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"And to the Republic for Which It Stands": Standing Issues in Elk Grove Unified School District v. Newdow

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"AND TO THE REPUBLIC FOR WHICH IT STANDS": STANDING ISSUES IN *ELK GROVE UNIFIED SCHOOL DISTRICT V. NEWDOW*

INTRODUCTION

On June 14, 2004—Flag Day, and the Fiftieth Anniversary of the 1954 Act of Congress (1954 Act) adding the words "under God" to the Pledge of Allegiance (Pledge)[1]—the United States Supreme Court announced its decision in *Elk Grove Unified School District v. Newdow* (*Newdow IV*).[2] Atheist Michael A. Newdow, an emergency room physician, attorney, and father, had challenged the constitutionality of the 1954 Act and petitioned the federal courts to prohibit his daughter's school district from requiring the daily recitation of the Pledge in her kindergarten classroom.[3] Rather than decide the constitutionality of the inclusion of the words "under God" in the Pledge, the decision's much anticipated outcome, the Court found that

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1. In 1954, the United States Congress amended the Pledge of Allegiance to include the words "under God." *See* Elk Grove United Sch. Dist. v. Newdow (*Newdow IV*), 124 S. Ct. 2301, 2306 (2004) (citing H.R. REP. NO. 1693, at 2 (1954)). In its opinion, the Supreme Court refers to the three opinions issued by the Ninth Circuit as *Newdow I*, *Newdow II*, and *Newdow III*. For clarity's sake, this Note will adopt that nomenclature and will refer to the Supreme Court's decision as *Newdow IV*.

The Pledge in its current statutory form reads as follows:

> "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.

4 U.S.C. § 4 (2004).

2. *See* Steve Lash, *Challenge to Pledge is Rejected "Under God" Stands as Justices Skirt Ruling on Oath's Constitutionality*, ATLANTA J. CONST., June 15, 2004, at A1. Respondent Michael Newdow sent reporters a poem via e-mail predicting that the Supreme Court would issue its opinion on Flag Day:

> I feel it is incumbent upon me to report/ That some believe there's poetry within our Supreme Court/ So be apprised that quite precisely fifty years ago/ The date the Congress chose to change the pledge in ways you know/ Was June 14—Flag Day—the year: 1954/ Perhaps this year on that date they'll choose to underscore/ That principles are sacrosanct and shouldn't bend a smidgen/ It says, "NO law." How perfect, for a government's religion. *Id.*

Tony Mauro, *Supreme Court: Pledge Case Has No Standing*, 230 LEGAL INTELLIGENCER 5 (June 15, 2004).

3. Linda Greenhouse, *8 Justices Block Effort to Excise Phrase in Pledge*, N.Y. TIMES, June 15, 2004, at A1; *see infra* notes 35–46 and accompanying text.

Newdow lacked standing to bring suit.[4] This Note will examine the less anticipated, though complicated and ultimately dispositive, standing issues at work in *Newdow*.

Part II of this Note provides a brief introduction to the standing doctrine. As Part II explains, the standing doctrine incorporates both constitutional and prudential considerations and determines whether a particular litigant may invoke the power of the courts.[5] As Part III of this Note indicates, Newdow attempted to invoke that power when he sought to invalidate the 1954 Act and to enjoin the school district from requiring the recitation of the Pledge.[6] Part III provides the factual background, procedural history, and essential holdings in the case as it traces Newdow's suit from the district court to the court of appeals, where the Ninth Circuit upheld his claim on the merits, and finally to its ultimate disposition in the United States Supreme Court.[7]

Following this background, Part IV analyzes the Ninth Circuit and Supreme Court's perception of Newdow's standing to invoke the jurisdiction of the federal courts.[8] Though deeply divided on the constitutionality of the Pledge, the Ninth Circuit and Chief Justice Rehnquist (in a concurring opinion) were in basic agreement on the standing issue, and in disagreement with the Supreme Court's majority.[9] As Part IV demonstrates, the Ninth Circuit and Chief Justice Rehnquist advance the better-reasoned approach to Newdow's standing. Influenced by a proper understanding of the state law issues at work in the case, the actual source of Newdow's standing, the harm at issue in the case, and the prudential concerns that mitigate in favor of reaching the merits, both the Ninth Circuit and the Chief Justice properly concluded that Newdow had adequate standing to bring his suit.[10]

Finally, Part V concludes this Note by addressing the implications of the majority's contrary holding in *Newdow IV*.[11] By incorrectly denying Newdow's standing, the majority's decision may have avoided the ramifications of declaring the Pledge unconstitutional, but it appears to have done so at the risk of abridging the rights of noncustodial parents.[12] Part V speaks to these issues in detail, and concludes

4. *See Newdow IV*, 124 S. Ct. at 2312.
5. *See infra* notes 22–34 and accompanying text.
6. *See infra* notes 35–46 and accompanying text.
7. *See infra* notes 35–114 and accompanying text.
8. *See infra* notes 118–216 and accompanying text.
9. *See infra* notes 118–216 and accompanying text.
10. *See infra* notes 118–216 and accompanying text.
11. *See infra* notes 217–274 and accompanying text.
12. *See infra* notes 217–274 and accompanying text.

