Under God but Not the Scarf: The Founding Myths of Religious Freedom in the United States and *Laïcité* in France

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In March 2004, the French parliament adopted a law that prohibits public school students from wearing clothing and insignia that "conspicuously manifest a religious affiliation." The law was approved by an overwhelming vote of 494-36 in the National Assembly, 276-20 in the Senate, and was strongly supported by popular opinion throughout France. The momentum for adopting such a law began in March 2003, when Prime Minister Jean-Pierre Raffarin of the governing conservative party UMP (*Union pour un Mouvement Populaire*) said in a radio interview that Muslim headscarves should "absolutely" be prohibited in public schools. A string of endorsements for such a law followed during the next few months, culminating in a December 2003 speech by President Jacques Chirac, also of the UMP, in which he similarly proposed that a law be adopted. Although the highest French administrative court (the *Conseil d'État*) had ruled as early as 1989 that French children have the constitutional right to wear religious insignia to school, and although many scholars of religion and law believed the law would be a bad idea, the Socialist Party joined arms with the conservatives in the cause that had the support of a majority of the French population.

For many Americans, the French effort to prohibit children from wearing religious clothing and insignia at schools may well exemplify their suspicions about prevailing anti-religious attitudes in France. The most recent attack on religious clothing, particularly the Islamic headscarf, might appear to be yet another manifestation of the excessive

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French dislike for religiosity, which has been particularly visible during the last ten years with the government's publicly-financed campaign against "cults," which sometimes targeted completely innocent groups.

Such negative perceptions may further be exacerbated by lingering memories of the policies of the French government in the months leading up to the invasion of Iraq, which were often seen as anti-American. Of course there also were voices of reason and self-critical reflection on both sides of the Atlantic. When the diplomatic tensions between the two countries were at their worst in 2003, the prestigious newspaper *Le Monde* published an editorial that said, in essence, "we French should acknowledge that one reason we seem to dislike Americans is that they behave at the United Nations in the same way that we behave in the European Union." In a similar vein, Winston Churchill is sometimes quoted (perhaps apocryphally) as having observed that "the United States and England are two nations divided by a common language." This essay will suggest that, in their attitudes toward the relationship between religion and the state, France and the United States are in fact "two nations divided by a common similarity."

France and the United States have some obvious underlying similarities. Their respective constitutions include the world's two oldest human rights texts that are currently in force: the French Declaration of the Rights of Man and Citizen and the American Bill of Rights. They were drafted within a few weeks of each other in the latter part of 1789. While the French may claim chronological priority in both drafting and implementation (the Bill of Rights was not ratified until 1791), Americans may claim greater continuity. The French Declaration has not had an uninterrupted tenure in the volatile world of French politics and constitutions. Nevertheless, the human rights assumptions underlying these two documents are now the recognized (if not always respected) norm in virtually every written constitution in the world as well as in all of the basic international human rights instruments.

With regard to freedom of conscience and religion, however, the two countries certainly have different linguistic starting points. Whereas in the United States the guiding principle is "religious freedom," the French use *"laïcité."* Although *"laïcité"* is often translated as "secular" or "secularism," the English words do not evoke the important connotations of the French. *"Laïcité,"* which was first coined in late nineteenth-century France, describes a particular attitude about the proper relationship between church and state. It derives from *"laïc"* or *"laïque,"* words originally used to signify monastic orders whose members were *not* ordained to the clergy, thus corresponding very closely to the English "lay" and even "secular" in the original sense of people who had taken vows to live celibate religious lives but who

were not ordained into the clergy. From the late eighteenth to the early twentieth century, the terms *laïc* and then *laïcité* came to refer to policies designed to restrict (or even eliminate) clerical and religious influence over the state. Ironically, the word *laïc* thus evolved from having a distinctly religious meaning, to later becoming anti-clerical, and ultimately meaning, at least for some, "anti-religion." (Many Americans similarly believe that "secular" means "anti-religious" rather than "non-religious.") Unlike France, where "*laïcité*" might have the connotation of the state protecting itself from the excesses of religion, the term "religious freedom" in the United States would be more likely to have the connotation of religion being protected from the excesses of the state. Thus Americans are more likely to be predisposed to have suspicions about state laws regulating religion while the French are more likely to be suspicious of an absence of regulation of religious activity. At least this is the theory.

The popular rhetoric in each country transforms the basic attitudes about *laïcité* and religious freedom into what can be called "founding myths." These myths are often described as embodying the unifying values of freedom, neutrality, and equality on which the respective republics were founded, but also as constituting an essential dimension of their unique identities. The French identity, as imagined, includes the comforting belief that the state protects its citizens from religious excesses. The American identity, as imagined, is that "we are a religious people." Thus *laïcité* and religious freedom, although *defined* as embodying neutrality, tolerance, equality, and freedom of conscience, are at risk of being *applied* in ways that divide citizens on the basis of their beliefs and convictions.

