


Fall 3-2-2008

## The Pledge of Allegiance in the Classroom and the Court: An Epic Struggle over the Meaning of the Establishment Clause of the First Amendment

Brian Wheeler

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### Recommended Citation

Brian Wheeler, *The Pledge of Allegiance in the Classroom and the Court: An Epic Struggle over the Meaning of the Establishment Clause of the First Amendment*, 2008 BYU Educ. & L.J. 281 (2008).

Available at: <https://digitalcommons.law.byu.edu/elj/vol2008/iss2/5>

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# THE PLEDGE OF ALLEGIANCE IN THE CLASSROOM AND THE COURT: AN EPIC STRUGGLE OVER THE MEANING OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

## I. INTRODUCTION

The United States Supreme Court has been at odds with itself for many years over what the Establishment Clause of the First Amendment<sup>1</sup> does and does not protect, particularly when it comes to speech within public schools. As part of this debate, a hot topic throughout the decade has been what the Establishment Clause means for the Pledge of Allegiance and its recitation in public schools. As the legal community anxiously awaits the Ninth Circuit's decision in the latest challenge to the Pledge,<sup>2</sup> the United States Supreme Court must prepare to make a final determination of what impact, if any, the Establishment Clause of the First Amendment has on voluntary teacher-led recitation of the Pledge of Allegiance by public school students.

Unlike its predecessor,<sup>3</sup> the pending litigation, *Newdow v. Congress*,<sup>4</sup> appears procedurally sound, which will require the Court to make a merits-based decision regarding the Pledge. With two of the most vocal Pledge proponents now removed from the bench, an in-depth analysis into the Establishment

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1. U.S. CONST. amend. I ("Congress shall make no law respecting an *establishment of religion*, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (emphasis added)).

2. *Newdow v. Cong.*, 383 F. Supp. 2d 1229 (E.D. Cal. 2005), *sub nom.* *Newdow v. Rio Linda*, No. 05-17257 (9th Cir. 2007). When this Comment was last revised in April 2008, the Ninth Circuit Court of Appeals had not yet delivered an opinion in this case. Until the Supreme Court determines the merits of the constitutional question surrounding the Pledge of Allegiance, however, this Comment remains relevant to the issue at large, even if not in the context of *Newdow v. Congress*.

3. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

4. *Newdow*, 383 F. Supp. 2d at 1229, *sub nom.* *Newdow v. Rio Linda*, No. 05-17257 (9th Cir. 2007).

Clause jurisprudence of the Court's two newcomers is particularly needed in order to predict how the Court may decide this issue. This Comment seeks to conduct such an analysis to predict how not only the new justices would vote, but how the entire Court would rule on a challenge to the Pledge of Allegiance's constitutionality.

While the late Chief Justice Rehnquist and retired Justice O'Connor are no longer members of the Court, their concurrences in the 2004 Pledge of Allegiance case *Elk Grove Unified School District v. Newdow*<sup>5</sup> have not become moot; rather they represent crucial pieces of the Court's Pledge jurisprudence. As the Court's most prominent insights into modern post-*Barnette* Pledge jurisprudence, the *Elk Grove* concurrences are possible trend-setting opinions, especially for the Court's newest justices, and must be analyzed accordingly.

### A. Establishment Clause Jurisprudence

The Court's Establishment Clause jurisprudence has arguably failed to provide clear standards and analytical frameworks for evaluating constitutional challenges. Several justices have noticed these problems in the current jurisprudence.

In Justice Clarence Thomas's *Elk Grove Unified School District v. Newdow*<sup>6</sup> concurrence, he stated that *Lee v. Weisman*<sup>7</sup> "adopted an expansive definition of 'coercion' that cannot be defended however one decides the 'difficult question' of '[w]hether and how th[e Establishment] Clause should constrain state action under the Fourteenth Amendment.'"<sup>8</sup> Justice Thomas further stated that the problems with the Court's Establishment Clause jurisprudence "run far deeper than *Lee*,"<sup>9</sup> concluding that "our Establishment Clause jurisprudence is in hopeless disarray."<sup>10</sup> And Justice Thomas is not alone in this regard. Justice Antonin Scalia has reached a

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5. *Elk Grove*, 542 U.S. at 18–33, 33–44.

6. *Id.* at 1; *infra* Section III.D.

7. 505 U.S. 577 (1992); *infra* Section III.B.

8. *Elk Grove*, 542 U.S. at 45 (Thomas, J., concurring) (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) (alternation in *Elk Grove*)).

9. *Id.*

10. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

similar finding in his bench opinions:

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children. . . . Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman* conspicuously avoided using the supposed “test” but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature’s heart (the author of today’s opinion repeatedly), and a sixth has joined an opinion doing so.<sup>11</sup>

Every constitutional test that the Court has set forth to guide Establishment Clause analyses, such as the infamous test from *Lemon v. Kurtzman*,<sup>12</sup> has been known to give unpredictable results. For this reason and others, many have started to think that maybe Justice Thomas, Justice Scalia, former Justice O’Connor, and the late Chief Justice Rehnquist were right—it is time “to begin the process of rethinking the Establishment Clause.”<sup>13</sup>

### B. Objectives

This Comment analyzes the sitting Court’s likely Pledge of Allegiance jurisprudence by looking at past opinions and current trends to predict how the Court would rule on the latest Newdow-initiated Pledge litigation, which is pending before the Ninth Circuit Court of Appeals.<sup>14</sup> Section II provides the proper context for this discussion by recounting how the Pledge of Allegiance came about, including its drafting, adoption, legislative history, and subsequent amendments. Section III examines the Supreme Court’s Establishment Clause jurisprudence and its application to a recent case challenging the constitutionality of the Pledge of Allegiance, while Section IV examines the congressional response. Section V then examines the current legislation and pending litigation

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11. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (citation omitted).

12. 403 U.S. 602 (1971); *infra* Section III.B.

13. *Elk Grove*, 542 U.S. at 45 (Thomas, J., concurring).

14. *Newdow*, 383 F. Supp. 2d at 1229, *sub nom.* *Newdow v. Rio Linda*, No. 05-17257 (9th Cir. 2007).

on these matters. Section VI reviews both the legislative record and the independent record of the sitting United States Supreme Court justices to determine how a Pledge of Allegiance case may be resolved in the current United States Supreme Court. Finally, Section VII presents the argument of why the Court should uphold school district policies calling for voluntary teacher-led recitations of the Pledge of Allegiance.

## II. A BRIEF HISTORY OF THE PLEDGE OF ALLEGIANCE

A former Baptist minister named Francis Bellamy wrote the original Pledge of Allegiance in 1892.<sup>15</sup> It was first published in *Youth's Companion*, a children-oriented magazine that had hired Bellamy shortly after his resignation from his religious post.<sup>16</sup> Bellamy also served as chairman of a committee of the National Columbian Public School Celebration in connection with his service to *Youth's Companion*.<sup>17</sup> As chairman, he was charged to develop a program to celebrate the 400th anniversary of Christopher Columbus's landing in the Americas.<sup>18</sup> Bellamy's program centered around a flag-raising ceremony that included his new salute to the flag, the "Pledge of Allegiance."<sup>19</sup> During the summer months before his flag ceremony, Bellamy successfully petitioned President Benjamin Harrison and Congress to issue a proclamation in observance of the Columbus Day celebration.<sup>20</sup> While the Pledge of Allegiance was first recited in public schools as part of a Columbus Day Celebration on October 12, 1892, thousands of other public and private schools participated in the Pledge during the official Columbus Day Celebration on October 21, 1892.<sup>21</sup>

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15. RICHARD J. ELLIS, TO THE FLAG: THE UNLIKELY HISTORY OF THE PLEDGE OF ALLEGIANCE 1, 9 (2005).

16. *Id.* at 19.

17. *Id.* at 14.

18. *Id.*

19. *Id.* at 17–20.

20. *Id.* at 16–17 & n.40. Bellamy was also able to gain the support of Harrison-predecessor President Grover Cleveland (who was soon thereafter elected again to the White House in the year of the Columbus Day celebration). *Id.* at 15.

21. *Id.* at 21–23. Although Columbus Day was originally planned for October 12, the congressional resolution changed the date to October 21. Thus, while a few cities celebrated on October 12 (notably New York), for the majority of towns celebrating Columbus Day, schoolchildren recited the Pledge for the first time on October 21, 1892. *Id.*

The Pledge that was adopted in 1892 for the Columbus Day observance is somewhat different than the version that survives today. It read, "I pledge allegiance to my Flag and to the Republic for which it stands—one Nation indivisible—with Liberty and Justice for all."<sup>22</sup> At the 1923 National Flag Conference, the Pledge of Allegiance took to a national stage and began its metamorphosis out of Bellamy's hands and into mainstream American society.<sup>23</sup> The Conference leadership changed the phrase "my Flag" to "the Flag of the United States of America," over Bellamy's protests.<sup>24</sup> The Pledge amendment sought to make it clear to immigrants that the flag being referenced was in fact the United States' Flag and not the flag of a state or any other nation.<sup>25</sup> This amendment was adopted and the Pledge of Allegiance remained unchanged for thirty years—that is until the Knights of Columbus began a campaign to add "under God" to the text of the Pledge.<sup>26</sup>

#### A. "Under God"

The Knights of Columbus, a Catholic fraternal organization, did not think the Pledge fully encompassed the fabric of America without a mention of God.<sup>27</sup> So, in 1952, the Supreme Council of the Knights of Columbus amended the Pledge for recitation at its meetings by adding the phrase "under God" after "one nation."<sup>28</sup> The Knights of Columbus then petitioned the President of the United States, the Vice President of the United States, and the Speaker of the United States House of Representatives to similarly amend the Pledge.<sup>29</sup>

In 1953, Representative Louis Rabaut of Michigan sponsored the first resolution in the United States Congress to amend the Pledge accordingly.<sup>30</sup> Although they failed at first,

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22. *Id.* at 19. The salute to accompany the Pledge consisted of raising one's arm toward the flag, but this salute was replaced by placing one's hand over one's heart after the Bellamy salute became associated with Fascism and the Nazis during the Second World War. *Id.* at 20, 91. See 4 U.S.C. § 4 (2000).

23. ELLIS, *supra* note 15, at 58, 65.

24. *Id.* at 65, 68.

25. *Id.* at 65–66.

26. *Id.* at 129–30.

27. *Id.* at 130–31.

28. *Id.* at 130.

29. *Id.*

30. *Id.* at 131.

the Knights of Columbus and other fraternal organizations refused to give up and began to use Lincoln's Gettysburg address, which included the phrase "under God," as persuasive authority justifying the change.<sup>31</sup>

Reverend George MacPherson Docherty, a Presbyterian minister and pastor of the New York Avenue Presbyterian Church in Washington D.C., advocated adding "under God" to the Pledge, which was inspired by a phrase in Abraham Lincoln's Gettysburg Address, during his Sunday sermon to commemorate Lincoln's birthday.<sup>32</sup> The following day, one of Docherty's petitioners, Representative Charles Oakman, introduced a resolution to the House that would codify the inclusion of "under God" in the Pledge.<sup>33</sup> Two days later, Senator Homer Ferguson presented an identical resolution to the Senate.<sup>34</sup>

The Oakman-Ferguson resolution, S.J.R. 126 in the Senate and H.J.R. 243 in the House, passed both chambers of Congress and President Eisenhower signed the bill into law on Flag Day, June 14, 1954.<sup>35</sup> Shortly thereafter, Eisenhower declared, "From this day forward, millions of our school children will daily proclaim . . . the dedication of our nation and our people to the Almighty."<sup>36</sup> Some opponents may argue that this statement by the President reveals the true intent of the amendment: to inculcate schoolchildren with religious tenets. Proponents may argue, however, that a statement by a sitting president cannot constitute legislative intent.