with a discussion of the uncertain influence of *Newdow IV* on the standing doctrine generally.[13]

II. BACKGROUND

As discussed below, and as Michael Newdow's case demonstrates, the standing doctrine can pose a powerful obstacle to a plaintiff. This section begins with a brief introduction to the requirements of the standing doctrine.[14] Following this introduction to standing, Part III provides the factual background, procedural history, and essential holdings in *Newdow I–IV* with a focus on the standing issue in his case.[15] Newdow first brought suit in district court where his case was dismissed on the merits.[16] On appeal in *Newdow I*, the Ninth Circuit reversed the district court, finding that Newdow had standing to bring suit and that the Pledge was unconstitutional.[17] In *Newdow II*, the Ninth Circuit addressed the standing issue again, after the mother of Newdow's daughter intervened to challenge his standing.[18] The Ninth Circuit upheld Newdow's standing.[19] In *Newdow III*, the Ninth Circuit amended its opinion in *Newdow I* and denied a petition for rehearing en banc.[20] Finally, in *Newdow IV*, a majority of the United States Supreme Court reversed the Ninth Circuit, holding that Newdow lacked standing to invoke the jurisdiction of the federal courts.[21]

A. Introduction to the Standing Doctrine

Article III of the United States Constitution provides that the power of the federal courts shall extend to "cases" and "controversies."[22] The Supreme Court has interpreted this "case and controversy requirement" along with "the idea of separation of powers on which the Federal Government is founded" in developing a number of doctrines that "are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society.'"[23] These

13. *See infra* notes 217–274 and accompanying text.
14. *See infra* notes 22–34 and accompanying text.
15. *See infra* notes 35–114 and accompanying text.
16. *See infra* notes 35–46 and accompanying text.
17. *See infra* notes 47–59 and accompanying text.
18. *See infra* notes 60–78 and accompanying text.
19. *See infra* notes 60–78 and accompanying text.
20. *See infra* notes 79–81 and accompanying text.
21. *See infra* notes 82–100 and accompanying text.
22. *See, e.g.*, Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 227–28 (1990) (citing U.S. CONST. art. III, § 2; Allen v. Wright, 468 U.S. 737, 750 (1984)).
23. *Allen*, 468 U.S. at 750 (citing Warth v. Seldin, 422 U.S. 490, 498 (1975)).

"case-or-controversy doctrines," according to the Supreme Court, "state fundamental limits on federal judicial power in our system of government."[24] In describing the development of these doctrines, the Court has noted that they relate "to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."[25]

According to the Supreme Court, the doctrine of standing, the "doctrine that requires a litigant to have 'standing' to invoke the power of a federal court . . . is perhaps the most important" of the Court's justiciability doctrines.[26] In determining whether a litigant has "standing," a court will ask, in a sense, "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[27] Such an entitlement is a function of both constitutional and prudential components. Newdow's suit presents an interesting case-study for the standing doctrine—his suit demonstrates the critical nature of the standing doctrine at each stage of the litigation, but also demonstrates the esoteric nature of this complex and malleable justiciability doctrine.

A. Constitutional Requirements

The Supreme Court has held that the "core component" derived from the case and controversy language in the Constitution requires that the plaintiff in a given case satisfy three constitutional standing requirements.[28] The plaintiff must (1) "allege personal injury," that is (2) "fairly traceable to the defendant's allegedly unlawful conduct," and that is (3) "likely to be redressed by the requested relief."[29]

Although the Court has conceded that the constitutional components of the standing doctrine embrace concepts that are not "susceptible of precise definition," the Court has held that at a minimum, the plaintiff must allege a "distinct and palpable" injury that is "not abstract" or "conjectural" or "hypothetical."[30] Finally, "[t]he injury must be 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision."[31]

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24. *Id.* These justiciability doctrines are the standing, mootness, ripeness, and political questions doctrines. *Id.*

25. *Id.* (citing Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.D.C. 1983)).

26. *Id. See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 32–54 (2001).

27. *Allen*, 468 U.S. at 750–51 (citing *Warth*, 422 U.S. at 498).

28. *Id.* at 751.

29. *Id.*

30. *Id.* (internal citations omitted).

31. *Id.* (citing Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26 (1976)).

B. Prudential Limitations

Unlike the constitutional requirements, the prudential components of the standing doctrine are not derived from the text of the Constitution. Rather, the prudential components consist of "several judicially self-imposed limits on the exercise of federal jurisdiction . . . ."[32] These limits include the "general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."[33]

The Supreme Court has held that "[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[34] The standing question, then, is a powerful, threshold inquiry. Without finding that the plaintiff in a suit is entitled to bring it in the first place, the court will not reach the merits of the plaintiff's claim.

III. SUBJECT OPINION: *ELK GROVE UNIFIED SCHOOL DISTRICT V. NEWDOW*

On March 8, 2000, atheist Michael A. Newdow brought suit in United States District Court for the Eastern District of California, challenging "the constitutionality of the words 'under God' in the Pledge of Allegiance to the Flag."[35] He alleged that the daily recitation of the Pledge, as led by the teacher in his daughter's public elementary school classroom, violated the Establishment Clause[36] of the First Amendment to the United States Constitution.[37]

Under California's Education Code, "every public elementary school" must begin its school day with "appropriate patriotic exercises."[38] The Code further provides that "the giving of the Pledge of Allegiance to the Flag of the United States of America" is one such patriotic exercise.[39] The Elk Grove Unified School District (District),

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32. *Id. See also* CHEMERINSKY, *supra* note 26, at 54–66.

