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One Nation Under God: *Newdow v. United States Congress*—a Poorly Chosen Battle in the War over Separation of Church and State

Russell W. Johnson[*]

On June 26, 2002, the Ninth Circuit Court of Appeals shocked the nation by ruling that the Pledge of Allegiance—the same Pledge that has been recited by public school students for nearly 50 years[1]—is unconstitutional.[2] The case, *Newdow v. U.S. Congress*[3], was brought by Michael Newdow, a minister of atheism[4] who takes offense at the phrase "under God" in the Pledge.[5] Newdow claimed injury because the state has interfered with his right to direct the religious upbringing of his eight-year-old daughter by subjecting her to the recitation of the Pledge in her public school.[6] The Ninth Circuit agreed and held that the addition

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1. On June 22, 1942, The Pledge was originally codified as "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." 36 U.S.C. § 172 (1946) (amended 1954). Congress added the words "under God" in 1954. Act of June 14, 1954, Pub. L. No. 396, 68 Stat. 249 (1954) (codified as amended at 4 U.S.C. § 4 (2000)).

2. Newdow v U.S. Congress, 292 F.3d 597, 612 (9th Cir. 2002), *amended by* 2003 WL 554742 (9th Cir. Feb. 28, 2003).

3. 292 F.3d 597 (9th Cir. 2002), *amended by* 2003 WL 554742 (9th Cir. Feb. 28, 2003).

4. April Shenandoah, *Take One Dramamine and Call Me When It's Over*, *at* http://www.american-partisan.com/cols/2002/shenandoah/qtr3/0703.htm (June 26, 2002) (stating that Newdow is a member of Americans United for Separation of Church and State (AU), and is ordained by the Universal Life Church as minister of atheism) (on file with the First Amendment Law Review).

5. *Litigant Explains Why He Brought Suit, at* http:www.cnn.com/2002/LAW/06/26/Newdow.cnna/index.html (June 26, 2002) (on file with the First Amendment Law Review).

6. A major preliminary issue in *Newdow v. U.S. Congress* was whether Michael Newdow had standing to bring suit. The Court of Appeals ruled that he did because the state's interference with Newdow's right to direct the religious (or non-religious) upbringing of his daughter constituted an injury in fact. *See Newdow*, 292 F.3d at 602–05. But after Newdow won his appeal, it was widely reported that he does not actually have primary custody of his daughter, and that his daughter and her mother (who does have primary custody) both claim to be

of the words "under God" to the Pledge in 1954,[7] and a California school district's policy of requiring students to recite the Pledge daily,[8] violates the Establishment Clause[9] of the First Amendment.[10]

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practicing Christians that are not injured by the Pledge. *E.g.*, *Mom: Girl Not Harmed by Pledging 'Under God'*, *at* http://www.cnn.com/2002/LAW/07/16/pledge.mother/index.html (July 16, 2002) (on file with the First Amendment Law Review). Newdow subsequently admitted, "My daughter is in the lawsuit because you need that for standing. I brought this case because I am an atheist and this offends me. . . ." *Litigant Explains Why He Brought Pledge Suit*, *supra* note 5. But the Ninth Circuit Court of Appeals, while considering whether to rehear the suit's constitutional issues *en banc*, issued an order confirming that Newdow still had standing despite not having primary custody of his daughter. *See* Newdow v. U.S. Congress, 313 F.3d 500, 505 (9th Cir. 2002) (finding that Newdow maintains standing because he retains sufficient custodial rights).

7. Act of June 14, 1954, Pub. L. No. 396, 68 Stat. 249 (1954) (codified as amended at 4 U.S.C. § 4 (2000)).

8. *See* Cal. Educ. Code § 52720 (1989) (calling for daily recitation of the Pledge or other patriotic exercise).

9. "Congress shall make no law respecting an establishment of religion," U.S. CONST. amend I. This provision is made applicable to the states and their school districts by the Fourteenth Amendment. *E.g.*, Lee v. Weisman, 505 U.S. 577, 580 (1992) (holding unconstitutional prayer at a public school graduation ceremony).

10. *See Newdow*, 292 F.3d at 612 ("In conclusion, we hold that (1) the 1954 Act adding the words "under God" to the Pledge, and (2) EGUSD's policy and practice of teacher-led recitation of the Pledge, with the added words included, violate the Establishment Clause."). In the amended opinion the Court of Appeals limited the breadth of its decision by avoiding an express ruling on the constitutionality of the Pledge. Instead the Court only held that the public school's policy of daily recitation of the Pledge is unconstitutional. However, as the dissent in the amended decision points out, even the amended decision "necessarily implies" that the act of Congress which added the words "under God" to the Pledge is unconstitutional. Newdow v. U.S. Congress, 2003 WL 554742 (9th Cir. Feb. 28, 2003) (O'Scannlain J., dissenting).

> Perhaps in an effort to avoid ultimate Supreme Court review, *Newdow II* which replaces [the original decision], avoids expressly reaching the technical question of the constitutionality of the 1954 Act. Fundamentally, however, the amended decision is every bit as bold as its predecessor. It bans the voluntary recitation of the Pledge of Allegiance in the public schools [which] . . . necessarily *implies* that both

Initially *Newdow* appeared to be a major victory for those desiring a high wall of separation between church and state, but winning this battle could ultimately cost Newdow and other separationists[11] the war. The case is likely to be overturned and has created a public backlash that will benefit efforts to lessen the degree of separation that currently exists. For that reason, Michael Newdow's lawsuit was a poorly chosen battle in the war over separation of church and state.

