unpublished manuscript, on file with author) (advancing an antifoundational or "political conception" of human rights); Charles Taylor, *Conditions of an Unforced Consensus on Human Rights*, *in* THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 124 (Joanne R. Bauer & Daniel A. Bell eds., 1999) (advancing an account of human rights that seeks to combine the insights of Gadamer's philosophical hermeneutics with Rawls's idea of an overlapping consensus).

including within liberal states, presupposes a common (pre-political) cultural identity reflected in the political order to which allegiance is given.[199]

Together, these three characteristics suggest the need to recover a form of reasoning that appeals to a conception of political life as a "sphere of practical reasoning whose *telos* is a *modus vivendi*, to a conception of the political in which it is a domain devoted to the pursuit not of truth but of peace, that has the authority of Hobbes."[200] On this basis, Gray's neo-Hobbesian view is said to be a true "political" liberalism in which the primacy of the political over the legal or the theoretical is strongly affirmed,[201] and in which there is no *a priori* attachment to any ideal regime, but rather to particular institutions "having a specific history, and to the common culture that animates them, which itself is a creature of historical contingency."[202]

The significance of Gray's agonistic account lies in his insight that the neo-Hobbesian and Rawlsian views, while both "liberal," are in fact rival projects. For this reason, it is not the coherence or superiority of either position that is important so much as the tension and potential for transformation between them. Contrary to the comprehensive liberalism of a *Theory of Justice*, and more dynamic than the later adjustments Rawls made in his *Political Liberalism*, agonistic liberalism seeks to reconcile these two positions by asserting the *limits* of rational choice and directly challenging the philosophy of history embodied in the Enlightenment project.[203] In rejecting the Rawlsian premise that principles of right can be independent of particular conceptions of the good, it thus seeks to mediate conflicts of value between rival views of the good in such a way that "the good has priority over the right, but in which no one view of the good has overall priority over all others."[204]

The central category in Rawls's theory of justice—the history-less and unsituated individual in a putative original position behind a veil of ignorance—springs squarely from the philosophical anthropology of the Enlightenment in holding that cultural difference is an inessential and transitory incident in human affairs. This approach views distinctive cultural

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199. Gray suggests that since belonging to a people or nation is a matter of historical memory and thus of historical contingency, it follows that allegiance to a liberal state cannot avoid also being a matter of contingency. Thus allegiance to a liberal form of life must always be a matter of "cultural solidarity," not of "universalizing rationality." GRAY, ENLIGHTENMENT'S WAKE, *supra* note 6, at 80; *cf.* WILLIAM A. GALSTON, THE PRACTICE OF LIBERAL PLURALISM 187-90 (2005) (criticizing Gray's assertion that value pluralism necessarily leads to a politics of *modus vivendi* absent a commitment to expressive liberty).

200. GRAY, ENLIGHTENMENT'S WAKE, *supra* note 6, at 74.

201. Gray is critical of the "anti-political" character of Rawls's *Political Liberalism* for seeking to remove the distinguishing features of the political (indeterminacy and contingency) from both its method and its results. From the perspective of value pluralism, this is both utopian and unrealizable. The idea of a constitutional or jurisprudential theory in which ad hoc judgments of political discourse are supplanted by disciplined legal decisions on major questions in the restraint of liberty is an illusion. It merely leads to the politicization of law as courts become the arenas for political struggle. This in turn leads to the corrosion of the virtue of civility as the idea of compromise between conflicting interests and ideals is gradually lost. *See* GRAY, ENLIGHTENMENT'S WAKE, *supra* note 6, at 77.

202. *Id.* at 78.

203. Gray describes the core of the Enlightenment as the "displacement of local, customary or traditional moralities, and of all forms of transcendental faith, by a critical or rational morality, which was projected as the basis of a universal civilization." *Id.* at 123.