Two controversies in France and the United States involving religion in the public schools illustrate the parallel uses of the myths of "*laïcité*" and "religious freedom" to reinforce popular notions of national identity. In the name of *laïcité*, the French National Assembly has now adopted (with the support of the majority of the population), a law prohibiting children from wearing conspicuous religious clothing and insignia at public schools, including Islamic headscarves (*voiles*), Jewish skullcaps (*kippas*), and Christian crosses. Similarly, in the name of "religious freedom," the American political establishment and much of the judiciary (with widespread popular support), insists that public school officials should lead children in reciting a pledge of allegiance declaring that the United States is "one Nation under God" and that this practice should be defended against a constitutional challenge. "Neutrality" and "equality" are used in France to prevent religious expression in schools; "neutrality" and "equality" are used in the United States to propagate state-sponsored theological declarations in schools.

French and American observers are likely to see the state actions on the opposite side of the Atlantic—banning religious clothing and promoting state-sponsored declarations about God—as *violating* the very principles of neutrality, tolerance, freedom of conscience, and human rights that their own countries scrupulously respect. Easily spotting the speck in the other's eye, they are blind to obstacles in their own (*Matthew* 7:1-5). In essence, I will argue, the French are making the same core mistake in banning religious clothing from schools as Americans make in insisting that public schools lead children in reciting a pledge that theirs is "one Nation under God." The mistakes arise in each country in part because the issues are being seen through the filters of the founding myths of *laïcité* and religious freedom.

I

French public rhetoric treats *laïcité* as a unifying and founding principle of the French Republic. (It is a constitutional principle appearing in article 1 of the 1958 Constitution.) One particularly striking, though not altogether unusual example of the homage to *laïcité*, was provided in a December 2003 speech by President Chirac. In it, he identified *laïcité* as the "cornerstone" (*pierre angulaire*) of the Republic. It is "inscribed in our traditions. It is at the heart of our republican identity." Chirac described it as a principle to which citizens should be faithful: "It is in fidelity to the principle of *laïcité*, the cornerstone, the bundle of our common values of respect, tolerance, and dialogue, to which I call all of the French to rally." *Laïcité* is a "pillar" of the Constitution. "Its values are at the core of our uniqueness as a Nation. These values spread our voice far and wide in the world. These are the values that create France." It is a doctrine that protects the basic rights of belief. "*Laïcité* guarantees freedom of conscience. It protects the freedom to believe or not to believe. It assures all of the possibility to express and practice their faith peaceably, freely, but without threatening others with one's own convictions or beliefs." It is "one of the great accomplishments of the Republic. It is a crucial element of social peace and national cohesion. We can never permit it to weaken!"

The president is not alone in using such words and phrases. Prime Minister Raffarin has observed that "*laïcité* is a cardinal value that precisely permits each person to express his or her convictions in freedom, security, and tolerance. *Laïcité* is our common approach. *Laïcité* allows France to be a land of tolerance. *Laïcité* prevents France from pitting [religious and ethnic] communities against each other." In a speech to the Freemasons in 2003, Nicolas Sarkozy, Minister of the Interior (whose responsibilities include religious issues), asserted that "*laïcité* is not a belief like others. It is our shared belief that allows

others to live with respect for the public order and with respect for the convictions of everyone." It is not only politicians who hold such beliefs. The historian of the Third Republic, Madeleine Rebérioux, speaks of "the love the French have for the law of 1905 [on the separation of church and state]." Jean Gaeremynck, a Counselor of State, praises *laïcité* in words that might more appropriately be used to describe a fine wine than a legal doctrine: "the French style of *laïcité*, in its originality, its subtlety, its finesse, and richness. . . ."

Americans might be amused to hear such effusive praise for a seemingly vague doctrine. But perhaps they might first consider some rhetoric emanating from their own country. In January 2002, President George Bush declared that "Religious freedom is a cornerstone of our Republic, a core principle of our Constitution, and a fundamental human right. Many of those who first settled in America, such as Pilgrims, came for the freedom of worship and belief that this new land promised." Such language comes not only from a born-again resident of the White House. Before President Bush was elected, the U.S. Congress enacted—unanimously—the International Religious Freedom Act of 1998. The introduction to that law states:

> The right to freedom of religion undergirds the very origin and existence of the United States. Many of our Nation's founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom. They established in law, as a fundamental right and as a pillar of our Nation, the right to freedom of religion. From its birth to this day, the United States has prized this legacy of religious freedom. . . .