### *B. The Codified Pledge*

In 1954, the decision of Congress and the President to add the phrase "under God" to the text of the Pledge of Allegiance brought the Pledge of Allegiance to the form we know today.<sup>37</sup> The Pledge of Allegiance and its ceremonial recitation is now codified in 4 U.S.C. § 4:

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31. *See id.* at 124, 132.

32. *Id.* at 132–33. Coincidentally, President Eisenhower, who was in attendance at the sermon, was sitting in the Lincoln pew at the time. *Id.* at 132. Evidently, he later told Docherty that he "agreed with [the sermon] 'entirely.'" *Id.* at 133.

33. *Id.* at 133.

34. *Id.* at 133.

35. *Id.* at 135–37.

36. *Id.* at 137.

37. 4 U.S.C. § 4 (2000).

The Pledge of Allegiance to the Flag: "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.," should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove any non-religious headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.<sup>38</sup>

Even before the Pledge's codification in the United States Code, school districts nationwide began to institute policies mandating the daily recitation of the Pledge of Allegiance.<sup>39</sup> Unlike today, most of the Pledge policies of the day called for compulsory recitation of the Pledge and students declining to participate in the exercise for any reason were disciplined accordingly.<sup>40</sup> It did not take long for such compulsory policies to make the Supreme Court's docket, however.

### III. CONSTITUTIONAL CHALLENGES IN COURT

The twentieth century was a time of much development in the Religion Clauses of the First Amendment. An issue of fierce debate that still continues today, 216 years after the ratification of the First Amendment, is what the Framers intended by the Free Exercise and Establishment Clauses and how those clauses should be applied more than two centuries later.

#### *A. Early Challenges*

The first challenge to these compulsory Pledge policies reached the Supreme Court in 1940, fourteen years before the insertion of the phrase "under God," in the case of *Minersville School District v. Gobitis*.<sup>41</sup> In *Minersville*, the Court ruled that public school districts could compel students to participate in reciting the Pledge of Allegiance,<sup>42</sup> including students who saw the Pledge as a blasphemous idolatry in conflict with their

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38. *Id.*

39. ELLIS, *supra* note 15, at 136.

40. *Id.* at 91–92.

41. 310 U.S. 586 (1940).

42. *Id.* at 599–600.



religious convictions, as the Gobitis did in *Minersville*.<sup>43</sup> The *Minersville* rule did not stand for long, however. The Court overruled its *Minersville* decision in *West Virginia State Board of Education v. Barnette*.<sup>44</sup> The Court held that “compulsory unification of opinion” violated the First Amendment.<sup>45</sup>

### *B. The Path That Led to Elk Grove and Its Renewed Challenge*

Since the overt compulsion in *Barnette* is not equally present in today’s Pledge policies, the Court has borrowed a lot of its modern Pledge of Allegiance jurisprudence from Establishment Clause principles found in more blatantly religion-based cases. In *School District of Abington Township, Pennsylvania v. Schempp*, the Supreme Court issued a ruling on two companion cases that both dealt with school policies requiring daily readings from the Bible.<sup>46</sup> The Court held that this practice, as well as the practice of requiring a daily recitation of the Lord’s Prayer, was unconstitutional under the Establishment Clause.<sup>47</sup> In their *Schempp* concurrence, however, Justices Goldberg and Harlan stated:

Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so.<sup>48</sup>

In *Lemon*, the Court held that Rhode Island’s Salary Supplement Act, which provided supplemental salary for teachers in nonpublic schools, and Pennsylvania’s Nonpublic Elementary and Secondary Education Act, which reimbursed nonpublic schools for teachers’ salaries, were unconstitutional because their impact predominantly benefited parochial schools. The Court deemed these practices “excessive entanglement between government and religion.”<sup>49</sup> In its

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43. *Id.* at 591–92.

44. 319 U.S. 624, 642 (1943).

45. *Id.* at 641.

46. 374 U.S. 203, 205, 211, 226–27 (1963).

47. *Id.* at 205–06, 226–27.

48. *Id.* at 306 (Goldberg, J., concurring).

49. *Lemon v. Kurtzman*, 403 U.S. 602, 606–07, 614 (1961).

*Lemon* opinion, the Court developed a test for determining whether statutes violated the Establishment Clause of the First Amendment.<sup>50</sup> The Court held that in order for a statute to pass constitutional muster, it must (1) have a secular purpose; (2) not have the primary effect of advancing or inhibiting religion; and (3) not foster an excessive entanglement of government and religion.<sup>51</sup>

In the time between the *Lemon* and the *Lee* decisions, the Court has used three tests to measure constitutionality of school-based statutory programs and policies that are criticized for being too cozy with religion. First, the Court applied the *Lemon* test, which, as stated above, requires that the statute have a secular purpose, not have the primary effect of advancing or inhibiting religion, and not foster excessive entanglement between government and religion.<sup>52</sup>

In *Lynch v. Donnelly*, the Court expounded upon the *Lemon* test while simultaneously declaring that it refused “to be confined to any single test or criterion.”<sup>53</sup> The Court held that “[i]n each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed.”<sup>54</sup> It is in this “line-drawing process” that the Court acknowledged the utility of the *Lemon* test.<sup>55</sup> Nevertheless, the Court permitted a municipality’s display of a nativity scene by focusing almost exclusively on the purpose prong, recognizing that even when religion substantially benefited, a secular purpose has saved such expressions from conflicting with the Establishment Clause.<sup>56</sup> The Court demonstrated the truth of this principle by holding that “notwithstanding the religious significance of the creche,” the city demonstrated a secular purpose that does not violate the Establishment Clause.<sup>57</sup>

In spite of the Court’s dispositive use of the purpose prong to excuse the nativity display, Justice O’Connor would have modified the *Lemon* test in *Lynch*. She argued in her *Lynch*

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50. *Id.* at 612-13.

51. *Id.*

52. *Id.*

53. 465 U.S. 668, 679 (1984) (holding that a nativity scene display by a municipality did not violate the Establishment Clause).

54. *Id.* at 678.

55. *Id.* at 679.

56. *Id.* at 680. The Court held that “[e]ntanglement is a question of kind and degree.” *Id.* at 684.

57. *Id.* at 687.

concurrence that the government's "actual purpose" must be to endorse or denounce religion, while the effect prong mandates that the act "in fact convey[] a message of endorsement or disapproval," without consideration of the government's actual purpose.<sup>58</sup>

In the Court's explanation of *Lemon*, it held that the focus of its inquiry must be in the proper context.<sup>59</sup> In *Lynch*, that meant that the Court had to analyze the nativity scene's constitutionality "in the context of the Christmas season."<sup>60</sup> It follows, then, that under a *Lynch* rationale, the Court would have to analyze the Pledge within the context of educational instruction and curriculum.

In *County of Allegheny v. American Civil Liberties Union*, the Court revised the *Lemon* test and developed a second test: the endorsement test.<sup>61</sup> This test asked whether the government effectively endorses religion by passing and enforcing a statute. Government action fails the endorsement test by having either the purpose or the effect of favoring a particular religious belief or established religion.<sup>62</sup>

The third test used by the Court in its Establishment Clause jurisprudence is the coercion test from *Lee v. Weisman*.<sup>63</sup> In *Lee*, a public school principal invited a rabbi to offer a prayer at the middle school's graduation ceremony.<sup>64</sup> Weisman, a student, sought to prevent the prayer by way of a court order.<sup>65</sup> The motion was denied shortly before the ceremony that she attended.<sup>66</sup> Weisman and her father subsequently brought an action and sued for a permanent injunction against Providence public schools from having clergy deliver prayers at future graduations, including her high school graduation.<sup>67</sup> The district court granted relief to Weisman,

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58. *Id.* at 690 (O'Connor, J., concurring).

59. *Id.* at 679 (majority opinion).

60. *Id.*

61. 492 U.S. 573, 592-94 (1989). Using this test, the Court held that the display of a crèche violated the Establishment Clause, but that the display of a menorah next to a Christmas tree did not have the unconstitutional effect of endorsing Christian and Jewish faiths in an action against a municipality. *Id.* at 621.

62. *Id.*

63. 505 U.S. 577 (1992).

64. *Id.* at 581.

65. *Id.* at 584.

66. *Id.*

67. *Id.*

through an application of the *Lemon* test, holding that the practice violated the Establishment Clause of the First Amendment.<sup>68</sup> The First Circuit Court of Appeals, inflamed by a school district's open defiance of the court order by offering another prayer at a graduation, affirmed the district court's ruling in an opinion consisting of just ninety-five words from the circuit judge with absolutely no reasoning mentioned other than a statement that it agreed with the district court: "We are in agreement with the sound and pellucid opinion of the district court and see no reason to elaborate further."<sup>69</sup>

In a more pungent opinion, Justice Kennedy, writing for the Court, likewise affirmed the permanent injunction against Providence, Rhode Island public schools.<sup>70</sup> The Court announced firmly that it would not reconsider its *Lemon* decision<sup>71</sup> and held that clergy offering prayers as part of a public school graduation ceremony is barred by the Establishment Clause.<sup>72</sup> The Court did not apply the *Lemon* test to the facts of the case. Instead, the Court held that the prayer ceremony at the graduation failed to pass the new coercion test and thus did not pass constitutional muster.<sup>73</sup>

On the issue of coercion, the Court held that "a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction."<sup>74</sup> The Court argued that since adolescents are susceptible to peer pressure, the "use [of] social pressure to enforce orthodoxy" violates the Establishment Clause.<sup>75</sup> The Court in essence equated peer pressure with government compulsion to act. Holding that high school graduation is "one of life's most significant occasions," the Court suggested that students are not free to abstain from participating in the ceremony.<sup>76</sup> The coercion test, then, as deduced from the opinion in *Lee*, finds that government action violates the

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68. *Weisman v. Lee*, 728 F. Supp. 68, 72, 75 (D.R.I. 1990).

69. *Weisman v. Lee*, 908 F.2d 1090, 1090 (1st Cir. 1990).

70. *Lee*, 505 U.S. at 586.

71. *Id.* at 587.

72. *Id.* at 599.

73. *See id.* at 599.

74. *Id.* at 593.

75. *Id.* at 594.

76. *Id.* at 595.

Establishment Clause if: (1) the action is directed by the government; (2) the act is a formal religious exercise; and (3) the direction by the government compels participation in the exercise from those present or in attendance.<sup>77</sup>

Justice Scalia filed a dissenting opinion in *Lee*, which was joined by Justice Thomas, the late Chief Justice Rehnquist, and the late Justice White.<sup>78</sup> Justice Scalia explained that he could not join the opinion because it went against an opinion he joined in *County of Allegheny v. American Civil Liberties Union*<sup>79</sup> coincidentally also written by Justice Kennedy.<sup>80</sup> In that opinion, Justice Kennedy urged that the Establishment Clause must be construed in light of the Nation's political and cultural heritage.<sup>81</sup> For this purpose, the Court declared that "[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause."<sup>82</sup>

Justice Scalia's *Lee* dissent further stated that since prayers at graduations have "long been recognized" and are "widely established,"<sup>83</sup> Court precedent does not allow an interpretation of the Establishment Clause that prohibits the practice.<sup>84</sup> This can equally be said of the Pledge of Allegiance, which has been recited in public classrooms since its inception in 1892. The dissent continued on to call the *Lee* majority's opinion "incoherent," and classified its discussion of physiological coercion of adolescents as "[going] beyond the realm where judges know what they are doing."<sup>85</sup> Justice Scalia called the Court's notion that a student who respectfully sits during a prayer without participating "has somehow . . . joined-in" as "nothing short of ludicrous."<sup>86</sup> The dissent also

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77. *See id.* at 586–87.

