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Establishing Anti-Foundationalism through the Pledge of Allegiance Cases

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ANTHONY R. PICARELLO, JR. *

INTRODUCTION

In 1954, Congress changed the Pledge of Allegiance so that it would describe our nation as one "under God."[1] Congress added those two words in order to reflect, in highly distilled form, the philosophical proposition that the state is bound to respect citizens' rights precisely because they derive from some transcendent source.[2] This contrasted the American philosophy of limited government with Soviet totalitarianism, under which the state is the ultimate power in the universe, the source of all human rights that may give and take away those rights at will. More

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1. 4 U.S.C. § 4 (2002). The prior Pledge read: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." 36 U.S.C. § 172 (1952).

2. *See* H.R. REP. 83-1693 (1954):

> Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp.

recently, Michael Newdow has challenged this addition of "under God" to the Pledge as an impermissible establishment of religion.[3]

This article takes the position that the Establishment Clause should not be read so broadly as to prohibit public school teachers from leading willing students in the recitation of a Pledge of Allegiance that includes the phrase "under God." Such a reading would preclude American governments from declaring and espousing any philosophy of government based on the premise that human rights are inalienable because their foundations are metaphysical. This prohibition would not serve to disestablish any religion, but instead to establish a certain philosophy (or more precisely, anti-philosophy) of government.

The idea that human rights derive from a transcendent source that precedes the state or the popular will—sometimes described as "natural law" or "natural right"—is very deeply engrained in American history, law, and culture. And, until recently, the government's communication of this idea in ways that include the concept of "God" has never been treated as inconsistent with the Establishment Clause. Describing our nation as "under God," for example, did not originate with the Pledge of Allegiance in 1954, but occurred before that in Lincoln's Gettysburg Address,[4] and before that in Washington's orders to his troops on the eve of the Founding.[5] The Declaration of Independence includes this very same concept—worded somewhat differently but in no less religious terms—that human beings are "endowed by their Creator with certain unalienable rights."[6] And ever since the Founding, all three branches of government have frequently and consistently used the term "God" to encapsulate these same ideas.

Thus, to declare that the Establishment Clause forbids "under God" in the Pledge is not simply to alter a common practice of the public

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3. Mr. Newdow's first Establishment Clause challenge to the words "under God" in the Pledge of Allegiance was successful in the Ninth Circuit Court of Appeals. *See* Newdow v. U.S. Cong., 292 F.3d 597 (9th Cir. 2002). The Supreme Court reversed the Ninth Circuit's holding, finding that Mr. Newdow lacked standing to bring his challenge. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 4 (2004). Mr. Newdow has refiled, now on behalf of more plaintiffs to avoid the same standing problem, and his lawsuit is once again pending before the Ninth Circuit Court of Appeals. *See* Newdow v. Carey, No. 05-17257 (9th Cir., appeal filed June 1, 2006).

4. *See infra* text accompanying note 25.

5. *See infra* text accompanying note 14.

6. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

schools, but to attack a foundational element of a prominent—if not the predominant—strain of the philosophy of inalienable rights and limited government in America. This interpretation of the Establishment Clause goes far beyond what is necessary to disestablish any state church, but instead forbids the state from promulgating any concept of itself that rests on metaphysical foundations. That, in turn, both treads into an area where the political branches should have broad latitude and, perhaps more importantly, suddenly declares unconstitutional a concept of inalienable rights that is, at a minimum, historically and culturally important.

I. WHAT THIS ARTICLE DOES AND DOES NOT ARGUE

It is important to make clear at the outset that the purpose of this article is *not* to argue that the concept of inalienable rights and limited government reflected in the Pledge is the *only* legitimate one in the American tradition, or even the *best* one currently offered.[7] These are much stronger claims than anyone would need to make in order to defeat an Establishment Clause challenge to the words "under God" in the Pledge, or to the political philosophy it reflects. Instead, the constitutional question is only whether government is even *permitted* to declare and promote this view at all; not whether government *must* espouse this view, but simply whether it *may*.