33. *Allen*, 468 U.S. at 751.

34. *Id.* at 750–51 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)) (internal citations omitted).

35. Newdow v. United States Congress (*Newdow I*), 292 F.3d 597, 600 (9th Cir. 2002).

36. The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

37. *Newdow I*, 292 F.3d at 600.

38. CAL. EDUC. CODE § 52720 (West 2004).

39. *Id.*

where Newdow's daughter attended kindergarten, supplemented the Code by requiring that "[e]ach elementary school class recite the pledge of allegiance to the flag once each day."[40] While Newdow did not maintain that the District or his daughter's teacher required her to recite the Pledge,[41] he argued that through this practice "his daughter is injured when she is 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, and that our's [*sic*] is one nation under God."[42] He, therefore, challenged the constitutionality of the 1954 Act that added the words "under God" to the text of the Pledge, the California law requiring daily patriotic exercises, and the District's policy of satisfying that requirement by obliging teachers to lead students in reciting the Pledge.[43] The magistrate presiding over the case recommended dismissing Newdow's complaint, finding no violation of the Establishment Clause.[44] On July 21, 2000, Judge Milton Schwartz adopted the findings and recommendations of the magistrate judge, and entered an order dismissing Newdow's complaint.[45] Newdow then appealed that judgment to the United States Court of Appeals for the Ninth Circuit.[46]

A. Newdow I: *The Ninth Circuit Finds Standing and an Establishment Clause Violation*

The Ninth Circuit ultimately issued three opinions in Newdow's case. In its first opinion, *Newdow I*, the Ninth Circuit determined that Newdow's complaint survived against the District and its superintendent.[47] Before reaching the Establishment Clause issues, the Ninth

40. *Newdow I*, 292 F.3d at 600 (citing the District policy) (internal citations omitted).

41. *Id.* at 601. The District "permits students who object on religious grounds to abstain from the recitation." Elk Grove United Sch. Dist. v. Newdow (*Nedrow IV*), 124 S. Ct. 2301, 2306 (2004).

42. *Newdow I*, 292 F.3d at 601.

43. *Id.*

44. On May 25, 2000, Magistrate Judge Peter A. Nowinski recommended dismissing Newdow's complaint. Newdow v. Congress of the United States, No. CIV S-00-0495 M.L.S. Pan P.S., 2000 U.S. Dist. LEXIS 22367, at *3 (E.D. Cal. May 25, 2000). Magistrate Nowinski reasoned that under the tests used by the Supreme Court in Establishment Clause cases, the Pledge "does not violate the Establishment Clause of the First Amendment." *Id.* at *2–3. *See also infra* note 52 and accompanying text.

45. *Newdow*, 2000 U.S. Dist. LEXIS 22367, at *3.

46. *Newdow I*, 292 F.3d at 601.

47. *Id.* at 602. The Ninth Circuit determined that the district court "correctly dismissed the claim" against the federal defendants, reasoning that it "lack[ed] jurisdiction over the President and the Congress," but the "constitutionality of the 1954 Act remain[ed] before" the Court." *Id.* The Ninth Circuit concluded that the President is "not an appropriate defendant in an action challenging the constitutionality of a federal statute" and that it similarly lacked jurisdiction, "in

Circuit first considered Newdow's standing to bring the suit, an issue the district court had not addressed in its disposition.[48] In its analysis of the standing issues, the Ninth Circuit first determined that Newdow had "standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter."[49] In addition, the Ninth Circuit found that Newdow had standing against the District's "policy and practice regarding the recitation of the Pledge" by virtue of his daughter's enrollment there.[50] Finally, the Ninth Circuit concluded that Newdow had standing to challenge the 1954 Act because "[t]he mere enactment of the 1954 Act in its particular context constitutes a religious recitation policy that interferes with Newdow's right to direct the religious education of his daughter."[51]

After concluding that Newdow had standing to challenge both the District's policy and the 1954 Act on these bases, the Ninth Circuit went on to evaluate each challenge under the "three interrelated tests to analyze alleged violations of the Establishment Clause in the realm of public education" set forth "over the last three decades" by the Supreme Court of the United States.[52] The Ninth Circuit held that under each test,[53] "the 1954 Act adding the words 'under God'" to the Pledge, and the School District's "policy and practice of teacher-led recitation of the Pledge, with the added words included," amounted to violations of the Establishment Clause.[54] The Ninth Circuit found that "[i]n the context of the Pledge, the statement that the United States is a nation 'under God' is an endorsement of religion. It is a profession of a religious belief . . . in monotheism."[55] The Ninth Circuit further found that the District's policy had an impermissible "co-

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light of the Speech and Debate Clause of the Constitution, Art. I, § 6, ch.1, . . . to issue orders directing Congress to enact or amend legislation." *Id.* at 601.

48. *Id.* at 602–05.

49. *Id.* at 602.