78. *Id.* at 631 (Scalia, J., dissenting).

79. *Id.*; see 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part).

80. As with Justice Scalia's dissenting opinion in *Lee*, Justice Kennedy's opinion in *Allegheny* was likewise joined by Chief Justice Rehnquist and Justice White. *See Allegheny*, 492 U.S. at 655.

81. *Id.* at 670.

82. *Id.*

83. *Lee*, 505 U.S. at 636 (Scalia, J., dissenting).

84. *Id.* at 631.

85. *Id.* at 636.

86. *Id.* at 637.

noted the majority's failure to apply the *Lemon* test and suggested that its ignoring *Lemon* altogether is a manifestation of its irrelevance.<sup>87</sup>

In a particularly relevant comparison, the *Lee* dissent questioned how the Court could determine that psychological coercion existed during the prayer, but failed to disapprove of the students standing for the recitation of the Pledge of Allegiance immediately preceding the rabbi's prayer.<sup>88</sup> In a foreshadowing of where some federal courts' Establishment Clause jurisprudence is today, Justice Scalia announced that the Pledge of Allegiance, as amended, would raise the same Establishment Clause issues as the prayers did in *Lee*.<sup>89</sup> As Justice Scalia predicted, these Establishment Clause cases stemming out of school prayer, such as *Lee*, have become the crux of the Pledge of Allegiance analysis for some federal courts—especially in the Ninth Circuit Court of Appeals.<sup>90</sup> The dissent rhetorically asked if the Pledge must now be struck down in a sarcastic tone that indicated their view of such an assertion as nothing more than a ridiculous argument that could not be furthered on legal principles.<sup>91</sup> The dissent recognized a slippery slope for references to ceremonial deism lest the Court's axe next fall on something as benign as the Pledge of Allegiance, which would “be the next project for the Court's bulldozer.”<sup>92</sup>

The dissent labeled the majority's definition of coercion as the “deeper flaw” of the *Lee* opinion.<sup>93</sup> In its view, the adoption of “peer pressure” as sufficient coercion fails to meet “[t]he coercion that was a hallmark of historical establishments of religion.”<sup>94</sup> Traditionally, coercion was identified with a more repressive definition: “[B]y force of law and threat of penalty.”<sup>95</sup> According to the dissent, coercion needed to be stronger than the unpleasantness of peer-pressure.<sup>96</sup> Comparing the *Lee* facts

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87. *Id.* at 644.

88. *Id.* at 638.

89. *Id.* at 639.

90. *See, e.g.,* *Newdow v. U.S. Cong.*, 292 F.3d 597, 606–07, 609 (9th Cir. 2002).

91. *Lee*, 505 U.S. at 639 (Scalia, J., dissenting).

92. *Id.*

93. *Id.* at 640.

94. *Id.*

95. *Id.* Black's Law Dictionary defines coercion as: “Compulsion by physical force or threat of physical force.” BLACK'S LAW DICTIONARY (8th ed. 2004).

96. *See Lee*, 505 U.S. at 640–41.

with those of *Barnette*, the dissent noted that the students in *Barnette* were faced with expulsion, institutional confinement, and prosecution of the students' parents.<sup>97</sup> The dissent stated that it was thus an "extravagant claim" to assert that the state coerced the students in *Lee*.<sup>98</sup>

In a closing statement equally applicable to the Pledge of Allegiance, Justice Scalia noted the voluntary nature of the exercises in *Lee*, much like the recitation of the Pledge: "To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law."<sup>99</sup>

Before *Elk Grove v. Newdow*, the Court last had an opportunity to consider the Pledge's constitutionality in 1993, but it denied certiorari.<sup>100</sup> In 1992, the United States Court of Appeals for the Seventh Circuit held that a school district's policy of conducting a voluntary recitation of the Pledge of Allegiance, including the words "under God," was constitutional.<sup>101</sup> Thus, by the time *Elk Grove* reached the Supreme Court, it had been more than a decade since a federal appellate court had addressed the constitutionality of the Pledge of Allegiance.

### C. *The Michael Newdow Crusade*

The Elk Grove Unified School District had a policy that required each of its elementary school classes to have a daily recitation of the Pledge of Allegiance.<sup>102</sup> Participation in the Pledge exercise was voluntary, based on the district's Pledge policy, and schools did not punish students for declining to pledge their allegiance to the flag.<sup>103</sup>

Michael Newdow, an atheist minister, had a daughter who

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97. *Id.* at 642.

98. *Id.*

99. *Id.* at 646.

100. *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993).

101. *Id.* at 448. This case proved to be sufficiently persuasive to the district court judge who upheld the Pledge in Newdow's 2000 challenge. *Newdow v. Cong.*, 2000 WL 35505916, at \*1 (E.D. Cal. 2000).

102. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 7–8 (2004).

103. *See id.*

attended a school within the Elk Grove District boundaries.<sup>104</sup> His daughter participated in the Pledge recitation at school—a practice that Newdow called a religious indoctrination of his child.<sup>105</sup> Newdow, representing himself in court, brought suit alleging that he had standing to do so on his own behalf and on behalf of his daughter as next friend.<sup>106</sup> Newdow claimed that the Pledge of Allegiance was inherently unconstitutional because of the words “under God” in the Pledge’s text.<sup>107</sup> He also argued that the district’s policy violated the Establishment and Free Exercise Clauses of the First Amendment to the Constitution.<sup>108</sup> The magistrate judge who heard the case determined that the Pledge does not violate the Religion Clauses and is therefore constitutional.<sup>109</sup> The District Court agreed with the magistrate judge and dismissed Newdow’s complaint.<sup>110</sup> Newdow appealed to the United States Ninth Circuit Court of Appeals, which reversed the decision of the lower court, issuing three separate opinions in the single appeal.<sup>111</sup>

### 1. Newdow I

The first of the three *Newdow* decisions handed down by the Ninth Circuit came on June 26, 2002.<sup>112</sup> The court held that Newdow had standing<sup>113</sup> and reversed the decision of the trial court on the case’s merits.<sup>114</sup> In its opinion, the court applied the *Lemon* test to the Pledge of Allegiance and the Elk

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104. Complaint at 14, 19, *Newdow v. Cong.*, 2000 WL 35505916 (E.D. Cal. 2000) (No. CIV. S-00-0495MLSPANPS).

105. *Id.* at 20, 22.

106. *Id.* at 3, 26. Black’s Law Dictionary defines a “next friend” as “[a] person who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but who is not a party to the lawsuit and is not appointed as a guardian.” BLACK’S LAW DICTIONARY (8th ed. 2004).

107. *See id.* at 34.

108. *Id.* at 24–25.

109. *Newdow v. Cong.*, No. CIVS-00-0495MLSPANPS, 2000 WL 35505916, at \*1 (E.D. Cal. July 21, 2000).

110. *Id.*

111. *Newdow v. U.S. Cong.*, 292 F.3d 597 (9th Cir. 2002); *Newdow v. U.S. Cong.*, 313 F.3d 500 (9th Cir. 2002); *Newdow v. U.S. Cong.*, 328 F.3d 466 (9th Cir. 2003).

112. *Newdow*, 292 F.3d 597. Newdow also joined President Clinton; the state of California; Elk Grove Unified School District; David W. Gordon, Superintendent EGUSD; Sacramento City Unified School District; and Jim Sweeney, Superintendent SCUSD to the action. *Id.*

113. *Id.* at 605.

114. *Id.* at 612.



Grove policy, concluding that both inherently violated the Establishment Clause of the First Amendment and are thus unconstitutional.<sup>115</sup>

Judge Fernandez dissented, stating that “Congress has not compelled anyone to do anything”<sup>116</sup> and arguing that the Religion Clauses “were not designed to drive religious expression out of public thought.”<sup>117</sup> He also observed that the religious substance of the “under God” addition to the Pledge was so small that it is *de minimis*, or so minimal that the law does not take it into consideration.<sup>118</sup>

## 2. *Newdow II*

In response to *Newdow I*, Sandra Banning, the mother of *Newdow*’s daughter, filed a motion to intervene.<sup>119</sup> Although Banning and *Newdow* shared physical custody of their daughter, Banning had sole legal custody of the child, which included the exclusive right to represent the child’s legal and educational interests.<sup>120</sup> She argued that her daughter did not have any objections to saying or hearing the Pledge of Allegiance, and that it was in the child’s best interest not to be a party to the suit.<sup>121</sup>

On December 4, 2002, the Ninth Circuit handed down its second opinion in the *Newdow* suit.<sup>122</sup> After the court’s initial June decision, the case received considerable national attention. For example, the United States Senate tried to intervene as a party after the June decision, but was deemed to lack standing to do so by the Ninth Circuit.<sup>123</sup>

More importantly, however, the court denied Sandra Banning’s motion to intervene or, in the alternative, to dismiss.<sup>124</sup> The court held that the mother’s sole legal custody did not deprive *Newdow* of Article III standing to bring the suit

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115. *Id.* at 611, 612.

116. *Id.* at 612 (Fernandez, J., concurring and dissenting).

117. *Id.* at 613.

118. *Id.*

119. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 9 (2004).

120. *Id.*

121. *Id.* at 9–10.

122. *Newdow v. U.S. Cong.*, 313 F.3d 500 (9th Cir. 2002).

123. *Newdow v. U.S. Cong.*, 313 F.3d 495, 499 (9th Cir. 2002).

124. *Newdow*, 313 F.3d 500, 505.

on behalf of his daughter in federal court.<sup>125</sup> On the merits of the case, the court held that when a school teacher leads students in reciting the Pledge, a message is sent that the state endorses “not just religion generally, but a monotheistic religion organized ‘under God.’”<sup>126</sup>

### 3. Newdow III

The Ninth Circuit handed down its third and final opinion on February 28, 2003.<sup>127</sup> The court amended its earlier opinion, omitting the discussion of Newdow’s standing to challenge 4 U.S.C. § 4, and then considered the defendants’ motion for an en banc review.<sup>128</sup> While the court denied a motion for an en banc review, nine judges dissented at least in part to the denial for en banc review.<sup>129</sup>

### 4. *Man on a “mission”*

Besides his challenges to the phrase “under God” in the Pledge of Allegiance, Newdow has filed suits to strike the national motto,<sup>130</sup> enjoin the practice of praying at presidential inaugurations,<sup>131</sup> and to eliminate the congressional

125. *Id.* at 505. In response to Banning’s motion, Newdow filed a motion for Rule 11 sanctions against her lawyer, which the court also denied. *Id.*

126. *Id.*

127. *Newdow v. U.S. Cong.*, 328 F.3d 466 (9th Cir. 2003).

128. *Id.* at 468–69.

129. *Id.* at 471–93.

130. A challenge to “In God We Trust” was filed in the U.S. District Court for the Eastern District of California on November 18, 2005. The court dismissed the action on June 12, 2006. *Newdow v. Congress*, 435 F.Supp.2d 1066 (E.D.Cal. 2006). *sub nom.* *Newdow v. LeFevre*, No. 06-16344 (9th Cir. argued Dec. 4, 2007). The Ninth Circuit heard oral arguments in this appeal on the same day that it heard oral arguments in the Pledge of Allegiance case.