The U.S. State Department, in an explanation of why it seeks to promote religious freedom internationally, stated:

> The quest for religious liberty has played an integral part in American history. Early in our nation's founding, the view that every human being has a fundamental right to believe, worship and practice according to his or her own conscience became a core conviction of the American people. Religious liberty is the first of the enumerated rights in our Constitution, and is known as "the first freedom," because the founders believed it to be a lynchpin of democracy and the other fundamental human rights.

The language that characterizes freedom of religion as the "first freedom" is made by those on both the political right and the left. Religious freedom as a cornerstone, as part of the American founding history and its values, is a deeply felt and inspiring notion for most Americans—just as is *laïcité* in France for both politicians and the public.

Quotations like those cited above fill the airwaves, newspapers, magazines, and speeches in both countries. The doctrines of *laïcité* and religious freedom are treated as founding pillars of the countries, as principles that have been respected through history, as beliefs that unite citizens, and as shared values that help create the treasured and

unique identities of the two countries. We do not need to doubt that the people who say such things believe them strongly. But do they believe them wisely?

II

The modern French understanding of *laïcité* developed largely (though not exclusively) during two periods of French history, the five years following the revolution of 1789 and the years between 1879 and 1907 (during the Third Republic). Without discussing the history of these two periods in detail, it is appropriate to identify briefly some of the notable circumstances that illustrate that *laïcité* did not arise as concept to unify the French people but as a concept that divided them.

On 2 November 1789, a few months after the seizure of the Bastille, the Constituent Assembly declared that the property of the Catholic Church would henceforth be at the disposition of the nation. In February of the following year, the Assembly revoked all monastic vows and forbad the taking of future vows. By July of 1790, the Revolution began its more ominous phase when the Assembly adopted the Civil Constitution of the Clergy, which reorganized the Catholic Church in France and declared that, in the future, new clergy would be elected by popular vote and then required to take an oath of loyalty to the state. Towards the end of that year, on 27 November 1790, the Assembly decided that all clergy of the state must pledge an oath of loyalty to the state, and the failure to do so would terminate all of their rights. Most historians believe that the Civil Constitution and the required oath of loyalty is what ultimately precipitated a civil war in France and led to increasing polarization and radicalization. The form of the oath, which had became popular during the Revolution, was a stiff, straight-arm salute. It had been adopted from what was believed to be the Roman salute and it was made popular in famous works by the artist Jacques-Louis David. (It is ironic that those who first promoted the American pledge of allegiance in the 1890s adopted the French, anti-clerical, revolutionary straight-arm salute—which remained very common in America until the fascist straight-arm salute made it offensive to the sensibilities of Americans.)

Although the majority of the clergy complied with the state requirement, many did not. Some clergy were arrested, others emigrated, and others practiced in secret. Riots broke out in parts of France in opposition to the state demands. Following a military defeat in September 1792, Parisian crowds broke into prisons (formerly monasteries) and murdered more than a thousand prisoners whose loyalty to the state was suspect, including several hundred incarcerated members of the clergy who had refused to take the oath.

During the following year, a wave of religious destruction swept through France. Priceless cultural treasures of religious architecture, sculpture, painting, and stained glass were looted or destroyed. On the exterior walls of the Cathedral of Notre Dame in Paris hundreds of medieval statutes of prophets, priests, and kings were decapitated, ripped from their coves, and ignominiously tossed into the Seine. The cathedral's thirteenth- and fourteenth-century stained-glass windows suffered the same shattered fate as the windows of almost every church in France. Yet even in its damaged state, the cathedral in Paris survived. The same cannot be said for the Third Abbey Church at Cluny, a masterpiece—perhaps *the* masterpiece—of Romanesque architecture and the largest building in Europe until the sixteenth century. At its medieval peak, Cluny was the most powerful ecclesiastical and intellectual center in Europe. When the Revolution had completed this wave of destruction, Cluny was a pile of rubble. The abbey church of Saint Denis outside Paris, whose apse was the world's first example of Gothic architecture and whose stained-glass windows prompted the writing of one of the most important medieval documents on visual aesthetics, did not escape the rampage. As the burial church for the kings and queens of France, Saint Denis was a prized symbolic target. The royal tombs were ripped open and the skeletons tossed in fields. By starkly polarizing church and state, the revolutionary crowds demolished a cultural legacy of the *patrie*. The scope of destruction of the dechristianizers makes the Taliban's blasting of the Bamiyan Buddha pale in comparison.