Similarly, the purpose of this article is *not* to argue that that "under God" in the Pledge of Allegiance is constitutional because "this is a Christian nation." The reality about the religious character of our country is much more complex. And in any event, even if that were true, it would not support the claim that "under God" is consistent with the Establishment Clause, but instead would probably undermine it.

Instead, this article argues that the phrase "under God" in the Pledge represents a kind of metaphysical "Rorschach test" upon which

7. Although it is irrelevant to the argument, I happen to believe that this political philosophy actually does represent the best offered, and enjoys at least an historical privilege among those philosophies that American governments might espouse. Indeed, it is a philosophy of government that tends to maximize the rights of the individual and of civil society as against the state; it has strong precedent in Founding era documents, it has enjoyed the consistent practice of all three branches of government since then; and it has been one of the cornerstones of the vibrant success of American religious pluralism and democracy.

individuals can project whatever they may think is the transcendent moral reality to which the state is cosmically accountable.[8] The fact that this source of accountability is often described in minimally religious terms—such as the "Creator" who endows inalienable rights, or the "God" whom our nation is under—should not suffice alone to force the underlying concepts out beyond the constitutional pale.

More importantly, if that minimal level of religious content were enough to violate the Establishment Clause, it would have two odd consequences, as set forth below. First, it would retroactively declare unconstitutional the legion expressions of the Founders (Section II)—and of officials in all three branches of government since the Founding, all of whom were sworn to uphold the Constitution (Section III)—to the effect that human rights derive from a source that transcends the state or the popular will. Second, it would effectively preclude government officials from continuing to espouse a philosophy of government involving such metaphysical premises (Section IV).

II. THE FOUNDERS' USE OF MINIMALLY RELIGIOUS LANGUAGE

In the Declaration of Independence, Thomas Jefferson defends the American Revolution based on the "self-evident" truth that all persons "are endowed by their Creator with certain unalienable rights."[9] The Declaration explains that these God-given rights provided a basis for

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8. In other words, "under God" is "open textured"—it is malleable and subject to a wide range of interpretations. *See* H.L.A. HART, THE CONCEPT OF LAW 124 (1961). And Mr. Newdow has responded to that ambiguity in one of the two ways that Hart predicted—to ignore the ambiguity and insist that the term has one and only one meaning, monotheism—and even more precisely the God of Christianity. *See id.* at 126-27 (discussing formalist response to open-textured language). *See also* Answering Brief for Plaintiff-Appellee at 31, Newdow v. Carey, No. 05-17257 (9th Cir., July 17, 2006) (adding "under God" in the Pledge entails "declaring that ours is a land of (Christian) Monotheists"); *id.* at 33 (same). Of course, there are some limits to the interpretive flexibility of "under God." *See* HART, *supra*, at 132-35 (criticizing rule skepticism response to open-textured language). At a minimum, it probably always has to mean that our government is "under something or other transcendent" that is the source and guarantor of our rights as citizens. And it is precisely that time-honored, foundational principle of American government that appears throughout Founding and subsequent documents, and that all three branches of government have read to be consistent with the Establishment Clause since its inception. *See infra* Sections II and III.

9. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

Americans to reject a tyrannical government and assume the "equal station to which the Laws of Nature and of Nature's God entitle them."[10] But the Declaration of Independence is not the only evidence of Jefferson's consistent argument that God is the source of inalienable rights. For example, shortly before drafting the Declaration of Independence, Jefferson wrote: "The God who gave us life gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them."[11] Later, he questioned: "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?"[12]

A year before the Declaration, a young Alexander Hamilton argued from similar premises for defiance of British oppression: "The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of the Divinity itself, and can never be erased or obscured by mortal power."[13]

The particular phrase "under God" first appears in American political history in the writings of George Washington, who used the phrase to describe the predicament of the nation just then being born. In his General Orders issued on July 2, 1776—by which time the Declaration had been agreed on but not published—Washington stated that:

> The fate of unborn Millions will now depend, *under God*, on the Courage and Conduct of this army—Our cruel and unrelenting Enemy leaves us no choice but a brave resistance, or the most abject submission; this is all we can expect—We have therefore to resolve to conquer or die . . . .[14]

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10. *Id.* para. 1.