131. On February 1, 2001, Newdow filed a lawsuit to enjoin the practice of praying at presidential inaugurations after two Christian clergymen offered prayers at George W. Bush’s inauguration on January 20, 2001. The trial court ruled that this did not violate the Constitution and Newdow appealed. The Ninth Circuit Court of Appeals held that Newdow did not have standing to bring the suit. *See also* Mike Newdow’s Past Litigation Page, [http://www.restorethepledge.com/live/past\\_litigation](http://www.restorethepledge.com/live/past_litigation) (last visited Mar. 30, 2008) [hereinafter *Litigation*]; *see Newdow v. Bush*, 2004 WL 334438 (9th Cir. 2004). Then, on December 17, 2004, Newdow filed another lawsuit to enjoin President Bush’s Presidential Inaugural Committee from having chaplains provide prayers at Bush’s second inauguration. *Litigation, supra*; *see Newdow v. Bush*, 355 F.Supp.2d 265 (D.D.C. 2005). A motion for a preliminary injunction was denied on January 14, 2005, and the Court of Appeals affirmed that denial on January 16. *Litigation, supra*; *Newdow*, 355 F. Supp. 2d 265; *Newdow v. Bush*, 2005 WL 89011 (D.C. Cir. 2005). According to Michael Newdow’s Web site, the United States Supreme Court denied

chaplain.<sup>132</sup> He is currently shopping for the “proper’ plaintiff” to bring suit on these issues again.<sup>133</sup>

#### D. Elk Grove v. Newdow

The United States Supreme Court granted writ of certiorari to Elk Grove Unified School District on October 14, 2003<sup>134</sup> and heard oral arguments on March 24, 2004.<sup>135</sup> The Court issued its decision on June 14, 2004, in an opinion written by Justice Stevens.<sup>136</sup> The Court held that because California law deprives Newdow of the right to sue as next friend, he did not have Article III standing to challenge the school district’s Pledge of Allegiance policy in federal court.<sup>137</sup> To have standing in federal court, Newdow must have demonstrated that (1) the Pledge of Allegiance policy caused him actual injury and (2) that his interests he sought to be protected were meant to be regulated by the constitutional guarantee in question.

Newdow failed the first prong of the standing requirement because he did not suffer an actual injury and was ineligible to represent his daughter as next friend.<sup>138</sup> Since Newdow did not have custody of his daughter, he could not bring a lawsuit on her behalf without her mother’s permission.<sup>139</sup> Since Newdow lacked standing to bring the suit in federal court, the question of whether the Pledge of Allegiance violates the Religion Clauses of the First Amendment was a moot point.

The late Chief Justice Rehnquist, Justice Thomas, and former Justice O’Connor issued separate opinions in which they addressed the constitutional question raised by the case.

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certiorari on January 19, one day prior to Bush’s 2005 inauguration. Following the inauguration, final judgment was rendered on Newdow’s suit by a federal district court. He was denied relief on the basis that he lacked standing to bring the suit and that the point at issue was moot. *See Litigation, supra*.

132. Newdow filed a lawsuit to discontinue the use of congressional chaplains in August, 2002, but the District Court for the District of Columbia held that Newdow lacked standing to bring the suit. *See Litigation, supra* note 131; *see also* Newdow v. Eagen, 309 F.Supp.2d 29 (D.D.C. 2004).

133. *See Litigation, supra* note 131 (seeking a “proper’ plaintiff” to challenge the use of congressional chaplains).

134. Elk Grove Unified Sch. Dist. v. Newdow, 540 U.S. 945 (2003).

135. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

136. *Id.*

137. *Id.* at 17-18.

138. *Id.*

139. *Id.*

In what were labeled as concurring opinions, the three justices dissented to the Court's conclusion that Newdow lacked prudential standing to bring the suit on behalf of his daughter, but concurred in the judgment of the Court based on the merits of the case through an analysis of the constitutional question.<sup>140</sup>

### *1. Chief Justice Rehnquist's concurrence*

With his semi-accusatory opening, Chief Justice Rehnquist called the Court's reasoning for dismissal "a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim."<sup>141</sup> The Chief Justice stated that he dissented from the opinion that Newdow lacked standing to sue, but concurred in the judgment based on the merits of the constitutional claim.<sup>142</sup> He stated that the school district's Pledge policy, which "require[d] teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words 'under God,' does not violate the Establishment Clause of the First Amendment."<sup>143</sup>

The Chief Justice took a more historical approach than the other concurring justices, stressing that the Pledge and its "under God" language represents a well-established patriotic exercise with roots in the nation's founding, not a religious exercise analogous to the prayer in *Lee*.<sup>144</sup> He cited historical authority consisting of examples of "patriotic invocations of God and official acknowledgements of religion's role in our Nation's history."<sup>145</sup> Some of the examples given by Chief Justice Rehnquist included George Washington's first inauguration, Washington's "day of public thanksgiving and prayer" proclamation, Abraham Lincoln's Gettysburg Address and second inaugural address, Woodrow Wilson's request to Congress for a declaration of war against Germany in World War I, Franklin Delano Roosevelt's first inaugural address, and Dwight D. Eisenhower's admonition to soldiers during World

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140. *Id.* at 18 (Rehnquist, C.J., concurring); *id.* at 33 (O'Connor, J., concurring); *id.* at 45 (Thomas, J., concurring).

141. *Id.* at 18 (Rehnquist, C. J., concurring).

142. *Id.*

143. *Id.*

144. *Id.* at 26, 31.

145. *Id.* at 26.

War II.<sup>146</sup>

Chief Justice Rehnquist also recognized the long tradition of this acknowledgement by pointing to many common civic declarations that have a similar reference to God. These included the national motto, “In God We Trust;”<sup>147</sup> a phrase in the national anthem, “In God is our trust;”<sup>148</sup> and the opening proclamation by the Marshal of the Supreme Court, “God save the United States and this honorable Court.”<sup>149</sup>

“The phrase ‘under God’ [in the Pledge] is in no sense a prayer, nor an endorsement of any religion,” the Chief Justice recognized.<sup>150</sup> As such, he argued that the facts in the *Elk Grove* case are sufficiently different from *Lee* as to make *Lee* inapplicable because the Pledge is neither an explicit religious exercise nor a formal religious exercise.<sup>151</sup> The Pledge, he stated, is a patriotic observance and an oath to the Nation and “not to any particular God, faith, or church.”<sup>152</sup> Additionally, he noted that students may abstain from pledging their allegiance and are thus not coerced to do so by the government.<sup>153</sup> To allow Michael Newdow or any other person to use a “heckler’s veto” against such a voluntary patriotic exercise is, the Chief Justice reasoned, “an unwarranted extension of the Establishment Clause.”<sup>154</sup>

## 2. Justice O’Connor’s concurrence

Justice O’Connor likewise concluded that the school district’s Pledge of Allegiance policy “does not offend the Establishment Clause.”<sup>155</sup> Her opinion focused less on the historical argument and more on a principle-based argument in favor of the Pledge’s constitutionality.<sup>156</sup>

Her main premise was that the Establishment Clause

146. *Id.* at 26–29.

147. 36 U.S.C. § 301 (2000).

148. FRANCIS SCOTT KEY, *The Star-Spangled Banner* (1814). Line six of the fourth verse of the Star-Spangled Banner includes the phrase, “In God is our Trust.” *Id.* See also 36 U.S.C. § 302 (2000).

149. *Elk Grove*, 542 U.S. at 29–30.

150. *Id.* at 31.

151. *Id.*

152. *Id.*

153. *Id.* at 31 n.4.

154. *Id.* at 33.

155. *Id.* at 33 (O’Connor, J., concurring).

156. *Id.*

cannot be reduced to a single test, but that the “different categories of Establishment Clause cases [...] may call for different approaches.”<sup>157</sup> Justice O’Connor suggested that a revised endorsement test is the most appropriate test to apply in cases such as *Elk Grove* that deal with a concept of ceremonial deism contained within the text of the Pledge of Allegiance and other civic observances.<sup>158</sup>

Justice O’Connor explained that there are two principles that must be examined by a court when applying the endorsement test. First, the objective viewpoint of a “reasonable observer” must be considered since a subjective approach to the endorsement analysis would “reduce the test to an absurdity,” yielding unpredictable and arbitrary results.<sup>159</sup> Second, the exercise must be viewed in its proper context and origins so that the reasonable observer would know the history and place of the conduct before applying the test so that the analysis could truly be objective.<sup>160</sup>

Applying this approach to the endorsement test, Justice O’Connor concluded that “[t]he reasonable observer . . . fully aware of our national history and the origins of such practices, would not perceive [the Pledge] as signifying a government endorsement of [religion].”<sup>161</sup> She labeled such references to God as mere references to ceremonial deism.<sup>162</sup>

According to Justice O’Connor, references to ceremonial deism do not offend the Constitution when examined in light of their context, character, and history.<sup>163</sup> She concluded that the reference to God in the Pledge is an example of ceremonial deism, as are the references in the national motto and the national anthem.<sup>164</sup> To determine whether “God” is a reference to a religious belief or merely to ceremonial deism, Justice O’Connor proposed a four-part test: (1) the reference is historical; (2) it is not overly prayerful; (3) it is nonsectarian;

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157. *Id.* (quoting *Bd. of Educ. v. Grumet*, 512 U.S. 687, 720 (1994) (O’Connor, J., concurring)).

158. *Id.* at 33–34.

159. *Id.* at 34–35.

160. *Id.*

161. *Id.* at 36.

162. *Id.* at 37. Before O’Connor’s *Elk Grove* concurrence, Justice Brennan recognized the ceremonial deism argument in his *Lynch v. Donnelly* dissent. 465 U.S. 668, 716 (Brennan, J., dissenting).

163. *Elk Grove*, 542 U.S. at 37 (O’Connor, J., concurring).

164. *Id.*

and (4) it contains only minimal religious content.<sup>165</sup> Through adherence to this formula, Justice O'Connor suggests that a practice that passes muster could not be perceived to endorse religion by the reasonable observer.<sup>166</sup>

Applying this test to the case, she concluded that the Pledge of Allegiance merely contains a reference to ceremonial deism.<sup>167</sup> As such, the phrase "under God" in the Pledge is constitutional; it is allowed under the Establishment Clause because it is not incorporated into any religion's canon, it is not administered by members of the clergy in public schools, it does not meet the Court's definition of prayer, it is a historical reference to the United States as a Nation, and because the reference is an inconsequential two words.<sup>168</sup> She further noted that the brevity of the phrase supports the notion that it is not meant to endorse religion and that it allows for easy opting out by students who do not wish to utter the phrase "under God."<sup>169</sup>

Justice O'Connor also pointed out that although the Pledge has been recited in schools for fifty years since the addition of the "under God" phrase, *Elk Grove* was only the third challenge to its constitutionality in federal court.<sup>170</sup> She discounted the explanation that a timid citizen-base was unwilling to challenge the Pledge on Establishment Clause grounds.<sup>171</sup> She pointed out that, in the interim, Establishment Clause-grounded challenges have been made on a broad range of practices: reading stories about witches and Halloween in school, using *The Learning Tree* in literature classes, providing an explanation of the theory of evolution in a museum, and using an Aztec sculpture in a Mexican culture commemoration, among others.<sup>172</sup>

In summary, Justice O'Connor argued that the Pledge's reference to God is a reference to ceremonial deism, which is an "inevitable consequence of the religious history that gave birth

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165. *Id.* at 37-44.

