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THE REPUBLIC OF CHOICE, THE PLEDGE OF ALLEGIANCE, THE AMERICAN TALIBAN

Pnina Lahav*

I. INTRODUCTION

In two important books, The Republic of Choice1 and The Horizontal Society,2 published in 1990 and 1999 respectively, Lawrence M. Friedman presents his theories of a massive social transformation which occurred in the last century. I wish to examine these theories through the prism of two cases: Elk Grove Unified School District v. Newdow3 and Hamdi v. Rumsfeld,4 both decided in the spring of 2004. Both Newdow and Hamdi have been at the center of public controversy for many months; each case carries many of the ingredients presented in Friedman's The Republic of Choice and The Horizontal Society. I shall present these cases, show how they reflect themes explored in The Republic of Choice and The Horizontal Society, and pose some questions about the horizons of the explanatory powers of Friedman's theory.

Friedman's theory, which he more recently integrated into his American Law in the Twentieth Century,5 presents two models of society: traditional and modern, or vertical and horizontal. The traditional, vertical society is typified by a clear hierarchical structure, fixed preordained identities, and minimal mobility.6 For its members, the future looks pretty much like the present and the present looks pretty much like the past.7 Friedman observes that in the twentieth century most societies have undergone a radical transformation, from the vertical to the horizontal society.8 The vertical structure has been breaking down in favor of a loose-fitting societal structure where people are, as Friedman says, like rolling stones, mobile, free to make choices, feeling entitled to change the present, and full of hopes for a future that better reflects their expectations and choices.9

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6. Friedman, supra n. 2, at 5.
7. Id. at 20.
8. Id. at 5.
9. Friedman, supra n. 1, at 9, 11.

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I cannot argue with this basic insight. My aunt, Marcelle Nissan, who passed away last spring, epitomized this process perfectly. She was born into a very patriarchal family in Iran, where father ruled supreme and mother was illiterate. The name her father chose for her, Marcelle, disclosed his aspirations to identify with the West (France) and some willingness to loosen his traditional moorings. In 1934, he moved his family to Palestine, and the twelve-year-old Marcelle rapidly abandoned her traditional values in favor of the modern. She still knew when to kiss the hands of elders to show respect, and instinctively jumped to serve any male, adult or child, before that person even realized he needed service. Yet Marcelle dared to smoke, wore a bikini, fought in Israel’s war of independence, and refused an arranged marriage, all to the great consternation of her mother. She ended up a single woman, an owner of a prosperous boutique, and an enthusiastic explorer who jumped on every opportunity to go to the movies, attend a lecture, and travel to exotic places. She was a classic representative of the horizontal society and proof of the fundamental changes in consciousness that have revolutionized the world in the twentieth century as analyzed by Friedman’s scholarship.

The two Supreme Court cases I chose to address are excellent materials with which to reflect on Friedman’s theories. In Newdow, the Court considered a challenge to the presence of the phrase “under God” in the Pledge of Allegiance.\textsuperscript{10} The Pledge reads: “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.”\textsuperscript{11} Michael A. Newdow argued that the Establishment Clause of the First Amendment to the United States Constitution\textsuperscript{12} does not permit the recognition of God in an official and daily patriotic exercise in public school classrooms.\textsuperscript{13}

In Hamdi, a citizen of both the United States and Saudi Arabia was captured in Afghanistan during the battle between the Taliban and American military forces, and challenged President George W. Bush’s decision to hold him in military custody indefinitely.\textsuperscript{14} What makes Newdow and Hamdi excellent examples of the horizontal society?

II. DR. NEWDOW AND MR. HAMDI: MEMBERS OF THE REPUBLIC OF CHOICE

Michael Newdow is a doctor and a lawyer. His professions by themselves qualify Dr. Newdow as a respectable member of the horizontal society, where mobility and experimentation are significant trends.\textsuperscript{15} In the horizontal society, one is not confined to a single professional pursuit, but is largely free to re-invent oneself at different stages of one’s life. Dr. Newdow’s family situation is anything but traditional. Neither married nor divorced, he fathered a daughter and has been committed to partaking in her

\begin{itemize}
\item \textsuperscript{10} Newdow, 124 S. Ct. at 2305.
\item \textsuperscript{12} The Establishment Clause states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. Const. amend. I.
\item \textsuperscript{13} Newdow, 124 S. Ct. at 2303; see Restore Our Pledge of Allegiance, Mike Newdow, http://www.restorethepledge.com/mike_newdow/ (accessed Oct. 7, 2005).
\item \textsuperscript{14} Hamdi, 124 S. Ct. at 2633, 2636.
\item \textsuperscript{15} Friedman, supra n. 2, at 228.
\end{itemize}
education and development. A scientist at heart—another mark of the horizontal society, which is so much a part of the idea of progress—Dr. Newdow is an avowed atheist, a member of a “society of atheists,” and even a distinguished member of this society. As Friedman points out, the horizontal society is a hotbed for the development of many subnations. People get together to form groups that reflect their special interests in order to nurture communal feelings of solidarity and to promote their point of view in the public sphere. The society of atheists of which Dr. Newdow is a member is a good example of such a group or subnation. Because of his atheistic worldview, Dr. Newdow adamantly disagrees with the current formulation of the Pledge of Allegiance.

Dr. Newdow fits the horizontal society in other ways as well. His specialty is emergency medicine, a relatively new specialty, designed to meet the many perils accompanying a hectic modern society, which has come to depend on a panoply of dangerous instruments. His motives to push the Pledge litigation all the way to the Supreme Court in Washington, D.C., and make the oral argument all by himself, may also fit neatly within the concept of the horizontal society. More than one motive may drive a man to invest so much time, energy, and resources in a legal battle. Perhaps Dr. Newdow was driven by the principle of atheism; conceivably, his daughter’s best interests fueled his professional zeal. Fame may also have fed his energy. In The Republic of Choice, Friedman discusses the pervasiveness of celebrity culture in modern society. “[C]elebrities,” he astutely observes, are “the new heroes, the new models, the shepherds” of the horizontal society. Fame makes one a celebrity; Dr. Newdow may have consciously or subconsciously understood that the Pledge litigation was a golden opportunity to attain his fifteen minutes of celebrity status.

Friedman also warns us not to assume that the transformation from the vertical or traditional to the horizontal or modern society is anywhere near completion. He points out that “Some elements of culture . . . are indeed tough, autonomous, and resistant to change.” Patriarchy, a central pillar of the traditional society, is important to Dr. Newdow’s case. He wishes to shape his daughter’s identity in his image, that of an atheist who does not believe in God. Even if Dr. Newdow is more tolerant, and understands that his daughter is free to believe in God, his insistence that she be encouraged to consider the menu of identity choices, including that of atheism, makes him a patriarch—a man who knows what choices others should contemplate.

Traditionalism also plays an important role in Dr. Newdow’s case. The mother of Dr. Newdow’s daughter is a born-again Christian who influenced the five-year-old Ms.

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17. Friedman, supra n. 2, at 104. “These groups could never come alive without the skills and technology of a horizontal society.” Id.
18. Id.
20. Id. at 113.
22. Friedman, supra n. 1, at 203.
23. Friedman, supra n. 2, at 5.
Newdow, their daughter, to embrace her faith. Becoming a born-again Christian, Friedman might argue, is simply another step in the endless search for personal identity and meaning, so typical of the horizontal society. Besides, as I already mentioned, Friedman does not ignore the existence of pockets of traditionalism in modern society. Rather, he urges us to see these pockets as marginal symptoms which should not cloud a bigger picture. Thus, regardless of its vertical elements, Dr. Newdow’s case fits neatly into Friedman’s horizontal theory.

Friedman devotes considerable space in *The Republic of Choice* to discussing a major dimension of the horizontal society: the culture of rights. He views the culture of rights as one of the most important developments in this century and a cardinal characteristic of the horizontal society. Friedman opens *The Republic of Choice* with a report on “a remarkable dialogue between a homeless black man and a reporter” in New York City in the winter of 1985. It was a nasty winter and the City decided to evacuate its homeless into municipal shelters. “The black man complained with great vigor about the city’s plan. ‘They can’t do that to us,’ he said. . . . ‘We’ve got rights.’”

Dr. Newdow’s claim of rights may be divided into two parts. One part of his claim is a traditional right—a parental right to be involved in his daughter’s education. The second part is the right he believes follows from his parental right: he insists that he has a right to edit the Pledge of Allegiance. This is a right with audacious implications: Dr. Newdow wants the Court to remove the generally beloved, awe-inspiring phrase “under God” from the Pledge of Allegiance. The resulting surgery performed upon the Pledge would be dramatic. It would force the severance of the formal ties between God and Nation. Only a full appreciation of the radical nature of Dr. Newdow’s claimed right can clarify the extent to which he is such a perfect member of Friedman’s horizontal society, and a creature of the culture of rights. One individual feels entitled to change the law and customs of the majority to suit his identity needs as an atheist parent.

Indeed, the vertical dimension again raises its stubborn head. A parental right is hierarchical and clashes with the modern idea of children’s rights. Dr. Newdow’s daughter strongly rejects her father’s philosophy. She feels she has a right to pledge allegiance to a Nation under God. As we saw above, Friedman may argue that this is precisely his point. The vertical and the horizontal are symbiotically intertwined. The

25. See Friedman, *supra* n. 2, at 5-6.
26. Id. at 209.
27. Friedman, *supra* n. 1, at 2. “Rights, laws, free choice: these are crucial terms and ideas in modern Western society.” Id.
28. Id. at 1.
29. Id.
30. Id. People do not in fact have as many rights as they think they do, but the important point Friedman is making is not empirical. It is the feeling that one is protected by a bundle of rights that matters in his theory.
31. See Respts. Br. on the Merits at *2-3, *Newdow*, 124 S. Ct. 2301, 2004 WL 314156 (stating that the insertion of “under God” in the Pledge is an “example of the majority using the machinery of the state to enforce its preferred religious orthodoxy”).
32. Br. for Sandra L. Banning in Support of the Pets. for Cert., *supra* n. 24 and accompanying text.
idea that children may have rights, that their voice should be heard, is itself a symptom of the culture of rights, an important aspect of the horizontal society.

