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THE SUPREME COURT AND PLEDGE OF ALLEGIANCE: DOES GOD STILL HAVE A PLACE IN AMERICAN SCHOOLS?

Charles J. Russo*

I. INTRODUCTION

The dearth of statistical or anecdotal¹ evidence aside, combined with the relative lack of reported litigation, it appears that most students and teachers regularly participate in perhaps the most common daily school ritual by joining in the patriotic recitation of the Pledge of Allegiance (Pledge) and the salute to the American Flag.² Yet, as discussed throughout this article, this daily practice has had a history of controversy, whether in schools or political settings.³

Turning specifically to schools, in *Newdow v. United States Congress* (*Newdow*),⁴ the Ninth Circuit set off a firestorm of controversy when, in a

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1. *But see They Turn Their Back on Pledge*, N.Y. Daily News 9 (Oct. 5, 2003) (reporting that in a survey of 50 public schools in New York City, officials in 13 locations, all but one located in Manhattan, have abandoned the daily recital of the pledge, even though a spokesperson for the Chancellor said that the schools will be reminded that reciting the pledge is not an option).

2. See Emily Tuttle, *Student Wins Support to Say Pledge*, Lewiston Sun J. <<http://www.sunjournal.com/print.asp?slg=010904pledge>> (Jan. 20, 2004) (detailing a student's fight to have the Pledge restored in school).

3. Controversy has swirled around the Pledge in political campaigns, especially the 1988 Presidential election between George H.W. Bush and Michael Dukakis. For news coverage of Bush's criticism of Dukakis' vetoing a 1977 bill that would have required teachers to lead students in the Pledge, see e.g. David Nyhan, *A Tide of Hysteria Rolls in on Dukakis*, The Boston Globe 14 (Sept. 30, 1988); Phil Gailey, *Bush Campaign Takes a Disturbing Turn with Attacks on Patriotism*, St. Petersburg Times 1A (Sept. 11, 1988). For a discussion of the underlying case, see *infra* note 91 and accompanying text.

4. *Newdow v. U.S. Cong.*, 292 F.3d 597 (9th Cir. 2002) [hereinafter *Newdow I*], judgment reversed, 313 U.S. 495 (9th Cir. 2002) (denying the United States Senate's motion to intervene); *Newdow v. U.S. Cong.*, 313 F.3d 500 (9th Cir. 2002) (permitting the suit to proceed even though the father lacked custody where the custody order established that he retained rights with respect to the child's education and general welfare, and denying the child's mother's motion to intervene), amended on denial of rehearing and stayed, 321 F.3d 772 (9th Cir. 2003), withdrawn from bound

case from California, it initially struck down the words “under God” in the Pledge of Allegiance for violating the First Amendment’s prohibition of governmental establishment of religion.⁵ The court subsequently modified its initial judgment and struck the Pledge down on the basis that it coerced a religious act.⁶ Previously, in a case from Illinois, *Sherman v. Community Consolidated School District 21 of Wheeling Township*,⁷ the Seventh Circuit affirmed that the Pledge, including the words “under God,” was constitutional, as long as children were free not to participate in its daily recitation.⁸ Given the split between these circuits, the Supreme Court’s decision to hear an appeal in *Newdow II*,⁹ places the Court at the epicenter in the latest battle in the culture wars¹⁰ over the place of religion in American education.¹¹

In light of the Supreme Court’s forthcoming ruling on the status of the words “under God” in the Pledge, this article is divided into the three sections.¹² The first section of the article offers a brief history of the Pledge and flag salute, while the second section reviews reported litigation involving these rituals, including *Newdow*. The final section of the article ruminates on how the Justices are likely to respond to this challenge to the Pledge, Justice Scalia’s self-recusal from the litigation, and what this dispute means for the Court’s wider jurisprudence vis-à-vis the place of religion in the marketplace of ideas.

volume; *Newdow v. U.S. Cong.*, 328 F.3d 466 (9th Cir. 2002) [hereinafter *Newdow II*], cert. granted sub nom. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 386 (2003).

5. *Newdow I*, 292 F.3d at 612.

6. *Newdow II*, 328 F.3d at 487.

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

8. *Id.*

9. *Newdow II*, supra n. 6.

10. The term “culture war” was apparently first used by James Davidson Hunter, *Culture Wars: The Struggle to Define America* (Basic Books 1991); see also *Courts and the Culture Wars* (Bradley C.S. Watson ed., Lexington Books 2002).

11. The Court has already heard oral arguments this term from a second case that impacts on religious freedom and education. In *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002), cert. granted, *Locke v. Davey* 123 S. Ct. 2075 (2003), the Court is set to decide whether to uphold the Ninth Circuit’s ruling, which would permit a student to participate in a publicly funded scholarship program that would have assisted him in receiving an undergraduate degree in Pastoral Ministries; the student was also pursuing business studies.

12. For a much briefer, preliminary version of this analysis, see Charles J. Russo, *The Pledge of Allegiance: Patriotic Duty or Unconstitutional Establishment of Religion?*, 69 No. 7 Sch. Bus. Affairs 22 (2003).

II. HISTORY OF THE PLEDGE OF ALLEGIANCE

In 1892, Francis Bellamy, a Baptist minister and Chair of a committee for the National Education Association dealing with state superintendents, who was forced to leave his pulpit because of his socialist leanings, wrote the Pledge, absent the words "under God."¹³ On September 8, 1892, about a month after the Pledge first appeared in *The Youth's Companion*, a popular magazine for children, millions of public school students recited it for the first time in celebration of the four hundredth anniversary of Columbus' discovery of America.¹⁴ Shortly thereafter, on October 12, 1892, President Benjamin Harrison issued a proclamation "describing Columbus as 'the pioneer of progress and enlightenment,'"¹⁵ while also urging educational officials to undertake appropriate observations in the schools.¹⁶

An early sign of support for the Pledge occurred in 1898 when, on the day after the United States declared war on Spain, the New York State Legislature passed the first statute requiring students to recite the Pledge.¹⁷ Similar laws were enacted in Rhode Island in 1801, Arizona in 1903, Kansas in 1917, and Maryland in 1918.¹⁸ Apparently, in response to protests against World War I in 1919, the state of Washington enacted the first law directing teachers, under the risk of dismissal, to lead weekly flag exercises.¹⁹ Statutes of this type were also adopted in Delaware in 1925, New Jersey in 1932, and Massachusetts in 1935.²⁰ By 1940, at least eighteen states had enacted laws mandating some sort of teaching about the flag, while evidence indicates that thirty states had adopted rituals, mostly at the local level, calling for some form of reverence for the pledge and salute.²¹

In 1942, following the trend that had started in the states, Congress

13. Jane Meredith Adams, *One Nation Divided: Judges Bar Pledge for Kids Out West, Cites Words 'Under God,'* *Newsday* A3 (June 27, 2003); Paul Wagenseil, *History: The Pledge of Allegiance*, <http://www.foxnews.com/printer_friendly_story/0,3566,56320,00.html> (June 27, 2002).

14. Wagenseil, *supra* n. 13.

15. Exec. Procl. 7720, 68 Fed. Reg. 59515, 59515 (Oct. 10, 2003). (President Bush, recognizing that "[i]n commemoration of Columbus' journey, the Congress, by joint resolution of Apr. 30, 1934, and modified in 1968 (36 U.S.C. 107), as amended, has requested that the President proclaim the second Monday of October of each year as 'Columbus Day.'").

16. David W. Manwaring, *Render Unto Caesar: The Flag Salute Controversy 2* (U. of Chi. Press 1962).

17. *Id.* at 3; see also John J. Concannon, *The Pledge of Allegiance and the First Amendment*, 23 *Suffolk U. L. Rev.* 1019, 1021 (1989).

18. Manwaring, *supra* n. 16 at 3.

19. *Id.*

20. *Id.*

21. *Id.* at 4-5.

entered into the fray about the Pledge and flag salute in an effort to “codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America.”²² Although stopping short of mandating its recitation, the new statute set forth the approved wording of the Pledge.²³ On June 15, 1954, responding to a campaign by the Knights of Columbus, a Roman Catholic fraternal and charitable organization, and other religious groups, all of whom were motivated by Cold war era fears of communism,²⁴ President Eisenhower signed an amendment to the Pledge into law that added the words “under God.”²⁵ In an attempt to avoid litigation, Congressional sponsors of the Act in both the House and Senate disclaimed any religious purpose, distinguishing between religion as an institution and a belief in the sovereignty of God, agreeing that the modification of the Pledge was “. . . not an act establishing a religion or one interfering with the ‘free exercise’ of religion.”²⁶

In this regard, the *Elk Grove Unified School District’s* certiorari brief raised a noteworthy point that may come into play should the Supreme Court keep an open mind with regard to treating the words “under God” as a form of “civic deism” (discussed below)²⁷ rather than an establishment of religion. That is, the brief examined the discussion between the Legislative Reference Service of the Library of Congress and the Assistant Counsel to the House Committee on the Judiciary over placement of the words “under God” in the Pledge. To this end, the brief points out that the Legislative Reference Service was satisfied “that the phrase ‘under God’ was a modifier to the phrase ‘one Nation’ because the addition was intended to affirm that the United States was founded on a fundamental belief in God . . . [,] not an intent to establish a religion or to

22. H.R. Rpt. 77-2047 (Apr. 22, 1942); Sen. Rpt. 77-1477, at § 1 (June 11, 1942) (codified at 4 U.S.C. § 4).

23. The original version of the Pledge read “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.” *Id.* at § 7.

24. Maura Dolan, *Pledge of Allegiance Violates Constitution, Court Declares Law*, L.A. Times A1 (June 27, 2002); See also Wagenseil, *supra* n. 13.

25. 4 U.S.C. § 4 (2003):

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 their 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.

