Religion, Constitutionalism, and Ethos

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In a little more than two pages in a law review, Hannah Pitkin once offered a deeply penetrating account of the nature and function of the United States Constitution. While jurists and commentators have long insisted that the Constitution derives its authority from its status as hard law,[1] Pitkin suggested that the authority of the Constitution flows in important part from its status as the embodiment of our "fundamental nature as a people," our national "ethos," which "is sacred and demands our respectful acknowledgement."[2] By this she meant that the Constitution commands authority because it expresses enduring social values. Thus Woodrow Wilson insisted that "the Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age."[3] Likewise, Franklin Roosevelt invoked the "original broad concept of the Constitution as a layman's instrument of government."[4] By such statements, these Presidents meant that the Constitution must be understood as an expression of the deepest cultural values of our nation.[5]

Supreme Court Justices also invoke the authority of the Constitution as ethos.[6] For example, Chief Justice Rehnquist supported his conclusion that the Constitution allows voluntary recitations of the Pledge of Allegiance in public schools by looking to certain significant events

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[1] *See, e.g.*, William W. Van Alstyne, *The Idea of the Constitution as Hard Law*, 37 J. LEGAL EDUC. 174, 179 (1987) (championing the ideal "of the constitution as hard law, law written in virtually capital letters (LAW), law as meaning reliable law.").

[2] Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 169 (1987).

[3] WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 69 (1908).

[4] FRANKLIN DELANO ROOSEVELT, T*he Constitution of the United States Was a Layman's Document, Not a Lawyer's Contract* (Sept. 17, 1937), *in* 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 353 (Samuel I. Rosenman ed., 1941).

[5] *See* Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. 1473, 1501 (2007).

[6] For a discussion of the ethos conception of constitutional authority and how it interacts with other conceptions, see generally ROBERT C. POST, *Theories of Constitutional Interpretation*, *in* ROBERT POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995).

in American history—specifically, President Washington's first inaugural address and Thanksgiving proclamation, President Lincoln's Gettysburg Address and second inaugural address, President Wilson's 1917 request for a declaration of war against Germany, President Franklin Roosevelt's first inaugural address, General Eisenhower's "Order of the Day" on D-Day, the initial appearance of the motto "In God We Trust" on the country's currency during the Civil War, and the opening proclamation of the Marshal of the U.S. Supreme Court, which dates back at least to 1827.[7] In Chief Justice Rehnquist's view, "[a]ll of these events strongly suggest that *our national culture allows* public recognition of our Nation's religious history and character."[8]

Rehnquist's understanding of the Establishment Clause was radically different from Justice Brennan's. Yet Brennan agreed with Rehnquist's implicit premise that the content of our national character confers constitutional authority:

> [T]he Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee. . . . [T]he Members of the First Congress should be treated . . . as the authors of a document meant to last for the ages. Indeed, a proper respect for the Framers themselves forbids us to give so static and lifeless a meaning to their work.[9]

While Rehnquist and Brennan disagreed about the pace at which the American ethos evolves in history, they nonetheless agreed that this ethos partially established the authority of the Constitution. Pitkin's understanding of constitutional authority thus finds support in the language favored by some influential Presidents and Justices.

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[7] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 26-29 (2004) (Rehnquist, C.J., concurring in judgment).

[8] *Id*. at 30 (emphasis added). As the approach of Chief Justice Rehnquist suggests, appeals to the authority of the Constitution as ethos are more likely to prove persuasive when the contemporary commitments being asserted possess an historical (although not necessarily an originalist) pedigree. *See infra* note 11 (quoting Pitkin).

[9] Marsh v. Chambers, 463 U.S. 783, 816-17 (1983) (Brennan, J., dissenting).