There is symmetry between some facts in *Newdow* and *Hamdi*. In both cases, a father appears before the Court to argue on behalf of his child. Dr. Newdow wants his daughter to be free to respect, and perhaps adopt his atheism. The father of Yaser Esam Hamdi, Esam Fouad Hamdi (or Himdi), wants his son released from solitary confinement in the United States and returned to his home in Saudi Arabia. In the mind of the father, his son was still a boy and “‘Boys like to try things new.’ . . . ‘He had never traveled outside Saudi Arabia before. He decided to show ‘I am a man.’” Mr. Hamdi, however, was not a child; he was twenty-four years old. His total dependence on what Friedman calls the “tender mercies” of American soldiers (if you wish, his hope that they do as the Pledge instructs them and allow him, too, to taste of the bounty of “liberty and justice”), and his utter helplessness as a man without rights should remind us of children.

A look at pictures of the young Hamdi prior to his ordeal gives the impression that he is a rather traditional person. He is photographed wearing the traditional male Arab headscarf, *kaftiyah*, and in one picture (after his release, where he was posing for the press) he also wears the traditional white robe, or *dishdasha*. The traditional Arab uniform certainly sends a message of keeping his distance from Western values. Mr. Hamdi grew up in Saudi Arabia in a home that valued family honor and patriarchy. Because there has been little access to Mr. Hamdi, all we know about his personal life comes from his father. According to Mr. Hamdi’s father, Hamdi was a student of marketing at King Fahd University when he left for Afghanistan in the summer of

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33. *Newdow*, 124 S. Ct. 2301; *Hamdi*, 124 S. Ct. 2633. Next friend habeas petitions on behalf of Yaser Essam Hamdi were brought before the federal district court by Frank Willard Dunham, Jr., the public defender, and Christian A. Peregrin, a private citizen. As these petitions were pending, Esam Fouad Hamdi, Yaser’s father, filed his own petition as his son’s next friend. These petitions were challenged by the United States government. On June 26, 2002, the Fourth Circuit Court of Appeals held that the public defender and the private citizen did not have standing to file a next friend petition. *Hamdi v. Rumsfeld*, 294 F.3d 598 (4th Cir. 2002). The Fourth Circuit did, however, permit Esam Fouad Hamdi’s petition to be considered. *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002).

34. Joel Brinkley, *From Afghanistan to Saudi Arabia, via Guantanamo*, 154 N.Y. Times A4 (Oct. 16, 2004). This article tells us that his name has been misspelled and mispronounced, and actually is “Himdi.” The article refers to Yaser as Hamdi (the name familiar to Americans), but to his father as Himdi. The ordeal from Saudi Arabia to Afghanistan to Guantanamo to the United States and back to Saudi Arabia, thus, ended in a formal separation of father and son, at least as far as their recognized names are concerned. *Id.*

35. *Id.*

36. *Id.*

37. Friedman, supra n. 2, at 67. Without courts, people will be “exposed to the tender mercies of the people in power.” *Id.*


39. Brinkley, supra n. 34.

40. In an interview, Esam Hamdi said that his family was “respected in Saudi Arabia” (hardly something one imagines hearing from the father of John Walker Lindh, the first American Taliban), and that “We believe in our religion that because parents are the main cause of our existence on earth, our duties toward them are very big.” Tony Bartelme, *Born in Louisiana, Captured in Afghanistan, Jailed in Hanahan: Yaser Hamdi Travels Long, Strange Road*, Post & Courier (Charleston, S.C.) 1A, 14A (Mar. 7, 2004).

41. Bartelme’s article was written prior to Mr. Hamdi’s release, at a time when almost no information was available about him. It appears that after his release, Mr. Hamdi has refrained from talking to the press.
2001. His voyage to Afghanistan to search for a more meaningful and personally invigorating Islam makes him similar to Mrs. Newdow and her daughter, who also pursue a fundamentalist experience in order to add meaning to life. The United States claims that once in Afghanistan, Hamdi joined the Taliban. The Hamdi family denies a Taliban connection. Regardless of which side tells the truth, all agree that after September 11th Mr. Hamdi was caught by the Northern Coalition and handed over to the American forces. He was classified as an “enemy combatant” and flown to Guantanamo Bay, Cuba. Once it was discovered that he was born in the United States, he was removed to a military brig in the United States and held in solitary confinement for more than two and a half years. Mr. Hamdi was released on October 11, 2004.

The most striking difference between Dr. Newdow and Mr. Hamdi is the role of God in their lives. One of the formative experiences in Dr. Newdow’s life is his campaign to banish God’s name from the public sphere. The most formative experience in young Hamdi’s life is his current ordeal. In a letter to his father, Mr. Hamdi writes: “My father, I think Allah is punishing me because I left without informing you and getting your permission.”

Mr. Hamdi, then, not only believes in God, Allah, but also in an omnipresent and controlling God who keeps a detailed record of every step mortals take. Mr. Hamdi believes that he has been receiving his comeuppance for leaving Saudi Arabia for Afghanistan without his parents’ permission. Consider the twenty-four-year-old Hamdi’s crucible—a hitherto sheltered member of the Saudi middle class, caught in a bloody military conflict at age twenty, escaping by the skin of his teeth from the hellish uprising in Mazar-e Sharif, and held incommunicado for more than two years in a military jail, first in Guantanamo, and then in the United States. The fact that Mr. Hamdi believes that this chain of events was brought upon him by the wrath of God, because he did not obey his parents, makes clear that in his universe, God is a mighty ferocious supreme being. Viewed from this perspective, members of the Hamdi family hardly belong in the “republic of choice.” However, Mr. Hamdi’s pursuit of faith may also appear quite similar to Dr. Newdow’s. Both are religious zealots, one of atheism and the other of Islam, and both were prepared to go to great lengths in order to pursue their personal version of the truth.

Friedman argues and Mr. Hamdi’s case shows that no one in our global village is immune to the effects of the horizontal society. In their native Saudi Arabia, the Himdis probably qualify as members of the horizontal avant-garde. Mr. Hamdi’s grandfather

42. Bartelme, supra n. 40.
43. “As a friend of Mr. Hamdi said in an interview, ‘His agenda was to take a sabbatical from school and try to get his head straight, to live in a strict Islamic environment with other young men like himself.’” Brinkley, supra n. 34, at A4.
44. Hamdi’s petition to the Supreme Court notes, “‘Pakistan intelligence sources said Northern Alliance commanders could receive $5,000 for each Taliban prisoner and $20,000 for a[n] [al] Qaeda fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess.’” Pet. for Writ of Cert. at n. 8, Hamdi, 124 S. Ct. 2633, 2003 WL 23170355 (quoting Jan McGirk, Fighting Terror, Boston Globe A30 (Nov. 17, 2002)).
45. Brinkley, supra n. 34.
46. Bartelme, supra n. 40, at 15A.
was the chair of the chamber of commerce in Mecca, through which he must have been familialized with travel and exposed to people from other lands and cultures. Because of Britain’s involvement in Saudi Arabia after World War I, it seems reasonable to assume that grandfather Hamdi was somewhat exposed to the West, at least to its colonial-British version.

Two of Mr. Hamdi’s uncles are doctors. Like Dr. Newdow, their education exposed them to the rational and scientific way of thinking required by modern medicine. Mr. Hamdi’s father may wear a dishdasha and a kaffiyah instead of a suit and a tie, he may hold traditional values, but he attended a university, like his brothers, and graduated with a degree in engineering. As an engineer (the quintessential profession of the age of progress), Mr. Hamdi’s father was sufficiently adventurous to choose to relocate to the United States for five full years, and in an interview he even insisted that he had enjoyed his American sojourn.

A small detail of young Hamdi’s lifestyle perhaps best reveals his modernist profile; he, the student of marketing, owned a cell phone. Friedman emphasizes that one of the most salient aspects of the horizontal society is the explosion in means of communication. Mr. Hamdi’s cell phone signals his modernity. He is just like other young men of his generation, whether in the Middle East, Asia, or the United States. Mr. Hamdi’s parents realized that their son had left Saudi Arabia without their permission when his cell phone fell silent. What did Mr. Hamdi have to say when admonished about leaving Saudi Arabia without securing his parents’ consent? His uncle reports that his nephew said that “he was an adult now and could do what he wanted.”

Mr. Hamdi, then, may have been a Taliban, may not have been the most typical member of the horizontal society, and may have since repented his sins. Yet at one time, Mr. Hamdi did think of himself as entitled to make his own choices, a quality that makes him a member of the republic of choice.

The right that Mr. Hamdi asks for, and that his father asks on his behalf, is the right to a writ of habeas corpus. Mr. Hamdi wants the chance to prove to a federal court that he has never been a Taliban or a member of al Qaeda, and that his liberty is denied him without due process of law. Like the parental right invoked by Dr. Newdow, this is a fairly conventional, uncomplicated constitutional right. In Newdow, the novelty was introduced when the remedy sought was the purging of the phrase “under God” from the Pledge. The novelty of the Hamdi request is his (unarticulated) argument that his rights

47. Id. at 14A.
48. Id.
49. Bartelme, supra n. 40. “Yaser Hamdi’s father, Esam, has fond memories of the five years he spent in the United States. He worked as a petroleum engineer with Exxon Chemicals in the later 1970s and early 1980s, living in Louisiana, Texas and California. ‘I had excellent neighbors, and we would go out together. America felt like home,’ he recalled recently in a telephone interview from Saudi Arabia.” Id.
50. See id.
52. Bartelme, supra n. 40.
53. Id. at 14A.
54. See Br. for Petrs., Hamdi, 124 S. Ct. 2633, 2004 WL 378715. Hamdi claims that the habeas corpus proceeding was “in name only” and that the Fourth Circuit decision “effectively stripped” Hamdi of his right to due process by “denying him any meaningful opportunity to challenge the basis for his detention.” Id. at *14.
as a dual citizen, who has spent most of this life outside of the United States, are not different from the rights of a United States citizen whose identity has been rooted in American culture.\

Thus, an initial comparison between the Newdow and Hamdi stories shows that each displays strong elements of the horizontal society as described by Friedman. Dr. Newdow fits the description of the horizontal man almost perfectly. Mr. Hamdi is more of a hybrid case. Yet he too, is a child of modernity. Dr. Newdow and Mr. Hamdi are both asking for an affirmation of their constitutional rights.