I. ESTABLISHING THE BACKGROUND

A. *The Pledge*

Francis Bellamy wrote the Pledge of Allegiance in 1892 without the words "under God."[12] Bellamy was employed by a family magazine called "Youth's Companion" that also sold American flags.[13] The pledge originally read: "I pledge allegiance to my Flag, and to the Republic for which it stands: one Nation indivisible, With Liberty and Justice for all."[14] The Pledge was written for a Columbus Day celebration where twelve million

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> an Act of Congress and a California law are unconstitutional . . . .

Id.

11. In this recent development, the term "separationists" will be used to refer to people who advocate maintaining or increasing the current amount of legal separation between church and state. The term "accomodationists" will refer to those who advocate reducing the current amount of separation. These terms are gross oversimplifications, but no other form of shorthand seems appropriate as both groups include a mixture of theists and atheists, liberals and conservatives, Republicans and Democrats, Federalists and Constitutionalists, etc.

12. *See* Cecilia O'Leary & Tony Platt, *Pledging Allegiance Does Not a Patriot Make*, L.A. Times, Nov. 25, 2001, *available at* http://www.commondreams.org/views01/1125-02.htm (on file with the First Amendment Law Review).

13. *See* John W. Baer, *The Strange Origin of the Pledge of Allegiance, at* http://archive.aclu.org/news/move/pledgeorigin.html (last visited Feb. 1, 2003) (on file with First Amendment Law Review).

14. *The Story of the Pledge of Allegiance* (Aug. 12, 2002) *at* http://www.flagday.org/Pages/StoryofPledge.html (last visited Feb. 1, 2003) (on file with the First Amendment Law Review).

children[15] recited the Pledge to honor the 400th anniversary of Columbus' arrival in North America.[16] This event inspired the practice of children reciting the pledge at the beginning of every school day.[17]

The Pledge was first altered at a National Flag Conference in 1923, when the words "my flag" were replaced with "the flag of the United States."[18] A year later, "of America" was added after "United States," making the first phrase, "I pledge allegiance to the flag of the United States of America. . . ."[19] Thirty years later, the words "under God" were added by an act of Congress, dividing the phrase "one Nation" from the word "indivisible."[20] The words were added during the Red Scare to differentiate the United States from communist nations.[21] Ironically, Bellamy, the original composer of the Pledge, was a socialist.[22]

Controversy over the Pledge began as early as 1916 when Hubert Eaves, an eleven-year-old black student, was arrested for not demonstrating proper respect to the flag, which he considered a symbol of Jim Crow laws and state-approved lynchings.[23] During World War II (prior to the addition of the words "under God"), a Jehovah's Witness challenged a law requiring public-school students to recite the Pledge, and the Supreme Court held that

15. *Id.*

16. Baer, *supra* note 13.

17. O'Leary & Platt, *supra* note 12.

18. *Id.*

19. *Id.*

20. Act of June 14, 1954, Pub. L. No. 396, 68 Stat. 249 (1954) (codified as amended at 4 U.S.C. § 4 (2000)).

21. *See* H.R. REP. NO. 83-1693, at 1-2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339–40 ("The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.").

22. Prior to working for the "Youth's Companion", Bellamy preached at the Bethany Baptist Church in Boston, MA, but was barred after espousing anti-capitalist propaganda in sermons like "Jesus as Socialist." Bellamy was also a member of the Society of Christian Socialists, and first-cousin to Edward Bellamy, a noted socialist writer. *See* Baer, *supra* note 13.

23. O'Leary & Platt, *supra* note 12.

compelling students to recite the Pledge is a violation of the First Amendment.[24] By that time the Pledge was seen as a symbol of national unity, and the Supreme Court decision prompted the harassment of a number of Jehovah's Witnesses, including the burning of a Kingdom Hall in Maine.[25] The Pledge, which students are no longer required to recite, then went almost fifty years without being successfully challenged under the First Amendment until Michael Newdow won his appeal in 2002.

B. Establishment Clause

The Establishment Clause of the First Amendment states that, "Congress shall make no law respecting an establishment of religion. . . ."[26] In the past, the Supreme Court has interpreted this clause expansively as forbidding not just any law establishing a state religion, but also any law "respecting" or touching such an establishment.[27] In 1947, the Supreme Court metaphorically defined its interpretation of the Establishment Clause by stating that the First Amendment required "a wall of separation between church and State."[28]

In the years that followed, the Court defended this wall by using several tests that were encapsulated into the *Lemon* test in 1971.[29] To survive the *Lemon* test, the government conduct in question: (1) must have a secular purpose; (2) must have a principal or primary effect that neither advances nor inhibits religion; and (3) must not foster an excessive government

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24. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("[T]he action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").

25. *See* Baer, *supra* note 13.

26. U.S. CONST. amend. I.

27. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) ("A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.") (emphasis added).

28. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

29. *See Lemon*, 403 U.S. at 612–13 (1971).

entanglement with religion.[30] *Lemon v. Kurtzman*,[31] the case that created the *Lemon* test, concedes that total separation is impossible,[32] but the plain language of the rule seems to require as close to total separation as is possible. For that reason, the *Lemon* test has produced a number of decisions favored by separationists[33] but has been decried by accomodationists as turning the Supreme Court into a "national theology board,"[34] which has strayed from protecting against indoctrination to attacking all things religious.[35]

Supporting the latter sentiment is the fact that the *Lemon* test was not meant to be an end in itself, but rather a means of gaining insight into the question of whether a particular practice violates the Establishment Clause.[36] Regardless of this fact, for more than ten years *Lemon* was applied as though it was an end in itself, as it was the only test the Supreme Court applied in

30. *Id.*

31. 403 U.S. 602 (1971).

32. *See id.* at 614 ("Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.").

33. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 593–94 (1987) (holding that public school curriculums cannot be designed with the purpose of promoting religious beliefs); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 392–97 (1985) (holding that religious-school students cannot receive state-sponsored aid that is "direct and substantial"); Stone v. Graham, 449 U.S. 39, 41–43 (1980) (holding that a law requiring the posting of Ten Commandments in public-school classrooms violates Establishment Clause).

34. County of Allegheny v. ACLU, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in part and dissenting in part) (lamenting the court's decision to evaluate what religious symbols mean), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

35. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting) ("The Court distorts existing precedent . . . [b]ut even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause. . . .").

36. *See Lemon*, 403 U.S. at 614 ("This is not to suggest, however, that we are to engage in a legalistic minuet in which precise rules and forms must govern. A true minuet is a matter of pure form and style, the observance of which is itself the substantive end. Here we examine the form of the relationship for the light that it casts on the substance.").

Establishment Clause cases until it decided *Marsh v. Chambers*[37] in 1983.[38] *Marsh* addresses a challenge to the Nebraska Legislature's practice of beginning sessions with a nonsectarian prayer delivered by a clergyman who was appointed and compensated by the legislature.[39] The practice seemed to fail the *Lemon* test,[40] but the Court was reluctant to strike it down, presumably because it did not want to set a precedent that could be used to eliminate numerous public references to religion, including the Court's own practice of beginning its sessions with, "God save the United States and this honorable court."[41]

Hard-pressed for an argument that the Nebraska practice was acceptable under *Lemon*, the Court chose instead to make an exception to the test.[42] This exception was based on the Court's historical analysis of the Establishment Clause, which reasoned that because legislative prayer was an accepted practice when the Constitution was written, the drafters must not have meant to

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37. 463 U.S. 783 (1983).

38. *See* Newdow v. U.S. Congress 292 F.3d 597, 605 (9th Cir. 2002) (tracing the history of the *Lemon* test and other Establishment Clause tests), *amended by* 2003 WL 554742 (9th Cir. Feb. 28, 2003).

39. *See Marsh*, 463 U.S. at 784–86 ("The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.").

40. *See id.* at 800–01 (Brennan, J., dissenting) ("I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.").

41. *See id.* at 786 ("In the very courtrooms in which the United States District Judge and later three Circuit Judges heard this case, the proceedings opened with an announcement that concluded, 'God save the United States and this Honorable Court.' The same invocation occurs at all sessions of this Court.").

42. As Justice Brennan noted in dissent:

> The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause. That it fails to do so is, in a sense, a good thing, for it simply confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer.

Id. at 796 (Brennan, J., dissenting).

prohibit it when they wrote the First Amendment.[43] The Supreme Court returned to the *Lemon* test in subsequent cases,[44] but *Marsh* proved more than a mere exception.[45] Its historical rationale continued to influence the Court in subsequent cases.[46]

This focus on original intent made it increasingly difficult for the Court to enforce the literal requirements of the *Lemon* test.[47] If applied literally, *Lemon* would require the extraction of countless public references to religion[48]—a step the court has been unwilling to take.[49] In recent years, the Court has sought to redefine Establishment Clause analysis by articulating the "endorsement" test[50] and the "coercion" test.[51] But instead of

43. *See Marsh*, 463 U.S. at 790 ("It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.").

44. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 681–85 (1984) (applying the *Lemon* test one year after making an exception in *Marsh).*

45. *See infra* note 46.

46. *See Lynch*, 465 U.S. at 673–74 ("The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees."). In a fashion similar to the majority opinion in *Marsh*, the Court goes on to cite historical examples of public references to religion as reasons why including a Nativity scene in a municipality's Christmas display does not violate the Establishment Clause. *See id.* at 675–78.

47. *See* County of Allegheny v. ACLU, 492 U.S. 573, 657 (Kennedy, J., concurring in part and dissenting in part) ("Taken to its logical extreme, some of the language quoted above would require a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause.").

48. *Id.* at 657 (Kennedy, J. concurring in part and dissenting in part).

49. *See Lynch*, 465 U.S. at 678 ("Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith--as an absolutist approach would dictate--the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.") (citations omitted).

