TOTALITARIANISM IN PUBLIC SCHOOLS: ENFORCING A RELIGIOUS AND POLITICAL ORTHODOXY

LORI A. CATALANO*

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.[1]

INTRODUCTION

On June 14, 2004, the United States Supreme Court had the opportunity to protect religious minorities from the constant belittling of their beliefs.[2] Instead, it evaded the question.[3] Two years earlier, Dr. Michael A. Newdow, a professed atheist,[4] had convinced the Ninth Circuit that the recitation of the Pledge of Allegiance in public schools was unconstitutional.[5] This sparked a national controversy, with protestors calling for the judges' removals[6] and members of Congress reciting the Pledge on the steps of the Capitol.[7] Senators gathered for the chaplain's prayer and Pledge recitation, usually much unattended, to start the workday.[8] Newdow received threatening telephone calls, but refused to

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[1] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[2] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 4–5 (2004).

[3] *See id*. at 5.

[4] *Id*.

[5] Newdow v. U.S. Cong., 328 F.3d 466, 482, 490 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[6] Howard Fineman, *One Nation, Under . . . Who?*, NEWSWEEK, July 8, 2002, at 23, 25.

[7] *Senators Call Pledge Decision "Stupid"*, CNN.COM, June 27, 2002, http://www.archives.cnn.com/2002/ALLPOLITICS/06/26/senate.resolution/pledge/index.html.

[8] Fineman, *supra*, note 6, at 23.

back down.[9] He insisted that his goal was to "separate faith from any action of government" by removing the words "under God" from the Pledge.[10]

Senate and House members immediately introduced bills to protect the modern version of the Pledge of Allegiance.[11] The Senate bill emphasized the necessity of retaining the words "under God" in the Pledge.[12] The House bill and House resolution expressed the sentiment that the Ninth Circuit had wrongly decided the issue,[13] and the House bill called for a limitation of the jurisdiction of the lower federal courts to hear cases concerning the constitutionality of the words "under God" in the Pledge.[14]

The controversy continued as the 2004 election campaigns of George W. Bush and John Kerry progressed.[15] Both presidential candidates declared their opposition to the removal of the phrase "under God" from the Pledge.[16] President Bush openly discussed his faith in God both on the campaign trail and in conferences with national leaders.[17]

Not since the early 1940s had the Pledge of Allegiance attracted this type of national attention.[18] Children had recited some version of the Pledge of Allegiance in public schools since the late 1800s without objection.[19] But in 1937, the parents of two young children challenged the school policy requiring them to recite the Pledge.[20] Ultimately, in 1943, the United States Supreme Court held that no one could be compelled to

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[9] *Id.*

[10] *Id.*

[11] *See, e.g.*, H.R. 5064, 107th Cong. (2002); S. 2690, 107th Cong. (2002); H.R. Res. 459, 107th Cong. (2002). The modern version of the Pledge of Allegiance was codified in 1954. *See* discussion *infra* Part IV.B.2. The original words of the Pledge of Allegiance were, "I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all." Morris G. Sica, *The School Flag Movement: Origin and Influence*, 54 SOC. EDUC. 380, 381 (1990); *see also infra* text accompanying notes 36–44.

[12] S. 2690 § 1.

[13] *See* H.R. 5064 § 2; H.R. Res. 459.

[14] H.R. 5064 § 2.

[15] *See* Fineman, *supra* note 6, at 23.

[16] Weston Kosova & Holly Bailey, *The Incredible W*, NEWSWEEK, Sept. 6, 2004, at 38 foldout.

[17] *See id.*

[18] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[19] *See* Sica, *supra* note 11, at 381.

[20] HAIG BOSMAJIAN, THE FREEDOM NOT TO SPEAK 104–05 (1999).

recite the Pledge of Allegiance, because it forced the speaker to profess certain beliefs.[21] This ended a decade filled with persecution of Jehovah's Witnesses for refusing to recite the Pledge on religious grounds.[22] Despite this decision, the Pledge remained as a part of the daily routine of schoolchildren throughout the United States.[23] Until Newdow's suit and the remarkable decision of the Ninth Circuit, the constitutionality of the Pledge probably did not occur to most Americans.

The Supreme Court overturned the Ninth Circuit's decision, holding that Newdow lacked the standing to challenge the constitutionality of the Pledge of Allegiance.[24] Loosely basing the decision on a prudential standing argument,[25] the majority did not decide the merits of the case. Justices Kennedy, Souter, Ginsburg, and Breyer joined Justice Stevens in evading the ultimate issue:[26] whether the United States was about to part with fifty years of tradition. Chief Justice Rehnquist and Justices O'Connor and Thomas concurred in the judgment, but did so based on the merits of the case,[27] finding that Newdow did have the standing to bring the suit.[28] Their concurrences found that the Pledge was constitutional as written.[29] Justice Scalia recused himself because he had previously

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[21] *Barnette*, 319 U.S. at 641–42. The Pledge can be interpreted as a profession of the belief not only in the government of the United States, but also the belief in monotheism. Newdow v. U.S. Cong., 328 F.3d 466, 487 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004). It specifically mentions "God," which indicates a preference not only for religion in general, but specifically for monotheistic religions. *Id*.

[22] *See* BOSMAJIAN, *supra* note 20, at 107–08.

[23] *See Elk Grove*, 542 U.S. at 38 (O'Connor, J., concurring).

[24] *Id*. at 5 (majority opinion).

[25] *Id*. at 17–18. Because Newdow was not the custodial parent, the Supreme Court opined that he lacked prudential standing to bring this suit in federal court. *Id.* at 16–18.

[26] *See id.* at 3–5. Justice Kennedy and Justice Souter were originally reluctant to dismiss Newdow's claim for lack of standing. *See* Dahlia Lithwick, *One Nation, Under Hallmark, Indivisible*, SLATE, Mar. 24, 2004, http://www.slate.com/toolbar.aspx?action=print&id=2097737. Justice Kennedy worried that the state was "tipping the balance" against Newdow, while Justice Souter felt that despite the custody concern, Newdow "nonetheless [had] an interest as a father." *Id.*

[27] *Elk Grove*, 542 U.S. at 26–33 (Rehnquist, C.J., concurring); *id*. at 33–45 (O'Connor, J., concurring); *id*. at 45–54 (Thomas, J., concurring).

[28] *Id.* at 18–26 (Rehnquist, C.J., concurring).

[29] *See* discussion *infra* Part III.C.

publicly denounced the Ninth Circuit's opinion.[30] Essentially then, four members of that Court concluded that the Pledge of Allegiance is constitutional as currently written. It is likely that Chief Justice Roberts would also find the Pledge constitutional, as would Justice Alito.

The Ninth Circuit was right. It is unconstitutional for any level of government to provide for the recitation of the Pledge of Allegiance in public schools. This may be a surprising statement, given the long history of the Pledge and its traditional recitation in school settings. But it is the only logical conclusion under Supreme Court precedent.

Part I of this Article begins by discussing the history of patriotic exercises in public schools, which began in the late 1800s. It discusses the persecution of Jehovah's Witnesses because of their refusal to salute the American flag. Next, it analyzes the rationale of the Supreme Court in holding that mandatory flag salutes violated the First Amendment. Part I concludes with examples of modern developments concerning the Pledge of Allegiance, including some surprisingly cruel treatment of students by their teachers for refusing to salute the flag.

Part II of this Article discusses the Establishment Clause tests that have been promulgated by the Supreme Court since 1962. It begins with the original cases banning prayer in public schools—*Engel v. Vitale* and *School District of Abington Township v. Schempp*. It ends with an examination of the historical cases of *Lemon v. Kurtzman*, *Lynch v. Donnelly*, and *Lee v. Weisman*, in which the Supreme Court delineated the *Lemon* test, the endorsement test, and the coercion test, respectively.

Part III of this Article describes the recent court decisions concerning the constitutionality of the words "under God" in the Pledge, highlighting the Supreme Court's decision in *Elk Grove Unified School District v. Newdow*. It also includes a discussion of other court decisions, in both trial and appellate courts, that examined the constitutionality of the Pledge of Allegiance.

Part IV begins with an analysis of the defects in the court decisions that held that the Pledge does not violate the Establishment Clause. It then examines the Pledge's constitutionality under the Establishment Clause tests, concluding that every test will produce the same conclusion—that the Pledge of Allegiance, recited in public schools, violates the Establishment Clause. It concludes with a proposal that the Pledge of Allegiance is unconstitutional, notwithstanding the Establishment Clause violation, because it violates free speech.

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[30] Dahlia Lithwick, *Scaliapalooza: The Supreme Court's Pocket Jeremiah*, SLATE, Oct. 30, 2003, http://www.slate.com/toolbar.aspx?action=print&id=2090532.

Part V of this Article looks to future challenges to the constitutionality of the Pledge. It discusses current legislation pending before both the House and the Senate that would limit the ability to bring an Establishment Clause challenge over the Pledge. Finally, it concludes with a prediction of the Supreme Court's actions in the future.

I. BACKGROUND

A. Patriotic Exercises in Public Schools

During the late 1800s, legislators and veterans groups were searching for a way to perpetuate the patriotism that had thrived in America during and immediately following the Civil War.[31] Many of these groups saw schools as the natural place to instill a sense of patriotism in America's youth.[32] The Grand Army of the Republic (GAR), a group of Civil War veterans, lobbied for the enactment of legislation mandating the display of the American flag in schools.[33] The GAR often donated flags to the schools, but there was little show of enthusiasm among the students.[34] In 1892, in preparation for a Columbus Day celebration, the National Education Association and Francis Bellamy planned a ceremony involving a flag salute by children throughout the country.[35] This salute included a recitation of the original Pledge of Allegiance, which was developed by Bellamy's *Youth's Companion*.[36] The original Pledge of Allegiance was: "I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all."[37] After this Columbus Day event, many schools continued to include patriotic exercises in the students' daily routines.[38] By 1900, eleven states had passed laws mandating the display of the national flag in public schools.[39]

The Pledge began to grow in popularity over the next few decades. In the 1920s and 1930s, many states passed laws requiring daily patriotic rituals in public schools.[40] These patriotic rituals were mandatory for the

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[31] Sica, *supra* note 11, at 380–82.

[32] *Id*. at 380.

[33] *Id*. at 380–82.

[34] *See id*. at 380.

[35] *Id*. at 381.

[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] *Id*. at 380.

[40] *See* BOSMAJIAN, *supra* note 20, at 104.

students enrolled in public schools—students who did not participate were sometimes disciplined.[41] In 1935, the Minersville School District in Pennsylvania expelled Lillian and Walter Gobitis for refusing to participate in their school's mandatory patriotic exercises, which included saluting the United States flag.[42] The Gobitis children were Jehovah's Witnesses and believed that scripture forbade saluting the flag in this manner; they believed it was idolatry of false gods.[43] Their parents could not afford to continue to pay for private schooling for the children,[44] so their father brought a lawsuit against the school district in 1937 to prevent the school from continuing to require participation in the exercises.[45]

The district court in Pennsylvania considered the liberty interest protected by the Due Process Clause to include the freedom to entertain "any religious belief."[46] This would allow the children to refrain from participating in the exercises on religious grounds.[47] The court held for the children, comparing coerced speech with totalitarianism, and stated that "[o]ur country's safety surely does not depend upon the totalitarian idea of forcing all citizens into one common mold of thinking and acting or requiring them to render a lip service of loyalty in a manner which conflicts with their sincere religious convictions."[48]

The Third Circuit affirmed the decision,[49] not wanting to follow in Hitler's footsteps, noting that he was known for persecuting Jehovah's Witnesses.[50] The Supreme Court, however, overturned the decision, stating that religious freedom was not absolute.[51] The Court's opinion focused on whether the necessities of society outweighed the constitutional

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[41] *Id*. at 104–05, 110.

