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Rachel R. Myers

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COMMENT

PLEDGE PROTECTION: THE NEED FOR OFFICIAL SUPREME COURT RECOGNITION OF CIVIL RELIGION

*RACHEL R. MYERS**

INTRODUCTION

As Senior Judge Lawrence Karlton of the United States District Court, Eastern District of California appropriately stated, there is an "ongoing struggle as to the role of religion in the civil life of this nation."[1] Since the country's founding, there has been an extensive religious dimension in American public life that has found expression through national rhetoric, rituals, and symbols. This religious dimension has come to be known as "American civil religion"—a unique blending of religion, politics, ideas of nationhood, and patriotism, which is energized by faith beliefs. With the seemingly strict separation of church and state in the United States, however, the idea and legitimacy of civil religion is continually scrutinized.

At the forefront of the struggle over civil religion is the constitutionality of one of the most explicitly patriotic rituals in the United States—the recitation of the Pledge of Allegiance in public schools. Over the past five years, the constitutionality of federal statute 4 U.S.C. § 4, which codifies the words "under God" in the Pledge of Allegiance, and the policies of several California public school districts providing for recitation of the Pledge have been challenged. In June 2002, the United States Court of Appeals for the Ninth Circuit held that both the federal statute and the school districts' policies were unconstitutional violations of the Establishment Clause.[2] In February 2003, after much public outcry, the Ninth Circuit amended its decision, this time declining to rule on the constitutionality of the federal statute and finding the school district policies unconstitutional on narrower grounds.[3] The decision was appealed to the Supreme Court,

* Rachel R. Myers, associate attorney at Dady & Garner, P.A., Minneapolis, MN.

1. *Newdow v. The Cong. of the U.S.A.*, 383 F. Supp. 2d 1229, 1231 (E.D. Cal. 2005) [hereinafter *Newdow IV*].

2. *Newdow v. U.S. Cong.*, 292 F.3d 597 (9th Cir. 2002) [hereinafter *Newdow I*] (holding that the school district policy was unconstitutional because it failed the endorsement test, the coercion test, and the *Lemon* test).

3. *Newdow v. U.S. Cong.*, 328 F.3d 466 (9th Cir. 2003) [hereinafter *Newdow III*]. The Ninth Circuit held that the school district policy was unconstitutional as an impermissible coercion of a

but the case was dismissed for lack of standing before the constitutionality of the Pledge could finally be decided.[4]

The Supreme Court's dismissal did not put an end to the constitutional debate over the Pledge of Allegiance. In September 2005, after five years of litigation, a federal district court in California held that the policies of several public school districts providing for recitation of the Pledge violated the Establishment Clause of the First Amendment, specifically because of the Pledge's inclusion of the words "under God."[5] With an appeal pending in the Ninth Circuit, and in consideration of the Ninth Circuit's previous holdings, there is a strong possibility that the Supreme Court will once again be faced with the question of the Pledge's constitutionality. While the Supreme Court has often stated in dicta that recitation of the Pledge is a constitutional exercise, it has never explicitly announced an exception to traditional Establishment Clause doctrine that would uphold the constitutionality of the Pledge of Allegiance.

In this comment I argue that to uphold the constitutionality of the Pledge of Allegiance, along with many other national symbols and rituals, the Supreme Court must formally and officially announce that a civil religion does exist in the United States that withstands Establishment Clause scrutiny. The Court's recognition of a civil religion would allow the government to continue to acknowledge religion formally and publicly, just as it has done since its founding, without being subject to continual constitutional attacks.

Part I of this comment explains the concept of civil religion and describes how the notion of American civil religion came into existence. Part II provides the historical roots of the Pledge of Allegiance and states how the Pledge fits within American civil religion. Part III describes the *Newdow* line of cases and the rationale behind the Ninth Circuit's and the California district court's opinions that declared the Pledge's religious language unconstitutional. Part IV focuses on the aftermath of *Newdow*—outlining the potential courses of action the Supreme Court can take when faced with the Pledge issue, and arguing that upholding the constitutionality of the Pledge on the basis of "historical acknowledgment" is insufficient. Finally, Part V asserts the reasons why adoption and recognition of civil religion is necessary for the Supreme Court's religion clause jurisprudence, as well as the American nation.[6]

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religious act, but did not consider whether the policy failed the endorsement test or the *Lemon* test. *Id.*

4. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17–18 (2004) [hereinafter *Elk Grove*].

5. *Newdow IV*, 383 F. Supp. 2d at 1242.

6. The "American Nation" consists of the ideals and beliefs that have comprised the United States of America since its founding. The recognition of civil religion is necessary to preserve and maintain these ideals and beliefs.

I. CIVIL RELIGION

A. *The Original Notion*

The concept of civil religion is not a new one, nor is it exclusively American. The original notion of civil religion arose in the late eighteenth century, but it was not until the mid-twentieth century that American civil religion was formally recognized. While the general definition of civil religion is consistent from country to country, its exact makeup is unique in each country in which it is located. In America, civil religion formed during the country's founding, and has continued to evolve over the past 250 years.

The phrase "civil religion" was first coined and discussed extensively by Jean-Jacques Rousseau in his treatise, *The Social Contract*, which was published in 1762.[7] Rousseau proposed that there were two types of religion in society—the religion of man and the religion of the citizen.[8] Rousseau believed the religion of man was a "completely spiritual religion, concerned exclusively with things heavenly."[9] In other words, the religion of man was purely private and existed between the individual and his or her personal God. In contrast, the religion of the citizen, or civil religion, was a religion that "unite[d] the divine cult with love of the laws," "ma[de] the homeland the object of its citizens' admiration," and "[taught] . . . service to the state."[10] Unlike the religion of man, the civil religion did not include personal religious beliefs, but rather dealt exclusively with the public interaction between the state and its citizens.

The religion of man and the religion of the citizen were distinct. The religion of man had no particular relation to the body politic, whereas civil religion was thought necessary for maintenance of a good society. Specifically, Rousseau defined civil religion as "a purely civil profession of faith, the articles of which it belong[ed] to the sovereign to establish, not exactly as dogmas of religion, but as sentiments of sociability, without which it [was] impossible to be a good citizen or a faithful subject."[11]

While Rousseau believed that a properly-functioning society needed civil religion, he also believed that limits should be placed on the role of civil religion in society. According to Rousseau, governments had a right to uphold and maintain the civil religion, but the tenets of civil religion "ought to be simple, few in number, precisely worded, without explanations or

7. Jean-Jacques Rousseau, *On the Social Contract* 99 (Donald A. Cress ed. & trans., Hackett Publg. Co. 1987).

8. *Id.* Rousseau also spoke of a third sort of religion, the religion of the priest, which subjects men to "contradictory duties and prevents them from being simultaneously devout men and citizens." *Id.* However, Rousseau quickly dismissed this third religion, saying that it was "of no value" and "[was] so bad that it [was] a waste of time to amuse oneself by proving it." *Id.*

9. *Id.* at 100. Rousseau specifically referred to the religion of man as the "holy, sublime, true religion" of "Christianity." *Id.*

10. *Id.* at 99.

11. *Id.* at 102–03.

commentaries" by the civil authority.[12] Specifically, the tenets of the civil religion should be limited to: the existence of God, the life to come, the reward of virtue and the punishment of vice, and the exclusion of religious intolerance.[13] These clearly defined limits on civil religion consequently limited the state's role in religious matters, which allowed citizens to freely hold their personal religious beliefs and opinions without the threat of state interference.

B. American Civil Religion

Rousseau's civil religion formed the basis for the concept of a purely American civil religion, which was introduced in 1967 by Robert Bellah in his essay *Civil Religion in America.*[14] Bellah's essay borrowed and expanded on Rousseau's idea of a civil religion by individualizing the concept to the American experience. Bellah claimed most Americans share common religious characteristics that are expressed through a public set of beliefs, symbols, and rituals, known as "American civil religion."[15] These common characteristics were thought to have contributed to a religious dimension that had permeated through the entirety of American life since the nation's founding.[16]

For Bellah, civil religion was shaped in form and tone by the words and acts of the Founding Fathers.[17] While none of the Founders specifically used the phrase "civil religion," Bellah argued there was every reason to believe that religion, particularly the idea of God, played a constitutive role in the thought of the early American statesmen.[18] This God, which served

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12. *Id.* at 102.