50. The "endorsement" test was first articulated by Justice O'Connor in her concurring opinion in *Lynch* and was later used by the Court in *County of Allegheny v. ACLU*. *See* Newdow v. U.S. Congress, 292 F.3d 597, 605 (9th Cir. 2002), *amended by* 2003 WL 554742 (9th Cir. Feb. 28, 2003) (describing the development of the "endorsement" test).

overruling *Lemon*, the "endorsement"[52] and "coercion"[53] tests have merely supplemented it.[54] The Supreme Court has yet to officially adopt one of these three tests[55] and, in at least one instance, it has

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51. The "coercion" or "psychological coercion" test, was first used by the Supreme Court in *Lee v. Weisman*. *See id.* at 605.

52. Intended as a clarification of Establishment Clause analysis, the "endorsement" test effectively collapsed the first two prongs of the *Lemon* test:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions. . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

See id. at 606 (O'Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 687–88).

53. The Supreme Court created the "coercion" test when it held unconstitutional the practice of including invocations and benedictions in the form of "nonsectarian" prayers at public school graduation ceremonies. Declining to reconsider the validity of the *Lemon* test, the Court in *Lee* found it unnecessary to apply the *Lemon* test to find the challenged practices unconstitutional. Instead, the Court "relied on the principle that 'at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so.' " *Id.* (quoting Lee v. Weisman, 505 U.S. 577, 577-78 (1992)).

Although coercive practices certainly violate the Establishment Clause, it is not a necessary element; non-coercive practices can violate the Establishment Clause as well. *See* Engel v. Vitale, 370 U.S. 421, 430 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion. . . ."); *see also Lee*, 505 U.S. at 618 (Souter, J., concurring) ("Over the years, this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement.").

54. *See Newdow*, 292 F.3d at 607 ("We are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them.").

55. *Id.*

applied all three.[56] Among the *Lemon* test, the "endorsement" test and the "coercion" test, the Supreme Court currently has several arrows in its constitutional quiver from which to choose.[57]

Additionally, a number of the Court's decisions over the last fifty years appear contradictory to the layperson, and thus send a confusing message to the public about what the First Amendment requires. For example, in *Lemon*, the Court struck down two state laws supplementing the salaries of parochial school teachers who taught secular subjects,[58] but the Court upheld statutes directing school authorities to lend secular textbooks to parochial school students[59] and to reimburse parents of parochial school students for bus transportation.[60] Additionally, the Court held that a state can pay for a sign language interpreter to assist a deaf child attending a sectarian school,[61] and that federal funds can be given to state agencies that lend educational equipment and materials to religiously-affiliated schools.[62] In similar fashion, the Court held that it is unconstitutional for a school classroom to be turned over to religious instructors,[63] but it held in later cases that it is also unconstitutional to exclude a Christian club from meeting at the school after hours,[64] or for a state university to withhold funds from a Christian student newspaper.[65]

These cases involve complex issues, and the Court has attempted to distinguish and clarify seeming contradictions, but the

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56. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302–17 (2000) (applying all three tests to invalidate public school policy permitting student-led, student-initiated prayer before football games).

57. *See Newdow*, 292 F.3d at 607 ("The Supreme Court has not repudiated *Lemon*; in *Santa Fe*, it found that the application of each of the three tests provided an independent ground for invalidating the statute at issue in that case; and in *Lee*, the Court invalidated the policy solely on the basis of the coercion test.").

58. Lemon v. Kurtzman, 403 U.S. 602, 606–07 (1971).

59. Bd. of Educ. v. Allen, 392 U.S. 236, 238 (1968).

60. Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947).

61. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3 (1993).

62. Mitchell v. Helms, 530 U.S. 793, 801 (2000).

63. McCollum. v. Bd. of Educ., 333 U.S. 203, 209–10 (1948).

64. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102 (2001).

65. Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 845–46 (1995).

message to the public and lower courts is that the Supreme Court has effectively created an "I know it when I see it"[66] test.[67] Thus, the Ninth Circuit and the American public find themselves asking the question: Is the United States one nation "under God?"

Newdow v. U.S. Congress epitomizes this confusion.[68] The majority opinion applies all three tests and finds the Pledge unconstitutional under the plain language of each. The dissenting opinion conversely argues that the Majority, through its formulaic application of the rules, has lost sight of the purpose of the Establishment Clause.[69] The distance between these disparate but defensible positions suggests one possible reason why the Court has yet to choose a test or to define clearly what the Establishment Clause requires: separationist precedent and an accomodationist interpretation of intent cannot be easily reconciled.[70]

The idea of a wall of separation is at the heart of the *Newdow* decision. In 1947, Justice Black wrote "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[71] That language has been quoted for decades and has become part of the public consciousness.[72]

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66. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (describing the difficulty in deciding when something is pornography and thus not protected by the First Amendment).

67. *See* Newdow v. U.S. Congress, 292 F.3d 597 (using all three tests to invalidate the Pledge); *see also* Committee for Public Ed. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J. dissenting) (calling the task of trying to patch together the "blurred, indistinct, and variable barrier" described in *Lemon* as "sisyphean").

68. *Compare Newdow*, 292 F.3d at 607–12 (applying all three tests to find the addition of the words "under God" a clear violation of the Establishment Clause) *with Newdow*, 292 F.3d at 613 (Fernandez, J. concurring in part and dissenting in part) (refusing to apply any tests because the purpose of the Establishment Clause was to avoid discrimination, not to drive religious expression out of public thought).

69. *See supra* note 68.