11. THOMAS JEFFERSON, ON THE INSTRUCTIONS GIVEN TO THE FIRST DELEGATION OF VIRGINIA TO CONGRESS, IN AUGUST, 1774, *reprinted in* 1 THE WRITINGS OF THOMAS JEFFERSON 181, 211 (Albert Ellery Bergh ed., 1904).

12. THOMAS JEFFERSON, NOTES ON VIRGINIA, Query XVIII (1782), *reprinted in* 2 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 11, at 1, 227.

13. ALEXANDER HAMILTON, THE FARMER REFUTED (1775), *quoted in* RON CHERNOW, ALEXANDER HAMILTON 60 (2004).

14. George Washington, General Orders, July 2, 1776, *in* 5 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, 211 (John C. Fitzpatrick ed., 1931) (emphasis added).

Seven days later, Washington used the phrase "under God" again in his General Orders of July 9, 1776, when he ordered the Declaration of Independence to be read to all the troops: "The General hopes this important Event will serve as a fresh incentive to every officer, and soldier, to act with Fidelity and Courage, as knowing that now the peace and safety of his Country depends (*under God*) solely on the success of our arms . . . ."[15]

After the war was over, the Continental Congress commissioned James Madison, Alexander Hamilton, and later Chief Justice Oliver Ellsworth to draft an "Address to the States, by the United States in Congress Assembled."[16] The Address, written in Madison's hand, ended with a resounding statement of the idea that rights inhere in human nature and proceed from an "Author":

> Let it be remembered, finally, that it has ever been the pride and boast of America, that *the rights for which she contended were the rights of human nature. By the blessings of the Author of these rights* on the means exerted for their defence, they have prevailed against all opposition, and form the basis of thirteen independent states.[17]

In 1785, two years after helping to draft this statement, Hamilton co-founded the nation's first abolitionist society, the New York Society for Promoting the Manumission of Slaves. At its opening meeting, the following statement was read: "The benevolent *creator* and father of men, *having given to them all an equal right to life, liberty, and property, no sovereign power can deprive* them of either."[18]

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15. George Washington, General Orders, July 9, 1776, *in* THE WRITINGS OF GEORGE WASHINGTON, *supra* note 14, at 245 (emphasis added).

16. 1 ELLIOT'S DEBATES 100 (2d ed. 1854).

17. *Id.* (emphasis added).

18. CHERNOW, *supra* note 13, at 214 (emphasis added). The American abolitionist movement that followed relied heavily on the idea that slaves possessed inalienable rights that derived from a source superior to the positive laws that allowed or enforced slavery. For a discussion of the role of religion in the abolition movement, see generally DOUGLAS M. STRONG, PERFECTIONIST POLITICS: ABOLITIONISM AND THE RELIGIOUS TENSIONS OF AMERICAN DEMOCRACY (1999); EDWARD MAGDOL, THE ANTISLAVERY RANK AND FILE: A SOCIAL PROFILE OF THE ABOLITIONIST CONSTITUENCY (1986); LEWIS PERRY, RADICAL ABOLITIONISM: ANARCHY AND THE GOVERNMENT OF GOD IN ANTISLAVERY THOUGHT (1973); David

Jefferson, Madison, and the other Founders were not writing on a blank slate in declaring a political philosophy that held that the state was subservient to the God-given, inalienable rights of its people. Their ideas drew not only on their own religious faiths,[19] but also on Blackstone and Classical political philosophy that recognized the universality and inalienability of individual rights. For example, when Jefferson wrote in the Declaration of the "equal station to which the Laws of Nature and of Nature's God entitle[d]"[20] Americans, he was alluding to accounts of the natural law from both Blackstone and Cicero. Blackstone expressed the view that the "law of nature" had its source in a "Supreme Being" and that this law was "impressed" into every human being:[21]