[42] Gobitis v. Minersville Sch. Dist., 24 F. Supp. 271, 272–73 (E.D. Pa. 1938), *aff'd*, 108 F.2d 683 (3d Cir. 1939), *rev'd*, 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[43] *Id*. at 273.

[44] BOSMAJIAN, *supra* note 20, at 105.

[45] *See id*.

[46] *Gobitis*, 24 F. Supp. at 274.

[47] *See id*.

[48] *Id*.

[49] Minersville Sch. Dist. v. Gobitis, 108 F.2d 683 (3d Cir. 1939), *rev'd*, 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[50] *Id*. at 683 n.3.

[51] *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 593–94, 600 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

rights to religious liberty and freedom of conscience.[52] It noted that although religion was to be given "every possible leeway,"[53] national unity was "an interest inferior to none in the hierarchy of legal values."[54] Balancing the legislature's interest in maintaining a free and orderly society with the individual's religious liberty, the Court found that the needs of society outweighed the needs of the individual.[55]

Justice Stone, in his dissenting opinion, focused on the "freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection," and opined that this should override any inconvenience to the school.[56] He criticized the state for suppressing the freedom of speech and prohibiting the free exercise of religion. He noted that the state sought to "coerce these children to express a sentiment which . . . they do not entertain, and which violates their deepest religious convictions."[57] Ultimately, Justice Stone felt that the interests of the state were not so great as to justify compelling children to violate their religious faith.[58]

After the Supreme Court handed down the *Gobitis* decision, persecution of Jehovah's Witnesses increased.[59] More states enacted laws mandating the recitation of the Pledge in schools, and these schools punished students who did not participate.[60] In 1942, Congress formally recognized the Pledge of Allegiance and passed legislation outlining the appropriate salute.[61]

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[52] *See id*. at 593–95.

[53] *Id*. at 594.

[54] *Id*. at 595.

[55] *See id*. at 593–95, 600.

[56] *Id*. at 607 (Stone, J., dissenting).

[57] *Id*. at 601.

[58] *See id*. at 605–07.

[59] BOSMAJIAN, *supra* note 20, at 107–08.

[60] *Id*. at 110.

[61] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 6–7 (2004). The salute was originally a stiff-arm salute. *Id.* at 7. The Pledge was to be recited while "standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words 'to the Flag' and holding this position until the end, when the hand drops to the side." *Id.* (quoting Joint Resolution on Flag of the U.S.A. Display and Use, ch. 435, 56 Stat. 377, 380 (1942) (current version at 4 U.S.C. § 4 (Supp. II 2004))). Congress changed this salute to the modern salute because of public disapproval of the original salute's similarity to the Nazi salute. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 627–28 (1943).

That same year, the Court gave its first indication that *Gobitis* would be overruled. *Jones v. Opelika*[62] involved three cases in which Jehovah's Witnesses were convicted of illegally selling religious pamphlets door to door;[63] they had been peddling without the required licenses.[64] Their convictions were brought to the Supreme Court to determine if the licensing requirement impinged on religious freedom.[65] The Court found that the license requirements did not violate the First Amendment's freedom of religious belief because they were neutral and nondiscriminatory.[66] Following this decision, three members of the Court attached a separate dissenting opinion indicating that *Gobitis* had been decided incorrectly.[67] These three Justices had originally joined the majority in *Gobitis* but now decided that a democratic government could not suppress the free exercise of religion.[68] They felt that the government had a responsibility to protect the religious view of minorities, however unorthodox.[69]

A district court in West Virginia used that separate dissenting opinion in *Jones* as the basis for its holding against the precedent of *Gobitis* in another case involving Jehovah's Witness children refusing to salute the flag in school.[70] The court found that requiring the children to recite the Pledge denied them the religious freedom granted by the Constitution.[71] The Supreme Court officially overturned *Gobitis* in 1943 when this district court ruling was appealed in *West Virginia State Board of Education v. Barnette*.[72] The Court emphasized that coerced speech is not necessary to instill patriotism in children.[73] It stressed that the only time the government can coerce speech in this context is in a situation presenting a "clear and present danger."[74] After *Barnette*, states could not force

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[62] 316 U.S. 584 (1942), *vacated*, 319 U.S. 103 (1943).

[63] *Id*. at 585–92.

[64] *Id*. at 586, 588–90.

[65] *Id*. at 585–86.

[66] *See id*. at 598–600.

[67] *Id*. at 623–24 (Black, Douglas, and Murphy, JJ., dissenting).

[68] *Id*.

[69] *See id*.

[70] Barnette v. W. Va. State Bd. of Educ., 47 F. Supp. 251, 252–53, 255 (S.D. W. Va. 1942), *aff'd*, 319 U.S. 624 (1943).

[71] *Id*. at 253.

[72] 319 U.S. 624 (1943).

[73] *Id*. at 641–42.

[74] *Id*. at 633.

children to recite the Pledge of Allegiance in schools.[75] If they had laws mandating the recitation of the Pledge, they had to include an opt-out provision—children had to be free to decide whether they wanted to recite it.[76]

In 1954, in the midst of the American uproar over communism, Congress added the words "under God" to the Pledge.[77] The purpose behind this addition was to distinguish American democracy from the "godless" communists of the Soviet Union.[78] President Eisenhower supported changing the Pledge, and this resolution easily passed in both houses of Congress.[79] The report on this amendment emphasized that "'[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.'"[80] This history of the amendment clearly indicates that the purpose of the additional words was religious. Today, the Pledge of Allegiance is: "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."[81]

B. Modern Developments

The Pledge of Allegiance did not garner much attention during the decades following *Barnette*. In recent years, however, it has again been brought into the limelight. Despite the Court's holdings in *Barnette* and

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[75] *See id*. at 642.

[76] *See id.*

[77] David Greenberg, *The Pledge of Allegiance: Why We're not One Nation "Under God"*, SLATE, June 28, 2002, http://www.slate.com/toolbar.aspx?action=print&id=2067499.

[78] *See id.*

[79] *Id.*

[80] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 31 (2004) (Rehnquist, C.J., concurring) (quoting H. R. REP. NO. 83-1693, at 2 (1954), *as reprinted in* 1954 U.S.C.C.A.N. 2339, 2340). The campaign to add the words "under God" to the Pledge may have been initiated by the Hearst newspapers and the Illinois Society of the Sons of the American Revolution (SAR). John W. Baer, "Under God" and Other Pledge of Allegiance Questions and Answers, http://pledgeqanda.com (last visited Feb. 1, 2006). At a celebration for President Lincoln's birthday, the SAR members recited the Pledge, adding the words "under God," based on Lincoln's Gettysburg Address, which supposedly included a reference to God. *Id.* A member of SAR later wrote to his former employer, William R. Hearst, Jr., about the change. *Id.* The Hearst newspapers then began their campaign to officially add those words to the Pledge. *Id.*

[81] 4 U.S.C. § 4 (Supp. II 2004).

later Establishment Clause cases, schools are again punishing children for refusing to recite the Pledge in school. In Washington, a teacher forced a thirteen-year-old Jehovah's Witness to stand in the rain for refusing to recite the Pledge in school.[82] In California, a teacher placed a sixteen-year-old student in detention for failing to recite the Pledge because she was an atheist.[83] A high school senior in Alabama refused to recite the Pledge and the school gave him the choice of receiving detention (and not graduating) or being paddled.[84] He chose to be paddled—and promptly brought suit in federal court.[85]

In the months following the terrorist attacks of September 11, 2001, Americans became more patriotic.[86] Flags flew at more houses and public places than ever before,[87] and sales of American flags increased dramatically.[88] Patriotic messages began appearing on clothing, in music, and on retail products. Public schools have shown their patriotism by placing more emphasis on the Pledge.[89] Several states have recently passed laws requiring the recitation of the Pledge in schools or have reenacted prior statutes that had fallen into disuse.[90] Some states that

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[82] Dionne Searcey, *Student May Sue District over Pledge*, SEATTLE TIMES, Mar. 10, 1998, at B1.

[83] Brad K. Brown, *The Pledge not Taken*, S.F. CHRON., June 29, 1998, at A3.

[84] Holloman v. Harland, 370 F.3d 1252, 1261 (11th Cir. 2004), *reh'g en banc denied* 116 Fed. App'x 254 (2004).

[85] *Id*.

[86] David L. Hudson Jr., Pledge of Allegiance in Public Schools, http://www.firstamendmentcenter.org/speech/studentexpression/topic.aspx?topic=pledge (last visited Feb. 1, 2006).

[87] *See* Michelle Slatalla, *A Search for a Symbol*, N.Y. TIMES, Sept. 20, 2001, at G1.

[88] *See* Norma Mushkat Gaffin, Rallying Behind the Flag Industry, http://featuredreports.monster.com/911/flag/ (last visited Feb. 1, 2006). Prior to September 11, 2001, the average number of house flags purchased annually by consumers was two million. *Id.* According to Tibor Egervary, director of sales and marketing for Valley Forge Flag Company, however, on that single day, "25 to 30 million people wanted [American] house flags instantly." *Id.*

[89] Hudson, Jr., *supra* note 86.

[90] *Id.*; *E.g.*, ARK. CODE ANN. § 6-16-108 (Supp. 2005); CONN. GEN. STAT. ANN. § 10-230 (West 2002); MISS. CODE ANN. § 37-13-6 (Supp. 2005); MO. ANN. STAT. § 171.021 (West Supp. 2005); N.H. REV. STAT. ANN. § 194:15-c (LexisNexis Supp. 2005); N.D. CENT. CODE § 15.1-19-03.1 (2003); OHIO REV. CODE ANN. § 3313.602 (LexisNexis Supp. 2004); S.D. CODIFIED LAWS 13-24-17.2 (2004); TENN. CODE ANN. § 49-6-1001 (2002); VA. CODE ANN. § 22.1-202 (2003).

already had these statutes have recently changed them to require the recitation of the Pledge in secondary schools as well as in primary schools.[91] Although most of the states have included an opt-out provision to comply with *Barnette*,[92] both Colorado[93] and Pennsylvania[94] have enacted statutes that the courts have held unconstitutional as written because of the prohibition against making the recitation mandatory. Colorado's statute did not include a non-religious opt-out provision, so a district court judge enforced a temporary injunction prohibiting its enforcement.[95] Pennsylvania's statute had an opt-out provision, but it required children to have permission from their parents in order to refuse to recite the Pledge.[96] The court did not deem this method as permissive enough to be an adequate opt-out provision.[97]

Even after courts held these two statutes unconstitutional, Virginia attempted to pass a similar law in early 2005.[98] The bill, which passed Virginia's House of Delegates 93–4,[99] provided for parental notification when children refused to either stand for or recite the Pledge.[100] Such a requirement calls to mind the Orwellian concept of Big Brother.[101] But

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[91] *See, e.g.*, 105 ILL. COMP. STAT. ANN. 5/27-3 (West Supp. 2005); UTAH CODE ANN. § 53A-13-101.6 (Supp. 2005).

[92] *E.g.*, ARK. CODE ANN. § 6-16-108 (Supp. 2005); CONN. GEN. STAT. ANN. § 10-230 (West 2002); OHIO REV. CODE ANN. § 3313.602. *See supra* text accompanying notes 73–76.

[93] Transcript of Ruling at 5–6, 13–14, Lane v. Owens, No. 03-B-1544 (D. Colo. Aug. 15, 2003), *available at* http://www.aclu-co.org/docket/200309/200309_309pledge_Courts_Oral_Ruling_8-15-03.pdf [hereinafter Lane Ruling].

[94] *See* Circle Sch. v. Pappert, 381 F.3d 172, 174 (3d Cir. 2004).