70. *See supra* note 47.

71. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

72. *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 1 (2002) ("[The] phrase, 'separation of church and state,' provides the label with which vast numbers of Americans refer to their religious freedom.").

But accomodationists argue that *Newdow* is perfect evidence of why it is dangerous to build up a body of law based upon a figure of speech.[73] To accomodationists, the metaphor is misleading and does not reflect what the Constitution actually requires.[74] Some members of this school of thought argue that the Constitution only forbids public funding of churches or discrimination against particular faiths.[75] To a subscriber of this interpretation, it seems ridiculous to read the Establishment Clause as requiring the extrication of every public reference to religion.[76]

If the Supreme Court hears *Newdow*, it could settle the debate over what the Establishment Clause requires by answering the literal and figurative question: Is America one nation "under God?"[77]

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73. *See generally* Stephen L. Carter, *Reflections On the Separation of Church and State*, 44 ARIZ. L. REV. 293, 294 (discussing the multiple interpretations of the phrase based on historical perspectives).

74. *See* Lynch v. Donnelly, 465 U.S. 668, 673 ("The concept of a 'wall' of separation is a useful figure of speech . . . [b]ut the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.").

75. *See* HAMBURGER, *supra* note 72, at 481 (contending that "the constitutional authority for separation is without historical foundation," but rather was shaped by "broader cultural and social developments, including ideals of individual independence, fears of Catholicism and various types of specialization.").

76. *See* Lynch v. Donnelly, 465 U.S. 668, 686 (1984) The Court in *Lynch* admitted as much, observing:

> The Court has acknowledged that the 'fears and political problems' that gave rise to the Religion Clauses in the 18th century are of far less concern today. We are unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgement of the religious heritage long officially recognized by the three constitutional branches of government.

Id. (citations omitted) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947)).

77. This statement may be less true now that the Ninth Circuit has amended its original opinion to avoid expressly ruling on the constitutionality of the Pledge. By limiting its ruling to the school's practice, the Ninth Circuit suggests that the Pledge may not be unconstitutional for everyone. *See* Newdow v. U.S. Congress, 2003 WL 554742 (9th Cir. Feb. 28, 2003) (O'Scannlain J., dissenting) ("*Newdow I* . . . no longer exists; it was withdrawn after the en banc

II. *NEWDOW* WILL BE REVERSED

Shortly after the *Newdow* decision was announced, the Ninth Circuit stayed the effect of the controversial ruling and in February of 2003 the Court declared that it would not rehear the case.[78] Because the Ninth Circuit declined to rehear *Newdow*, the case will likely be appealed to the Supreme Court.[79] If the Supreme Court hears *Newdow*, it will likely reverse the decision because the Court is weary of formulaic applications of the *Lemon* test that do not comport with its interpretation of the Establishment Clause's original intent.[80] *Newdow* certainly does not appear to be

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call failed. The panel majority has evolved to this extent: in *Newdow I* the Pledge was unconstitutional for everybody; in *Newdow II* the Pledge is only unconstitutional for public school children and teachers."). Compare the amended opinion with *Lee v. Weisman*, 505 U.S. 577 (1992), where the Court held that a public school may not have a prayer at a graduation ceremony because "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so."

78. *See* Newdow v. U.S. Congress, 2003 WL 554742 (9th Cir. Feb. 28, 2003).

79. *See* Oliver Libaw, *Pledging Religious Allegiance? Supreme Court Likely to Have Final Say on First Amendment Issue, at* http://abcnews.go.com/sections/us/DailyNews/pledge_effects020626.html (June 27, 2002) (discussing the likelihood that *Newdow* would be appealed prior to the Ninth Circuit's refusal to rehear the case) (on file with the First Amendment Law Review); *see also California School District to Appeal Pledge Ruling to Supreme Court, at* http://www.cnn.com/2003/LAW/03/04/pledge.of.allegiance.ao/index.html (last visited Mar. 4, 2003) (reporting the school district's intention to appeal the case to the Supreme Court after the Ninth Circuit refused to rehear the case en banc) (on file with First Amendment Law Review).

80. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting) ("*Lemon* has had a checkered career in the decisional law of this Court."); Agostini v. Felton, 521 U.S. 203, 233 (1997) (stating that *Lemon*'s entanglement test is merely "an aspect of the inquiry into a statute's effect"); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J. concurring in judgment) (collecting opinions criticizing *Lemon*); Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J. dissenting) (stating that *Lemon*'s "three-part test represents a determined effort to

consistent with the Court's view of original intent,[81] and the Court has said several times in dicta that it would uphold public references to religion like the words "under God" in the Pledge.[82]

When first articulating the "endorsement" test, Justice O'Connor made it clear that she would allow for government acknowledgements of religious heritage such as the government declaring Thanksgiving to be a public holiday, printing the words "In God We Trust" on coins, praying in the legislature, and opening court sessions with "God save the United States and this honorable court."[83] In 1989, the Supreme Court stated, "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief."[84] Even Justice Brennan, a famous separationist, stated in dicta that if he were asked to decide the question, he would

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craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service"); Hunt v. McNair, 413 U.S. 734, 741 (1973) (stating that the *Lemon* factors are "no more than helpful signposts").

