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Brief Response to Attorney Albright's Article

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By Prof. Peter Brandon Bayer

Attorney D. Chris Albright's provocative plea that the phrase "under God" in the Pledge of Allegiance is insufficiently religious to offend contemporary Establishment Clause principles rests on three wobbly premises: (1) a limited perspective of some of the Framers, one which the Supreme Court rightly has eschewed; (2) Supreme Court dicta reflecting at best certain justices' cursory suppositions about the religiosity of the words "under God;" and, (3) the wholly irrelevant, and possibly inaccurate argument that the words "under God" have had scant influence on schoolchildren. Space constraints mandate that responses to Mr. Albright's contentions be extremely brief.

Beginning with the intent of the Framers, any "accommodation" of religious beliefs afforded under the Establishment Clause must not confound the overarching principle of neutrality. Accommodation outside a realm of neutrality results in unlawful official endorsement of or coercion regarding religion. Thus, as noted in my article, a public high school may not refuse student religious organizations the same access that secular student groups enjoy because such accommodation evinces neither favoritism for nor enmity towards religion.[1] By stark contrast, the Pledge's inclusion of "under God" renders it an officially sanctioned vow of national fealty, authored by Congress as testimony that devotion to and dependence upon divinity are integral precepts of national identity and purpose. As such, the Pledge does not merely accommodate religion. Rather, it intentionally fosters religion by engraving Government's endorsement that to truly adhere to American ideas, one must believe that our's is a "nation under God."

Consistent with the foregoing, despite Chief Justice Rehnquist's lament, the Court has long and fittingly rejected the premise that government may affirmatively promote religion as preferable to atheism, agnosticism, and unconventional beliefs.[2] Our ever maturing appreciation of Establishment Clause philosophy has heightened our awareness of the myriad ways Government, even with good intentions, may intrude into religious decisions which rightfully and exclusively belong to, "the home, the church and the inviolable citadel of the individual heart [.]"[3] Consequently, based on our unfolding and increasing cognizance, we may reject discrete practices that the Founders themselves might have been unwilling or unable to recognize as inconsistent with the core purposes of the very Clause they drafted.[4]

Equally fragile is Attorney Albright's appeal to a line of Supreme Court dicta that supposes the purposes and effects of reciting the Pledge with the words "under God" are sufficiently secular to withstand Establishment Clause review. Of course, unlike the Ninth Circuit, the Supreme Court has yet to confront squarely the Pledge issue based on a full evidentiary record and thoroughgoing argument. Similarly, Attorney Albright declines to confront the text, texture, and thrust of the 1954 amendment. Like the dicta he cites, Mr. Albright uncritically accepts the term "under God" as dispassionate description - a mere "acknowledgment of religion"[5] -- and ignores both the clear instrumental nature of the Pledge and the inevitable goal of religious fostering that results from, and indeed motivated the addition of those words. By contrast, discussing a document that expresses a particular author's religious reverence does not require either embracing or pretending to embrace that author's sectarian preferences. One readily understands, therefore, Justice Brennan's hesitancy in dictum upon which Mr. Albright relies that "reference to divinity in the revised pledge ... may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address."[6] Discussing the philosophy of the Pledge likely is not a religious act, but officially encouraged recitation of the Pledge's words "under God" is.

The last leg of Mr. Albright's argument is based on the supposition that because our nation enjoys a wide array of beliefs and practices

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Brief Response to Professor Bayer's Article

By D. Chris Albright

The inapplicability of the Supreme Court's school prayer decisions to the Pledge is implicitly conceded by Professor Bayer's argument that the Pledge should be treated as containing "a prayer of adoration sandwiched among . . . secular affirmations." The Pledge is not in fact a prayer, as it is merely declaratory, and is neither addressed to nor intended as a communication with Deity. Only by insisting that the Pledge be defined as prayer can the reasoning of the Supreme Court's school prayer cases be twisted into application against it.

Professor Bayer maintains that our nation's patriotic documents and anthems can still be discussed in public schools, notwithstanding the Pledge decision, since they are only a reflection of their various authors' personal beliefs. Such potential prior restraint on the public value and treatment of such documents is, however, precisely what is troubling. One may be directed to study the love letters of Lincoln for purely historic reasons, to learn more about the man's biography, without expectation of developing similar feelings towards the object of his affection. However, the Gettysburg Address was never intended as a merely private profession of Lincoln's own personal politics, with no more value to stir the public soul than the dissected anatomy of a frog. Rather, the Gettysburg Address, like the Declaration of Independence and other similar documents and anthems, has been treated for generations as intended not just for public study, but for public celebration, as articulating our nation's purpose and the basis for the rights which its citizens cherish. Nature abhors a vacuum. If our patriotic creeds may now only be discussed with detachment and dispassion, as if they were solely and only of historic or biographical worth, but their rhetoric and values may not be publicly celebrated, let alone inculcated, one wonders what philosophies will be utilized to fill the void. What will future generations be told is the purpose of our nation, or the basis on which they should profess any loyalty thereto, if our great patriotic creeds are no longer allowed to provide any answers to these questions?

