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Marilyn Manson, French Headscarves and American Flags

The United States and France are each republics that arose from eighteenth century revolutions. Yet despite these origins, the republican tradition is today believed to be much stronger in France than in the United States. One would imagine, for instance, that the French Headscarves Affair would never have occurred in the United States, given the liberal guarantee of free exercise of religion upheld by the First Amendment to the American Constitution. In this respect, it is believed, when it comes to matters of freedom of speech, conscience, and personal expression, whether of religious or other identities, the liberal tradition in the United States clearly trumps the republican tradition. This, it is claimed, is in contrast to France where, as the Headscarves Affair shows, republican ideals are quite prominent on such issues. This paper challenges these assumptions by looking at two key issues that have arisen within the U.S. Court system and have involved appeals to the First Amendment – Marilyn Manson and the American flag.

The major revision that has occurred in the history of the American Founding over the last forty years has led many to the conclusion that it was not what we today understand as liberalism, centered on the seventeenth century natural rights philosophy of figures like John Locke, which was the seminal foundation of the American Republic, but rather a series of republican ideas that had their sources in the ancient Greeks, the Roman Stoics, and, later, the Italian Renaissance.[1] Previously, it had been argued that "[the] Lockean understanding of the proper relations among morality, religion, and the liberal polity was the orthodox view among the American founders" (Galston, 1998, 263). But ever since the onset of this republican revisionism, matters have seemed far more complex (cf. Zuckert 1996, 202-06).

Yet of those who accept this "revisionism" as an accurate portrayal of the American Founding, few would deny that, once that Founding was inaugurated, and the American public sphere developed its distinctive "separation of powers" centered on the executive, the legislature and the judiciary, it was liberal values, centered on the individual's freedom *from* government, rather than republican values, centered on the citizen's duty *to* government, which were increasingly paramount. For instance, faced with the very anti-republican demand of Quakers for an exemption from the military service necessary for "the common defense" of the new Republic, the new President, George Washington, responded in an eminently liberal manner, insisting on the sanctity of individual conscience over such uniform civic obligations:

I assure you very explicitly that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire that the laws may always be as extensively accommodated to them as a due regard to the

[1] Cf. Wood (1969, 48-50); Pocock (1975, 545-46). For the role of the Stoics, see Nussbaum (2008, 77-80). For a critical discussion of this "republican synthesis", see Zuckert (1996).

protection and essential interests of the nation may justify and permit (Washington, October 1789).

Similarly the Bill of Rights, when applied by the U.S. Courts, has also advanced the priority of liberal over republican values, embodying, as it does, a series of injunctions enjoining government from interfering with the liberties of individuals.[2] The Bill of Rights was the tag-end of the Founding process – arising only as a late development in order to fulfill promises to those states who had ratified the Constitution on condition that such rights be guaranteed.[3] And yet its legal influence on the American public sphere has been far greater than the Aristototelian, Ciceronian, Renaissance or radical Whig sources that republican revisionists associate with the Founders.[4] The result has been a reversal over time of the relative influence of the liberal and republican traditions, with Mark Tushnet telling us that "the republican tradition is far less available to us than it was to the framers" (Tushnet 1988, 645).

Yet such a contrast concerning the relative influence of liberal and republican values in the American public sphere is by no means clear-cut. This is evident if we contrast the United States with another liberal democracy equally, or often more overt in its republicanism (France). If we engage in this contrast at the site most likely to give rise to liberal/republican conflict – that of the public school - we shall see that the question of relative influence of liberalism and republicanism

[2] On the Bill of Rights as embodying a distinctly *liberal* set of values, see Jackson J. (1943, 639-40).
[3] "Rhode Island and North Carolina flatly refused to ratify the Constitution in the absence of amendments in the nature of a Bill of Rights." (Rehnquist J., 1985, 92-93, dissenting).
[4] Of course, this liberal influence of the Bill of Rights was, at times, halting. For instance, if we take the free speech element of the First Amendment, the Supreme Court was originally far more willing to uphold the draconian provisions of the *Espionage Act 1917*, for the sake of collective interests centered on national security, than it was to uphold the individual rights to free speech embodied in the Amendment itself - cf. Holmes J. (1919a, 217); Holmes J. (1919b, 52-53); Holmes J. (1919c, 208-09). Indeed although Justice Holmes was a party to these decisions, it was his (and Justice Brandeis') subsequent dissents from them that formed the basis of a much more liberal interpretation of First Amendment free speech rights by the Supreme Court later in the century – cf. Holmes J. (1919d, 627-31); Holmes J. (1925, 672-73); Brandeis J. (1927, 374-77).

is complex. This is because republican values in France and the United States have, with some important exceptions, given rise to contrary legal and political outcomes on church/state matters. As we shall see, this is primarily due to the very different history and trajectory of the republican tradition within each of these polities. The result is a study in the way in which political traditions can have very different legal and political implications depending on history and context.

This article will begin with a brief national comparison of separation of church and state issues in the United States and France, demonstrating the basic contrasts between each. It will then discuss political traditions in general and contrast the liberal and republican traditions in this context. In the section "Contrary Traditions", it then describes how French republicanism has had an anti-clerical emphasis which is absent in the American republican tradition, and this, along with the respective influence of the liberal tradition, explains much of the contrast between the two countries on separation issues – though not all, as the Marilyn Manson case reveals. A series of liberal/republican conflicts centered on public schools is then discussed – the Pledge of Allegiance, School prayer and Marilyn Manson issues in the United States and the Headscarves Affair in France. Other salient church/state issues in the United States, such as evolution and intelligent design, are not discussed, as their instrumental purpose to republican concerns, centered on a unified citizenship, are less obvious. We see the U.S. Courts adopting a liberal position on most of these issues, in contrast to a republican hegemony in France, with the exception of the Marilyn Manson case which shows a deep parallel between the two countries. With this comparative focus, we perceive the deep parallels and contrasts between these two republics, each a product of revolution, and each seeking to negotiate fraught and contentious issues concerning church and state in the context of competing political traditions.

National Comparisons

This article compares the relative influence of the liberal and republican traditions in the United States and France by focusing on what appears to be a key similarity between them but which in fact reveals their fundamental differences. This is the insistence within both polities on a "separation" between church and state. In the United States, the term "separation" is actually used, and is primarily underpinned by the Establishment Clause of the First Amendment to the U.S. Constitution, as interpreted and enforced by the U.S. Courts. This Amendment also contains a "Free Exercise", "Free Speech", "Free Press, "Freedom of Assembly" and "Petition" clause. It reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances (Constitution of the United States, Amendment I).