166. *See id.* at 36-38.

167. *Id.* at 37.

168. *Id.* at 40-43.

169. *Id.* at 43.

170. *Id.* at 38-39.

171. *Id.* at 39.

172. *Id.* at 39.

to our founding principles of liberty.”<sup>173</sup> Nothing less should be expected in the founding of the Nation by “religious refugees” and references to ceremonial deism in patriotic exercises must be examined in that context.<sup>174</sup>

### 3. Justice Thomas’s concurrence

Justice Thomas unequivocally stated his purpose for writing his concurrence: “We granted certiorari in this case to decide whether the . . . Pledge policy violates the Constitution. The answer to that question is: ‘no.’”<sup>175</sup> Justice Thomas immediately attacked the Court’s Establishment Clause jurisprudence, which he described as being in “hopeless disarray.”<sup>176</sup> He specifically attacked the *Lee* decision, stating that “*Lee* adopted an expansive definition of ‘coercion’ that cannot be defended.”<sup>177</sup> He noted, however, that the problem goes beyond *Lee*.<sup>178</sup>

Justice Thomas admitted that “[i]t is difficult to see how [the Pledge] does not entail an affirmation that God exists.”<sup>179</sup> Thus, if the Court followed *Lee* and other Court precedents on point, it would be required to strike down the Pledge of Allegiance as unconstitutional.<sup>180</sup> With the correction of *Lee* and other Establishment Clause jurisprudence, however, Justice Thomas would uphold the Pledge policy because he believes that it is not subject to the Establishment Clause in the first place.<sup>181</sup> The main premise of Justice Thomas’s concurrence is that the Establishment Clause is a federalism provision that cannot be incorporated by the Fourteenth Amendment, and is thus moot in the determination of whether the Pledge policy of the Elk Grove School District violates the Establishment Clause.<sup>182</sup> In fact, Justice Thomas asserted that

173. *Id.* at 44.

174. *Id.* at 35–37.

175. *Id.* at 45 (Thomas, J., concurring).

176. *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring)).

177. *Id.* at 45.

178. *Id.*

179. *Id.* at 48.

180. *Id.* at 46, 49.

181. *Id.* at 46.

182. *Id.* at 45–46. In constitutional law, incorporation denotes a special meaning. Incorporation is the means of applying provisions from the Bill of Rights to the states by way of interpreting the Fourteenth Amendment’s Due Process Clause to encompass



by incorporating the Establishment Clause and applying it to the states, the government would be violating the very thing that the Establishment Clause was meant to protect: freedom from congressional interference with state establishments of religion.<sup>183</sup>

Looking at the text of the Establishment Clause, Justice Thomas stated that the Establishment Clause prevents Congress from establishing a national religion and from interfering with the state establishment of religion.<sup>184</sup> He asserted that nothing in the language of the Constitution suggests that the Clause extends any further than that or that it protects any individual rights from being abridged through state action due to incorporation.<sup>185</sup>

Justice Thomas argued that, unlike the Free Exercise Clause, which protects an individual right, the Establishment Clause does not protect an individual right, but is merely a federalism provision to protect the states from the imposition of the federal government and thus necessarily resists incorporation through the Fourteenth Amendment.<sup>186</sup> Thus, he concluded that the Pledge of Allegiance is constitutional because it does not violate any free exercise rights of individuals.<sup>187</sup>

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those rights. Since its ratification, the Fourteenth Amendment has been used by the Court to incorporate provisions from the First, Fourth, Sixth, and Ninth Amendments. Total incorporation of the Bill of Rights is rarely advocated since the incorporation of certain provisions, such as those contained in the Tenth Amendment, would seem counterproductive to incorporate. More commonly, the Court has taken a "selective incorporation" approach by which only certain provisions of the Bill of Rights are applied to the states through the Fourteenth Amendment's Due Process Clause. *See, e.g., Escobedo v. Illinois*, 378 U.S. 478 (1964) (incorporating Sixth Amendment guarantee of right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating Fourth Amendment protection against unreasonable searches and seizures).

183. *Id.*

184. *Id.* at 50.

185. *Id.* In contrast, the most notable argument in favor of the incorporation of the Establishment Clause comes from Justice Brennan's concurrence in *Schempp*. Justice Brennan argued that an approach similar to Justice Thomas's "underestimates the role of the Establishment Clause as a coguarantor, with the Free Exercise Clause, of religious liberty." *Sch. Dist. v. Schempp*, 374 U.S. 203, 256 (1963) (Brennan, J., concurring). His main premise was that the "Framers did not entrust the liberty of religious beliefs to either clause alone," but that the two Religion Clauses best protect individual religious rights when applied in harmony with each other. *Id.* He continues that "religious liberty . . . would not be viable if the Constitution were interpreted to forbid only establishments ordained by Congress." *Id.* at 258.

186. *Elk Grove*, 542 U.S. at 49 (Thomas, J., concurring).

187. *Id.*

Justice Thomas also argued that *Lee* failed to correctly address the Establishment Clause, but merely perverted the definition of coercion.<sup>188</sup> He stated that coercion, in terms of the Establishment Clause, necessarily calls for actual legal coercion “*by force of law and threat of penalty.*”<sup>189</sup> He agreed that the Establishment Clause bars governmental preferences for particular religious faiths, but reiterates that “[l]egal compulsion is an inherent component of ‘preferences’ in this context.”<sup>190</sup>

In essence, Justice Thomas believed the Pledge of Allegiance does not offend the Constitution because 1) it did not violate the Free Exercise Clause; and 2) the Fourteenth Amendment did not incorporate the Establishment Clause and therefore did not apply. Furthermore, he believed that even if the Establishment Clause did apply, the Pledge of Allegiance is still constitutional because 1) the definition of coercion stated by the Court in *Lee* was incorrect and 2) the Pledge does not constitute coercion in his own coercion test.<sup>191</sup>

#### IV. CONGRESSIONAL RESPONSE

On November 4, 2002, Congress passed S. 2690, which the President signed on November 13, 2002, reaffirming the language of the Pledge of Allegiance with the “under God” phrase included: “In codifying this subsection, . . . the 107th Congress reaffirmed the exact language that has appeared in the Pledge for decades.”<sup>192</sup>

##### *A. Congressional Motive*

Not afraid to be transparent as to its motivation for the resolution, Congress declared that the Ninth Circuit Court of Appeals’ holding and rationale in *Newdow* was “erroneous.”<sup>193</sup>

188. *Id.*

189. *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)).

190. *Id.* at 53.

191. *Id.* at 45, 51–52, 54.

192. 4 U.S.C. § 4 (Supp. 2002) (S. 2690, §1 is comprised of “Findings.” S. 2690 §2 is the actual reaffirmation of the Pledge. The bill has since been passed as Public Law 107-293 and codified in 4 U.S.C. §4. Thus, while these findings probably represent what would be labeled “legislative history,” they are published in the actual code section and are not merely found in supplemental sources of legislative history).

193. *Id.*

Congress criticized the Ninth Circuit's rationale by pointing out that by adhering to its reasoning, "absurd result[s]" would follow.<sup>194</sup> For example, even "teacher-led voluntary recitations of the Constitution itself would be unconstitutional," since the Constitution contains an "express religious reference" by use of the phrase "Year of our Lord" in Article VII.<sup>195</sup>

### *B. Congressional Justification*

In the 2002 amendment to 4 U.S.C. §4, which re-codified the Pledge of Allegiance, Congress added authority to its intent by adding a section entitled "Findings" in support of the Pledge's use of the phrase "under God."<sup>196</sup> Traveling across an American heritage timeline of sorts, Congress expressed to the courts and to the American public its resolve to secure the Pledge of Allegiance in its present form.

Congress began by describing the Mayflower Compact, which declared, "Having undertaken, for the Glory of God and the advancement of the Christian Faith and honor of our King and country, a voyage to plant the first colony in the northern parts of Virginia."<sup>197</sup>

Congress next appealed to the founding of the Nation by quoting the Declaration of Independence: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."<sup>198</sup> Then, through a nostalgic look at notable Founders, Congress related quotes by Thomas Jefferson, "God who gave us life gave us liberty,"<sup>199</sup> and George Washington, "Let us raise a standard to which the wise and the honest can repair; the event is in the hand of God!"<sup>200</sup>

In a clear jab at the Court's rocky Establishment jurisprudence, Congress added another tidbit of American history trivia:

On July 21, 1789, on the same day that it approved the

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194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* (quoting THE MAYFLOWER COMPACT (1620)).

198. *Id.* (quoting THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776)).

199. *Id.* (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1781)).

200. *Id.* (quoting George Washington, President of the Constitutional Convention, Before the Constitutional Convention Delegates (May 14, 1787)).

Establishment Clause concerning religion, the First Congress of the United States also passed the Northwest Ordinance, providing for a territorial government for lands northwest of the Ohio River, which declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."<sup>201</sup>

Congress then appealed to the same authority that Reverend Docherty did in his sermon: George Washington's proclamation for "a day of public thanksgiving and prayer," and Abraham Lincoln's Gettysburg Address, which included the phrase "under God."<sup>202</sup> Again showing the American public that this amendment was a direct congressional response to the federal courts' current Pledge jurisprudence, Congress cited Supreme Court case law as further justification for its measure.<sup>203</sup> Citing the 1952 *Zorach v. Clauson* decision, Congress quoted Justice William Douglas who wrote for the Court:

The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other. That is the common sense of the matter. Otherwise the State and religion would be aliens to each other—hostile, suspicious, and even unfriendly. . . . A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."<sup>204</sup>

Congress lastly reminded the courts and the American people of its own precedent by noting the 1954 amendment to the Pledge passed by Congress and signed by President Eisenhower, the 1956 congressional proclamation of the national motto of the United States as "In God We Trust," and other examples of "reference to our religious heritage" as noted by former Chief Justice Burger.<sup>205</sup>

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201. *Id.* (quoting NORTHWEST ORDINANCE, art. III (U.S. 1787)).

202. *Id.* ("[T]hat this Nation, *under God*, shall have a new birth of freedom -- and that Government of the people, by the people, for the people, shall not perish from the earth." (quoting Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (emphasis added))).

203. *Id.*

204. *Id.* (quoting *Zorach v. Clauson*, 343 U.S. 306, 312–13 (1952)).

205. *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984)).

Congress's findings added authority to the Pledge's existing wording and signaled Congress's intent to maintain it, even in the face of *Elk Grove v. Newdow*.

## V. POST-*ELK GROVE* LITIGATION

Although the Supreme Court handed down its opinion in *Elk Grove v. Newdow* just four years ago, much has happened with respect to the Pledge of Allegiance and its struggle for survival in today's public schools. By the looks of it, the final determinative ruling on the Pledge of Allegiance is just on the horizon.

### A. *Newdow v. Congress*

Undeterred by the Supreme Court's 2004 decision, Michael Newdow initiated yet another challenge to the Pledge in the U.S. District Court for the Eastern District of California on January 3, 2005.<sup>206</sup> This time around, Newdow filed suit as a co-plaintiff with two other sets of parents and their minor children, whom he represented as counsel.<sup>207</sup> While Newdow still lacked standing, the court held that the other parents had standing to challenge the school district policy.<sup>208</sup> The district court, which issued its decision on September 14, 2007, held that *Newdow III* was binding precedent and enjoined the school district from enforcing its Pledge policy, but stayed the ruling pending its appeal to the Ninth Circuit Court of Appeals.<sup>209</sup> The Ninth Circuit heard oral arguments in the case on Tuesday, December 4, 2007.<sup>210</sup>

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206. Complaint, *Newdow v. Cong.*, 383 F. Supp.2d 1229 (E.D. Cal. 2005) (No. Civ. S-05-17LKK/DAD).