[95] Lane Ruling, *supra* note 93, at 5–6, 13–14.

[96] *Circle Sch.*, 381 F.3d at 174.

[97] *See id.* at 181.

[98] *See* H.R. 1912, 2005 Gen. Assem., Reg. Sess. (Va. 2005), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?051=fultHB1912E+pdf (last visited Feb. 1, 2006).

[99] Virginia General Assembly Bill Tracking, http://leg1.state.va.us/cgibin/legp504.exe?051+vot+HV0343+HB1912 (last visited Feb. 1, 2006).

[100] H.R. 1912.

[101] *See generally* GEORGE ORWELL, 1984 (The New American Library 1961) (1949). Orwell saw the concept of Big Brother as the wave of the future, predicting that a society such as the totalitarian Oceania described in the novel would exist by the year 1984. Erich Fromm, *Afterword* to ORWELL, *supra*. Big Brother was the leader of Oceania and censored all thoughts and behavior that went against the government of Oceania. *See* ORWELL, *supra*, at 6–7.

Big Brother is not alive in Virginia. The bill was stopped in the senate after the ACLU informed Virginia's Education and Health Committee that it would challenge the law if it passed.[102]

II. ESTABLISHMENT CLAUSE PRECEDENT

The current controversy over the Pledge of Allegiance is based on the words "under God," which were added in 1954.[103] Modern Pledge cases allege a violation of the Establishment Clause.[104] The Establishment Clause of the First Amendment prohibits government from establishing a national religion.[105] The Supreme Court set out the basic rules to establish a violation of the Establishment Clause in *Everson v. Board of Education*[106]—the government cannot pass laws that aid religion or prefer one religion to another, nor can the government force a person to profess a belief in any religion.[107]

In *Engel v. Vitale*,[108] decided in 1962, the Supreme Court held that school prayers were unconstitutional as violative of the Establishment Clause.[109] New York schoolchildren were praying every morning in class, as directed by the school board.[110] The Court held that the Constitution did not allow government to create "official prayers" for schoolchildren to recite as part of a daily governmental religious program.[111] The school board argued that the prayers did not violate the Establishment Clause

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[102] Press Release, ACLU, Following ACLU Action, Virginia Senate Committee Kills Bill Requiring Schools to Notify Parents when Students Refuse to Recite Pledge (Feb. 17, 2005), http://www.aclu.org/religion/gen/16257prs20050217.html.

[103] *See* Newdow v. U.S. Cong., 328 F.3d 466, 483 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[104] *See, e.g.*, *id.*; Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 439–40 (7th Cir. 1992).

[105] U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion . . . ." *Id.*

[106] 330 U.S. 1 (1947).

[107] *Id.* at 15–16. Violations of the Establishment Clause also occur when the government commits the following acts: sets up a church, punishes a person for certain religious beliefs, levies taxes to support religious institutions, or participates in the affairs of a religious organization. *Id.*

[108] 370 U.S. 421 (1962).

[109] *Id*. at 425.

[110] *Id.* at 422.

[111] *Id*. at 425.

because they were both optional and non-denominational.[112] The Court nevertheless found that this type of prayer violated the Establishment Clause, holding that such a violation did not depend on direct coercion by the government;[113] rather, the indirect coercive pressure placed on minorities to conform to the majority was sufficient to violate the Constitution.[114]

The following year, the Supreme Court held that school-sponsored Bible reading was unconstitutional in *School District of Abington Township v. Schempp*.[115] The Court combined two companion cases from Pennsylvania and Maryland, where schools were beginning each day with the recitation of Bible passages.[116] Here, like in *Engel*, states were aiding religion by requiring the recitation of Bible passages, and the Court found an Establishment Clause violation.[117] Despite the fact that students could be excused from the reading upon parental request, the Court emphasized that these exercises still violated the First Amendment.[118]

After these two cases, school-sponsored prayer during school hours was considered unconstitutional. But other issues arose concerning government involvement with private religious schools. The Court needed to define what constituted an Establishment Clause violation in order to determine how much government involvement was permissible under the Constitution. The Supreme Court has since promulgated three tests to determine when violations of the Establishment Clause occur.

A. Lemon v. Kurtzman*—The "Purpose" Test*

Lemon v. Kurtzman[119] involved two cases questioning the constitutionality of government funding of private religious schools for payment of teacher salaries.[120] The Court acknowledged that the Religion Clauses of the First Amendment were "at best opaque," but it attempted to articulate a standard by which to judge the Clauses and suspected violations of them.[121] The Court promulgated a three-prong test to

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[112] *Id*. at 430.

[113] *Id*. at 430–31.

[114] *Id*.

[115] 374 U.S. 203, 205 (1963).

[116] *Id*. at 205, 211.

[117] *Id*. at 224–26.

[118] *Id*. at 224–25.

[119] 403 U.S. 602 (1971).

[120] *Id*. at 606–07.

[121] *Id*. at 612–13.

determine if a government activity violated the Establishment Clause.[122] To pass the *Lemon* test, the governmental provision must first have a secular legislative purpose.[123] Second, the principal effect of the provision must neither advance nor inhibit religion.[124] Finally, the provision must not foster "'an excessive government entanglement with religion.'"[125]

The *Lemon* cases involved both the state reimbursement of funds spent on teacher salaries and supplementation of teacher salaries in private religious schools.[126] Here, the states' purpose was to improve the quality of education; because states always have a legitimate interest in maintaining the quality of education, the states passed the purpose prong of the test.[127] Though the states passed this first prong, they needed to pass all three prongs to avoid an Establishment Clause violation. The Court then evaluated the funding programs under the third prong of the test, looking for excessive government entanglement with religion.[128] The Court focused on the nature of the institutions, the nature of the aid, and the resulting relationship between the institutions and the states.[129] The legislatures in Pennsylvania and Rhode Island had noted that religious schools devote a substantial portion of time to religious education.[130] In order to ensure that the government funding supported only secular education, the legislatures created statutory provisions to guarantee the separation between the secular education and the religious education.[131] Because the school systems in each case were supervised by the religious organizations, the Court was concerned that the religious education could merge into the secular education.[132] In each case, the government would

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[122] *Id*.

[123] *Id*. at 612.

[124] *Id*.

[125] *Id*. at 613 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). The *Lemon* test was later modified by the Court in *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997), where the Court merged the entanglement prong into the effects prong. *See also* Mitchell v. Helms, 530 U.S. 793, 807–08 (2000) (plurality opinion) ("[I]n *Agostini* . . . we therefore recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect.").

[126] *Lemon*, 403 U.S. at 606–07.

[127] *Id*. at 613.

[128] *Id*. at 613–14.

[129] *Id*. at 615.

[130] *Id*. at 613.

[131] *Id.*

[132] *Id.* at 618–19.

have had to monitor the schools to ensure that the schools were using the grant money for secular purposes only.[133] Given the pervasive religious environment in the school systems, the state monitoring would have to be comprehensive and continuous.[134] The Court stated that this close monitoring would be an excessive entanglement with religion.[135] Because the failure to pass the third prong was sufficient to cause a violation of the Establishment Clause, the Court did not need to determine the effect prong of the test.

B. Lynch v. Donnelly *and* County of Allegheny v. ACLU—*The "Endorsement" Test*

The second test promulgated by the Court was first delineated in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*.[136] In this opinion, she describes the endorsement test for finding an Establishment Clause violation, noting that the *Lemon* test did not provide enough guidance for the lower courts.[137] *Lynch* involved the city display of a crèche, along with other traditional holiday symbols such as a Santa Claus figure and a Christmas tree.[138] The Court, using the *Lemon* test, held that the display did not violate the Establishment Clause because the crèche was included with many other displays.[139] In her concurring opinion, Justice O'Connor focused on the purpose and effect prongs of the *Lemon* test to develop the new endorsement test.[140] The test focused on both the government's intention and on the public's perception of the activity.[141] In Justice O'Connor's test, the proper inquiry under the purpose prong of the *Lemon* test is whether the government's intention is to endorse religion.[142] The effect prong then examines the actual message conveyed by the

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[133] *Id.* at 619–21.

[134] *Id.* at 619.

[135] *Id.*

[136] 465 U.S. 668 (1984).

[137] *Id*. at 687–91 (O'Connor, J., concurring).

[138] *Id*. at 671 (majority opinion).

[139] *See id*. at 684–85, 687.

[140] *Id*. at 690 (O'Connor, J., concurring).

[141] *Id*.

[142] *Id*. at 691. Note that this prong is more difficult for the government to prove than the purpose prong of the *Lemon* test. *Any* governmental intent to endorse religion violates this prong, but any secular purpose allows the government to pass the purpose prong of *Lemon*.

action.[143] The message conveyed is evaluated by the objective standards of the community.[144] If either inquiry results in a message of endorsement of religion, then the action violates the Establishment Clause.[145] In this situation, Justice O'Connor found that neither the government's intention nor the actual message conveyed was one that endorsed religion because the religious symbol (the crèche) was among many other traditional holiday symbols.[146]

A majority of the Court later adopted Justice O'Connor's test in *County of Allegheny v. ACLU*.[147] *County of Allegheny* involved similar holiday displays of a crèche, menorah, and Christmas tree.[148] Here, however, the crèche had the dominant position on the steps of the courthouse, while the other two symbols were on the grounds.[149] Unlike the display in *Lynch*, nothing surrounded the crèche to detract from its position of importance or its religious message.[150] The display of the crèche alone showed the government's preference for the Christian religion over any others.[151] Focusing on the actual message conveyed in this situation, the Court found that the community would perceive this as "an unmistakable message that [the county] supports and promotes the Christian praise to God that is the crèche's religious message."[152] Because the public would perceive an endorsement of the Christian religion in the display, the display violated the Establishment Clause.[153]

C. Lee v. Weisman—*The "Coercion" Test*

The Supreme Court promulgated the third Establishment Clause test in *Lee v. Weisman*.[154] *Lee* invalidated school-sponsored religious exercises at

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[143] *Id*. at 690.

[144] *Id*.

[145] *Id*. Note that this prong of the endorsement test is easier for the government to meet than the effect prong of the *Lemon* test because it is based on the majority's perception of the message, not its effect on the *entire* community.

[146] *Id*. at 691.

[147] 492 U.S. 573, 592–94 (1989).

[148] *Id*. at 578.

[149] *See id*.

[150] *Id*. at 598.

[151] *Id*. at 600.

[152] *Id*.

[153] *Id*. at 579, 599–600.

[154] 505 U.S. 577 (1992).

school graduation ceremonies.[155] Although the prayer here was nonsectarian, one of the students objected.[156] The Court determined that the state officials performed a religious exercise and that attendance at graduation was not voluntary.[157] The Court declined to use either the *Lemon* test or the endorsement test.[158] Instead, the majority opinion, written by Justice Kennedy, focused on the psychological coercion that children endure to conform.[159] He stated that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[160] He noted that children feel pressured to conform to the majority and may conform despite beliefs to the contrary.[161] This inducement to conform to the majority violates the Establishment Clause.[162]

D. What is the Proper Test to Use to Determine an Establishment Clause Violation?

The three key tests for Establishment Clause violations have not been overruled.[163] Indeed, the Supreme Court continues to use all three of the tests.[164] In *Santa Fe Independent School District v. Doe*,[165] the Court invalidated school-sponsored prayer at high school football games using all three of the Establishment Clause tests.[166] It first analyzed the issue under *Lee*, stating that the "analysis [was] properly guided by the principles that [were] endorsed in *Lee*."[167] The pre-game prayers, according to the Court, coerced students into participation, much like the prayers at school graduations.[168] The Court also found that "the realities of the situation

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[155] *Id*. at 599.

[156] *See id*. at 581.

[157] *Id*. at 586.

