Burqinis, Burqas and Marilyn Manson: Liberalism and Republicanism in the French and American Public Spheres

Dr. John William Tate

Senior Lecturer in Politics and International Relations

University of Newcastle

Australia

[O]ne model of the relationship between church and state…[was]….spread across Europe by the armies of Napoleon, and reflected in the Constitution of France, which begins 'France is [a]….secular….Republic'…..Religion is to be strictly excluded from the public forum. This is not, and never was, the model adopted by America. (*McCreary County v. ACLU* 545 U.S. 844 (2005), at 886, per Scalia J., dissenting).

As Justice Scalia's epigraph above suggests, it is widely assumed that the American and French polities possess deep political and historical differences which produce very different outcomes concerning the presence or absence of religion within the public sphere. As an example of this, many point to *L'Affaire du Foulard* in France, which, in 2004, resulted in a legislative prohibition on all overt religious symbols, including Islamic headscarves (foulards), worn by students within French public schools. They also point, as an example of the same, to the banning of the burqa and niqab in French "public places" in 2010, and the more recent controversy, in 2016, concerning a purported ban on "burqinis" on French beaches. Such outcomes, it is argued, could never arise in the United States because, unlike the French, the First Amendment to the U.S. Constitution prioritizes the liberty of the individual relative to society – a liberty which extends to a constitutional right of "free exercise" of religion – thereby affirming the individual entitlement of Muslim women to wear such attire in public at the expense of any collectivist demands that insist on the contrary.

It might be argued that such a contrast testifies to the dominance of the liberal over the republican tradition in the United States in a way that is not repeated in France. Although both France and the United States are republics, it is sometimes suggested that they differ in terms of the relative priority they accord to these liberal and republican imperatives (see Hulliung 2002; Laborde 2011: 56). It is these liberal and republican imperatives which, we shall see, are central to negotiating the presence or absence of religion in the French and American public spheres, each often underwriting contrary outcomes.

However despite the fact that there are genuine differences in the United States and France when it comes to the willingness to affirm the presence or absence of religion in the public sphere, we shall see that any clear-cut distinction or dichotomy between the two (such as Justice Scalia advances in the epigraph above) is overdrawn. One reason for this is that there have been occasions when religion has been "strictly excluded from the public forum" in the United States, thereby appearing to accord with the "model" that Justice Scalia, in the epigraph above, ascribes to France. The most famous example is the U.S. Supreme Court's removal of school-endorsed prayer from public schools in 1962.

Yet while this might appear to be an instance of parallel between the two polities, a profound difference resides in the rationale underwriting such removal. When religion has been removed from the public sphere in the United States, it has usually been for *liberal* reasons, centered on freedom of conscience, not the republican reasons which (we shall see) have often underwritten such outcomes in France. So for instance, Justice Black, delivering the opinion of the U.S. Supreme Court in the 1962 school prayer case, made clear that it was the potentially coercive impact of school-endorsed prayer on the freedom of conscience of public school students, not its impact on republican concerns centered on citizenship, which underwrote the "secular" outcome in which religion was, in this instance, removed from the public sphere:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain (Black 1962: 431).

Such judicial judgments suggest a significant contrast between the United States and France, indicating that when "secular" outcomes occur in each of these polities, involving the *removal* of religion from the public sphere, it is likely to be for very different reasons, centered, respectively, on liberal or republican imperatives.

Yet there have also been exceptions to this contrast, resulting in clear parallels between the United States and France in ways entirely at odds with Scalia J.'s account above. This occurs when religion has been "strictly excluded from the public forum", within each of these polities, for overwhelmingly *republican* reasons, entirely at the expense of liberal concerns centered on freedom of conscience. We shall see that such republican concerns underwrote the legislative ban on the hijab, burqa and burqini in France. We shall also see that they underwrote the removal of religion from the American public sphere in the case of the Pledge of Allegiance, and more recently, a Marilyn Manson t-shirt.

Conversely, these same parallels arise when, far from religion being "strictly excluded from the public forum" within these polities, religion has been *retained* within the public sphere, and this for reasons thoroughly associated with the liberal norm of freedom of conscience. Indeed, we shall see that in the case of the hijab, burqa and burqini, key French state institutions have divided on these liberal and republican lines, with the French Parliament and local French councils advocating "secular" outcomes, on republican grounds, involving the removal of these garments from the French public sphere, and the *Conseil d'État*, France's highest administrative court, consistently insisting on the contrary, affirming the entitlement of French Muslim women to wear this attire in public based on their freedom of conscience, and the free exercise of religion associated with this.

In this respect, far from there being a clear distinction between the American and French polities, such as Justice Scalia refers to in his epigraph above, each polity is capable of giving rise to either "secular" or "non-secular" outcomes, concerning the presence or absence of religion in the public sphere, depending on whether liberal or republican imperatives are paramount. In this way, the article seeks to show that, in matters of religion, there is nothing inevitable about the relative influence of the liberal and republican traditions in France and

the United States. On the contrary, both traditions, each with their very different priorities, are still very much in contestation within each polity, as are the outcomes they produce.

Outline of the Article

This article will begin with a discussion of the liberal and republican traditions, identifying their primary imperatives and priorities. It will then advance some historical reasons why the liberal and republican traditions have a different relative influence in France and the United States, and also how their distinct values and imperatives are capable of endorsing completely contrary positions concerning the presence or absence of religion in the public sphere. Further, at those times when each tradition concurs in endorsing a "secular" outcome, in which religion is removed from the public sphere, we shall see (as per the examples above) that their rationale for doing so is entirely different.

The article then discusses the foulard, burqa and burqini affairs in France, identifying the conflict between liberal and republican imperatives which played out between key French state institutions in the context of these controversies. The article then focuses on the United States, identifying key moments when something very akin to a French republican agenda was applied to justify the removal of religion from the American public sphere, in ways entirely at odds with liberal commitments to liberty of conscience. One such instance concerned the Pledge of Allegiance, while in another, involving a Marilyn Manson t-shirt, the circumstances were so analogous to the foulard controversy in France that I have dubbed it the "American Headscarf Affair". Finally, the article discusses recent moves on the U.S. Supreme Court, concernment the interpretation of the Establishment Clause of the First Amendment, in which some judges seek to allow a greater presence for religion within the

American public sphere, but arguably on distinctly republican grounds. The result has been division within the U.S. Supreme Court.

By focusing on these French and American examples, the paper shows how, contrary to Justice Scalia's epigraph above, there is no clear distinction between the United States and France concerning the "strict exclusion" of religion from the "public forum". Adherents of both the liberal and republican traditions in each polity still engage in active contestation concerning this issue, each seeking to endorse their respective outcomes, with the result that (contra Scalia) "secularism" cannot wholly be ascribed to France nor its contrary to the United States. In this way, we see that the presence of both the liberal and republican traditions in both France and the United States are subject to ongoing contestation.

Note: Wherever officially endorsed English translations of French state sources are available I have quoted these. Where these are not available, I have quoted the source in the original French.

Liberalism and Republicanism

Both liberalism and republicanism constitute extremely broad traditions and contain plural and multifarious elements. But each can be distinguished in terms of two overriding imperatives. We shall see that these are, in the case of liberalism, individual liberty, understood as freedom from restraint, which includes individual freedom of conscience and the freedom of outward expression (including on matters of religion) to which this freedom of conscience is believed to give rise. Regarding republicanism, we shall see that its overriding imperative is an emphasis on citizenship, and the civic loyalties and obligations to which it is believed to give rise.

From the time of the inauguration of the French and American republics, the liberal and republican traditions have coexisted within them. As Mark Hulliung states, referring to both the United States and France: "Liberalism and republicanism….are political movements and ideologies found on both sides of the Atlantic." (Hulliung 2002: 16). The lineages of the republican tradition are much older than those of liberalism. Whereas liberals trace their antecedents back to seventeenth century Europe, in the debates concerning individual liberty, toleration and limits on government that emerged in the wake of the Reformation, republicans trace their antecedents back to the classical period of ancient Greece and Rome.