50. *Newdow I*, 292 F.3d at 603.

51. *Id.* at 605.

52. The Ninth Circuit identified these tests as: (1) "the three-prong test set forth in *Lemon v. Kurtzman*," (2) "the 'endorsement' test, first articulated by Justice O'Connor in her concurring opinion in *Lynch*, and later adopted by a majority of the Court in *County of Allegheny v. ACLU*," and (3) "the 'coercion' test first used by the Court in *Lee*." *Id.* (internal citations omitted).

53. *Id.* at 607–12.

54. *Id.* at 612 (Fernandez, J., concurring in part, dissenting in part). While concurring in the majority's holding that Newdow had standing to challenge the 1954 Act and the District's policy and practice of reciting the Pledge, Judge Fernandez dissented in the judgment that the Pledge and the District's policy violated the Establishment Clause. *Id.* at 615. He argued that the phrase's "tendency to establish religion [or affect its exercise] is de minimis." *Newdow I*, 292 F.3d at 615 (Fernandez, J., concurring in part, dissenting in part).

55. *Id.* at 607 (majority opinion). The Ninth Circuit went on to conclude that "[a] profession that we are a nation 'under God' is identical . . . to a profession that we are a nation 'under

ercive effect" based on "the mere fact that a pupil is required to listen every day to the statement 'one nation under God . . . .'"[56] The Ninth Circuit finally noted that the legislative history behind the 1954 Act demonstrated that "the *sole* purpose" of the inclusion of the words "under God" was to "advance religion, in order to differentiate the United States from nations under communist rule."[57] The Ninth Circuit, therefore, vacated the district court's dismissal of the case and remanded it for further proceedings consistent with its opinion.[58] Judge Fernandez, joining the two-judge majority's analysis of the standing issues, dissented from the court's ultimate conclusion.[59]

B. Newdow II: *The Ninth Circuit Affirms Newdow's Standing Over the Mother's Objections*

In *Newdow II*, Sandra Banning, the mother of Newdow's daughter, took issue not only with the Ninth Circuit's decision in *Newdow I* but also with Newdow having brought the suit in the first place.[60] Filing a motion to intervene in the action to challenge Newdow's standing,

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Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no god,' because none of these professions can be neutral with respect to religion." *Id.* at 607–08.

56. *Id.* at 609. The Ninth Circuit noted that the Pledge was meant to result in recitation, citing President Eisenhower's declaration during the signing of the Act that "[f]rom this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty." *Id.* (quoting 100 CONG. REC. 8618 (1954)) (internal quotation marks omitted).

57. *Id.* at 610. Citing excerpts from the legislative history behind the bill, the Ninth Circuit reasoned that "the purpose of the 1954 Act was to take a position on the question of theism, namely, to support the existence and moral authority of God, while 'deny[ing] . . . atheistic and materialistic concepts.'" *Newdow I*, 292 F.3d at 610 (quoting H.R. REP. NO. 83-1693, at 1–2 (1954)).

58. *Id.* at 612.

59. *Id.* at 612–15 (Fernandez, J., concurring in part, dissenting in part). This decision in *Newdow I* sparked intense reaction across the United States, from opponents and supporters alike. *See* Evelyn Nieves, *Judges Ban Pledge of Allegiance From Schools, "Citing Under God,"* N.Y. TIMES, June 27, 2002, at A1. In Washington, D.C., for example, Senators took a break from scheduled deliberations to "unanimously pass[ ] a resolution condemning the ruling" and "dozens of House members gathered on the Capitol steps to recite the pledge and sing 'God Bless America.'" *Id.* Then Senate Majority Leader Tom Daschle referred to the decision as "just nuts," and House Speaker Dennis Hastert declared that "the liberal court in San Francisco has gotten this one wrong." Bob Egelko, *Pledge of Allegiance Ruled Unconstitutional; Many Say Ruling by S.F. Court Hasn't a Prayer After Appeals*, S.F. CHRON., June 27, 2002, at A1, *available at* 2002 WLNR 6883680. President Bush reportedly referred to the ruling as "ridiculous." Jonathon King, *One Nation, Under God, Constitutional?; California Court Declares Pledge Unconstitutional in Case Brought by an Atheist Who Used to Live in Fort Lauderdale*, SUN-SENTINEL, June 27, 2002, at 1A. In a newspaper interview, Newdow recounted that he had installed a second phone in his home due to "the steady influx of obscene messages and death threats that were pouring in." Scott Gold & Eric Bailey, *1 Plaintiff, Against the Grain*, L.A. TIMES, June 27, 2002, at A1.