Compare the preceding cases with Brennan's dissent in Lynch:

> Although I agree with the Court that no single formula can ever fully capture the analysis that may be necessary to resolve difficult Establishment Clause problems . . . I fail to understand the Court's insistence upon referring to the settled test set forth in *Lemon* as simply one path that may be followed or not at the Court's option. . . . At the same time, the Court's less than vigorous application of the *Lemon* test suggests that its commitment to those standards may only be superficial.

Lynch, 465 U.S. at 696–97 (Brennan, J. dissenting).

81. *See infra* note 82.

82. *See Newdow*, 292 F.3d at 613–14 (Fernandez, J. concurring in part and dissenting in part) (stating that Chief Justice Burger, Chief Justice Rehnquist, and Justices Harlan, Brennan, White, Goldberg, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia, and Kennedy, have all recognized the lack of danger in the words "under God" and similar expressions for decades).

83. *See Lynch,* 465 U.S. at 692–93 (combining the purpose of solemnizing with the history and ubiquity of such practices to find that they are constitutional).

84. *See Newdow,* 292 F.3d at 613–14 (Fernandez, J. concurring in part and dissenting in part) (quoting *Allegheny*, 492 U.S. at 602–03).

probably find that public references like "One Nation Under God" are constitutional.[85]

III. A *NEWDOW* REVERSAL WOULD BE A BAD PRECEDENT FOR SEPARATIONISTS

Reversing *Newdow* would be a bad precedent for separationists.[86] Not only would it specifically allow for similar state references to religion, but it could also cause the *Lemon* test, which has produced decisions favored by separationists, to be overturned.[87]

Less than a year after the Court forged an historical exception to the *Lemon* test in *Marsh*, it heard *Lynch v. Donnelly*,[88] which dealt with a city government's inclusion of a nativity scene in a Christmas display.[89] The Court held the action constitutional by employing an analysis strongly influenced by *Marsh*, concluding that an interpretation of the Establishment Clause should comport with its understanding of the Framer's intent.[90]

The Court prefaced its argument in *Lynch* by pointing out that while the wall of separation between church and state is a useful metaphor, it is not what the Constitution requires.[91] The

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85. *See* Marsh v. Chambers, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting). Brennan commented:

> I frankly do not know what should be the proper disposition of features of our public life such as 'God save the United States and this Honorable Court,' 'In God We Trust,' 'One Nation Under God,' and the like. I might well adhere to the view . . . that such mottos are consistent with the Establishment Clause, not because their import is *de minimis*, but because they have lost any true religious significance.

Id.

86. *See supra* note 77.

87. *See supra* note 77.

88. 465 U.S. 668 (1984).

89. *See id.*

90. *See id.* at 673 ("The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees.").

91. *See id.* at 673 ("The concept of a 'wall' of separation is a useful figure of speech . . . [b]ut the metaphor is not a wholly accurate description of the

Lynch analysis continued in favor of allowing the nativity scene by stating that, although the Constitution requires tolerance, it does not call for "callous indifference" toward religion,[92] and posited that the First Amendment actually mandated some accommodation of religion.[93]

Seeing the difficulty of squaring these assertions with the *Lemon* test, the Court explained that, while it has often found the *Lemon* test to be a useful way of examining Establishment Clause cases, it was "unwilling to be confined to any single test or criterion in this sensitive area."[94] In his dissent, Justice Brennan stated that the Court was breaking from precedent by claiming that it was not bound by *Lemon*, and that the Court seemed inclined to give the *Lemon* test only superficial enforcement.[95]

The controversy surrounding *Newdow* and the confusion over how to interpret the Establishment Clause may prompt the Supreme Court to abolish the *Lemon* test.[96] The current Court has refused to confine itself to the *Lemon* test. Justice O'Connor and Justice Kennedy have proposed alternative tests, and three Justices have suggested that they are simply lying in wait of a good opportunity to eliminate the *Lemon* test.[97] *Newdow*'s prohibition of a practice that the Court has said in dicta that it would uphold,

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practical aspects of the relationship that in fact exists between church and state.").

92. *See id.* at 673 (citing Zorach v. Clauson, 343 U.S. 306 (1952)).

93. *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions and forbids hostility toward any."). Presumably the constitutional mandate for accommodation stems from a reading of the Establishment Clause and the Free Exercise clause together.

94. *See id.* at 679 (citing three cases in addition to *Marsh*). The Court did cover its bases in *Lynch* by superficially applying the Lemon Test, holding that, by viewing the inclusion of the nativity scene within the context of the Christmas Season, they could discern a secular purpose. *Id.*

95. *See id.* at 696–97 (Brennan, J. dissenting).

96. *See supra* note 77.