204. GRAY, TWO FACES OF LIBERALISM, *supra* note 32, at 135.

identities—and the practices that they variously embody such as the wearing of religious symbols—as individually "chosen lifestyles" whose proper place is in private life or the sphere of voluntary association. Any demand that "cultural identities have political embodiment—in sovereign nationhood, for example—is [thus] perceived as a form of atavism, inconsistent with modernity—in which, however, it is by far the most potent political force."[205]

By contrast, Joseph Raz's idea of "inherently public goods" suggests that the activity of choosing has little value if there is not available to the chooser a range of worthwhile options, as embodied in a rich public culture or form of common life.[206] Central then to value pluralism is the assertion that there are valuable options, genuine goods, and "authentic forms of human flourishing whose matrices are the social structures of nonliberal societies" in which individual choice may variously be constrained, limited, or understood in conflicting ways. A single-minded and exclusively rationalistic conception of individual freedom fails to recognize that such values and goods will be "crowded out or driven out, or survive only as pale shadows of themselves, in liberal societies, once their undergirding social structures have been knocked away."[207] Furthermore, the practice of analyzing cultural and religious diversity solely through the lenses of rational choice, individual preferences, and personal plans of life as opposed to as between conflicting and exclusionary ways of life, fails to recognize that membership in cultural and religious groups (and, indeed, in nation-states themselves) is typically *unchosen* and that religious and cultural identity has historically been more ascriptive than elective.[208]

The political implications of strong value pluralism may, in fact, dictate that liberal practice—even in its "agonistic" form—enjoys no theoretical privileges.[209] For this reason, Gray has now advanced an account of what he

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205. GRAY, ENLIGHTENMENT'S WAKE, *supra* note 6, at 124.

206. RAZ, MORALITY OF FREEDOM, *supra* note 6, at 198-200.

207. GRAY, ENLIGHTENMENT'S WAKE, *supra* note 6, at 84. Gray draws squarely on Alasdair MacIntyre regarding the failure of the Enlightenment project's objective of finding a free-standing rational justification of liberal political morality. As MacIntyre states:

> On the one hand the individual moral agent, freed from hierarchy and teleology, conceives of himself and is conceived by moral philosophers as sovereign in his moral authority. On the other hand the inherited, if partially transformed rules of morality have to be found some new status, deprived as they have been of their older teleological character and their even more ancient categorical character as expressions of ultimately divine law.

MACINTYRE, *supra* note 57, at 60. For Gray, this collapse gives "contemporary moral discourse its distinctive character of emotivism or subjectivism, in which moral judgments are in the end assimilated to preferences, and of deep incoherence." GRAY, ENLIGHTENMENT'S WAKE, *supra* note 6, at 148. It is merely the "long shadow cast in the slow eclipse of Christian transcendental faith" with the result that we today live "among the fragments of archaic moral vocabularies, whose undergirding structure of metaphysical and religious beliefs has long since collapsed." *Id.* at 152.

208. Echoing Raz, Gray powerfully notes that:

> [I]n the real world of human history . . . cultural identities are not constituted, voluntaristically, by acts of choice; they arise by inheritance, and by recognition. They are fates rather than choices. It is this fated character of cultural identity which gives it its agonistic, and sometimes tragic character.

GRAY, ENLIGHTENMENT'S WAKE, *supra* note 6, at 124.

209. Gray points to the tension between strong value pluralism and the priority accorded to personal autonomy in both Berlin and Raz. "There seems to be a tension, perhaps ineradicable in Raz's liberalism, between the radically historicized and contextualized account of autonomy he advances and

terms "*modus vivendi* pluralism" in contrast to his earlier position of "pluralist liberalism."[210] This more recent account places no particular weight on the four constitutive features of classical liberal theory—i.e., moral or normative individualism, egalitarianism, universalism, and meliorism[211]—and envisages instead not individuals but *communities* as the fundamental units of political and legal pluralism. This move has two grounds of justification: first, a "Hobbesian" ground, which asserts that the legal recognition of different communities will promote peace; and second, a "Herderian" ground, which suggests that recognition of the cultural identities of peoples commingled in the same territory in the legal order to which they are subject will stop inevitable secessionist struggles.[212]