III. THE HORIZONTAL SOCIETY AND THE CULTURE OF RIGHTS

We now confront another dimension of Friedman’s theory: constitutionalism and judicial review. Friedman takes note of the ubiquity of written constitutions in the second half of the twentieth century. He writes:

To make a constitutional system work, some mechanism is needed to put muscle behind the rights of the citizens. Otherwise, they are exposed to the tender mercies of the people in power. There are a number of such mechanisms. The American contribution to this delicate art is judicial review. This takes, in the first place, independent courts—powerful, proud, and determined, and detached from governmental interference. In the second place, it takes a doctrine or norm which allows (or encourages) these courts to say no to actions that violate constitutional principle.

When a constitution is the highest law in the land, it is, by definition, at the top of the pyramid of norms, and a supreme court, likewise, stands at the top of a vertical, extremely hierarchical judicial system. Friedman sees the jurisprudence of rights developed by supreme courts as flesh of the flesh of the horizontal society. Maybe this is proof that the horizontal cannot exist without the vertical, but I shall leave this question for another time. For now it is enough to observe that judicial review, as practiced by the United States Supreme Court, is at the heart of Dr. Newdow’s and Mr. Hamdi’s claims. Without an acceptance of Chief Justice Marshall’s two-century-old axiom that “It is emphatically the province and duty of the judicial department to say what the law is,” neither Dr. Newdow nor Mr. Hamdi could imagine that the Court had the capacity to supply a remedy to vindicate his rights.

55. The classification I am proposing here is not dependent on any particular attachment to the United States, nor to American values. Rather, I am drawing a distinction between someone who did not grow up in the United States, and presumably did not consider himself an American, and others who may have more complex relationships with the United States.

56. Friedman, supra n. 2, at 67.

57. See Hans Kelsen, Pure Theory of Law (Max Knight trans., 2d rev. ed., U. Cal. Press 1967). Kelsen conceptualized valid norms as always deriving legitimacy from a higher norm. His hierarchy of norms visualized a pyramid form where the highest source of authority was a constitution and below it layers of statutes, treaties, regulations, judicial opinions, and ordinances.

58. Marbury v. Madison, 5 U.S. 137, 177 (1803). This canonical case already reveals the limits of judicial review. Chief Justice Marshall did recognize Mr. Marbury’s right, but not for a remedy from the Supreme Court.
On June 14, 2004, the Court rejected Dr. Newdow’s petition.\(^{59}\) Two weeks later the Court partially accepted Mr. Hamdi’s petition and ordered the Executive Branch to grant Mr. Hamdi some procedural rights to which he is entitled under the Constitution.\(^{60}\)

Given the central role of the Constitution in the American political and legal systems, and given the authoritative role of the Supreme Court, what outcome should we have expected for Dr. Newdow and Mr. Hamdi? Friedman’s theory about the pervasiveness of the culture of rights should make us expect the Court to uphold both rights and claims. If the Court were indeed performing its task as a protector of rights, as Friedman tells us it has been doing in the last quarter of the twentieth century, then one would expect the Court to affirm the rights of both Dr. Newdow and Mr. Hamdi.

Furthermore, and of no less significance, I suggest that from the doctrinal perspective, Newdow was an easier case. The body of jurisprudence concerning the Establishment Clause was rather clear, and I believe that Justice Thomas (concurring) correctly observed that under current law, the phrase “under God” does not belong in the Pledge.\(^{61}\) The Ninth Circuit Court of Appeals adopted the same position.\(^{62}\) The fact that a five to three Court denied Dr. Newdow’s claim on a technicality (holding that he had no standing) may itself reveal the Court’s determination to sidestep the straightforward substantive constitutional issues.

Mr. Hamdi’s case was somewhat more difficult from the doctrinal perspective. There has been a dearth of precedential law addressing the question of executive powers during hostilities, and the clarity of this precedential law has been controversial.\(^{63}\) Furthermore, it was not clear that the Court would be willing to collide with the executive branch. In the last twenty years, the Court displayed a strong preference for a powerful executive, and thus might be willing to condone administrative detention of suspected terrorists. From a doctrinal perspective, and given the post-September 11th climate, the Court could be expected to grant Dr. Newdow his right, but possibly deny Mr. Hamdi his. Why then did the Court accept Mr. Hamdi’s petition and deny Dr. Newdow’s, and how does this comport with Friedman’s theories?

Friedman may point to a theory that would easily explain these outcomes. One of Friedman’s major contributions to legal theory and history has been the instrumental conception of law: that law is historically contingent and reactive to social forces.\(^{64}\) Since the beginning of his career, Friedman has taught us to reject the formalist theories that envision law as independent of society. Instead, Friedman has always insisted that we must look at law in context and understand the political and social factors which

\(^{59}\) Newdow, 124 S. Ct. 2301.

\(^{60}\) Hamdi, 124 S. Ct. 2633. And yet almost three months later, Hamdi was still held incommunicado, without access to legal counsel and without a judicial review of his version of the facts. Id.

\(^{61}\) Newdow, 124 S. Ct. 2330 (Justice Thomas states, “as a matter of our precedent, the Pledge policy is unconstitutional.”).

\(^{62}\) See Newdow v. U.S. Cong., 292 F.3d 597, 607-08 (9th Cir. 2002) (applying the endorsement test and concluding that the statement “under God” [was] an endorsement of religion . . . conveying a message of state endorsement of a religious belief”).

\(^{63}\) See Hamdi, 124 S. Ct. at 2643, 2669 (Justice O’Connor and Justice Scalia disagreeing about the precedential value of Ex Parte Milligan, 71 U.S. 2, 125 (1866) and Ex Parte Quirin, 317 U.S. 1 (1942)).

\(^{64}\) See generally Lawrence M. Friedman, Legal Culture and Social Development, 4 Law & Socy. 1 (1969).
The political and social circumstances within which Dr. Newdow’s case has evolved suggest that, at the present time, it would be very difficult, if not impossible, for the Supreme Court to accept Dr. Newdow’s claim. A solid body of scholarship argues that America is a religious country. The Pledge, as it has been recited since the 1950s, enjoys tremendous public support. After the events of September 11th and the declaration of a Global War on Terrorism, the need to reaffirm the covenant between God and People has grown even stronger. As anecdotal proof, take Harvard University’s political scientist Samuel P. Huntington’s recent polemic Who Are We? Chapter five, tellingly, is titled “Religion and Christianity,” and Huntington opens it by discussing the Ninth Circuit Court of Appeals holding that the phrase “under God” in the Pledge violates the First Amendment. Here is Huntington on the Court of Appeals’ opinion:

The supporters of the court were an articulate but very small minority. The critics were an outraged and overwhelming majority of all political persuasions. President Bush termed the decision “ridiculous.” The Democratic Senate majority leader, Tom Daschle, called it “nuts”; Governor George Pataki of New York said it was “junk justice.”

Moreover:

The Senate passed a resolution, 99 to 0, urging that the decision be reversed, and members of the House of Representatives gathered on the steps of the Capitol to recite the Pledge and sing “God Bless America.” A Newsweek poll found that 87 percent of the public supported inclusion of the words while 9 percent opposed.

When Friedman tells us the Supreme Court exists to protect the rights of minorities, he is echoing an honorable American principle dating back to Madison Federalist Ten. However, Friedman also knows that courts respond to social pressure and may find it very difficult to protect a tiny minority against an overwhelming outraged majority, especially when the subject matter is God. It is quite easy to argue that in rejecting Dr. Newdow’s plea, the Supreme Court was responding not to the principle of the separation of church and state, but rather to politics. It was practicing some “passive virtues” or “minimalism” and attempting to avoid the pitfalls of making a decidedly unappealing ruling. To quote Justice Frankfurter’s reaction to another famous citizenship case,
which accompanied a famous pledge case, the Justices may have been reading the newspapers.\footnote{Schneiderman v. United States, 320 U.S. 118 (1943), was considered by the Supreme Court at the same time as West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). In Schneiderman, the Court considered the constitutionality of stripping a person of his naturalized citizenship. 320 U.S. at 120.}

What the Justices were reading in the newspapers about Mr. Hamdi must have been more controversial. It is possible that the Justices were embarrassed and maybe a bit alarmed by reports concerning the torture of detainees in the Abu-Ghraib prison in Iraq, and therefore were inclined to resist the idea that President George W. Bush enjoys unsupervised and unbridled discretion to detain people without access to a court of law for as long as he deems necessary.\footnote{H.N. Hirsch, The Enigma of Felix Frankfurter 169-70 (Basic Bks. 1981) (footnote omitted) (The last reference is to the Court’s changing its position from Minersville School District v. Gobitis, 310 U.S. 586 (1940) to West Virginia State Board of Education, 319 U.S. 624.).} But such a causal relationship is not the same as arguing that public opinion was in favor of Mr. Hamdi’s rights to habeas corpus.

The circumstances surrounding Newdow and Hamdi provide a persuasive explanation for the question of why the Court denied Dr. Newdow’s right but granted Mr. Hamdi’s request for habeas corpus. However, while partially credible, this explanation does not do justice to Friedman’s scholarship. Friedman never argued for a straightforward causal relationship between historical events and judicial rulings. His theory of law is complex, addressing a multitude of social forces developing over time, with undercurrents not always visible to the naked eye, but which affect and shape the legal system. It is a theory too sophisticated to be discussed as a mere variation on the character of Mr. Dooley’s observation that the Supreme Court follows the election returns.\footnote{72. Warren Richey, When Do News Reports Influence Those in Black Robes? Christian Sci. Monitor 2 (July 7, 2004); Jeffrey Rosen, One Eye on Principle, the Other on the People’s Will, 153 N.Y. Times § 4, 3 (July 4, 2004).}

In his journal, Justice Frankfurter recorded the following exchange with Justice Black, a moment after he asked the Solicitor General whether the government suggested that the Communist Party had no principles:

At which Black turned to me with blazing eyes and ferocity in his voice and said, “The Hearst press will love that question.” I replied, “I don’t give a damn whether the Hearst press or any other press likes or dislikes any question that seems to me relevant to the argument. I am a judge and not a politician.” “Of course,” replied Black, “you, unlike the rest of us, live in the stratosphere.” I made no further comment but resisted the impulse to say that in any event I do not change my views and votes on cases before this Court because of newspaper criticism.