If Pitkin is right that our Constitution is not just what we do, but who we are—not just how we strive to (re)constitute ourselves,[10] but how we are already constituted[11]—then the general subject of religion and constitutionalism encompasses a basic problem for progressive constitutionalists who believe in a wall of separation between church and state—who, with Justice Ginsburg, believe that "the aim of the Establishment Clause is genuinely to uncouple government from church."[12] No doubt a separationist approach, one that maintains a secular public space,[13] has substantial virtues. Among other things, it disables government from threatening the equal social status of citizens who are deeply alienated by the religious practices advanced, endorsed, or coerced by government. But this virtue, although considerable, does not address the problem I have in mind.

The problem, in short, is that the American people tend to be strikingly religious. What is more, our "fundamental nature as a people"[14] seems partially defined by a strong commitment to the public affirmation of religious belief.[15] This facet of the American ethos finds expression even in the judicial opinions of certain "liberal" Justices. Whether and to what extent such

[10] *See* Pitkin, *supra* note 2, at 168 ("To constitute, one must not merely become active at some moment but must establish something that lasts, which, in human affairs, inevitably means something that will enlist and be carried forward by others. Unless we succeed in creating—together with others—something lasting, inclusive, principled, and fundamental, we have not succeeded in *constituting* anything.").

[11] *See id*. at 169 ("Except insofar as we *do*, what we think we *have* is powerless and will soon disappear. Except insofar as, in doing, we respect what we *are*—both our actuality and the genuine potential within us—our doing will be a disaster. Neglect any one of these dimensions, and you will get the idea of our United States Constitution very wrong.").

[12] Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 817-18 (1995) (Ginsburg, J., dissenting) (citing Everson v. Board of Ed. of Ewing, 330 U.S. 1, 16 (1947)).

[13] In *Pinette*, Ginsburg endorsed the argument in Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197-214 (1992), that the negative bar against establishing a religion implies an affirmative establishment of a secular public order. *See* 515 U.S. at 817.

[14] Pitkin, *supra* note 2, at 169.

[15] To be clear, this is an admission against interest. I am a secular Jew who, like many progressives, fears the increasing presence of religion (and Christianity in particular) in the public life of our nation. But it strikes me as false and potentially dishonest to characterize the American ethos as reflecting my values on the general subject of religion and constitutionalism.

expression is normatively acceptable—maybe even required to a certain extent—is the difficult question that progressive constitutionalists face.

I.

One does not need to look hard to find evidence of the pervasive role of religion in public and private life in America. Much social science research establishes that Americans are very religious in absolute terms and uncommonly religious relative to inhabitants of other economically developed societies. For example, Samuel Huntington's *Who Are We?*,[16] however forcefully it has been criticized in various ways, compiles data that seems difficult to dismiss:

> Overwhelming majorities of Americans affirm religious beliefs. When asked in 1999 whether they believed in God or a universal spirit, or neither, 86 percent of those polled said they believed in God, 8 percent in a universal spirit, and 5 percent in neither. When asked in 2003 simply whether they believed in God or not, 92 percent said yes. In a series of 2002-2003 polls, 57 percent to 65 percent of Americans said religion was very important in their life, 23 percent to 27 percent said fairly important, and 12 percent to 18 percent said not very important. Seventy-two percent to 74 percent said they believed in life after death, while 17 percent said they did not.[17]

Huntington also offers robust support for his comparative claim that "Americans rank . . . among the most religious people in the world and differ dramatically in their high level of religiosity from the people of other economically developed countries."[18] For example, America is "a

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[16] SAMUEL P. HUNTINGTON, WHO ARE WE?: THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY (2004).

[17] *Id*. at 86. Huntington further reported:

> In 2001, 66 percent of Americans viewed atheists unfavorably, while 35 percent viewed Muslims that way. Similarly, 69 percent of all Americans said they would be bothered by or could not accept the marriage of a member of their family to an atheist, compared with 45 percent of white Americans who said the same about a family member marrying a black person.

Id. at 88.