60. Newdow v. United States Congress (*Newdow II*), 313 F.3d 500, 501–02 (9th Cir. 2002).

Banning maintained that she and her daughter were Christians.[61] She further alleged that she did not object to her daughter reciting the Pledge, nor did her daughter object to reciting it.[62] Thus, in *Newdow II*, the Ninth Circuit had to "carefully reconsider the question of Newdow's Article III standing in light" of the issues Banning raised.[63]

The Ninth Circuit recognized that in its initial opinion it had held that "a parent has Article III standing to challenge on Establishment Clause grounds state action affecting his child in public school."[64] When he brought suit, Newdow had alleged "that he was the father, and had custody of the minor child."[65] As the Court learned in *Newdow II*, "Newdow and Banning formed a family consisting of an unmarried man, an unmarried woman, and their biological minor child, who lived together part of the time and lived in separate homes in Florida and California, from time to time, with informal visiting arrangements."[66]

In February 2002, those "informal" arrangements became subject to an official custody order[67] entered in California Superior Court after Newdow had appealed to the Ninth Circuit in *Newdow I*.[68] Newdow then filed a motion to share joint legal custody with Banning.[69] On September 25, 2002, the Superior Court entered an order "enjoining Newdow from pleading his daughter as an unnamed party or representing her as a 'next friend' in [the] lawsuit."[70] The Superior Court reserved the issue of Newdow's Article III standing in federal court for determination by the Ninth Circuit.[71]

In *Newdow II*, Newdow rephrased his assertion of standing, no longer claiming to "represent his child," but maintaining that he brought suit "in his own right as a parent to challenge alleged uncon-

61. *Id.*
62. *Id.*
63. *Id.* at 502.
64. *Id.*
65. *Id.*
66. *Newdow II*, 313 F.3d at 502.
67. The order gave Banning "*sole* legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of [the child]." *Id.* (quoting the custody order) (alterations in original). It required that "both parents . . . consult with one another on substantial decisions relating to non-emergency major medical care, dental, optometry, psychological and educational needs . . . ." *Id.* (quoting the custody order). It further provided that "[i]f mutual agreement is not reached," then "Ms. Banning may exercise legal control of [the child] that is not specifically prohibited or inconsistent with the physical custody order." *Id.* (quoting the custody order) (alterations in original).
68. *Id.*
69. *Id.*
70. *Newdow II*, 313 F.3d at 502.
71. *Id.*

stitutional state action affecting his child while she attends public school . . . . "[72] After Newdow had rephrased his standing in this manner, the Ninth Circuit framed the issue in *Newdow II* as whether "the grant of sole legal custody to Banning" deprived Newdow, "as a noncustodial parent, of Article III standing to object to unconstitutional government action affecting his child."[73] Persuaded by an approach taken by the Seventh Circuit,[74] the Ninth Circuit held "that a noncustodial parent, who retains some parental rights, may have standing to maintain a federal lawsuit to the extent that his assertion of retained parental rights under state law is not legally incompatible with the custodial parent's assertion of rights."[75] The Ninth Circuit noted that "California state courts have recognized that noncustodial parents maintain the right to expose and educate their children to their individual religious views, even if those religious views contradict those of the custodial parent or offend her."[76] Bolstered in its conclusion through this state-law interpretation, the court held that the custody order did "not strip Newdow of all of his parental rights,"[77] and concluded that he retained "sufficient parental rights to support his standing . . . ."[78]

C. Newdow III: *The Ninth Circuit Amends its Opinion and Denies Rehearing En Banc*

In *Newdow III*, the Ninth Circuit addressed the case for a third and final time. On February 28, 2003, the court entered an order amending its opinion in *Newdow I* and denying the petitions before it for rehearing and rehearing en banc.[79] Following this order in *Newdow III*, the District petitioned for a writ of certiorari to the United States Supreme Court.[80] The Supreme Court granted the petition to consider whether "(1) Newdow has standing as a noncustodial parent to

72. *Id.*

73. *Id.* at 503.

74. *Id.* (citing Navin v. Park Ridge Sch. Dist. 64, 270 F.3d 1147 (7th Cir. 2001) (per curiam)).

75. *Id.* at 503–04.

76. *Newdow II*, 313 F.3d at 504. In drawing this conclusion, the Ninth Circuit relied on two California cases: *Mentry v. Mentry*, 190 Cal. Rptr. 843 (Cal. Ct. App. 1983) and *Murga v. Petersen*, 163 Cal. Rptr. 79 (Cal. Ct. App. 1980).

77. *Newdow II*, 313 F.3d at 504.

78. *Id.* at 505.

79. Newdow v. United States Congress (*Newdow III*), 328 F.3d 466, 468 (9th Cir. 2003). The amended opinion "omitted the initial opinion's discussion of Newdow's standing to challenge the 1954 Act," but left intact Newdow's standing to challenge the District's policy. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow IV*), 124 S. Ct. 2301, 2308 (2004).

80. *Newdow IV*, 124 S. Ct. at 2308.

challenge the School District's policy, and (2) if so, whether the policy offends the First Amendment."[81]

D. Newdow IV: *The Supreme Court Reverses the Ninth Circuit, a Majority Finding Newdow Lacked Standing*

On June 14, 2004, Justice Stevens announced the Supreme Court's much-anticipated decision in *Elk Grove Unified School District v. Newdow* (*Newdow IV*).[82] The five-justice majority concluded that Newdow lacked "standing to invoke the jurisdiction of the federal courts," and thus reversed the Ninth Circuit's decision.[83] Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, concurred in the judgment but not in the majority's resolution of the standing issues.[84] Finding that Newdow had standing to challenge the Pledge, the concurring justices would have disposed of the case on the merits, finding no violation of the Establishment Clause.[85]

1. *Majority Opinion in* Newdow IV: *Newdow Lacks Standing*

After detailing the background facts informing the Court's decision, Justice Stevens began the majority opinion with a discussion of the Court's standing jurisprudence, noting that it consisted of "two strands."[86] He stated that, first, "Article III standing . . . enforces the Constitution's case or controversy requirement"[87] by requiring that a plaintiff show "the conduct of which he complains has caused him to suffer an 'injury in fact' that a favorable judgment will redress."[88] He then discussed the prudential standing doctrine, noting that it "embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'"[89] As Justice Stevens conceded, while the Court has "not exhaustively defined the prudential dimensions of the standing doctrine," it "encompasses 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative

81. *Id.*

82. *Id.* at 2304. Justices Kennedy, Souter, Ginsburg, and Breyer joined Justice Stevens. *Id.*

83. *Id.* at 2305.