207. *Newdow*, 383 F. Supp.2d at 1231–32. The additional plaintiffs are identified as Jan Doe, Pat Doe, and Jan Roe (parents), and Doe Child, Roechild-1, and Roechild-2 (minor children). *Id.* at 1231 n.1.

208. *Id.* at 1237.

209. *Newdow v. Cong.*, No. Civ.S0517LKKDAD, 2005 WL 3144086, at \*1 \*2 (E.D. Cal. Nov. 18, 2005).

210. Audio of Oral Arguments, *Newdow v. Rio Linda*, No. 05-17257 (9th Cir. argued Dec. 4, 2007), available at [http://www.ca9.uscourts.gov/ca9/media.nsf/24E980CBAF33C47A882573A700796173/\\$file/05-17257.wma](http://www.ca9.uscourts.gov/ca9/media.nsf/24E980CBAF33C47A882573A700796173/$file/05-17257.wma). The Ninth Circuit's three-judge panel that heard Newdow's latest Pledge challenge consisted of Judges Steven Reinhardt, Dorothy Nelson, and Carlos Bea. *Id.* While Nelson and Bea are new to the Pledge debate, Reinhardt was part of the 2-1 majority that declared the Pledge unconstitutional. If oral arguments are indicative, Reinhardt is still unwavering in his position. For example, when, in response to Judge Bea's question, Reinhardt suggested

If precedent is any indication, it is likely that the Ninth Circuit will affirm the district court's order. Whatever the Ninth Circuit's decision, however, it is likely that an appeal will be taken by the losing party. If that is the case, the Supreme Court could hear the case as early as late 2008 and could render a decision on the issue sometime in early-to-mid 2009. Although this timetable is merely speculative, it represents the immediacy of the Court's likely need to address this issue on its merits. With such a potential landmark case on the near horizon, a justice-specific speculation on the Court's leaning based on previous jurisprudence becomes particularly pertinent. In addition, however, the political pressures facing the justices is a factor that cannot be brushed aside and ignored based on an ideological hope of indifference.

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to Newdow that an inherent stigma is sufficient injury for a student who leaves the classroom during the Pledge. Bea jokingly labeled the timely assistance as "a lifeline." Judge Bea, on the other hand, reminded Newdow that of the Supreme Court justices who have discussed the constitutionality of "under God" in the Pledge, all fourteen have sided with the Pledge (noting that in *Allegheny*, the Court even used the Pledge as a permissible constitutional benchmark). Notwithstanding, Nelson asked if removing "God" from the Pledge would make it any less patriotic. *Id.*

The appellants split their time between three parties, but the government began by unequivocally declaring, "The voluntary recitation of the Pledge of Allegiance in public schools does not violate the Establishment Clause." Thereafter, the appellants essentially argued (1) the district court erred by relying on the vacated *Newdow III* decision, (2) the Pledge is not "akin" to the prayer in *Lee*, (3) the Pledge is a legitimate element of the school curriculum that teaches tolerance for those who choose not to participate, and (4) the reference to God is not a religious affirmation, but a reference to the "philosopher's God" or ceremonial deism, which is a Brennan and O'Connor-like idea of ceremonial deism. *Id.*

Michael Newdow contended that the Pledge has religious significance, characterizing the case as not being between believers and nonbelievers, but instead between one group that believes in treating people equally and one group that believes in treating people unequally. He plead to the court, "I hope this Court will go for equality." In the context of this Comment, an exchange between Newdow and the panel regarding the Supreme Court's likely disposition is particularly ironic. The panel advised Newdow, "If I were you, I wouldn't try to count up the votes." Notwithstanding, Newdow contended, "I think there's definitely four votes there and I'm not sure there aren't many more. We haven't heard from a couple of the justices." The four votes Newdow is likely referring to are those of Justices Stevens, Breyer, Souter, and Ginsburg. *Id.*

Regardless of the Ninth Circuit's released opinion, it is likely that both sides would appeal an unfavorable decision. That being said, Judge Reinhardt's light-hearted remark in Newdow's other oral argument on the same day and before the same court (the national motto case) has a ring of truth to it: "I think if we agreed with Mr. Newdow, you'd have a good chance [of finding out what the Supreme Court would do in this case]. If we agree with [the government], the Supreme Court might not take it." Audio of Oral Arguments, *Newdow v. LeFevre*, No. 06-16344 (9th Cir. argued Dec. 4, 2007); see *supra* note 130.

*B. Congressional Reaction—Again*

Congress has never been shy about its endorsement of the Pledge of Allegiance. For example, as mentioned in Section IV, in an express response to the Ninth Circuit Court of Appeals' decision in *Newdow v. Congress*, the United States House of Representatives considered Senate bill S. 2690 titled, *An Act to Reaffirm the Reference to One Nation Under God in Pledge of Allegiance*.<sup>211</sup> The bill passed the House by an overwhelming margin of 401-5 and unanimously passed the Senate 99-0.<sup>212</sup> With the passage of this bill, Congress announced unequivocally that a reverence for the Pledge of Allegiance, as presently constituted, still exists in the United States.

It should come of little surprise then that on May 17, 2005, just four months after *Newdow* filed his latest Pledge lawsuit, House Bill 2389 was introduced in the House of Representatives.<sup>213</sup> H.R. 2389 would amend title 28 of the United States Code to restrict the jurisdiction of federal courts to hear certain cases and controversies involving the Pledge of Allegiance.<sup>214</sup> The bill's sponsor, Representative W. Todd Akin, a Republic Congressman from Missouri, presented the bill with its 197 co-sponsors as the *Pledge Protection Act*.<sup>215</sup>

The jurisdictional limitation would not apply to the Superior Court of the District of Columbia or the District of Columbia Court of Appeals, however.<sup>216</sup> The bill, as voted on by the House of Representatives, included the following addition: "This Act and the amendments made by this Act take

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211. An Act to Reaffirm the Reference to One Nation Under God in Pledge of Allegiance, S. 2690, 107th Cong. (2002); see 4 U.S.C. §4 (Supp. 2002) (cited reaffirmation in amendment by Pub. L. No. 107-293, (Nov. 13, 2002)).

212. GovTrack.us, S. 2690 [107th]; Pledge of Allegiance Bill, <http://www.govtrack.us/congress/bill.xpd?bill=s107-2690> (last visited Mar. 24, 2008).

213. GovTrack.us, H.R. 2389 [109th]; Pledge Protection Act of 2005, <http://www.govtrack.us/congress/bill.xpd?bill=h109-2389> (last visited Mar. 24, 2008).

214. Pledge Protection Act of 2005, H.R. 2389, 109th Cong. § 2 (2006). The bill was passed by the House on July 19, 2006, but stalled in the Senate Committee on the Judiciary. GovTrack.us, *supra* note 213. The bill would have amended chapter 99 of title 28 of the United States Code by adding Section 1632 which reads in part as follows: "(a) Except as provided in subsection (b), no 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." H.R. 2389.

215. GovTrack.us, *supra* note 213.

216. H.R. 2389.

effect on the date of the enactment of this Act and apply to any case that (1) is pending on such date of enactment; or (2) is commenced on or after such date of enactment.”<sup>217</sup> H.R. 2389 passed the House of Representatives on July 19, 2006, by a vote of 260-167—a passage rate of more than sixty percent.<sup>218</sup> The bill was received by the Senate on August 4, 2006 and was referred to the Senate Committee on the Judiciary.<sup>219</sup> Although the bill died when the 110th Congress convened, Representative W. Todd Akin re-introduced it as H.R. 699 in 2007.<sup>220</sup> Congress has not taken any further action on this bill, however.<sup>221</sup> If Congress passes such a bill and it is signed into law, it could squelch any future challenges to the Pledge.

Given the sharp partisan divide on the topic,<sup>222</sup> it is unlikely that a Democrat-controlled Congress will pass the Pledge Protection Act. Therefore, this battle will likely play itself out in the proper forum—the Supreme Court of the United States. Since the Court will likely have to settle the Pledge’s constitutionality at some point, it is important to examine how the sitting justices would likely vote. With the departure of two longtime justices since the *Elk Grove* decision (the late Chief Justice Rehnquist and the retired Justice O’Connor), such an analysis becomes particularly paramount for the Court’s newcomers.

## VI. THE COURT’S CURRENT DISPOSITION

To most accurately hypothesize how the current Court would rule when the issue of the Pledge of Allegiance again presents itself, an examination into prior opinions written by the sitting justices provides the most predictable and trustworthy results. For most of the justices, a glance through the Supreme Court Reporter leaves a predictive record of how a particular justice would rule. But for the new justices, Justice Alito and Chief Justice Roberts, a more expansive view is

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217. *Id.*

218. GovTrack.us, *supra* note 213.

219. *Id.*

220. GovTrack.us, H.R. 699: Pledge Protection Act of 2007, <http://www.govtrack.us/congress/bill.xpd?bill=h110-699> (last visited Mar. 24, 2008).

221. *Id.*

222. For example, ninety-six percent of House Republicans supported H.R. 2389, while eighty-one percent of Democrats opposed it. *Id.*



necessary to predict their disposition on the Pledge of Allegiance.

### A. Elk Grove *Insights and Justice Thomas*

As discussed above, the various *Elk Grove* opinions shed considerable light on the disposition of the Court members. Justice Clarence Thomas, for example, issued a determinative “no” to the question of whether the Pledge violates the Constitution in his concurring opinion.<sup>223</sup> While Justice Thomas might not join an opinion deeming the Pledge constitutionally-sound under current Court jurisprudence, he would likely concur in such a judgment and issue a separate opinion outlining an argument similar to his *Elk Grove* incorporation argument, discussed in III.D.3., *supra*. He might even call for overruling decisions such as *Lee* and *Lemon*.

The late Chief Justice William Rehnquist delivered an opinion similar to Justice Thomas’s, declaring that the Pledge of Allegiance is not a violation of the Establishment Clause.<sup>224</sup> Whether his replacement, Chief Justice John Roberts, would rule likewise is an issue taken up below.

### B. Chief Justice Roberts

The new Chief Justice is likely to follow his predecessor, Chief Justice Rehnquist. It was not surprising that the new Chief Justice declined to state specifically how he would rule on a Pledge of Allegiance case during his Senate confirmation hearing,<sup>225</sup> but he did venture out further than he did on other possible issues to come before the Court. Chief Justice Roberts acknowledged that the Court has not been entirely consistent in its interpretation of the Religion Clauses of the First Amendment: “That is an area in which I think the Court can redouble its efforts to try to come to some consistency in its approach.”<sup>226</sup>

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223. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring).

224. *Id.* at 18 (Rehnquist, C.J., concurring).

225. *See Confirmation Hearing on the Nomination of John Roberts to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 358 (2005) (statement of Judge John Roberts, Nominee to be Chief Justice of the United States Supreme Court), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_senate\\_hearings&docid=f:23539.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:23539.pdf).