[18] *Id*.

glaring exception" to the generally inverse relationship that exists between the level of religious commitment in a country and the country's level of economic development.[19]

For more qualitative but no less revealing evidence, one might consider the many ways in which our (liberal Democratic) President speaks about religion. He seems to go out of his way to stress his religious faith and his belief in God. For example, in his Inaugural Address, President Obama underscored the "God-given promise that all are equal" and stated that "God calls on us to shape an uncertain destiny."[20] He also referenced "God's grace upon us" before ending with "God bless you" and "God bless the United States of America."[21] He even invoked "the words of Scripture" that "the time has come to set aside childish things."[22] As Chief Justice Rehnquist's opinion in *Newdow* suggests,[23] President Obama was following the public practice of many a previous President.

II.

It is easy to offer many examples of instances in which the "conservative" Justices on the contemporary Court viewed robust symbolic expressions of religious belief as compatible with the Establishment Clause. More striking for present purposes are the instances in which the "liberals" allow accommodation of religious beliefs, either by not deciding certain Establishment Clause questions or by deciding them in a particular way.

Consider, for example, the prudential standing holding in *Elk Grove Unified School District v. Newdow*.[24] The Court, in an opinion authored by Justice Stevens and joined by

[19] *Id*.
[20] President Barack Hussein Obama, Inaugural Address, Jan. 20, 2009, *available at* http://www.whitehouse.gov/blog/inaugural-address/.
[21] *Id*.
[22] *Id*.
[23] *See supra* note 7 and accompanying text.
[24] 124 S. Ct. 2301 (2004).

Justices Kennedy, Souter, Ginsburg and Breyer, held that respondent Michael Newdow could not challenge the inclusion of the words "under God" in recitations of the Pledge of Allegiance at his daughter's public elementary school. The Court so concluded based on a novel "prudential"—that is, not constitutionally required—standing theory. Specifically, Justice Stevens wrote these words for the Court:

> In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law. . . . We conclude that, having been deprived under California law of the right to sue as next friend, Newdow lacks prudential standing to bring this suit in federal court.[25]

Chief Justice Rehnquist countered that "the Court may have succeeded in confining this novel principle almost narrowly enough to be, like the proverbial excursion ticket—good for this day only."[26] Justice O'Connor also would have reached the merits and affirmed the constitutionality of policies providing for the recitation of the Pledge in public schools.[27]

Many commentators have sided with the Chief Justice, suggesting that the Court created limits on its own authority in order to have its cake and eat it too: The Ninth Circuit's decision striking down the local school district's Pledge-recitation policy is no longer law, yet the Supreme Court did not have to say what the law is, potentially setting off a political firestorm—and quite possibly triggering a constitutional amendment—during an election year.[28] The Chief

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[25] *Id.* at 2312.

[26] *Id.* at 2316 (Rehnquist, C. J., concurring in judgment).

[27] *Id*. at 2321-27 (O'Connor, J., concurring in judgment).

[28] *See, e.g.*, Stuart Taylor Jr., *Our Imperial, Disingenuous, Indispensable Court*, National Journal, *available at* http://nationaljournal.com/taylor.htm (visited July 19, 2004) ("In short, none of the nine consistently practices judicial restraint. And when the justices do invoke that ideal, it is often an exercise in disingenuousness. Take the 5–3 decision on June 14, which ducked the merits of the case in which a federal appeals court in California had ruled that 'under God' must be dropped when the Pledge of Allegiance is recited in schools . . . . The case presented

Justice's criticism that the Court was fashioning a prudential standing rule essentially "for this day only," a charge the majority did not seriously dispute, suggests that the Court's opinion will have the generative force of a rock. In the meantime—that is, since the decision was handed down in 2004—students in public schools around the country may recite the words "under God" in the Pledge without any Establishment Clause impediment imposed by the U.S. Supreme Court.