26. Br. for the U.S. in Opposition at 4, *Newdow v. U.S. Cong.*, 2003 WL 22428408, (citing H.R. Rpt. 83-1693 at 3) (1954) (citing *Zorach v. Clauson*, 343 U.S. 306 (1952), Sen. Rpt. 83-1287 at 2 (1954)).

27. See discussion and accompanying text *infra* n. 154.

turn the Pledge into a religious prayer.”²⁸ It will be interesting to see whether this nuanced discussion has any impact on the Court’s analyses.

More recently, following *Newdow I*, on November 13, 2002, the Senate and House of Representatives adopted a joint resolution reaffirming the reference to “one Nation under God in the Pledge of Allegiance.”²⁹ As with the initial modification in 1954, Congress acknowledged the importance that Americans, as a religious people, place in a belief in God. Insofar as litigation over statutes and/or policies calling for students and/or teachers to recite the amended Pledge (including the words “under God,” typically accompanied by ceremonies saluting the flag) has reached mixed results, the situation is far from clear.

III. LITIGATION INVOLVING THE PLEDGE

A. Early Cases

Opposition to the Pledge and flag salute based on religious grounds, albeit not to the words “under God,” appeared as early as 1918³⁰ when a state trial court in Ohio rejected the claim of a Mennonite foster father who challenged his arrest and fine for directing his nine-year-old daughter to neither attend school nor to salute the American flag.³¹ The foster father apparently directed the child to refuse to participate because of his opposition to war. Conceding that differences of opinion existed about American involvement in World War I, the court criticized the foster father’s conduct as:

[N]ot conscionable, for conscience would lead to respect for government and to its defense, especially in time of war, but rather it is the forerunner of disloyalty and treason. All true Americans are conscientiously opposed to war, but when war is upon us, we will fight and fight until the victory over our enemy is won.³²

Beginning in 1936, a flurry of judicial activity involving the Pledge and flag salute, filed mostly by Jehovah’s Witnesses,³³ began with *Nicholls*

28. Br. for the Sch. Dist. Respts. in Opposition at 3–4, *Newdow v. The Cong. of the U.S.*, 2003 WL 22428410.

29. Pub. L. No. 107–293, 116 Stat. 2057 (2002).

30. For a detailed history of the early opposition to the flag salute, see Manwaring, *supra* n. 16 at 11–15.

31. *Troyer v. St.*, 1918 WL 1176 (Ohio Com. Pl. (1918)).

32. *Id.* at 3.

33. “In mid-1936, 120 Jehovah’s Witnesses were estimated to have been excluded from school for this reason. By 1939, the figure had passed two hundred.” Manwaring, *supra* n. 16 at 56 (internal

*v. Mayor of Lynn*³⁴ wherein the Supreme Judicial Court of Massachusetts rejected a challenge based on the First Amendment.³⁵ The court held that as a valid legislative enactment that did not establish a penalty for a disobedient student, the school officials had the right "to inculcate patriotism and to instill a recognition of the blessings conferred by orderly government under the Constitutions of the State and nation."³⁶ In addition, the court observed that the Pledge and salute did not restrain anyone from worshiping God within the meaning of the First Amendment, since they neither relate to nor exact anything in opposition to religion.³⁷

Over the next three years, the Supreme Court refused to hear four cases that questioned the constitutionality of the Pledge and/or the flag salute, all because they lacked a substantial federal question. In *Leoles v. Landers*,³⁸ the Supreme Court dismissed an appeal from Georgia where a state court affirmed that school officials did not violate the religious freedom rights of a sixth grade Jehovah's Witness when she was expelled for refusing to salute the flag.³⁹ The court concluded that officials acted incident to their duty to instruct children in the study of and devotion to American institutions and ideals.⁴⁰ A year later, in *Hering v. State Board of Education*,⁴¹ the Supreme Court dismissed an appeal from New Jersey where a state court affirmed that students who were Jehovah's Witnesses could be required to recite the Pledge because it was just that, a pledge, and not an oath or religious rite. As such, the New Jersey Supreme Court concluded that the Pledge was "a patriotic ceremony which the Legislature has the power to require of those attending schools established at public expense."⁴²

In *Johnson v. Town of Deerfield*,⁴³ the Supreme Court summarily affirmed an order of the federal trial court in Massachusetts. Earlier, the trial court had refused to enjoin a statute that required all students,

citations omitted).

34. *Nicholls v. Mayor of Lynn*, 7 N.E.2d 577 (Mass. 1937).

35. *Id.* at 581.

36. *Id.* at 579.

37. *Id.* at 580. A second case from Massachusetts did not result in reported litigation after a father was fined for directing his children not to salute the flag. *Manwaring*, *supra* n. 16 at 60.

38. *Leoles v. Landers*, 192 S.E. 218 (Ga. 1937), *appeal dismissed*, 302 U.S. 656 (1937).

39. *Id.* at 223.

40. *Id.* at 222.

41. *Herring v. St. Bd. of Ed.*, 189 A. 629 (N.J. Sup. Ct. 1937), *aff'd*, 194 A. 177 (N.J. Err. & App. 1937), *appeal dismissed*, 303 U.S. 624 (1938).

42. *Id.* at 629.

43. *Johnson v. Town of Deerfield*, 25 F. Supp. 918 (D. Mass. 1939), *aff'd*, 306 U.S. 621 (1939), *rehearing denied*, 307 U.S. 650 (1939).

including Jehovah's Witnesses, to recite the Pledge on the ground that attendance in public schools is subject to reasonable state regulation.⁴⁴ On the same day, in *Gabrielli v. Knickerbocker*,⁴⁵ the Supreme Court also denied a petition for certiorari from a California decision that upheld the actions of school officials who expelled a student who refused to recite the Pledge and salute the flag.⁴⁶ The California court found that a local board had the power to impose a reasonable regulation designed to promote the efficiency of its schools as they educate children in good citizenship, patriotism, and loyalty to state and nation.⁴⁷ In other litigation not appealed to the Supreme Court, courts in Florida⁴⁸ and New York⁴⁹ rejected similar challenges, while suits from Texas⁵⁰ dealt with non-constitutional issues. At the same time, a case from Pennsylvania, which struck the Pledge down as unconstitutional, was making its inexorable way to the High Court.⁵¹

B. Supreme Court Cases

The Supreme Court finally accepted a case on the merits challenging the constitutionality of requiring students to salute the flag in *Minersville School District v. Gobitis (Gobitis)*.⁵² *Gobitis* was filed by a Jehovah's Witnesses father from Pennsylvania who filed suit on his own behalf and on behalf of his two children.⁵³ The father argued that requiring his children to salute the flag while in school, at the risk of being expelled for non-compliance, was the equivalent to forcing them to worship an image that violated their religious beliefs as reflected in the book of Exodus.⁵⁴

44. *Id.* at 921.

45. *Gabrielli v. Knickerbocker*, 82 P.2d 391 (Cal. 1938), *cert denied*, 306 U.S. 621 (1939).

46. *Id.* at 394.

47. *Id.*

48. *St. ex rel. Bleich v. Bd. of Pub. Instruction for Hillsborough County*, 190 So. 815 (Fla. 1939) (affirming decision upholding constitutionality of a statute requiring all children attending free public schools to salute the flag).

49. *People ex rel. Fish v. Sandstrom*, 279 N.Y. 523 (N.Y. Jan 17, 1939) (upholding the constitutionality of a regulation requiring children to participate in a ceremony of saluting the flag).

50. *Reynolds v. Rayborn*, 116 S.W.2d 836 (Tex. Civ. App. 1938) (reinstating a father's custody of a child even though he refused to have her salute the flag); *Shinn v. Barrow*, 121 S.W.2d 450 (Tex. Civ. App. 1938) (dismissing an appeal of a child's suspension for refusing to salute the flag as moot where the school term ended).

51. *Gobitis v. Minersville Sch. Dist.*, 21 F. Supp. 581 (E.D. Pa. 1937).

52. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

53. *Id.* at 592.

54. More specifically, the Court noted that the Witnesses relied on Exodus 20:3-5, according to which:

3. Thou shalt have no other gods before me. 4. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. 5. Thou shalt not bow down thyself to them, nor serve

In reversing an order of the Third Circuit that affirmed an injunction in favor of the plaintiffs,⁵⁵ the Court, in an 8–1 judgment,⁵⁶ reasoned that the students were not free to excuse themselves from participating in the Pledge because it was a rational way that the state officials could use to teach patriotism in schools.⁵⁷ The Court also recognized that Pennsylvania's compulsory attendance law was a legitimate legislative enactment, which the father would have violated by having his children refrain from participating in the Pledge.⁵⁸

Controversy over the Pledge refused to subside even after *Gobitis*. As such, the Court revisited the issue of requiring students to recite the Pledge when Jehovah's Witnesses and others in West Virginia challenged the constitutionality of a revised state education board regulation enacted after *Gobitis*, which stipulated that refusal to participate in the flag salute could be treated as an act of insubordination leading to expulsion from school.⁵⁹ As in *Gobitis*, the plaintiffs in *West Virginia State Board of Education v. Barnette* (*Barnette*)⁶⁰ claimed that the salute violated the religious freedom rights of schoolchildren.⁶¹ After a federal trial court enjoined the recitation of the Pledge,⁶² the Court in *Barnette*, torn by the conflict between state authority and individual rights, took the unusual step of explicitly reversing *Gobitis* in a 6–3 decision.⁶³ In its analysis, the Court was convinced that educational officials exceeded constitutional limitations on their authority by invading the sphere of intellect and spirit that is protected by the First Amendment, especially in light of the students' passive refusal to participate in the flag salute.⁶⁴ The Court concluded that "[t]o believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."⁶⁵ Although not explicitly referring to it, it is

them

Id. at 591 n. 1.

55. *Gobitis v. Minersville Sch. Dist.*, 24 F. Supp. 271 (E.D. Pa. 1938), *aff'd*, 108 F.2d 683 (3d Cir. 1939), *cert. granted*, 309 U.S. 645 (1940).