It is Aristotle who is most often identified as having first raised distinctly republican concerns – not least the identity and duty of citizens within the *polis*.[1] All "states", Aristotle tells us, are created to achieve a "supreme good" (Aristotle 1979: Book I, I, 25). It is the determination of this good, and the role of citizens in achieving it, that most concerns republicans. This "good", therefore, as articulated in public terms, gives rise to obligations and duties on the part of citizens which, according to republicans, ought to outweigh their private interests, and political virtue consists in fulfilling these duties ahead of private interests in cases of conflict between the two (see Skinner 1993: 303; Wood 1969: 60-64). As Gordon Wood states:

> The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism." (Wood 1969: 53).

Certainly there are other republican traditions that cite Roman sources, such as Cicero, rather than Aristotle, as a primary source, and emphasise a republican conception of "liberty" as

[1] As Aristotle puts it: "…..a state is the sum total of its citizens. So we must ask Who is a citizen? And What makes it right to call him one?" (Aristotle 1979: Book III, I, 102).

well as a collective ideal of the "public good".[2] Indeed, Philip Pettit has advanced a "neo-republican" project in which "liberty", defined as "non-domination", is a central political value, and is explicitly contrasted to a liberal ideal of liberty understood as "non-interference" (or "freedom from restraint") (Pettit 1997: 51).[3] However at some level, all republicans emphasise an overriding duty of the citizen to the "polis" and the obligation, in specific circumstances, to "sacrifice…..individual interests to the greater good" that Gordon Wood refers to in the passage above.

When these collective obligations override individual liberty, understood as freedom from restraint, republican imperatives find themselves at odds with liberal ones. As Joseph Raz tells us, "[t]he specific contribution of the liberal tradition to political morality has always been its insistence on the respect due to individual liberty" (Raz 1988: 2). Similarly, Will Kymlicka declares that "[t]he basic principles of liberalism, of course, are principles of individual freedom". (Kymlicka 1996: 75). When this liberal ideal of liberty threatens to be submerged by collectivist demands, liberals are likely to insist upon limits to this intrusion. Indeed, the nineteenth century French political theorist, Benjamin Constant, identified precisely this insistence on independence from excessive outside interference as what distinguishes "modern" from "ancient" conceptions of liberty (Constant 1989: 312, 317, 321).

The Development of French Republicanism

The republican tradition in France has its origins in the French Revolution, and its immediate intellectual antecedents, but it consolidated its presence within the French polity during the

[2] Cécile Laborde, for instance, distinguishes between a "neo-Athenian" republicanism, with its sources in Aristotle, elucidated by J.G.A. Pocock, and a "neo-Roman" republicanism, with its sources in Cicero, elucidated by Quentin Skinner (Laborde 2011: 2-3).

[3] For the identification of the liberal tradition with an ideal of liberty understood as "non-interference" (or "freedom from restraint") see Berlin 2008: 173-74.

Third Republic (1870-1940) (Thomson 1989: 128). It remains highly influential in France to this day. Cécile Laborde, for instance, refers to an "official" French republicanism, which, she says, "*is* the dominant language of modern politics in France, a cultural and philosophical idiom as pervasive as that of liberalism in other countries." (Laborde 2011: 3).

The republicanism that arose in the context of the French Revolution, and entrenched itself in French political culture during the Third Republic, manifested itself not only in hostility to monarchy but also in hostility towards the Church, and any involvement of religion in French public life (Laborde 2011: 44-45). As Alfred Cobban states: "The anti-clericalism of Voltaire and the *philosophes* had bitten….deeply into the minds of those who represented the Third Estate at Paris…." (Cobban 1966, 173). Indeed even at the height of anti-republican reaction, in Vichy France, the Vichy Regime's attempt "….to enforce religious instruction in State schools…..inevitably awakened all the old anti-clerical bitterness and had to be speedily abandoned." (Thomson 1989, 223).

Part of the reason for this hostility towards religion was that republicans perceived the personal allegiances, elicited by religion, as a potential threat to the common civic attachments which republicans believed were necessary for a unified citizenry and which were based on an overriding commitment to the ideals of the Republic (Thomson 1989: 128; Laborde 2011: 41-42). One of their sources for such a position was Jean-Jacques Rousseau, who identified such a threat in Christianity:

> [F]ar from attaching the hearts of the citizens to the state, this religion detaches them from it, as from all other things of this world, and I know of nothing more contrary to the social spirit.[4]

French republicans have responded to this threat of religion, and the competing loyalties to which it is perceived to give rise among citizens, by endorsing an official doctrine of

[4] Rousseau 1968: Bk. IV, ch. 8, p. 182.

"laïcité". This doctrine, according to republicans, encompasses a rigorous ideal of "secularism" within the French public sphere, wherein (to use the phrase of Justice Scalia in the epigraph above) religion is to be "strictly excluded from the public forum" (see Bowen 2007: 2). Article One of the French Constitution begins by making explicit reference to *laïcité* as one of the key attributes of the French Republic:

> La France est une République indivisible, *laïque*, démocratique et sociale.[5]

Laïcité

The current French Government provides a tripartite definition of "laïcité", embodying three distinct principles, that, while insisting on a separation of public and religious organizations (thereby endorsing something akin to "secularism" in the public sphere referred to above) also seeks to incorporate, within the same ideal of "laïcité", liberal principles centered on freedom of conscience and religious expression:

> La laïcité repose sur trois principes et valeurs : la liberté de conscience et celle de manifester ses convictions dans les limites du respect de l'ordre public, la séparation des institutions publiques et des organisations religieuses, et l'égalité de tous devant la loi quelles que soient leurs croyances ou leurs convictions.[6]

Similarly, the *Conseil d'État* has also advanced a tripartite definition of *laïcité,* and has also included within it liberal principles centered on individual liberty, explicitly referring to "liberty of religion and respect for pluralism":

> La laïcité française doit, à tout le moins, se décliner en trois principes : ceux de neutralité de l'État, de liberté religieuse et de respect du pluralisme.[7]

[5] *Assemblée Nationale* 2019b, Article 1. Emphasis added.
[6] Gouvernement.fr (2019).
[7] Conseil d'État (2004).

Both tripartite definitions refer directly to liberal principles centered on freedom of conscience and religious expression. We shall see that (at least in the view of the *Conseil d'État*) the application of *laïcité* does not, on the basis of such liberal principles, always mandate a "secular" outcome wherein religion is "strictly excluded from the public forum". Rather it can, at times, underwrite a contrary outcome, wherein individuals are entitled to engage in religious expression within the public sphere. In this context, we see that *laïcité* is a complex and variegated concept, embodying distinct and separate principles. It is precisely because it is variegated, and therefore capacious, that different French state institutions can advocate contrary outcomes concerning the presence or absence of religion in the French public sphere and yet each claim that in so doing, they are abiding by principles of *laïcité.*

The Development of American Republicanism

As Mark Tushnet tells us, referring to the American Republic today, "the republican tradition is far less available to us than it was to the framers" (Tushnet 1988: 645). Much recent research has been undertaken in seeking to excavate the influence of republicanism on the American founding, in addition to more overt liberal influences (see Gould 1993). But unlike France, republicanism in the United States is not imbued with an anti-religious or anti-clerical element, perhaps because the Church was not seen as an overt political enemy of American revolutionaries as it was for their French counterparts (see De Tocqueville 1974: 172-73).

Nevertheless, although far more isolated and unusual, we shall see that there have been recent overt expressions of republican sentiment in the United States which have been just as rigorous in seeking to remove religion from the public sphere as those in France, with the same adverse implications for freedom of conscience and religious expression. Further, even in contemporary American politics, republican sentiments can undergo a recrudescence. For

instance, President Donald Trump's declaration, in 2016, that those who burn the American flag should have their citizenship revoked or serve jail sentences, and in 2018 that professional athletes who refuse to stand during the American national anthem should be "suspended" from playing, can be identified as a prioritisation of republican values, demanding overt expressions of public loyalty at the expense of liberal values centered on freedom of conscience and dissent (Trump 2016; Trump 2018).