In France, an official commitment to the separation of church and state arises form the ideal of *laïcité*, which roughly translates as "secularism".[5] The ideal of *laïcité* has a long history in France, first emerging among the radical republican elements of the French Revolution which saw the Church as a conservative institution at odds with the principles of the Revolution.[6] The ideal of *laïcité* is today embodied in French statute law.[7] It is also embodied in Article 1 of the French Constitution where, in the official English translation below, "laïque" is translated as "secular":

[5] It is true that this is how the term is translated in the French government's official English version of the French Constitution (see note 8 below). However as Mohammad Mazher Idriss explains, "…..there is no single definition behind the concept of laïcité because its meaning holds various interpretations amongst academic commentators, although in a very broad sense, the concept can be understood as symbolizing the non-religious nature of the state where the state neither recognizes nor subsidises a particular religion." (Idriss, 2005, 261).

[6] It was for this reason that the Constituent Assembly passed the "Civil Constitution of the Clergy" in 1790, seeking to subordinate the Church in France to revolutionary principles – cf. Cobban (1966, 173-74).

[7] See notes 24 and 25 below.

France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis.[8]

In order to demonstrate the very different manner in which this commitment to separation is played out within France and the United States, and the respective role of liberal and republican values within this, the article focuses on the point within the French and American public spheres where liberal and republican values are most likely to meet, and, in their respective demands on the citizen, conflict – the public school.

In the United States, this conflict was first made apparent in the middle of the twentieth century in the context of the Pledge of Allegiance and school prayer. In France it was most recently made manifest in an issue that first emerged in French public schools in 1989 but continued as a national issue until 2004 – the Headscarves Affair (*L'Affaire du foulard*). Each of these issues involved competing demands on the part of the liberal and republican traditions concerning the separation of church and state. As we shall see, the liberal tradition in the United States has generally championed this separation when the Establishment Clause of the First Amendment has been at stake, but not the Free Exercise Clause.[9] The republican tradition in the United States, on the other hand, has been much less vigorous in demanding a separation of church and state in Establishment Clause matters, though as we shall see, has on occasion done so in Free Exercise matters.[10] Indeed, republican arguments emanating from no less an

[8] "Constitution of October 4, 1958" (English translation), in *Assemblee Nationale*, at http://www.assemblee-nationale.fr/english/8ab.asp.
[9] See the section "Religious Symbols in U.S. Schools" below.
[10] See the section "Marilyn Manson" below, where the wearing of the t-shirt was clearly perceived by the dissenting judge as a "free speech" and "free exercise" matter. For an instance of U.S. republican arguments being used to support a rigorous separation on an Establishment Clause matter, see note 57 below.

august institution than the U.S. Supreme Court have most recently been used to argue for the *reversal* of such separation, insisting that the Establishment Clause allows for an official endorsement of monotheistic belief and monotheistic worship by the U.S. state.[11] Such a position would be almost unthinkable for republicans in France. Although current French President, Nicolas Sarkozy, made comments in 2007 suggesting that *laïcité* ought to be less rigorously applied in the French Republic than hitherto, we shall see that French republicans have been largely united, for more than a century, on the need to rigorously uphold *laïcité* when it comes to matters believed central to the Republic, and this rigour has been understood to require a thorough separation of church and state.[12] As we shall see, the reason for this profound difference between the republican tradition in the United States and France is its very different history within each polity. The one important exception to this difference, however, concerned the U.S. Court of Appeals ruling in 2000, upheld without comment by the U.S. Supreme Court, banning Marilyn Manson t-shirts in an Ohio public school.[13] In this instance, republican commitments in the United States played out in precisely the same manner, on precisely the same issues, and with precisely the same outcomes, as those involved in the Headscarves Affair in France. Unbeknownst to the rest of the world, and indeed to Americans themselves, therefore, the United States has had its very own "Headscarves Affair".

[11] Cf. 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).

[12] President Sarkozy's comments arose during his visit to the Vatican in December 2007 where he reportedly told Pope Benedict XVI: "It is in the interests of the Republic that there exist also a moral reflection inspired by religious convictions. First because secular morality ('morale laïque') always runs the risk of wearing itself out or changing into fanaticism when it isn't backed up by hope that aspires to the infinite. And then because morality stripped of any ties to transcendence is more exposed to historic contingencies and eventually to facileness." (Sarkozy 2008).

[13] For one other exception, see Frankfurter J. who uses republican arguments to justify a separation of church and state at note 55 below.

Political Traditions

Any comparison of the liberal and republican traditions assumes that the two can be distinguished as a discrete body of ideas and practices. Yet when it comes to political traditions, the boundaries defining them are often nebulous. As Jeremy Waldron has written:

> The terms 'socialism', 'conservatism', and 'liberalism' are like surnames and the theories, principles and parties that share one of these names often do not have much more in common with one another than the members of a widely extended family. If we examine the range of views that are classified under any one of these labels, we may find what Wittgenstein referred to in another context as 'a complicated network of similarities overlapping and criss-crossing…..sometimes overall similarities, sometimes similarities of detail'; but we are unlikely to find any set of doctrines or principles that are held in common by all of them, any single cluster of theoretical and practical propositions that might be regarded as the *core* or the *essence* of the ideology in question. (Waldron 1987, 127).

Consequently, although we shall see that it is always fairly clear what constitutes a "liberal" argument, republican arguments, with their appeals to the "people", the "nation", or even "tradition", overlap at times with either conservative or democratic discourse. Republicanism, conservatism and democracy, of course, are fundamentally different political traditions, and yet in contrast to liberalism, with its inherent *individualism*, all place emphasis on *collective* entities and ideals. Often, in the case of the "people" or the "nation", these ideals are the same in name, although very differently conceived. This needs to be kept in mind in the discussion that follows. So also must the fact that, in referring to the "republican" arguments of various individuals, particularly U.S. Supreme Court justices, I am not suggesting that these individuals are self-consciously republican in their commitments. Rather I am referring to the inherently "republican" nature of their

arguments – i.e. the fact that such arguments draw on ideas and concepts, and use them in ways, thoroughly characteristic of established republican discourse.

Liberalism versus Republicanism

As Waldron tells us above, political and intellectual traditions are broad entitles often encompassing as much dispute within their borders as without. Indeed Alasdair MacIntyre insists that such "dispute" is the sign of a "living" tradition:

> [W]hen a tradition is in good order it is always partially constituted by an argument about the goods the pursuit of which gives to that tradition its particular point and purpose….A living tradition then is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition (MacIntyre 1997, 222).