[158] *See id*. at 587. "Thus we do not accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon v. Kurtzman* . . . ." *Id.*

[159] *Id*. at 592–94.

[160] *Id*. at 592.

[161] *Id*. at 593.

[162] *Id*.

[163] *See* Newdow v. U.S. Cong., 328 F.3d 466, 487 (9th Cir. 2003), *rev'd sub nom*. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[164] *See id*.

[165] 530 U.S. 290 (2000).

[166] *Id*. at 294, 301–17.

[167] *Id*. at 301–02.

[168] *Id*. at 311–13.

plainly reveal[ed] that its policy involve[d] both perceived and actual endorsement of religion."[169] Finally, the Court examined the policy allowing pre-game prayers under the *Lemon* test.[170] It found that "this policy was implemented with the purpose of endorsing school prayer,"[171] thus failing the purpose prong of the *Lemon* test.[172]

One of the most recent Establishment Clause cases to come before the Court was *McCreary County v. ACLU of Kentucky*,[173] a case involving the display of the Ten Commandments on government property.[174] In *McCreary County*, the Court declined to overrule *Lemon*[175] and held that the display of the Ten Commandments in Kentucky courthouses violated the Establishment Clause because the government's purpose was clearly religious.[176]

It appears that no single case outlining the proper test to determine an Establishment Clause violation exists. The Supreme Court has used all three tests without overruling any of them, thus allowing the lower courts to use any or all of them. The Ninth Circuit did note, however, that the Supreme Court most commonly used the *Lemon* test to evaluate alleged violations of the Establishment Clause.[177]

III. RECENT COURT DECISIONS DETERMINING THE CONSTITUTIONALITY OF THE PLEDGE OF ALLEGIANCE

A. The Seventh Circuit Finds the Pledge to Be Constitutional as an Instance of Ceremonial Deism

The circuit courts are currently split over whether the presence of the words "under God" in the Pledge of Allegiance violates the Establishment Clause. The Seventh Circuit was the first Court of Appeals to hear a case

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[169] *Id*. at 305.

[170] *Id*. at 314–16.

[171] *Id*. at 315.

[172] *Id*. at 315–16.

[173] 125 S. Ct. 2722 (2005).

[174] *Id*. at 2727.

[175] *Id*. at 2734–35.

[176] *Id*. at 2739–40, 2745. *McCreary County* was one of two companion cases involving such a display. In the other case, *Van Orden v. Perry*, 125 S. Ct. 2854, 2856 (2005), the Court did not use the *Lemon* test, stating that it was "not useful" in that particular situation, but also did not overrule it.

[177] *See* Newdow v. U.S. Cong., 328 F.3d 466, 485–86 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

involving the constitutionality of the words "under God" in the Pledge of Allegiance, and in 1992 it determined that the Pledge did not violate the Establishment Clause.[178] A parent challenged the constitutionality of Illinois's statute providing for the daily recitation of the Pledge in public schools.[179] The statute provided that "'[t]he Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions supported or maintained in whole or in part by public funds.'"[180] The district court determined that the Pledge of Allegiance passed all three prongs of the *Lemon* test.[181]

On appeal, in determining whether the statute violated *Barnette*, the Seventh Circuit, in dicta, stated that the words "under God" in the Pledge are an example of ceremonial deism, which is an important part of American history.[182] The court noted that references to God exist throughout American history.[183] It also reasoned that the meaning and intention of the Establishment Clause had to be considered within its historical context and not given its plain meaning.[184] Because the Founding Fathers routinely celebrated Christian rituals, the Establishment Clause must be understood as not being in conflict with the use of ceremonial references to God.[185] The court, instead of following Supreme Court precedent, chose to look to dicta in various cases to determine the outcome of the case.[186] The Supreme Court Justices were divided on which test controlled in an Establishment Clause context, so the court reasoned that it was free to disregard all of the tests.[187] In doing so, it upheld the Illinois statute.[188]

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[178] *See* Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992).

[179] *Id*. at 439.

[180] *Id*. (quoting ILL. REV. STAT. ch. 122, § 27-3 (1991) (currently codified at 105 ILL. COMP. STAT. ANN. 5/27-3 (West Supp. 2005))).

[181] *Id*. at 445.

[182] *See id*. at 445–48.

[183] *Id*. at 445–46.

[184] *Id*. at 445.

[185] *Id*. at 445–47.

[186] *See id*. at 446–48.

[187] *Id*. at 445; *see also* Newdow v. U.S. Cong., 328 F.3d 466, 490 (9th Cir. 2003), *rev'd sub nom.* Elk Grove United Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[188] *Sherman*, 980 F.2d at 448.

B. The Ninth Circuit Finds the Pledge to Be Unconstitutional as Violative of the Establishment Clause

The Ninth Circuit came to a different conclusion in *Newdow v. U.S. Congress*.[189] Newdow brought an action on behalf of his daughter challenging the constitutionality of the recitation of the Pledge of Allegiance in California public schools.[190] California had a statute like Illinois's providing for the daily recitation:

> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.[191]

The Ninth Circuit determined that the recitation of the Pledge in schools violated the Establishment Clause because it coerced the students into performing a religious act.[192] The court determined that it was free to use any of the three tests earlier promulgated by the Supreme Court in order to determine if an Establishment Clause violation existed.[193]

Initially, a three-judge panel of the Ninth Circuit found the Pledge of Allegiance to be unconstitutional as written with the words "under God"[194] because it violated all three Supreme Court tests. Using the endorsement test, it found that by aiming to instill a respect for the ideals in the Pledge, the government endorsed these ideals.[195] The court also found that the recitation of the Pledge of Allegiance in public schools violated the coercion test promulgated in *Lee* by making the students choose between

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[189] 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom*. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[190] *Id*. at 482–83.

[191] CAL. EDUC. CODE § 52720 (West 2002).

[192] *Newdow*, 328 F.3d at 487, 490.

[193] *See id*. at 487.

[194] Newdow v. U.S. Cong., 292 F.3d 597, 600, 607–12 (9th Cir. 2002), *amended by* 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom*. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[195] *Id*. at 608.

conforming to the majority and protesting against the religious content.[196] Finally, evaluating the addition of the words "under God" to the Pledge under the *Lemon* test, the court found that the legislative history clearly showed a sectarian purpose, thus violating the Establishment Clause.[197] It ultimately held that both the Act adding the words "under God" to the Pledge and the recitation of the Pledge in public schools were unconstitutional.[198]

The Ninth Circuit amended its opinion the following year, removing the evaluation of the constitutionality of the words "under God."[199] It still held that the recitation of the Pledge in public schools violated the Establishment Clause.[200] In doing so, it did not use either the *Lemon* test or the endorsement test because it concluded that the recitation of the Pledge violated the coercion test.[201] The amended opinion also noted that the Seventh Circuit, in deciding *Sherman*, had neglected to follow Supreme Court precedent.[202] In contrast, it was following precedent in rendering its decision.

C. The Supreme Court's Decision in Elk Grove Unified School District v. Newdow

The Supreme Court recently overturned the Ninth Circuit's decision in *Newdow* on a technicality, holding that Newdow did not have standing to bring a lawsuit on behalf of his daughter.[203] The majority based its holding primarily on the domestic relations exception to the jurisdiction of federal courts.[204] It found that it was "improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing."[205] The majority also analogized the case to those declined on the basis of the abstention doctrine, finding that it was "appropriate for the

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[196] *Id*. at 608–09.

[197] *Id*. at 609–11.

[198] *Id*. at 612.

[199] *See* Newdow v. U.S. Cong., 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[200] *Id*. at 490.

[201] *Id*. at 487–90.

[202] *Id*. at 490.

[203] *Elk Grove*, 542 U.S. at 17–18.

[204] *Id*. at 12–13.

[205] *Id*. at 17.

federal courts to decline to hear a case involving 'elements of the domestic relationship,' even when divorce, alimony, or child custody is not strictly at issue."[206]

Finally, the Court based its holding on a criticism of the Ninth Circuit's construction of the state law of California. The Ninth Circuit found that Newdow did have standing to bring a lawsuit on behalf of his daughter because he was a parent with a child in that school system.[207] The Supreme Court, however, found that Newdow did not have standing because the custody order in effect at the time of the Court of Appeals decision had given the child's mother sole custody.[208] A later custody order had granted joint custody, but gave the final decision to the child's mother in matters over which the parents disagreed.[209] Thus, the majority saw no major difference between the two orders.[210] The final ruling handed down by the Supreme Court reversed the Ninth Circuit's holding that the Pledge of Allegiance violated the Establishment Clause.[211]

In their concurring opinions, Chief Justice Rehnquist and Justices O'Connor and Thomas decided the merits of Newdow's case,[212] finding that Newdow did have standing to bring the suit.[213] Chief Justice Rehnquist used the same reasoning that the Seventh Circuit used in *Sherman* to find that the recitation of the Pledge of Allegiance was a secular activity.[214] He noted that historically, many Presidents have invoked God during political functions.[215] Specifically, he cited George Washington's oath upon taking office, which involved a prayer from

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[206] *Id*. at 12–13 (citation omitted) (quoting Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992)).

[207] Newdow v. U.S. Cong., 328 F.3d 466, 485 (9th Cir. 2003), *rev'd sub nom*. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[208] *Elk Grove*, 542 U.S. at 14, 17–18.

[209] *Id*. at 14. The order stated, "Ms. Banning will continue to make the final decisions as to the minor's health, education, and welfare if the two parties cannot mutually agree." *Id.* n.6.

[210] *Id*.

[211] *Id*. at 17–18.

[212] *Id*. at 26–33 (Rehnquist, C.J., concurring); *id*. at 33–45 (O'Connor, J., concurring); *id*. at 45–54 (Thomas, J., concurring).

[213] *Id*. at 18–26 (Rehnquist, C.J., concurring).

[214] *See id*. at 25–33.

[215] *Id*. at 26–29.

Psalms.[216] In his opinion, the American culture allowed these references to God as recognition of the religious history of the country.[217]

According to the Chief Justice, the inclusion of the words "under God" did not convert the Pledge from a patriotic exercise to a religious activity.[218] It was merely recognition of the fact that America was founded upon a belief in God, as noted in the House reports on the addition of the words to the Pledge.[219] The phrase did not tend to establish a religion so it did not violate the Establishment Clause.[220]

In Justice O'Connor's concurrence, she pointed out that the endorsement test must be taken from the reasonable observer's point of view.[221] This reasonable observer must take into account the historical value of the conduct when determining the message conveyed.[222] Although the reference to God in the Pledge of Allegiance is stated as a religious belief, the historical background behind the founding of the country makes it necessary to retain the words.[223] A reasonable observer, knowing the historical background of this country, would not perceive this as a religious message.[224] Justice O'Connor placed the Pledge in a category of "ceremonial deism," along with other historical references to God, like the motto "In God We Trust" on coins and the religious references in the national anthem.[225]

She examined the Pledge under the four factors present in ceremonial deism: history and ubiquity, absence of worship or prayer, absence of reference to particular religion, and minimal religious content.[226] In examining the Pledge of Allegiance as an instance of ceremonial deism, the first requirement is that the Pledge be historical and ubiquitous.[227] Justice O'Connor noted that the words "under God" were added to the Pledge fifty years ago, and since that time, it has been recited daily by

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[216] *Id*. at 26.

[217] *Id*. at 30.

[218] *Id*. at 31.

[219] *Id*.

[220] *See id*.

[221] *Id*. at 34 (O'Connor, J., concurring).

[222] *Id*. at 35.

[223] *See id*. at 35–36.

[224] *Id*. at 36.

[225] *Id*. at 37.

[226] *Id*. at 37–44.