226. *Id.*; see also Kelly St. John, *Pledge Again Ruled Unconstitutional*, SAN

Even more indicative of his views on this issue are two briefs Justice Roberts wrote as Deputy Solicitor General of the United States: an amicus brief in *Lee* and a brief on the merits in *Board of Education v. Mergens*. In both briefs, the Chief Justice urged the Court to overrule *Lemon*, a move that would indicate an abrupt change in the Supreme Court's Establishment Clause jurisprudence.

In the *Mergens* brief, for example, Justice Roberts argued that the "*Lemon* test has generated results that often obfuscate as much as they illuminate proper action under the Establishment Clause."<sup>227</sup> He then explained the impact of this confusion, asserting that the *Lemon* test "is divorced from the context in which it was spawned" and now actually prohibits "practices and traditions with ancient roots in the history and experience of the American people."<sup>228</sup> Certainly the Pledge of Allegiance could fall within this definition.

In the *Lee v. Weisman* brief, Justice Roberts argued that the rabbi-given prayer at a public secondary school graduation did not violate the Establishment Clause because it did not "establish any religion nor coerce nonadherents to participate in any religion or religious exercise against their will."<sup>229</sup> He suggested that the Religion Clauses demand a "single, careful inquiry into whether the practice at issue provides direct benefits to religion in a manner that threatens the establishment of an official church or compels persons to participate in a religion or religious exercise contrary to their consciences."<sup>230</sup> The Pledge of Allegiance, with its nondenominational reference to God, would also pass such a test.

### C. Justice Alito

New Associate Justice Samuel Alito is not what one would call a wild card. Justice Alito would likely follow his predecessor's lead on the issue of the Pledge of Allegiance's

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FRANCISCO CHRON., Sept. 15, 2005, at A1.

227. Appellate Brief for the United States at 43, *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (No. 88-1597).

228. *Id.*

229. Amicus Curiae Brief for the United States at 13, *Lee v. Weisman*, 505 U.S. 577 (1992) (No. 90-1014).

230. *Id.* at 23-24.

constitutionality. Nicknamed “Scalito”<sup>231</sup> by opponents during his 2005 Senate confirmation hearing, Justice Alito is likely to be even more opposed to a constitutional ban on the Pledge of Allegiance than even Justice O’Connor.

In a dissent he joined in *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Board of Education*,<sup>232</sup> Justice Alito showed his willingness to distinguish *Lee* as a “highly fact-sensitive” decision that does not prescribe any “broad constitutional principle[s] which ban[] prayer at all high school graduation ceremonies, regardless of the manner in which the decision to include prayer is made or implemented.”<sup>233</sup> The main premise of the dissent was that the Establishment Clause could not prohibit speech allowed by the Free Exercise Clause since the prayer in question was student-led speech.<sup>234</sup>

Justice Alito also showed his willingness to support even non-student-led religious speech on school premises in *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District*.<sup>235</sup> Writing for the majority, Justice Alito advocated a much higher threshold of coercion than required by the Supreme Court in *Lee*.<sup>236</sup> He held that a religious group was permitted to distribute materials on campus as long as the students were not compelled to listen to the speech,<sup>237</sup> which the Court demonstrated in *Lee* and *Santa Fe Independent School District v. Doe* is nothing more than a subjective measure of peer pressure felt by various groups of students.<sup>238</sup>

As the Pledge of Allegiance policies currently being litigated all involve non-compulsory teacher-led and student-led speech, it is highly probable that Justice Alito will support a non-compulsory Pledge of Allegiance policy that includes the phrase “under God.”

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231. Cragg Hines, ‘Scalito!’ Nothing is ‘Lite’ About Bush’s Newest Pick, HOUSTON CHRON., Nov. 1, 2005, at B9.

232. 84 F.3d 1471 (3d Cir. 1996).

233. *Id.* at 1490 (Mansmann, C.J., dissenting).

234. *Id.* at 1489.

235. 386 F.3d 514 (3d Cir. 2004).

236. *Id.* at 535.

237. *Id.*

238. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311–12 (2000); *Lee v. Weisman*, 505 U.S. 577, 597–98 (1992).

*D. Justice Scalia*

Although Justice Scalia recused himself in *Elk Grove*,<sup>239</sup> the very reason for his recusal was his reported criticism of the Ninth Circuit's decision in *Newdow*, asserting that "[t]he [E]stablishment [C]ause was once well understood not to exclude God from the public forum and political life."<sup>240</sup> This criticism of the *Newdow* decision, and his long-time criticisms of *Lemon* and other Establishment Clause jurisprudence, suggests that he would very likely uphold the constitutionality of the Pledge of Allegiance.

Little doubt can exist that Justice Scalia would turn the Court's Establishment Clause jurisprudence on its head if given the chance. In *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, the Court ruled that a county courthouse could not display the Ten Commandments.<sup>241</sup> In his dissent, Justice Scalia argued that the "Court's oft repeated assertion that the government cannot favor religious practice is false."<sup>242</sup> Assuming he takes part in a future pledge case, it is quite certain that Justice Scalia will side with the Pledge of Allegiance as a constitutionally valid exercise.

*E. Justices Stevens, Breyer, Souter, and Ginsburg*

Justices Stevens, Souter, Breyer, and Ginsburg would all probably rule against the Pledge of Allegiance. Commonly considered as the Court's most liberal justices,<sup>243</sup> these four have maintained their solidarity when it comes to Establishment Clause jurisprudence. In every published Supreme Court opinion involving the Establishment Clause in the past three years, Justices Stevens, Souter, Breyer, and Ginsburg have each maintained a consistent track record of

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239. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 18 (2004).

240. Pamela Gould, *Religious Freedom Praised*, FREE LANCE-STAR, Jan. 13, 2003, available at <http://fredericksburg.com/News/FLS/911/2003/012003/01132003/846367>. Justice Scalia offered his criticism of the Ninth Circuit's *Newdow* decision at a Religious Freedom Day observance in Fredericksburg, Virginia. *Id.*

241. 545 U.S. 844, 850–51, 881 (2005).

242. *Id.* at 885 (Scalia, J., dissenting).

243. See, e.g., David T. Canon, *Renewing the Voting Rights Act: Retrogression, Influence, and the "Georgia v. Ashcroft Fix,"* 7 ELECTION L.J. 3, 6 (2008); Stephen E. Gottlieb, *What Federalism & Why? Science Versus Doctrine*, 35 PEPP. L. REV. 47, 58 n.33 (2007).

expanding the Establishment Clause's prohibitive reach. During oral arguments in *Elk Grove*, for example, Justice Souter said, "[T]he reference to under God means something more than a mere description of how somebody else once thought. . . . So I think, I think there's some affirmation there."<sup>244</sup>

### F. Justice Kennedy

Given his mixed stances in previous Establishment Clause cases, Justice Kennedy is more of a wild card on this issue than any of the other Justices. Justice Kennedy wrote the majority opinion in *Lee*, where the Court held that students in public schools are psychologically coerced to participate in religious practices when others pray at high school graduations.<sup>245</sup> While proponents of the Pledge of Allegiance vigorously argue that the recitation is not a religious exercise like prayer, even Justice Thomas has noted the difficulty in squaring Justice Kennedy's *Lee* reasoning with voluntary recitations of the Pledge of Allegiance.<sup>246</sup> Opponents of the Pledge may argue that students are coerced to participate, even though the policies expressly authorize only a voluntary recitation, citing Justice Kennedy's psychological coercion rationale as a controlling point of law mandating the Court to hold the Pledge of Allegiance unconstitutional as a violation of the Establishment Clause.

Despite his opinion in *Lee*, Justice Kennedy's positions in later Establishment Clause cases would seem to favor upholding the constitutionality of the Pledge of Allegiance. In *McCreary County*, Justice Kennedy joined parts of Justice Scalia's dissenting opinion (1) acknowledging the role of religion in America's heritage<sup>247</sup> and (2) arguing that the *Lemon* test has simply been manipulated to fit "the Court's hostility to religion."<sup>248</sup> This second point argues that if *Lemon's* purpose prong is not to be completely done away with,

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244. Transcript of Oral Argument at 38–39, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (No. 02-1624).

245. *Lee v. Weisman*, 505 U.S. 577, 599 (1992).

246. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 46 (2004) (Thomas, J., concurring).

247. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 906 (2005) (Scalia, J., dissenting).

248. *Id.* at 900.

it must at least be used as intended—to examine the legislature’s purpose and not a third party’s perception of that purpose. Along these lines, one could easily argue that both the text of the Pledge and its codification by Congress in 1954 merely acknowledges the role of deity in the founding of the United States and nothing more. Such a reading of the Pledge of Allegiance could lead Justice Kennedy to uphold its constitutionality.

In *Van Orden v. Perry*, Justice Kennedy was part of a plurality that held that the Establishment Clause allowed the display of the Ten Commandments on the Texas State Capitol grounds.<sup>249</sup> He joined the plurality opinion, which stated that “[s]imply having religious content or promoting a message consistent with religious doctrine does not run afoul of the Establishment Clause.”<sup>250</sup>

In *Zelman v. Simmons-Harris*, Justice Kennedy joined Chief Justice Rehnquist, Justices O’Connor, Scalia, and Thomas, in ruling that Ohio’s school voucher program did not offend the Establishment Clause of the First Amendment<sup>251</sup>—even though the Court noted that ninety-six percent of the beneficiaries’ children attended religious schools.<sup>252</sup> The Court held that the Establishment Clause prevents states from passing legislation that has the “‘purpose’ or ‘effect’ of advancing or inhibiting religion.”<sup>253</sup> Since the Ohio law in question did not advance or inhibit any particular religion, the Court ruled that it did not offend the Establishment Clause.<sup>254</sup> Similarly, one could argue that the Pledge’s generic reference to God does not advance or inhibit any particular religion, thus preserving its constitutionality.

Based on his more recent Establishment Clause jurisprudence, Justice Kennedy is probably less likely to make a blanket ruling against the Pledge and Congress’s 1954 amendment to its text—his chosen application of coercion, however, will guide his decision about the constitutionality of policies of teacher-led recitations of the Pledge in public schools. While it may appear that Justice Kennedy’s

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249. 545 U.S. 677, 691–92 (2005).

250. *Id.* at 690.

251. 536 U.S. 639, 662–63 (2002).

252. *Id.* at 647.

253. *Id.* at 648–49 (quoting *Agostini v. Felton*, 521 U.S. 203, 222–23 (1997)).

254. *Id.* at 662–63.

Establishment Clause jurisprudence is contradictory, his discreet, regular practice of distinguishing facts may explain the facial discrepancies. It is apparent that if Justice Kennedy wants to side with the Pledge policy on the merits of the constitutional issue, he will be forced to either vote to overrule his own opinion in *Lee*, or follow the alternative endorsement test for applicability of *Lee* described by Justice O'Connor in her *Elk Grove* concurrence, as discussed above.

Given his particular aptitude for distinguishing Establishment Clause cases, Justice Kennedy's disposition in a Pledge case will likely be more fact-sensitive than his colleagues on the Court. While all of the justices make fact-based judgments in their decisions, Justice Kennedy appears less invested in one particular Establishment Clause ideology over another. As discussed above, *Newdow's* present challenge claims a more tangentially-related injury that may be more easily distinguished than the facts in *Elk Grove*, which claimed a more causal relationship between the injury and the government action.

In light of the facts in the latest *Newdow* case, Justice Kennedy may have an easier time joining an opinion that upholds the constitutionality of the district's Pledge policy because coercion is more difficult to demonstrate where its effects resulted in no injury. Where a causal relationship is more apparent between the language of the Pledge and the litigant's injury, however, an argument that the Pledge's language is akin to the prayer in *Lee* may allow Justice Kennedy to more easily adopt a *Lee* approach to the subtle coercion of peer pressure and ridicule, which may lead to striking down the Pledge policy.