The liberal tradition is very broad, encompassing economic libertarians and others who have countenanced far lower levels of inequality and far greater levels of state involvement in society.[14] Nevertheless despite this breadth and diversity, and despite Jeremy Waldron's injunction against "cores" and "essences" above, the liberal tradition can be said to be characterized by an underlying commitment to individual liberty, defined more or less as freedom from interference by others, which it must balance against other competing concerns. As Joseph Raz tells us:

> The specific contribution of the liberal tradition to political morality has always been its insistence on the respect due to individual liberty (Raz 1988, 1-2).

Similarly, the republican tradition is broad and variegated. It is also much older than the liberal tradition. As Maurice Cranston tells us, "No one spoke of 'liberals' until after Waterloo…." (Cranston 1952, 619). But the republican tradition has

[14] For such libertarians, see note 21 below. On those liberals who insist on greater levels of equality, see John Rawls' discussion of his "difference principle" at Rawls (1980, 75-83).

multiple sources stretching back over two thousand five hundred years. It is Aristotle who is most often pointed to as first raising distinctly republican concerns – not least the identity and duty of citizens within the *polis*.[15] All "states", Aristotle tells us, are created to achieve a "supreme good", and it is the determination of that good, and the role of citizens in achieving it, that most concerns republicans (Aristotle 1979, Book I, I, 25). The "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.[16] Commitment to the public good, and loyalty to the republic (not least, its cohesion and order) are therefore supreme republican ideals. Although recent historiography has identified Aristotle, Cicero and the Renaissance ideals of the Italian city-states as the primary sources of American republicanism, it is the legacy of the French Revolution, and in particular, its prior intellectual sources in figures like Jean-Jacques Rousseau, which has been the primary influence upon French republicanism.[17]

The liberal and republican traditions are often at odds in terms of their respective conceptions of the individual, society, and the role of government over each. After all, republicans emphasise collective ideals centered on the duties of citizenship – goods individuals ought to perform for the sake of civic virtue.[18] Liberalism is also a civic doctrine. Its values and imperatives presume a civil context of established law, enforced by the state, within which these imperatives have normative force.[19]

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[15] 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, p. 102).

[16] As Gordon S. Wood states: "The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their revolution." (Wood 1969, 53).

[17] Cf. Hobsbawm (1990, 67-68). For the influence of Rousseau on the French Revolution, see Doyle (1989, 52-53, 276, 278, 376); Cobban (1973, 164-65).

[18] Cf. Wood (1969, 60-64). On "virtue", see Skinner (1993, 303).

[19] It is on the basis of this civil context that, from the very beginnings of the liberal tradition, "liberty" has been distinguished from "license" – cf. Locke (1963, II, § 6, 22 and 57).

It therefore cannot be entirely indifferent or opposed to republican concerns, centered on the maintenance and unity of civil society. But liberals have also perceived in such concerns a potential threat to individual liberty, raising collective demands which may impinge upon or destroy it.[20] This is evident in Milton Friedman's objection to some distinctly republican elements in John F. Kennedy's inauguration speech:

> In a much quoted passage in his inaugural address, President Kennedy said, 'Ask not what your country can do for you – ask what you can do for your country.' It is a striking sign of the temper of our times that the controversy about this passage centered on its origin and not on its content. Neither half of the statement expresses a relation between the citizen and his government that is worthy of the ideals of free men in a free society…..The free man will ask neither what his country can do for him nor what he can do for his country. He will ask rather 'What can I and my compatriots do through government' to help us discharge our individual responsibilities, to achieve our several goals and purposes, and above all, to protect our freedom?[21]

Needless to say, a liberal like Milton Friedman is every republican's anti-hero, and, in his denial of national purposes above and beyond individual interests, every recruitment officer's worst nightmare. Yet earlier liberals, like John Stuart Mill, were equally vigilant in perceiving collective demands (in Mill's case, for social conformity) as a threat to individual liberty (Mill 1971, 78-113). Republicans, on the other hand, have had few such concerns precisely because, unlike liberals, they do not perceive civil society or the state as an instrument to advance or protect individual interests, but rather as embodying a collective good in and of itself with which individuals should identify.[22] To this end they have even been willing, when necessary, not only to subordinate individual interests to

[20] This is the point Isaiah Berlin makes about liberalism and collective ideals in general – cf. Berlin (2008).
[21] Friedman (1962, pp. 1-2).
[22] As Quentin Skinner states, for classical republicans, "….a free state is one that is able to act according to its own will, in pursuit of its own chosen ends. It is a community, that is, in which the will of the citizens, the general will of the body politic, chooses and determines whatever ends are pursued by the community as a whole." (Skinner 1993, 301).

public duties of citizenship, but in normative terms, to replace the one with the other. It was the eighteenth century *philosophe*, Jean-Jacques Rousseau, who articulated this republican ideal in its most extreme form:

> Whoever ventures on the enterprise of setting up a people must be ready, shall we say, to change human nature, to transform each individual, who by himself is entirely complete and solitary, into a part of a much greater whole, from which that same individual will then receive, in a sense, his life and his being. The founder of nations must weaken the structure of man in order to fortify it, to replace the physical and independent existence we have all received from nature with a moral and communal existence.[23]

In this respect, liberals and republicans, given their competing commitments, often find themselves at odds. Liberals, with their commitment to individual liberty and their conception of civil society and the state as instrumental to this purpose, are unwilling to go as far as republicans in displacing individual interest with public duties for the sake of the collective good. It is in that cradle of impressionable young minds, the public school, that this conflict between these competing political traditions is most likely to arise.

Contrary Traditions

What France and the United States share, of course, is revolution. And like all revolutionary societies, the founding act of establishing a new political regime required new citizenship identities capable of generating cohesion and loyalty between individuals (Anderson 1990, 12). Yet despite this similarity, there are also significant differences between the French and American republican traditions. This can be seen most clearly in terms of their respective stances regarding the separation of church and state.

[23] Rousseau (1970), Bk. II, ch. 7, pp. 84-85.

From the time of the Revolution onwards, the French Catholic Church was seen by republicans as a potential source of reaction, allied to the old regime, and so from the "Civil Constitution of the Clergy" in 1790, to the moves to institutionalize the separation of church and state during the Third Republic (1870-1940), French Republicans have always maintained a commitment to *laïcité*:

> A doctrinaire rationalism and laicism, forced into becoming a creed as absolute and as intransigent as its opponent, has therefore remained throughout the Third Republic a persistent feature of the French 'national vision' (Thomson 1989, 128).