Burqinis, Burqas and Foulards

Since 1989, with the inauguration of *L'Affaire du Foulard*, specific items of Muslim women's clothing have been at the center of political debate within the French Republic. A number of competing discourses are involved in these debates. These include not only the conflict between liberal and republican discourses identified above, but also a distinctly feminist discourse in those contexts where these items of clothing are perceived as a sign of gender inequality for the women who wear them.[8] There are also other discourses present in the French debates that fit none of the discursive frameworks associated with liberalism, republicanism and feminism. These include the Islamic perspectives of many Muslims themselves regarding this attire and what they perceive to be the demands or entitlements of their culture or their religion.[9] They also include the fears of what some in France perceive as an expanding Muslim "fundamentalism". This is perhaps most graphically illustrated by the

[8] For instance, during the move towards the burqa ban in France in 2010, then French President, Nicholas Sarkozy, supported the legislation on the grounds of female equality, declaring that "it was unacceptable to have women who were 'prisoners behind netting, cut off from all social life, deprived of identity'", and concluded that such imprisonment is "not the idea that the French republic has of women's dignity" (BBC 2009). Similarly, Fadela Amara, a minister of Algerian descent in Sarkozy's government, called the burqa "a kind of tomb, a horror for those trapped within it" (Langley 2014).

[9] Dr Raihan Ismail, from the Centre for Arab and Islam Studies at the Australian National University, affirms that some Muslim women perceive these garments in either cultural or religious terms. As she states: "[S]ome women cover their faces for 'cultural reasons'. If they have worn it since they were young they might feel uncomfortable without it. Some women view it as a religious obligation – it's about devotion to God" (Bita 2017).

French Prime Minister, Jean-Pierre Raffarin, who, in 2004, justified the French Parliament's decision to ban the foulard in public schools (as part of a wider ban on all religious symbols in this part of the public sphere) as necessary "….to contain the spread of Muslim fundamentalism and ensure that the principle of secularism on which France is based remains intact". (Cosgrove-Mather 2004).

The following sections will focus, in turn, on three public controversies involving Muslim women's clothing in France - *L'Affaire du Foulard*, the burqa ban and the burkini controversy. Given the comparative focus of this article, the primary emphasis in these accounts will be on competing liberal and republican discourses, rather than the other discourses identified above, since such a focus on liberalism and republicanism allows a more direct contrast with the United States.

***L'Affaire du Foulard* I**

L'Affaire du Foulard began in September 1989 "….shortly after France had celebrated the bicentenary of the Revolution" (Idriss 2005: 271). It arose when three Maghrebian Muslim schoolgirls "…..were excluded from their school in Creil, Northern France, because they insisted on wearing the hijab in class. Media reports ignited a national furor and right-wing politicians expressed worries that 'Islamic fundamentalism' had spread to the heart of the country" (Idriss 2005: 271). As Cécile Laborde states, the affair "…..raised a legal challenge for *laïcité*: there are no school uniforms in French state schools, and it was unclear whether there was an explicit rule preventing pupils from wearing religious symbols" (Laborde 2005, 326).

The French Education Minister, Lionel Jospin, ordered, in response, the reinstatement of the girls to their school, and then sought the advice of the *Conseil d'État* "on the wearing of religious symbols in state schools in order to clarify the state of affairs as a matter of law" (Idriss 2005: 272). The *Conseil d'Etat* directly considered the following question: Whether, given the principles of the Constitution and the laws of the Republic, and the rules applying to the organization and functioning of public schools, the wearing of "signs" belonging to a religious community within public schools is or is not compatible with the principle of *laïcité* (Conseil d'Etat 1989).

It handed down its ruling on November 27, 1989, declaring that such practice was compatible with *laïcité,* so long as the practice was also consistent with respect for the pluralism and freedom of other students and did not impinge on the educational functions of the school or regular school attendance of students:

> Il résulte des textes constitutionnels et législatifs et des engagements internationaux de la France sus-rappelés que le principe de la laïcité de l'enseignement public…… comporte pour [élèves] le droit d'exprimer et de manifester leurs croyances religieuses à l'intérieur des établissements scolaires, dans le respect du pluralisme et de la liberté d'autrui, et sans qu'il soit porté atteinte aux activités d'enseignement, au contenu des programmes et à l'obligation d'assiduité (Conseil d'État 1989).

The Court insisted that such entitlements to religious expression could legitimately be limited by the broader functions of the school, such as preparing students to fulfill the wider responsibilities of "man and citizen", including respect for other individuals and the promotion of equality between men and women.[10] Further, such "signs" could be disallowed if by their "ostentatious" manner they resulted in "pressure, provocation, proselytism or propaganda" impinging on the freedom of other students or members of the educational

[10] *Conseil d'État* 1989.

community.[11] The *Conseil d'Etat* left it to the school principal (*le directeur d'ecole*) and school authorities to determine when a student's religious expression breached these limits (Conseil d'Etat 1989). The *Conseil d'Etat* reaffirmed this ruling in 1992 (Conseil d'Etat 1992).

This ruling was distinctly "liberal" in that although it identified circumstances in which the religious liberties of French public schoolchildren might be curtailed for the sake of wider collective obligations, nevertheless within these limits, such liberties (and the freedom of religious expression associated with them) were protected in the public sphere. For our purposes, what is significant is that the ruling made clear that the maintenance of *laïcité* was consistent with the retention of religious expression within the public sphere, and need not wholly be identified with its removal.

***L'Affaire du Foulard* II**

It was French politicians, galvanized by the controversy, and responding to wider debates within the French polity, who pursued the issue in the wake of the *Conseil d'Etat* ruling and drove matters to a contrary conclusion. They did so, in many cases, by utilizing a republican discourse which focused on the role of public schools in instilling a common citizenship identity, and common civic loyalties and obligations, among French students. This perspective also informed their conception of what *laïcité* required in these circumstances.

This reversal began on September 29, 1994, when the French Education Minister, François Bayrou, issued a "Circulaire", subtitled "La reaffirmation de l'idéal laïque", published in the *Bulletin officiel de l'Éducation nationale.* Bayrou explicitly situated his position within a republican rather than a liberal framework, referring specifically, in the passage below, to "le

[11] *Conseil d'État* 1989.

projet national et le projet républicain" (Bayrou 1994). Bayrou did make reference to liberal entitlements of freedom of religion, but he explicitly subordinated these entitlements to "le projet républicain", by insisting that such freedoms did not justify any threat to the solidarity and fraternity of French citizens at the centre of that project:

> En France, le projet national et le projet républicain sont confondus autour d'une certaine idée de la citoyenneté. Cette idée française de la nation et de la République est, par nature, respectueuse de toutes les convictions, en particulier des convictions religieuses, politiques et des traditions culturelles. Mais elle exclut l'éclatement de la nation en communautés séparées, indifférentes les unes aux autres, ne considérant que leurs propres règles et leurs propres lois, engagées dans une simple coexistence.[12]

On these grounds, Bayrou moved away from a distinctly liberal conception of the French polity, instead affirming, on republican grounds, a far deeper constitutive unity among French citizens. To this end, he declared that France is more than simply an "ensemble" of citizens possessing and exercising their individual rights. Instead, he insisted, French citizens are united in a deeper sense as "one community of destiny":

> La nation 'n'est pas seulement un ensemble de citoyens détenteurs de droits individuals. Elle est une communauté de destin."[13]

Bayrou insists that "le projet républicain" (based, as he declares at note 11 above, "d'une certaine idée de la citoyenneté", and directed towards "une communauté de destin") is threatened by the sort of freedom of conscience and religious expression which manifests itself in "ostentatious" signs of religion. This is because it is these "signs" which (he tells us in the passage below) are capable of "separating" students from the "common life of the school" – a "common life" in which students are "integrated" into the republican values which make possible a common French citizenship:

[12] Bayrou 1994.
[13] Bayrou 1994.