It is also worth noting that during the second pre-election debate between President George W. Bush and Senator John Kerry, President Bush singled out Newdow’s case as an illustration of a right claim that should be rejected. President George Bush, Presidential Debate, Transcript: Second Presidential Debate (Washington U., St. Louis, Mo., Oct. 8, 2004) (available at http://www.washingtonpost.com/wp-srv/politics/debateresults/debate_1008.html). His explicit reaction supports a general “hunch” that in Newdow’s case the Justices understood the political dangers lurking in the option of granting Dr. Newdow his claim. During the October 8, 2004 Presidential Debate, President Bush said:

Let me give you a couple of examples, I guess, of the kind of person I wouldn’t pick [for the Supreme Court]. I wouldn’t pick a judge who said that the Pledge of Allegiance couldn’t be said in a school because it had the words “under God” in it. I think that’s an example of a judge allowing personal opinion to enter into the decision-making process as opposed to a strict interpretation of the Constitution.

Id.\footnote{73. Finley Peter Dunne, Mr. Dooley’s Opinions 26 (R.H. Russell 1901) (Dunne’s character is noted for his observation that “no matter whether th’ constitution follows th’ flag or not, th’ supreme court follows th’ iliction returns.”).}
To try to understand why the Court denied Dr. Newdow’s right while accepting Mr. Hamdi’s, we should pause to contemplate subtle ties between the two cases and their meaning in the context of Friedman’s theory. Newdow and Hamdi are not random cases simply representing the rights-related case law of last term. Rather, Newdow and Hamdi taken together reflect a reaffirmation of the nation-state. The nation-state is returned to the public sphere as a cardinal principle, a construct that subordinates rights to the greater needs of the nation as represented by the state, and that uses the powerful myths of historical origin and uniqueness in order to support its superior status in its people’s worldview.

If I am correct and Newdow and Hamdi signify the reaffirmation of the nation-state, then I would like to pose two questions to Friedman. First, is it possible that after the events of September 11th we are witnessing a reversal of the trend from the traditional to the modern society? In both The Horizontal Society and The Republic of Choice, Friedman recognizes social forces that militate against the modern, horizontal society. He does not think these forces are powerful enough to withstand the rise of modernity. Has Friedman underestimated the social forces working against the horizontal society, which have grown more salient and powerful after September 11th? Was it impossible to predict the socio-cultural developments in the post-September 11th climate? Is it possible to say that today Friedman’s theory should be inverted, that a process is in the making whereby the “vertical” elements of society are gaining the upper hand and the horizontal elements are receding, even becoming somewhat marginal?

Second, is it possible that we are confronted with social conditions quite independent of traditional and horizontal societies? All societies, whether vertical or horizontal, traditional or modern, experience centralization of power and a wilted culture of rights during security crises. Is it possible that there are archetypal forces at work, deep and primordial, which survive social changes? Historically, security crises produced a setback to any culture of rights. Duties, rather than rights, become the dominant mode of public thought. The French have a saying for predictable,

74. And because we are dealing with the United States, the only superpower in the beginning of the twenty-first century, maybe even the imperial nation-state. For an interesting discussion of the nation-state and the American constitutional order, see Mark E. Brandon, War And The American Constitutional Order, in The Constitution in Wartime: Beyond Alarmism and Complacency 11 (Mark Tushnet ed., Duke U. Press 2005).

75. Korematsu v. U.S., 323 U.S. 214, 219 (1944) (Justice Black stating that “Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.”); Schenck v. U.S., 249 U.S. 47, 52 (1919) (Justice Holmes observing that, “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort ... that no Court could regard them as protected by any constitutional right.”). This appears to be a reflexive reaction under conditions of crisis. Compare the dictum of Chief Justice Moshe Sma’or of Israel’s Supreme Court. Chief Justice Sma’or stated:

When the security of the state and the public peace are in grave danger, ordinary legal tools might not be sufficient, and it is necessary to prefer the needs of state security over the protection of individual liberties. In such a case the public mandates that every citizen sacrifices his rights for the benefit of the public.

H.C. 16/48, Brun v. Prime Minister and Minister of Def., 1 P.D. 109, 112 (1948) (footnote omitted; emphasis omitted) (quoted in Pnina Lahav, Judgment in Jerusalem: Chief Justice Simón Agranat and the Zionist Century 90-91 (U. Cal. Press 1997)). This dictum was delivered in 1948, the year the State of Israel came into existence. Id. A militant right-wing Jewish organization, LEHI (The Stern Gang), assassinated United Nations Envoy, Count Folke Bernadotte, in an effort to thwart international involvement in the Palestinian Israeli conflict. Id. The nascent Israeli government reacted with massive administrative detentions of members of the militant organization, and the Court’s statement was delivered in the context of denying relief. Id.
historically repetitive phenomena: "plus ça change, plus c’est la même chose." If this is correct, then should one conclude that Friedman’s theories are simply irrelevant to the Newdow and Hamdi jurisprudence? Yet is it a paradox to argue that a theory of social change is irrelevant in the face of social changes brought about by peculiar circumstances such as a security crisis?

IV. DR. NEWDOW, MR. HAMDI, AND THE NATION-STATE

Five years into the twenty-first century, it is too early to predict whether a vertical society (surely different from the vertical society of the eighteenth century, but one with more salient vertical elements) is at the gate. Still, it seems the events of September 11th and the rise of the national-security state delivered a setback to the horizontal society as conceptualized by Friedman. The culture of rights is definitely experiencing a blow, represented most forcefully by the PATRIOT Act, but also by voices discouraging dissent and criticism of the government. Lower court opinions supporting more powers to the Executive Branch are another indication that a different trend is on the march. Newdow and Hamdi should be understood and interpreted within this context.

The ingredient commonly thought to guarantee the well-being of the nation-state is patriotism. Members of the nation-state—its subjects or citizens—are expected to place their country above all values, most importantly their own lives. Patriots are willing to defend their country to the bitter end. In return, they are immortalized as national heroes. Viewed from this perspective, Dr. Newdow’s right should be denied because, in the Court’s mind, God and the Nation are inextricable. It is one thing to add God to a pledge, as was done on Flag Day, June 14, 1954, when the words “under God” were added; it is quite another matter to remove God once people grew accustomed to the association between God and nation. Patriotism is threatened when God is deliberately removed from the Pledge. The cardinal reason for granting Mr. Hamdi’s petition is rooted in patriotism. It springs from reciprocity. Citizens should stand ready to fight

76. See also Arthur Schopenhauer, The World as Will and Representation, vol. 2, 444 n. 4 (E.F.J. Payne trans., Dover 1966) (for a somewhat different formulation, “Eadem, sed aliter,” meaning the same things happen again and again, only differently).


We need honest, reasoned debate; not fearmongering. To those who pit Americans against immigrants, and citizens against non-citizens; to those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists—for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies, and pause to America’s friends. They encourage people of good will to remain silent in the face of evil.

(sacrifice) for the country’s survival; for its part, the country should treat its citizens with
care and not deny their liberty without due process of law.

An analysis of the Pledge is a good place to begin the effort to understand the
underlying problems intuitively grasped by the Justices. The Pledge posits “one nation
under God.”\footnote{78. 4 U.S.C. § 4.} A nation “under God” invokes the metaphor of a marital union; the wife
is under the husband, erotically and otherwise. This metaphor has guided the
understanding of the relationship between the church and God throughout the Middle
Ages. The Nation, thus, merely replaces the church in asserting the sacred union.\footnote{79. Jewish tradition similarly views the Jewish people as the beloved female betrothed to God. See Arthur
the guiding metaphor is that of a family, then it is easy to see the citizens—members of
the Nation—as the product of this sacred union, and therefore entitled to special
privileges and immunities.

Another way of understanding the need to invoke patriotism in explaining the
significance of the relationship between God and nation is by consulting the etymology
and history of the term “patriotism.” The Oxford English Dictionary traces the word to
1605, as the nation-state was in the making. Patriotism meant “love of or zealous
1989). In 1596, the word appeared as denoting a fellow-countryman, compatriot, but in the meaning of love of
country it only appeared nine years later.} and was rooted in the notion of fatherhood. The notion of a
patriot is traced to paternity—fatherhood and fatherland—and denotes the biological
affinity of the members of the national community. The transplantation of these notions
from family to nation (all who are children of the fatherland), and the inclusion of
persons who do not share biological genes, designated the rise of the nation-state.
Territory (fatherland) came to replace God, but not entirely. The fatherland could also
be the motherland, and its happy protection by God was not denied even in the face of
the emerging recognition of the principle of the separation of church and state.

Whether the nation-state is a trinity between God, land, and nation or whether
merely a union between God and nation as described in the Pledge, the historical fact
remains, that the idea of patriotism is rooted in the vertical society. It traces itself to a
nation’s fathers, and assumes a relationship based upon status, not contract. As a
socially constructed notion, however, patriotism needs nurturing and sustenance. In a
nation of immigrants which had recently experienced a civil war, it should not be
surprising that a pledge of allegiance was introduced, requiring all children (the young
and impressionable) to swear allegiance to the nation (and the Union).\footnote{81. This may explain why a pledge is not customary in other western countries. The American need for
nurturing loyalty (discouraging un-Americanism) was well captured in Edward Everett Hale’s story, The Man
Without a Country, also made into a play (The Slacker), and was widely taught in public schools at the
beginning of the twentieth century. Edward Everett Hale, The Man Without a Country (Harv. Classic Shelf
Fiction 1917). The man without a country was a young military officer convicted of treason during the War of
Independence, who cavalierly told the judge: “Damn the United States! I wish I may never hear of the United
States again!” Id. at ¶ 7. The officer was sentenced to have his wish fulfilled: never to set foot in the United
States, nor receive any information about the country. Id. Hale’s story describes the misery of the young man,
exiled aboard United States navy ships for more than forty years, as he came to realize the barrenness of life
without a country. Id. His last wish was that a stone be placed in his memory, saying: “He loved his country
as no other man has loved her, but no man deserved less at her hands.” Id. at ¶ 79. For a history of the}
Newdow and Hamdi came before the Court in the aftermath of September 11th. Mr. Hamdi's case fits squarely into the war atmosphere. The United States claimed he is a member of the Taliban forces, caught in the battlefield while using his Kalashnikov assault rifle against American soldiers.\(^{82}\) The government designated him as an enemy combatant because it relied on this version of events. The Justice Department insisted that the President of the United States has the constitutional power to detain Mr. Hamdi indefinitely, without access to counsel or due process.