Laïcité was officially embodied in a law, passed by the *Chambre des députés* on December 9, 1905, which, in its official title, "*concernant la separation des Églises et de l'État.*"[24] Article 1 provided for freedom of conscience ("la liberté de conscience") and free exercise of religions ("le libre exercice des cultes"). Article 2 insisted that the Republic does not recognize or subsidize any religion or form of worship ("La République ne reconnaït, ne salarie ni ne subventionne aucun culte").[25] As we have seen, the same ideal found its way into the French Constitution inaugurating the Fifth Republic in 1958, which remains the Constitution of France to this day.

Yet for many republicans, when it comes to *laïcité*, the strains of Voltaire's *écrasez l'infâme* ("crush the infamous thing") are mixed with the rousing tones of the *Marseillaise*, with the result that an element of anti-clericalism informs their commitments. Alfred Cobban points to how this was evident during the French Revolution itself: "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). It was precisely because the Church was viewed in

[24] "Loi du 9 décembre 1905 concernant la separation des Eglises et de l'Etat", at *Legifrance. Le Service Public De La Diffusion du Droit*, at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070169&dateTexte=20110316.
[25] *Ibid.*

political terms, as allied to the old regime, and therefore hostile to republicanism, that anti-clericalism has often accompanied the French republican commitment to *laïcité*. Alexis de Tocqueville made this point over one hundred and seventy years ago:

> Unbelievers in Europe attack Christians more as political than as religious enemies; they hate the faith as the opinion of a party much more than as a mistaken belief, and they reject the clergy less because they are the representatives of God than because they are the friends of authority (Tocqueville 1994, 300-01).

We need to keep these historical facts in mind if we are to understand why a local high school incident in Northern France in 1989, involving three young Muslim schoolgirls wearing headscarves ("hijabs"), turned into a national *cause célèbre* that lasted fifteen years, eventually involving national parliamentary intervention. The school is the crucible of citizenship for many republicans, and any religious influences within it are strongly suspected of diluting those public loyalties. 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).

Republicanism in the United States, on the other hand, is imbued with no such anti-clerical element. The overt enemies of the American Republic were the British Government of George III and its local loyalists, not the clergy. Indeed, whenever the Supreme Court has gone about enforcing a separation of church and state under the auspices of the Establishment Clause, it has insisted that it does so in deference to the "exalted" place of religion within American life, not in any hostility to it, and in defence of its integrity against the intrusion of government:

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard (Clark J., 1963, 226. Cf. *ibid*, at 212-13, 222; Frankfurter J., 1948, 215-17; Black J., 1948, 211-12; Douglas J., 1952, 313; Black J., 1962, 431-32).

Certainly the earliest expressions of what we today understand as liberalism exhibited a similar concern with the sanctity of religion, and the right of each individual to freedom of conscience regarding such matters.[26] But as Justice Black explained, the religious clauses that eventually found their way into the First Amendment had their origin not so much in a self-conscious liberalism as in genuine fears, on the part of many American colonists, that the state impingement on religious liberty that they or their predecessors had experienced in Britain and in many of the American colonies would be emulated by the new federal government (Black J. 1947, 8-13; Black J. 1962, 425-30). Certainly there exists an intimate connection between these religious concerns and what we today understand as liberalism – in that both are concerned with religious liberty – but they are not the same. One is concerned with religious liberty for pious reasons, centered on the worship of God, and the other for the sake of individual rights and the limits on government that they impose. Republicans in the United States have also been very interested in religion, but not for the sake of individual liberty. Rather, as we shall see, their commitment to religion has arisen from its collective place in the lives of the "people".[27]

[26] On reason John Locke insisted individuals ought to enjoy freedom of conscience, rather than having their faith dictated by others, is that in the latter case, their salvation is in the hands of another, yet we can never be sure that this other knows the "one truth, one way to heaven" (Locke, 1993, 396).
[27] See note 34.

Flags, Pledges and Schools

Needless to say, republicans do not believe that the civic virtue and sense of public obligation they hold so dear arises naturally within the breast of each individual. On the contrary, such values must be inculcated, and it is in education, and in particular the education of the young, that republicans perceive their genesis. As Arthur M. Schlesinger states:

> The schools and colleges of the republic train the citizens of the future. Our public schools in particular have been the great instrument of assimilation and the great means of forming an American identity. What students are taught in schools affects the way they will thereafter see and treat other Americans, the way they will thereafter conceive the purposes of the republic (Schlesinger 1992, 17).[28]

Equally, Justice Frankfurter of the U.S. Supreme Court has stated:

> 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).

In France, the teaching of the history of the French Revolution, the very origin of the French Republic, along with other republican ideals, has been an important source for inculcating among school students a sense of this "common destiny" that Frankfurter J. refers to (cf. Thomson 1989, 143-47). In the United States, this process has been undertaken by daily school ceremonies such as the Pledge of Allegiance:

[28] Of course, Schlesinger is more usually perceived as part of a broad American liberal tradition, but clearly this does not preclude republican sympathies when it comes to the moulding of future U.S. citizens in public schools.

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands: one Nation under God, indivisible, with Liberty and Justice for all.[29]

It was an earlier version of this pledge which, in 1940, produced one of the first significant confrontations between liberal and republican values within the American school system. Two children of Jehovah Witnesses sought exemption from this ceremony on the grounds 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", God insisting that "Thou shalt have no other gods before me" (Frankfurter J. 1940, 592). In particular, they sought exemption under that part of the First Amendment that guarantees the "free exercise" of religion. 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, the collective ideals of national unity and common citizenship. As he 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? (*ibid*, 593).

Although 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", nevertheless he insisted that in this case the Court was not dealing with minor exemptions from minor public purposes. (*ibid*, 594, 596). Rather, in such school ceremonies designed to promote national loyalty

[29] The phrase, "under God", was inserted by presidential order of Dwight D. Eisenhower, on June 14, 1954, insisting that "In this way we are reaffirming the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource in peace and war." (http://atheism.about.com/od/churchstatemyths/a/pledgeandgod_2.htm). See note 32 below on the constitutional status of the "under God" phrase.

and cohesion, it was dealing with "the ultimate foundation of a free society", one "without which religious toleration itself is unattainable" (*ibid*, 596, 595. Cf. *ibid*, 600). As he put it:

> The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. '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…..The precise issue, then, for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious (*ibid*, 596, 598).