[227] *See id*. at 37–38.

schoolchildren everywhere.[228] Because the Pledge is seen more as a patriotic exercise than a religious one, there is no political divisiveness that normally occurs when the government sponsors a religious act.[229] Newdow's suit was only the third one challenging the constitutionality of the Pledge, so Justice O'Connor reasoned that most Americans do not find it objectionably religious.[230]

Ceremonial deism is also exemplified by the absence of worship or prayer.[231] Justice O'Connor noted that this factor, too, must be seen from the reasonable observer's point of view.[232] A reasonable observer would not view the Pledge of Allegiance as worship but rather as a patriotic activity.[233] No religion has adopted the Pledge of Allegiance as part of its canon, thus diminishing its religious value.[234] Although the purpose of these additional words may have been religious, it may also have been to promote an understanding of the religious background of this country.[235] Knowing the historical background of the Pledge, then, a reasonable observer would not view it as worship or prayer.[236]

Justice O'Connor also placed the Pledge in the category of ceremonial deism because it does not reference a particular religion;[237] rather, it acknowledges religion in a very general way.[238] By referring to God, rather than Jesus, it acknowledges all of those religions that place their faith in one Supreme Being.[239] It does not include those religions that do not profess to a belief in God, such as Buddhism, but it would be difficult to acknowledge religion in such a way that would not leave any religion

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[228] *Id*. at 38.

[229] *Id*. at 38–39.

[230] *Id*. Justice O'Connor noted the two other cases that challenged the constitutionality of the Pledge before Newdow's case: *Sherman v. Community Consolidated School District 21*, discussed *supra* Part III.A, and *Smith v. Denny*, 280 F. Supp. 651 (E.D. Cal. 1968). *Elk Grove*, 542 U.S. at 38–39 (O'Connor, J., concurring). *Smith* challenged the constitutionality of the Pledge, but was dismissed as being an unsubstantial federal question. *Smith*, 280 F. Supp. at 654.

[231] *Elk Grove*, 542 U.S. at 39–41 (O'Connor, J., concurring).

[232] *Id*. at 40.

[233] *Id*. at 40–41.

[234] *Id*. at 40.

[235] *Id*. at 41.

[236] *Id*. at 40–41.

[237] *Id*. at 42.

[238] *Id*.

[239] *Id*.

out because of the wide variety of religious beliefs.[240] Justice O'Connor also noted that when the words "under God" were added, the religious background of this country was not as diverse as it is now, thus justifying the reference to God.[241]

The final factor placing the Pledge of Allegiance in the category of ceremonial deism is its minimal religious content.[242] The brief reference to God confirms that its use was merely to acknowledge religion, not to endorse it in any way.[243] The brevity allows people to refrain from reciting that portion of the Pledge.[244] It also shows that government did not prefer one religion to another.[245]

Justice O'Connor finally noted that the coercion test from *Lee v. Weisman*[246] did not apply in this instance, as coercing someone "to participate in an act of ceremonial deism is inconsequential."[247] Therefore, any reference to God that can be categorized as ceremonial deism must necessarily pass both the endorsement test and the coercion test.[248] The Religion Clauses of the First Amendment guarantee freedom of belief; because ceremonial deism is not a profession of belief, it is not protected by the First Amendment.[249]

Justice Thomas also decided that the Pledge of Allegiance was constitutional, but acknowledged that the Ninth Circuit's decision was based on Supreme Court precedent.[250] According to Justice Thomas, *Lee* required the Ninth Circuit to strike down the Pledge policy, just as *Lee* struck down prayers at graduation.[251] Justice Thomas concluded that based on Supreme Court precedent, the Pledge of Allegiance was unconstitutional.[252] He concurred in the judgment, however, because he believed that *Lee* was not decided correctly.[253]

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[240] *Id*.

[241] *Id*.

[242] *Id*.

[243] *Id*. at 43.

[244] *Id*.

[245] *Id*.

[246] *See supra* Part II.C.

[247] *Elk Grove*, 542 U.S. at 43–44 (O'Connor, J., concurring).

[248] *Id*. at 44.

[249] *See id*.

[250] *Id*. at 45 (Thomas, J., concurring).

[251] *Id*. at 46.

[252] *Id*. at 49.

[253] *Id*.

Justice Thomas felt that the Establishment Clause did not protect individual rights,[254] but was instead meant to prevent the federal government from establishing a national religion.[255] The only individual right associated with the Establishment Clause, in Justice Thomas's view, is the freedom from being legally coerced into declaring a belief.[256] Legal coercion consists of the "force of law and threat of penalty."[257] Therefore, the psychological coercion analysis used in *Lee* has no place in an Establishment Clause context because that case did not involve force of law or threat of penalty.[258]

IV. THE UNCONSTITUTIONALITY OF THE PLEDGE OF ALLEGIANCE UNDER THE FIRST AMENDMENT

A. The Defects in the Sherman *Analysis*

In determining whether the Illinois statute in *Sherman* was constitutional, the Seventh Circuit also discussed the constitutionality of the actual words of the Pledge.[259] It noted that the Supreme Court had heard *Lee* "in large part to reconsider *Lemon*, and [that] *Lee* concluded without renewing *Lemon*'s lease."[260] The Seventh Circuit determined that *Lemon* was no longer the appropriate test to use to determine an Establishment Clause violation, in line with the dissent in *Lee*, where four Justices proposed to eliminate the *Lemon* test altogether.[261] The court went on to state that Justice Kennedy, who joined the majority opinion in *Lee*, did not endorse *Lemon*, and that Justice Souter, who was also part of the majority opinion, declined to use the *Lemon* test.[262] Thus, when combining the four dissenting Justices with these two Justices, a total of six Justices

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[254] *Id*. at 49–50.

[255] *Id*.

[256] *Id*. at 50–52.

[257] *Id*. at 52 (quoting Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)).

[258] *See id*. at 53–54.

[259] Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 445–48 (7th Cir. 1992).

[260] *Id*. at 445.

[261] *Id*. The dissent in *Lee* consisted of Chief Justice Rehnquist and Justices Scalia, White, and Thomas. *Lee*, 505 U.S. at 631–46 (Scalia, J., dissenting). Justice Ginsburg replaced Justice White on August 10, 1993. U.S. Supreme Court, Members of the Supreme Court of the United States 2, http://www.supremecourtus.gov/about/members.pdf (last visited Feb. 10, 2006). Justice Blackmun, a member of the majority opinion in *Lee*, is now deceased; Justice Breyer replaced him on August 3, 1994. *Id*.

[262] *Sherman*, 980 F.2d at 445.

had implicitly overturned *Lemon*.[263] Accordingly, the Seventh Circuit determined that it was not constrained to follow precedent and use this test.[264]

This reasoning would be flawed today. Justice Kennedy endorsed the *Lemon* test in the recent Establishment Clause case of *Zelman v. Simmons-Harris*.[265] This case involved the constitutionality of programs issuing vouchers to children to attend private schools, including religious schools.[266] Using the *Lemon* test, the voucher program was sustained by the Court as a neutral program that did not aid religion.[267]

In addition, the majority in *Santa Fe Independent School District v. Doe* used the *Lemon* test to invalidate prayers invoked prior to football games.[268] This majority included Justices Stevens, O'Connor, Kennedy, Souter, Ginsberg, and Breyer.[269] None of these Justices evaluated the case under a different Establishment Clause test, although the dissenters felt that the *Lemon* test should not have been applied.[270] According to this case, only two current members of the Court, Justices Scalia and Thomas, would not use the *Lemon* test to invalidate any type of school prayer.[271] The Court has heard numerous Establishment Clause cases since *Sherman*;[272] it used the *Lemon* test in the majority of those cases.[273]

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[263] *Id*.

[264] *Id*.

[265] 536 U.S. 639, 648–63 (2002). Although Justice Kennedy never actually cites to *Lemon*, he uses the test as modified by the Court in *Agostini v. Felton*. *See supra* note 125.

[266] *Zelman*, 536 U.S. at 645.

[267] *See id*. at 662–63.

[268] 530 U.S. 290, 294, 314–17 (2000).

[269] *Id*. at 292.

[270] *See id*. at 319–20 (Rehnquist, C.J., dissenting) (noting that *Lemon* had a "checkered" past).

[271] Chief Justice Roberts took his judicial oath on September 29, 2005. U.S. Supreme Court, *supra* note 261, at 1. His views on the *Lemon* test are not certain; however, he is likely to follow in former Chief Justice Rehnquist's conservative footsteps.

[272] *E.g.*, McCreary County v. ACLU of Ky., 125 S. Ct. 2722 (2005); Van Orden v. Perry, 125 S. Ct. 2854 (2005); *Zelman*, 536 U.S. 639; Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Mitchell v. Helms, 530 U.S. 793 (2000); *Santa Fe*, 530 U.S. 290; Agostini v. Felton, 521 U.S. 203 (1997); Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Bd. of Educ. v. Grumet, 512 U.S. 687 (1994); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

[273] *See, e.g.*, *McCreary County*, 125 S. Ct. 2722; *Zelman*, 536 U.S. 639; *Santa Fe*, 530 U.S. 290; *Grumet*, 512 U.S. 687.

The Seventh Circuit's decision not to use the *Lemon* test was also faulty because the majority in *Lee* did not overturn *Lemon*. In fact, the Court specifically noted that it was declining the invitation to reconsider *Lemon*, as requested in amicus briefs.[274] In his concurring opinion in *Lee*, Justice Blackmun noted that in thirty-one Establishment Clause cases decided by the Supreme Court since *Lemon*, all but one had used that test.[275] The majority simply chose not to use it, finding an Establishment Clause violation without needing the *Lemon* test—it was unnecessary to use the *Lemon* test because the situation involved direct government action.[276] The Court noted that "[t]he government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."[277] The situation in *Lee* conflicted with established rules about prayer exercises for students, and thus it was invalid under *Engel v. Vitale* and *School of Abington Township v. Schempp*.[278] Justice Blackmun noted that "[i]n no case involving religious activities in public schools has the Court failed to apply vigorously the *Lemon* factors."[279]

The *Sherman* court devoted a great deal of time to listing historical references to God, including those made or written by the Founding Fathers.[280] It referenced the tradition of Thanksgiving proclamations by past Presidents, the Declaration of Independence, and the Gettysburg Address as including references to God.[281] The court failed to mention, however, that multiple historical figures, including the Founding Fathers, continued to affirm the importance of the separation of church and state.

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[274] Lee v. Weisman, 505 U.S. 577, 587 (1992).

[275] *Id*. at 603 n.4 (Blackmun, J., concurring). Justice Blackmun noted that the only case in which the Court did not use the *Lemon* test was *Marsh v. Chambers*, 463 U.S. 783 (1983). *Lee*, 505 U.S. at 603 n.4. In *Marsh*, the lower court used the *Lemon* test to invalidate legislative prayers, but the Supreme Court reversed this decision without applying the *Lemon* test. *Marsh*, 463 U.S. at 786. Instead, the Court chose to find a historical justification for allowing prayers at legislative sessions. *Id*. at 786–92. It reasoned that legislative prayer would not violate the Establishment Clause because those Founding Fathers who wrote the Constitution also provided for a congressional chaplain. *See id*. at 790.

[276] *Lee*, 505 U.S. at 587, 599 (majority opinion).

[277] *Id*. at 587.

[278] *Id*. at 587, 592–93.

[279] *Id*. at 603 n.4 (Blackmun, J., concurring).

[280] Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 445–46 (7th Cir. 1992).

[281] *Id*.