84. *See infra* notes 101–114 and accompanying text.

85. *Newdow IV*, 124 S. Ct. at 2312–33 (Rehnquist, C.J., concurring). Justice Scalia agreed to recuse himself from hearing the case after receiving criticism for remarks he made questioning the Ninth Circuit's decision on the merits at an event for Religious Freedom Day. *See* Linda Greenhouse, *Supreme Court to Consider Case on "Under God" in Pledge to the Flag*, N.Y. TIMES, Oct. 15, 2003, at A1.

86. *Newdow IV*, 124 S. Ct. at 2308.

87. *Id.* at 2308–09 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–62 (1992)).

88. *Id.* (citing *Lujan*, 504 U.S. at 560–61).

89. *Id.* at 2308 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'"[90]

Justice Stevens also noted that the Court's "prudential standing analysis is informed by the variety of contexts in which federal courts decline to intervene because . . . the suit 'depends on a determination of the status of the parties.'"[91] One area in which the Court has been loathe to intervene, he indicated, is in "the realm of domestic relations."[92] While "rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue," Justice Stevens reasoned that "in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts."[93] Describing the Court's "deference to state law in this area" as "strong," he noted that the Court has even recognized "a 'domestic relations exception' that 'divests the federal courts of power to issue divorce, alimony, and child custody decrees.'"[94] He further noted that the Court may "decline to hear a case involving 'elements of the domestic relationship,' even when divorce, alimony, or child custody is not strictly at issue . . . ."[95]

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90. *Id.* at 2309 (quoting *Allen*, 468 U.S. at 751).

91. *Id.* at 2309 n.5 (quoting Ankenbrandt v. Richards, 504 U.S. 689, 706 (1992)).

92. *Newdow IV*, 124 S. Ct. at 2309 (citing *In re* Burrus, 136 U.S. 586, 593–94 (1890)).

93. *Id.*

94. *Id.* (quoting *Ankenbrandt*, 504 U.S. at 703). 28 U.S.C. § 1332 (2000) provides, in pertinent part:

> [D]istrict courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state . . . as plaintiff and citizens of a State or of different States.

Id.

The Supreme Court has held that there is a "domestic relations exception" to this diversity jurisdiction provision that "divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt*, 504 U.S. at 703. Of course, in *Ankenbrandt* the Court held that the exception was inapplicable to the case then before it because the lawsuit in no way sought a divorce, alimony, or child custody decree. *Id.* at 704.

95. *Newdow IV*, 124 S. Ct. at 2309 (citing *Ankenbrandt*, 504 U.S. at 705–06) (internal citations omitted). *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), discussed by both Justice Stevens in *Newdow IV* and the *Ankenbrandt* Court, addressed the propriety of a federal court abstaining from exercising its jurisdiction. The Supreme Court reasoned in *Colorado River* that abstention, the exception rather than the rule, "is appropriate 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law,'" or "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Id.*

Drawing from this background of judicial restraint, the majority concluded that Newdow lacked the prudential standing necessary to bring his suit.[96] The majority reasoned that Newdow's standing "derive[d] entirely from his relationship with his daughter," but was persuaded by the fact that, in this case, his interests were potentially in conflict with the interests and rights not only of Banning, but of their daughter as well.[97] Further, because the California Superior Court had deprived Newdow the opportunity to litigate as his daughter's "next friend," and because the custody order gave Banning what the majority understood to be a "tiebreaking vote," the majority reasoned that he was not able to bring the suit over her veto.[98]

In the Court's view, it was simply "improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing."[99] The Court reasoned that when complicated questions of family law are "sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law."[100]

2. *Concurring Opinions in* Newdow IV: *Newdow Has Standing, But There Is No Constitutional Violation*

Chief Justice Rehnquist and Justices O'Connor and Thomas each wrote concurring opinions in *Newdow IV*. Ultimately, each justice concurred in the Court's judgment: they too would have reversed the Ninth Circuit's decision in *Newdow II*. Each of the concurring justices, however, disagreed with the majority's interpretation of the standing issue. The concurring justices found that Newdow possessed the requisite standing to challenge the Pledge and the school's Pledge policy, but they found no constitutional violation under the Establishment Clause.

a. Chief Justice Rehnquist's Concurring Opinion

Chief Justice Rehnquist, writing in concurrence, sharply criticized the majority's resolution of the standing issues.[101] Joined in his decision on the standing question by Justices O'Connor and Thomas,

96. *Newdow IV*, 124 S. Ct. at 2312 & n.8.
97. *Id.* at 2311.
98. *Id.* at 2310 n.6.
99. *Id.* at 2312.
100. *Id.*
101. *Id.* at 2313–16 (Rehnquist, C.J., concurring).