In other words, Frankfurter J. was insisting that the liberties associated with the liberal tradition were not possible without the prior civic unity, and the public practices which advance this unity, so important to republicans (cf. *ibid*, 600). He therefore gave priority to the latter over the individual consciences of the Jehovah Witness children, demanding that they participate in the Pledge. The Court, with only one dissent, agreed (cf. Stone J. 1940, 601).

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 (Jackson J. 1943, 633-34, 641-42). Indeed, it presented the very purpose of the Constitution, and the Courts, as

upholding the protection of such individual liberties from these collectivist demands:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us (*ibid*, 641-42).

School Prayer

The two school prayer cases that came before the Supreme Court two decades after the flag cases involved very much the same conflict between liberal and republican imperatives.[30] As with the Pledge of Allegiance, a minority of students claimed conscientious objection to a public school activity – in this case, school prayer. Although school prayer did not have quite the same patriotic connotations as the Pledge of Allegiance, and unlike the Pledge of Allegiance was not compulsory, nevertheless it was a collective activity designed by the state to instill core values within an otherwise highly diverse student body, and so fell within the broad imperatives of the republican tradition.[31] And yet despite this similarity, an interesting difference arose between the two cases. Although the Court, in considering school prayer, followed the second flag case in upholding the rights of individual conscience in the face of collective imperatives, nevertheless the solution they arrived at was not simply individual exemption from a prescribed school activity, as in the flag case, but the abolition of school prayer altogether. As Justice Black put it in *Engel v. Vitale*, delivering the opinion of the Court:

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[30] Cf. *Engel v. Vitale* 370 U.S. 421 (1962); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

[31] So for instance, the school prayer adopted by the Board of Education of Union Free School District No. 9 in New York (the subject of the first school prayer case) was intended to fulfill state purposes, it being prescribed by a state government body, the State Board of Regents, who had recommended and published the prayer as part of their *Statement on Moral and Spiritual Training in Schools* (cf. Black J. 1962, 422-23). On it not being compulsory, see Stewart J. (1962, 445).

It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance. (Black J. 1962, 435. Cf. *ibid*, 425).

The reason for this difference concerns the privileged place of "religion" within the First Amendment. Whereas the First Amendment might be said to uphold the liberty of individual conscience in its Free Speech and Free Exercise clauses, thereby allowing the Court to endorse individual exemptions to established state practices, its injunction that "Congress shall make no law respecting an establishment of religion" does away with exemptions and, according to a majority of the Court in the prayer cases, upholds a complete prohibition on the state's endorsement of religion. Thus whereas there is no constitutional injunction against government imposing a Pledge of Allegiance on all willing students[32], the Establishment Clause (as interpreted by a majority of the Supreme Court) does impose a total prohibition on state-endorsed religious activities such as public school prayer (cf. *ibid*, 424; Clark J. 1963, 205).[33]

Consequently, in contrast to the Pledge of Allegiance, any attempt to use school prayer to inculcate collective values and commitments was completely scuttled by the Supreme Court in the early 1960s – a point not lost on its republican critics:

The Court's decisions in *Engel v Vitale* and *Abington Township v Schempp*, which declared unconstitutional state-conducted recitation of prayers and devotional Bible reading, overturned a

[32] In 2002, the Ninth Circuit Court of Appeals ruled the phrase "under God" unconstitutional, causing much public fury and resulting in the U.S. Senate voting 99-0 and the U.S. House of Representatives 416-3 (with 11 abstentions) to reaffirm the Pledge (Gunn 2004, 19-20). In 2010 the Ninth Circuit Court of Appeals, in a 2-1 ruling, overturned this decision on the grounds that, since the Pledge (since the 1943 flag case discussed above) is voluntary, the content of the pledge does not undermine any individual's constitutional rights (cf. Williams 2010).

[33] For dissents from this point of view, both at the time and more recently, see Stewart J. and Rehnquist CJ. at notes 38 and 39.

deeply entrenched custom. The rulings provoked a massive public outcry and have met with steady resistance since their announcement…..There is ample evidence that many base their support for prayer laws on the belief that America is a Christian nation and that organized prayer furthers the asserted educational goals of instilling the nation's traditional values in children and forestalling atheism.[34]

Separation and Neutrality

It was not only the doctrine affirming a separation of church and state, underwritten by the Establishment Clause, that the Supreme Court relied on to abolish school prayer (Black 1962, 431-33; Clark 1963, 217, 219-20). It also relied on what has come to be known as the "neutrality" doctrine (cf. Douglas J. 1962, 443; Clark J. 1963, 215, 222, 225, 226). The two doctrines were perceived by the Court as mutually reinforcing (cf. Clark J. 1963, 215-22). The neutrality doctrine was first espoused by the Court in *Everson v Board of Education* in 1947. As Justice Black put it, 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.[35]

As we shall see later in the paper, a significant point here regards Black J.'s insistence that the neutrality of the state applies not only between believers but also between believers and non-believers. Without the latter qualification, the state could be "neutral" to religion by favouring all religions equally.[36] By insisting that

[34] Harvard Law Review (1987, 1660-61).
[35] Black J. (1947, 18).
[36] Indeed Justice Rehnquist (as he then was) argued that this was precisely the Founder's intention, they being "….definitely not concerned about whether the Government might aid all religions evenhandedly", just so long as it did not establish a "national church" or engage in the "preference of one religious sect over another." (Rehnquist 1985, 99). Clark J., delivering the opinion of the Court, explicitly rejected such a position (Clark 1963, 216-17).

it must also be neutral towards non-believers, the neutrality doctrine insists that the state must stay out of the realm of religious endorsement altogether.

The separation doctrine is much older than the neutrality doctrine. Whereas the neutrality doctrine has its origins in *Everson*, the separation doctrine was first affirmed by the Supreme Court, as an appropriate interpretation of the Establishment Clause, in 1878.[37]

But even at the time of the prayer cases, there were those who questioned the application of these doctrines. Justice Stewart, dissenting in the second prayer case, argued that to remove religion, and religion alone, from the public sphere, in the name of "separation", while leaving all non-religious or secular features of that sphere intact, was not to display "neutrality" towards religion, but rather partiality towards its opposite:

> [A] compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.[38]

[37] Waite CJ. (1878, 164). Dissenting justices have, at times, questioned the "constitutionality" of the phrase "separation of church and state" given that it originally arose from extra-judicial sources in the form of a letter President Thomas Jefferson wrote to the Danbury (Conn.) Baptist Association on January 1, 1802 (cf. Stewart J. 1963, 313; Rehnquist J. 1985, 91-92, 106-07). Advocates of the separation doctrine have generally viewed its enforcement as requiring some rigor. For instance, Justice Black states: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." (Black J. 1947, 18; cf. *ibid*, 15-16; Black J. 1948, 212; Frankfurter J. 1948, 231-32).