The court acknowledged only Thomas Jefferson as one important historical figure who had firm objections to the intermingling of church and state.[282] He believed that religion was a matter solely between a person and his god.[283] "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State."[284] John Adams stated that America was founded on the natural authority of the people, and not on any power derived from God.[285] Other evidence from the late 1700s reiterated the separation between church and state in America. For example, the Treaty of Tripoli, written in 1776 and ratified by Congress in 1797, stated that "the government of the United States of America is not in any sense founded on the Christian Religion."[286]

The *Sherman* court placed the Pledge of Allegiance in the same category of ceremonial deism as the motto "In God We Trust" on coins and the Declaration of Independence.[287] It equated reciting the Pledge with reciting the Gettysburg Address, which also includes a reference to God.[288] The court found that because the reference to God in the Pledge of Allegiance was merely ceremonial, the Pledge is a non-sectarian vow and did not violate the Establishment Clause.[289]

The *Sherman* court's examples of ceremonial deism are not affirmations of a belief because they do not require people to profess beliefs that they do not have. A person may have every bit as much patriotism toward our country as a Christian American, but still be an atheist. To ask this person to profess a belief in our nation is also to ask him to profess a belief in God, or at least in monotheism. However, at no point during the recitation of the Declaration of Independence or the

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[282] *Id*. at 446.

[283] *See* Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 281–82 (Albert Ellery Bergh ed., 1907).

[284] *Id*. (quoting U.S. CONST. amend. I).

[285] *See* JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1786–87), *reprinted in* THE POLITICAL WRITINGS OF JOHN ADAMS 108, 119 (George W. Carey ed., 2000).

[286] Treaty of Peace and Friendship, U.S.-Tripoli, art. 11, Nov. 4, 1796, 8 Stat. 154, 155.

[287] *Sherman*, 980 F.2d at 447.

[288] *Id*. at 446; *see also* Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *in* LINCOLN ON DEMOCRACY 307 (Mario M. Cuomo & Harold Holzer eds., 1990).

[289] *Sherman*, 980 F.2d at 447–48.

Gettysburg address will the speaker have to affirm a belief in God, or pledge allegiance to the value of monotheism.[290]

Ceremonial deism also indicates that any religious meaning the words may once have had has now been "'lost through rote repetition.'"[291] Courts cannot hold that words have lost their meaning over time.[292] Words used in public ceremonies retain their intended meanings.[293] The original meaning of the words was religious and thus the words retain their religious meaning. The public outcry against the removal of the words "under God" also indicates that the words have in no way lost their meaning.[294]

B. The Pledge of Allegiance Examined Under the Establishment Clause Tests

1. The Recitation of the Pledge of Allegiance in Public Schools Is Unconstitutional when Examined Under Lee*'s Coercion Test*

Using the coercion test articulated in *Lee*, the Pledge fails if one assumes that the Pledge is a profession of religious belief. Under *Lee*, a

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[290] The Declaration of Independence states, in part, "When in the Course of human events, it becomes necessary for one people . . . to assume . . . the separate and equal station to which the Laws of Nature and of Nature's God entitle them . . . ." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). The Gettysburg Address states, in part, "[W]e here highly resolve . . . that this nation, under God, shall have a new birth of freedom . . . ." Abraham Lincoln, *supra* note 288, at 307.

Interestingly enough, the Gettysburg Address may not have actually contained the words "under God." GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 191–95 (1992). The "first draft," housed in the Library of Congress, does not contain the words "under God." *Id*. at 192–94. Many scholars have concluded that this draft was the actual draft Lincoln was holding when he delivered the Address. *Id*. at 193. However, there are discrepancies between this copy and the newspaper accounts, including the absence of the words "under God." *Id*. at 193–95. Four separate newspaper accounts, written by copyists who were present at the address, describe the Address as containing the words "under God." *Id*. at 192. Many scholars agree that Lincoln added those words contemporaneously. *See id*. at 192, 194.

[291] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 39–41 (2004) (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting)).

[292] *Sherman*, 980 F.2d at 448 (Manion, J., concurring).

[293] *Id*.

[294] *See supra* notes 6–10 and accompanying text.

state-sponsored religious exercise in a public school has the effect of coercing those present to participate.[295] Analogizing the Pledge of Allegiance to the school prayer recitation in *Lee*, a similar situation appears. The Pledge is recited in a public school, which is a governmental entity, in a situation where most, if not all, of the students present will participate. The same psychological coercion discussed in *Lee* exists in the Pledge of Allegiance situation as well. Any student who does not wish to participate may see the school-sponsored recitation as an "attempt to employ the machinery of the State to enforce a religious orthodoxy."[296] The religious orthodoxy in the Pledge of Allegiance does include Christianity and Judaism, as both profess to a belief in God.[297] However, it obviously does not include those Americans who believe in either a different deity or no deity at all.

Of course, *Lee* cannot be applied if one does not assume the Pledge to be a profession of a religious belief, an assumption the Ninth Circuit undertook.[298] By reciting the Pledge, the speaker is pledging allegiance to monotheism by stating, "I pledge allegiance to . . . one Nation under God . . . ."[299] As Justice Thomas has specifically stated, "[G]overnment cannot require a person to 'declare his belief in God.'"[300] Under *Barnette*, pledging allegiance to the flag is to declare a belief.[301] With the current wording of the Pledge, reciting the Pledge is to declare a belief in God. Applying *Lee* to this, coercing a student to profess a belief in God violates the Establishment Clause. The coercion that was present in *Lee* is the same coercion that is present in every classroom in which students recite the Pledge of Allegiance—that of peer pressure to conform. "This pressure, though subtle and indirect, can be as real as any overt compulsion."[302]

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[295] Lee v. Weisman, 505 U.S. 577, 592, 599 (1992).

[296] *Id.* at 592.

[297] ELIZABETH BREUILLY ET AL., RELIGIONS OF THE WORLD: THE ILLUSTRATED GUIDE TO ORIGINS, BELIEFS, TRADITIONS & FESTIVALS 10 (Martin E. Marty ed., 1997).

[298] Newdow v. U.S. Cong., 328 F.3d 466, 487 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[299] 4 U.S.C. § 4 (Supp. II 2004); *see also Newdow*, 328 F.3d at 487.

[300] *Elk Grove*, 542 U.S. at 48 (Thomas, J., concurring) (quoting Torcaso v. Watkins, 367 U.S. 488, 489 (1961)).

[301] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943).

[302] Lee v. Weisman, 505 U.S. 577, 593 (1992).

2. *The Recitation of the Pledge of Allegiance in Public Schools Is Unconstitutional Under the* Lemon *Test*

The *Lemon* test must be applied to determine if the state-mandated recitation of the Pledge of Allegiance violates the Establishment Clause. Under the first prong of the *Lemon* test, the Pledge violates the Clause if it does not have a secular purpose.[303] The outcome turns on whether the purpose prong applies to the words of the Pledge itself or to the state-mandated recitation of it. If it applies to the words itself, the history behind the Pledge demonstrates its purpose. At first, the purpose of the Pledge was clearly secular; it did not include the words "under God" and was merely a show of patriotism.[304] In 1954, however, with the addition of the words "under God," the purpose changed. The legislative history surrounding the amendment clearly states the purpose of the additional words. The House Report observed that "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God."[305] President Eisenhower, while signing the Act into law, stated that "[f]rom this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty."[306] This demonstrates that the government had a religious purpose when adding the words "under God" to the Pledge of the Allegiance.

In contrast, however, the purpose of the state-mandated recitation is secular—to "foster national unity and pride in those principles [that our flag symbolizes]."[307] But when combined with the words "under God," is the purpose still secular? The Ninth Circuit obviously thought not, deeming the Pledge to be a religious act.[308] The court noted that to recite the Pledge is "to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism."[309]

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[303] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[304] *See* discussion *supra* Part I.A.

[305] H.R. REP. No. 83-1693, at 2 (1954), *as reprinted in* 1954 U.S.C.C.A.N. 2339, 2340.

[306] Newdow v. U.S. Cong., 328 F.3d 466, 488 (2003) (quoting 100 Cong. Rec. 8618 (1954) (statement of Sen. Ferguson incorporating signing statement of President Eisenhower)), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[307] *Elk Grove*, 542 U.S. at 6.

[308] *Newdow*, 328 F.3d at 487.

[309] *Id*.

At first blush, the Pledge appears to pass the second prong of the *Lemon* test because its primary effect is not to aid religion; rather, it promotes a sense of patriotism. However, "[e]very government practice must be judged in its unique circumstances."[310] The recitation of the Pledge of Allegiance in public schools has the effect of promoting a belief in God to children who may not yet fully understand their religious beliefs. It "inculcate[s] in students a respect for the ideals set forth in the Pledge, including the religious values it incorporates."[311] As the Supreme Court has stated, "[G]overnment inculcation of religious beliefs has the impermissible effect of advancing religion."[312] Thus, the effect of the recitation of the Pledge of Allegiance in public schools is not primarily secular.[313] Violating both prongs of *Lemon*, then, the recitation of the Pledge in schools violates the Establishment Clause.

3. The Recitation of the Pledge of Allegiance in Public Schools Is Unconstitutional Under the Endorsement Test

The Pledge of Allegiance also appears to violate the Establishment Clause under the endorsement test articulated by Justice O'Connor in *Lynch v. Donnelly*. If the government's intended message in the Pledge is not secular, or if the objective meaning of the Pledge in the community is not secular, then government has violated the Establishment Clause.[314] The government's intention in adding the words "under God" was to endorse Christianity.[315] The government's intention in having the Pledge recited daily in schools, however, is to promote patriotism.[316]

Looking at the message conveyed by the recitation of the Pledge of Allegiance in public schools, there are two views. The test requires that the objective meaning of the message in the community be secular; this would depend upon the demographics of the community.[317] The average American likely sees the message conveyed as one of patriotism because most Americans will not focus on the phrase "under God," as the majority

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[310] Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).

[311] *Newdow*, 328 F.3d at 487.

[312] Agostini v. Felton, 521 U.S. 203, 223 (1997).

[313] *See* discussion *supra* Part IV.B.2.

[314] *See* discussion *supra* Part IV.B.2.

[315] *See* discussion *supra* Part I.A.

[316] Sica, *supra* note 11, at 380–82.

[317] *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

of Americans do profess to believe in God.[318] They will be focusing on the rest of the message conveyed because that phrase does not stand out as inimical to their beliefs. In the majority of American communities, then, the Pledge of Allegiance would not seem to be conveying any objectionable message.[319] However, not all Americans believe in God; eight percent of Americans are "nonreligious, secular, or atheists."[320] The message sent to this segment of the population by the government is that "they are outsiders, [and] not full members of the political community."[321]

In *County of Allegheny v. ACLU*,[322] the Court held that the government endorsed Christianity by placing a crèche in a more preferential location

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[318] Humphrey Taylor, While Most Americans Believe in God, Only 36% Attend a Religious Service Once a Month or More Often (Oct. 15, 2003), http://www.harrisinteractive.com/harris_poll/index.asp?PID=408. The major religions in the United States today are Christianity and Judaism. *See* TheUSAonline.com, Religion in the United States, http://www.theusaonline.com/people/religion.htm (last visited Feb. 10, 2006). Approximately 83% of the population claims to be Christian; two percent practices Judaism. *Id.*

[319] This is evidenced by the public outcry to the notion that the words "under God" should be removed from the Pledge. *See* Fineman, *supra* note 6, at 23. The American people even objected when Cadbury Schweppes introduced a new patriotic can of the beverage Dr. Pepper. *See* James L. Evans, Soda Pop Evangelism (Feb. 28, 2002), http://marty-center.uchicago.edu/sightings/archive_2002/0228.shtml. The can was introduced in November 2001 and displayed an image of the Statute of Liberty, along with the words "One Nation . . . Indivisible." Cadbury Schweppes, A Note to Dr Pepper Consumers, http://www.dpsu.com/drpepper_can.html (last visited Feb. 10, 2006). The general public objected to the words "under God" not being present in the slogan. *See* Evans, *supra*.