13. *Id.*

14. Robert N. Bellah, *Civil Religion in America*, 96 Daedalus 1 (Winter 1967).

15. *Id.* at 3–4. Bellah quoted John F. Kennedy's 1961 inaugural address as an example and a clue with which to introduce the complex subject of civil religion. *Id.* at 1. In his inaugural address, Kennedy stated that he had sworn his solemn oath before "Almighty God," and that "the rights of man c[a]me not from the generosity of the state, but from the hand of God." John F. Kennedy, *Inaugural Address*, 1961 Pub. Papers. In concluding his address, Kennedy asked for "[God's] blessing and His help" in leading the country. *Id.* Bellah argued Kennedy was justified in using the word "God" in the public, political realm because religion is not a strictly private affair. Bellah, *supra* n. 14, at 3. Although there is a separation of church and state in America, this does not mean the political realm is denied a religious dimension. *Id.*

16. *Id.* at 3.

17. *Id.* at 7.

18. *Id.* at 6. Bellah noted that Washington, Adams, and Jefferson each mentioned God in their inaugural addresses. *Id.* In footnote three of *Civil Religion in America*, Bellah stated:

> God is mentioned or referred to in all inaugural addresses but Washington's second, which is a very brief (two paragraphs) and perfunctory acknowledgement. It is not without interest that the actual word "God" does not appear until Monroe's second inaugural, 5 March 1821. In his first inaugural, Washington refers to God as "that Almighty Being who rules the universe," "Great Author of every public and private good," "Invisible Hand," and "benign Parent of the Human Race." John Adams refers to God as "Providence," "Being who is supreme over all," "Patron of Order," "Fountain of Justice," and "Protector in all ages of the world of virtuous liberty." Jefferson speaks of "that Infinite Power which rules the destinies of the universe," and "that Being in whose

as a genuine vehicle of national religious self-understanding, was actively interested and involved in history, with a special concern for America.[19]

While civil religion was based on the idea of God, this God was not clearly sectarian or Christian. Rather, the God of American civil religion was somewhat deist, advocating natural religion and emphasizing morality, and was much more related to law, order, and right than to salvation and love.[20] Bellah argued that the Founders' lack of Christian reference in the civil religion they formed implied a clear division between the civil religion and Christianity.[21] However, civil religion was not merely "religion in general."[22] Civil religion was specific when it came to the topic of America, which saved it from empty formalism and made it a substantive religion of "an institutionalized collection of sacred beliefs about the American nation."[23]

Civil religion in the American political society consists of the values, goals, and mission of the nation, its government, and its people in terms of their faith in God. Specifically, American civil religion can be defined as:

> [A] form of devotion, outlook and commitment that deeply and widely binds the citizens of the nation together with ideas they

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hands we are." Madison speaks of "that Almighty Being whose power regulates the destiny of nations," and "Heaven." Monroe uses "Providence" and "the Almighty" in his first inaugural and finally "Almighty God" in his second.

Id. at 19, n. 3 *citing Inaugural Addresses of the Presidents of the United States from George Washington 1789 to Harry S. Truman 1949*, 82d Congress, 2d Session, H.R. Doc. 540 (1952). Bellah also noted that, as of 1967, not one of the subsequent presidents had failed to mention God in his inaugural address. *Id.* at 7. Since 1967, all subsequent presidents who have delivered inaugural addresses have mentioned or referred to God. *See* Richard M. Nixon, *Inaugural Address*, 1969 Pub. Papers; Richard M. Nixon, *Inaugural Address*, 1973 Pub. Papers; Jimmy Carter, *Inaugural Address*, 1977 Pub. Papers; Ronald Reagan, *Inaugural Address*, 1981 Pub. Papers; Ronald Reagan, *Inaugural Address*, 1985 Pub. Papers; George H. Bush, *Inaugural Address*, 1989 Pub. Papers; William J. Clinton, *Inaugural Address*, 1993 Pub. Papers 1, 3; William J. Clinton, *Inaugural Address*, 1997 Pub. Papers 43, 46; George W. Bush, *Inaugural Address*, 2001 Pub. Papers 1, 2–3; George W. Bush, *Inaugural Address*, 2005 Pub. Papers.

19. Bellah, *supra* n. 14, at 7–8.

20. *Id.* at 7 (Bellah referred to the God of civil religion as a "Unitarian" God.). Unitarianism is defined as "the belief that God exists in one person, not three." Christian Apologetics & Research Ministry, *What is Unitarianism?*, http://www.carm.org/uni/unitarianism.htm (accessed Nov. 23, 2005). It is the denial of the doctrine of the Trinity, as well as the full divinity of Jesus, and is, therefore, not Christian. *Id.*

21. *Id.* at 8 (especially since society was overwhelmingly Christian at the time of the founding). In further support of his statement that American civil religion was not clearly Christian, Bellah noted that neither Washington, Adams, Jefferson, nor any of the subsequent presidents mentioned Christ in his inaugural address. *Id.* at 7. Additionally, not all of these presidents who spoke of God were Christians. Adherents.com, *Religious Affiliation of U.S. Presidents*, http://www.adherents.com/adh_presidents.html (last modified Nov. 19, 2005) (John Adams, John Quincy Adams, Millard Fillmore, and William Howard Taft were Unitarians, while Thomas Jefferson, Abraham Lincoln, and Andrew Johnson were of no specific denomination.).

22. Bellah, *supra* n. 14, at 8.

23. Gail Gehrig, *The American Civil Religion Debate: A Source for Theory Construction*, 20 J. Sci. St. Relig. 51, 53 (Mar. 1981) (summarizing Bellah, *supra* n. 14).

> possess and express about the sacred nature, the sacred ideals, the sacred character, and the sacred meanings of their country.[24]

It is important to note that American civil religion is not the worship of the American nation, but rather, an understanding of the American experience.[25]

C. *American Civil Religion's Existence in United States History and Culture*

As Bellah first noted, and as demonstrated today, there is an elaborate and well-institutionalized civil religion that actually exists alongside other traditional church religions, and even non-traditional religions in America. The themes emerging from American civil religion are historically rooted in the American experience and continue to be a dominant force in today's society. Civil religion drives many of the actions taken by the American government and, specifically, consists of five major themes: 1) a transcendent principle of morality to which this polity is, or ought to be, responsible;[26] 2) a faith in democracy as a way of life for all people and an associated belief in an American mission to spread it throughout the world;[27] 3) a sense of civil piety—that exercising the responsibilities of citizenship is somehow a good end in itself;[28] 4) a reverence for American religious folkways;[29] and 5) a belief that Destiny has great things in store for the American people.[30]

American civil religion is far from an abstract, thematic notion, but is instead, readily visible in today's society. The major themes in the civil religion that explain the meaning of and the purpose behind the American political society are expressed through public rituals, myths, and symbols.[31] This fact is evident in the symbolic expression of religion in America's

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24. Bruce Murray, FACSNET, Articles, *With 'God on our side'?: How American 'Civil Religion' permeates society and manifests itself in public life*, http://www.facsnet.org (quoting Rowland Sherrill, Speech, FACS Conference Speech on Civil Religion (Indianapolis, Ind., Sept. 23, 2003)).

25. Bellah, *supra* n. 14.

26. *See* Sidney E. Mead, *The Nation With the Soul of a Church*, in Richey & Jones, *American Civil Religion* 59–63 (Richey & Jones eds., 1974) ("the spiritual core which identifies [America] as a nation is the conception of a universal principle which is thought to transcend and include all the national and religious particularities . . . the religion of the republic is essentially prophetic . . . its ideals and aspirations stand in constant judgment. . . .").

27. Anders Stephanson, *Manifest Destiny: American Expansion and the Empire of Right* (Harper Collins *Canada Ltd.* 1995).

28. *See* John F. Wilson, *Public Religion in American Culture* 136–41 (1979); *see also* Sacvan Bercovitch, *The Puritan Origins of the American Self* 17–18 (1975).

29. *See* W. Lloyd Warner, *An American Sacred Ceremony*, in Richey & Jones, *American Civil Religion* 89 (Richey & Jones eds., 1974).

30. Sacvan Bercovitch, *The American Jeremiad* 23, 78 (1978).

31. Scot M. Guenter, *The American Flag, 1777–1924: Cultural Shifts from Creation to Codification* 21 (Associated U. Presses, Inc. 1990) (quoting Ellis M. West).

founding documents, such as the Declaration of Independence;[32] congressional practices;[33] official presidential addresses[34] and executive acts;[35] judicial formalities;[36] oaths of judicial office, citizenship, and military and civil service;[37] and national emblems, including "In God we trust,"[38] United States currency,[39] and the National Anthem.[40] Additionally, the United States has sacred places (the Lincoln Memorial, the Tomb of the Unknown Soldier, Plymouth Rock), national heroes (Abraham Lincoln, George Washington, the Founding Fathers), a distinctive worldview (the American Way of Life), and uniquely American holidays (statutorily mandated National

32. *Declaration of Independence* [¶¶ 1, 2, 32] (1776). The Declaration of Independence refers to a higher power four different times, and explicitly affirms a belief and reliance on God at the time of the nation's founding. *Id.* ("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 . . . . And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.").