Legal pluralism of this kind is merely the "institutional embodiment of the human need for strong forms of common life in circumstances of substantial cultural diversity."[213] Because it recognizes forms of diversity beyond individual life plans informed by personal conceptions of the good, and takes seriously the plurality of whole ways of life complete with their associated conflicting moralities and often exclusionary allegiances, this conception poses direct challenges to the liberal idea of a neutral state. Central among these, as we have seen, is that value pluralism of this kind involves conceptions of the good that resist legal privatization and relegation to the private sphere of voluntary association, which is their fate under the neutrality of the liberal state. *Modus vivendi* pluralism seeks not to suppress or deny the

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the central and dominating role he wishes autonomy to have in political morality." *Id*. at 142. If Raz is correct that liberalism is itself a whole way of life rather than a set of neutral political principles on questions such as personal autonomy, then the liberal form of life can have no special or universal claim on reason.

210. Gray's shift from agonistic liberalism to *modus vivendi* pluralism suggests the possibility of a range of different types of value pluralism. This suggestion is borne out in recent work in legal and political philosophy. *See, e.g.*, WILLIAM E. CONNOLLY, PLURALISM 8 (2005) (developing an account of "multidimensional pluralism" which includes the idea of a "thick network pluralism that exceeds both shallow, secular models of pluralism and the thick idea of the highly centered nation"); GEORGE CROWDER, LIBERALISM AND VALUE PLURALISM 135-62 (2002) (arguing that value pluralism leads in fact to a strong form of liberalism whose central value is autonomy understood as a form of positive rather than negative liberty); GALSTON, *supra* note 199, at 69 (defending a pluralist liberal account based on three concepts—"value pluralism, political pluralism, and expressive liberty"); Bonnie Honig, *The Politics of Agonism*, 21 POL. THEORY 532 (1993) (advancing a conception of "agonistic" democracy and institutions capable of diminishing the significance of existing, pre-political loyalties and attachments); John Kekes, *Pluralism and the Value of Life*, 11 SOC. PHIL. & POL'Y 44 (1994) (rejecting the dismissal by "postmodern agonistic democrats" of even the possibility of conflict resolution and examining the kinds of institutions and mechanisms that may help to mediate conflict and forge agreement).

211. The four constitutive elements of liberalism are as follows: (1) *moral individualism*, which holds that, since nothing has ultimate value except states of mind or feeling, or aspects of the lives of human individuals, the claims of individuals will always defeat those of collectivities, institutions, or forms of life; (2) *egalitarianism*, which is the denial of any natural or political hierarchy among human beings and holds that the human species is a single status moral community and that monarchy, hierarchy, and subordination are practices standing in need of an ethical defense; (3) *universalism*, which holds that there are weighty duties or rights that are owed to all human beings, regardless of their cultural inheritances or historical circumstances, just in virtue of their standing as human beings; and (4) *meliorism*, which holds that even if human institutions are imperfectible, they are nonetheless open to indefinite improvement by the judicious use of critical reason. *See* JOHN GRAY, POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT 286-87, 314-20 (1993).

212. GRAY, ENLIGHTENMENT'S WAKE, *supra* note 6, at 136. Gray here invokes Thomas Hobbes, as a primary author of liberal toleration, and Johann Gottfried von Herder, as a primary author of counter-Enlightenment romanticism. *Id.* at 67, 130 (Hobbes), 165 (Herder).

213. *Id.* at 136.

demands of subjects such as Muslim minority groups in European nation-states, but rather to create a diversity of jurisdictions for the various contending communities to reach (provisional) settlements. The legal system of India, for example, is just such a "mixed" conception of a political order, which is in part individualist and secular but also partly Islamic and partly Hindu, complete with all the conflicts of jurisdiction that such plural inheritances give rise to in the laws of marriage and the family.[214]

Modus vivendi pluralism requires us to reimagine our concepts of human rights and democracy. Human rights must now be seen not as free-standing universal principles, but as social conventions constantly being contested and refashioned in a world of plural societies and patchwork states.