L'école est, par excellence, le lieu d'éducation et d'intégration où tous les enfants et tous les jeunes se retrouvent, apprennent à vivre ensemble et à se respecter. La présence, dans cette école, de signe et de comportement qui montreraient qu'ils ne pourraient pas se conformer aux mêmes obligations, ni recevoir les mêmes cours et suivre les mêmes programmes, serait une négation de cette mission…. C'est pourquoi il n'est pas possible d'accepter à l'école la présence de signes si ostentatoire que leur signification est précisément de séparer certains élèves des règles de vie commune de l'école. (Bayrou 1994).

Bayrou's concerns regarding the impact of these "signs" of religion on citizenship identity are similar to those of Rousseau, at note 4 above, more than two hundred years before. Bayrou made clear that his concerns applied only to "ostentatious" signs of religion ("de signes ostentatoires") not "discrete signs" ("de signes plus discrets") (Bayrou 1994). This is because (as the last line of the passage above indicates) only the former were seen to be capable of "separating" students from the "common life of the school", thereby endangering "le projet républicain". The Minister's "Circulaire" was widely interpreted in France as including the Muslim foulard among the "ostentatious" signs which it sought to proscribe (Idriss 2005: 274; Bowen 2007: 89).

However, while Bayrou, in his conclusions above, overrode the liberal entitlements of Muslim schoolgirls to freedom of conscience and religious expression (the very entitlements upheld by the earlier *Conseil d'État* ruling) he nevertheless declared that the proscription of "ostentatious" signs of religion was consistent with freedom of conscience in an alternative respect. This is because although such proscription denied the entitlement of Muslim public schoolgirls to wear the hijab, he declared that it protected the freedom of conscience of *other* school students, not wearing such "signs", in those contexts where such "signs" constitute "des éléments de prosélytisme".[14] In this way, he said, by advocating such proscription, he was affirming both liberal values, centered on individual liberty, and "le projet républicain" –

[14] Bayrou 1994.

what he called "ce double mouvement de respect des convictions et de fermeté dans la défense du projet républicain de notre pays".[15]

In the wake of Minister Bayrou's "Circulaire", other leading French politicians also moved much more explicitly against the foulard in public schools. In March 2003, Prime Minister Jean-Pierre Raffarin, heading the conservative party UMP (*Union pour un Mouvement Populaire*), called for a legislative ban on Muslim headscarves in public schools (Gunn 2004: 7). This was endorsed by President Jacques Chirac, of the same party, in December 2003, in line with a recommendation by the *Stasi Commission* appointed by Chirac to investigate the matter (Gunn 2004: 7, 16-17). In February 2004, the *Assemblée Nationale* voted 494-36 in favour of a law prohibiting public school students from wearing religious clothing and signs that "conspicuously show" a religious affiliation (Cosgrove-Mather 2004). This was affirmed the following March in the *Sénat* by a vote of 276-20 (Cosgrove-Mather 2004). In this way, the French Parliament entirely reversed the *Conseil d'État* rulings of more than a decade before.

Burqa I

Some six years later, the French Parliament legislated to remove the burqa, as well as the full face-covering niqab, from the French public sphere, and did so by prohibiting all full-face coverings in "public places". Section 1 of Law no. 2010-1192 of 11 October 2010 states: "No one may, in public places, wear clothing that is designed to conceal the face" (Law no. 2010-1192, Section 1). In section 2 of the legislation, "public places" is defined broadly, comprising "the public highway and any places open to the public or assigned to a public service" (Law no. 2010-1192, Section 2). The law does not apply if the face-covering "is justified for health or occupational reasons, or if it is worn in the context of sports, festivities

[15] Bayrou 1994.

or artistic or traditional events" (Law no. 2010-1192, Section 2). Prior to the passage of the legislation through the French Parliament, the Constitutional Council ruled that the law could not apply to places of religious worship without violating fundamental religious freedoms in France (Constitutional Council 2010).

With these reservations, the *Assemblée Nationale*, on July 13, 2010, voted for this law and, by an almost unanimous margin of 335 votes in favour, one vote against, and three abstentions, secured its passage.[16] On September 14, 2010, the same law was affirmed in the *Sénat* by a similar margin of 246 votes in favour and one abstention.[17]

The Explanatory Memorandum that prefaces the legislation makes clear, in the passage below, that its intended focus, despite its reference to *all* public face-coverings, is the burqa and niqab. Further, it makes clear that the French Parliament does not view the burqa and niqab in liberal terms, centered on the entitlement of Muslim women to freedom of conscience and religious expression, but rather in republican terms, declaring that these garments are prohibited because they are at odds with the values of the French Republic. It was on these republican grounds, therefore, that the Parliament, in the legislation, affirmed a "secular" outcome, removing the burqa and niqab from the public sphere:

> France is never as much itself, faithful to its history, its destiny, its image, than when it is united around the values of the Republic: liberty, equality, fraternity. Those values form the foundation-stone of our social covenant; they guarantee the cohesion of the Nation; they underpin the principle of respect for the dignity of individuals and for equality between men and women. These are the values which have today been called into question by the development of the concealment of the face in public places, in particular by the wearing of the full veil…..Even though the phenomenon at present remains marginal, the wearing of the full veil is the sectarian manifestation of a rejection of the values of the Republic.[18]

[16] Spielmann 2014: 9.
[17] Spielmann 2014: 9.
[18] Explanatory Memorandum 2010.

One of the key republican values which the Memorandum claimed was vitiated by the public presence of the niqab and burqa was the ideal of "fraternity". This ideal underwrites the republican conception of "citizenship", insisting on a solidarity among French citizens of a type that (in Rousseau's words at note 4 above) might be vitiated by religion, and which Bayrou, at note 11 above, referred to as "a community of destiny". We saw that it was precisely this ideal of "fraternity" which Bayrou believed was placed in jeopardy by the presence of the foulard within public schools. It is this same "fraternity" which, as the Memorandum makes clear, the French Parliament believed was placed in jeopardy by the presence of the niqab and burqa in "public places":

> Negating the fact of belonging to society for the persons concerned, the concealment of the face in public places brings with it a symbolic and dehumanizing violence, at odds with the social fabric…..The systematic concealment of the face in public places, contrary to the ideal of *fraternity*, also falls short of the minimum requirement of civility that is necessary for social interaction (Explanatory Memorandum 2010. Emphasis added).

Burqa II

As with the hijab in public schools, the *Conseil d'État* arrived at a different position to the French Parliament concerning the burqa and niqab, one that was at odds with the "secular" outcomes affirmed by the French Parliament above. A key reason, once again, resides in the different conceptions of *laïcité* which the *Conseil d'État* and Parliament were applying to the circumstances of the case.

On January 29, 2010, prior to the passage of the burqa ban in Parliament, the French Prime Minister, François Fillon, requested that the *Conseil d'État* carry out a study on "the legal grounds for a ban on the full veil", adding that the study should show how to make this ban

"as wide and as effective as possible" (Spielmann 2014: 20). Despite this concerted request for advice which would make a nation-wide ban effective, the *Conseil d'État* was unable to recommend such ban.

In a report adopted by the Plenary General Assembly, on March 25, 2010, the *Conseil d'État* declared that it could not recommend a law which specifically banned the full-face veil (burqa or niqab) worn by Muslim women in France ("une interdiction generale du seul viole integral ne saurait etre recommandee" – Conseil d'Etat 2010: 17). Nor could it recommend a law which placed a general ban on all garments that covered the face within public places, even if this prohibition was premised on considerations of "public safety", declaring that such a law carried "juridical risks" ("L'interdiction sous toutes ses forms de la dissimulation volontaire du visage dans l'ensemble de l'espace pubic ne peut elle-meme etre envisage sans risqué juridique" – Conseil d'Etat 2010: 22. See also *ibid*, 17, 23-24).

The conception of *laïcité* that the *Conseil d'État* was applying in order to arrive at these conclusions was one that, like the tripartite conceptions offered by the French Government and the *Conseil d'État* at notes 6 and 7 above, perceived liberty of conscience and freedom of religious expression as "inseparable" from *laïcité*. As the Court stated in its Report:

> [L]a laïcité….est, en effet, en droit public français, inséparable de la liberté de conscience et de religion, et de la liberté pour toute personne d'exprimer sa religion ou ses convictions, libertés qui sont protégées à la fois par la Constitution et par la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales.[19]

On this basis, the *Conseil d'État* concluded that any law that sought to impose a "general restriction" on freedom of religious expression in the public sphere would be at odds with *laïcité* given that the entitlements to such expression are (in the Court's view) "inseparable" from *laïcité* itself:

[19] Conseil D'État 2010: 18.