> This law of nature, being co-eval with mankind and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.[22]

Similarly, Cicero famously distilled the natural law in this way:

> True law is right reason conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions, and the wicked treat them with indifference. This law cannot be contradicted by any other law, and is not liable either to derogation or abrogation. Neither the senate nor

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F. Forte, *Spiritual Equality, the Black Codes and the Americanization of the Freedman*, 43 LOY. L. REV. 569 (1998).

19. *See, e.g.*, Sch. Dist. v. Schempp, 374 U.S. 203, 213 (1963) ("The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.").

20. THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776) (alteration added).

21. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 41 (1765).

22. *Id.*

> the people can give us any dispensation for not obeying this universal law of justice. It needs no other expositor and interpreter than our own conscience. It is not one thing at Rome, and another at Athens; one thing to-day, and another to-morrow; but in all times and nations this universal law must forever reign, eternal and imperishable. It is the sovereign master and emperor of all beings. God himself is its author, its promulgator, its enforcer. And he who does not obey it flies from himself, and does violence to the very nature of man.[23]

Importantly, Cicero's (106-43 B.C.) concept of "God" was neither Christian nor monotheistic.

In short, the Founders both repeatedly expressed the core idea that government could not infringe certain rights because they came from a higher authority, and routinely used "God" or similarly generic religious terms to describe that authority. Though famously committed to a vigorous principle of disestablishment, they did not understand these expressions to offend that principle.

III. THE USE OF MINIMALLY RELIGIOUS LANGUAGE BY ALL THREE BRANCHES

All three branches of government—not just the judiciary—are properly interpreters of the Constitution.[24] And consistently, all three branches have interpreted the Establishment Clause—implicitly or explicitly—to allow government to declare and urge on its citizens the

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23. CICERO'S TUSCULAN DISPUTATIONS; ALSO, TREATISES ON THE NATURE OF THE GODS, AND ON THE COMMONWEALTH 428 (C.D. Yonge trans., 1877).

24. *See* City of Boerne v. Flores, 521 U.S. 507, 535 (1997) ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."); Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (explaining that the Supreme Court "must have 'due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government'" (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring))).

political philosophy that rights are inalienable because they derive from a transcendent source.

A. The Executive Branch

The Executive Branch has led the way in affirming the political philosophy of inalienable rights and limited government by reference to the concept of "God." In his Gettysburg Address, Abraham Lincoln used the very same phrase now attacked in the Pledge, declaring that "this nation, *under God*, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from this earth."[25] This is typical of Lincoln, who routinely used religious language in official statements to emphasize that government interests are subordinate to human rights and the ultimate Author of those rights. The Emancipation Proclamation provides another example: "And upon this act, sincerely believed to be an act of justice, warranted by the Constitution, upon military necessity, I invoke the considerate judgment of mankind, and the gracious favor of Almighty God."[26]

As with Hamilton before him, Lincoln relied heavily on this tradition of the cosmic accountability of the state in his opposition to slavery. The idea that slavery violated the inalienable rights of enslaved human beings found its highest expression in Lincoln's Second Inaugural Address, which turns on Lincoln's suggestion that both North and South were being punished for the crime of chattel slavery:

> If we shall suppose that American Slavery is one of those offences which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South this terrible war as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to Him?

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25. ABRAHAM LINCOLN, GETTYSBURG ADDRESS (Nov. 19, 1863), *reprinted in* GREAT SPEECHES: ABRAHAM LINCOLN 104 (Stanley Appelbaum, ed., 1991) (emphasis added).

26. ABRAHAM LINCOLN, FIRST EMANCIPATION PROCLAMATION (Jan. 1, 1863), *reprinted in* GREAT SPEECHES *supra* note 25, at 100.

> Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil be sunk, and until every drop drawn with the lash shall be paid by another drawn with the sword, as it was said three thousand years ago, so still it must be said "the judgments of the Lord are true and righteous altogether."[27]

Ninety years later, President Eisenhower viewed the addition of the words "under God" to the Pledge as falling squarely within this tradition: "The[] words ['under God'] will remind Americans that despite our great physical strength we must remain humble. They will help us to keep constantly in our minds and hearts the spiritual and moral principles which alone give dignity to man, and upon which our way of life is founded."[28]

This approach to official proclamations is hardly unique to Lincoln and Eisenhower, and is certainly not limited to the precise phrase "under God." Similar ideas and language appear as a matter of course in the important speeches of Presidents from the founding to the present day. For example, with one exception (Washington's brief, second inaugural in 1793[29]), every single presidential inaugural address includes some reference to God—whether as the source of rights, of blessing to the country, or of wisdom and guidance. Highlights include the following:

- "[M]ay that Being who is supreme over all, the Patron of Order, the Fountain of Justice, and the Protector in all ages of the world of virtuous liberty, continue His blessing upon this nation . . . ."[30]

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27. LINCOLN, SECOND INAUGURAL ADDRESS (Mar. 4, 1865) (quoting *Psalm* 19:9), *reprinted in* GREAT SPEECHES, *supra* note 25, at 107.

28. Letter from Dwight D. Eisenhower to Luke E. Hart, Supreme Knight of the Knights of Columbus (Aug. 17, 1954), *in "Under God" Under Attack,* COLUMBIA, Sept. 2002, at 9 (alterations added).

29. *See* GEORGE WASHINGTON, SECOND INAUGURAL ADDRESS (Mar. 4, 1793), *reprinted in* THE INAUGURAL ADDRESSES OF THE PRESIDENTS (John Gabriel Hunt ed., 1997).

30. JOHN ADAMS, INAUGURAL ADDRESS (Mar. 4, 1797), *reprinted in* DAVIS NEWTON LOTT, THE PRESIDENTS SPEAK: THE INAUGURAL ADDRESSES OF THE

- "We admit of no government by divine right, believing that so far as power is concerned the Beneficent Creator has made no distinction amongst men; that all are upon an equality . . . ."[31]

- "The American people stand firm in the faith which has inspired this Nation from the beginning. We believe that all men have a right to equal justice under law and equal opportunity to share in the common good. We believe that all men have the right to freedom of thought and expression. We believe that all men are created equal because they are created in the image of God."[32]

- "[T]he same revolutionary beliefs for which our forebears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state, but from the hand of God."[33]

- "We are a nation under God, and I believe God intended for us to be free."[34]

- "When our founders boldly declared America's independence to the world and our purpose to the Almighty, they knew that America, to endure, would have to change."[35]

This history reflects that the Executive Branch has repeatedly drawn upon minimally religious language and imagery to reaffirm the political philosophy that our government is a limited one, bound to respect the inalienable rights of its people because they are given by some higher authority. Thus, to conclude that the government's

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AMERICAN PRESIDENTS FROM GEORGE WASHINGTON TO GEORGE WALKER BUSH 10, 15 (M. Hunter & H. Hunter eds., 4th ed. 2002) (alteration added).

31. WILLIAM HENRY HARRISON, INAUGURAL ADDRESS (Mar. 4, 1841), *reprinted in* LOTT, *supra* note 30, at 81, 82.

32. HARRY S. TRUMAN, INAUGURAL ADDRESS (Jan. 20, 1949), *reprinted in* LOTT, *supra* note 30, at 280, 289.

33. JOHN F. KENNEDY, INAUGURAL ADDRESS (Jan. 20, 1961), *reprinted in* LOTT, *supra* note 30, at 306. (alteration added).