The second principal phase of *laicité* began in 1879 and happily was less violent than the first. Once again, however, the Catholic Church was the target—particularly congregations. "Congregations" was the term most commonly used in French law to signify religious associations other than churches, and included monasteries, convents, and religious hospitals and schools. Beginning in 1880, the French government attempted to suppress almost all of the several thousand congregations that then existed in France. It dissolved the Society of Jesus (Jesuits) and declared that congregations were illegal unless they obtained prior recognition by a statute enacted by the parliament. When the parliament refused to grant legal recognition, they were dissolved, the inhabitants evicted, and the assets sold. Subsequent actions continued to pressure congregations, many of which had continued to survive despite government efforts to suppress them. The famous 1901 Law on Associations and the 1905 Law on the Separation of Church and State also were used for this purpose. In addition, the 1905 Law unilaterally revoked the Concordat of 1801 and nationalized all religious property that had been acquired before 1905. Though the 1901

and 1905 laws (as amended) are fundamental laws in France today, they were adopted in large measure as anti-clerical and anti-Catholic. To this day, all French cathedrals and churches that were built before 1905 remain the property of the *laïc* French state (which allows the church to use them).

III

When Americans praise the doctrine of religious freedom, the Pilgrims are often cited as the first example of people who came from Europe in search of freedom to worship. In 1954, the two Congressional reports that advocated adding the words "under God" to the Pledge of Allegiance cited the Mayflower Compact of 1620 as the prototypical example of the Godly establishment of the new world. Such a nostalgic view of history, however, glosses over what religion and God actually meant to the Puritans. The 1648 Laws and Liberties of Massachusetts, like the 1880 decree in France, prohibited Jesuits from living in the colony. The 1648 Laws also prohibited teaching the doctrines of adult baptism or that people could have a direct relationship with God that was unmediated by the clergy. Anyone found preaching such heresies would be liable to banishment from the Commonwealth. Should heretics return after having once been banished, the punishment was execution. Some Quakers who insisted on preaching their heretical doctrines were hanged on the Boston Common. The Puritan laws also made it a capital offense to be a blasphemer or a witch.

Eighteenth- and nineteenth-century America was notable for virulent anti-Catholicism. In the century before the Constitution was adopted, anti-Catholic laws existed throughout the colonies and typically prohibited Catholics from holding public office. Many of the revered founders of the United States were in fact bitterly hostile towards Catholics, and one of the fears widely held during the constitutional period was that a "Papist" might someday be elected president. Freedom of religion was not the "first freedom" as the rhetoric suggests, indeed it was not included in the Constitution drafted in 1787 though other rights were (such as the prohibition on bills of attainder and *ex post facto* laws). The "First Amendment" became first only by default: two earlier amendments submitted to the states by the First Congress were not ratified.

Anti-Catholicism did not disappear with the ratification of the Constitution or the Bill of Rights. Repeated waves of attacks on Catholics occurred during the following hundred years. In the same century that the anti-Semitic forgery *The Protocols of the Elders of Zion* first circulated in Europe, forged "exposés" of Catholics and Mormons circulated in the United States. It was not only the words that hurt. Mobs at-

tacked and burned down churches, monasteries, and homes, with some of the more spectacular cases being the 1834 burning of the Ursuline convent in Charlestown, Massachusetts and the anti-Catholic "Bible riots" in a suburb of Philadelphia in 1844. The anti-Catholic Know-Nothing political party was able to elect seventy-five members to Congress in 1854. The famous writer and Congregational minister, Josiah Strong, a spokesman for the American Evangelical Alliance, identified in 1885 the seven "perils" facing America, including immigration, socialism, Catholicism, and Mormonism.

When the Jehovah's Witnesses, on the basis of their religious beliefs, refused to pledge allegiance to the American flag, a wave of violence broke out against them. Those who professed to love both God and the flag could not bear the insult to their national banner, and used that as the basis for attacking the witnesses. In 1942, the chief of the Civil Rights office in the Justice Department wrote that "the files of the Department of Justice reflect an uninterrupted record of violence and persecution of the Witnesses. Almost without exception, the flag and the flag salute can be found as the percussion cap that sets off these acts." At the same time that hooded members of the Ku Klux Klan pointedly carried the American flag in parades in city streets, devout religious people were being assaulted for their refusal to pledge allegiance to it.

If religious freedom was a founding principle of the republic, as popular rhetoric fondly suggests, Americans certainly seem to have been unaware of it until rather recently. For practical purposes, the Supreme Court did not begin to apply the First Amendment to support religious freedom claims until the 1920s, and then only with regard to rights of private religious schools. It was not until the 1930s and 1940s that the first, powerful, and inspiring modern decisions regarding religious speech and other manifestations of religion were published. Social discrimination against Catholics and Jews was open and notorious well into the twentieth century. It was not until the 1960s, with the election of the first Catholic President, John F. Kennedy, the adoption of the Civil Rights Act of 1964, and several decisions of the Supreme Court, that what is now described as "the first freedom" and the founding principal came to be very widely accepted—almost two hundred years *after* the founding of the United States and three hundred and fifty years after the Mayflower Compact.