Human rights are not immutable truths, free-standing moral absolutes whose contents are self-evident. They are conventions, whose contents vary as circumstances and human interests vary. They should be regarded not as a charter for a worldwide regime, liberal or otherwise, but rather as embodying minimum standards of political legitimacy, to be applied to all regimes.[215]

On this view, human rights are enforceable conventions that provide protection against injuries to certain human interests that make any kind of worthwhile life impossible. This conception generates certain "objective" minimal standards of decency and legitimacy, but these cannot be liberal values writ large. Nor can there be any final or definitive "list" of human rights. Judgments about human interests will shift as threats to human interests change. Seeking a definition of human rights is not (or not *only*) an inquiry into a preexisting metaphysical truth, but a question demanding a practical decision: which human interests warrant universal protection? The legitimacy

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214. A useful illustration of this dynamic is the Shah Bano case in India. Mohammed Ahmed Khan v. Shah Bano Begum, (1985) 3 S.C.R. 844 (India). The case involved a conflict between Muslim Personal Law, which required only the return of the marriage settlement upon divorce, and the Code of Criminal Procedure, which required monthly maintenance in specified situations of need. Confronted with a conflict between a legal autonomy regime protecting India's Muslim minority and the uniform Indian criminal code protecting the equal rights of women regardless of religion, the court held that the criminal statute overrode personal law in cases of conflict and that destitute women should not be denied the general protection of the criminal law on the basis of their religion. This led to widespread protests by Muslim leaders who argued that enforcing the uniform maintenance provisions violated the religious freedom of Muslims. Subsequently, the government conceded to political pressure and passed the Muslim Women (Protection of Rights on Divorce) Act of 1986 which provides that Muslim women do not have a right to maintenance unless at the time of marriage the couple elect to submit themselves to the maintenance provisions of the Code. The main danger perceived by the Muslim minority was that, under the uniform Criminal Procedure Code, the *shari'a* (and Muslim identity more broadly) would come under attack by secularizing, assimilationist forces, "enforc[ing] majoritarian Hindu values on all Indians." BRUCE B. LAWRENCE, SHATTERING THE MYTH: ISLAM BEYOND VIOLENCE 134 (1998). This fear was not unfounded given the Supreme Court's support for the unfinished task under Article 44 of the Constitution to develop a common civil code that would end the autonomy of the Muslim community in determining personal and family law. The Court has criticized Islam for its systematic maltreatment of women, thus reflecting the view of the Hindu majority that state intervention is necessary to "save" Muslim women from the oppression of their religion and culture. As has been noted, such an approach risks essentializing Islamic culture and history and constructing Muslims as an indivisible community without its own internal divisions, contests and struggles over the meaning of social justice and gender equality in matters of family and personal law. *See* VEENA DAS, CRITICAL EVENTS: AN ANTHROPOLOGICAL PERSPECTIVE ON CONTEMPORARY INDIA 98 (1995). See *infra* Part VII for further discussion of this case.

215. GRAY, TWO FACES OF LIBERALISM, *supra* note 32, at 106.

of any political regime is then correlated to the degree to which it is actually successful in preventing systematic injury to a wide range of such interests.

Because the right to freedom of religion is a complicated bundle of entitlements, each made up of a diversity of claims, it protects a range of human interests that are often at odds. When conflicts arise (as they do even as between or within the most minimal rights), these can reasonably be settled in different ways. Proselytism is legally prohibited in Greece, Malaysia, and China; nevertheless, these states claim to protect freedom of religious belief and practice.[216] In this respect, these states are qualified regimes of toleration that depend for their existence on a historically situated authority able to enforce a broadly shared and thus legitimate conception of a common life. As a point of intersection for competing claims between different groups and individuals, the right to religious freedom must yield in certain instances to the demands of public peace without which the exercise of freedom of religion itself could not be guaranteed.[217]

The notion of *modus vivendi* thus argues that *both* rights-based liberal conceptions of the individual subject and communitarian philosophies of ideal community are misguided ways to approach societies strongly divided by the opposed ethical beliefs of diverse religious and cultural groups. In Thomas Nagel's words, both are "views from nowhere" that seriously fail to take into account conflicts of interest or value and the fact of "hybridity"—the condition whereby individuals belong not to one but to several ways of life, with all their conflicts.[218] In such situations, there can be no overarching or final consensus on values. Given that the interpenetration of different ways of life is an inescapable fact, the need for coexistence points not toward consensus on common values, but rather toward the development of *common institutions* through which conflicts of rival values can be mediated and provisionally settled. States must, in other words, reflect the plurality and hybridity of common identities. The difficulty, of course, comes in meeting this condition and in establishing the necessary degree of legitimacy between differently situated individuals and groups.