56. The sole dissenter was Justice Stone, *Minersville*, 310 U.S. at 601 (Stone, J., dissenting).

57. *Id.* at 599–600.

58. *Id.* at 597–98.

59. *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 625–26 (1943).

60. *Id.*

61. *Id.* at 629–30.

62. *Barnette v. W. Va. St. Bd. of Educ.*, 47 F. Supp. 251 (S.D.W. Va. 1942).

63. *W. Va. St. Bd. of Educ.*, 319 U.S. at 642. (Justices Roberts, Reed, and Frankfurter were the dissenting justices.).

64. *Id.*

65. *Id.* at 641.

hard to imagine that the Court was not influenced by the fact that as World War II was raging on, American and other forces fought to ensure freedom for peoples throughout the world.⁶⁶ Although religion admittedly played a part in both of the cases that reached the Supreme Court, the words “under God” had not yet been added to the Pledge. Even so, there is no reason to think that the results would have been any different had the phrase been included at that time.

C. *Post-Barnette Litigation*

The Pledge was not re-litigated again until almost a quarter-century after *Barnette*. Moreover, as reflected in this sequential review of cases, the litigation involving the Pledge took on a different focus once the words “under God” were added. In the post-*Barnette* litigation, which concerned religious objections by Jehovah’s Witnesses, later suits not only objected to the words “under God” on religious grounds,⁶⁷ but also on political-free speech bases,⁶⁸ culminating in challenges by atheists who objected to any mention of God in schools.⁶⁹

In *Holden v. Board of Education*,⁷⁰ the Supreme Court of New Jersey considered whether Black Muslim children who refused to recite the Pledge could be excluded from public school based on their claim that having to join in would have violated their religious beliefs.⁷¹ While others recited the pledge, the Black Muslim students stood respectfully at attention and were not disruptive while their classmates participated in the Pledge.⁷² Even though the students maintained that their beliefs were motivated as much by politics as by religion, educational officials rejected their claim of “conscientious scruples” since the two were intertwined with their racial motives.⁷³ Although not resolving whether the students’ refusal to salute the flag was religious or political,⁷⁴ the court ordered

66. Various opponents of the salute, including the Parent and Teachers Association, Boy and Girl Scouts, and the Red Cross objected to the salute who described it “. . . as ‘being too much like Hitler’s,’” a claim repudiated by the United States Flag Association. *Id.* at 627–28.

67. See *infra* n. 70 and accompanying text (discussing post-*Barnette* challenge to the Pledge on religious grounds).

68. See *e.g. infra* nn. 69, 79, 81–82 and accompanying text (discussing post-*Barnette* challenges to the pledge on political-free speech bases).

69. See *e.g. infra* n. 100 and accompanying text (discussing post-*Barnette* challenge to the Pledge by atheists objecting to any mention of God in schools).

70. *Holden v. Bd. of Educ.*, 216 A.2d 387 (N.J. 1966).

71. *Id.*

72. *Id.* at 391.

73. *Id.* at 389.

74. *Id.*

officials to reinstate the students.⁷⁵

Smith v. Denny,⁷⁶ a dispute from California, appears to have been the first reported case wherein plaintiffs challenged the inclusion of the words "under God" in the Pledge.⁷⁷ In addition to dicta from the Supreme Court supporting the notion that the Pledge did not violate the First Amendment's religion clauses,⁷⁸ the court favorably cited a decision from a federal trial court in Arizona, which declared that singing the National Anthem in schools was not an establishment of religion since the latter "is not a religious but a patriotic ceremony, intended to inspire devotion to and love of country."⁷⁹

Maryland's high court, in *State v. Lundquist*,⁸⁰ and the Fifth, now Eleventh Circuit,⁸¹ in *Banks v. Board of Public Instruction of Dade County*,⁸² struck down requirements that would have directed students who objected to saluting the flag to stand while their classmates did so.⁸³ The case from Maryland was filed by a teacher (who was also a father) on the basis that he "refuse[d] to engage in a mandatory flag salute ceremony, not for religious reasons but because he could not 'in good conscience' force patriotism upon his classes."⁸⁴ The teacher/father also "objected strongly to being forced to salute the flag because he believed such a requirement eliminated his right to freely express his own loyalty to the United States."⁸⁵ In the case from Florida, a student argued that he had the constitutional right to refuse to stand for the Pledge and salute,

75. *Id.* at 391.

76. *Smith v. Denny*, 280 F. Supp. 651 (S.D. Cal. 1968) [hereinafter *Smith*]. "[N]o case litigating the issue of whether the reference to God in the pledge of allegiance violates the first amendment has been decided by the Supreme Court . . ." *id.* at 653.

77. *Id.* at 652.

78. See *id.* at 653 (citing to *Engel v. Vitale*, 370 U.S. 421, 435 n. 21 (1962) [hereinafter *Engel*] (striking down school sponsored prayer at the start of the class day, and explaining, in dicta, that: [N]othing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God

and decision at *infra* n. 155.

79. *Id.* at 753-54 (citing *Sheldon v. Fannin*, 221 F. Supp. 766, 774 (D. Ariz. 1963)).

80. *St. v. Lundquist*, 278 A.2d 263 (Md. 1971) [hereinafter *Lundquist*].

81. In light of the growth in the Southeastern part of the United States, the Eleventh Circuit was created in 1981 when Congress divided it into the Fifth and Eleventh Circuits. Pub. L. No. 96-452, 94 Stat. 1994 (1980) (codified at 28 U.S.C.A. § 41).

82. *Banks v. Bd. of Pub. Instruction of Dade County*, 314 F. Supp. 285 (S.D. Fla. 1970) [hereinafter *Banks*], *aff'd*, 450 F.2d 1103 (5th Cir. Unit A 1971).

83. *Lundquist*, 278 A.2d 263; *Banks*, 314 F. Supp. 285.

84. *Lundquist*, 278 A.2d at 266.

85. *Id.*

and that his suspension violated his constitutional right of free speech and expression.⁸⁶ In neither case had officials offered students the option of leaving their classrooms.⁸⁷

Conversely, in *Goetz v. Ansell*,⁸⁸ even where children had the choice of leaving a classroom or standing silently during the Pledge, the Second Circuit determined that school officials in New York could not discipline a student who objected by remaining quietly seated because of his belief that the United States did not provide liberty and justice for all of its citizens.⁸⁹ The court decided that forcing a student to stand was no more acceptable than having him leave the room while the Pledge was recited, since this might reasonably have been viewed as a punishment for not participating.⁹⁰

The first two of the three cases directly involving teachers were decided in favor of the educators. In *Russo v. Central School District No. 1*,⁹¹ a probationary teacher in New York, as a matter of conscience, refused to join her students in flag salute ceremonies, including the recitation of the Pledge, based on her belief that the words "liberty and justice for all" did not reflect the quality of American life. Instead, the teacher stood in respectful silence, with her hands at her side, and did nothing to prevent her students from participating in the ceremony.⁹² Although the court noted that, "we do not share her views,"⁹³ and conceded that school officials have a substantial interest in maintaining ceremonies that support saluting the flag,⁹⁴ the Second Circuit ruled that the teacher could not be required to join in the recitation ceremony because doing so would have violated her First Amendment right to freedom of expression, even if it was expressed by her silence.⁹⁵

Five years later, the Supreme Judicial Court of Massachusetts, in the absence of a live controversy, handed down a non-binding advisory opinion after then Governor Dukakis asked the court how they would rule if litigation arose over a bill dealing with the Pledge.⁹⁶ In *Opinion of the Justices to the Governor*,⁹⁷ the court posited that a bill designed to

86. *Banks*, 314 F. Supp. at 287.

87. *Lundquist*, 278 A.2d 263; *Banks*, 314 F. Supp. 285.

88. *Goetz v. Ansell*, 477 F.2d 636 (2d Cir. 1973).

89. *Id.* at 636-37.

90. *Id.* at 638.

91. *Russo v. C. Sch. Dist. No. 1*, 469 F.2d 623 (2d Cir. 1972).

92. *Id.* at 626.

93. *Id.* at 633.

94. *Id.* at 632.

95. *Id.* at 634.

96. *Op. of the J.J. to the Gov.*, 363 N.E.2d 251, 252 (Mass. 1977).

97. *Id.* at 251.

have public school teachers begin the first class of each day by leading students in a group recitation of the Pledge would have violated the First Amendment.⁹⁸ The court declared that the proposed law would have been unconstitutional because even though it did not impose criminal penalties against non-complying teachers, the court feared that an element of compulsion remained in the prospective statutory mandate.⁹⁹

In the only other case involving the merits of a claim by a teacher, *Palmer v. Board of Education*,¹⁰⁰ the Seventh Circuit reached the opposite result. The court affirmed that despite her claim that doing so conflicted with her religious beliefs, a kindergarten teacher in Illinois, who was a Jehovah's Witness, was not free to disregard the prescribed curriculum with regard to patriotic matters. As such, the court upheld the school board's dismissal of the teacher because she refused to participate in the Pledge, sing patriotic songs, and celebrate certain national holidays.¹⁰¹

Returning to cases focusing primarily on students, in *Sherman v. Community Consolidated School District 21 of Wheeling Township (Sherman)*,¹⁰² the Seventh Circuit affirmed that school officials in Illinois could lead the Pledge, including the words "under God," as long as children were free not to participate in its daily recitation.¹⁰³ The court rejected the claim of a father and son, both of whom were atheists, that the Pledge violated the child's First Amendment right to freedom of religion.¹⁰⁴ The court noted that the use of the phrase "under God" in the context of the secular vow of allegiance was a "patriotic or ceremonial" expression rather than one of religious belief.¹⁰⁵ To the dismay of later critics, such as the *pro-se* plaintiff in *Newdow*, the Court affirmed the earlier judgment by explicitly eschewing the seemingly ubiquitous *Lemon* test,¹⁰⁶ on which the trial court had relied in upholding the pledge,¹⁰⁷ in

98. *Id.* at 255.