34. RONALD REAGAN, FIRST INAUGURAL ADDRESS (Jan. 20, 1981), *reprinted in* LOTT, *supra* note 30, at 340, 344.

35. WILLIAM JEFFERSON CLINTON, FIRST INAUGURAL ADDRESS (Jan. 20, 1993), *reprinted in* LOTT, *supra* note 30, at 362.

describing itself as "under God," as in the Pledge, has the primary effect of advancing religion would be to conclude that all of these presidents were mistaken in their consistent interpretation of the Establishment Clause as allowing government to promulgate precisely that self-understanding.

B. The Legislative Branch

In 1789, when the first Congress submitted the Establishment Clause and the rest of the Bill of Rights to the states for ratification, it also established the office of legislative chaplain[36] and called upon President Washington to "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God . . . ."[37] The practice begun by the first Congress of acknowledging that the state is not the final guarantor of the inalienable rights of its citizens has continued throughout this country's history.[38]

The Congress that inserted the words "under God" into the Pledge stood squarely within this tradition. As Congressman Wolverton observed in urging the inclusion of "under God" in the Pledge:

> Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that every human being has been created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. Thus, the inclusion of God in our pledge of allegiance . . . sets at naught the communistic theory that the State takes precedence over the individual . . . .[39]

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36. *See* Marsh v. Chambers, 463 U.S. 783, 790 (1983).

37. 1 ANNALS OF CONG. 949 (Joseph Gales & William Seaton eds., 1789); *accord id.* at 90, 92, 958-959.

38. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 30 (2004) (Rehnquist, C.J., concurring) (noting Congress's adoption of the Star Spangled Banner, which includes religious language, as the national anthem); *see also, e.g.*, 36 U.S.C. § 302 (2006) (making "In God we trust" the national motto).

39. 100 CONG. REC. 7762 (1954) (statement of Rep. Wolverton). *See also* H.R. REP. NO. 83-1693, at 1-2 (1954); S. REP. NO. 83-1287, at 2 (1954) (describing

The proponents of adding the phrase "under God" to the Pledge were conscious not only of that tradition generally, but also of the exigencies of their historical moment. As noted above, a prime reason the words "under God" were inserted into the Pledge was to distinguish this country from the Soviet Union.[40] But this was not some jingoistic exercise in contrasting good believers with bad atheists. It was a serious reflection on the different visions of human nature—and therefore of human freedom—that underlay the two systems.

Thus, by amending the Pledge in 1954, Congress once again reiterated the political philosophy that government should be limited precisely because the rights of the people derive from a power higher than the state.[41] Because this merely locates the Pledge within the natural rights philosophy of Washington, Hamilton, Jefferson, Madison, and Lincoln, leading students in reciting the amended Pledge is no less permissible under the Establishment Clause than leading them in the original expressions of that philosophy.

C. The Judicial Branch

The Supreme Court has joined its sister branches in reflecting and reinforcing the traditional American political philosophy that the state is constrained by the inalienable rights of its citizens because they derive from some transcendent source. That is the very real insight in what is too often assumed to be a throw-away line by Justice Douglas:

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similar sentiments of Senator Ferguson, author of the Senate proposal); 100 CONG. REC. 7757-7758 (1954) (statement of Rep. Bolton).

40. *See supra* page 183. The legislative history is replete with references to "atomic peril," 100 CONG. REC. 7761 (1954) (statement of Rep. O'Hara); "communism," *id.* at 7757 (statement of Rep. Bolton); "the conflict now facing us," *id.* at 7759 (statement of Rep. Rabaut); "a time in the world," *id.* at 7764 (statement of Rep. Bolton); and "this moment in history," *id.* at 6077 (statement of Rep. Rabaut).

41. The House Report also quotes from two other men who helped shape this country early in its history. William Penn said, "'Those people who are not governed by God will be ruled by tyrants.'" H.R. REP. NO. 83-1693, at 2 (1954); *see also* 100 CONG. REC. 7760 (statement of Rep. Oakman (quoting William Penn)). George Mason explained: "'All acts of legislature apparently contrary to the natural right and justice are, in our laws, and must be in the nature of things considered as void. The laws of nature are the laws of God, whose authority can be superseded by no power on earth.'" H.R. REP. 83-1693, at 2 (1954); *see also* 100 CONG. REC. 7760 (statement of Rep. Oakman (quoting George Mason)).