[320] The USAonline.com, *supra* note 318. The religious beliefs of the citizens of the United States vary widely. *See id*. There are a large number of Buddhist centers in the United States. *See* BREUILLY ET AL., *supra* note 297, at 120. Buddhists do not believe in God; they follow the teachings of the Buddha, or the "enlightened one," trying to find the knowledge necessary to achieve nirvana. *See id*. at 10. Jainism also has a large following in the United States, which has one of the largest Jain communities outside of India. *Id*. at 11. Jains do not believe in God; they follow a group of great teachers known as Jinas in a life of nonviolence. *Id*. Taoism exists in Chinese communities all over the world. *Id*. Taoists believe in the interaction of the yin and the yang, two forces that give order to all life in the Universe. *Id.*

[321] *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

[322] 492 U.S. 573 (1989).

than other seasonal displays.[323] The United States government has codified the Pledge of Allegiance and emphasized its importance to the country by providing for its recitation in schools. By analogy to *Allegheny*, this emphasis of the importance of the Pledge demonstrates government endorsement of its message. Examining the words of the Pledge of Allegiance, the words convey a belief in one God.[324] Therefore, the government is endorsing monotheistic religions. This endorsement of particular religions constitutes a violation of the Establishment Clause under Justice O'Connor's test.

C. Where the Supreme Court Was Wrong in Newdow

1. The Court Improperly Invoked the Domestic Relations Exception

The majority opinion relied heavily on *Ankenbrandt v. Richards*[325] as support for its holding.[326] This case involved a tort action brought by a mother, on behalf of her daughters, against her ex-husband.[327] The lower court dismissed the action based on the domestic relations exception to diversity jurisdiction.[328] The Supreme Court reversed this decision, finding that "the domestic relations exception encompasses *only* cases involving the issuance of a divorce, alimony, or child custody decree."[329] The Court did acknowledge that it could decline to hear other cases involving domestic relations issues even if they were not specifically divorce or custody cases, as when a case involves a difficult question of state law relating to the family law issue.[330]

The majority in *Elk Grove* overextended this exception to include all cases *involving* "delicate issues of domestic relations."[331] This

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[323] *See id.* at 578–81.

[324] *See supra* text accompanying note 21.

[325] 504 U.S. 689 (1992).

[326] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12–17 (2004). Chief Justice Rehnquist, in his concurrence, also opined that the majority improperly invoked the abstention doctrine as a basis for its holding. *Id.* at 21 (Rehnquist, C.J., concurring). The majority correctly noted, however, that it was not using the abstention doctrine. *Id.* at 13 n.5 (majority opinion). Rather, it was relying on the domestic relations exception. *Id.* at 12–17.

[327] *Ankenbrandt*, 504 U.S. at 691.

[328] *Id*. at 691–92.

[329] *Id*. at 704 (emphasis added).

[330] *Id.* at 705.

[331] *Elk Grove*, 542 U.S. at 21.

interpretation of *Ankenbrandt* does not follow from the language of the case. *Ankenbrandt* was specific in its holding that the domestic relations exception was very limited, and should be applied sparingly as with all abstention doctrines.[332] The domestic relations issue there was a side issue to the main tort claim involved in the case, and the Court noted that the domestic relations exception did not apply in such situations.[333] Despite the overextension of the domestic relations exception, the majority in *Elk Grove* did correctly state that some cases would involve substantial federal questions that would transcend the domestic relations issue.[334] However, it still declined to look to the merits of this case, which clearly presented a substantial federal question. As correctly noted by Chief Justice Rehnquist, the merits of this case "transcend[ed] the family law issue."[335]

The majority also neglected to address the fact that the domestic relations exception applies only to cases sitting in diversity, based on the Court's construction of 28 U.S.C. § 1332, which defines diversity jurisdiction for the federal courts.[336] The issue in *Elk Grove* involved a challenge to the constitutionality of a California statute—i.e., a federal question.[337] Because the basis for jurisdiction was not diversity, the Court should not have used the domestic relations exception to deny standing.

2. *The Court Ignored the Policy of Deferring to Courts of Appeal in the Construction of California State Law*

The Court also based its holding in *Elk Grove* on an interpretation of California law that differed from that of the Ninth Circuit's interpretation.[338] The Court of Appeals found that noncustodial parents maintained sufficient parental rights to establish standing in cases based on religion because they "maintain the right to expose and educate their children to their individual religious views."[339] The Supreme Court,

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[332] *Ankenbrandt*, 504 U.S. at 703.

[333] *Id.* at 704.

[334] *Elk Grove*, 542 U.S. at 13.

[335] *Id.* at 20 (Rehnquist, C.J., concurring).

[336] *Id.* at 20–21.

[337] *Id.* at 21, 25.

[338] *Id*. at 16–18 (majority opinion).

[339] Newdow v. U.S. Cong., 313 F.3d 500, 504 (9th Cir. 2002), *amended by* 328 F.3d 446 (9th Cir. 2003), *rev'd sub nom.* Elk Grove United Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

however, concluded that the rights of noncustodial parents with respect to religion only include the right to discuss religion with their children.[340]

By not deferring to the Ninth Circuit's interpretation of California state law, the Court declined to follow the settled Supreme Court policy of "deferring to regional courts of appeals in matters that involve the construction of state law."[341] Chief Justice Rehnquist noted that not only had the majority not followed settled Supreme Court policy, it had also misinterpreted state law.[342] The Supreme Court has allowed parents to sue in the Establishment Clause context.[343] This standing to sue is not based on the child, but rather on the relationship between the parent and the child.[344] The parental relationship itself gave Newdow the standing necessary to bring an Establishment Clause case.[345] Newdow did not have the power to sue as next friend of his daughter, but he did have his own standing to sue as a parent of a child in that particular school system.[346]

3. The Pledge of Allegiance Is not an Instance of Ceremonial Deism

Justice O'Connor's concurring opinion categorized the Pledge as ceremonial deism.[347] One aspect of ceremonial deism is that the words must have lost their meaning over time.[348] As previously discussed, courts cannot remove meaning from words used in public ceremonies.[349] The words retain their intended meaning. The public outcry against removing the words "under God" from the Pledge indicates that the words do have meaning for many Americans. The other examples of ceremonial deism referenced by Justice O'Connor do not require the affirmation of a belief.[350]

Justice O'Connor's analysis is also flawed when it characterizes the Pledge of Allegiance as not including worship or prayer.[351] Again, whether it is considered worship or prayer is to be evaluated from a

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[340] *See Elk Grove*, 542 U.S. at 16–17.

[341] Bowen v. Massachusetts, 487 U.S. 879, 908 (1988).

[342] *See Elk Grove*, 542 U.S. at 19, 22–25 (Rehnquist, C.J., concurring).

[343] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985).

[344] *Elk Grove*, 542 U.S. at 24 (Rehnquist, C.J., concurring).

[345] *Id*.

[346] *See id.* & n.2.

[347] *Id.* at 37 (O'Connor, J., concurring).

[348] *See id.* at 41.

[349] *See supra* text accompanying notes 276–278.

[350] *See Elk Grove*, 542 U.S. at 37 (O'Connor, J., concurring).

[351] *Id*. at 40.

reasonable observer's perspective.[352] She states that no reasonable observer would see it as a form of prayer.[353] But the Pledge is an affirmation of a belief in God.[354] To the majority, it may not seem to be a form of prayer, but to the minority that do not believe in God, it is objectionable as an affirmation of a belief that they do not possess.

Another difficulty with the analysis is Justice O'Connor's statement that the Pledge does not reference any particular religion; instead, it is neutral toward religions.[355] Justice O'Connor does acknowledge that the reference to God ignores those religions that do not believe in God, such as Buddhism.[356] Rather than finding that the Pledge is not neutral, however, she reasons that it would be impossible to include a religious reference that encompassed every religious belief.[357] In other words, majority rules. The problem with appealing to the majority is that the purpose of the Establishment Clause was to prevent the majority, via the government, from establishing a national religion.[358] By allowing a religious reference that encompasses the majority of the country's religions, the Court is essentially allowing the majority religions to dominate over the minority religions, and over those who do not practice religion at all. This leaves those with minority beliefs feeling like outsiders, which was exactly what the Establishment Clause was meant to prevent.

The other problem with allowing a "neutral" reference to religion is that the Court has previously stated that there is no "neutral" prayer.[359] Any reference to religion necessarily cannot be neutral. Thus, the Pledge's "neutrality" (such as it is) does not save it from violating the Establishment Clause. Just as there is no nondenominational prayer, there is no nondenominational reference to God.

D. The Unconstitutionality of the Pledge as Violative of Free Speech

Even assuming that the Pledge of Allegiance does not violate the Establishment Clause, the Pledge is still unconstitutional when recited in public schools because it violates the Free Speech Clause of the First Amendment. *Barnette* gives us the basic First Amendment rule that

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[352] *Id*.

[353] *Id*.

[354] *Id*. at 48 (Thomas, J., concurring).

[355] *Id*. at 42 (O'Connor, J., concurring).

[356] *Id*.

[357] *Id*.

[358] *See* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

[359] *See* Engel v. Vitale, 370 U.S. 421, 430 (1962).

government cannot compel speech.[360] The Pledge of Allegiance did not contain the words "under God" at that time; therefore, the case was decided based on a free speech theory, not on an Establishment Clause theory.[361] The Court noted that government could not compel its citizens to proclaim a belief in anything, using the oft-quoted phrase, "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."[362] Coercion was a concern of some Justices even then—in their concurring opinion, Justice Black and Justice Douglas stated that the First Amendment does not allow government to coerce its citizens into expressing a viewpoint that is not their own.[363]

As coercion was a concern with this original Pledge of Allegiance case, it seems logical to extend the psychological coercion test from *Lee* to all First Amendment issues. The government cannot coerce (psychologically or otherwise) a student into affirming a certain political belief. The Eleventh Circuit recently found that a school's coercion of a student into reciting the Pledge of Allegiance violated that student's First Amendment free speech right.[364] The coercion at issue in the case was from a teacher, in her position of power.[365] The court in *Holloman* stated that the coercion test still applies, just as in the context of the Establishment Clause.[366] If the coercion test applies to the recitation of the Pledge of Allegiance in public schools, it does not matter whether the Pledge contains the words "under God." The government-sponsored recitation of the Pledge of Allegiance in public schools will be unconstitutional and invalid because it coerces the minority into conforming to the majority opinion.

V. A LOOK INTO THE FUTURE

Despite the Supreme Court's eluding the ultimate issue in *Newdow*, it is not likely to find an Establishment Clause violation in the Pledge of Allegiance anytime soon. Several Justices indicated this in *Elk Grove* and

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[360] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[361] *See id*. at 628–29, 642.

[362] *Id*. at 642.

[363] *See id*. at 643–44 (Black and Douglas, JJ., concurring).

[364] Holloman v. Harland, 370 F.3d 1252, 1279, 1294–95 (11th Cir. 2004).

[365] *See id*. at 1268–69.

[366] *See id*. at 1269.

prior opinions. Chief Justice Rehnquist[367] and Justice O'Connor[368] specifically stated that the Pledge of Allegiance does not violate the Establishment Clause, and their replacements are likely to follow their lead and maintain a conservative viewpoint of the Pledge's constitutionality. Justice Thomas has also stated that the Pledge does not violate the Establishment Clause.[369] He noted that the Establishment Clause was meant to be read literally, solely prohibiting the government from establishing a national religion.[370] In his view, the Clause does not purport to protect any individual right.[371] This statement, however, ignores the precedent set in *Everson*, *Lemon*, and *Lee*.[372] These cases do not limit Establishment Clause violations only to those acts of government that establish a religion.[373] Justice Scalia made his opinion obvious in remarks made outside of the courtroom. He does not believe that the Court has the power to determine whether the Pledge violates the Establishment Clause because of the inclusion of the words "under God"—he feels that this is a task for the legislature.[374] Despite his recusal in *Elk Grove*, he will probably not recuse himself in any future Pledge case, provided that he does not specifically denounce the lower court decision before it reaches the Supreme Court.[375]

The Supreme Court may never again hear a case on the Pledge of Allegiance after *Elk Grove*. After the uproar over the Ninth Circuit's

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[367] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 18 (2004) (Rehnquist, C.J., concurring).