At first glance, Dr. Newdow's case seems unrelated to these events. In fact, Dr. Newdow launched his case before September 11th.\(^{83}\) But I suggest that the relationship between the two is not farfetched or speculative. In reviewing Dr. Newdow's case, even professionals very adept at compartmentalization cannot ignore the conditions of war and their impact on patriotism. I believe the Justices must have experienced a connection between the two cases.\(^{84}\)

There may not be an equivalent of a smoking gun to prove the Court was thinking of the United States' involvement in war and reflecting on the role of patriotism in this context. However, there are some clues that may indicate that patriotism influenced the Court's decisions. The centerpiece of the Court's work during the last term revolved around the tension between rights and national security. Rasul v. Bush\(^{85}\) was argued on April 20, 2004, Rumsfeld v. Padilla\(^{86}\) was argued on April 28, 2004, and Hamdi was argued on April 28, 2004. Thus, the Justices were busily reflecting on the conditions of war presently enveloping the United States and the dangers associated with terrorism even if they were not reading the newspapers. Moreover, the Court handed down the Newdow and Hamdi opinions within two weeks of each other (Newdow on June 14, 2004; Hamdi on June 28, of 2004). Finally, and perhaps most tellingly, the Justices

patriotic pedigree of the Pledge, see Ellis, supra n. 11. For an insightful discussion of patriotism and citizenship, see Martha C. Nussbaum, For Love of Country? Debating the Limits of Patriotism (Beacon Press 1996).

82. See Br. for the Respt. at *4, Hamdi, 124 S. Ct. 2633, 2004 WL 724020 (The government labeled Hamdi as an enemy combatant "[b]ased on interviews with Hamdi in Afghanistan and his association with the Taliban."); Hamdi v. Rumsfeld, 337 F.3d 335, 345 (4th Cir. 2003) ("government asserts that Hamdi was in Afghanistan bearing arms as a Taliban soldier when he was seized"); see also Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 534, ¶¶ 3-4 (E.D. Va. 2002) (declaration of Michael H. Mobbs).

83. Docket for Case No. 00-16423, Newdow, 292 F.3d 597 (9th Cir. 2002). Newdow first sued on March 8, 2000, before September 11th, 2001. Id. While highly speculative, it certainly could be that had the United States not experienced September 11th, his case would end up differently. Compare the volatile case of who is a Jew in Israel, in which a military officer in the Israeli army claimed that to be a Jew in Israel meant to be an Israeli, not a Jew in accordance with Jewish law. See Lahav, supra. n. 75, at ch. 12. The officer, Shalit, launched his petition to the High Court of Justice before the 1967 War. Id. With the revival of religious fervor and messianism in Israel after the war, the Shalit case was upgraded into a cosmic question of national meaning and survival. Id. Ultimately, Shalit and the secular camp supporting him lost to nationalist/religious forces. Id.

84. The idea that one should refrain from critical speech for fear of demoralizing the population or abetting the enemy has been in the air since September 11th (as expected during security crises). The instinct that now is not the time to send God back to the private sphere seems related to the notion that "when a nation is at war," certain speech-acts are intolerable. Both God and unanimity of opinion are popularly considered essential to winning a struggle against evil.

85. 124 S. Ct. 2686 (2004) (Persons detained as “unlawful combatants” in the United States military base in Guantanamo, Cuba, argued they were constitutionally entitled to have a hearing before a federal court.).

86. 124 S. Ct. 2711 (2004). Mr. Padilla, a United States citizen, was detained as an unlawful combatant for purposes of interrogation in the context of the United States war against terrorism. Id. As of this writing, he is still in detention without trial.
decided to deliver Newdow on Flag Day. They must have been fully aware of the symbolism attached to this decision and to the connections between the flag, patriotism, the Pledge, and war in American legal culture.

Again, further anecdotal proof of the fact that the flag, the nation, and the war were dominant cultural themes since 2001 is found in Huntington's book, Who Are We? Dedicated to American national identity, its past and future, Huntington's book opens with the following paragraph:

Charles Street, the principal thoroughfare on Boston's Beacon Hill, is a comfortable street bordered by four-story brick buildings with apartments above antique stores and other shops on the ground level. At one time on one block American flags regularly hung over the entrances to the United States Post Office and the liquor store. Then the Post Office stopped displaying the flag, and on September 11, 2001, the liquor store flag flew alone. Two weeks later seventeen flags flew on this block, in addition to a huge Stars and Stripes suspended across the street a short distance away. With their country under attack, Charles Street denizens rediscovered their nation and identified themselves with it.

Not surprisingly, Huntington makes it very clear that he thinks the phrase “under God” belongs in the Pledge.

Let me examine the rhetoric of the Newdow Court to show the significance of patriotic nationalism for the resolution of the case. The opinion was decided five to three, with the majority declining to undertake a substantive review of Dr. Newdow's claims on the grounds that he lacked standing. The very reliance on a technicality is


88. Huntington, supra n. 66.

89. Id. at 3.

90. Id. at 83. Huntington states:

Dr. Newdow [and the Ninth Circuit] got it right: atheists are “outsiders” in the American community. As unbelievers, they do not have to recite the Pledge or to engage in any religiously tained practice of which they disapprove. They also, however, do not have the right to impose their atheism on all those Americans whose beliefs now and historically have defined America as a religious nation.

Id. Unlike the Chief Justice and Justice O'Connor, Huntington has no problem acknowledging that the American nation is Christian and its God is a Christian God. Id. at 83. “America is a predominantly Christian nation with a secular government. Non-Christians may legitimately see themselves as strangers because they or their ancestors moved to this ‘strange land’ founded and peopled by Christians...” Id. at 66.

91. Newdow, 124 S. Ct. at 2312. The majority stated: “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.” Id. (Justice Scalia not participating). See Matthew J. Franck, Recusal Absurdity, http://nationalreview.com/comment/franck200310220904.asp (Oct. 22, 2003) (On January 12, 2003, at a Religious Freedom Day event sponsored by the Knights of Columbus, Justice Scalia stated that the Ninth Circuit decision had “plausible support” in previous Supreme Court rulings and that the decision to remove “under God” was not a task for the courts.). See also Suggestion for Recusal of J. Scalia, Newdow, 124 S. Ct. 2301 (available at http://supreme.lp.findlaw.com/supreme_court/briefs/02-1624/03-7.recuse.pdf) (Newdow requesting Scalia recuse himself because he had shown that he had already decided on his case without properly reviewing all materials). Justice Kennedy's position in this case is of particular interest. Justice Kennedy authored the opinion in Lee v. Weisman, where a non-denominational prayer during graduation was declared unconstitutional. 505 U.S. 577 (1992). The doctrinal reasons for this result were rooted in a “coercion” test, a test that went beyond physical coercion to recognize the power of subtle influences such as peer pressure on young minds. Id. at 585-86. It was quite rational to expect that Kennedy's reasoning would also apply to
telling of the Court’s determination to avoid the issue. Another revealing signal is that
not even one Justice came out in favor of a “God free” pledge.

Justice Stevens opened his opinion for the majority in Newdow with some ringing
rhetoric from his dissenting opinion in Texas v. Johnson. In Johnson, decided a few
months before the fall of the Berlin Wall and the end of the Cold War, the Court held
that burning the American Flag was a permissible, if unwelcome, symbolic speech-act
under the First Amendment to the United States Constitution. Justice Stevens
dissent, believing that the flag was special and the matter ought to fall outside the
reach of the First Amendment. Fifteen years later, in Newdow, speaking for himself
and four other Justices, he began with a quote from his 1989 dissent:

“The very purpose of a national flag is to serve as a symbol of our country,”... As its
history illustrates, the Pledge of Allegiance evolved as a common public acknowledgement
of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster
national unity and pride in those principles.

Having wrapped the Pledge of Allegiance in the evocative flag, Justice Stevens
proceeded to emphasize the symbolism inherent in the date chosen to deliver the
Newdow opinion. June 14 was National Flag Day, a date determined by Congressional
legislation to commemorate the flag four years after the end of World War II. Congress
did not choose this date randomly. On June 14, 1777, the Stars and Stripes was
recognized as the United States’s official flag. If this were not enough, June 14 was
symbolic for yet another event: on that day, five years after the declaration of National
Flag Day, Congress amended the Pledge to include the phrase “under God,” a historical
fact acknowledged in Justice Stevens’s introduction.

By choosing June 14 to deliver its Newdow opinion, the Court signaled it was well
aware of the patriotic weight attached to the day, and perfectly willing to enhance this
symbolism by making the appropriate decision. From now on, Americans will
remember June 14 not only as the day that turned the Stars and Stripes into the national
flag, not only as National Flag Day and the day Congress added the phrase “under God,”
but also as the date that the Supreme Court of the United States refused to allow an
atheist to tamper with the union between God and nation. The national narrative of the

young Ms. Newdow. While all agreed that Ms. Newdow could not be constitutionally required to participate in
the Pledge, the argument that she would feel subtly coerced to join her teacher and class was very strong.
Newdow, 124 S. Ct. at 2306. In Texas v. Johnson, the flag burning case (Justice Stevens’s dissenting opinion in
this case opens the majority opinion in Newdow), Justice Kennedy wrote a moving opinion, explaining that
“The hard fact is that sometimes we must make decisions we do not like. We make them because they are
right, right in the sense that the law and the Constitution, as we see them, compel the result.” 491 U.S. 397,
420-21 (1989). One would expect him to act likewise here. However, this time he silently joined the
majority’s decision to deny the petition, perhaps convinced that the case was not ripe for decision. Newdow,
124 S. Ct. at 2304.