IV

Though *laïcité* and religious freedom were not the founding principles of tolerance and neutrality as the rhetoric sometimes suggests, it is important to recognize that they have made some important and posi-

tive contributions. One of the principal values of *laïcité* is the official respect it accords for beliefs that are not religious, and for recognizing the human dignity of the many people who do not find strength or value in religion. Whether such nonbelievers are scientists, philosophers, doctors, political leaders, or day laborers, they are officially respected by a *laïc* state for their profound contributions to society, and they are valued as people who are fully entitled to participate in the political world and in public discourse.

With regard to the United States, there has emerged—albeit more recently than the myth implies—a very healthy presumption that people of widely divergent religious beliefs should be protected by the state and that respecting religious freedom positively aids the health and strength of the state. Such policies and attitudes are not only fully consistent with international human rights standards that protect freedom of religion, they are also deeply respectful of human dignity and individual choice to devote all or part of one's life to religion. While much of the world becomes increasingly secular and skeptical, and while other parts of the world seem to be increasingly religious, it is no small accomplishment for the United States to be in the vanguard of stimulating scientific discovery and protecting freedom of religion.

V

The French and American founding myths of *laïcité* and religious freedom thus have several characteristics in common: they are revered as foundational cornerstones; they are described as having emerged gloriously from the historical past; they are described as explaining the essence of the nation's values; and they are offered as principles that unite all citizens of the republic. But they also have a darker underside. Although they profess to be unifying, their legacy also has been one of dividing and ostracizing those whose beliefs are found to be different from the accepted norm. The two cornerstone doctrines were not established by a founding generation and then passed on to subsequent generations as a doctrine that unites all citizens; rather, they developed in fits and starts and frequently were used to divide citizens from each other. Two controversies in France and the United States—the headscarf and "under God"—give us a contemporary window into the use of founding myths.

In July 2003, after several of the leading politicians in France had recommended the adoption of a law to ban religious attire from public schools, President Chirac appointed a group of prominent French scholars and officials to make its own recommendations. Known as the "Stasi Commission" (after its chairman, Bernard Stasi), it issued its report in early December 2003. The Commission made several recom-

mendations, including improving living standards in some economically depressed communities and improving education about religion and *laïcité*. The media, however, focused almost exclusively on only one of the Commission's recommendations: prohibiting public school students from wearing "clothing and insignia signifying a religious or political affiliation." Although phrased in the neutral words of "clothing" and "insignia," the media immediately interpreted it to be a recommendation to prevent Muslim girls from wearing headscarves in schools.

The Stasi Commission's report began with a lengthy praise of the doctrine of *laïcité*. Although the encomiums were somewhat less flowery than those of President Chirac, the admiration was unmistakable. Among the admired aspects of *laïcité* were its respect for neutrality and equality. The Commission of course recognized that its function was not simply to praise *laïcité*, nor even to discuss religious clothing generally, but to address specifically the Islamic headscarf, which it characterized as the "explosive" issue. When we focus specifically on the Commission's treatment of the issue that prompted its creation and that served as the basis of its most prominent recommendation, it is disappointing to see just how shallow the Commission's analysis was. Though its report was seventy-eight pages in length, only a few short pages even discussed the core issue of headscarves or other religious clothing. And here the Commission's analysis is surprising both for what it says and what it does not say.

First, the Commission does not assert that the wearing of headscarves (or other religious attire) is becoming increasingly disruptive in schools. In fact, the Commission makes no attempt at all to quantify the alleged problem or to identify trends—a rather striking omission for a group with such serious scholars among its members. The Commission failed even to note that the responsible official from the Ministry of Education—*who was herself a Member of the Commission*—had reported earlier in the year that the number of problematic cases had been sharply reduced.

Second, the Commission did not analyze or consider any reasons or religious motivations for why children might *want* to wear religious clothing or insignia to school. The Commission did not consider whether the wearing of headcoverings by Jewish boys or Muslim girls was prompted by religious piety, personal modesty, or cultural identification. The Commission's report *never even considered the rights of religion or belief* that might be infringed if its recommendation to ban religious clothing were adopted or why its analysis should supersede that of the *Conseil d'État* that had held children have a constitutional

right to wear such clothing. This is probably the most striking omission and failure in the report.