33. Since the writing of the Establishment Clause, Congress has begun each day of the congressional session with a chaplain-led prayer. *See e.g. Lynch*, 465 U.S. at 674 ("In the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid chaplains for the House and Senate.").

34. Kennedy's Inaugural Address, Lincoln's Second Inaugural Address, and the Gettysburg Address are all predominantly religious in tone. Presidents often make appeals or references to God and religion during public speeches and in times of national crisis.

35. Most recently, President George W. Bush has even gone so far to establish a White House Office of Faith-Based and Community Initiatives. *See* The White House, *Office of Faith-Based and Community Initiatives*, http://www.whitehouse.gov/government/fbci/ (accessed Mar. 28, 2006).

36. The Supreme Court begins each of its sessions with the phrase, "God save the United States and this honorable court." O. Smith, *Early Indiana Trials and Sketches: Reminiscenses* (1858) (quoted in 1 C. Warren, *The Supreme Court in United States History* 469 (rev. ed. 1926).

37. All oaths end with the optional phrase "[S]o help me God." *See* 28 U.S.C. § 453; 5 U.S.C. § 3331; 10 U.S.C. § 502; 8 CFR § 337.1.

38. "In God we trust" is the national motto. 36 U.S.C. § 302 (West 2005). Many states also have explicitly religious mottos: Arizona ("God Enriches"); Colorado ("Nothing without Providence"); Connecticut ("He Who Transplanted Still Sustains"); Florida ("In God We Trust"); Ohio ("With God, All Things Are Possible"); and South Dakota ("Under God the People Rule").

39. 31 U.S.C. § 5112(d)(1) (West 2005) ("United States coins shall have the inscription 'In God We Trust.'").

40. 36 U.S.C. § 301 (West 2005) ("The composition consisting of the words and music known as the Star-Spangled Banner is the national anthem."). The fourth verse of the Star-Spangled banner is wholly religious, and states:

> Oh! thus be it ever, when free-men shall stand
> Between their loved home and the war's desolation!
> Blest with victory and peace, may the heav'n rescued land
> Praise the Power that hath made and preserved us a nation.
> Then conquer we must, when our cause it is just,
> And this be our motto: "In God is our trust."
> And the star-spangled banner in triumph shall wave
> O'er the land of the free and the home of the brave!

USA Flag Site, *The Star Spangled Banner Lyrics By Francis Scott Key 1814*, http://www.usa-flag-site.org/song-lyrics/star-spangled-banner.shtml. (accessed Dec. 5, 2005). Many other patriotic songs also contain overt or implicit references to the divine. Among them: "America" ("Protect us by thy might, great God our King"); "America the Beautiful" ("God shed his grace on thee"); and "God Bless America."

Prayer Day,[41] the Fourth of July, Thanksgiving). Taken together, these symbols unite American society and comprise American civil religion.

II. History of the Pledge of Allegiance

The Pledge of Allegiance is a vital part of American civil religion as a patriotic exercise in the United States that was designed to foster a sense of national unity and pride. It has been a mainstay in American culture for over 100 years. Although the Pledge of Allegiance has been continuously recited by American citizens of all ages and backgrounds since its original inception, its text has been slightly modified over the years. While these modifications may have changed the Pledge's form, they have not changed its patriotic substance and its role in American civil religion.

The Pledge of Allegiance was initially published and recognized in 1892 as part of the 400th anniversary of Christopher Columbus's arrival in America.[42] As part of the historical commemoration, *The Youth's Companion*, a widely circulated national magazine, proposed that public school pupils recite the following affirmation:

> I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all.[43]

The Pledge quickly united schools and civic organizations across the country, with school students and organizational members reciting its words on a regular basis.[44]

In 1942, the Pledge of Allegiance was officially adopted by Congress as part of a patriotic effort "to codify and emphasize the existing rules and customs pertaining to the display and use of the flag of the United States of America."[45] In order to foster a sense of national pride, the original version of the Pledge was slightly altered to include a specific reference to the United States. In its official form, the Pledge read:

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41. 36 U.S.C. § 119 (West 2005) ("The President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation in churches, in groups, and as individuals.").

42. John W. Baer, *The Pledge of Allegiance: A Centennial History, 1892–1992*, 3 (1992).

43. *Id.*; *see also* Under God ProCon.org, *History of the Pledge of Allegiance*, http://www.undergodprocon.org/pop/Pl-edgeHistory.htm (accessed Oct. 17, 2005) (Francis Bellamy, a Baptist clergyman, chairman of state superintendents of education in the National Education Association, and editor of the Boston-based children's magazine *The Youth's Companion*, wrote and published the original version of the Pledge of Allegiance on September 8, 1892.).

44. Pew Forum on Religion & Pub. Life, *One Nation Under God? A Constitutional Question* 2, http://pewforum.or-g/religion-schools/pledge/backgrounder.pdf (Mar. 19, 2004).

45. H.R. Rpt. No. 2047, 77th Cong., 2d Sess. 1 (1942); S. Rpt. No. 1477, 77th Cong., 2d Sess. 1 (1942).

> I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all.[46]

Twelve years later, during the Eisenhower administration of 1954, Congress amended the Pledge of Allegiance once again by adding the words "under God" after the word "Nation."[47] For many in Congress, the addition of the words "under God" was necessary to emphasize and celebrate the distinction between the United States and the officially atheistic and Communist nation of the Soviet Union.[48] In amending the Pledge, Congress noted that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God."[49] The Pledge of Allegiance, as it exists in its current form, reads:

> I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.[50]

This version of the Pledge, which reflected the United States' individualism and included the phrase "under God," went undisturbed and uncontested in federal appellate court for almost forty years.[51] However, in 1992,

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46. Pub. L. No. 622, § 7, 56 Stat. 380 (1942). Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380.

47. Pub. L. No. 396, § 7, 68 Stat. 249 (1954). Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249. It is interesting to note that the Knights of Columbus, a Catholic organization, first added the phrase "under God" to their recitations of the Pledge. Pew Forum on Religion & Pub. Life, *supra* n. 44.

48. Pew Forum on Religion & Pub. Life, *supra* n. 44; *see also* H.R. Rep. No. 1693, 83d Cong., 2d Sess., 1–2 (1954) ("Our American government is founded on the concept of individuality and the dignity of the human being" and "[u]nderlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp."); S. Rep. No. 1287, 83d Cong., 2d Sess. 2 (1954) ("The spiritual bankruptcy of the Communists is one of our strongest weapons in the struggle for men's minds and this resolution gives us a new means of using that weapon."). As amended, the Pledge would thus textually reject the communist philosophy "with its attendant subservience of the individual." H.R. Rep. No. 1693, *supra* at 1–2; S. Rep. No. 1287, *supra* at 2.

49. H.R. Rep. No. 1693, *supra* n. 48, at 2; S. Rep. No. 1287, *supra* n. 48, at 2 ("Our forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership . . . . Throughout our history, the statements of our great national leaders have been filled with reference to God.").

50. 4 U.S.C. § 4 (2005). The section, in its entirety, states:

> 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.

Id.

51. Several early cases legally challenged state statutes involving mandatory recitation of the Pledge, but did not challenge the constitutionality of the Pledge directly. *W. Va. v. Barnette*, 319 U.S. 624 (1943) (overruling *Gobitis* and holding that coerced recitation of the Pledge violates the core rights and principles for which the flag stands); *Minersville v. Gobitis*, 310 U.S. 586 (1940)

the Pledge of Allegiance was attacked with its first, direct constitutional challenge. Robert Sherman, an atheist parent suing for himself and as natural guardian for his school-aged son, challenged the constitutionality of an Illinois state statute that required recitation of the Pledge of Allegiance in public elementary schools, as well as the constitutionality of the Pledge itself.[52] The United States District Court for the Northern District of Illinois rejected Sherman's argument that the Pledge of Allegiance violated the First Amendment's Establishment Clause and free exercise clause, and concluded that the Pledge was, in fact, constitutional.[53]

Sherman appealed the case to the Seventh Circuit, which concluded that "under God" in the Pledge of Allegiance was an expression of "ceremonial deism," rather than a constitutionally prohibited religious exercise.[54] "Under God," as an expression of "ceremonial deism," was viewed as having "lost [its] original religious significance" and could therefore be constitutionally used by the state for the secular purpose of "solemnizing public occasions."[55] Sherman attempted to appeal the Seventh Circuit's decision to the United States Supreme Court, but the Court denied *certiorari*.[56]

Without a Supreme Court decision to create binding precedent for lower courts, the question of whether the Pledge of Allegiance passed constitutional muster remained open. Although the Supreme Court had frequently implied and stated in dicta that the Pledge of Allegiance was a constitutional exercise,[57] this authority was merely persuasive and the ap-

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(finding that the state has a paramount interest in nurturing patriotism and holding that students' religious beliefs did not excuse them from complying with the requirement to say the Pledge). The United States District Court, Eastern District of California ruled on the constitutionality of the Pledge of Allegiance in the form that included the phrase "under God" in *Smith v. Denny*, 280 F. Supp. 651 (E.D. Cal. 1968). In *Smith*, the court held that the requirement that the Pledge of Allegiance be recited in schools did not constitute either a deprivation of the free exercise of religion or an establishment of religion within the meaning of the First Amendment. *Id.* at 654. The Ninth Circuit declined to address the issue and subsequently dismissed the appeal. *Smith v. Denny*, 417 F.2d 614 (9th Cir. 1969).