92. 491 U.S. 397.
93. Id.
94. Id. at 436.
95. It may well be that this was Justice Stevens’s condition for joining the other four Justices and thereby
forming a majority to decide Newdow without proclaiming substantively on the validity of “under God.”
96. Newdow, 124 S. Ct. at 2305 (citations omitted).
97. Id. at 2360. “Congress... amended the text to add the words ‘under God.’ Act of June 14, 1954...”
Id.
flag was a subtle way for the Court to signal that it was a patriotic court, loyal to the nation's symbols. The majority later invoked the need to exercise judicial restraint "when matters of great national significance are at stake." Those willing to read between the lines would be amused by the final paragraph of the majority's opinion. The Court ends with a statement concerning the prudence required to avoid judicial review of private matters. Prudence would even more forcefully apply to precisely the opposite of "the private"—to matters occurring in the public sphere such as the recitation of Pledge of Allegiance. The majority comments, "When hard questions of domestic relations [read 'public matters'] 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." Thus, Justice Stevens's majority opinion, while self-described as based on nothing but a technicality—Dr. Newdow's lack of standing—does recognize the significance of the familiar version of the Pledge for the culture of the American nation-state.

The three concurring Justices—Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas—are much more open about their feelings. They like the Pledge exactly as it is and would not part with the phrase "under God." Chief Justice Rehnquist opens his concurring opinion with a statement about the patriotic meaning of the Pledge:

To the millions of people who regularly recite the Pledge, and who have no access to, or concern with, such legislation or legislative history, "under God" might mean several different things: that God has guided the destiny of the United States, for example, or that the United States exists under God's authority. How much consideration anyone gives to the phrase probably varies, since the Pledge itself is a patriotic observance focused primarily on the flag and the Nation, and only secondarily on the description of the Nation.

The Chief Justice, an amateur historian, proceeds to show how pervasive the appeal to God has been in various statements of "the Nation's leaders." Being a member of the national leadership himself, he is aware of the fact that the invocation of God's name

98. The seminal case of *West Virginia State Board of Education v. Barnette*, holding that children cannot be coerced into participating in the Pledge, similarly announced its opinion on June 14, 1943. 319 U.S. 624. Justice Jackson wrote that "the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas." *Id.* at 632 (thereby endorsing the Pledge while exempting Jehovah's Witnesses from the requirement of pledging allegiance).
100. *Id.* at 2312.
101. The Chief Justice's concurrence was made of two parts. The first rejected the majority's holding that standing was lacking. *Id.* at 2312. Both Justice O'Connor and Justice Thomas joined this part. The second addressed the meaning of the phrase "under God" in American history, and was joined only by Justice O'Connor. *Id.* Justice O'Connor, however, wrote her own concurrence, arguing that her endorsement test can work in this case and that its "proper" application would result in upholding the Pledge as it is. *Id.* at 2321-23. She did concede this was a "close question." *Newdow*, 124 S. Ct. at 2323. Justice Thomas was not content with either approach and filed his own concurring opinion. *Id.* at 2327. In his view, the precedent of *Lee v. Weisman* would require the elimination of "under God" from the Pledge, and therefore should be overruled. *Newdow*, 124 S. Ct. at 2330. Justice Thomas also saw fit to "take this opportunity to begin the process of rethinking the Establishment Clause," challenging the idea that it has been incorporated into the Fourteenth Amendment. *Id.* at 2328.
102. *Id.* at 2317. The Chief Justice assumes an almost unanimous degree of conformism in this matter. He does not pause to reflect on millions who may be puzzled by the tie between God and the nation, either because to them God is a Western concept, or because they would like to see a separation between God and State.

http://digitalcommons.law.utulsa.edu/tlr/vol40/iss4/4
need not be tied to any deep belief in the divine. Rather, it could be a perfunctory, even knee jerk, appeal to conventional expectations. It could be no more than a paraphrase of Justice Brandeis's formula for assuring American Jews that the support of Zionism would not jeopardize the appearance of their loyalty to the United States. Justice Brandeis's formula was "to be good Americans, we must be better Jews, and to be better Jews, we must become Zionists." The Chief Justice states that "Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith or church." The paraphrase would be: "to be a good American one must be a good patriot, and to be a good patriot one must pledge allegiance to the nation under God."

God, then, is the sugar in the pie of patriotism. The best proof for this, says the Chief Justice, comes from the national anthem:

Aditional support [for] this idea is our national anthem, “The Star-Spangled Banner,” . . . . The last verse ends with these words: “Then conquer we must, when our cause it is just, And this be our motto: ‘In God is our trust.’ And the star-spangled banner in triumph shall wave O’er the land of the free and the home of the brave!”

Justice O’Connor joins the Chief Justice’s concurrence “in full” and yet takes a different approach. She weaves together nationalism, patriotism, and God, invoking history as well as contemporary culture and normative assumptions. She begins with history, tracing the origins of the American nation to religious refugees, stating that “It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating these references would sever ties to a history that sustains this Nation even today.” These references, she continues, all fall under the category of ceremonial deism, a category which should be distinguished from religious practices, and which therefore is immune to the Establishment Clause. Clearly, according to O’Connor, the facts that the Pledge was introduced while the “refugees” have had already been masters of the land, and the phrase “under God” was introduced when the country had already been universally recognized as one of two superpowers, do not disqualify the

103. The tendency of a nation’s leadership to carry God’s name in vain has been observed since biblical times. See Isaiah 58:2 (King James) (“Yet they seek me daily, and delight to know my ways, as a nation that did righteousness, and forsook not the ordinance of their God.”).


105. Newdow, 124 S. Ct. at 2320 (footnote omitted).

106. Id. at 2319 (citation omitted). In keeping with the most salient aspect of the horizontal society—its vibrant technological innovations—the cite used by the Chief Justice Rehnquist for the National Anthem is a website. Id. (citing Balt. County Pub. Lib., Fort McHenry: Birthplace of Our National Anthem, http://www.bcpl.net/~etowner/anthem.html (accessed Aug. 7, 2005)).

107. Id. at 2321. Justice O’Connor states: “But while the history presented by THE CHIEF JUSTICE illuminates the constitutional problems this case presents, I write separately to explain the principles that guide my own analysis of the constitutionality of that policy.” Id.

108. Justice O’Connor differs from the Chief Justice in her insistence that an appropriate application of her endorsement test would result in upholding the constitutionality of the Pledge. Newdow, 124 S. Ct. at 2321-27. Hence, the thrust of her opinion is doctrinal. In this part of the article, I only deal with her theories related to the link between patriotism, nationalism, and God.

109. Id. at 2322 (footnote omitted).

110. See id. (Justice O’Connor, in a footnote, lists a variety of state mottoes and other official statements referring to God.).
Pledge’s formula from being an incidence of the old ceremonial deism embraced by the early “refugees.”\textsuperscript{111}

“In any event” (as Friedman likes to say),\textsuperscript{112} Justice O’Connor urges the reader not to give too much weight to the mention of God. The American nation should be the focus of the inquiry:

Even if taken literally, the phrase [under God] is merely descriptive; it purports only to identify the United States as a Nation subject to divine authority. That cannot be seen as a serious invocation of God or as an expression of individual submission to divine authority.\textsuperscript{113}

Later, she urges her audience to remember that the phrase is a “simple reference to a generic ‘God’” and that it is brief (only two out of the thirty one words of the Pledge).\textsuperscript{114} She ends her opinion by tying God and religion to the birth of the Nation and to the Nation’s lofty dedication to liberty:

Certain ceremonial references to God and religion in our Nation are the inevitable consequences of the religious history that gave birth to our founding principles of liberty. It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it.\textsuperscript{115}

O’Connor may be somewhat uneasy about her attachment to the phrase. It may well be that the awkwardness she experiences pushes her to flatten the idea of God, turn it into something generic, devoid of substantive content, light and superficial. God, in O’Connor’s rendition, is actually the white between the stripes of the flag. You cannot have the flag without the white, but you hardly notice it, and hardly nurture feelings toward it.

Patriotism, devotion to country, and love of nation drive the Newdow Court. The emphasis on patriotism is the starch binding the majority to the concurring Justices. How is Hamdi related to these themes?

Mr. Hamdi’s case is grounded in his status as citizen of the United States. The United States government recognized this special status when it removed Mr. Hamdi from Guantanamo Bay, Cuba, where all other detainees caught in Afghanistan have been kept, and transferred him to a military brig in the United States.\textsuperscript{116} The fact that Mr. Hamdi was born on United States soil and was held on United States soil make him a member of the Nation and it is this special status that ties his case to Dr. Newdow’s. If

\textsuperscript{111} Id. “It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths.” Id. (footnote omitted). The choice of words, “religious refugees,” is interesting in that it evokes the ubiquitous refugee problems of the twentieth century, and implies a dimension of victimhood rather than the glorious triumph of pioneers who arrived to settle a new land. It could be read as a rhetorical move designed to subtly plant in the readers’ mind the notion that the cause under attack (the ability to invoke God) is just.

\textsuperscript{112} Friedman, supra n. 2, at 99, 101-02, 107. (Friedman’s The Horizontal Society is peppered with this phrase).

\textsuperscript{113} Newdow, 124 S. Ct. at 2325.

\textsuperscript{114} Id. at 2326.

\textsuperscript{115} Id. at 2327.