99. *Id.* at 254.

100. *Palmer v. Bd. of Educ.*, 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

101. *Id.* at 1274.

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

103. *Id.* at 439.

104. *Id.* at 449.

105. *Id.* at 447.

106. *Id.* at 445. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971) [hereinafter *Lemon*], the Court declared that:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.

Id. at 612-13 (internal citations omitted).

favor of Kennedy's coercion test, which had been recently enunciated in *Lee v. Weisman* (*Lee*).¹⁰⁸ More specifically, the *Sherman* court was satisfied that ceremonial references to a deity in civic life cannot "be understood as prayer or, support for all monotheistic religions, to the exclusion of atheists and those who worship multiple gods."¹⁰⁹

D. *Newdow v. United States Congress*

The most recent controversy involving the Pledge arose in California, where a self-professed atheist and non-custodial father of an eight-year old girl, whose own petition for certiorari described himself as "an incredibly outstanding parent,"¹¹⁰ challenged both the Pledge and a board policy that directed students to recite it at the start of the school day.¹¹¹ The board policy, which was enacted pursuant to a state law requiring officials in public elementary schools to "conduct... appropriate

Even though the first two parts of the increasingly unworkable *Lemon* test emerged in cases involving prayer and Bible reading in public schools in *Sch. Dist. of Abington Township v. Schenipp*, 374 U.S. 203 (1963) [hereinafter *Abington*] and *Murray v. Curlett*, 228 Md. 239 (Md. 1962), and the third developed in a dispute over a charitable tax exemption, *Walz v. Tax Commn. of N.Y.C.*, 397 U.S. 664 (1970) (upholding New York State's practice of providing state property tax exemptions for church property that is used in worship services), it was widely, and perhaps inappropriately, applied as a one-size fits all solution in disputes involving aid to non-public schools until the Court recast it in *Agostini v. Felton*, 521 U.S. 203 (1997) [hereinafter *Agostini*] (permitting the on-site delivery of Title I services to children in their religiously affiliated non-public schools and modifying the *Lemon* test by reviewing only its first two parts, while recasting entanglement as one criterion in considering a statute's effect). For a discussion of this case, see Charles J. Russo, Allan G. Osborne, Gerald M. Cattaro & Philip P. DiMattia, *Agostini v. Felton and the Delivery of Title I Services in Catholic Schools*, 1 *Catholic Educ.: A J. of Inquiry and Prac.* 263 (1998). Based on the Court's having ignored it in *Lee v. Weisman*, 505 U.S. 577 (1992) [hereinafter *Lee*] (striking down school sponsored prayer at public school graduation ceremonies, in part, on the basis of coercion), and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) [hereinafter *Santa Fe*] (prohibiting student-led prayer at the start of high school football games), it seems that *Lemon* is equally as tenuous in cases involving prayer and other expressions of belief in public schools.

107. *Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township*, 758 F. Supp. 1244, 1247-48 (N.D. Ill. 1991).

108. *Lee*, 505 U.S. at 587. ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . ." *Id.* 591-92. "[I]n the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." *Id.* at 595. "[T]he United States . . . made this a center point . . . arguing that the option of not attending the graduation excuses any inducement or coercion The argument lacks all persuasion." *Id.* at 596. "To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity . . ."). *Id.* at 596. For a discussion of this case, see Ralph D. Mawdsley & Charles J. Russo, *Lee v. Weisman: The Supreme Court Pronounces the Benediction on Public School Graduation Prayers*, 77 *Educ. Law Rep.* 1071 (1992).

109. *Sherman*, 980 F.2d at 445.

110. Pet. for Writ. of Cert. for Michael A. Newdow at 23 n. 23, *Newdow v. U.S. Cong.*, 124 S.Ct. 386 (2003).

111. *Id.*

patriotic exercises” at the beginning of the school day, and that “[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy such requirements,”¹¹² did not compel children to join in reciting the Pledge.¹¹³

At the outset of the litigation, the father, Michael A. Newdow, did not inform the child’s mother that he was acting, even though she had sole custody of their child and “. . . the custody order require[d] both parents to consult on any substantial decision regarding their daughter’s education”¹¹⁴ Moreover, the child’s mother, Sandra L. Banning, reported that neither she, nor her daughter, was troubled by the child’s recitation the Pledge.¹¹⁵ The father’s claim raised two primary challenges. First, he claimed that his daughter was injured by being “compelled to ‘watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God.’”¹¹⁶ Second, he then argued that he had standing as a taxpayer to challenge the Pledge policy¹¹⁷ on the ground that federal and state moneys were used to enforce it.¹¹⁸

A federal trial court in California, in an unpublished opinion accepting the recommendation of a magistrate judge that the Pledge was constitutional, dismissed *Newdow I* for failure to state a (federal) claim; the court did not act on Newdow’s state claims.¹¹⁹ Upon further review, a divided Ninth Circuit reversed in favor of Newdow.¹²⁰ After deciding that the plaintiff had standing, the Ninth Circuit struck down both the 1954 statute, which added the words “under God” to the Pledge, and the board policy authorizing its daily recitation.¹²¹ Rejecting Congressional disclaimers of a religious purpose in revising the Pledge, the court held that both the statute and the policy violated the Establishment Clause insofar as teachers had to begin each school day by having students recite the words “under God.”¹²² In the face of swift and stinging criticism,¹²³ a

112. Cal. Educ. Code § 52720 (2003).

113. *Newdow II*, 328 F.3d at 482–83.

114. Br. for Sandra L. Banning in Support of the Petitions for Cert. at 3–4, *Newdow v. U.S. Cong.*, 124 S. Ct. 860, 124 S.Ct. 383, 124 S.Ct. 384, 2003 WL 23055033.

115. *Out From Under God*, Newsweek 12 (Aug. 19, 2002).

116. *Newdow II*, 328 F.3d at 483.

117. Newdow’s petition, *supra* n. 110 at 6.

118. At the same time, the court did not address the father’s claim that the policy violated the state constitution.

119. *Newdow v. U.S. Cong.*, 2000 E.D. Cal. LEXIS 22366 (July 21, 2000).

120. *Newdow II*, 328 F.3d 466.

121. *Id.* at 490.

122. *Id.*

123. See e.g. Fredric U. Dicker, Vincent Morris & Brad Hunter, *God-Awful: Holy War as Court Outlaws Pledge*, N.Y. Post I (June 27, 2002); Robert S. Greenberger, *Appeals Court Strikes Down The*

day later the court stayed its judgment.¹²⁴ The court subsequently rejected motions that Congress¹²⁵ and the child's mother be permitted to intervene in the litigation.¹²⁶

After the Ninth Circuit, sitting en banc, refused over the dissent of six judges¹²⁷ to re-examine *Newdow I*, the same initial panel of judges, again by a 2–1 margin, struck the Pledge down.¹²⁸ This time, however, the court focused on the narrower ground that “the school district policy impermissibly coerces a religious act,”¹²⁹ while refusing to address the constitutionality of the federal statute that authorized the Pledge.¹³⁰ In its analysis, the court rejected the notion that the Pledge was a patriotic exercise, a form of “civic deism.”¹³¹ Further, in a significant procedural matter, the court essentially glossed over Newdow's standing, almost summarily asserting he could proceed even though, as noted, the child's mother, whom the court inexplicably refused to permit to intervene, claimed that her daughter did not suffer any harm.¹³²

Dissatisfied with the Ninth Circuit's second ruling, both the school board and the father sought further review.¹³³ The board appealed both in defending the constitutionality of its policy and in challenging the father's standing to bring the case.¹³⁴ As with the earlier rounds of litigation, the father appealed because he was dissatisfied that he did not receive the full relief he sought by declaring that Congress violated the Establishment Clause by including the words “under God” in the Pledge, and because he did not think that his right to standing was addressed satisfactorily.¹³⁵

Pledge of Allegiance, The Wall Street J. A4 (June 27, 2002); Frank J. Murray, *Pledge of Allegiance Ruled Unconstitutional-Democrats and Republicans Denounce Appeals*, Washington Times, Panel Decision A01 (June 27, 2002); *Insult to All Ninth Circuit Kills Pledge of Allegiance*, The San Diego Union-Tribune B 12:7; B 8:1; B 14:2, 6 (June 27, 2002).

124. *Newdow I*, 292 F.3d 597.

125. *Newdow*, 313 F.3d at 500.

126. *Id.* at 506.

127. *Newdow II*, 328 F.3d at 471.

128. *Id.* at 490.

129. *Id.* at 487.

130. *Id.* at 490.

131. *Id.* at 487.

132. *Out From Under God*, *supra* n. 115.

133. For an article on how life in the district has been affected by the litigation, see Carline Hendry, *Pledge Debate Taken to Hear in Calif. Dist.*, Educ. Week 1, 24–26 (Mar. 3, 2004).

134. *Supra* n. 28, at 5–6.

135. Newdow's petition, *supra* n. 110 at 7–8.

IV. DISCUSSION

A. *Prolegomena*

In light of Congressional threats to intervene should the High Court affirm the earlier order striking this modification down as unconstitutional, the Ninth Circuit, perhaps aided and abetted by the Supreme Court, has placed the Nation on the precipice of a constitutional controversy, if not crisis, over the appropriateness of including the words "under God" in the Pledge.¹³⁶ Thus, by agreeing to hear an appeal in *Newdow*, the Court has joined the latest battle in the ongoing culture war in a dispute focusing on religion, values, and even diversity in American schools and society.

Before engaging in substantive analyses of the issues, preliminary reflections on the place of religion in public education are in order. While it almost goes without saying that religion is, and should remain, primarily a concern of parents rather than educators in public schools, one can only wonder what is gained when the courts leave no choice but to exclude many religious activities from schools or run the risk of litigation.¹³⁷ Put another way, although the debate is often framed as not wanting values, especially religious values to dominate in public schools, it is at best disingenuous, and at worst dishonest, to make this the central issue. Instead, since educators teach values every day, for example, by instructing students not to cheat and to respect others, the debate should be more accurately framed as a clash of cultures over whose values should prevail in schools.