[368] *Id*. at 44–45 (O'Connor, J., concurring).

[369] *Id*. at 54 (Thomas, J., concurring).

[370] *Id*. at 49–50.

[371] *Id*. at 51.

[372] In his concurring opinion, Justice Thomas acknowledges that his view ignores the precedent set in *Lemon* and *Lee* and states that he feels the prior Establishment Clause cases were decided incorrectly. *See id*. at 45 & n.1.

[373] *See* discussion *supra* Part II.A–C.

[374] Bill Mears, *Skeptical Supreme Court Weighs Pledge Case*, CNN.COM, June 14, 2004, http://www.cnn.com/2004/LAW/03/24/scotus.pledge/index.html.

[375] Justice Scalia has already laid the groundwork for not recusing himself from hearing cases about subjects on which he has already expressed an opinion. He authored the majority opinion in *Republican Party of Minnesota v. White*, which stated that "[a] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice." 536 U.S. 765, 777 (2002). His statements were directed specifically at the *Newdow* case in the Ninth Circuit; this was the basis for his recusal. Mears, *supra* note 374.

decision in *Newdow*, several members of Congress proposed a bill in the House of Representatives that would limit the authority of the federal courts to hear cases deciding the constitutionality of the words "under God" in the Pledge of Allegiance.[376] Although that bill never progressed past the House in 2004, another bill was proposed in 2005.[377] The bill, if signed into law, would limit the jurisdiction of the federal courts so that cases concerning the words "under God" could no longer be heard, except in specified courts.[378] The bill also would prevent the Supreme Court from hearing appeals on such cases by removing its appellate jurisdiction over this issue.[379]

> [N]o court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance, as defined in section 4 of title 4, or its recitation.[380]

If this bill also passes the Senate, which some have indicated will occur, then President Bush will likely sign it into law.[381] He has already made his thoughts about the constitutionality of the Pledge of Allegiance known.[382]

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[376] Pledge Protection Act of 2004, H.R. 2028, 108th Cong. (2004).

[377] Pledge Protection Act of 2005, H.R. 2389, 109th Cong. (2005).

[378] *Id*.

[379] *Id*.

[380] *Id*. The Act originally contained an exception for the Supreme Court and also granted it appellate jurisdiction to hear these cases. *House Votes to Bar Court Review of Pledge*, MSNBC.COM, Sept. 24, 2004, http://www.msnbc.msn.com/id/6082472. An amendment to the Act was proposed to include this provision, but it did not pass the House. *Id.* Some legislators have expressed concern over the limitation of the appellate jurisdiction of the Supreme Court, as it could be extended into many other areas. *Id.* "The issue today may be the pledge, but what if the issue tomorrow is Second Amendment (gun) rights, civil rights, environmental protection, or a host of other issues that members may hold dear?" *Id*. (quoting Rep. Judy Biggert).

[381] Keith Peters, Pledge Protection Act on Tap (Sept. 20, 2004), http://www.family.org/cforum/fnif/news/a0033774.cfm (quoting Rep. Todd Akin).

[382] *Bush Calls Pledge Ruling "Out of Step"*, USATODAY.COM, June 27, 2002, http://www.usatoday.com/news/nation/2002/06/27/bush-pledge.htm. President Bush stated that the Pledge of Allegiance is "a confirmation of the fact that we received our rights from God, as declared in the Declaration of Independence." *Id.*

Even if the Pledge Protection Act passes, the limitation on the Supreme Court's jurisdiction to hear cases concerning the constitutionality of the Pledge of Allegiance may not be valid. Article III, Section 2 of the United States Constitution confers appellate jurisdiction upon the Supreme Court, subject to "Exceptions, and under such Regulations as the Congress shall make."[383] Whether this congressional power extends to removing specific types of cases from the Supreme Court's appellate jurisdiction is a topic that has not been fully resolved. Some scholars argue that Congress cannot, within its constitutional power, completely eliminate judicial review of certain constitutional issues.[384] Additionally, Congress would violate the Establishment Clause by depriving the federal courts to hear such cases if the statute was enacted "precisely in order to permit the Pledge to be illegally recited."[385] Thus, federal courts would likely consider this law unconstitutional, negating the congressional purpose.[386]

Others argue that as long as constitutional issues can still be asserted in state courts, then congressional limits on the federal court system's jurisdiction would be valid.[387] "As long as the state courts remain open, at least a technically adequate forum to protect constitutional rights remains available."[388] The difficulty of allowing constitutional issues to be heard only in state courts is the risk of disuniformity.[389] There could be potentially fifty different interpretations of the constitutionality of the Pledge.[390]

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[383] U.S. CONST. art. III, § 2.

[384] *See, e.g.*, Lloyd C. Anderson, *Congressional Control over the Jurisdiction of the Federal Courts: A New Threat to James Madison's Compromise*, 39 BRANDEIS L.J. 417, 429 (2000–2001).

[385] Vikram Amar & Alan Brownstein, Conduct Unbefitting the Congress: The So-Called Pledge Protection Act Passed by the House of Representatives (Oct. 1, 2004), http://writ.news.findlaw.com/commentary/20041001_brownstein.html.

[386] *Id*.

[387] *See, e.g.*, Anderson, *supra* note 384, at 429.

[388] *Id*. (quoting Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 156 (1982)). Scholars have argued about this issue since 1953, when Professor Henry Hart published the seminal article opposing Congress's power to limit the jurisdiction of the Supreme Court. *See id.* at 417–18; *see also generally* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

[389] Amar & Brownstein, *supra* note 385.

[390] *Id*.

The Supreme Court has not specifically stated whether these limits imposed by Congress are constitutionally valid.[391] Certain limits imposed by Congress have been upheld, however, on the basis that Congress had not eliminated *all* judicial review.[392] It remains to be seen whether a complete elimination of judicial review by the Supreme Court on a certain issue would be constitutionally valid. The Supreme Court has stated that legislation completely depriving citizens of constitutional rights is an invalid limitation on the Supreme Court's jurisdiction.[393] Thus, a limitation on jurisdiction over violations of the Due Process Clause or the Equal Protection Clause would not be valid.

In the past two decades, Congress has proposed legislation that would eliminate the Supreme Court's appellate jurisdiction over such areas as school prayer, abortion rights, school desegregation, and the military draft.[394] These examples of legislation were proposed in response to controversial decisions by the Supreme Court in these areas.[395] None of these bills were passed into law, so the Supreme Court did not have the opportunity to decide whether such legislation would be valid.[396] The Pledge Protection Act may end up dying in congressional committees just as those bills did.

If the Pledge Protection Act does not pass, then this issue will continue to be raised in the federal courts until the Court makes a final decision as to the Pledge's constitutionality. Indeed, Newdow filed suit in the Eastern District of California in 2005—this time ensuring that he was accompanied by plaintiffs who could not possibly be dismissed for lack of standing.[397] The district court, constrained to follow the Ninth Circuit's decision in the initial *Newdow* case, held that the Pledge was unconstitutional when recited in public schools, and issued an injunction preventing its recitation.[398]

If the Pledge policy does reach the Supreme Court in the future, a majority of the current Court likely will find it constitutional as an

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[391] Anderson, *supra* note 384, at 419.

[392] *Id*.; *see also* Felker v. Turpin, 518 U.S. 651, 661–62 (1996) (upholding a provision depriving the Supreme Court of appellate jurisdiction over successive habeas corpus petitions, on the basis that the Court still retained original jurisdiction over such petitions).

[393] *See* Anderson, *supra* note 384, at 423–26.

[394] *Id*. at 427.

[395] *Id*.

[396] *Id*. at 433.

[397] Newdow v. Cong. of the U.S., 383 F. Supp. 2d 1229, 1234–36 (E.D. Cal. 2005).

[398] *Id*. at 1242.

exception to Establishment Clause jurisprudence. Chief Justice Roberts will likely follow the rest of the conservative members of the Court in holding that the Pledge does not violate the Establishment Clause. Justice Alito also likely has extremely conservative views of government and religion, as he was appointed by George W. Bush, who has openly expressed his religious views.[399] Justice Thomas has indicated that he supports the Pledge policy.[400] Justice Scalia, although not part of the *Elk Grove* decision, would also hold that the Pledge of Allegiance is constitutional.[401] This voting bloc would only need one more Justice in order to form a majority supporting the Pledge of Allegiance.

The fifth Justice would most likely be Justice Kennedy because the other four Justices have a liberal voting history favoring a strong separation of church and state.[402] Justice Stevens favors a strong separation of church and state, as evidenced in his opinion in *Santa Fe Independent School District v. Doe*.[403] Justice Souter is likely to join Justice Stevens, as evidenced by his remarks favoring Newdow during his oral argument.[404] Justice Breyer will probably vote with the liberals against the Pledge policy, as he has indicated his support for a strong separation of church and state.[405] Justice Ginsburg, too, will likely join the liberals in voting against the recitation of the Pledge in schools.[406]

Justice Kennedy would probably be the swing vote needed by the conservatives to declare that the Pledge of Allegiance is constitutional. Although he wrote the opinion in *Lee*, he has indicated that certain instances of ceremonial deism are constitutional.[407] Although the Pledge of Allegiance would surely be unconstitutional using his coercion analysis, he may vote with the conservatives and make the Pledge an exception to the Establishment Clause as an instance of ceremonial deism. With his

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[399] *See supra* text accompanying notes 15–17.

[400] *See supra* text accompanying notes 250–258.

[401] Todd Collins, *Lost in the Forest of the Establishment Clause:* Elk Grove v. Newdow, 27 CAMPBELL L. REV. 1, 33 (2004).

[402] *Id*. at 34–36.

[403] 530 U.S. 290, 313–15, 317 (2000).

[404] Collins, *supra* note 401, at 35.

[405] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 728–29 (2002) (Breyer, J., dissenting).

[406] Collins, *supra* note 401, at 36.

[407] *See* County of Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part).

vote, a majority of the present Court could officially recognize the Pledge of Allegiance as being an exception to the Establishment Clause.

CONCLUSION

The millions of young schoolchildren who recite the Pledge of Allegiance daily may not really know what they are saying. To some older children and adults, however, it stands for a principle that completely goes against their religious beliefs. These minority views must be protected.

The United States government is such that the majority rules, but the United States Constitution was written in part to protect the minority from being oppressed by this majority. One of the many purposes of the Supreme Court is to ensure that the rights of the minorities in this country are not trodden upon. The only way the growing minority of non-Christians in this country will continue to enjoy the same freedom of religion enjoyed by the majority is if the Supreme Court holds up its end of the bargain. Unfortunately, given the current composition of the Supreme Court, this is not likely to occur. Some of the current members of the Supreme Court had the chance to clarify the extent of religious references prohibited by the Establishment Clause, but instead chose to evade the question.

The current members of the Supreme Court will probably not find an Establishment Clause violation in the Pledge of Allegiance. By doing this, however, the Court must either carve out an exception to precedent or change the Establishment Clause tests. If a case is once again brought before the Court, this time without a standing problem, it will have to answer the question. The majority will no longer be able to evade the issue, as it did in *Elk Grove*. Without at least one more liberal on the Court, however, the majority opinion will likely uphold the Pledge policy. Only when a more liberal Court is present will the religious beliefs of the minority be protected.