Mais la laïcité ne saurait fonder une restriction générale à l'expression des convictions religieuses dans l'espace public……et ne peut donc justifier une prohibition absolue du voile intégral dans l'ensemble de l'espace public…. Le principe de laïcité ne pourrait donc, à lui seul, fonder une interdiction générale du port du voile intégral (Conseil d'État 2010: 18).

Burqini I

In 2016, up to thirty mayors of French local councils sought to ban Muslim women wearing the burqini in those public places (particularly beaches) that fell within the Councils' jurisdiction (Holmes and AFP 2016). The action resulted in media coverage right around the world.

The mayor of Cannes, David Lisnard, was the first mayor in France to impose a ban on the burqini. He is a member of Nicholas Sarkozy's *Les Républicains* party. He insisted that "ostentatious dress, whatever the religion, is a problem in the current context", declaring that "burqinis were 'Islamist' and a sign of the 'salafisation of our society'" (Chrisafis 2016). Nicolas Sarkozy declared himself in favour of a nationwide burqini ban and, in a bid for his party's nomination in the 2017 presidential race, said that he would introduce such a national legislative prohibition if re-elected to his former presidential office (Dearden 2016).

The then French Prime Minister, Manuel Valls, also advanced, in his support of a burqini ban, a concern about the "growing influence" of "Salafism" in France and its impingement on the public sphere:

We must have open eyes to the growing influence of salafism, which contends that women are inferior and impure and that they must be sidelined. This was the question, absolutely not anecdotal, that was at the center of the debate around the burkini and the burqa. It is not an insignificant bathing suit. It is a provocation of radical Islam, which is emerging and wants to impose itself in the public space (Valls 2016).

Burqini II

The ban in one sea-side Riviera town, Villeneuve-Loubet, was challenged in the *Conseil d'Etat* by those affected by the ban. Once more, the Court did not endorse the positions of French politicians above, who insisted on a "secular" outcome involving the vigorous removal of the burqini from the public sphere. Instead it overturned the ban of Villeneuve-Loubet on the grounds that it "dealt a serious and clearly illegal blow to fundamental liberties such as….freedom of movement, freedom of conscience and personal liberty" (Dearden 2016).[20] In this way, the Court framed the issue of the burqini as a matter of individual conscience and free exercise of religion, thereby applying to the burqini ban a conception of *laïcité* centered on liberal principles similar to those it affirmed over twenty-five years earlier in the case of the foulard in public schools and six years earlier in the case of the burqa and niqab.

The *Conseil d'État's* overturning of the burqini ban in this one town is widely seen as a judicial precedent affecting all other towns which have adopted the same ban (Dearden 2016). In immediate response, over twenty mayors refused to lift their local bans, and many demanded that the Court ruling itself be overturned by a national legislative ban on the burqini, delivered by the French Parliament, just as was done in the wake of the *Conseil d'Etat's* ruling on the foulard in 1989 and 1992 (Dearden 2016. See also Chrisafis 2016).

[20] The Court also rejected another argument presented in support of the ban – that the presence of the burkini on French beaches was a threat to "public order" (Dearden 2016).

American Republicanism and Public Schools I

For liberals and republicans, public schools are exceptional civic institutions, and this because of the significant emphasis republicans place upon them as crucibles of citizenship, and liberals as cradles of individual conscience. Concerning the latter, the U.S. Courts have been far more insistent on banning state-endorsed prayer when it occurs in public schools than when it occurs, for example, in state legislative chambers, because it is in schools that the freedom of conscience of individuals is deemed most fragile (due to youth) and so the "coercive" effects of officially sanctioned prayer likely to be the most pronounced.[21] In this respect, separation of church and state, under the auspices of the First Amendment, has been interpreted far more rigorously by U.S. Courts when it comes to public schools than elsewhere – the Court even banning state-endorsed prayer at High School graduation ceremonies and High School football games.[22]

Yet this civic exceptionalism also results in reverse outcomes, where far from American students enjoying wider First Amendment liberal rights at public schools than elsewhere, the peculiar circumstances of schools have at times led the U.S. Courts to interpret the First Amendment much more narrowly than would be the case in non-school contexts.

One such circumstance concerns the Pledge of Allegiance in U.S. public schools. Justice Felix Frankfurter of the U.S. Supreme Court has referred to public schools in very similar terms to François Bayrou, even making reference to their role in producing a "common destiny":

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny (Frankfurter J. 1948, 51).

[21] On how the Supreme Court is much more rigorous in enforcing Establishment Clause prohibitions on state-endorsed religious practices in public schools than elsewhere, see Rehnquist 2005: 690-91; Stewart 1963: 316. On the Supreme Court allowing the Nebraska state legislature to pay a chaplain to lead the legislature in prayer at the opening of its sessions, see *Marsh v. Chambers* 463 U.S. 783 (1983).

[22] See *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

It was during Justice Frankfurter's term of judicial office that two Jehovah's Witness public school children sought exemption from the Pledge of Allegiance ceremony on First Amendment grounds of "free exercise" of religion, insisting that "such a gesture of respect for the flag was forbidden by the command of Scripture", not least Exodus 20 which forbids the worship of "graven images" (Frankfurter J. 1940, 592). Justice Frankfurter, delivering the opinion of the Court, made apparent his awareness that the case involved a conflict between, on the one hand, the liberty of conscience upheld by the Free Exercise Clause of the First Amendment, and on the other, what we have seen is a republican concern to instill in public school children a common sense of citizenship, and its associated obligations, as a means to ensure a "common" national "destiny". As Frankfurter J. put it:

> When does the constitutional guarantee compel exemption from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good? (Frankfurter 1940, 593).

Frankfurter J. conceded that "…..in safeguarding conscience we are dealing with interests so subtle and so dear" that "every possible leeway should be given to the claims of religious faith" (Frankfurter 1940, 594). Nevertheless he insisted that in this case the Court was not dealing with minor exemptions from minor public purposes. (Frankfurter 1940, 596). Rather, in the Pledge of Allegiance ceremony, designed to promote national loyalty and cohesion, it was dealing with "the ultimate foundation of a free society", one "without which religious toleration itself is unattainable" (Frankfurter 1940, 595, 596. See Frankfurter 1940, 600). In other words, Frankfurter J. claimed that without the civic unity demanded by republicans, liberal imperatives like freedom of religion were not possible. With only one dissent, the Court agreed, insisting that such republican concerns, in the circumstances of the case, should be paramount, thereby making participation in the Pledge of Allegiance ceremony

compulsory and overriding the "free exercise" entitlements of the Jehovah's Witnesses children. As Frankfurter J. put it:

> The ultimate foundation of a free society is the binding tie of cohesive sentiment…. 'We live by symbols'. The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution (Frankfurter 1940, 596).

Yet despite this resounding affirmation of republican priorities at the expense of liberal ones, the U.S. Supreme Court, three years later, at the height of the Second World War, reversed its decision above and (with only Justice Frankfurter dissenting) insisted that in cases of conflict, the conscience of the individual must take precedence over the demands for civic unity, thereby allowing for individual exemptions from the Pledge of Allegiance ceremony (Jackson J. 1943, 633-34, 641-42).

American Republicanism and Public Schools II

We have seen that there have been times when the U.S. Supreme Court has vigorously affirmed the First Amendment rights of school children in public schools. This is particularly the case with the Free Speech Clause of the First Amendment. In *Tinker v. Des Moines School District*, the Supreme Court famously declared, at the height of the Vietnam War, that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate", thereby upholding the right of students to wear black armbands in protest against American involvement in the war, so long as the protest did not "materially disrupt classwork or involve *substantial disorder* or invasion of the rights of others."[23]

[23] Fortas 1969: 506, 513.