The core of this debate rests on the paradox of how a democratic society that was established largely in pursuit of religious freedom can safeguard the rights of both the majority and minority. In other words, as the most highly religious country among wealthy western nations,¹³⁸

136. See *infra* note 200 and accompanying text.

137. See e.g. *Sechler v. St. College Area Sch. Dist.* 121 F. Supp. 2d 439 (M.D. Pa. 2000) (refusing to permit a suit by a youth minister, challenging a school's practice of permitting a display that included information on Chanukah and Kwanza, but nothing on Christmas, to proceed); *Walz ex rel. Walz v. Egg Harbor Township Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003) (affirming that a restriction of distribution of proselytizing pencils and evangelical candy canes to outside classroom and after school hours did not violate the First Amendment rights to freedom of speech and free exercise of religion); but see *Westfield High Sch. L.L.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003) (enjoining board speech policies prohibiting students from distributing such candy canes and religious literature during non-instructional time).

138. *Among Wealthy Nations . . . U.S. Stands Alone in its Embrace of Religion, The Pew Global Attitudes Project* <<http://people-press.org/reports/display.php3?ReportID=167>> (Dec. 19, 2002) (reporting that in a survey of forty-four Nations, 59 percent of Americans responded that religion plays a very important role in their lives; by contrast, 33 percent of respondents in Great Britain, 30

while few Americans seem to be troubled by including the words “under God” in the Pledge,¹³⁹ it is worth remembering that constitutional rights are not subject to the ballot box or public opinion. As such, it is important to safeguard the rights of the minority. Yet, as tensions flare when in protecting the rights of increasingly vocal secularist opponents of religion, the judiciary has not steered a clear path in avoiding what can best be described as a tyranny of the minority, often led by various public interest groups¹⁴⁰ exercising a kind of “heckler’s veto,”¹⁴¹ which allows a small group to drown out the wishes of the majority.

Amid debate over religion and inconsistent judicial messages, one can only wonder how educators can expect to foster their espoused appreciation for diversity in all of its manifestations if they are unwilling to tolerate expressions of religious beliefs that might not be shared by all members of a school community.¹⁴² It is ironic that in a nation that claims to value religious freedom, the courts have not only been unable to reach a consensus on the appropriateness of religious activities in schools, but, as noted, have arguably taken impermissible steps to remove just about all school-sponsored references to religion from schools, however tenuous their connections to establishment may be. Clearly, as the Supreme Court prepares to consider the constitutionality of the words “under God” in the Pledge, the Justices must find a middle ground

percent in Canada, 21 percent in Germany, and 11 percent in France gave the same answer).

139. See e.g. *NYers Favor God and Old Glory*, N.Y. Post 6 (Oct. 25, 2003) (reporting that 81 percent of New Yorkers approve keeping “under God” in the Pledge of Allegiance); Russ Oates, *AP Online Survey: Support for First Amendment Up* (Aug. 1, 2003) (reporting that 68 percent of respondents did not think that the inclusion of “under God” in the Pledge violated the First Amendment); *The Washington Post In Brief*, Wash. Post B9 (June 14, 2003) (reporting that 89 percent of respondents in a poll by Quinnipiac University in Connecticut support keeping the phrase “under God” in the Pledge); *U.S. Newswire*, (Mar. 20, 2003) (reporting that 59 percent of high school students were offended by someone who refused to stand during the Pledge).

140. Perhaps the most widely recognized group in this regard is the American Civil Liberties Union. See e.g., *County of Allegheny v. A.C.L.U. Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) [hereinafter *Allegheny*]. See *infra* n. 169 and accompanying text for a discussion of this case.

141. *Good News Club v. Milford C. Sch.*, 533 U.S. 98, 118 (2001) [hereinafter *Good News*] (permitting a religious group to use public school facilities). In *Good News Club*, Justice Thomas made this point in warning that the Court is unwilling “to employ Establishment Clause jurisprudence using a modified heckler’s veto, in which a group’s religious activity can be proscribed on the basis of what . . . members of the audience might misperceive.” *Id.* For a discussion of this case see Charles J. Russo & Ralph D. Mawdsley, *And the Wall Keeps Tumbling Down: The Supreme Court Upholds Religious Liberty in Good News Club v. Milford C. Sch.*, 157 Educ. L. Rep. 1–14. (2001).

142. A recent case from Michigan highlighted this conundrum. See *Hansen v. Ann Arbor Pub. Schs.*, 2003 WL 22912029, 1 (E.D. Mich. 2003) (In ruling that school officials violated a student’s rights, a federal trial court judge acerbically wrote that “[t]his case presents the ironic, and unfortunate, paradox of a public high school celebrating ‘diversity’ by refusing to permit the presentation to students of an ‘unwelcomed’ viewpoint on the topic of homosexuality and religion, while actively promoting the competing view.”). *Id.*

that can accommodate the perspectives of all Americans.

*B. Divining the Outcome in Newdow*¹⁴³

As it goes about the challenging task of reviewing the status of the Pledge, the Court clearly set forth the two questions that it is set to consider:

1. Whether respondent has standing to challenge as unconstitutional a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance. 2. Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words ‘under God,’ violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment¹⁴⁴

As with most educational disputes that have reached it,¹⁴⁵ especially with regard to the Religion Clauses of the First Amendment,¹⁴⁶ the Supreme Court is overtly polarized into three distinct camps. At one end are the accommodationists/strict constructionists—Chief Justice Rehnquist¹⁴⁷ and Justices Scalia¹⁴⁸ and Thomas.¹⁴⁹ These Justices typically

143. An imprecise science at best, patterns tend to reflect how the Justices tend to vote. For example, a recent study reported that in a mathematical analysis of patterns over the past eight years, covering 468 cases, Justices Scalia and Thomas voted together more than 93 percent of the time while Justices Ginsburg and Souter voted the same way more than 90 percent of the time. See Erica Klarreich, *Ideal Justice*, Sci. News (June 28, 2003); Jack Kilpatrick, *Justices [D]on't [F]it into [P]redictable [I]deological [B]oxes*, Deseret News A9 (Aug. 4, 2003). An earlier story, Daniel E. Troy, *The Court's Mr. Right*, Natl. Rev. 39–41 (Aug. 9, 1999), reported that during Justice Thomas' first five years on the High Court, he and Justice Scalia voted together 80 percent of the time, Justices Breyer and Souter voted together 84 percent of the time, and Justices Ginsberg and Souter voted together 80 percent of the time.

144. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 384, 384 (Mem) (2003).

145. In addition to the religion cases highlighted throughout, and aid cases that are excluded from this discussion. See e.g. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie v. Earls*, 536 U.S. 822 (2002), *on remand*, 300 F.3d 1222 (10th Cir. 2002) (upholding by a 5–4 margin, drug-testing of students involved in extra-curricular activities); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), and *Gratz v. Grutter*, 123 S. Ct. 2411 (2003) (by margins of 5–4 and 6–3, respectively, upholding the University of Michigan's affirmative action admissions policy in its law school while striking down its reliance on a point system in admissions to undergraduate programs).

146. For a discussion of related issues, see Charles J. Russo & Ralph D. Mawdsley, *The Supreme Court and the Establishment Clause at the Dawn of the New Millennium: 'Bristl[ing] with Hostility to All Things Religious' or Necessary Separation of Church and State?*, 2001 BYU Educ. & L.J. 231.

147. Since joining the Court, Chief Justice Rehnquist has typically voted in favor of religious freedom in educational settings. See e.g. *Widmar v. Vincent*, 454 U.S. 263 (1981) (upholding access by a Christian group to use school facilities in a university setting); *Wallace v. Jaffree*, 472 U.S. 38 (1985) [hereinafter *Wallace*] (striking down a statute from Alabama that authorized a daily period of silence in public schools for meditation or voluntary prayer as an endorsement of religion) (Rehnquist, J., dissenting); *Edwards v. Aguillard*, 482 U.S. 578 (1987) [hereinafter *Edwards*] (striking down a statute that prohibited the teaching of “evolution-science” in public schools unless accompanied by instruction on “creation-science”) (Rehnquist, J., dissenting); *Bd. of Educ. of*

interpret the Constitution as not requiring an absolute “separation of church and state”—language that does not appear in the text of the Constitution. They have consistently voted in favor of religious freedom in terms of permitting religious activity in public schools. However, as discussed below, Justice Scalia’s self-recusal in *Newdow* makes it all the more difficult in attempting to divine the outcome if the Court addresses the case on its merits.¹⁵⁰ As an accommodationist, Justice Scalia would likely have joined Chief Justice Rehnquist and Justice Thomas in upholding the Pledge. These members of the Court are likely to agree that the words “under God” are more of an expression of America’s religious heritage, often referred to as “civic deism,” than an unconstitutional establishment of religion.

On the other hand, demonstrating talisman-like obeisance for the tired, if not failed, Jeffersonian metaphor mandating the “building a wall of separation between church and state,”¹⁵¹ a phrase that is not found in the text of the Constitution, the separationists on the Court, Justices Stevens,¹⁵² Souter,¹⁵³ and Ginsburg,¹⁵⁴ have consistently voted to exclude

Westside Community Sch. v. Mergens, 496 U.S. 226 (1990) [hereinafter *Mergens*] (upholding the Equal Access Act); *Lee*, 505 U.S. 577; (Rehnquist, C.J., dissenting); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) [hereinafter *Lamb’s Chapel*] (granting a religious group access to use public school facilities); on remand, 17 F.3d 1425 (2d Cir. 1994); *Santa Fe*, 530 U.S. 290; *Good News*, 533 U.S. 98.