52. *Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township*, 758 F. Supp. 1244, 1245 (N.D. Ill. 1991). The Illinois statute at issue stated: "The Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions supported or maintained in whole or in part by public funds." *Id.* at 1246.

53. *Id.* at 1251. In granting defendant's motion for summary judgment, the court contrasted the reading of Bible passages or the Lord's Prayer from the recitation of the Pledge of Allegiance and found that "reciting the pledge in public schools does not violate the Establishment Clause." *Id.* (viewing the Pledge as a patriotic, and not a religious, exercise).

54. *Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437, 447 (7th Cir. 1992).

55. *Id.* The Seventh Circuit held that public schools in Illinois could lead the Pledge of Allegiance daily without violating the First Amendment so long as pupils were free not to participate. *Id.* at 442.

56. *Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township*, 508 U.S. 950 (1993).

57. *See e.g. Allegheny County v. A.C.L.U.*, 492 U.S. 573, 602–03 (1989) ("Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that the government may not communicate an endorsement of religious belief

pellate circuits were essentially left free to decide the issue in any manner they saw fit.[58] This created the strong and likely potential for future claimants to challenge the constitutionality of the Pledge. Michael Newdow was one of those claimants.

III. THE *NEWDOW* CASES

Michael Newdow, a man who has been described as "America's least favorite atheist,"[59] has been in and out of the court system for the past five years, challenging the constitutionality of the Pledge of Allegiance. Specifically at issue in the *Newdow* line of cases is the constitutionality of 4 U.S.C. § 4, a federal statute codifying the wording of the Pledge of Allegiance to the Flag; California Education Code § 52720,[60] a state statute requiring every public elementary school to conduct "appropriate patriotic exercises" at the start of each school day; and the practices of four California public school districts of leading students in daily recitation of the Pledge.[61]

. . . ."); *Wallace v. Jaffree*, 472 U.S. 38, 78 n. 5 (1985) (O'Connor, J., concurring) ("[T]he words "under God" in the Pledge . . . serve as an acknowledgement of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.' "). *Lynch*, 465 U.S. at 676 (including the Pledge of Allegiance, and its language "One nation under God," in a list of civic exercises with religious connotations, which the Court implied are permissible); *Sch. Dist. of Abington Township, Penn. v. Schempp*, 374 U.S. 203, 304 (1963) (Brennan, J., concurring) ("The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.").

58. *U.S. v. Dixon*, 509 U.S. 688, 714 (1993) (dicta are not binding as stare decisis); *Humphrey's Executor v. U.S.*, 295 U.S. 602, 627 (1935) (dicta "may be followed if sufficiently persuasive" but are not binding).

59. Jessica Reaves, *Person of the Week: Michael Newdow*, Time Online Edition (June 28, 2002) (available at http://www.time.com/time/pow/article/0,8599,266658,00.html).

60. Cal. Educ. Code Ann. § 52720 (West 2005). California law implicates the Pledge of Allegiance in its Education Code by requiring each public elementary school in the State to "conduct[ ] appropriate patriotic exercises" at the beginning of the school day. *Id.* Reciting the Pledge of Allegiance satisfies this statutory requirement. *Id.* Specifically, the California statute states:

> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the school day, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.
>
> In every public secondary school there shall be conducted daily appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy such requirement. Such patriotic exercises for secondary schools shall be conducted in accordance with the regulations which shall be adopted by the governing board of the district maintaining the secondary school.

Id.

61. In order to comply with the Cal. Educ. Code § 52720, Elk Grove Unified School District adopted a policy that provides: "Each elementary school [shall] recite the pledge of allegiance to the flag once each day." Pl.'s First Amend. Compl. at 8:35–37. EGUSD allowed students who objected on religious grounds to abstain from the recitation. *Id.*

Newdow—who is an attorney, medical doctor, and atheist minister[62]—first began his assault on the Pledge of Allegiance in March 2000 when he filed suit against Elk Grove School District (hereinafter "EGSD") in the United States District Court, Eastern District of California on his own behalf and on behalf of his school-aged daughter as a "next friend," claiming that EGSD's Pledge recitation practice and the phrase "under God" contained within the Pledge violated the religion clauses of the First Amendment of the Constitution.[63] Specifically, Newdow claimed that codification of the Pledge was an attempt by Congress to "endors[e] [a] theistic belief" and "explicitly denigrate[ ] the religious beliefs of . . . citizens that deny the existence of any supreme being."[64] The original case was referred to Magistrate Judge Peter A. Nowinski, who concluded that the Pledge did not violate the Establishment Clause and recommended dismissal of the suit.[65] On July 21, 2000, District Judge Milton L. Schwartz issued an order adopting in full Magistrate Judge Nowinski's findings and recommendations and dismissed Newdow's complaint.[66]

Newdow subsequently appealed his decision to the Ninth Circuit Court of Appeals, which rendered three separate decisions during the course of the appeal. The Ninth Circuit first held that Newdow had standing as a parent to challenge practices that interfered with his right to direct the religious education of his daughter.[67] Additionally, the court found that both the federal statute codifying the Pledge of Allegiance and EGSD's policy violated the Establishment Clause.[68]

In its analysis of the constitutionality of the federal statute and the school district's policy, a two-judge majority followed the Supreme Court's lead and, "for purposes of completeness"[69] used three different tests to assess the Establishment Clause challenges: 1) the three-part *Lemon* test from

62. CNN.com, *Skeptical Supreme Court Weighs Pledge Case*, http://www.cnn.com/2004/LAW/03/24/scotus.pledge/ (posted June 14, 2004). While Newdow is not currently a practicing attorney, he received a juris doctorate degree from the University of Michigan in 1988.

63. Pl.'s Original Compl. at ¶ 18, *Newdow v. The Cong. of the U.S.*, CIV S-00-0495 (E.D. Cal. Mar. 8, 2000) (available at http://www.restorethepledge.com/).

64. *Id.* at ¶¶ 34, 40.

65. Findings and Recommendations of U.S. Magistrate Judge Peter A. Nowinski (May 25, 2000) (available at http://www.restorethepledge.com/) (relying on the Seventh Circuit's decision in *Sherman*, 980 F.2d at 437, which upheld the constitutionality of the Pledge of Allegiance, as well as dicta contained in Supreme Court and Court of Appeals decisions, and stating that the Pledge of Allegiance does not violate either the *Lemon* test or the endorsement test under the Establishment Clause).

66. Or. of U.S. Dist. Judge Milton L. Schwartz, *Newdow v. The Cong. of the U.S.*, CIV S-00-0495 (E.D. Cal. July 21, 2000) (available at http://restorethepledge.com/).

67. *Newdow I*, 292 F.3d at 602.

68. *Id.*

69. *Id.* at 607.

Lemon v. Kurtzman;[70] 2) the endorsement test first articulated in Justice O'Connor's concurrence in *Lynch v. Donnelly*;[71] and 3) the coercion test relied upon in *Lee v. Weisman*.[72] The Ninth Circuit held that the Act and the policy violated the Establishment Clause because they both failed the *Lemon* test, as well as the endorsement and coercion tests.[73]

Newdow's victory in the Ninth Circuit did not come without its own challenges. After the Ninth Circuit rendered its initial opinion, Sandra Banning, the mother of Newdow's daughter, challenged Newdow's ability to bring suit by asserting that she and Newdow shared physical custody of their daughter.[74] Banning declared that a state-court order granted her "exclusive legal custody" of the child, "including the sole right to represent [the daughter's] legal interests and make all decision[s] about her education" and welfare.[75] Additionally, Banning claimed that her daughter was a Christian who believed in God and had no objection to the recitation of the Pledge or to hearing others recite the Pledge.[76] On September 25, 2002, the California Superior Court entered an order awarding Banning "sole legal custody" of the child and enjoining Newdow from including his daughter in

70. 403 U.S. 602, 612–13 (1971) ("First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'").