But the Courts have been far less forthcoming in other free speech contexts in public schools, again interpreting First Amendment rights much more narrowly in public school contexts than elsewhere. It is when speech is considered by the U.S. Courts to be distinctly non-political or non-religious in its content that the Courts have been most willing to allow its suppression in schools for the sake of school policy or wider collective concerns. For instance, when Alaska school student Joseph Frederick and classmates unfurled a banner on a school excursion reading "BONG HiTS 4 JESUS", in full view of television cameras as the Olympic Torch Relay for the 2002 Winter Games in Salt Lake City passed by, the Supreme Court ruled that the School was entitled to suspend the student, thereby denying him First Amendment rights to free speech, on the grounds that the School is entitled to enforce its policy against the propagation of illegal drug use (Robert 2007: 397, 409-10).[24] Further, when a student used "elaborate, graphic, and explicit sexual metaphors" in a speech before a public school assembly, the Supreme Court in *Bethel School District v. Fraser* was similarly unwilling to uphold First Amendment free speech rights, even though the Court affirmed they would apply to such epithets when used by adults outside school grounds (Burger 1986: 676). Instead, it sided with the School Board's entitlement to determine "what manner of speech is inappropriate" in schools – all as part of the school's institutional mandate to uphold discipline and order:

> Under the First Amendment, the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, but it does not follow that the same latitude must be permitted to children in a public school. It is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse….The inculcation of these values is truly the work of the school, and the determination of what manner of speech is inappropriate properly rests with the school board.[25]

[24] As the Chief Justice put it: "…..not even Frederick argues that the banner conveys any sort of political or religious message…..[T]his is plainly not a case about political debate over the criminalisation of drug use or possession." (Robert 2007: 403).
[25] Burger 1986: 676.

In this way we see that, just as with the first Pledge of Allegiance case above, there have been times when the Supreme Court has been willing to sideline a concern for individual liberties for the sake of wider school purposes. In each case, such rulings had the effect of displacing a liberal emphasis on individual liberty in favour of more collective concerns centered on the formation of a certain type of school pupil.

American Republicanism and Public Schools III

For our purposes, the most interesting of these types of judicial rulings to emerge in recent decades is one involving "shock rock" artist, Marilyn Manson. This is so for two reasons. Firstly, in the divided opinion of the Court, we can perceive, once again, the pre-eminent conflict between liberal and republican imperatives concerning the place of religion in the public sphere, particularly when this "sphere" is the public school. But secondly, the reasoning of a majority of the judges, concerning the relative priority of these imperatives, renders the case closely analogous to *L'Affaire du Foulard* in France. It is for this reason that I have dubbed it "The American Headscarf Affair".

The matter concerned a senior student, Nicholas Boroff, at Van Wert High School, Ohio, who on August 29, 1997, was told by the Chief Principal's Aide to remove from his person a Marilyn Manson t-shirt depicting, on its front, a three-faced Jesus, with the words "See No Truth, Hear No Truth, Speak No Truth", and on the back the word "BELIEVE" with the letters "LIE" highlighted. (Wellford 2000: 467). The school had a "Dress and Grooming" policy that declared that "clothing with offensive illustrations, drug, alcohol or tobacco slogans….are not acceptable". (Wellford 2000: 467). The Aide and the Principal declared the t-shirt "offensive" and Boroff was given "…the choice of turning the shirt inside-out, going home and changing, or leaving the school and being considered truant. Boroff left school"

(Wellford 2000: 467). He returned on the next four subsequent school days, each time wearing a different Manson t-shirt, and was ordered to remove these as well.

Boroff's Mother filed suit on his behalf declaring that his First Amendment rights to freedom of speech had been violated. The District Court upheld the School's decision, as did a 2-1 majority of the U.S. Court of Appeals for the Sixth Circuit. The U.S. Supreme Court denied, without comment, discretionary review of the judgment, thereby rejecting Boroff's appeal against the Court of Appeals judgment (ABC News 2001).

Although the case involved the First Amendment's "Free Speech" Clause, nevertheless (as the dissenting judge affirms below) the speech on the three-faced Jesus t-shirt involved explicitly religious content, expressed in a public school ground, and so, to this extent, the matter is directly applicable to the theme of our discussion concerning the presence of religion in the public sphere. Further, according to previous Supreme Court First Amendment rulings, the fact that the t-shirt's religious content was expressly hostile towards religion makes no difference to the fact that, for First Amendment purposes, it contained religious content. As Justice Fortas put it in 1968, delivering the opinion of the Court:

> Government in our democracy….may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or *even against the militant opposite* (Fortas 1968: 103-04. Emphasis added).

Liberalism, Republicanism and Marilyn Manson I

It is in the U.S. Court of Appeals ruling that we witness a direct conflict between a liberal and a republican agenda concerning the Marilyn Manson t-shirts. Judge Wellford, delivering the majority opinion, began by affirming the position of the Supreme Court in *Bethel School District v. Fraser* (at note 25 above) that "[i]t is a highly appropriate function of public

school education to prohibit the use of vulgar and offensive terms in public discourse". (Wellford 2000: 468, 469). The Judge declared that if the Manson t-shirts had had a political or religious content, then, in line with *Tinker* at note 23 above, the school would have had to prove "substantial disorder" to school activities before it would be constitutionally entitled to prohibit them.[26] But, he insisted, "[t]he record is devoid of any evidence that the T-shirts, the 'three-headed Jesus' T-shirt particularly, were perceived to express any particular political or religious viewpoint".[27] In the perceived absence of such content, he therefore affirmed the right of the school, in line with *Bethel*, to prohibit the t-shirts for the sake of their "vulgarity" or "offensiveness" alone:

> In our view…..the evidence does not support an inference that the school intended to suppress the expression of Boroff's viewpoint, because of its religious implications. Rather….[t]he record establishes that all of the T-shirts were banned in the same manner for the same reasons – they were determined to be vulgar, offensive, and contrary to the *educational mission* of the school…..In this case, where Boroff's T-shirts contain symbols and words that promote values that are so patently contrary to the school's *educational mission*, the School has the authority, under the circumstances of this case, to prohibit those T-shirts.[28]

Although the school's "educational mission" could be justified on a number of grounds besides a republican one, it was the republican agenda, centered on the inculcation of values necessary for citizenship, which was advanced by the School and endorsed by the majority of the Court as justification of that "mission" in this case. This is most evident in the School Principal's explicit reference to "citizenship" in his affidavit. Referring to Manson's song lyrics in *Antichrist Superstar* - "Let's just kill everyone and let your god sort them out / fuck it / Everybody's someone else's nigger / I know you are so am I / I wasn't born with enough middle fingers" – the Court quotes the Principal in his affidavit as follows:

[26] Wellford 2000: 470-71.
[27] Wellford 2000: 470.
[28] Wellford 2000: 470, 471. Emphasis added.

The principal attested that those types of lyrics were contrary to the school mission and goal of establishing 'a common core of values that include…..human dignity and worth….self respect, and responsibility', and also the goal of instilling 'into the students, an understanding and appreciation of the ideals of democracy and help them to be diligent and competent in the performance of their obligations as *citizens*'.[29]

Liberalism, Republicanism and Marilyn Manson II

It is extraordinary that a majority of the Court could assume, at notes 27 and 28 above, that despite the explicitly religious content of the three-headed Jesus t-shirt, there was no "evidence" the t-shirt expressed "any particular political or religious viewpoint", thereby allowing the Court to presume that the Principal banned the t-shirts on the grounds of their "offensiveness" and "vulgarity" alone. Indeed, this assumption is even more extraordinary given that the Principal, in his affidavit, expressly declares the contrary, stating that he found the three-headed Jesus t-shirt "offensive" precisely because (i) it expressed a viewpoint on religion that was contrary to the school "mission" and (ii) this was a viewpoint on religion that he and other members of the "school community" perceived to be "offensive":

I have found the t-shirt which contains the three-faced Jesus to be offensive…..This t-shirt is offensive because it mocks a major religious figure. Mocking any religious figure is contrary to our educational mission which is to be respectful of others and others' beliefs. Second, mocking this particular religious figure is particularly offensive to a significant portion of our school community, including students, teachers, staff members and parents (Clifton 2000).