148. Justice Scalia has also upheld religious freedoms in school settings. See e.g. *Edwards*, 482 U.S. 578; *Mergens*, 496 U.S. 226; *Lamb’s Chapel*, 508 U.S. 384; *Lee*, 505 U.S. 577; *Santa Fe*, 530 U.S. 290; *Good News*, 533 U.S. 98.

149. See e.g. *Lee*, 505 U.S. 577; *Santa Fe*, 530 U.S. 290; *Lamb’s Chapel*, 508 U.S. 384; *Good News*, 533 U.S. 98.

150. For a similar reflection on the outcome, without making a final prediction, see Bill W. Sanford, Jr., *Separation v. Patriotism: Expelling the Pledge from School*, 34 St. Mary’s L.J. 461 (2003).

151. The metaphor of the “wall of separation” comes from Thomas Jefferson’s letter of Jan. 1, 1802 to Nehemiah Dodge, Ephraim Robbins & Stephen S. Nelson, A Committee of the Danbury Baptist Association. Thomas Jefferson, *Writings of Thomas Jefferson* vol. 16, 281 (Andrew Ellery Bergh ed. The Thomas Jefferson Memorial Assn. 1903). Jefferson wrote:

Believing with you that religion is a matter which lies solely between man and his God . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between church and state.

Id.

The Supreme Court first used the term in *Reynolds v. U.S.*, 98 U.S. 145, 164 (1879) (rejecting a Free Exercise Clause challenge to a federal polygamy statute).

152. Since joining the Court, Justice Stevens voted against permitting prayer or religious activity in public schools in all but two cases, both of which involved access to educational facilities. See *Widmar*, 454 U.S. 263; *Lamb’s Chapel*, 508 U.S. 384. In all other instances, he voted against religious liberty. See *Wallace*, 472 U.S. 38; *Edwards*, 482 U.S. 578; *Mergens*, 496 U.S. 226; *Lee*, 505 U.S. 577; *Santa Fe*, 530 U.S. 290; *Good News*, 533 U.S. 98.

153. During his time on the Court, Justice Souter voted against religious activity in the three cases in which he participated. See *Lee*, 505 U.S. 577; *Santa Fe*, 530 U.S. 290; *Good News*, 533 U.S. 98.

religion, whether in the form of aid or activity, in public schools. Based on their individual and bloc votes, it is safe to say that they are likely to strike the Pledge down. These Justices' reliance on Jefferson's "wall" metaphor has led Justice Stevens, for example, to reveal a deep-seated animosity toward religion in any case, as he has voiced his almost paranoid fear that providing poor children in failing urban schools with vouchers might turn the United States into a nation that engages in the same misuse of religion that occurs in parts of the world that are replete with ethnic-religious strife.¹⁵⁵

The views of the remaining three Justices, Kennedy, O'Connor, and Breyer, are somewhat in doubt. Their votes in *Newdow* will likely depend on whether they are willing to treat the words "under God" in the Pledge as what is euphemistically described as "civic deism" rather than the unconstitutional establishment of religion. Under civic deism, "references to God [such as that] contained in the Pledge of Allegiance . . . [are] protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content."¹⁵⁶ Thus, it remains to be seen whether these Justices will be willing to acknowledge that "civic deism" recognizes that although the Pledge contains the words "under God," it has not had a tendency to establish a state religion or suppress the beliefs of minority groups since religious freedom is such an integral part of the American consciousness, a position that the Court has reflected in dicta.¹⁵⁷ As such, the key question for Justices O'Connor and Kennedy, in particular, is whether the words "under God" in the Pledge should be treated differently from other forms of religious expression such as prayer.

Although he has typically been more of a separationist, Justice Breyer's having partially joined both the majority and concurrence in permitting a religious club to meet in a public school suggests that he

154. During her time on the High Court, Justice Ginsberg also opposed religious activity in the cases in which she was involved, *Santa Fe*, 530 U.S. 577; *Good News*, 533 U.S. 98.

155. In *Zelman v. Simmons-Harris*, Justice Stevens wrote, "I have been influenced by my understanding of the impact of religious strife on the decisions of our forbear[or]s to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another." 536 U.S. 639, 686 (2002) (Stevens, J., dissenting).

156. *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) [hereinafter *Lynch*] (Brennan, J., dissenting); see also *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (upholding prayer at the start of legislative sessions based on the recognition that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country").

157. *Smith*, 280 F. Supp. at 653 (citing support for the concept of civic deity as not violating the Establishment Clause). For examples of two noted separationists, see Justice Black in *Engel*, 370 U.S. 421, and Justice Brennan in *Abington*, 374 U.S. 203.

may join Justices O'Connor and Kennedy as a swing vote.¹⁵⁸ Justices O'Connor¹⁵⁹ and Kennedy¹⁶⁰ typically have the greatest impact on cases involving religion in the market place of ideas, including public schools. They have reached mixed results in this crucial area, however, voting to permit access to public school facilities, but placing limits on religious activities involving prayer in public schools. Perhaps the best example of Justice O'Connor's influence in the important arena of religion is a far-reaching non-school case, *Lynch v. Donnelly* (*Lynch*).¹⁶¹ In *Lynch*, the Court permitted the placement of a Christmas display including Santa's house, a Christmas tree, and a Nativity scene on public property.¹⁶² In her concurring opinion, Justice O'Connor enunciated her "endorsement test." Under this test, Justice O'Connor wrote in a concurring opinion that "[e]ndorsement sends a message to non-adherents 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. Disapproval sends the opposite message."¹⁶³ She added that "irrespective of government's actual purpose, [if] the practice under review in fact conveys a message of endorsement or disapproval . . . [a court] should render the challenged practice invalid."¹⁶⁴ Relying on this test, Justice Stevens' opinion in *Santa Fe Independent School District v. Doe*¹⁶⁵ struck down prayer before high school football games in part based on his assertion that school officials appeared to endorse religion.¹⁶⁶

158. See e.g. *Good News*, 533 U.S. 98. Although it is beyond the scope of the analysis in this article, Justice Breyer also demonstrated an openness to religious freedom by joining Justice O'Connor's concurrence in *Mitchell v. Helms*, 530 U.S. 793, 836 (2000) (O'Connor, J., concurring) (upholding the constitutionality of Chapter 2 of Title I, now Title VI, of the Elementary and Secondary Education Act, a far-reaching federal law permitting the loan of instructional materials including library books, computers, television sets, tape recorders, and maps, to non-public schools). For a discussion of this article see Ralph D. Mawdsley & Charles J. Russo, *Religious Schools and Government Assistance: What is Acceptable After Helms?* 151 Educ. L. Rep. 373 (2001).

159. Justice O'Connor voted in favor of religious freedom in *Mergens*, 496 U.S. 226; *Good News*, 533 U.S. 98; but see *Wallace*, 472 U.S. at 67 (O'Connor, J., concurring); *Edwards*, 482 U.S. 578; *Lee*, 505 U.S. 577; *Santa Fe*, 530 U.S. 290.

160. Justice Kennedy voted in favor of religious freedom in *Mergens*, 496 U.S. 226; *Lamb's Chapel*, 508 U.S. 384, *Good News*, 533 U.S. 98; but see *Lee*, 505 U.S. 577; *Santa Fe*, 530 U.S. 290.

161. *Lynch*, 465 U.S. 668.

162. *Id.* at 686.

163. *Id.* at 687-88 (O'Connor, J., concurring).

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

165. *Santa Fe*, 530 U.S. 290. For a discussion of *Santa Fe*, see Ralph D. Mawdsley & Charles J. Russo, *Student Choice and School District Prayers: What is Constitutionally Acceptable?*, 151 Educ. L. Rep. 379 (2001).

166. *Id.* at 318.

A year later, in her concurring opinion in *Wallace v. Jaffree*,¹⁶⁷ wherein the Court struck down a mandatory moment of silence for meditation or voluntary prayer, Justice O'Connor adopted an approach that can arguably be viewed as being at odds with her opinion in *Lynch*, where she rejected the claim that the holding would render the Pledge unconstitutional because Congress amended it in 1954 to add the words "under God." She continued to write that, "In my view, the words 'under God' in the Pledge . . . serve as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'"¹⁶⁸

Optimism that Justices O'Connor and Kennedy might uphold the Pledge must be tempered by the attitudes they displayed with regard to "civic deism" in non-school settings in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter (Allegheny)*.¹⁶⁹ Unlike the mixed positions that these two Justices have adopted with regard to other aspects of religion in public schools, as discussed below, their positions in *Allegheny* do not, at first glance, appear to bode well for the Pledge.

In *Allegheny*, the Court struck down the display of a crèche on public property as violating the Establishment Clause.¹⁷⁰ At the same time, the Court permitted a display consisting of a menorah, a Christmas tree, and a sign about religious freedom to remain on public property insofar as it concluded that these did not have the unconstitutional effect of advancing religion.¹⁷¹ In her concurrence, Justice O'Connor applied the endorsement test in discussing ceremonial deism in the form of legislative prayers or statements at the opening of judicial sessions, which mention God.¹⁷² She commented that "examples of ceremonial deism do not survive Establishment Clause scrutiny simply by virtue of their historical longevity alone."¹⁷³ Rather, insofar as she declared that ceremonial deism would still have to pass muster under her endorsement test, it is doubtful whether the Pledge would survive Justice O'Connor's scrutiny.

Justice Kennedy's opinion in *Allegheny* echoed Justice O'Connor's sentiment. In discussing the Pledge's use of the words "under God," he stated that while "no one is obligated to recite the phrase . . . it borders on

167. *Wallace*, 472 U.S. 38.

168. *Id.* at 78 n. 5 (1985) (O'Connor, J., concurring).

169. *Allegheny*, 492 U.S. 573.

170. *Id.* 601-02.

171. *Id.* at 621.

172. *Id.* at 631 (O'Connor, J., concurring).