Chief Justice Rehnquist described the majority's "new prudential standing principle" a result of: (1) a misplaced reliance on the domestic relations exception and the abstention doctrine; (2) a misguided criticism of the Ninth Circuit's understanding of California state law; and (3) improper reliance on the "prudential standing prohibition on a litigant's raising another person's legal rights."[102] He then took issue with the majority's dependence on each of the three justifications for denying Newdow standing.[103]

Chief Justice Rehnquist reasoned that, despite the majority's contrary conclusion, Newdow presented "a substantial federal question that transcend[ed] the family law issue to a greater extent" than in the cases on which the majority relied.[104] Chief Justice Rehnquist also criticized the majority's characterization of the source of Newdow's of standing in the case. The Chief Justice conceded that Newdow's daughter is "intimately associated with the source of respondent's standing (the father-daughter relationship and [Newdow's] rights there under)," but argued that "the daughter *is not the source* of [Newdow's] standing . . . ."[105] Chief Justice Rehnquist further contended that the majority's criticism of the Ninth Circuit's "standing decision and the prudential prohibition on third-party standing provide no basis for denying [Newdow's Article III] standing."[106]

b. Justice O'Connor's Concurring Opinion

Though she joined Chief Justice Rehnquist in his opinion, Justice O'Connor wrote a separate concurrence, emphasizing that she would have followed the Court's "policy of deferring to the Federal Courts of Appeals in matters that involve the interpretation of state law," and thus concluded that Newdow did have standing to bring suit.[107] After resolving the standing issue, Justice O'Connor went on to evaluate the merits of the case under the endorsement test.[108] In so doing, she

102. *Newdow IV*, 124 S. Ct. at 2313 (Rehnquist, C.J., concurring).

103. *Id.* at 2313–16.

104. *Id.* at 2314.

105. *Id.* at 2316.

106. *Id.*

107. *Id.* at 2321 (O'Connor, J., concurring in the judgment).

108. Justice O'Connor would apply the endorsement test "[w]hen a court confronts a challenge to government-sponsored speech or displays . . . ." *Newdow IV*, 124 S. Ct. at 2321 (O'Connor, J., concurring in the judgment). Justice O'Connor explained that "[e]ndorsement . . . '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.* (citing Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). Justice O'Connor further explained that "[i]n order to determine whether endorsement has occurred, a reviewing court must keep in mind two crucial and related princi-

determined that "the appearance of the phrase 'under God' in the Pledge" is an instance of "ceremonial deism," and is, in her understanding, an acknowledgement or reference "to the divine without offending the Constitution."[109]

c. Justice Thomas's Concurring Opinion

Justice Thomas, similarly joining Chief Justice Rehnquist's disposition of the standing issue, also wrote separately in a concurring opinion to advocate a "rethinking [of] the Establishment Clause."[110] Justice Thomas opined that the Court should understand the Establishment Clause as "a federalism provision, which . . . resists incorporation."[111] Reasoning that "the Pledge policy is not implicated by any sensible incorporation of the Establishment Clause," Justice Thomas similarly found no constitutional violation.[112]

Thus, in *Newdow IV*, the majority began and ended its review of the case with the issue of standing. Finding that Newdow lacked standing to invoke the jurisdiction of the federal courts to consider his complaint, the majority never reached the underlying Establishment Clause issues that the Ninth Circuit had grappled with in *Newdow I*.[113] The concurring justices, agreeing with the Ninth Circuit that Newdow met the threshold standing requirement, would have gone on to reverse the Ninth Circuit on its disposition of the merits.[114]

IV. ANALYSIS

The Ninth Circuit's opinion in *Newdow II*, Justice Stevens's majority opinion in *Newdow IV*, and Chief Justice Rehnquist's concurring opinion in *Newdow IV* each approached Newdow's standing (or lack thereof) to bring suit in a different way. These three distinct view-

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ples." *Id.* (citing *Lynch*, 465 U.S. at 688). The test "assumes the viewpoint of a reasonable observer," who "must be deemed aware of the history of the conduct . . . in our Nation's cultural landscape." *Id.* at 2322.

109. *Id.* at 2323.

110. *Id.* at 2327–28 (Thomas, J., concurring in the judgment).

111. *Newdow IV*, 124 S. Ct. at 2327–28. (Thomas, J., concurring in the judgment). Justice Thomas maintained that the Establishment Clause "protects state establishments from federal interference but does not protect any individual right." *Id.* at 2331. Justice Thomas concluded that "[t]hrough the Pledge policy, the State has not created or maintained any religious establishment, and neither has it granted government authority to an existing religion." *Id.* at 2333. He further contended that "[t]he Pledge policy does not expose anyone to the legal coercion associated with an established religion." *Id.* Finding "no other free-exercise rights . . . at issue," Justice Thomas concluded that the Pledge policy fully comported with the Constitution. *Id.* at 2322.

112. *Id.* at 2328.