Therefore, Justice Kennedy's decision will depend on *Newdow's* depiction of the injury caused by the Pledge. If Justice Kennedy can be persuaded that the recitation of the Pledge *caused* the injury claimed to the plaintiff's minor children, he will likely adhere to his earlier coercion test. In short, while Justice Kennedy may side with the Pledge in the context of a congressional act, he is less likely to do so when injury results due to the Pledge's recitation at school. That is, while he will not likely strike down the Pledge as inherently violative of the Establishment Clause, he is less likely to approve a school policy that orchestrates teacher-led recitations of the Pledge in a public school, which is subject to compulsory

attendance laws, when that policy *causes* a remediable injury to a student. That causal relationship would more fully support a *Lee* coercion application, whereas tangentially-related injuries do not invoke the same level of coercion. Accordingly, where a causal relationship is not clearly established, or where an adoption of Justice O'Connor's endorsement test precludes a coercion analysis, the Pledge of Allegiance will carry the day.

### G. Final Vote Verdict

Ultimately, a case challenging the constitutionality of the Pledge of Allegiance will likely result in a 5-4 split decision. For the reasons stated above, Chief Justice Roberts and Justices Alito, Thomas, and Scalia will all likely rule that school districts' policies allowing for the voluntary recitation of the Pledge of Allegiance *do not offend* the Establishment Clause. Conversely, Justices Stevens, Souter, Breyer, and Ginsburg would all likely rule that the Pledge of Allegiance *does offend* the Establishment Clause and that *Lee* and *Lemon* operate as precedent to support their striking down the Pledge of Allegiance. This establishes the more easily predicted 4-4 divide on the Court.

Justice Kennedy, on the other hand, will most likely be the swing vote. If he adheres to his earlier coercion rationale in *Lee*, he will likely side with Justices Stevens, Souter, Breyer, and Ginsburg, giving them a fifth vote against a Pledge-recitation policy. Alternatively, if Justice Kennedy follows Justice O'Connor's more benign endorsement test, which would preclude a kinship between the prayer in *Lee* and the Pledge; or if he distinguishes the latest *Newdow* facts from the offending facts in *Lee*, which would preclude a causal relationship between the Pledge recitation and the injury; or if he succumbs to public opinion and congressional ire, Justice Kennedy could just as easily vote alongside Justices Roberts, Alito, Thomas, and Scalia.

Facially, it seems too close to call; the magnitude of his *Lee* decision, however, lends itself best to the conclusion that Justice Kennedy will most likely serve as the fifth vote in opposition to the Pledge of Allegiance's constitutionality as presently practiced in many public schools.



## VII. THE CONSTITUTIONAL PLEDGE

The Pledge of Allegiance itself, as amended in 1954, is constitutional.<sup>255</sup> Furthermore, a public school policy mandating voluntary daily teacher-led recitations of the Pledge of Allegiance does not offend the Religion Clauses of the First Amendment. The constitutional innocence of the Pledge is maintained for three primary reasons. First, the Pledge is not religious speech, but merely an appeal to the historical context under which this nation was founded and constitutes only ceremonial deism. Second, voluntary teacher-led recitations of the Pledge cannot constitute coercion or compulsion. By its own terms, it is a voluntary act and no assertion of peer pressure from other students can equate to coercion by the government. Third, even if the Pledge is determined to contain “religious speech,” it is *de minimis* and merely acknowledges the principles of the very fabric of our American society. Even assuming *arguendo* that the Pledge is religious speech, it must then necessarily follow that the Free Exercise Clause of the First Amendment protects the voluntary recitation of such speech by willing students.

The Pledge of Allegiance is a pledge to uphold the Constitution of the United States and the freedoms guaranteed to her citizens by virtue of the sacrifice and perseverance of forefathers who secured those freedoms. One such freedom is the freedom of speech, which includes a freedom “not to speak at all.”<sup>256</sup> As such, any Pledge recitation must be voluntary and not compelled by the government under threat of force or law.

The primary effect of the adoption of the Pledge of Allegiance and its recitation in public schools is not to advance religion, but to instill in young minds an acknowledgment of the American heritage and the freedoms represented by the Flag of the United States. By adopting the Pledge of Allegiance, including the *de minimis* reference to “God,” the government

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255. This conclusion and the other arguments presented in this section are largely attributable to the *Elk Grove* concurrences. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 18 (2004) (Rehnquist, C.J., concurring); *id.* at 33 (O’Connor, J., concurring); *id.* at 45 (Thomas, J., concurring). Any errors, however, in portraying these arguments are mine alone.

256. *Johanns v. Livestock Mktg. Ass’n.*, 544 U.S. 550, 572 n.2 (2005) (citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985)).

has not endorsed any religion. The Pledge is not religious speech since the reference to God is nothing more than a reference to ceremonial deism as described by Justice O'Connor in her *Elk Grove* concurrence. It has not been canonized by any religion, nor does any religion claim or enjoy preferential reference based on its recitation.

The use of the word "God" in the Pledge is a generic one and can mean a number of different things to a number of different people. It does not say one nation under Jesus, or under Vishnu, or Allah, or Buddha, but one nation under "God." This reference is an example of ceremonial deism in a patriotic observance, similar to the Declaration of Independence, Star-Spangled Banner, and the Gettysburg Address. The Pledge of Allegiance does not have the purpose or the effect of showing that the government favors or prefers any particular established religion.

The Pledge of Allegiance and its recitation in public schools also fails to meet the coercion test. In adherence to the *Barnette* mandate, Pledge policies in force today are voluntary in nature. Students have the choice whether to participate and those who choose not to participate are not compelled to do so by threat of force or law: they are not expelled, detained, fined, and their parents are not prosecuted, as was the case in *Barnette*.<sup>257</sup> Students legitimately have the choice to participate or to sit or stand respectively without pledging their allegiance to the flag.

#### A. Coercion

The legal implications of the word "coercion" is another paramount issue that has been perverted by inconsistent use in Supreme Court decisions. Unlike *Barnette*, students are not threatened with discipline for abstaining from pledging their allegiance in voluntary pledge policies. In the context of the Pledge, the Court must determinatively settle the definition of "coercion."

*Lee* is the epitome of exemplary cases of coercion misapplication. The Court held that psychological coercion was present in *Lee* because high school graduation cannot practically be viewed as voluntary due to the high level of importance placed on it by society.<sup>258</sup> Some may assert that

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257. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943).

258. *Id.*

compulsory education laws present a *prima facie* case for coercion in school-led activities. In adherence to *Barnette*, states cannot compel students to pledge their allegiance to the flag of the United States and modern Pledge policies recognize this. Can peer pressure constitute government-induced coercion, however? Does invoking *Lee*-like psychological peer pressure arguments elevate classmate peer pressure to the level of government-induced coercion when students feel embarrassed or ashamed when abstaining from pledging their allegiance to the flag? The fine line between what constitutes coercion and what does not begs the question, does the “[l]aw reach[] past formalism”?<sup>259</sup> Pressure from peers towards conformity is not grounds for coercion. The Court has never accepted the “follow the leader” rationale or the “he told me to jump off the bridge” defense in our legal system.

Justice Thomas correctly stated, “[E]ven if we assume that sitting in respectful silence could be *mistaken* for assent to or participation in a graduation prayer, dissenting students graduating from high school are not ‘coerced’ to pray. At most, they are ‘coerced’ into possibly appearing to assent to the prayer.”<sup>260</sup> Equally applicable, it must follow that students are at most coerced into possibly appearing to assent to the Pledge of Allegiance. This is insufficient.

### *B. Public Policy Perspective and “God”*

According to a recent Gallup poll, more than ninety percent of Americans believe in “God.”<sup>261</sup> This is why Justice O’Connor saw the need to recognize ceremonial deism in civic life. The reference to “God” in the Pledge of Allegiance is merely a reference to what Justice O’Connor calls ceremonial deism.

#### *1. Unintended consequences*

Similar to Congress’s observation in its reaffirmation of the Pledge of Allegiance, striking down the Pledge would be, in

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259. *Lee*, 505 U.S. at 595.

260. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 47 (2004) (Thomas, J., concurring).

261. Frank Newport, *Who Believes in God and Who Doesn’t?*, GALLUP NEWS SERVICE, June 23, 2006, available at <http://www.gallup.com/poll/23470/Who-Believes-God-Who-Doesnt.aspx> (stating that “[i]f Americans are simply asked if they believe in God or a universal spirit, more than 90% will say yes”).

effect, a mandatory precedent that would dictate the elimination of our national motto, "In God We Trust," and its removal from our currency. It would also dictate the removal of the Declaration of Independence from the Library of Congress and our schools and the destruction of the Lincoln monument, which bears the text of the Gettysburg Address on its walls. Necessarily, it would also require the removal of the text of the Constitution of the United States from every courthouse, classroom, and library with the strict admonition that the Constitution not be read in schools lest the state "coerce" a belief in God as the Constitution uses an even less generic reference to deity in Article VII: "Year of our Lord."<sup>262</sup> Eliminating these fundamental pillars of our nation's founding and tradition will lead down a slippery slope that will threaten the very fabric that makes up the ideals of liberty that bind this nation together.

### VIII. CONCLUSION

The Pledge of Allegiance was written and adopted as a patriotic observance for the 400th anniversary of Christopher Columbus's landing in the Americas. It was meant as a patriotic observance to honor the heritage of the Nation and was inspired by the Declaration of Independence, the Constitution, and the Gettysburg Address, to name a few.

The Court held that students cannot be forced to pledge their allegiance, but pledge policies today call for the voluntary recitation of the Pledge. Opponents of the Pledge, such as Michael Newdow, claim that the 1954 Act of Congress, in which it added the phrase "under God," qualified the Pledge as religious speech and is a violation of the Establishment Clause of the First Amendment.

Thus, the questions that must be answered by the Court are two-fold: 1) is the Pledge of Allegiance religious speech, and 2) does the Pledge of Allegiance compel the affirmation of a religious belief in God? The Court is likely to be called upon in the very near future to consider Newdow's latest lawsuit challenging the Pledge's constitutionality. The current Court, with the substitution of two outspoken Pledge proponents, is in a deadlock that will likely be decided by a 5-4 vote with Justice

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262. U.S. CONST. art. 7, ¶ 2.

Kennedy serving as the swing vote.

The Chief Justice, as well as Justices Scalia, Alito, and Thomas will all likely vote in favor of a voluntary Pledge policy and may even vote to reverse current Establishment Clause jurisprudence by voting to overrule *Lemon* and *Lee*. Justices Souter, Breyer, Ginsburg, and Stevens will most likely vote against the Pledge. Their voting record in Establishment Clause cases indicates that they would prefer to uphold the Court's current Establishment Clause jurisprudence, including *Lee* and *Lemon*.

Justice Kennedy, although the author of *Lee*, has shown considerable willingness to view the Establishment Clause in a light favorable to the Pledge of Allegiance, but his *Lee* opinion overshadows an inclination to completely dismiss his strict, although misapplied, concept of coercion. Most indicators, however, suggest that while Justice Kennedy may vote to strike down a teacher-led Pledge policy as coercive, he is unlikely to kill the Pledge of Allegiance itself. Notwithstanding, no one is putting a surprise switch beyond Justice Kennedy, who is clearly uninterested in committing himself to one side or the other before considering the matter in its entirety.

*Brian Wheeler*