Third, the Commission responded to the allegation that some families and communities coerce (and even threaten) Muslim girls into wearing the headscarf. The Commission was deeply disturbed about such undue pressure on the girls and asserted that the French state has an obligation to protect these vulnerable children. It also feared that community pressure on the girls was contributing to sex segregation and an inferior status for Muslim girls and women. While the Commission was certainly correct to identify these serious issues, its analysis as a whole suggests that it had a rather erratic concern about coercion. Whereas it condemned coercion to wear the headscarf, it revealed no comparable interest in coercion *not* to wear the headscarf. Although there is in France strong media, school, popular, and political antagonism directed at the wearing of the headscarf, the Stasi Commission failed to criticize this coercion. Its selective concern with coercion was further revealed in its discussion of Jewish boys who are ridiculed and threatened when they wear the skullcap. Whereas the Commission had argued that the state has a responsibility to protect girls who do not want to wear the headscarf, it did not see any responsibility of the state to ensure that boys who wish to wear the skullcap are protected in this choice against coercion and harassment. Nor did the Commission seem to be aware of the pointed irony that its own recommendation would *coerce* children to dress differently from how they might wish. Thus the Commission did not consistently oppose coercion; it opposed it only when it the result was the wearing of religious attire.

Finally, the Commission offered no analysis to show that its recommendation—banning religious clothing—would ameliorate the problems that it identified: coercion and sexual discrimination. Indeed, even if we accepted the Commission's explanation of why girls wear the headscarf (community harassment if they do not comply), we are offered no analysis to show why banning the headscarf at schools would solve the problem. In fact, if the Commission's underlying analysis about coercion is true, we can well imagine the possibility that community threats on the unfortunate girls will *increase* if they are forced to unveil themselves in schools. We also can imagine, again assuming that the Commission's explanation is correct, that girls suffering from coercion might withdraw from state schools and be placed in private religious schools, thereby exacerbating the sex segregation that the Commission professedly deplores.

If we step back for a moment and look globally at what the Commission did, there are two important observations. First, it did not take seriously the rights of conscience and belief of the children. Second,

the solution offered—banning religious attire in public schools—is not shown to solve the problem the Commission identified and it may well be counterproductive. Thus it appears that the Commission was perhaps less interested in eliminating coercion and sex segregation than it was in recommending that schools have the appearance of *laïcité*. The Commission *could have said* that "what unites us as French citizens is our respect for the choices of individuals to believe or not to believe as their consciences dictate." Unfortunately, the Commission essentially said that "what unites us as French citizens is a particular notion of *laïcité* that abhors the appearance of religious differences in schools." The Commission's application of neutrality and equality means that everyone has the equal right not to wear religious clothing. We have heard of such "equality" before: "The law, in its majestic equality, forbids the rich as well as the poor from sleeping under bridges, begging in the streets, and stealing bread" (Anatole France, *Le lys rouge*, 1894).

Although most Americans presumably would not share the concerns of President Chirac and the Stasi Commission regarding individuals wearing religious attire in public schools, this does not mean that Americans are indifferent to the role of religion in public schools. In fact, it would probably be fair to say that two of the perennial constitutional conflicts in the United States, at least during the last thirty years, have involved either the role of religion in public schools or abortion. A significant percentage of the population—depending on how the questions are formulated—probably would approve of school-sponsored prayers, Bible reading, and the posting of the Ten Commandments. Political candidates and fundraisers frequently allege that the "Supreme Court has taken prayers and the Bible out of school," and some even assert that a decline in American morals can be traced directly to the Supreme Court decisions in prayer and Bible-reading cases.

In June 2002, when a panel of the Ninth Circuit Court of Appeals ruled that the phrase "under God" in the Pledge of Allegiance was unconstitutional, there was a public uproar (*Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), *subsequently withdrawn and replaced by Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2003) (hereafter *Newdow II*). As recounted by Derek Davis in the preceding issue of the *Journal of Church and State*, the decision was roundly criticized by the political leadership of the country. President Bush called the decision "ridiculous" and the Senate Democratic Leader called it "nuts." Senator Ensign stated that the "courts are completely out of control" and that he was "outraged" by the decision. Congressman Sensenbrenner called the decision "preposterous." The Senate voted 99-0 to reaffirm the language of the Pledge, as did the House of Representatives

by a vote of 416-3 (with 11 abstentions). After voting on the resolution, 100 Members of Congress gathered to have their photograph taken on the steps of the Capitol building while they solemnly held their hands over their hearts and repeated the pledge.

The United States is the only country in the world where public school children stand and declare their allegiance not only to their country, but also to a *flag*. (In the Philippines, the only other land with a pledge, the children declare their love for their country and not their allegiance to its flag.) In earlier periods of American history, we can well imagine that the religious population would have recoiled at the idea of a state-mandated oath to a flag, as the Puritans certainly would have done and as the Jehovah's Witnesses actually did. But far from seeing a pledge to a flag as an act of idolatry, by the 1950s Americans had blended it into a concoction of patriotic feelings, religious beliefs, and notions of the "American dream." As a result, just as hostile sentiments were aroused against the Jehovah's Witnesses who refused to pledge the flag, so hostile feelings were aroused against the judges of the Ninth Circuit who questioned the constitutionality of the Pledge. Even other judges in the Ninth Circuit approved of the popular reaction against the panel decision when they characterized it as an act of "judicial legerdemain which, not surprisingly, produced a public outcry across the nation" (*Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2003) (O'Scannlain, J., dissenting from denial of rehearing *en banc*) (hereafter *Newdow III*).