173. *Id.* at 630 (O'Connor, J., concurring).

sophistry to suggest that the ‘reasonable’ atheist would not feel less than a ‘full member of the political community’ every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.”¹⁷⁴

Returning to school cases, it is worth observing that Justices O’Connor and Kennedy have reached mixed results with regard to religious activity in public school settings. For example, in *Lee v. Weisman*¹⁷⁵ Justice Kennedy authored the majority opinion, joined by Justice O’Connor, in striking down school sponsored graduation prayer on the ground that students were coerced to participate in such ceremonies.¹⁷⁶ The Ninth Circuit echoed this language in *Newdow II*.¹⁷⁷ Further, both Justices joined the Court’s majority in *Santa Fe*, wherein the Court, in an opinion by arch-separationist Justice Stevens that relied in part on Justice O’Connor’s endorsement test,¹⁷⁸ struck down student-led prayer before a high school football game.¹⁷⁹ On the other hand, both Justices joined the majority in *Good News Club v. Milford Central School*,¹⁸⁰ wherein the Court upheld the right of a Christian club to meet in public school facilities after hours since secular based groups had access to do the same.¹⁸¹

Should Justice O’Connor strictly apply her endorsement test, there is some chance that she could tip the scales in favor of the separationists, regardless of how Justice Kennedy rules, depending on whether she is satisfied that the Pledge is neutral. Additionally, apart from how Justice O’Connor decides, Kennedy’s dissent in *Allegheny* suggests that he, too, could be convinced to side with the separationists. The key question in this regard is whether Justices O’Connor and Kennedy can be swayed by sentiment, such as that expressed by Judge Fernandez in his *Newdow I* dissent, wherein he presciently questioned whether the two judge majority sought to “cool the febrile nerves of a few [opponents of the Pledge] at the cost of removing the healthy glow conferred upon the many citizens when the forbidden verses, or phrases, are uttered, read, or seen[.]”¹⁸² and stop short of striking down the Pledge.

In sum, Justice O’Connor appears to be most concerned that the

174. *Id.* at 673 (Kennedy, J., concurring in part and dissenting in part).

175. *Lee*, 505 U.S. 577.

176. *Id.* at 599.

177. *Newdow II*, 328 F.3d at 486.

178. *Santa Fe*, 530 U.S. at 310–12.

179. *Id.* at 313.

180. *Good News*, 533 U.S. 98.

181. *Id.*

182. *Newdow I*, 292 F.3d at 615.

government not endorse a religious act and that it maintain neutrality in the same regard. Concomitantly, Justice Kennedy's greatest concern about religion in public schools seems to focus on whether governmental coercion is present. Clearly, the Pledge policy at issue in *Newdow II* involves neither of these two elements that raise concerns for Justices O'Connor and Kennedy. As such, in light of their generally centrist views,¹⁸³ despite their having raised some concerns about the place of "civic deism" and religious activity in schools, it is likely that Justices O'Connor and Kennedy will join Chief Justice Rehnquist and Justice Thomas in upholding the Pledge. Thus assuring at least a plurality, the Court will again repudiate the Ninth Circuit¹⁸⁴ rather than run the risk of tearing apart the American fabric by striking down the words "under God" in the Pledge. Further, given the openness that he has displayed toward religion in his most recent cases, there is reason for cautious optimism that Justice Kennedy will not join the separationists, Justices Stevens, Ginsburg, and Souter, who will likely call for the removal of the words "under God." Even if Justice Breyer joins his colleagues in upholding the Pledge, the Ninth Circuit may well have set off a firestorm that may lead Congress significantly to reform the jurisdiction of the federal courts.

C. Justice Scalia's Recusal

Perhaps the most interesting twist in light of the Court's agreement to review *Newdow*¹⁸⁵ is that Justice Scalia has recused himself. While Scalia did not explain why he would not participate, the brief for the *pro-se* plaintiff, a medical doctor with a law degree, requested that Scalia do so in response to a speech that he delivered in January 2003.¹⁸⁶ Speaking at a Religious Freedom Day Rally in Fredericksburg, Virginia, in January 2003, Justice Scalia, although conceding that the Ninth Circuit had "some plausible support"¹⁸⁷ from Supreme Court precedent in reaching its

183. *But see Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (striking down, in a majority opinion written by Justice Kennedy, a statute that made it illegal for two persons of the same sex to engage in certain intimate sexual conduct as applied to adult males who engaged in consensual act of sodomy in the privacy of home). Justice O'Connor concurred with Justice Kennedy's majority opinion in a 6-3 decision. *Id.* at 2484 (O'Connor, J., concurring).

184. See Arthur D. Hellman, *Getting it Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. Davis L. Rev. 425 (Winter 2000) (discussing the Supreme Court and the Ninth Circuit); see also Stephen L. Wasby, *The Supreme Court and Courts of Appeals en Bancs*, 33 McGeorge L. Rev. 17 (2001).

185. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 860 (Mem), 861 (2003).

186. Pet. for Writ. of Cert. for Michael A. Newdow, *Newdow v. U.S. Cong.*, 124 S.Ct. 386 (2003).

187. Mark Walsh, *Scalia: Courts go too far on Church State*, Educ. Week 22 (Jan. 22, 2003);

judgment, suggested that this was a matter better left to legislative, rather than judicial, action. He also spoke in support of prayer in school.¹⁸⁸ Months earlier, House Majority Leader, Representative Tom DeLay of Texas, and others, suggested that Congress, relying on its authority under Article III, Section 2 of the Constitution, could remove matters relating to the Pledge from the jurisdiction of the federal judiciary if the Court refuses to overturn the Ninth Circuit's judgment.

Justice Scalia's public criticisms of the Ninth Circuit's controversial ruling were arguably imprudent since he addressed a matter that could plausibly have come before the Court.¹⁸⁹ Notwithstanding, Scalia's speech was in character with his own well-known jurisprudential perspectives in support of religious freedom. Moreover, since it is no secret that Scalia is an accommodationist who does not fear that religious activities in schools might lead to the establishment of religion, his recusal may well have been unnecessary but for his personal integrity.

But for his personal integrity, it is perplexing that Justice Scalia would recuse himself, given that other members of the Court who have also spoken out on matters that could have come before them have not recused themselves in the past. It should be conceded, however, that the parties in those cases did not raise the issue like the plaintiff in *Newdow*.¹⁹⁰ For example, Justice O'Connor voiced skepticism about the death penalty without addressing a particular case in a speech that she delivered in July 2001.¹⁹¹ Yet, almost a year later, she and Justice Ginsburg joined the Court's opinion that executions of mentally retarded criminals were "cruel and unusual punishments" prohibited by the Eighth Amendment.¹⁹² Four months earlier, while speaking in Maryland,

Justice [D]ecries [C]ourts [R]emoval of God, Houston Chron. 5 (Jan. 13, 2003).

188. Walsh, Educ. Week 22 (Jan. 22, 2003).

189. Scalia was probably acting pursuant to 28 U.S.C. 455(a), according to which, "[a]ny justice, judge, or [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Further, Canon 3(A)6 of the Code of Conduct for United States, under the heading Adjudicative Responsibilities, reads:

A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge's direction and control. This proscription does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education.

175 F.R.D. 363.

190. For a very brief discussion of some of these issues, see Charles J. Russo & Ralph D. Mawdsley, *Pledge Case Recusal Reveals Double Standard in Supreme Court*, 33 No. 22 Your Sch. and the L. 1, 4 (2003).

191. See Charles Lane, *O'Connor Expresses Death Penalty Doubt; Justice Says Innocent May Be Killed*, The Washington Post A1 (July 4, 2001).

192. *Atkins v. Va.*, 536 U.S. 304 (2002). Justices O'Connor and Ginsburg also joined the majority in *Kelly v. S.C.*, 534 U.S. 246 (2002), wherein the Court held that a criminal defendant was

Justice Ginsburg, who joined the same opinion, had called for a moratorium on the death penalty.¹⁹³ Further, in a related development, there was no outcry when Ginsburg, while speaking in Australia, arrogantly leveled a personal criticism at Congressman Tom DeLay, a leader in the legislative action supporting the Pledge, by mocking his having been an exterminator, not a lawyer, before becoming a legislator, as she disagreed with his correct observation that the Constitution permits the impeachment of federal judges who abuse their powers.¹⁹⁴

If one is concerned about Scalia's judicial impartiality for speaking out on a matter of public concern, one can wonder what questions can be raised over the death penalty issue or, more on point, about Justices Stevens, Souter, and Ginsburg, who, as noted, have consistently espoused strict-separationist views. Thus, the fact that Scalia criticized a highly controversial case in a speech under the broad rubric of religious freedom should not be a sufficient reason to request a recusal absent specific proof of a lack of impartiality when similar standards have not been applied to other members of the Court.

D. Reflections

Two initial issues merit some consideration. First, it is hard to know why the Court has agreed to allow Newdow to argue his own case.¹⁹⁵ This unusual action is perplexing not only because the plaintiff lacks the requisite three years of practice, but also because he has never before argued a case.¹⁹⁶ Given his apparently contentious personality, the father would likely cry "foul" in the event that he is unsuccessful at the Supreme Court.

entitled to a jury instruction that the alternative to the death penalty is a life sentence without parole.

193. See e.g. Note, *Smashing the Tragic Illusion of Justice: The Reprehensibility of the Death Penalty in Virginia*, 41 Cath. L. 255, 260 n. 18 (2002).

194. For the relevant portion of Justice Ginsburg's speech, see Jay Nordlinger, *Undies to the [M]aid, [K]nocking the [O]ld [E]xterminator, Castro and the Red Sox — and [M]ore*, Natl. Rev. Online <<http://www.nationalreview.com/impromptus/impromptus200310170904.asp>> (Oct. 17, 2003) ("The most egregious instance was Ruth Bader Ginsburg's mockery of DeLay—on foreign soil. She was in Australia when she ridiculed a point that DeLay had made—perfectly correct—namely, that the Constitution allows for the impeachment of judges who abuse their powers. She said, 'Mr. DeLay is not a lawyer but, I am told, an exterminator by profession.' This provoked great yuks in the house.").

195. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 860 (mem) (2003); see also Bob Egelko, *Atheist Dad Is Allowed to Argue Pledge Case / Justices Reviewing 'under G.c.l.'* The S.F. Chron. A19 (Dec. 2, 2003); Howard Mintz, *Pledge-[B]an [B]acker to [R]epresent [H]imself: Sacramento Dad to Face U.S. Supreme Court*, San Jose Mercury 6 (Dec. 2, 2003).

196. According to the Supreme Court's Rule 5.1, "[t]o qualify for admission to the Bar of this Court, an applicant must have been admitted to practice . . . for a period of at least three years immediately before the date of application" USCS S. Ct. R. 5 (2003).

The second initial concern focuses on the Court's agreement to hear oral arguments on the question of the father's standing. That is, the Court must examine whether the father's claim can proceed since, when the litigation began, he had neither custody, nor the shared the custody that he now has, of his daughter.¹⁹⁷ While the Court could rely on this procedural, rather than substantive, means to dispose of the case, such a resolution is unlikely since in doing so the constitutionality of the words "under God" would remain in doubt in light of the split between the Circuits. Further, as strident as the father is in his opposition to religion in general, and not just to the Pledge, if the Court were to address the merits of his claim, *res judicata* would effectively preclude any attempt on Newdow's part to re-litigate the controversy.

Placing aside attempts to divine how individual Justices might rule in a case that appears too close to call, the Court needs to be mindful of two important matters in reaching its judgment. First, as suggested earlier, the Justices must consider whether the Pledge is, in fact, an unconstitutional establishment of religion or whether it is a form of ceremonial deism—an expression of America's deeply, long held belief in God.¹⁹⁸ In reaching its conclusion, the Court is likely to consider the various Establishment Clause tests that it has enunciated over the years. However, insofar as the *Lemon* test has fallen increasingly out of favor, the Court is likely to turn to either Justice O'Connor's endorsement standard and/or to Justice Kennedy's coercion test. Under either of these tests, as discussed above, a majority, or at least a plurality, of the Justices can place their ideological biases aside and permit the Pledge to withstand constitutional muster.

The Justices must also examine the impact that striking down the Pledge might have on American public schools and society as a whole. Put another way, it is possible that the public would lose respect for the Court as an institution if it were to vitiate the Pledge. Further, if judicial ideologues who find an impermissible governmental establishment of religion in such matters as the words "under God" in the Pledge, continue to impose their wills on the American people, then perhaps Congressional leaders will make good on their promise to restrict the authority of the federal courts in matters of religion, thereby setting off a potentially divisive constitutional crisis,¹⁹⁹ not only over the words

197. See Tony Mauro, *Court Watch: Pledge Case: New Twist Alters Outlook High Court Nears Decision on Review Of 'under God' Suits*, 26 No., 38 Legal Times (Sept. 22, 2003).

198. For a brief discussion of the role of religion in American history, see Br. of the U.S. as Resp't. Supporting Petrs. at 20–26, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct 860 (2003) (available in 2003 WL 23051994).

199. See e.g. U. S. Cong., An Act to reaffirm the reference to one Nation Under God in the

“under God,” but also over the scope congressional authority to act.²⁰⁰

Unhappy with the Ninth’s Circuit’s rulings, federal legislators have already proposed ways of blunting its action. A Washington Times news article, for example, reported that House Majority Leader, Representative Tom DeLay of Texas, suggested that Congress, relying on its authority under Article III, Section 2 of the Constitution, could remove matters relating to the Pledge from the jurisdiction of the federal judiciary if the Supreme Court refuses to overturn *Newdow II*.²⁰¹ This same news story also reported that two days earlier, the Senate had voted 94–0 in a resolution supporting the current wording of the Pledge, just as, during the summer of 2002, the House had adopted a similar resolution by a vote of 416–3, with 11 members voting present.²⁰² More recently, Republican Congressman Todd Akin of Missouri, and Republican Senator Orrin Hatch of Utah, sponsored the Pledge Protection Act of 2003,²⁰³ according to which: “No court established by Act of Congress shall have jurisdiction to hear or determine any claim that the recitation of the Pledge of Allegiance, as set forth in section 4 of title 4, violates the first article of amendment to the Constitution of the United States.”²⁰⁴

As Congress seems poised to enter the fray, especially during a Presidential election year, should the Court hand down a plurality decision or strike down the words “under God” in the Pledge, fireworks might truly begin to fly. As such, the Court should ask itself whether it is willing to set up a show down with Congress, which has clearly and unequivocally gone on the record demonstrating its support of the current wording of the Pledge.

Pledge of Allegiance. Pub. L. No. 107–293, 2690, 116 Stat. 2057 (2002).

200. A power struggle between Congress and the Court re-emerged in 1995 when for the first time since 1937, it invalidated a federal statute. In *U.S. v. Lopez*, 514 U.S. 549 (1995), the Court invalidated the Gun-Free School Zones Act on the basis that Congress exceeded its authority in basing the statute on the Commerce Clause. For a discussion of this case, see Charles J. Russo, *United States v. Lopez and the Demise of the Gun-Free School Zones Act: Legislative Over-reaching or Judicial Nit-picking?*, 99 Educ. L. Rep. 11–23 (1995). For a similar dispute, wherein the Court vitiated the Religious Freedom Restoration Act, see *City of Boerne v. Flores*, 521 U.S. 507 (1997). For discussion of *Flores*, see Ralph D. Mawdsley, *Flores v. City of Boerne: Testing the Constitutionality of the Religious Freedom Restoration Act*, 115 Educ. L. Rep. 593 (1997).

201. Stephen Dinan, *DeLay Threatens to Curb Courts’ Jurisdiction: Vents Ire Over Pledge of Allegiance*. Washington Times A4 (Mar. 6, 2003).

202. *Id.*

203. H.R. 108–2028 (2003), introduced in the House on May 8, 2003. Senator Orrin Hatch, Republican from Utah, introduced the same Bill in the Senate, on June 19, 2003. Sen. 108–1297 (2003).

204. For news coverage of this proposed bill, see e.g., *Editorial, Delay’s Raiders*, St. Louis Post-Dispatch B2 (Aug. 3, 2003) (discussing the Pledge Protection Act); *Letters to the Editor: We Must Keep “Under God” In the Pledge from U.S. Rep. Todd Akin*, St. Louis Post-Dispatch B6 (Aug. 25, 2003).

V. CONCLUSION

In sum, it will be interesting to observe whether the Court accepts the *Newdow* plaintiff's argument that his daughter was harmed by having to listen to a recitation about God because he, but apparently not she nor her mother, does not want her exposed to something with which he disagrees. By analogy, since courts are generally unreceptive to similar arguments when parents challenge curricular content such as reading series²⁰⁵ and sex education programs,²⁰⁶ there is no reason to expect that the Supreme Court would be any more willing to be swayed by the father's arguments. Further, if the Court does address the merits of the claim, it bears watching to see whether it limits its rationale to the narrower basis of the Ninth Circuit's ruling, which struck the policy down on the basis that it coerced a religious act,²⁰⁷ or whether it responds to the trial court's having struck the Pledge down on the ground that the words "under God" were unconstitutional.

The way in which the Supreme Court clarifies the place of religious activity in schools, vis-à-vis the words "under God" in the Pledge, is likely to have a major impact on the future since the manner in which this debate plays out will reveal whether Americans still cherish the underlying values of freedom of religion (and speech) that contribute so greatly to the Nation's history. That is, as an argument can be made that secularists and strict separationists are seeking to transform the United States into a post-Christian secularized society by virtue of their seeking to remove all references to religion, whether dealing with the Ten Commandments in schools, or references to the "holiday" rather than Christmas,²⁰⁸ the Court is on the front line of either upholding long cherished traditions, or perhaps setting in motion further conflict that might affect its very jurisdiction in such disputes.

If the Court were to strike down the words "under God" in the Pledge, it is hard to know where, absent Congressional intervention, this

205. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.3d 1058, 1063 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988) (rejecting a parental challenge to the content of a reading series in classes on the basis that exposing children to "something does not constitute teaching, indoctrination, opposition or promotion of . . . any particular value or religion.").

206. *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995) (denying parental challenges to an explicit sex-AIDS education program).

207. *Newdow II*, 328 F.3d at 487.

208. For an interesting reflection of this issue, see Jay Nordlinger, *December's C-Word: Who would have thought that "Christmas" would become verboten?* (Don't answer that). *Natl. Rev.* 26 (Dec. 31, 2003); see also Diana West, *Censorship across the divide: 'Epithet' that!* <<http://www.townhall.com/columnists/dianawest/dw20040105.shtml>> (Jan. 5, 2003) (decrying attempts offer the greeting "Merry Christmas").

trend will reach its (il)logical extreme. For example, although it has already been upheld, perhaps further challenges could be forthcoming to references to God on currency.²⁰⁹ Constitutional disclaims notwithstanding,²¹⁰ future litigation might question the validity of the reference to God in Oaths of Office²¹¹ or in the Supreme Court itself. Recognizing the place of religion in the American colonies and the early Republic, one can only imagine that most of the Founders would be spinning in their graves in opposition to such a transformation of American society²¹² if such a trend were to continue unabated.

209. *Aronow v. U.S.*, 432 F.2d 242 (9th Cir. 1970) (upholding "in God we trust" on United States currency and coins).

210. U.S. Const. art. VI, cl. 3:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

211. See e.g. 5 U.S.C. § 3331:

An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic . . . So help me God." This section does not affect other oaths required by law.

212. See e.g. Leonard W. Levy, *Original Intent and the Framers' Constitution* Ch. 9, 174 (Ivan R. Dee, Inc. 1988).