71. 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring). Justice O'Connor's endorsement test effectively collapsed the first two prongs of the *Lemon* test:

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

Id. Justice O'Connor's endorsement test was later adopted by a majority of the Court in *Allegheny*, 492 U.S. at 573.

72. 505 U.S. 577 (1992) ("at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so.").

73. *Newdow I*, 292 F.3d at 611. The court found that the Act failed the purpose prong of the *Lemon* test because its primary purpose was to advance religion. *Id.* at 609–10. The policy passed the purpose prong of the *Lemon* test, but failed the effects prong because the policy was viewed as being "highly likely to convey an impermissible message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God," especially considering the age and impressionability of schoolchildren confined within the environment of the classroom. *Id.* at 611. Under the endorsement test, the court found that the statement that the United States is a nation "under God" was an unconstitutional endorsement of religion because it was a profession of a religious belief in monotheism. *Id.* at 607. The school district's practice of teacher-led recitation of the Pledge amounted to state endorsement of religion because it aimed to inculcate in students a respect for the ideals set forth in the Pledge. *Id.* at 608. The policy and the Act both failed the coercion test because they "place[d] students in the untenable position of choosing between participating in an exercise with religious content or protesting." *Id.*

74. *Newdow IV*, 383 F. Supp. 2d at 1233.

75. *Id.* at 1233–34.

76. *Id.*

the lawsuit.[77] The Ninth Circuit reconsidered the question of Newdow's standing and held that the "grant of sole legal custody to Banning" did not deprive Newdow, as a noncustodial parent, of Article III standing to object to unconstitutional government action affecting his child.[78]

On February 28, 2003, the Ninth Circuit issued an order amending its first opinion and denying rehearing en banc.[79] The amended opinion significantly narrowed the panel's earlier decision in *Newdow I*. In its amended opinion, the Ninth Circuit declined to determine whether Newdow was entitled to declaratory relief regarding the Act's constitutionality and simply held that EGSD's policy and practice of teacher-led recitation of the Pledge violated the Establishment Clause.[80]

On June 14, 2004, the Supreme Court considered the Ninth Circuit's decision.[81] Since the Ninth Circuit declined to rule on the constitutionality of the 1954 Act, the issue of the Pledge's constitutionality was not before the Court. Rather, the Court was faced with the two issues that the Ninth Circuit *did* choose to rule on: 1) whether Newdow had prudential standing to challenge the school district's policy in federal court; and, if so, 2) whether the Elk Grove School District's Pledge recitation policy violated the Establishment Clause.[82] The Supreme Court held that Newdow lacked standing to bring suit in federal court and, as a result, never addressed the constitutionality of the school district's policy or the Pledge itself.[83]

The Court's decision did not prevent Newdow from continuing to attack the constitutionality of the Pledge of Allegiance and EGSD's practices. On January 3, 2005, Newdow, joined by two other sets of parents and their minor children, once again filed suit in the United States District Court, Eastern District of California challenging the Pledge.[84] This time, however, EGSD's Pledge practices were not the only target of Newdow's attacks. Rather, Newdow aimed his attacks at the Pledge practices of EGSD, as well as the Pledge practices of three additional California public school districts.[85]

The California district court once again held that Newdow lacked standing to bring suit, but held that the additional plaintiffs had sufficient

77. *Id.*

78. *Newdow v. U.S. Cong.*, 313 F.3d at 500, 502–03 (9th Cir. 2002) [*hereinafter Newdow II*].

79. *Newdow III*, 328 F.3d at 468.

80. *Id.* at 490. While the Ninth Circuit recognized that it was free to apply any or all three of the Establishment Clause tests, it declined to employ either the *Lemon* test or the endorsement test (as it had originally done), and only employed the *Lee* coercion test. *Id.* at 487.

81. *Elk Grove*, 542 U.S. at 1.

82. *Id.* at 10.

83. *Id.* at 18–19.

84. *Id.*

85. *Id.* The other school districts that were defendants in the action were Sacramento City Unified School District ("SCUSD"), Elverta Joint Elementary School District ("EJESD"), and Rio Linda School District ("RLSD"). *Newdow IV*, 383 F. Supp. 2d at 1229.

standing to challenge the school district policies.[86] In deciding the constitutional question, Senior District Judge Lawrence Karlton reasoned that he was "bound by the Ninth Circuit's holding in *Newdow* III" and held that the school districts' policies violated the Establishment Clause.[87] Specifically, in his opinion, Judge Karlton stated that the words "under God" violated the right of school children to be "free from a coercive requirement to affirm God."[88] The district court refrained from addressing the constitutionality of the Pledge itself by stating that any claims relating to the federal statute were moot since the issuance of an injunction would prevent plaintiffs from suffering an injury-in-fact that would require redress from the court.[89]

On September 19, 2005, five days after the district court issued its opinion, the Becket Fund for Religious Liberty, an institute that believes religious expression is a natural part of life in civilized society,[90] intervened on behalf of parents and students and petitioned the district court for Certification of an Order for Interlocutory Appeal.[91] On November 18, 2005, Judge Karlton entered a permanent injunction to implement the September 14, 2005 judgment by prohibiting teacher-led recitation of the Pledge with "under God" in it.[92] Subsequently, on November 21, 2005, the Becket Fund filed an appeal with the Ninth Circuit Court of Appeals seeking to reverse the injunction prohibiting recitation of the Pledge in California public schools.[93] The Rio Linda Union School District filed a Notice of Appeal on December 9, 2005,[94] and the United States of America filed a Notice of Appeal on January 13, 2006.[95]

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86. *Elk Grove*, 542 U.S. at 1237, 1239–40.

87. *Newdow IV*, 383 F. Supp. 2d at 1242. It is debatable whether the district court was actually bound by the Ninth Circuit's decision in *Newdow III* considering the Supreme Court reversed the Ninth Circuit's decision and held that Newdow lacked standing to bring the suit. When a court lacks Article III standing, there is no jurisdiction because there is no case or controversy within the meaning of the Constitution. *Id.* at 1241.

88. *Id.* at 1240.

89. *Id.* at 1242.

90. The Becket Fund for Religious Liberty, *About Us*, http://www.becketfund.org/index.php/article/82.html?PHPSES-SID=db6f0069653bac2-1a26b5f0af9dba778 (accessed Dec. 2, 2005). The Becket Fund for Religious Liberty officially defines itself as a "nonprofit, nonpartisan, interfaith, legal and educational institute dedicated to protecting the free expression of religious traditions." *Id.* It operates in three arenas: in the courts of law, in the court of public opinion, and in the academy. *Id.*

91. A district court order may be appealed directly to the Supreme Court, thus, effectively by-passing appellate court review when the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

92. Or. Granting Perm. Inj., *Newdow v. The Cong. of the U.S.A.*, 383 F. Supp. 2d 1229 (Nov. 18, 2005)

93. Notice of Appeal, *Newdow v. The Cong. of the U.S.A.*, No. 05-00017 (9th Cir. filed Nov. 21, 2005).

94. Notice of Appeal, *Newdow v. The Cong. of the U.S.A.*, No. 05-00017 (9th Cir. filed Dec. 9, 2005).

95. Notice of Appeal, *Newdow v. The Cong. of the U.S.A.*, No. 05-00017 (9th Cir. filed Jan. 13, 2006).

IV. *NEWDOW* AFTERMATH

A. *The Supreme Court's Potential Courses of Action*

Before the United States Supreme Court can uphold the constitutionality of the Pledge of Allegiance, three key events must occur. First, the Ninth Circuit must decide that the words "under God" in the Pledge of Allegiance unconstitutionally violate the Establishment Clause, as it initially did in *Newdow I*, and again in *Newdow III*.[96] Second, one of the appellants must appeal the Ninth Circuit's decision to the Supreme Court, which will inevitably occur in the event the Ninth Circuit finds the Pledge unconstitutional.[97] Third, the Supreme Court must decide to specifically rule on the constitutionality of the Pledge of Allegiance and grant *certiorari* in the *Newdow* case.