The opinions of the Ninth Circuit judge (Fernandez, J.) who dissented from the panel's decision (*Newdow II*) and six judges who dissented from the decision not to rehear the case *en banc* (*Newdow III*) provide us with some texts with which we can compare the Stasi Report in France (all quotations below are from dissenting opinions).

The dissenting judges begin by arguing that the American Constitution is one that is balanced, neutral, and tolerant. Under it, "religious tolerance and diversity flourished in this country," and the United States may take pride in the fact that it has become a "beacon for other nations in this regard." The Constitution is a "practical and balanced charter" and was written for the purpose of avoiding discrimination. At root, the American constitutional system provides that "government will neither discriminate for nor discriminate against a religion or religions."

When applying the balanced and nondiscriminatory Constitution to the case before them, the dissenting judges show great sympathy for the feelings of those who wish to recite the pledge. The declaration that the United States is "under God" inspires "a vestige of the awe all of us, including our children, must feel at the immenseness of the uni-

verse and our own small place within it, as well as the wonder we must feel at the good fortune of our country." In reciting the pledge, many Americans feel a "healthy glow." And if the words were stricken, it would "deprive[ ] children in public schools of the benefits derived from those expressions." The sentiments inspired by the theological language are of high importance and removing them would constitute a real deprivation to children.

As for plaintiff Newdow, who had argued that the state and federal governments have no business drafting theological claims or leading children in reciting them, Judge Fernandez ridicules his "feel-good" sentiments. Although the *Newdow* case involved only references to God being struck from the pledge, Judge Fernandez—with no citation to the record—extravagantly mischaracterizes this limited claim and then caricatures it as emanating from someone who was mentally unbalanced. "[S]uch phrases as 'in God We Trust,' or 'under God' have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the *fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity*" (emphasis added). Whereas the Stasi Commission had simply ignored the concerns of believers, Judge Fernandez ridiculed non-believers by mocking their "febrile nerves" and "fevered eyes." Whereas the strong feelings manifested in the "public outcry" in support of the pledge are taken as evidence of the pledge's value, the strong feelings against the pledge are taken as evidence of fevered imaginations. (Although the dissenting judges probe the psychological motivations of plaintiff Newdow, they do not probe the psychologies of the strong supporters of the pledge. How important is the pledge *really*? Do its adult proponents feel strongly enough about it that they recite it daily *themselves*? Do parents recite it with their children on weekends and during summer vacation? Is its value felt strongly, but not deeply?)

The dissenting judges suggest that the constitutionality of "under God" in the pledge is supported by the many other references to God in American documents, symbols, and institutions. These include references in the Declaration of Independence, the Constitution, the Gettysburg Address, the National Anthem, the National Motto ("in God We Trust"), and other popular symbols. As a logical matter, of course, the dissenting judges are not advancing a *constitutional* argument when they identify the many cases where American traditions and laws have incorporated religious language and symbols. One does not prove that an action is constitutional by citing the number of times it has occurred any more than one proves that murder is legal by citing the number of times it is committed. The issue is not the frequency in which lan-

guage and imagery refers to God, but to its principled constitutionality. Even if this point might not be initially understood with regard to religion, it can easily be understood with regard to racial discrimination. If a statute were challenged on the grounds of racial discrimination, we would not take seriously an argument that defended the statute on the grounds that all of the founders were white and that many were slaveholders, or that the Congress that approved the Fourteenth Amendment also enacted laws that discriminated on the basis of race, or that the legislators who voted for the Civil Rights Act of 1964 discriminated in their hiring practices. With regard to race and sex, it is now very clear that *justifying a statute on the basis of discriminatory traditions would be a repudiation of the principles of equality and neutrality and not an application of them.*

Moreover, the judges' list of religious examples is an exercise in sentimental cherry picking. When a favorable historical example is found, it is cited as support; if a historical example is inconvenient, it is ignored. The "founders'" references to God in the Declaration of Independence are cited; the absence of similar references in the Constitution—which actually is the law of the land—is ignored. (The Constitution makes only one arguable reference, and this was its use of the conventional expression "in the Year of our Lord," which is not an impressive precedent.) They ignore the founders' motto, "E Pluribus Unum," in favor of the motto adopted in the 1950s. The phrase "In God We Trust" was first inscribed on a two-cent coin in 1864, in the middle of the bloodiest war in American history, when it was obvious that the Union war effort placed much more trust in metal cannons, swords, bayonets, and muskets than on the metal inscription of God on a two-cent coin. We can imagine that the Confederates would have been as impressed by the sincerity of their enemy's invocation of God on a coin as would have their Union opponents if the Confederates had done the same.