This statement is significant because, as Judge Wellford admitted at note 26 above, if the t-shirts were perceived by the school (or the Court) to have political or religious content, then Boroff's First Amendment rights would have been clearly at stake, and, in line with *Tinker*, "substantial disorder" to school activities would have had to have been proven before the

[29] Wellford 2000: 470. Emphasis added.

School would be constitutionally entitled to curtail them. It was because the t-shirts were considered by a majority of the Court (at notes 27 and 28 above) to be devoid of this religious or political content that the Court ruled the school could avoid the *Tinker* requirement and (following the precedent of *Bethel*) ban the t-shirts on the basis of "offensiveness" alone.

Judge Gilman, in dissent, acknowledged the significance of the majority opinion's refusal to identify religious expression in Boroff's t-shirt. He declared that if only expletives and other "vulgar" words were at issue, he too would have found the t-shirts "offensive", in the same way as the Court, in *Bethel*, viewed the school assembly speech, and would have sided with the majority in upholding their ban (Gilman 2000: 473-74). But he insists that in this case (like *Tinker*), political/religious content is at issue, and it is this which (contrary to the majority opinion) ensures that First Amendment rights are at stake:

> Unlike the majority, I believe that a jury could reasonably find that the reason why School officials declared Boroff's Marilyn Manson T-shirts 'offensive' was because the first Marilyn Manson T-shirt he wore contained a message about religion that they considered obnoxious….This particular T-shirt was found 'offensive' because it expresses a viewpoint that many people personally find repellant, not because it is vulgar. Censorship on that basis is simply not permitted in the absence of a reasonable prediction by school officials of substantial disruption of, or material interference with, school activities (Gilman 2000: 472, 474. See also Gilman 2000: 473).

The Supreme Court, in other cases, has prohibited t-shirts in school grounds on the basis of their "offensiveness" alone.[30] It was Judge Gilman's determination, in his dissenting judgment, that the Manson t-shirt contained explicit religious content, which allowed him to situate the case within the auspices of Boroff's First Amendment entitlements. It is because Judge Wellford, delivering the judgment of the majority, refused to concede the t-shirts had

[30] These t-shirts involved sexually explicit language or involved individuals dressing as members of the opposite sex. See *Broussard v. School Board of City of Norfolk*, 801 F. Supp, 1526 (E.D. Va. 1992); *Pyle v. South Hadley School Committee*, 824 F. Supp. 7 (D. Mass. 1993); *Harper v. Edgewood Board of Education*, 655 F. Supp. 1353 (S.D. Ohio 1987).

religious content, instead identifying them as merely "offensive", that Boroff's First Amendment rights could be circumvented (within the majority judgment) and the precedent of *Bethel* prevail. This conclusion allowed the republican agenda of the school, identified in the Principal's reference to citizenship at note 29 above, to prevail, since this agenda did not have to be balanced against Boroff's First Amendment entitlements to "free speech" or "free exercise" of religion.

The issue of "offensiveness" did not arise in *L'Affaire du Foulard* because all sides acknowledged that Muslim headscarves (in contrast to Marilyn Manson t-shirts) embodied religious content, with the result that the religious freedoms of Muslim schoolgirls were clearly at stake in any attempt to prohibit these items in French public schools. Nevertheless, in all other respects, the Marilyn Manson t-shirts were treated by the school authorities and a majority of the Court of Appeals for the Sixth Circuit in a manner analogous to Muslim headscarves in France. In each case, these items of clothing were removed from public schools because of the threat they were perceived to pose to citizenship formation, with similar implications for the "free exercise" rights of those denied the entitlement to wear them.

Republican Resurgence

Yet while the Manson issue revealed a parallel between U.S. and French republicanism in terms of arguments deployed and outcomes reached, what we might call the recent "republican resurgence" on the U.S. Supreme Court, centered on Establishment Clause jurisprudence and the separation/neutrality doctrines associated with it, reveals the opposite. Whereas the Manson issue, like the headscarves issue in France, showed the state (in the form of the U.S. Courts and the Ohio school) concerned to remove religion (or its "militant

opposite") from public schools in a rigorous manner, these recent Supreme Court judgments, advanced by one distinct group of justices on the Supreme Court bench, seeks to reverse such separation and allow for a state endorsement of theistic belief (the very thing which the school prayer cases had sought to prohibit).

It is *Everson v. Board of Education* which is a primary obstacle to any such revision of Establishment Clause jurisprudence, since it is this judgment which first upheld the neutrality doctrine (in addition to the separation doctrine) as necessary to the maintenance of this Clause. As Justice Black put it in that case, delivering the opinion of the Court:

> [The First Amendment] requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.[31]

The authority of *Everson* is maintained by at least *one majority* on the Supreme Court to this day.[32] As Justice Souter declared in 2005, delivering the opinion of the Court:

> The touchstone for our analysis is the principle that the 'First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion'….When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality…..(Souter J. 2005, 860).

[31] Black J. 1947, 18.

[32] See Souter J. (2005). I refer to "one majority" because on the same day, concerning the same issue (state display of the Ten Commandments) the Court delivered another majority opinion with the contrary outcome (Rehnquist CJ. 2005, 686-88). This judgment was the culmination of that long line of dissents outlined at notes 33-37 below. According to the dissenting judges in this case, the ruling was entirely contrary to the neutrality doctrine (see Stevens J. 2005, 709-12; Souter J. 2005, 737, 745-46).

From the 1980s onwards, however, a series of Supreme Court justices and Chief Justices (Burger, Rehnquist, Kennedy, and Scalia) have argued, initially in minority dissents, but most recently in a majority view, that although the framers of the Constitution intended to prohibit the "establishment" of a national church, they in no way intended the rigorous separation of church and state nor the neutrality doctrine which the Court has sought to uphold since *Everson.*[33] They have therefore argued that the state need not be "neutral" between religion and non-religion, and that a minimal (non-denominational) endorsement of monotheistic belief by the state (even in the form of school prayer) is therefore consistent with the Establishment Clause, since although not "neutral" between religion and non-religion, it does not, in and of itself, amount to an "establishment" of religion.[34] As Rehnquist J. (as he then was) put it in *Wallace v. Jaffree*:

> The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing non-discriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*.[35]

Further, these judges have insisted that the line of separation between church and state which the Court has sought to construct on the basis of the neutrality doctrine, inherited from *Everson*, has been chronically inconsistent.[36] Indeed, they have even at times argued, along

[33] See Rehnquist J. (1985, 98-99, 101-106); Scalia J. (1987, 639); Kennedy J. (1989, 657, 662-63, 670. 672); Scalia J. (1992, 631, 633); Scalia J. (2005, 887, 889-90, 896, 906). For the majority opinion, see note 32 above.

[34] See Rehnquist J. (1985, 99-100, 106); Scalia J. (1987, 639); Kennedy J. (1989, 657-62, 670); Scalia J. (1992, 631, 633); Scalia J. (2005, 889-90, 891-94, 899-900, 910). For the view that school prayer is constitutional, see Rehnquist (1985, 113-14). For an instance of these "republican" justices upholding the orthodox view that it is not, see Kennedy J. (1989, 660). .

[35] Rehnquist (1985, 106; cf. *ibid*, 99-100). See also Rehnquist (2005, 684). Similarly, Justice Scalia has referred to the "demonstrably false principle that the government cannot favor religion over irreligion" (Scalia 2005, 893).

[36] See Rehnquist (1985, 106-107, 110, 112); Scalia J. (1987, 635-40); Kennedy J. (1989, 655-56, 674); Scalia J. (1992, 644); Scalia J. (2005, 889-92); Rehnquist CJ. (2005, 685).

the lines of Justice Stewart in the 1960s school prayer cases, that a too rigorous enforcement of the separation doctrine implies not a "neutrality" but a "hostility" towards religion.[37] They therefore recommend, on Establishment Clause matters, a conservative return to what they perceive as the Framer's more benign and pro-religious intentions:

> The true meaning of the Establishment Clause can only be seen in its history…..As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead to the type of unprincipled decisionmaking that has plagued our Establishment Clause cases since *Everson* (Rehnquist J. 1985, 113).