\textsuperscript{116} Compare Hamdi, 124 S. Ct. 2633, with Rasul, 124 S. Ct. 2686. The United States similarly transferred John Walker Lindh, popularly known as the American Taliban, to American soil as soon as it was discovered that he was an American citizen.
Newdow describes a Nation “under God” promising “liberty and justice for all,” Hamdi depicts the special relations between the Nation and its citizens.\textsuperscript{117} Citizenship appears to be central to all of the opinions in Hamdi. The plurality, led by Justice O’Connor, insists several times that Mr. Hamdi is “an American citizen detained on American soil.”\textsuperscript{118} The relationship between the Nation, its soil, and citizenship is highlighted as essential and powerful. The plurality insists Mr. Hamdi’s status as a son of the Nation (a citizen) makes his right to be “free from physical detention by one's own government” so “elemental,” of a “fundamental nature,” and a “core right.”\textsuperscript{119} Justices Souter and Ginsburg, while disagreeing with the plurality’s position that Congress has authorized the indefinite detention of “enemy combatants,” still agree that citizenship is crucial.\textsuperscript{120} They, too, highlight the fact that Mr. Hamdi is “an American citizen held on home soil incommunicado.”\textsuperscript{121} Justices Scalia and Stevens similarly assume that the fact that Mr. Hamdi is a citizen on United States soil is dispositive. “Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different,” they note, presumably realizing well that they are creating a dictum.\textsuperscript{122} Scalia and Stevens are even more adamant about the rights stemming from the status of citizenship. The plurality would allow detention of a citizen on United States soil if a “neutral decision maker” concludes that the citizen indeed falls into the Executive’s definition of an enemy combatant.\textsuperscript{123} Scalia and Stevens would accept only a determination by a federal court. A United States citizen, they insist, cannot be constitutionally detained without trial unless Congress has suspended the writ of habeas corpus.\textsuperscript{124}

There is a catch, however, that connects the seemingly radical protection guaranteed by Scalia and Stevens to the conventional concept of the Nation: “Citizens aiding the enemy have been treated as traitors subject to the criminal process.”\textsuperscript{125} Nothing short of treason comes to mind when a child of the Nation is found behind the enemy lines.\textsuperscript{126} Indeed, Justices Scalia and Stevens refer to Mr. Hamdi as a “presumed

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\item \textsuperscript{117} It is even possible to further press this point and argue that while Newdow is about the relationship between God and the Nation (the Nation is “under” God), Hamdi is about the relationship between the Nation and its children.
\item \textsuperscript{118} Hamdi, 124 S. Ct. at 2638. Three Justices note that the case deals with an American citizen on American soil. \textit{Id.} at 2635, 2652, 2669. O’Connor, for the plurality, mentions this fact four times. \textit{Id.} at 2635, 2638, 2648 (plurality). Souter, in his concurrence, mentions this fact three times. \textit{Id.} at 2652, 2659 (Souter & Ginsburg, JJ., concurring in part and dissenting in part). Scalia, in his dissent, mentions this fact once. \textit{Id.} at 2669 (Scalia & Stevens, JJ., dissenting).
\item \textsuperscript{119} Hamdi, 124 S. Ct. at 2646, 2650.
\item \textsuperscript{120} \textit{Id.} at 2659 (Souter & Ginsburg, JJ., concurring in part and dissenting in part).
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.} at 2673 (Scalia & Stevens, JJ., dissenting).
\item \textsuperscript{123} \textit{Id.} at 2660 (Souter & Ginsburg, JJ., concurring in part and dissenting in part).
\item \textsuperscript{124} Hamdi, 124 S. Ct. at 2671 (Scalia & Stevens, JJ., dissenting).
\item \textsuperscript{125} \textit{Id.} at 2663. They also suggest that “our constitutional tradition has been to prosecute ... for treason or some other crime.” \textit{Id.} at 2660. Presumably “the other crime” they refer to is related to treason.
\item \textsuperscript{126} Treason is a very potent concept and tool, implicating the very survival of the commonwealth. It has been known to be manipulable by governments for the purpose of whipping public opinion into support of the current government and silencing criticism. See generally Otto Kirchheimer, \textit{Political Justice: The Use of Legal Procedures for Political Ends} 62-95 (Princeton U. Press 1961). The harmful ramifications of treason charges led the American founders to provide highly specific requirements for the offense in Article III of the Constitution. The case of another “American Taliban,” John Walker Lindh, is instructive. Immediately after
\end{itemize}
citizen”—a very potent adjective. Justice Thomas, while permitting the Executive to detain both citizens and aliens inside or outside United States territory, agrees with Scalia and Stevens about the characterization of citizens such as Hamdi, saying that these are not “loyal citizen[s].”

127 Scalia and Stevens would subject such disloyalty to a criminal trial, while Thomas would allow administrative detention; all three make note of the connection between citizenship and loyalty to the Nation. The distance from here to the Pledge of Allegiance, designed specifically to cultivate loyalty to the Nation is rather short. Chief Justice Rehnquist’s observation in Newdow makes it explicit:

I do not believe that the phrase “under God” in the Pledge converts its recital into a “religious exercise” . . . . Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents.128

Eight Justices would recognize a constitutional right to be free of arbitrary physical detention to all citizens on United States soil. Why? Their explanation that they find this right in the Constitution itself is not persuasive. The eight explain that the right is rooted in the Due Process Clause.129 The guarantee of Due Process, however, speaks of persons, not of citizens.130 Indeed, most of the quotes offered by the Justices in support of the proposition that citizens were always singled out for special treatment refer to persons, not to citizens.

Why do the Justices ignore the clear language of the text and narrow the protection to “citizens on the home soil?” I suggest the reason is their concept of the Nation and their understanding of the nation-state. The Justices conceive of the Nation as a distinct entity with an exclusive heritage. This nation needs protection (through the Pledge) and it in turn protects (through the extension of rights). The right to physical liberty, the Court implies, has been developed by and for the people, and therefore, when times are rough, is limited to them alone. For this reason, the plurality speaks in one breath of “the values that this country holds dear” and “the privilege that is American citizenship.”

128. U.S. Const. amend. V. The Constitution distinguishes between citizens and persons, and most of the Bill of Rights speaks of persons, not citizens. Id. at amend. I-XXVI. The first section of the Fourteenth Amendment recognizes the “privileges and immunities of citizens of the United States,” but then proceeds to grant the right of due process to persons. U.S. Const. amend. XIV, § 1.

129. Hamdi, 124 S. Ct. at 2648 (plurality).

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131. Hamdi, 124 S. Ct. at 2648 (plurality).
imperative, is the fountain from which rights flow. These Justices trace the values the Nation holds dear—primarily the elemental liberty (mentioned in the Pledge of Allegiance)—to the Nation’s roots. The thirteenth-century Magna Carta, guaranteeing the right of habeas corpus to the English barons, is the pedigree they invoke. They trace the values the Nation holds dear—primarily the elemental liberty (mentioned in the Pledge of Allegiance)—to the Nation’s roots. The thirteenth-century Magna Carta, guaranteeing the right of habeas corpus to the English barons, is the pedigree they invoke. 132

The myth of origin, shaping the Nation as an entity committed to liberty since King John set his seal to the Magna Carta on June 1, 1215 (another June date, if one is inclined to fortify the symbolism of the month of June), long before Columbus discovered America, ties Hamdi to Newdow. God, flag, national soil, citizenship, and liberty are woven into a triumphant national narrative. Justices Scalia and Stevens go even further than Justices Souter and Ginsburg in invoking an imagined community more than eight centuries old. They emphasize the ethnic Anglo-Saxon roots of the American nation-state: “The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.” 133

They also mention the Anglo-Saxon roots of the offense of treason, analogize United States citizens to British subjects, and invoke that great eighteenth-century English legal authority, Blackstone, as the source of authority and guidance in this area. 134 Ethnicity, the essence of nationhood, thereby joins God, flag, national soil, citizenship, and liberty. Together they make “the Nation” and justify the protection of its children against occasional executive fiat. In the process, the Pledge’s glorious promise of “liberty and justice for all” is transformed into a narrow guarantee of liberty and justice to United States citizens on United States soil. 135

132. Id. at 2662 (Souter & Ginsburg, JJ., concurring in part and dissenting in part). “Whether insisting on the careful scrutiny of emergency claims or on a vigorous reading of § 4001(a), we are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons’ insistence, confined executive power by ‘the law of the land.’” Id. at 2659. “The struggle between subject and Crown continued, and culminated in the Habeas Corpus Act of 1679, described by Blackstone as a ‘second magna charta, and stable bulwark of our liberties.’” Id. at 2662 (citation omitted).

133. Id. at 2661.

134. Hamdi, 124 S. Ct. at 2660-61. Justice Scalia is an ardent devotee of Blackstone and prides himself on relying on the English eighteenth-century scholar rather than on “external” sources for purposes of deciding what the law is. One is reminded of his dissent in Lee v. Weisman, a case of extreme doctrinal relevance to Newdow, where Justice Scalia scolded Justice Kennedy’s majority opinion for relying on Freud rather than on Blackstone. Id. at 2684 (Scalia, J., Rehnquist, C.J., White & Thomas, JJ., dissenting) (“I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud.”). Free association reminds one that Freud, the Austrian Jew, lost his citizenship through Nazi fiat, and found shelter in England, home of the Anglo-Saxon Blackstone. Freud’s story, when considered historically, may prove the superiority of the Anglo-Saxon system; when considered normatively, however, it may prove the danger lurking in nativist impulses, regardless of ethnic origins. Attaching rights to citizens rather than to persons may tempt governments to strip non-citizens of basic human dignity. See Alexander M. Bickel, The Morality of Consent 53-54 (Yale U. Press 1975). For a brilliant discussion, see Seyla Benhabib, The Rights of Others: Aliens, Residents and Citizens ch. 2 (Cambridge U. Press 2004).

135. In Newdow, Chief Justice Rehnquist, somewhat facetiously, points out that Dr. Newdow did not ask to remove the phrase “‘with liberty and justice for all’” from the Pledge. See Newdow, 124 S. Ct. at 2320 (Rehnquist, C.J., O’Connor & Thomas, JJ., concurring). It would have been interesting to see the Chief Justice’s reaction to a petition to replace “all” with “American citizens.” Of course, the Chief Justice could use the legal distinction between action and omission to justify a denial of such a claim. From the rhetorical perspective of vindicating the national myth, however, “all” sounds much more glorious than “all citizens.” One possible interpretation of the Chief Justice’s remark is that the “noble lie” captured by the Pledge should better be kept intact. In this context, it is interesting to reflect on Yaser Essam Hamdi’s grandfather in Mecca of the early twentieth century. Many in the Middle East at the time, particularly the merchant classes of which the elder Hamdi was one, admired the British for their civility and fine principles of government. It took time...
I have already mentioned that Mr. Hamdi was a dual citizen, and I would like to discuss this point before I return to Friedman’s theories. Mr. Hamdi was born in Baton Rouge, Louisiana, and therefore was classified as an American citizen. Citizenship was vested in Mr. Hamdi for the simple reason that the Fourteenth Amendment bestows citizenship on anybody born on United States soil. Apparently, Esam and Nadiah Hamdi, Yaser’s parents, never intended to make the United States their home. Between the age of three when he arrived in Saudi Arabia and his departure to Afghanistan, Mr. Hamdi did not travel outside the country he has considered and still considers his home.