Once the Supreme Court makes the decision to rule on the Pledge, it has at least four options. First, the Court could reverse the Ninth Circuit's ruling and decide that the Pledge fits into the category of permissible "historical acknowledgements" upheld in *Marsh v. Chambers*,[98] and *Lynch v. Donnelly*.[99] Second, the Court could overrule those three cases, thereby eliminating the exceptions to the Court's Establishment Clause doctrine and upholding the Ninth Circuit's decision.[100] Third, the Court could retain its overall Establishment Clause doctrine, including the exceptions, but hold that the Pledge is not an exception and is thus, unconstitutional. The Court could find the Pledge unconstitutional for any of the following reasons: the words "under God" amount to an endorsement of religion; recitation of the Pledge impermissibly coerces students; the primary purpose of the Pledge is to advance religion; the religious language is not sufficiently historical; or on some other grounds.[101] Fourth, and finally, the Court could officially recognize that the Pledge is a constitutional exercise of civil religion that withstands Establishment Clause scrutiny.

Since the overruling of *Marsh* and *Lynch* seems "highly unlikely,"[102] and given the vast support for the constitutionality of the Pledge of Allegiance in Supreme Court dicta,[103] it is unlikely the Court will find the Pledge to be an unconstitutional violation of the Establishment Clause. Instead, in finding that the Pledge passes constitutional scrutiny, the Court

96. In the event the Ninth Circuit holds that the Pledge is constitutional, Newdow may choose to appeal, which would also create the potential for the Supreme Court to be faced with the Pledge issue.

97. See comments at *supra* n. 96.

98. 463 U.S. 783 (1983).

99. 465 U.S. 668 (1984).

100. John E. Thompson, *What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, 38 Harv. Civ. Rights-Civ. Libs. L. Rev. 563, 580–87 (2003). As Thompson noted, however, this ruling seems "highly unlikely." *Id.* at 588.

101. The first three arguments were advanced by the Ninth Circuit in its decision in *Newdow I*.

102. Thompson, *supra* n. 100, at 588.

103. *Supra* n. 57.

will have to either rely on the "historical acknowledgement" precedent, or craft a new exception to its Establishment Clause jurisprudence—the civil religion exception.

B. *The Insufficiency of the "Historical Acknowledgement" Doctrine*

The Supreme Court decisions in *Marsh* and *Lynch* provide two early examples of exceptions to traditional Establishment Clause scrutiny. These cases originally combined to create the "historical acknowledgment" doctrine. *Marsh* was the first case to escape Establishment Clause scrutiny under the *Lemon* test since the test's inception over twenty years earlier. *Marsh* involved the constitutionality of legislative prayer in the state of Nebraska where a chaplain was paid out of public funds to offer a prayer at the beginning of each legislative day.[104] In its decision, the Supreme Court chose to ignore the *Lemon* test, uphold public sponsorship of religion, and rule that the Nebraska legislature's prayer practice was constitutional.[105] In the majority opinion, Chief Justice Burger noted the long and venerable history of legislative prayer in Congress, the colonies, and the state of Nebraska, and stated that "[t]o invoke Divine guidance on a public body entrusted with making the laws . . . is simply a tolerable acknowledgment of beliefs widely held among the people of this country."[106] In basing its decision on historical acknowledgement, the Court gave no deference to the fact that a clergyman of only one denomination had been selected for 16 years and that prayers were only in the Judeo-Christian tradition.[107]

One year later, the Court once again relied heavily on history and allowed the city of Pawtucket, Rhode Island to erect a public Christmas display, including a crèche, during the holiday season.[108] In *Lynch*, the Court found that government-sponsored crèches depict "the historical origins of the traditional event long recognized as a National Holiday."[109] Additionally, the Court observed that there "is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789."[110] In spite of the "purpose" and "pri-

104. *Marsh*, 463 U.S. at 783.

105. *Id.* at 795. The *Marsh* decision was handed down in 1983, before the Supreme Court adopted the endorsement test or coercion test into its Establishment Clause jurisprudence, which explains why those tests were not under consideration in the legislative prayer issue. *Id.* at 668. The Court's ignorance of the *Lemon* test was peculiar considering the Eighth Circuit found that the Nebraska legislative prayer violated all three prongs of the *Lemon* test: recitation of the legislative prayer did not have a secular purpose; the primary effect of selecting the same minister for 16 years and publishing his prayers was the promotion of a particular religious expression; and use of state money for compensation and publication led to entanglement. *Marsh v. Chambers*, 675 F.2d 228, 234–235 (8th Cir. 1982).

106. *Marsh*, 463 U.S. at 792.

107. *Id.* at 793–94.

108. *Lynch*, 465 U.S. at 685.

109. *Id.* at 680.

110. *Id.* at 674.

mary effect" prongs of the *Lemon* test, the Court reasoned that the government's "reason or effect merely happen[ed] to coincide or harmonize with the tenets of some . . . religions," and was thus allowable under the Establishment Clause.[111]

In finding the issues presented in *Marsh* and *Lynch* constitutional, the Court examined practices dating back to the country's founding. The discussion in *Marsh* focused on the "unbroken practice"[112] of legislative prayer for two centuries in the National Congress, for more than a century in Nebraska, and in many other states. *Lynch* also detailed the "unbroken history"[113] of the celebration of Christmas "by the people, by the Executive Branch, by the Congress, and the courts for two centuries . . . ."[114] The reasoning in these opinions seems to indicate that a governmental practice can withstand Establishment Clause scrutiny as an historical acknowledgement only if the practice has been prevalent in American society and culture since the nation's founding.

While the Court has chosen to uphold legislative prayer and Christmas displays, among other things, using historical acknowledgement doctrine precedent, the doctrine does not provide sufficient constitutional protection for national symbols such as the Pledge of Allegiance. The historical acknowledgement doctrine is insufficient to uphold the Pledge for many reasons: the Pledge may not possess the historical quality that would allow it to become a constitutional historical acknowledgement; the recent change in the composition of the Court may affect the applicability of the historical acknowledgement doctrine to the Pledge issue; and, even if the current Court decides to view the Pledge as an historical acknowledgement, it may, nonetheless, still be considered unconstitutional under the Establishment Clause.

1. The Pledge Lacks an Unbroken History and Practice in America

Unlike legislative prayer and the Christmas holiday, the current form of the Pledge of Allegiance has not existed since the founding. Rather, the Pledge was not officially recognized until 1892, over 100 years after America's founding. Additionally, the Pledge's history is far from unbroken. Since its initial publication, the Pledge has been changed twice. The words "under God," which are the main subject of the constitutional challenge in *Newdow*, did not become a part of the Pledge's text until 1954. The Pledge, in its current form, is a mere fifty-two years old, which pales in comparison to practices that have been around for more than two hundred

111. *Id.* at 682.
112. *Marsh*, 463 U.S. at 795.
113. *Lynch*, 465 U.S. at 674.
114. *Id.* at 686.

years. As a result of the Pledge's relatively short-lived history, the historical acknowledgement doctrine relied upon in *Marsh* and *Lynch* does not neatly encompass the Pledge, and is not a guaranteed basis upon which to uphold the Pledge as a constitutional exercise under the Establishment Clause.

2. *Former Advocates of the Pledge as an Historical Acknowledgement Are No Longer on the Supreme Court*

The composition of the Supreme Court has changed dramatically since the Court's first contact with *Newdow* and the Pledge constitutionality issue. Although the Court did not initially rule on the constitutionality of the Pledge, several justices, including Justice Rehnquist and Justice O'Connor, issued concurring opinions specifically stating that the Pledge is constitutional. Both of these opinions contained strong references to the history and tradition of the Pledge, as well as the role of religion in American society. With Justice Rehnquist's and Justice O'Connor's absence from the Court, the recognition of the Pledge as an historical acknowledgement is on shaky ground.

Justice Rehnquist's concurrence was replete with references to the invocation of God in public life since America's founding. Rehnquist specifically addressed the Pledge and wrote, "The phrase 'under God' in the Pledge seems, as a historical matter, to sum up the attitude of the Nation's leaders, and to manifest itself in many of our public observances."[115] The Chief Justice then went on to detail various American rituals and symbols that appealed to God or acknowledged religion's role in the nation's history.[116] For Rehnquist, the Pledge withstood Establishment Clause scrutiny because its words "under God" were a reflection of "the traditional concept that our Nation was founded on a fundamental belief in God."[117]

Likewise, Justice O'Connor's concurrence focused on the ways in which America's history had left its mark on national traditions. O'Connor did not employ the historical acknowledgement doctrine in its pure form (to state that the Pledge was constitutional since references to "God" had been made since the nation's founding). Instead, the Justice looked to the history that was encompassed in the Pledge of Allegiance—the fact that our nation was founded "under God"—and stated that this historical *fact* turned the Pledge into an act of ceremonial deism.[118] As an act of ceremonial deism with an historical grounding, O'Connor asserted that the Pledge's words

115. *Elk Grove*, 542 U.S. at 26 (Rehnquist, C. J., concurring).