A pair of recent Ten Commandments cases provides another illuminating example. In *McCreary County, Kentucky v. ACLU of Kentucky*,[29] and *Van Orden v. Perry*,[30] the Court held 5-4 that the *McCreary County* Ten Commandments displays in county courthouses violated the Establishment Clause but that the *Van Orden* monument, a large monolith that had long stood on the grounds of the Texas statehouse, did not.[31] Only Justice Breyer was in the majority in both cases, and his narrow concurrence in the judgment was decisive in *Van Orden*. Breyer declared that he was acting to reduce the "divisiveness" that Ten Commandments cases generate.[32] He wrote that "to reach a contrary conclusion here, based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions."[33] Breyer sent a strong signal that advocates of church-state separation should not challenge longstanding displays and that their ideological adversaries should not build new ones.[34]

In both *Newdow* and *Van Orden*, certain "liberal" Justices seem (either implicitly or explicitly) to be registering the constitutional relevance of the religious commitments of most

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a dilemma for the four liberals and Kennedy. A decision striking out 'under God' would have provoked an election-year firestorm, perhaps even a constitutional amendment.").

[29] 545 U.S. 844 (2005).

[30] 545 U.S. 677 (2005).

[31] *McCreary County*, 545 U.S. at 881; *Van Orden*, 545 U.S. at 692.

[32] 545 U.S. at 698 (Breyer, J., concurring in the judgment).

[33] *Id*. at 704.

[34] *See id.* at 703-04.

Americans and to be incorporating those commitments into the grounds of judicial decision. Breyer's opinion in *Van Orden*, which states the law for the time being,[35] was more transparent than the approach taken by the Court in *Newdow*. But in both instances the authoritative opinion conceived of law as an institution that must account for the conditions of its own legitimation.[36] In both instances the professional articulation (or nonarticulation) of constitutional law by the Court was partially shaped by the religious commitments of the American public.

III.

I have so far described some evidence that supports my reading of the American ethos on the general role of religion in public life, and I have further described two instances in which "liberal" Justices seem to read the American ethos in much the same way and to deem it relevant to the execution of their judicial responsibilities. I do not think what I have written so far should be regarded as particularly controversial, although I may be wrong about that. Regardless, the normative questions that follow are another kettle of fish. There is no shortage of commentators who perceive much to admire in the Ninth Circuit's reasoning in *Newdow*,[37] and no shortage who condemn Justice Breyer's concurrence in the judgment in *Van Orden*.[38] If, however, one agrees

[35] Change will come as soon as the reconstituted Court hears an Establishment Clause case. Justice Alito is very likely to reject Justice O'Connor's endorsement test and to allow much more symbolic expression of religion by government. I expect the Roberts Court to reject the metaphor of a wall separating church and state and to hold that the government violates the Establishment Clause only if it literally establishes a church or coerces religious participation. *Cf.* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553 (2007) (holding 5-4 along predictable ideological lines that taxpayers do not have standing to assert an Establishment Clause claim against Executive Branch actions funded by general appropriations, as opposed to a specific congressional grant).

[36] *See generally* Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008).

[37] *See, e.g.*, Douglas Laycock, *The Supreme Court, 2003 Term—Comment: Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 224 (2004) ("In *Newdow*, it may have been politically impossible to affirm and legally impossible to reverse."); *id*. at 231 ("Under principles that had been consistently applied over forty years, the court of appeals properly invalidated 'under God' in the Pledge. This brief recital is a government-sponsored religious observance, and prohibiting such observances is the settled remedy." (footnote omitted)).

[38] *See, e.g.*, Erwin Chemerinsky, *Why Justice Breyer Was Wrong in* Van Orden v. Perry, 14 WM. & MARY BILL RTS. J. 1, 3 (2005). For a particularly scathing critique, see William Van Alstyne, *Ten Commandments, Nine*

with Pitkin that our "fundamental nature as a people"[39] confers constitutional authority, then such criticism may not tell the whole story.