[38] Stewart J. (1963, 314). For the Court's response to Stewart J., see Clark (1963, 225). For a more recent view that school prayer is constitutional, see Rehnquist (1985, 113-14).

Justice Stewart is not questioning the validity of the neutrality doctrine in this instance, just what presences or absences within the public sphere are consistent with its maintenance.[39] However, more recent Supreme Court jurisprudence, drawing on republican rather than liberal values, seeks to deny the validity of the neutrality doctrine altogether, in its insistence that the state is entitled to endorse a minimum conception of monotheistic belief, even if this means an absence of neutrality towards non-believers.[40]

French Headscarves

We have seen above that, in the United States, separation of church and state has been advanced as a means of ensuring individual religious liberty, and if not always arising from liberal motives, has nevertheless been entirely consistent with the liberal tradition. In France, on the other hand, separation has been championed by the republican tradition. We also saw that the public school has been seen by republicans in both the United States and France as the crucible of citizenship, where wider obligations, commitments and loyalties are forged. All of these issues came together in the Headscarves Affair in France.

L'Affaire du foulard arose in September 1989, "….shortly after France had celebrated the bicentenary of the Revolution" (Idriss 2005, 271). 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 furore and right-wing politicians expressed worries that 'Islamic fundamentalism' had spread to the heart of the country" (*ibid*). As Cécile

[39] "What these cases compel….is an analysis of just what the 'neutrality' is which is required by the interplay of the Establishment and Free Exercise Clauses of the First Amendment…." (Stewart J. 1963, 313; cf. *ibid*, 317). He did, however, question the validity of the separation doctrine - see note 38.

[40] Cf. Rehnquist J. (1985, 98-100, 101-106); Rehnquist (2005, 684-85); Scalia J. (1987, 635-40); Scalia J. (1992, 631, 633, 644, 645); Scalia J. (2005, 887, 889-94, 897, 899-900, 910); Kennedy J. (1989, 655-56, 657, 662-63, 670. 672, 674). ; Scalia J. (1992, 631, 633).

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 school sought legal advice from the French Education Minister, who in turn sought it from France's highest administrative court, the *Conseil d'Etat*.

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 is or is not compatible with the principle of *laïcité* (cf. Conseil d'Etat, 1989). It handed down its ruling on November 27, 1989, declaring that such practice was compatible with *laïcité*, so long as it was consistent with respect for the pluralism and freedom of other students and did not impinge on the educational functions of the school.[41] It insisted such rights of religious expression could be limited by broader functions of the school, such as those 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.[42] Further, such "signs" would 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

[41] "La liberté ainsi reconnue aux élèves comporte pour eux 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'Etat, 1989).

[42] "Son exercice peut -être limité, dans la mesure où il ferait obstacle à l'accomplissement des missions dévolues par le législateur au service public de l'éducation, lequel doit notamment, outre permettre l'acquisition par l'enfant d'une culture et sa préparation à la vie professionnelle et à ses responsabilités d'homme et de citoyen, contribuer au développement de sa personnalité, lui inculquer le respect de l'individu, de ses origines et de ses différences, garantir et favoriser l'égalité entre les hommes et les femmes." (*ibid*).

community.[43] 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.[44] The Court justified the wearing of such "signs" by students within schools on the grounds that it was consistent with the exercise of freedom of expression and religious belief ("l'exercice de la liberté d'expression et de manifestation de croyances religieuses") and with the French Constitution, the laws of the Republic, and France's international commitments which prohibit any discrimination in access to education on the basis of religious beliefs.[45] The *Conseil d'Etat* reaffirmed this ruling in 1992 (Conseil d'Etat, 1992).

In the wake of the *Conseil d'Etat* ruling, political agitation around the headscarf issue continued to grow. Many republicans saw the presence of such overt religious symbols in public schools as contrary to the long tradition of secular education in France, underpinned by the principle of *laïcité*; some feminists saw young Muslim schoolgirls perhaps forced to adopt a religious identity at odds with their own, due to pressure of family and community; sections of popular opinion saw the threat of Muslim identity to a common French cultural identity (cf. Laborde 2005, 306; Baker 2006-08, 343). All these groups were therefore keen to see a ban on headscarves in schools, even if at the expense of the religious conscience of Muslim schoolgirls. It was French politicians, however, galvanized by the controversy, who came down on the side of proscription. On September 29, 1994, the French Education Minister, François Bayrou, issued a "Circulaire", subtitled "La reaffirmation de l'idéal laïque", and published in the *Bulletin officiel de l'Éducation nationale,* where he advanced distinctly republican arguments to justify a ban on "ostentatious" religious symbols in public schools. He pointed out,

[43] "….ou par leur caractère ostentatoire ou revendicatif, constitueraient un acte de pression, de provocation, de prosélytisme ou de propagande, porteraient atteinte à la dignité ou à la liberté de l'élève ou d'autres membres de la communauté educative…." (*ibid*).
[44] Cf. *ibid*.
[45] "Il interdit conformément aux principes rappelés par les mêmes textes et les engagements internationaux de la France toute discrimination dans l'accès à l'enseignement qui serait fondée sur les convictions ou croyances religieuses des élèves." (*ibid*).

in impeccable republican fashion, that France is more than simply an "ensemble" of citizens possessing individual rights – it is united in a deeper sense as "one community of destiny".[46] He stated that although this was consistent with the French Republic respecting a diversity of religious beliefs and practices, it did not allow this expression to produce a process of separatism whereby communities coexisted without any underlying unity or common commitments.[47]

We hear here the echoes of the Rousseauian ideal that a common national citizenship requires a common national identity, and that only this can underwrite a united French nation.[48] The Minister then pointed out that schools are the place where the integration necessary for such unity is achieved. In schools, above all, are highly diverse individuals moulded into French citizens, with mutual obligations and commitments.[49] He pointed out that *laïcité* is foundational to this process.[50] On this basis, he concluded that the presence within the school of "signs and behaviours" indicating an inability to affirm these common obligations and commitments undermines this "mission".[51] He declared that the wearing of "ostentatious signs" of religion is an example of this, since it separates students