116. *Id.* at 26–33 (detailing presidential speeches, the national motto, judicial procedures, etc.).

117. *Id.* at 31 (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess., 2 (1954)).

118. *Id.* at 37. A religious act becomes an act of ceremonial deism if history renders a belief necessary to serve certain secular functions. *Lynch*, 465 U.S. at 717 (Brennan, J., dissenting). In the case of the Pledge, history proves that there is a long-acknowledged belief that the American nation was founded "under God." This foundational belief was viewed as necessary to serve certain secular functions, which explains why references to God were, and still are, often made in

had lost all religious meaning and were thus exempt from the purview of the religion clauses.[119]

No other Justice signed on to either Rehnquist's or O'Connor's concurring opinions that specifically addressed the constitutionality of the Pledge.[120] Without advocates of the historical acknowledgement doctrine on the Court, its survival in Establishment Clause jurisprudence is questionable. This is so especially where the doctrine itself has been criticized and where several other viable tests are already at the Court's disposal when determining constitutional questions that arise under the Establishment Clause. Without the historical acknowledgement doctrine, and without any other alternatives that would uphold the Pledge of Allegiance, the Pledge is at severe risk of being declared unconstitutional.

3. *The Pledge, as an Historical Acknowledgement, Arguably Violates the Constitution*

Even if the current Court chose to view the Pledge as an historical acknowledgement, the Pledge would still arguably be unconstitutional. The Court's reluctance to disturb the content of the Pledge is understandable, but that cannot justify the Court's departure from controlling precedent. When analyzing issues under the Establishment Clause, the Court is required to apply its preexisting precedent, which consists of the *Lemon* test, the endorsement test, and the coercion test. If the Court strictly adhered to its Establishment Clause jurisprudence, this precedent would have to be applied even if the Pledge was deemed an historical acknowledgement. In light of the Ninth Circuit's prior holding in the *Newdow* case and Justice Thomas's concurring opinion, combined with the fact that Justice Rehnquist and Justice O'Connor are no longer on the Court, the Pledge could not constitutionally survive as an historical acknowledgement.

The Ninth Circuit justified its ruling that the Pledge is unconstitutional through the application of all three Establishment Clause precedent tests. In *Newdow I*, the Ninth Circuit held that: the Pledge had the primary purpose of advancing religion, which violated the *Lemon* test;[121] the Pledge's phrase "under God" was an unconstitutional endorsement of religion under the endorsement test;[122] and, the Pledge "place[d] students in the untenable position of choosing between participating in an exercise with religious content or protesting," which failed the coercion test.[123] In its subsequently

civil society. That necessity of the governmental references to God, coupled with the long history of this foundational belief, gives the Pledge an essentially secular meaning.

119. *Id.* at 31.

120. Justice Thomas did not join Justice Rehnquist's entire concurrence, but only Part I, which addressed the issue of standing, and not the constitutionality of the Pledge. *Id.* at 18.

121. *Newdow I*, 292 F.3d at 609–10.

122. *Id.* at 607.

123. *Id.* at 608.

amended and narrowed decision, *Newdow III*, the Ninth Circuit held that the Pledge was impermissibly coercive and thus, unconstitutional.[124] While only employing the coercion test, the Ninth Circuit recognized that it was free to apply any or all three of the Establishment Clause tests, and the Pledge only had to fail one of these tests to be declared unconstitutional.[125] The Ninth Circuit decision has been described as "a valid interpretation of both the Constitution's meaning and of the Supreme Court's Establishment Clause doctrine."[126] It may be difficult for the Supreme Court, when faced with the Pledge issue, to deny this valid constitutional interpretation in spite of an historical acknowledgement.

Justice Thomas's concurring opinion in the *Newdow* case supports the argument that the Court may choose to adhere to its precedent and find the Pledge unconstitutional. In his concurrence, Justice Thomas concluded that, "as a matter of precedent, the Pledge policy is unconstitutional."[127] Specifically, Thomas stated that "[a]dherence to [the coercion test] would require [the Court] to strike down the Pledge" as unconstitutionally coercive.[128] The opinion of a current Justice, albeit a concurring one, further adds to the argument that the Pledge cannot be viewed as a constitutional historical acknowledgement.

Precedent, combined with sound reasoning in the Ninth Circuit and a Supreme Court Justice's concurring opinion, seriously threatens the constitutionality of the Pledge as an historical acknowledgement. It cannot be doubted that "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."[129] To do as we have always done is not an exception to the Constitution, and, as such, the historical acknowledgement doctrine does not sufficiently protect the Pledge of Allegiance.

V. The Necessity for Official Recognition of Civil Religion by the Supreme Court

The existence of an American civil religion and its similarities to traditional religion have been the sources of much of the Supreme Court's confusion in interpreting the Establishment Clause. Given the absence of civil religion from Supreme Court jurisprudence, courts across the country have been deprived of a valuable analytic tool and source of historical religious

124. *Newdow III*, 328 F.3d at 490.

125. *Id.* at 487.

126. Thompson, *supra* n. 100, at 563.

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

128. *Id.* at 46. Justice Thomas's concurrence called for "the process of rethinking the Establishment Clause." *Id.* at 45. He acknowledged that the "Establishment Clause is a federalism provision, which, . . . resists incorporation" and "protects state establishments from federal interference but does not protect any individual right." *Id.* at 45, 50. Under Justice Thomas's reasoning, arguably, the state would be free to establish its own state religion.

129. *Walz v. Tax Commr. of City of N.Y.*, 397 U.S. 664, 678 (1970).

understanding. They have not had at their disposal an adequate doctrine that would allow them to uphold government references to religion that have been prevalent in society since America's founding.

Religious aspects in society are inevitable, and the Supreme Court has already recognized that a civil religion does exist in the United States. This context paves the way for formal Supreme Court recognition of a civil religion that withstands Establishment Clause scrutiny. A civil religion doctrine is necessary in Establishment Clause jurisprudence because it would lead to the promotion of morality in society, limit the government and protect natural rights, and allow expression of the United States' rich religious history and tradition.

A. *Religion in Society is Inevitable and its Complete Removal is Unrealistic*

The character of our nation has contributed to the fact that religious symbolism exists in the secular realm. In *Lynch*, Chief Justice Rehnquist wrote, "Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty."[130] Our nation was founded by settlers who sought to escape religious persecution and attain religious freedom. As a result, it is not surprising that America has references to divinity in its symbols, songs, mottos, and oaths. The elimination of such references, including elimination of the words "under God" in the Pledge of Allegiance, would sever ties to a history that sustains this country even today.[131]

From a pragmatic standpoint, it would be virtually impossible to remove all aspects of religion from society. Given the pervasiveness of religiosity in American culture and society, it is doubtful that a complete and effective religious purging could occur, or that the majority of citizens would be amenable to the idea. As Yehudah Mirsky observed,

> [P]ublic religion is . . . a meaningful element of American life which most, if not all, of us would rather not see eliminated root and branch. Its abiding presence seems to speak to some curious need for religious symbols and rhetoric in a seemingly disestablished republic.[132]

For example, in times of war and national tragedy, governmental leaders frequently make appeals to God, and the nation often takes comfort in the idea that there is a higher power watching over and protecting America.[133]

130. 465 U.S. at 675.

131. *Allegheny*, 492 U.S. at 623 (declining to draw lines that would "sweep away all government recognition and acknowledgement of the role of religion in the lives of our citizens").

132. Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 Yale L.J. 1237, 1240 (1986).

133. *See e.g.* Murray, *supra* n. 24 (noting the public religious outpouring following the September 11, 2001 terrorist attacks).

Religion's existence in society has not only been allowed, but has been cherished by citizens and government alike.

When the Ninth Circuit handed down its decision in *Newdow*, which rendered the Pledge unconstitutional under the Establishment Clause, public uproar ensued. Members of Congress declared that the decision was "stupid,"[134] "nuts,"[135] and "wrong."[136] Shortly after the Ninth Circuit's ruling, both the House and the Senate approved resolutions condemning the decision and expressing support for the Pledge of Allegiance.[137] Additionally, several national groups and organizations vowed to immediately intervene and appeal the federal appellate court's decision. This intense reaction is demonstrative of the strong public religious sentiment, which makes eradication of religion from society unrealistic.