VII. CONCLUSION

This Article has argued for an account of value pluralism in international legal theory animated not by a comprehensive moral theory governing all ways of life, but rather the search for peaceful coexistence between different ways of life. Value pluralism is best understood in this respect as encouraging an *ethos* of cultivation and engagement by attempting to reach political

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216. *See* Stahnke, *supra* note 160, at 251, 286-89, 307-10.

217. GRAY, TWO FACES OF LIBERALISM, *supra* note 32, at 112-13. "Where there is a history of division among communities with distinct religious traditions, unqualified freedom of religion may in fact be a prelude to renewed conflict." *Id.* at 132. *See, e.g.*, Harold J. Berman, *Religious Rights in Russia at a Time of Tumultuous Transition: A Historical Theory*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 285 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) (arguing that the 1997 Russian law on the Freedom of Conscience and Religious Associations was not only an acceptable limitation on the right to religious freedom of certain (proselytizing) minority religions in Russia's struggle to establish new religion-state relationships following the collapse of communism and "official atheism," but in fact a necessary one given the historical and societal factors at issue).

218. THOMAS NAGEL, THE VIEW FROM NOWHERE (1986).

settlements and forms of reconciliation between the claims, values, and practices of diverse religious and cultural communities, and the assertions of right and justice to which they continually give rise.[219] How this is to be achieved in any particular situation involving a manifestation of religion or belief can only be the result of a fragile and circumstantial consensus, derived through an intersubjective hermeneutics and philosophy of critical praxis.

We have seen how contemporary controversies such as the *affaire du foulard* and cases such as *Shah Bano*—situations where a minority asserts a claim of right to religious freedom against the majority while at the same time imposing certain restrictions on its own internal minorities—illustrate the great complexity of this dialectic. In such genuine cases of conflicting rights, I have argued that no general or universal theory is possible. Any just (and uncoerced) resolution must depend on the character and weight of the particular rights involved and on the social and historical context. This requires recognition of and mediation between at least three different kinds of consideration: (i) between competing conceptions of the appropriate rights-holders (whether a minority versus a majority, or an individual versus a minority or majority); (ii) between the relevant goods and interests at stake (whether individual or collective, religious or secular); and (iii) between the particular claims of right that these goods and interests ground (whether individual or collective claims to autonomy or identity).

In Part IV, we saw how struggles over the wearing of the Islamic headscarf played out in four nation-states with different histories and varying background conceptions of these three considerations. Similarly, *Shah Bano* can be seen to illustrate the importance of recognizing that such cases raise competing conceptions of equality: on the one hand, collective claims to religious identity and difference, on the other hand, individual claims to personal autonomy regardless of religion. My central assertion in Part III was that while the nondiscrimination principle privileges the latter over the former, a value pluralist approach seeks to satisfy and mediate *both* claims—the demand for substantive equality between religious and cultural groups in a theory of toleration and differential treatment by the state *and* the demand for substantive equality in terms of the treatment by the religious minority of the autonomy of its own members.[220] The attempt to satisfy *both* equality claims

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219. This dynamic is evident in the literature on liberal toleration. *See, e.g.*, William A. Galston, *Two Concepts of Liberalism*, 105 ETHICS 516 (1995) (juxtaposing, in the context of the *Yoder* decision, opposing liberal conceptions of autonomy and diversity); David Owen, *Political Philosophy in a Post-Imperial Voice: James Tully and the Politics of Cultural Recognition*, 28 ECON. & SOC'Y 520 (1999) (distinguishing two Enlightenment traditions of public reason, one an abstract and universalizing activity that reflects on historically and culturally situated practices of practical reasoning "from above" and legislates their character and limits, the other always dependent to some extent on historically and culturally situated practices of practical reasoning, and so the methodological extension of the self-reflective character of such practices).

