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February 29, 2008: The Establishment Clause "under God": Toward an American Law of a Meaning-Filled Public Space

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2/29/2008--I use the word meaning because I am yet afraid of the real word, which is, the Holy. The word meaning will do for the moment. If we think of the State of embodying the Holy, we have the makings of theocracy and tyrannies of all kinds. But if we think of the State as subject to the Holy, we have a different kind of politics. The words "under God" in the Pledge of Allegiance certainly were intended and are intended to represent different claims on different levels. On one level, they are weapons in the culture wars. We are under God and therefore cannot have abortion and gay marriage. On another level, they represent the claim of the Judeo-Christian tradition. This is the level at which the 9th Circuit found the Pledge unconstitutional. On yet another level, they represented in the 1950's a claim on behalf of the liberal-democratic-capitalist West against Communism. But within these words "under God" is also the claim that the State, the nation, the people are "under" something. We are not self-sufficient. The world is not merely our resource. Other beings do not exist for us. That claim, this faith, is certainly not uncontroversial. In fact, in the 1950's, when the words "under God" were added, the claim was ceasing to represent what America really believed about reality. Even its religion was becoming mere human production. So, inserting these words at that time might have been a looking backward to something that we used to believe. My proposal for constitutional law is that it has no proper place in this struggle. That struggle can be named in different ways. It is between materialism and meaningfulness. It is between atheism and faith. It is between the powerful and the powerless. It is between mechanism and dignity. I would like to say it is between capitalism and justice. No matter how the struggle plays out, there is no place for a court to step in. There is no place for a law professor to have an opinion out of dreary conventional (to quote Conway Morris) categories. Noah Feldman argued that the Establishment Clause should be understood as involving money. There is a sense in which this is so. But more to the point, the Establishment Clause should be understood as separating institutions—the institution of the State from those of the churches. In the realm of the holy itself, the Establishment Clause is irrelevant. FDR was appealing to the realm of the Holy in his prayer for our armies at Normandy on nationwide radio in 1944. He was asserting that the Holy has power in history. He was asserting that the Nazis were the enemies of the Holy. Law has nothing to do with such matters. Law only profanes them.