B. *The Supreme Court has Already Acknowledged the Existence of a Civil Religion*

The Supreme Court has already acknowledged the existence of a civil religion, so it would not be a stretch for the Court to adopt officially a civil religion doctrine as part of its Establishment Clause jurisprudence. For years, the Supreme Court has affirmed that "[w]e are a religious people whose institutions presuppose a Supreme Being."[138] In 1992, the Court acknowledged the existence of a "civic religion" for the first time in *Lee v. Weisman*.[139] Justice Anthony Kennedy spoke for the majority and wrote, "There may be some support, as an empirical observation, . . . that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not."[140]

Dicta in other Supreme Court cases support adoption of a civil religion doctrine as well. In *County of Allegheny v. American Civil Liberties Union*,

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134. CNN.com, *Senators call Pledge decision 'stupid'*, http://archives.cnn.com/2002/ALLPOLITICS/06/26/senate.re-solution.pledge (June 27, 2002). Senator Robert Byrd, D-West Virginia, said, "I hope the Senate will waste no time in throwing this back in the face of this stupid judge. Stupid, that's what he is." *Id.*

135. *Id.* Senate Majority Leader Tom Daschle, D-South Dakota, commented on the ruling saying, "This decision is nuts." *Id.*

136. *Id.* House Speaker Dennis Hastert said,

> Obviously, the liberal court in San Francisco has gotten this one wrong. Of course, we are one nation, under God. The Pledge of Allegiance is a patriotic salute that brings people of all faiths together to share in the American spirit.

Id. About 100 to 150 House members gathered on the steps outside the Capitol and recited the Pledge of Allegiance in a show of opposition to the decision. *Id.*

137. H. Res. 459 (June 27, 2002).

138. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). This phrase has been continually reaffirmed by the Supreme Court. *See e.g. McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 73 U.S.L.W. 2722, 2746 (2005); *Lynch*, 465 U.S. at 675; *Marsh*, 463 U.S. at 792; *Engel v. Vitale*, 370 U.S. 421, 450 (1962).

139. 505 U.S. 577 (1992) (holding that a city public school could not provide for a "nonsectarian" prayer to be given by a clergyman at the school's graduation ceremonies).

140. *Id.* at 589.

the Court wrote, "the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society."[141] Additionally, it has been noted that "religion has been closely identified with our government, . . . that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him," and "this background is evidenced today in our public life."[142] These ties the Court has made between religion and government provides the basis for a civil religion Establishment Clause doctrine.

Once adopted, the civil religion doctrine would effectively uphold the Pledge of Allegiance. When specifically speaking about the Pledge, the Seventh Circuit has said, "A civil reference to God does not become permissible . . . only when . . . it is sapped of religious significance."[143] The Pledge is constitutional and "[w]e need not drain the meaning from the reference [to God] to reach this conclusion."[144] With this backdrop, it would be judicially efficient and economical for the Supreme Court to craft the civil religion doctrine.

C. *A Complete Removal of Religious Reference from Society Does Not Withstand Establishment Clause Scrutiny*

Civil religion withstands Establishment Clause scrutiny because it is somewhat less than an establishment of religion. Established churches have official clergy and a relatively fixed and formal relationship with the government that establishes them.[145] Civil religion, on the other hand, is usually practiced by political leaders who are laypeople and whose leadership is not specifically spiritual.[146] Additionally, civil religion is a ritual expression of patriotism, which does not include religion in the conventional sense of the word.[147]

As previously stated, absolute removal of religious reference from society would be nearly impossible, if not unconstitutional on its own accord. Effectively abolishing all religious content from secular society would result in the complete disestablishment of religion, which is arguably an establishment in itself. Without any religious references, the United States

141. 492 U.S. at 657 (1989).

142. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (holding that the recital of prayer in public school violates the Establishment Clause).

143. *Sherman*, 980 F.2d at 448 (Manion, J., concurring).

144. *Id.*

145. *See e.g., Serbian E. Orthodox Diocese for U.S.A. and Can. V. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. St. Nicolas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952). Both cases stood for the proposition that states could not interfere with established churches—those associated with official churches and having a hierarchical structure—on official church matters without violating the free exercise clause. *Id.*

146. *Id.*

147. *Id.* at Practical political philosophy.

would become essentially atheistic,[148] thus inhibiting the free exercise of religion. The complete removal of religion from society, as a disestablished establishment and inhibitor of free exercise, could questionably result in multiple violations of individuals' constitutional rights.

D. *Civil Religion Promotes Morality, Limits the Government, and Protects Natural Rights*

It has long been asserted that a religious element in society leads to a moralistic society. De Tocqueville spoke of religion as "a political institution which powerfully contributes to the maintenance of a democratic republic among the Americans" by supplying a strong moral consensus amidst continuous political change.[149] If common ground can be defined that permits once-conflicting faiths to express the shared conviction that there is an ethic and a morality that transcend human invention, the sense of community and purpose sought by all decent societies might be advanced.[150] The official recognition and acknowledgement of civil religion may result in increased morality and, in turn, a stronger loyalty and devotion to America.

Additionally, a moralistic people with religious beliefs can necessarily limit governmental action. John Courtney Murray, a political philosopher, theologian, and Catholic priest, often spoke of the influence that religion and the American political life have on one another.[151] Murray contended that the first order of the American political faith is that the political community, as a form of free and ordered human life, looks to the sovereignty of God as the first principal of its organization.[152] God is the sovereign over the political community, as well as over individual people.[153] Through faith in God, an individual is able to learn his or her own personal dignity, which then guarantees his or her individual rights in the face of law and government.[154] The recognition by government that a God exists and the recognition by individuals that they are guaranteed certain rights by God lead to a limited government.

In America, the government was limited by the Constitution and by the democratic will of the people. The people of the United States recognized they were governed only because they consented to be governed and limited

148. The words "under God" were added to the Pledge in an attempt to avoid a resort to an atheistic society. *Supra* n. 48.

149. Alexis de Tocqueville, *Democracy in America* vol. 1, 300 (Phillips Bradley ed., 1st Borzoi ed., Alfred A. Knopf, Inc. 1945).

150. *Id.* at 589.

151. Woodstock Theological Ctr., *John Courtney Murray, S.J., and Religious Pluralism*, http://www.georgetown.e-du/centers/woodstock/report/r-fea33.htm. (accessed Dec. 7, 2005).

152. John Courtney Murray, *We Hold These Truths*, E Pluribus Unum: The American Consensus (1960).

153. *Id.*

154. *Id.*

the government accordingly by preserving individual rights in a written constitution. This recognition could not have occurred if the people had refused to believe there was an authority higher than the government. Under democracy, the government was limited not only by law, but also by the will of the people it represented. Murray argued that a virtuous people can only be free from the restraints of government when the people realize they are "inwardly governed by the recognized imperatives of the universal moral law."[155]

Removal of God from society and a denial of the civil religion would inhibit the will of the people, eventually resulting in an unlimited and all-powerful government. If people did not recognize they had the ability to restrain government, due to the natural rights bestowed on them by God, government would be free to repress its citizens and violate their inherent rights. Civil religion must be recognized by the Supreme Court to maintain the limited government that presently exists in America.

CONCLUSION

The "ongoing struggle as to the role of religion in the civil life of this nation"[156] will probably never be completely resolved. But the idea of an "American civil religion" could put an end to the debate over the constitutionality of national symbols and rituals (such as the Pledge of Allegiance) that have had long-standing formal and public acknowledgement in civil society.

The Court needs to have a bright-line rule for determining the constitutionality of issues arising under the Establishment Clause that involve historically-rooted, governmental practices and traditions. The Court's current "historical acknowledgement" doctrine is insufficient to uphold the Pledge of Allegiance, the Star Spangled Banner, and the motto "In God We Trust," along with a multitude of other national symbols, since they are not significantly historical and do not date back to America's founding. However, these American symbols are firmly embedded in this nation's civil religion and, as such, would be upheld under the civil religion doctrine.

The civil religion doctrine is necessary in Supreme Court Establishment Clause jurisprudence, as well as in society, for a multitude of reasons: it promotes a morality in the nation's citizens, limits government actions, and protects individual rights. The Court has already acknowledged that a civil religion exists and, since this civil religion is able to withstand Establishment Clause scrutiny, it would be relatively simple for its official recognition and incorporation into Supreme Court jurisprudence.

Without the civil religion doctrine, the Pledge of Allegiance is at risk of losing the words "under God," which have served to unite children and

155. *Id.*

156. *Newdow IV*, 383 F. Supp. 2d at 1231.

adults of this country since the mid-twentieth century. Once the Pledge is ruled unconstitutional, it is only a matter of time before America loses many of its other treasured symbols, songs, rituals, and practices.[157] The Pledge needs protection and, as a vital component of the American civil religion, it should be entitled to that protection.

157. On November 18, 2005, Michael Newdow filed suit challenging the constitutionality of the national motto "In God We Trust" on the national currency.