[46] "La nation 'n'est pas seulement un ensemble de citoyens détenteurs de droits individuals. Elle est une communauté de destin." (Bayrou 1994).
[47] "En France, le projet nationale et le projet républicain se 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, engages dans une simple coexistence." (*ibid*).
[48] See Rousseau at note 23 above. Such judgments fall within the assimilationist tradition of French national identity. As Rogers Brubaker explains: "[W]hile French nationhood is constituted by political unity, it is centrally expressed in the striving for cultural unity." (Brubaker 1992, 1).
[49] "Cet ideal se construit d'abord à l'école. 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." (Bayrou 1994).
[50] "Cet idéal laïque et national est la substance même de l'école de la République et le fondement du devoir d'éducation civique qui est le sien." (*ibid*).
[51] "La présence, dans cette école, de signes et de comportements qui montreraient qu'ils ne pourraient pas se conformer aux mêmes obligations, ni recevoir les mêmes cours et suivre les memes programmes, serait une negation de cette mission." (*ibid*).

from the "common life" of the school.[52] Further, he insisted that the wearing of such "signs" amounts to proselytism, particularly if accompanied by a questioning of accepted school practices, and so endangered the freedom of religious conscience of other schoolchildren and the "common life" of the school.[53]

Thus we see the extent to which the Minister's "Circulaire" moves in a very different direction to the ruling of the *Conseil d'Etat.* The *Conseil* had also declared that the wearing of "ostentatious" or "provocative" signs of religion was contrary to *laïcité*, but it did not rule that Muslim headscarves were an instance of this. Rather, it advanced *prime facie* rights of religious expression when it came to such symbols, consistent with the freedom of other students, the wider obligations of future citizenship, and the educational mission of the school. But the Minister's "Circulaire" was widely read in France as including headscarves among such "ostentatious" signs (Idriss 274). The Circulaire's justification of the removal of headscarves from public schools therefore prioritized republican purposes over liberal ones, insisting that freedom of religious expression, in this instance, threatened the "mission" of French schools to instill among schoolchildren a sense that they belonged to one "community of destiny".[54] The Minister therefore drew on very much the same republican assumptions concerning national unity as Justice Frankfurter some forty-five years earlier when he also sought to remove the presence of religious practices (voluntary scripture classes) from public schools:

> Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from

[52] "C'est pourquoi il n'est pas possible d'accepter à l'école la presence et la multiplication de signes si ostentatoires que leur signification est précisément de séparer certains élèves des règles de vie communes de l'école." (*ibid*).
[53] "Ces signes sont, en eux mêmes, des éléments de prosélytisme, a plus forte raison lorsqu'ils s'accompagnent de remise en cause de certains cours ou de certaines disciplines, qu'ils mettent en jeu la sécurité des élèves ou qu'ils entrainent des perturbations dans la vie en commun de l'établissement." (*ibid*).
[54] See note 46 above.

entanglement in the strife of sects….The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. 'The great American principle of eternal separation'…..is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.[55]

In the wake of Minister Bayrou's "Circulaire", the Headscarves Affair continued to escalate for almost a decade. 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 (*ibid*, 7, 16-17). In February 2004, the *Assemblée Nationale* voted 494-36 in favour of a law prohibiting public school students wearing religious clothing and signs that "conspicuously show" a religious affiliation (Cosgrove-Mather, 2004). This was approved by 276-20 the following March in the *Sénat* (*ibid*). Prime Minister Raffarin said the law was necessary "….to contain the spread of Muslim fundamentalism and ensure that the principle of secularism on which France is based remains intact" (*ibid*).

Religious Symbols in U.S. Schools

The predominant legal position in the United States, when it comes to schoolchildren wearing religious symbols in public schools, has been far more akin to the *Conseil d'Etat's* decision than any subsequent position adopted by the

[55] Frankfurter J. (1948, 216-17, 231). Frankfurter J.'s republican argument for removing religion from public schools is contrasted to those who advanced republican arguments to retain it (see note 34 above) – each side insisting that their respective outcome was necessary for citizenship formation.

French government or parliament. In other words, U.S. legal practice in this area has prioritized liberal concerns with freedom of religious expression over republican concerns with citizenship formation or national unity. For instance, although the Supreme Court, in its Establishment Clause jurisprudence, has banned state endorsement of religion in public schools, the same is not the case when individual students seek to engage in their *own* freedom of religious expression within school grounds. So long as there is no suggestion of state endorsement of such practices, with all the threats this might pose to the freedom of conscience of others, both the state and the Courts in the United States have been inclined to see this as a Free Exercise matter, and so allow for the presence of religious expression within school grounds.[56]

In this respect, the First Amendment's Free Exercise and Establishment Clauses can give rise to opposite outcomes when it comes to separation of church and state. Far from mandating separation, the Free Exercise Clause can at times demand quite the opposite. The one U.S. Court case arising from a headscarf issue illustrates precisely this. It involved a sixth grade Muslim girl, Nashala Hearn, suspended by school authorities from the Benjamin Franklin Science Academy, in Muskogee, Oklahoma, on September 11, 2003, for refusing to remove a headscarf, on the grounds that it violated the school district "dress code" prohibiting head coverings (a rule designed to curb gang-related activity in schools) as well as the fact that some other school children were reputedly "frightened" by it (Associated Press, 2004a; Associated Press, 2004b). The U.S. Justice Department joined the lawsuit, on the girl's side, in March 2004, claiming that her "free exercise" rights had been violated, and this resulted in a settlement in which the school paid the girl an "undisclosed sum" in damages and changed its dress code to allow students to apply to the local school board if they wish to wear items of clothing for

[56] Cf. Stevens J.(2000, 313). See also the rulings by successive U.S. presidential administrations allowing for voluntary school prayer in schools – Clinton (1995); U.S. Department of Education (1998); U.S. Department of Education (2003).

religious reasons (*ibid*). This upholding of individual "free exercise" rights is, as we have seen, entirely consistent with the liberal tradition, but quite contrary to the blanket state ban on all such Muslim headscarves in French public schools. The one significant exception to this liberal "free exercise" ascendancy in U.S. public schools, and therefore to this contrast with France, concerned a Marilyn Manson t-shirt.

Marilyn Manson

We have seen that, in a legal and political sense, public schools are exceptional civil institutions. In the United States, the Courts have been far more insistent on banning state-endorsed prayer when it occurs in public schools than when it occurs, for instance, in 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.[57] In this respect, the Establishment Clause has been interpreted far more rigorously when it comes to schools than elsewhere – the Supreme Court even banning public prayer at High School graduation ceremonies and High School football games.[58]

Yet this "school exceptionalism" is also exhibited in the reverse direction, where far from students enjoying wider First Amendment rights than elsewhere, the peculiar circumstances of schools have allowed the Courts to apply the First Amendment much more narrowly than would be the case in non-school contexts, often for republican purposes of citizenship formation. This is particularly the case

[57] See Rehnquist CJ. (2005, 690-91) on how the Supreme Court is much more rigorous in enforcing the Establishment Clause in schools than elsewhere. See also Stewart J. (1963, 316). On the 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).