After Mr. Hamdi returned to Saudi Arabia, he gave an interview in which he said “he had not even been aware he was American until ‘they sent me to Virginia from Guantanamo.” 136 The interview implies that when he arrived in the United States his English was not fluent. 137 His father told the interviewer that he knew that Saudi law prohibited dual citizenship. 138 The interview states that “Both he and his father said they assumed that when Mr. Hamdi received his Saudi identity card when he turned 18, ‘he was Saudi, not American.’” 139 We learn that once Mr. Hamdi was removed from Guantanamo Bay to a military brig on American soil, he was put in solitary confinement where he was often shackled and strip searched. 140 Upon realizing the privileged treatment stemmed from his status as a United States citizen, Mr. Hamdi recalls telling his captors/fellow citizens, “If the American citizenship is what is keeping me here, then take it. Take it! Send me back to Guantanamo.” 141 A look at the agreement between Mr. Hamdi and the United States of America signed prior to his release reveals an executive branch very tight-fisted about the extension of United States citizenship. Mr. Hamdi was required to sign that he “considers himself to be a citizen of the Kingdom of Saudi Arabia,” and that:

Hamdi agrees to appear before a diplomatic or consular office of the United States at the United States Embassy in Riyadh, Saudi Arabia, formally to renounce any claim that he may have to United States nationality pursuant to Section 349(a)(5). This provision is without prejudice to the right of the United States to determine that Hamdi lost United States nationality at an earlier time. Hamdi further agrees to so appear within seven (7) days of arriving in the Kingdom of Saudi Arabia pursuant to paragraphs 1 and 2 of this agreement. 142
In his interview with the New York Times, Mr. Hamdi said he accepted the condition that he renounce United States citizenship. Indeed he acted upon it "with no regret, he said, almost as soon as he stepped off the United States military contract plane in Riyadh on Oct. 11." When approached to put his signature to the agreement, Mr. Hamdi signed in Arabic, his native tongue. Surely, there are many American citizens whose native tongue is not English, or who feel more comfortable signing their names in their native tongue. However, given all we know about Mr. Hamdi's personal history, it is quite likely that his signature in Arabic was yet another subtle statement that he felt like a Saudi, not like an American, and that he was using the technical fact of his place of birth, because it was the only window of opportunity to get his freedom.

This background could be problematic for the reasoning in Mr. Hamdi's case. Let me begin by saying that Mr. Hamdi is not the typical dual citizen. He is not the person who feels at home in two (or more) countries and cultures. Nor is he ambivalent about his ties to more than one country. He seems to think of himself as a Saudi citizen and not to value United States citizenship as such. Had the Court expressed an interest in Mr. Hamdi's thoughts or objective ties to the United States, it may have found that his lawyers were invoking his citizenship for instrumental reasons. The fact he was born on United States soil could distinguish him from other Guantanamo detainees and afford him more efficient, quicker relief.

What did the Court have to say about the meaning of Mr. Hamdi's American citizenship? Justices Scalia and Stevens allude to his dual nationality when they call him a "presumed American citizen." Justice Thomas implies that he is a disloyal citizen, and maybe implies further that he thereby lost his right to due process. The majority, however, is silent. No detail about Mr. Hamdi, the person, emerges from the opinions. Clearly, the Court chose to view Mr. Hamdi not as a person but rather as an abstraction of citizenship, but why?

One may argue that if the threads connecting Newdow and Hamdi are patriotism and nationhood, then the Court could have easily upheld Mr. Hamdi's detention by insisting that his claim to citizenship was impaired. Why did six Justices (the plurality, Souter, and Ginsburg) choose to avoid this path and ignore the issue of technical citizenship? I suggest these Justices did so deliberately, in order to emphasize and solidify the concept of the nation-state. Protection extended formally, based on one's formal status regardless of background, intent and actions, elevates the Nation into a mighty protector. It is true that only children of the Nation are afforded the process thereby due. But it is also true that this approach guarantees the window is firmly shut.

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143. Brinkley, supra n. 34.
144. Id.
146. Hamdi, 124 S. Ct. at 2660.
before the hand that will separate one class of citizens from another on the basis of perceived loyalty. Under the Court’s approach, all citizens are protected equally, regardless of how un-American they might be. This result, it appears, not only would put a cap on the powers of the executive branch, but would also reaffirm Justice Jackson’s celebrated rhetoric about the greatness of the American Nation in another famous pledge case:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

To summarize: Dr. Newdow and Mr. Hamdi both represented, in various mutations, the horizontal society; each asked the Court to uphold rights in keeping with the culture of rights that is so central to The Republic of Choice. Dr. Newdow combined a traditional right of parenthood with a request for an audacious and novel remedy, very much in tune with the horizontal society. Mr. Hamdi asked for a very traditional right, harking back to the early constitutional monarchy in England, but his peculiarly modern status as a technical citizen complicated his claim. The Court rejected the audacious right proposed by Dr. Newdow and only partially agreed to extend the conventional right to Mr. Hamdi, while ignoring altogether the factor of dual citizenship.

I tried to show that the Court did not ground its reasoning in modernist, horizontal understanding of society. Rather, the Court’s reasons pointed in the direction of an exclusivist, nationalist understanding of society and its polity. In other words, it would be a mistake to understand the Court as embracing freedom of choice by ignoring Mr. Hamdi’s dual nationality. Quite the contrary, the blind eye turned on Mr. Hamdi’s dual nationality signaled discomfort with the republic of choice.

If one accepts the theory that the Supreme Court, in exercising judicial review, participates in a national seminar about the central meaning of the American Republic, then the Court may be both echoing and shaping a trend away from the horizontal and towards a vertical, nationalist exclusivity. The Nation acknowledges its vertical position “under God,” encourages its children to develop allegiance to itself, and in turn protects these children when they are denied due process of law. One may even go further to speculate that Mr. Hamdi, the borderline case, is benefiting from the determination of the Court to protect American citizens (particular patriots who take the Pledge of Allegiance seriously) from arbitrary executive denial of liberty. It is not altogether farfetched to assume that but for the Court’s concern for “real” United States citizens whose fate may be at stake, Mr. Hamdi would not have found a sympathetic ear at the Court. What does Friedman say about this analysis?

148. Hamdi, 124 S. Ct. at 2650 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)) (“We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”).

149. Barnette, 319 U.S. at 642 (footnote omitted).

Chapter three of Friedman's *The Horizontal Society* is devoted to the issue of nationalism and its variations. Friedman understands well the forces feeding the ideology of nation building, the politics of exclusion, and the role of ethnicity: "Nationalism is, and has to be, a blood brother of ethnicity." He quotes with approval Ernst Gellner's observation that nationalism is "a principle which holds that the political and national unit should be congruent." Friedman understands nationalism as a social construct, where patriots "[massage the nation] into life" through such means as myths of origin, national anthems, or the telling of a heroic didactic narrative of a nation gloriously overcoming adversity. This description applies quite literally to the Rehnquist and O'Connor concurrences in *Newdow*. One can imagine them massaging the Nation's heart into life and placing it directly under God. Friedman also points out that immigrant nations like the United States "seem to be prone to outbursts of ferocious patriotism, and even nativism," and ferocious patriotism may well explain at least the concurrences in *Newdow*.

Nationalism and nativism, as I argued above, may also explain the case of *Hamdi*. The Court protected Mr. Hamdi, very marginally, despite the fact that he was an alleged Saudi Taliban and only technically a United States citizen. Friedman views dual citizenship as another major indicator of the horizontal society, stating that "Dual citizenship... implies some kind of plural equality socially. It rejects the idea that membership in a country is confined to a tightly defined and exclusive group, or that it requires a total commitment of hearts and minds." Friedman believes—or at least he believed at the end of the twentieth century as he was writing *The Horizontal Society*—that we have been witnessing a process whereby:

[T]he unified nation dissolves, politically and culturally, into many little subnations, into bits and pieces. There is a serious question as to whether the nation in the sense of the group of groups, the loyalty of loyalties, still exists in any meaningful way. . . . In the United States, a case could be made that the "nation" is not a nation anymore.

In characteristic fashion, Friedman is sensitive to nuance. He does not make a bold statement about the end of nationalism. Rather, he concedes that "There is plenty of old-fashioned patriotism left." Yet he suggests that "It is a question of changes in the margins—of more or less."

It may be time for Friedman to reconsider his theory in light of the post-September 11th climate of the twenty-first century. In light of the Court's performance in *Newdow*

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151. Friedman, supra n. 2, at 82.
152. Id. Friedman suggests that nationalism "is the glue that keeps the nation state from flying apart." Id. at 86.
153. Id. at 92-95.
154. Id. at 96.
155. Friedman, supra n. 2, at 160.
156. Id. at 117. Friedman also says: "Indeed some sort of cultural evolution seems to be in progress, redefining the nation, recasting the very idea." Id. at 118.
157. Id. at 119.
158. Id.
and *Hamdi*, situated in the war against terrorism, is the “change in the margin” mentioned by Friedman going in the other direction? Are we seeing, more or less (as Friedman says), a reversal of the trend towards horizontalism and a retreat into nativism and nationalism?

If I am correct, then there are at least two possible ways to interpret recent developments. We may be witnessing a reversal of the trend discussed by Friedman. The horizontal society may be receding in the face of the rise of nationalism and verticalism. Of course, it is evidently correct that the twenty-first-century nationalism is deploying modern means to reassert itself, and that in this sense it partakes in the horizontal society. But it is still nationalism, unleashing powers we thought were tamed and subdued in the second half of the twentieth century.

*Newdow* and *Hamdi* may represent a shift rooted in yet another phenomenon. Perhaps it is not that the horizontal society is experiencing a transformation (in the margins, more or less) back to a vertical society, but rather that periods of national security crisis have always been, and probably will always remain, periods of centralization (verticalization) and ferocious patriotism, regardless of whether society is pre-modern, modern, or post-modern. If this is correct and we are witnessing societal behavior under crisis, then the question of the validity of the culture of rights celebrated by Friedman is again put into question.

**VI. CONCLUSION**

Lawrence Friedman has a middle name, Meir. Meir was a great rabbi in the Talmudic era and, true to his namesake, Friedman has been a grand rabbi of the law and society movement and of the discipline of legal history, not only in the United States, but also throughout the world. Meir is a Hebrew word; it is the present tense conjugation of the verb to enlighten. Lawrence Meir Friedman has been enlightening us, and having an enlightening influence on all of us—on me certainly—for several decades. It is an honor to participate in this celebration of his work. May he continue to enlighten us for many years to come.