220. How, exactly, a minority group might protect the interests of women on issues such as maintenance and divorce will, of course, involve complex and contested questions of communal and individual value that will differ in differing political communities. As Raz has argued, the "same social arrangements can have different social meanings, and therefore differing moral significance, in the context of different cultures." Joseph Raz, *How Perfect Should One Be? And Whose Culture Is?*, *in* IS MULTICULTURALISM BAD FOR WOMEN? 98, 98 (Joshua Cohen et al. eds., 1999). Whether, for example, the final political settlement reached following *Shah Bano* of a right of exit of individuals to submit themselves to the uniform criminal law is sufficient to protect the rights of Muslim women is sure to be

creates a situation of complex equality and genuine value pluralism by enabling different religious and cultural groups to "adjust and change to a new form of existence within a larger community, while preserving their integrity, pride in their identity, and continuity with their past and with others of the same culture in different countries."[221]

Value pluralism thus holds that the freedom to manifest religion or belief does not include the right of Muslims in Europe, or any other majority or minority religious group, to elevate their faith into the established faith governing all others in a political regime. At the same time, value pluralism requires a "reassessment on the part of secular, enlightened Europeans of their own tendency to treat belief as neatly separable from disciplinary practices, cultural routines, and the education of sensory experience."[222] Classical liberal theory's assumption of religious belief in the private realm and of abstract citizenship in the public sphere as the defining features of modernity remains plausible only so long as the Kantian liberal algebra is thought to provide an independent means by which to reach authoritative public agreements without recourse to the comprehensive views of citizens. The problem, as we have seen, is that no *single* conception of reason or public discourse is able to fulfill this task. It is not the admirable Kantian quest for multiple faiths to coexist in the same public space that is problematic, but rather the dogmatic assertion that this can only be done in one way. By pursuing an *ethos* of engagement in public life among a plurality of controversial theistic and nontheistic perspectives, value pluralism opens ways for us to transcend this impasse and reimagine the limits of liberal theory.

(and remain) contested in India. *See, e.g.*, Leslie Green, *Internal Minorities and their Rights*, *in* GROUP RIGHTS 101, 113 (J. Baker ed., 1994) (arguing that internal minorities need their rights most in the case of minority groups in which "membership is partly ascriptive, and exit, when possible, is costly"). This raises difficult questions regarding how personal status laws may be reformed and brought into conformity with equality norms. The leading theorist on this issue is Abdullahi An-Na'im who has emphasized that "the validity and efficacy of human rights among Muslims must be promoted through an *internal transformation* of their attitudes about Shari'a in general, and the interpretation of certain principles, especially regarding the rights of women and non-Muslims." Abdullahi Ahmed An-Na'im, *Global Citizenship and Human Rights: From Muslims in Europe to European Muslims*, *in* RELIGIOUS PLURALISM IN HUMAN RIGHTS IN EUROPE: WHERE TO DRAW THE LINE? 13, 21 (M.L.P. Loenen & J.E. Goldschmidt eds., 2007) (emphasis added). In similar terms, Catherine MacKinnon has argued that it is "preferable that sex-unequal laws be changed by the affected communities" and thus endorses a conception of substantive sex equality in India that would "promote change from within" by giving women the discretion to use a uniform code of family law. CATHERINE A. MACKINNON, *Sex Equality Under the Constitution of India: Problems, Prospects, and "Personal Laws," in* ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 120, 136-37 (2006). For an illuminating discussion of this issue in the context of the new South African constitution, see Rashida Manjoo, *The Recognition of Muslim Personal Laws in South Africa: Implications for Women's Human Rights* (Human Rights Program at Harvard Law School Working Paper, July 2007), *available at* http://www.law.harvard.edu/programs/hrp/documents/Manjoo_RashidaWP.pdf.

221. Raz, *supra* note 220, at 99.

222. CONNOLLY, *supra* note 210, at 58.