The dissenting judges assert that the state should be "neutral" with regard to religion and non-religion. But then, in perhaps their most peculiar observation, they assert that removing "under God" would not be neutral because it would create a bias against religion. It is difficult to see how, other than in a mythical world where a judge's thumb weighs heavily on the scales of justice, that adding "under God" in a national pledge is a neutral act while removing it would constitute a bias against religion.

The Ninth Circuit dissenting judges, like the Stasi Commission, displayed great solicitude for the feelings and consciences of those whose wishes were consistent with the majority of the population. While the Stasi Commission couched its explanation in terms of *laïcité* and the

Ninth Circuit in terms of religious freedom, all asserted that principles of equality and neutrality lay behind their judgments. Yet both the Stasi Commission and the dissenting judges failed even to articulate fairly and objectively the issues of conscience that did not conform to the majority sentiment. The Stasi Commission simply ignored them, as if they did not exist. The Ninth Circuit judges, on the other hand, not only ridiculed them by using terms such as "febrile" and "fevered," they falsely caricatured Newdow's claim by transforming it from a complaint about a state-sponsored theological declaration into a demand to eliminate all references to religion and God in the public square. The Stasi Commission and the dissenting judges reached conclusions that were consistent with popular majorities of their respective countries and that conformed to the mythic symbols, images, rhetoric and self-identity.

The widespread and vehement American desire to have public school children recite in unison "one Nation under God" in classrooms no doubt seems both peculiar and parochial not only to the French, but probably the great majority of the people outside the United States who are aware of the practice. On the other hand, Americans ask why the French feel a need to call upon the state to enact and enforce a law to prevent school children from covering their heads. While most French and Americans probably see their national symbols as being "neutral," they are in fact *not neutral* with regards to matters of religion, belief, and conscience. Thus, in France, "neutrality" means that the state needs to protect people in their choice not to wear head coverings, but not in their choice to wear them. In the United States, "neutrality" means that theological pronouncements by Congress are permissible while the absence of such statements is, in the words of the dissenting judges, tantamount to "establishing atheism."

VI

Perhaps one day, French political leaders who, in the name of neutrality and tolerance, wish to prohibit schoolchildren from honoring their God by wearing head coverings, might understand the deepest meaning of the prayer offered by the secular, anti-clerical, godfather of tolerance and *laïcité*. In his *Treatise on Tolerance* (chapter XXIII), the great Voltaire himself—the person whose life and teachings were most honored during the first revolution—offered his own prayer to God:

> Make us help each other bear the burden of our difficult and transient lives. May the small differences between the clothes that cover our weak bodies, between all our inadequate languages, all our petty customs, all our imperfect laws, all our foolish opinions, between all of the circumstances that seem so enormous in our eyes but so equal in thine—may all these small nuances that distinguish the atoms we call men not serve as a basis for hatred and persecution. May those who light

candles at noon to celebrate thee also sustain those who are fully satisfied with the light of thy sun. May those who show their love for thee by wearing white cloth not detest those who express their love for thee by wearing black wool.

In the United States, perhaps the good legislators who pose for photographs of themselves reciting the pledge on the steps of the Capitol and insist that children should publicly profess that theirs is a nation under God might, somewhere in their hearts, understand the deepest significance of the message:

[Be not] like the hypocrites; for they love to stand and pray in the synagogues and at the street corners, that they may be seen by men. Truly I say to you, they have received their reward. But when you pray, go into your room and shut the door and pray to your Father who is in secret; and your Father who sees in secret will reward you.

And in praying do not heap up empty phrases as the Gentiles do; for they think that they will be heard for their many words. Do not be like them. . . . (*Matthew* 6:5-7).

At the moment, unfortunately, it appears that many proponents of French *laïcité* and American religiosity are wrapping themselves in their myths rather than embracing the essence of their teachers' deepest principles: tolerance (rather than uniformity) and personal piety (rather than formulaic public pronouncements). We should hope that those who have devout beliefs in God and those who respect human rights would understand that decisions about religion and faith should be made by individuals, their families, and their faith and belief communities—and not by states legislating religious dress codes or professions of faith. Whereas the myths might not support such a solution, the principles of tolerance, equality, and neutrality certainly should.

The French and Americans should consider whether, despite their obvious differences, they resemble each other in some uncomfortably similar ways. Perhaps it is to Scotland—where favorable ancient inclinations to both France and America have long prevailed—where all might find merit in the message of its greatest poet: what a gift it would be to see ourselves as others see us.