Our "institutions" do indeed "presuppose a Supreme Being,"[42] because they presuppose the existence of a source of rights that is prior to the state—even a state backed by a large popular majority.[43] For the same reason, Chief Justice Marshall established the tradition of opening the Supreme Court for business with the words "God save the United States and this Honorable Court."[44]

The Supreme Court has also recounted in detail how the Framers did not view references to or invocations of God, such as the foregoing, as an "establishment" of religion.[45] Government expression may *acknowledge* or *reflect* the broader culture, including its religious elements, so long as it does not *establish* religion.[46] That is, government may freely recognize the role of religion in society, so long as it does not advocate for or "endorse" it.[47] As Justice Goldberg put the matter succinctly forty years ago: "Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings."[48]

The theory of the Establishment Clause urged in Mr. Newdow's lawsuits challenging "under God" in the Pledge is at war with these principles. If voluntarily reciting the Pledge is unconstitutional simply because it refers to a nation "under God," then voluntarily reciting the

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42. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

43. Since *Zorach*, the Court has repeatedly reaffirmed that "[w]e are a religious people whose institutions presuppose a Supreme Being." Sch. Dist. v. Schempp, 374 U.S. 203, 213 (1963) (alteration in original); *see also* Lynch v. Donnelly, 465 U.S. 668, 675 (1984); Marsh v. Chambers, 463 U.S. 783, 792 (1983); Walz v. Tax Comm'n, 397 U.S. 664, 672 (1970).

44. Engel v. Vitale, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting) (citation omitted).

45. *See, e.g.*, Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 671-73 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); *Lynch*, 465 U.S. at 675-78 (1984); *Marsh*, 463 U.S. at 792 (1983).

46. *See Marsh*, 463 U.S. at 792 (permitting government religious expression as "acknowledgment of beliefs widely held among the people of this country").

47. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306-08 (2000).

48. *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring). *See also* McGowan v. Maryland, 366 U.S. 420, 562 (1961) (Douglas, J., dissenting) ("The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.").

Declaration of Independence or the Gettysburg Address (as schoolchildren have done for generations) must also be unconstitutional, because those documents similarly refer to the Creator as the source of our rights.

If courts were to follow this logic, it would effect a drastic change in our national ethos by declaring unconstitutional a theory of inalienable rights that bears enormous historical and cultural importance, even to this day. Courts should continue to respect not only that ethos, but also the consistent interpretation of the Establishment Clause reflected in the expression and conduct of both coordinate branches.

IV. A TRANSCENDENT SOURCE OF RIGHTS

Mr. Newdow has claimed that "under God" in the Pledge violates the Establishment Clause because any reference to the supernatural in the government's view of itself—particularly when public school teachers lead public school students in reciting that view—impermissibly involves the government in religious affairs, and coerces those students into religious expression.[49] If this were the case, the Constitution would allow the government to espouse only those political philosophies in which rights have some kind of this-worldly—and therefore contingent—source.

Some contemporary legal theorists—the anti-foundationalists, led by Richard Rorty and Stanley Fish—have embraced both the repudiation of metaphysical foundations for legal rights, and the corresponding contingency of those rights.[50] Others have criticized anti-

49. Answering Brief for Plaintiff-Appellee at 36-37, Newdow v. Carey, No. 05-17257 (9th Cir., July 17, 2006) (discussing "coercion" test); *id.* at 56 (emphasizing right "to have a government that does not 'lend its power to one side or the other in controversies over religious . . . dogma'") (quoting Employment Div. v. Smith, 494 U.S 877 (1990)).