97. *See* Tangipahoa Parish Bd. of Educ. v. Freiler, 120 S.Ct. 2706, 2708 (2000) (Scalia, J., dissenting) (stating, along with Chief Justice Rehnquist and Justice Thomas, that he would have granted certiorari to an appeal to resolve the issue of a stricken school board's policy of disclaiming evolution as only one theory of creation, if only for the opportunity to finally inter the *Lemon* test).

along with the public backlash the case has created, would be a gift-wrapped opportunity for doing away with the "oft-criticized"[98] test.[99]

IV. *NEWDOW* CREATED A PUBLIC BACKLASH

It is not yet clear whether the Supreme Court will have the opportunity to hear *Newdow*, but the court of public opinion has already delivered its verdict. America is one nation "under God" according to a majority of Americans who were outraged by *Newdow*.[100]

The same day *Newdow* was announced, the U.S. Senate unanimously passed a resolution "expressing support for the Pledge of Allegiance" and asking Senate counsel to "seek to intervene in the case."[101] Legislators from both political parties were quoted expressing their outrage over the decision. Senator Robert Byrd (D-WV) said he was the only remaining member of Congress who voted to add the words to the Pledge in 1954, and warned that any judges declaring the Pledge unconstitutional would be blackballed.[102] Byrd further hoped that the Senate

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98. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 319 (Rehnquist, C.J., dissenting) ("[The Court] applies the most rigid version of the oft-criticized test of *Lemon v. Kurtzman*. . . .").

99. *See supra* note 77.

100. *See* Richard S. Durham, *One Nation, Under Conservative Judges*, http://www.businessweek.com/bwdaily/dnflash/jul2002/nf2002071_1247.htm (July 1, 2002) (on file with the First Amendment Law Review); *Vast Majority in U.S. Support 'Under God'*, *at* http://www.cnn.com/2002/US/06/29/poll.pledge (June 30, 2002). Richard Durham noted:

> According to a June 26-27 Fox News/Opinion Dynamics Poll, 83% of Americans disagree with the decision, while only 12% approve. And it's not just Republican conservatives who decry this latest round of judicial activism. Democrats give the ruling a big thumbs down, 77% to 16%, as do liberals, 72% to 20%.

Durham, *supra*.

101. *See Senators Call Pledge Decision 'Stupid'*, *at* http://www.cnn.com/2002/ALLPOLITICS/06/26/senate.resolution.pledge/index.html (June 27, 2002) (on file with the First Amendment Law Review).

102. *Id.*

would, "waste no time throwing [the decision] back in the face of this stupid judge."[103] Then-Senate Majority Leader Tom Daschle echoed Byrd's sentiments by stating "[t]he decision is nuts."[104]

Republican Senator Trent Lott referred to *Newdow* as an "unbelievable decision" and a "stupid ruling."[105] Senator Christopher Bond, a Republican from Missouri, called the decision, "the worst kind of political correctness run amok."[106] Later that day more than 100 House members gathered on the Capitol steps and recited the Pledge in a show of defiance.[107]

The Executive Branch also commented on the *Newdow* decision. President Bush, in response to the ruling, said that *Newdow* was "out of step with the traditions and history of America" and promised to appoint judges who would affirm God's role in public life.[108]

Outraged political reactions emerged quickly and from all corners of the political spectrum, in anticipation of their constituents' response.[109] Iowa Republican Charles Grassley explained the response candidly: "This decision is so much out of the mainstream of thinking of Americans and the culture and values that we hold in America, that any Congressman that voted to take it out would be putting his tenure in Congress in jeopardy at the next election."[110]

Many religious groups denounced the decision as well.[111] For example, Jerry Falwell, televangelist and Baptist pastor, called for mass civil disobedience in the form of ongoing classroom

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103. *Id.*

104. *Id.*

105. *Id.*

106. *See Pledge Ruling Not Popular, to Say the Least, at* http://www.cnn.com/2002/LAW/06/07/pledge.allegiance/index.html (last visited Feb. 10, 2003) [hereinafter *Pledge Ruling Not Popular*].

107. *Id.*

108. *See Bush Calls Pledge Ruling 'Out of Step', at* http://www.usatoday.com/news/nation/2002/06/27/bush-pledge.htm#more (June 27, 2002) (on file with the First Amendment Law Review).

109. *Pledge Ruling Not Popular, supra* note 106.

110. *Id.*

111. *See 'Under God' embraced in court of public opinion, at* http://www.freedomforum.org/templates/document.asp?documentID=16918 (September 6, 2002).

pledge recitations.[112] Even some traditional separation advocates, like the Anti-Defamation League[113] and the National Education Association, dismissed the decision.[114]

Because *Newdow* was immediately stayed, the case's only practical effects so far have been to bolster the opposition and fuel misperceptions about separationists.[115] Both effects will likely spill over from *Newdow* into other separation issues.

An editorial in *The New York Times* summed up the predicament *Newdow* has created for separationists: "We wish the words had not been added back in 1954. But just the way removing a well-lodged foreign body from an organism may sometimes be more damaging than letting it stay put, removing those words would cause more harm than leaving them in."[116]

The decision is likely to be a huge public relations victory for accomodationists and could "give President Bush carte blanche to stack the federal bench" with accomodationist judges.[117] The public relations victory *Newdow* has given accomodationists is why even those who believe *Newdow* was correctly decided think the suit was a poor battle to choose. For example, Douglas Laycock of the University of Texas School of Law defended the ruling in principle but said that it was a "stupid thing to do" in light of public sentiments.[118] Laycock pointed out that "[t]he harm done by such practices is extraordinarily modest," and that the case "would weaken citizens' faith in the courts as they handle more troublesome aspects of public religion."[119]

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112. *Id.*

113. *Id.*

114. *Id. See also Federal Appeals Court Bans Pledge of Allegiance in Schools*, *at* http://www.nea.org/neatoday/0209/rights.html (last visited March 15, 2003) (mentioning that NEA Board of Directors voted to support the current version of the Pledge) (on file with the First Amendment Law Review).