Similar conservative arguments have involved the invocation of the American "people" and their "historical practices" which are again deemed inherently "religious", and a reversal of separation and neutrality sought on this basis.[38] It is these collective sources, rather than the liberal views of individual justices insisting on the "neutrality" and "separation" doctrines, that those advocating such a reversal insist ought to control the Court's interpretation of the Constitution:

> [O]ur Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historical practices of our people (Scalia J. 1992, 632).

Numerous justices on the U.S. Supreme Court has regularly acknowledged the deeply religious character of American society, and therefore the fact that the separation and

[37] See Burger CJ. (1985, 85, 86); Scalia J. (1987, 616-17); Kennedy J. (1989, 655, 657, 664, 677-78); Rehnquist CJ. (2000, 318); Scalia J. (2005, 900, 910); Rehnquist (2005, 684). On Justice Stewart see Stewart J. (1963, 314). For the Court's response to Stewart J., see Clark (1963, 225). Justice Goldberg put forward a similar view – Goldberg J. (1963, 306).

[38] On the "religious" nature of these "historical practices", see Kennedy J. (1989, 657, 663); Scalia J. (1992, 645-46); Scalia J. (2005, 906); Rehnquist CJ. (2005, 683, 686-87). See also Stewart J. (1962, 446, 450).

neutrality doctrines do not (contra the view of the justices immediately above) rest on a "hostility" towards religion, or indeed on an anti-clerical bias similar to that affirmed by many republicans in France.[39] On the contrary, they have used what they perceive as the deeply religious nature of American society as reason *for* separation and neutrality, just as Scalia J. and Rehnquist C.J. have used it as reason *against.*[40]

Yet the profound difference between the American and French republican traditions can be seen in the fact that the justices identified above have sought to reverse separation and neutrality by appeal, not only to conservative values, but also to distinctly republican ideals in a way inconceivable in France. It is in this respect that I have identified such judgements in terms of a "republican resurgence" on the Supreme Court. Thus Justice Scalia insists that the government ought to be able to affirm a monotheistic conception of God (short of Christianity) including state-endorsed prayer to that God, without falling foul of the Establishment Clause[41], and he justifies the violation of "neutrality" towards polytheists and atheists that this would entail by appealing to the unifying effects which such practice will have on the Republic as a whole. As he puts it: "…..it is a shame to deprive our…… society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation….." (Scalia J. 1992, 646). He makes the same point again, as follows:

[39] Clark J., 1963, 226. See also *ibid*, at 212-13, 222; Frankfurter J., 1948, 215-17; Black J., 1948, 211-12; Douglas J., 1952, 313; Black J., 1962, 431-32.

[40] See Rehnquist J. 1985, 91-106; Scalia J. 2005, 900, 905, 906, 910.

[41] "Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. The former is, as *Marsh v Chambers* put it, 'a tolerable acknowledgment of beliefs widely held among the people of this country' " (Scalia J. 2005, 894; cf. *ibid*, 897).

With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists (Scalia J. 2005, 893).

Scalia J. acknowledges the "competing interests" involved in such matters, not least the "interest" of minorities in "not feeling 'excluded'" in the face of such public affirmations of national faith. However he resolves the issue on republican grounds, insisting that "[o]ur national tradition has resolved that conflict in favor of the majority", upholding the majority's "interest" in "….being able to give God thanks and supplication *as a people,* and with respect to our national endeavours."[42]

Justice Scalia can affirm majority interests in this manner precisely because he is free of liberal inhibitions. It is liberals that are concerned with minorities - majorities, they assume, usually being able to take care of themselves within liberal democracies. Indeed, at the pointy end of the republican tradition, where collectivist aspirations wholly outweigh individualist ones, it is the "minority" at odds with the collective which is "forced to be free".[43] As Justice Black pointed out as long ago as *Everson,* it was precisely the fear of such outcomes (in the form of enforced religious conformity) which led the early Americans to explicitly insert into their Constitution the religious clauses of the First Amendment, which they hoped would guarantee their right to decide the fate of their own souls.[44] And yet, although he insists he stops short of "establishment", it is precisely this concern with conformity which Justice Scalia seeks to dismiss, with his explicit insistence that the collective aspirations of a

[42] Scalia J. (2005, 900). See also Scalia J. (1992, 645).
[43] See Rousseau 1968, Bk. I, ch. 7, 64).
[44] See Black J. 1947, 8-13; Black J. 1962, 425-30.

majority ("the people") should, when it comes to matters of religion, entirely outweigh the fears of a minority in being "excluded".[45]

Martha Nussbaum insists that central to American political tradition/s is the belief that liberty of conscience must be *equal* liberty for each individual.[46] Yet this is a distinctly *liberal* point of view. Scalia J. invokes a very different "national tradition" above, one premised clearly on conservative and republican imperatives, centered on the aspirations of the "people" and the "unifying" concerns of the "nation". Although he does not go as far as those who, in the words of John Dunn, seek "….to reinsert an explicitly Christian basis…into the delicate structures of America's long-term political accommodation"[47], nevertheless he and the like-minded justices referred to above seek to insert an explicitly monotheistic basis into the same, and they do so on the basis of conservative and republican argument, invoking appeal to the "people", "nation", and the need to ensure the "unity" of each. We have seen that French Republicanism, in the name of the same principle, produces precisely the opposite outcomes regarding church and state. Such is the difference that the very different history of church and state within the two polities makes.

Conclusion

Justice Scalia's epigraph at the beginning of this article identifies the very different experience of France and the United States concerning the place of "religion" within the public sphere – the ideal of "secularism" being associated with one rather than the other. In

[45] Of course "exclusion" is not the same as enforced religious conformity. But even Justice Stewart, in dissent against the removal of prayer from public schools, insisted that the way in which "exclusion" is accommodated – i.e. for those students not wishing to participate in prayer - can have "coercive" effects (Stewart J. 1963, 318, 320).

[46] "This is….a country that has long understood that liberty of conscience is worth nothing if it is not equal liberty." (Nussbaum, 2008, 2).

[47] Dunn (2005, 435). As we have seen at note 41 above, Scalia J. explicitly stops short of insisting that state endorsement of "Christian" belief is consistent with the Establishment Clause.

those instances in the United States where religion has been removed from the public sphere, we have seen that this has taken place for overwhelmingly liberal rather than republican reasons, centered on the liberty of individual conscience, and the requirement that government not impinge upon it. Yet we also saw that such liberalism need not always mandate the removal of religion from the public sphere, and that it was only republican imperatives, centered on concerns for citizenship, that had a consistent propensity to endorse such "secular" outcomes.

But what the article showed, above all, is that such contrasts between France and the United States, such as Scalia J. drew in his epigraph, were at times reversed. We saw that republican imperatives have, at times, mandated the removal of religion from the American public sphere, in ways usually associated with France, with all the negative implications for liberal values centered on freedom of conscience. Conversely, in the case of France, we saw that the key legitimating norm which the French state and Parliament has used to justify the removal of religion from the public sphere on republican grounds (*laïcité*) has a liberal dimension which, when applied by the *Conseil d'État*, has mandated no such removal of religion from the public sphere at all, thereby indicating that any conception of *laïcité* as coextensive with "secularism" is inaccurate and misleading.

What this evidence demonstrates, above all, is that far from there being any clear distinction between the United States and France, concerning the presence of religion in the public sphere (such as Justice Scalia identifies in his epigraph) there are both parallels and contrasts between both polities. In this way, we see that the relative priority and influence of the liberal and republican traditions, within each polity, is not set in stone, but rather capable of continuous engagement, so that the dominance of one over the other, in any specific instance, is by no means assured. The result is that the question of whether religion is retained or removed from the public sphere is not predetermined, in the United States and France, by

the relative influence of these traditions, but rather is capable of ongoing political contestation.

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