50. *See* Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. PA. L. REV. 371, 374-78, 443-54 (1992) (summarizing the thought of Rorty and Fish); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 892-917 (1989); Sanford Levinson, *Law As Literature*, 60 TEX. L. REV. 373, 379-86 (1982).

foundationalism vigorously.[51] In 1946, long before these theories were elaborated in the legal literature, one attorney summarized the core of that critique in an address to the judges of the Ninth Circuit Court of Appeals:

> [I]f there is no higher law, there is no basis for saying that any man-made law is unjust . . . ; and in such case, the ultimate reason for things, as Justice Holmes himself conceded, is force. If there is no natural law, there are no natural rights; and if there are no natural rights, the Bill of Rights is a delusion, and everything which a man possesses—his life, his liberty, and his property—are held by sufferance of government, and in that case it is inevitable that government will some day find it expedient to take away what is held by a title such as that. And if there are no eternal truths, if everything changes, everything, then we may not complain when the standard of citizenship changes from freedom to servility and when democracy relapses into tyranny.[52]

The purpose of this article is not to flesh out or resolve the debate between anti-foundationalists and their critics, but instead simply to point out that a decision striking down the use of "under God" in the Pledge *would* resolve that debate—at least when it comes to the position the government may take in it. Specifically, the Establishment Clause would then preclude the government from viewing itself (and urging that view on its citizens) as constrained to respect the rights of its citizens because those rights derive from a metaphysical or transcendent source. As a result, the government would be permitted to declare and espouse only those political philosophies that do not rely on such a source.

The Establishment Clause should not be read so aggressively. This reading goes far beyond what is necessary to disestablish any

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51. *See, e.g.*, Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523 (1996); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 309-13 (1985).

52. Harold R. McKinnon, The Higher Law, Address Before the Conference of Federal Judges of the Ninth Circuit, at San Francisco (September 3, 1946), *in* James B. Schall, *The Intellectual Context of Natural Law*, 38 AM. J. JURIS. 85, 85 (1993) (alteration added).

religion, and instead treads into territory where the political branches should have virtually plenary control—the government's ability to define and advocate its own political philosophy.[53] This result would appear all the more absurd in light of the long history of American governments' declaring publicly that they are constrained to respect the rights of their citizens precisely because those rights rest on metaphysical or transcendent foundations.

CONCLUSION

It could be that Mr. Newdow has it right. It could be that the Founders themselves and, since then, all three branches of government, all got it wrong—over and over again—in interpreting the Establishment Clause as consistent with the political philosophy distilled into the phrase "under God" in the Pledge of Allegiance. But to put it kindly, that is a stretch. Such a consistent series of decisions by so many governmental actors in all three branches of government over such a long period time—all implying that the Establishment Clause is consistent with this theory of fundamental rights—represents powerful evidence that the Constitution allows the government to express this political philosophy, even using the term "God." And any Establishment Clause theory that leads to the opposite result must be flawed in some way.

In sum, the core constitutional question is this: does the Establishment Clause allow the government to hold that there is something metaphysical or transcendent out there (whomever or whatever it may be, by whatever name) that is both the source of rights for individuals, and the corresponding source of limits on government to respect those rights? The Declaration of Independence, the Gettysburg Address, and the countless other expressions of American political philosophy from before the Founding to the present, from all three branches of government—legislative, executive, and judicial—all answer this question, "yes."

Mr. Newdow and his supporters answer that question, "no." And by virtue of the very system of government predicated on the answer "yes," Mr. Newdow has the right—a right that is not subject to the whim of shifting majorities—to hold this view, to shout it from the

53. *See* Bd. of Regents v. Southworth, 517 U.S. 217, 229 (2000); Rust v. Sullivan, 500 U.S. 173, 192-95 (1991).

rooftops, and even to shape his life around it. But Mr. Newdow does *not* have the right to impose his "no" on everyone else—to preclude American governments from understanding themselves in this way, from expressing that self-understanding, and even from urging it on their citizens. And that is exactly what Mr. Newdow would accomplish if courts were to accept his interpretation of the Establishment Clause.