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

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 Vietnam, so long as the protest did not "materially disrupt classwork or involve substantial disorder or invasion of the rights of others…."[59] But the Courts have been far less forthcoming in other free speech contexts in public schools.

It is when speech is considered by the Courts to be distinctly non-political or non-religious in its content that Courts have been most willing to suppress it in schools. 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, and deny 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.[60] 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 free speech rights, even though the Court affirmed they would apply to such metaphors when used by adults outside school grounds.[61] Instead, it sided with the School Board's right to determine "what manner of speech is inappropriate" in schools – all as part of the school's institutional mandate to

[59] Fortas J. (1969, 506, 513).
[60] Robert CJ. (2007, 397, 409-10). 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." (*ibid*, at 403).
[61] *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), at 676.

uphold discipline and order, and fulfill its educational mission of instilling certain values among students.[62]

Yet for our purposes, the most interesting free speech case to emerge in schools is one involving "shock rock" artist, Marilyn Manson, because it is in the divided opinion of the Court that we can perceive, once again, the pre-eminent conflict between liberal and republican values when it comes to public schools. The case 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 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 "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" (*ibid*). 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 and being considered truant. Boroff left school" (*ibid*). 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. His Mother filed suit on his behalf declaring his First Amendment rights 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 subsequently affirmed the Court of Appeals decision without comment (ABC News, 2001).

[62] As the Court put it: "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." (*ibid*).

It is in the U.S. Court of Appeals ruling that we witness a direct conflict between a liberal and republican agenda, regarding public schools, with interesting parallels to the Headscarves Affair in France. Judge Wellford, delivering the majority opinion, began by affirming the opinion of the Supreme Court in *Bethel* that "[i]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse".[63] The Judge declared that if the Manson t-shirts had had a political or religious content, then, in line with *Tinker*, the school would have had to prove "substantial disorder" to school activities before they could be constitutionally entitled to prohibit them.[64] But he insisted that "[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." (Wellford 2000, 470). He therefore affirmed the right of the school 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.[65]

Although the "educational mission of the school" could be justified on a number of grounds besides a republican one, its priority in this instance is consistent with a republican agenda. Indeed, the Principal of the school, in his affidavit, explicitly linked this educational mission to republican values, not least the formation of an upright citizenry. Referring to Manson's song lyrics in *Antichrist Superstar* -

[63] See note 62 above. Cf. Wellford (2000, 468); *ibid*, 469.
[64] On *Tinker*, see note 59 above. Cf. Wellford (2000, 470-71).
[65] Wellford (2000, 471, 470).

"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 as follows:

> 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' (*ibid*, 470).

It is extraordinary that the Court could assume that, despite the Principal's invocation of such highly evaluative principles, he banned the t-shirts on the grounds of their "offensiveness" alone.[66] Surely it was because the t-shirts expressed a message which was at odds with these principles that the Principal found them "offensive"? In which case, the "offensiveness" arose not on any intrinsic grounds, pertaining to some "vulgarity" inherent to the t-shirts themselves, but because they expressed values at odds with those endorsed by the principal. This is a point resoundingly made by Judge Gilman in dissent. He acknowledges that if only expletives and other "vulgar" words were at issue, he too would have found the t-shirts "offensive" and sided with *Bethel* 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 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

[66] See note 65 above.

not permitted in the absence of a reasonable prediction by school officials of substantial disruption of, or material interference with, school activities (*ibid*, 472, 474; cf. *ibid*, 473).

Indeed, as evidence that it was the religious message of one of the t-shirts which was considered obnoxious, the Judge quotes the Principal in his affidavit as follows:

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, 472).

One of the fundamental features of the "neutrality" doctrine that has grown around the Establishment Clause ever since *Everson v. Board of Education* is that the state must be neutral, not only between religions, but also, as we have seen, between religion and non-religion, and even religion and its "militant opposite".[67] Further, we have seen that the Free Exercise Clause has been interpreted by both the U.S. government and the U.S. Courts as allowing for religious expression, including the display of religious symbols, within school grounds so long as this does not impinge on the freedoms of other students or the broad operations of the school.[68] Both of these principles seem to have been flouted by the Court of Appeals' majority ruling in this case. The Principal could certainly argue, and did argue, that permitting the Manson t-shirts displayed values at odds with those advanced by the educational mission of the school, but a majority of the Court, in refusing to acknowledge the political or religious content of the t-shirts, allowed the principal to suppress such speech without any need to prove the "substantial disorder" to school activities required by *Tinker*. As such, liberal principles were not even

[67] Cf. Fortas J (1968, 104). See also note 35 above.
[68] See note 56 above.

weighed against republican ones, and the latter were upheld because mere "offensiveness" alone was deemed to be their only counterveiling value.

The issue of "offensiveness" did not arise in the French case, all sides acknowledging that Muslim headscarves (in contrast to Manson t-shirts) were a religious symbol and so the religious freedoms of Muslim schoolgirls were at stake. Nevertheless, in all other respects, the Marilyn Manson t-shirts were treated by the school authorities, the Court of Appeals and the Supreme Court in a manner entirely analogous to Muslim headscarves in France. In each case, these items of clothing were considered fundamental threats to the process of citizen formation with which public schools, as part of their educational mission, are charged, and were therefore thoroughly opposed by those imbued with republican commitments for this reason. In affirming these commitments at the expense of any liberal agenda of freedom of conscience or expression, both the Courts in the U.S. and the government and legislature in France ensured that the republican agenda won out. The result was a thorough separation of church and state on republican grounds, and at the expense of liberalism, as students, in removing either their headscarves or Manson t-shirts, were required to leave their religious conscience at the school gate.

Conclusion

Martha Nussbaum insists that central to American political tradition/s is the belief that liberty of conscience must be *equal* liberty for each individual.[69] Yet this is a distinctly *liberal* point of view. Both the French Headscarves case in France, and the Marilyn Manson case in the United States show that republican commitments involve very different priorities, where republican demands can impact unequally

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

on individuals. This was also evident in the first U.S. flag case judgment delivered by the Supreme Court, prior to its reassertion of liberal priorities in the second flag case in 1943. In each case, we see that liberalism and republicanism, as political traditions, conflict at a number of levels. This is particularly the case in regard to public schools, where liberals and republicans see so much at stake, either in terms of fragile individual consciences or future patriotic citizens.

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