Professor Bayer indicates that the Ninth Circuit's opinion is consistent with a "reevaluation of core precepts" that our Nation is currently undergoing. For those who believe our nation's "core precepts" have served us well, and stand in greater need of continuing promotion than reevaluation, these are potentially troubling words. This is especially so if the purported need for such reevaluation is not to be democratically tested. If the modern era requires a Constitution that more relentlessly prohibits public expressions of faith than the original, a democratic process of Constitutional amendment exists to accomplish this goal. If public recitation of the Pledge violates sound public policy, Congress and the School Boards may be convinced to abrogate the legislation that led to this practice. However, if these changes cannot be accomplished through such democratic methods, but only imposed against the will of the people, via a judicial coup d'etat, which rewrites the actual language and intent of the original Constitution, then perhaps such a reevaluation is not truly in order in the first place. As Justice Frankfurter once said: "As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard."[1] NL

ENDNOTES

1. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 645 (1943)(Frankfurter, J., dissenting).

LAW RELATED EDUCATION
High School Mock Trial Competition Results

by Marcia Stribling, Law Related Education Coordinator

More than 75 attorneys and justices assisted us this year at the local and state levels of the Nevada High School Mock Trial Competitions; many volunteered to judge the competitions. Several more helped by coaching the teams on their strategies and presentations. Well-established attorneys, those new to the legal profession and state and local judges served as presiding judges and scoring judge panel members. Students were judged on their presentation of information and teamwork rather than on their knowledge of the law.

Eight teams of students from across Nevada vied for the state championship in Henderson this past March. High school students representing Green Valley H.S., Reno H.S., Faith Lutheran H.S., Advanced Technologies Academy Team A, Foothill H.S., Advanced Technologies Academy Team C, Galena H.S., and The Meadows took on the roles of attorneys and witnesses to present a fictitious criminal case.

Students had practiced and rehearsed their roles since September under the guidance of a teacher and volunteer attorney coach. The results of the state competition were: 1st Place, Reno H.S., and, 2nd Place, Green Valley H.S. Reno H.S. is now preparing for the national competition which will be held in New Orleans May 8-10.

The national problem is a civil case, so the students are developing new strategies and learning new roles. Each round or case lasts 90 to 120 minutes and includes opening and closing arguments, presentation and cross examination of witnesses.

If you would like to know more about the mock trial program or how to help, contact Marcia Stribling, Law Related Education Coordinator, at the State Bar of Nevada in Las Vegas.

STATE WINNERS! - Pictured above is the team from Reno H.S. along with their coaches and Nevada Supreme Court Justice Nancy Becker (center).

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regarding religion, the words "under God" in the Pledge have not and likely will not endanger Establishment Clause principles. As a threshold point, whatever laudable religious diversity and freedom may depict American society hardly resolves the serious question whether and in what numbers school children (or others) have felt coerced, even subtly, either to embrace or to feign embracing the Pledge's official statement of religious favoritism. That neither a national nor monolithic religion has gripped America since 1954 is no proof that daily obligated recitation of "under God" has no effect on impressionable children's perceptions regarding religion.

Moreover, the purported lack of widespread negative effects is completely irrelevant to the underlying philosophy - and singular grandeur - of Constitutional rights. The Bill of Rights protects *individuals*. A class of one no less than a class of many may demand full constitutional coverage.[7] Thus, societal approval cannot validate an establishment of religion if one student feels compelled either to utter "under God" or to stand in uncomfortable silence - if one parent feels that State sponsored invocation of God interferes with her right to direct the religious upbringing of her child.[8] Contrary to the assertions of Attorney Albright, to protect freedom for one and all, that is the way it should be. NL

ENDNOTES

1. *E.g., Good News Club v. Milford Central School*, 533 U.S. 98 (2001); Lamb's Chapel v. Central Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).
2. *E.g., Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 225-26 (1963).
3. *Id.*, at 226.
4. *Cf., Brown v. Board of Education*, 347 U.S. 483, 492-93 (1954)(Invalidating officially mandated racial segregation of public schools, the Court accented, "... we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when Plessy v. Ferguson [generally permitting "separate but equal" state mandated racial segregation of public services] was written.")
5. *Wallace v. Jaffree*, 472 U.S. 38, 78 (1985)(O'Connor, J., concurring)(legislative authorization of a one-minute period of silence violated the Establishment Clause because the legislature's intent was "wholly religious").
6. *Schempp*, 374 U.S. at 304 (Brennan, J., concurring)(emphasis added).
7. *Cf, Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (*per curiam*) (equal protection case).