115. Shenandoah, *supra* note 4 (suggesting a possible conspiracy between Americans United, the ACLU and the Ninth Circuit Court of Appeals).

116. *'One Nation Under God'*, N.Y. TIMES, June 27, 2002, at A28.

117. Durham, *supra* note 100.

118. *See* Richard N. Ostling, *Despite courts, Americans Want to Be 'Under God'*, THE TIMES UNION (Albany, N.Y.), Sept. 8, 2002, at A8, *available at* http://www.pjstar.com/news/sept11/ap/g104703a.html.

119. *Id.*

Perhaps the biggest concern about *Newdow* for separationists is the effect the backlash it has created will have on other separation issues. According to an editorial in the *New York Times:*

> Most important, the ruling trivializes the critical constitutional issue of separation of church and state. There are important battles to be fought virtually every year over issues of prayer in school and use of government funds to support religious activities. Yesterday's decision is almost certain to be overturned on appeal. But the sort of rigid overreaction that characterized it will not make genuine defense of the First Amendment any easier.[120]

One issue that may be affected by the public backlash from *Newdow* is the national debate over school vouchers.[121] The day after the Ninth Circuit announced *Newdow*, the Supreme Court announced a landmark decision of its own in *Zelman v. Simmons-Harris*,[122] holding that a school voucher program in Cleveland, Ohio, was constitutional.[123] The attention the voucher case would normally have received was swallowed up in the wake of *Newdow*'s media attention. *Zelman* was a huge blow to separationists because it could potentially lead to significant state funds being funneled to religious schools, so long as the programs incorporate necessary elements of neutrality and parental choice.[124] But voucher opponents could not speak out against it with as much

120. *One Nation Under God, supra* note 116.

121. For further reading on the legal issues surrounding school vouchers, see Thomas Berg et al., Joint Statement of Church-State Scholars on School Vouchers and the Constitution: What the United States Supreme Court Has Settled. What Remains Disputed, *in* SCHOOL VOUCHERS: SETTLED QRESTIONS, CONTINUING DISPUTES, 3–14 (Pew Fourm on Religion and Public Life, 2002), *available at* http://pewforum.org/issues/files/VoucherPackage.pdf.

122. Zelman v. Simmons-Harris, 122 S.Ct. 2460 (2002).

123. *See* Douglas Laycock, *Vouching Towards Bethlehem*, 5 RELIGION IN THE NEWS, Summer 2002, *available at* http://www.trincoll.edu/depts/csrpl/RINVol5No2/vouching.htm.

124. *See* Berg et al., *supra* note 121 at 5–6.

fervor as they would have liked, since the decision came only a day after *Newdow*.[125] There was little chance of garnering public outrage over a decision that Justice Souter characterized as a break from liberal precedent dating back to *Everson*,[126] because the public was still immersed in the Pledge of Allegiance controversy.[127]

How long this public backlash continues will be a key factor while the voucher issue is argued in state courts.[128] *Zelman* provided a blueprint for a voucher program acceptable under the Federal Constitution, but whether replica programs will be acceptable under individual state constitutions will be a hotly debated issue in the future.[129] Many state constitutions contain specific prohibitions that would make voucher programs more difficult to implement. However, that obstacle is mitigated by the fact that state constitutions are more easily amended than the Federal Constitution. Additionally, the voucher debate will have to be fought in a post-*Newdow* environment.[130] Thus, Michael Newdow's poorly chosen battle and the public backlash it has created will likely make it easier for voucher advocates to have success on the state level.

V. CONCLUSION: *NEWDOW* WAS A POORLY CHOSEN BATTLE

Whether or not *Newdow* was rightly decided is an impossible question to answer. Both the majority and dissenting opinion offer compelling and sound legal arguments. Whether one agrees with the decision depends largely upon her core beliefs about religion and how the Constitution should be interpreted. Likewise, whether or not the extrication of references like "under God" is good public policy is an impossible question to answer. Again, a person's answer depends largely upon her background.

125. *See* Laycock, *supra* note 122.
126. *Zelman*, 122 S. Ct. at 2485 (Souter J., dissenting).
127. *See* Laycock, *supra* note 123.
128. *Id.*
129. *See* Berg et al., *supra* note 121 at 8–9.
130. *Id.*

The only clear answer with regard to *Newdow* is that bringing the suit was a bad idea.

Michael Newdow is an advocate of separation of church and state who won an impressive battle in the Ninth Circuit Court of Appeals. But his victory could cause separationists to lose the war over separation of church and state because the case will likely be overturned and set a precedent lowering the wall of separation that currently exists. Furthermore, because *Newdow* has created a public backlash, it will make future separationist efforts more difficult to achieve. Particularly in post 9-11 America, when prayer and patriotism have been unifying forces and legal scholars are questioning the legitimacy of the concept of separation of church and state, *Newdow* was a poor battle to choose.[131] Newdow's victory in the Ninth Circuit could lead to the Supreme Court, as well as the majority of citizens, declaring that the United States is indeed one nation "under God."

131. *See* Ostling, *supra* note 118.