To be sure, strong doctrinal arguments call into question the Court's handling of *Newdow* and *Van Orden*, although I will not rehearse them at length here. Suffice it to say that Pledge policies call for the profession of a religious belief in monotheism in a sensitive context (public schools) and by impressionable people (children). The setting, moreover, can be highly coercive in light of peer pressure, despite the formal voluntariness of the practice. In fact, the various religious organizations that recoiled at the Ninth Circuit's decision were unwittingly supporting the plausibility of the result that the court of appeals reached. If the Pledge were as secular as the government argued, there would have been little reason for religious groups to be *so* upset. It was instructive to hear the Solicitor General's secular characterization of the Pledge at oral argument in *Newdow* at the very moment that protesters were praying outside the Court.[40]

As for *Van Orden*, the monument on the statehouse grounds was large (6 feet high and 3 feet wide) and the words "I AM the LORD thy God" were written on it in clearly visible letters. This display, too, seemed like an endorsement of religion—and specifically, of the existence of (one) God—by the state. Fairly applied, the *Lemon* test,[41] Justice O'Connor's endorsement test,[42] and the coercion test[43] each likely would lead to the invalidation of the Pledge policy, and the Ten Commandments display at issue in *Van Orden* likely would flunk the *Lemon* and endorsement tests.

Judges, and Five Versions of One Amendment — The First ("Now *What?")*, 14 WM. & MARY BILL RTS. J. 17 (2005).

[39] Pitkin, *supra* note 2, at 169.

[40] *Newdow* was before the Court during the term that I clerked there.

[41] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

[42] *See* Lynch v. Donnelly, 465 U.S. 668 (1984) (O'Connor, J., concurring).

[43] *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992); Allegheny County v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., dissenting).

Doctrinal arguments, however, obviously cannot account for where the doctrine comes from, nor can they determine when it should change. Strong doctrinal arguments were available to indict legislative prayer in *Marsh v. Chambers*,[44] yet the pull of history and ethos overwhelmed those arguments in the view of the Court. If the authority of our Constitution flows partly from who we are as a people and not entirely from its status as LAW, then it may be of some constitutional relevance that the overwhelming majority of Americans would object strenuously to excision of the words "under God" from the Pledge and do not want longstanding Ten Commandments monuments removed from public spaces.

To be clear, I am not imagining that ethos possesses the kind of authority that empowers a judge to decide a case a certain way (call it "E") just because a sufficient number of people believe in E. Such an account would be corrosive of any degree of legal autonomy. Rather, I am suggesting that the authority of ethos empowers a judge who decides E because E is the correct outcome to justify why E is right in part by appealing to principles and commitments that are widely shared.

Accordingly, I am not advancing the claim that constitutional law is merely a vessel through which constitutional culture flows. I am instead conceiving of constitutional law and constitutional culture as relating dialectically.[45] It follows that what I am suggesting does not prove too much. For example, even if I am right, prayer in schools can still remain constitutionally out of bounds. When core antiestablishment values are threatened, as they would be by a reinauguration of prayer in schools, constitutional law appropriate intervenes to regulate constitutional culture, just as constitutional culture at other times informs the fashioning

[44] Marsh v. Chambers, 463 U.S. 783 (1983).

[45] For a discussion, see generally Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

of constitutional law. Moreover, constitutional culture has long been willing to abide, if not approve, the Court's prohibition on school prayer.[46]

The question for progressive constitutionalists in cases like *Newdow* and *Van Orden* is which component of the dialectical relation should be given priority. It seems unlikely that the answer should always to be the same. Are the words "under God" in the Pledge or a Ten Commandments monument on the grounds of a statehouse sufficiently threatening to antiestablishment values that constitutional law should intervene to remove them, much as it did with school prayer several decades ago? Or, as I have implicitly suggested may be the case, is the threat to an establishment of religion sufficiently less serious in the Pledge and Ten Commandments contexts that a constitutional culture which strongly supports public expressions of both should be allowed to reorient to some extent the doctrinal path of constitutional law?

The problem eludes resolution at a theoretical level, but it ought to be generally recognized. And it may counsel greater accommodation of religious expression in particular public settings than progressives might personally wish to allow. Principled adherence to the ideal of the Living Constitution may require them to tolerate children saying "under God" in the Pledge of Allegiance, and it may also require them to tolerate certain Ten Commandments displays in the public square—even as progressives continue to insist on the constitutional impertinence of school prayer.

[46] *See* Abington School District v. Schempp, 374 U.S. 203 (1973); Engel v. Vitale, 370 U.S. 421 (1962).