113. *See supra* notes 52–59 and accompanying text.

114. *See supra* notes 101–112 and accompanying text.

points are arguably a function of each opinion's divergent approach to four important issues underlying Newdow's case: (1) the operation of California law to establish or defeat Newdow's standing; (2) the actual source of Newdow's standing; (3) the "harms" in the case; and (4) standing aside, the concerns that might, or fail to, support the suit to go forward. Moreover, although the opinions did not specifically address this issue, each opinion's decision on the merits underlying the case may have arguably influenced its analysis of the standing issue. This section provides an analysis of these issues and the influences on the courts reviewing them. Ultimately, while the Ninth Circuit's and Chief Justice Rehnquist's opinions differ deeply on the merits of the Establishment Clause issue, this analysis will demonstrate that these two opinions advance the better-reasoned approach to the standing issues presented in *Newdow*.

A. Newdow's Standing Under California Law

The Ninth Circuit, Justice Stevens, and Chief Justice Rehnquist each addressed the issue of whether California law operated to defeat or support Newdow's standing in the case.[115] As this section will demonstrate, the Ninth Circuit offered a better-reasoned interpretation of the California case law than did Justice Stevens in the majority opinion in *Newdow IV*.[116] Moreover, Chief Justice Rehnquist was correct to defer to this interpretation, finding that California law supported Newdow's standing in the case.[117]

After the Ninth Circuit established in *Newdow II* that "a noncustodial parent, who retains some parental rights, may have standing to maintain a federal lawsuit to the extent that his assertion of retained parental rights under state law is not legally incompatible with the custodial parent's assertion of rights," it turned to California law to determine whether Newdow retained standing "despite Banning's opposition as sole legal custodian to his maintaining this lawsuit."[118] The court first determined that the custody order between the two parents, while granting Banning sole legal custody, "plainly" did not "strip Newdow of all of his parental rights," and interpreted it to "establish[ ] that Newdow retains rights with respect to his daughter's education and general welfare."[119] The court then went on to discuss two California state court decisions that "recognized that noncustodial

115. *See infra* notes 118–147 and accompanying text.
116. *See infra* notes 118–147 and accompanying text.
117. *See infra* notes 143–147 and accompanying text.
118. Newdow v. United States Congress (*Newdow II*), 313 F.3d 500, 503–04 (9th Cir. 2002).
119. *Id.* at 504.

parents maintain the right to expose and educate their children to their individual religious views, even if those religious views contradict those of the custodial parent or offend her."[120]

1. In re Marriage of Murga

First, in *In re Marriage of Murga*, a mother (the custodial parent), challenged the father's request to modify his visitation rights because he was moving to another state, and requested an order barring him from "(1) requiring the child to engage in any religious activity except as approved by the mother . . . [which included] . . . (2) '[s]ermonizing, evangelizing, instructing, discoursing with, and/or attempting to indoctrinate' the child on any religious subject without her prior approval . . . . "[121] Although "[t]he mother contend[ed] that as the custodial parent, she [had] an absolute right to direct the child's religious upbringing,"[122] the California Court of Appeal rejected this formulation of her rights.[123] The court noted that it was unaware of any California case holding that "in the absence of a showing of harm to the child, the custodial parent may enjoin the noncustodial parent from discussing religious subjects with the child or from involving the child in the noncustodial parent's religious activities."[124] The court noted that, in fact, a majority of jurisdictions considering the question had adopted the opposite rule.[125] Thus, the court in *Murga* held that "while the custodial parent may make the ultimate decisions concerning the child's religious upbringing, a court will not enjoin the noncustodial parent from discussing religion with the child or involving the child in his or her religious activities in the absence of a showing that the child will be thereby harmed."[126]

2. Mentry v. Mentry

Second, in *Mentry v. Mentry*, a father appealed a restraining order prohibiting him from "engaging the children of [his] dissolved marriage in any religious activity, discussion, or attendance during visitations" and from providing them with religious material when they were with him.[127] In this case, the court articulated the rule set out in *Murga*, cited with approval a Massachusetts case (also relying in part

120. *Id.*
121. *In re* Marriage of Murga, 163 Cal. Rptr. 79, 79–80 (Cal. Ct. App. 1980).
122. *Id.* at 81.
123. *Id.* at 82.
124. *Id.* at 81–82.
125. *Id.* at 82.
126. *Id.*
127. Mentry v. Mentry, 190 Cal. Rptr. 843, 844 (Cal. Ct. App. 1983).

on *Murga*),[128] and stressed that the law "tolerates and even encourages up to a point the child's exposure to the religious influences of both parents although they are divided in their faiths. . . . [B]ecause the law sees a value in 'frequent and continuing contact' of the child with both its parents" and their respective religious preferences.[129] The court concluded that the mother had failed to show harm sufficient to justify severing such exposure.[130] The court went on to discuss "additional considerations implicit in the *Murga* rule" that influenced its decision.[131] The court reasoned that "[t]he concept of family privacy embodies not simply a policy of minimum state intervention but also a presumption of parental autonomy."[132] From this premise, it concluded that "considerations of family privacy and parental autonomy should continue to constrain the exercise of judicial authority despite the fact that the family is no longer intact."[133] Finally, the court stressed that "indeed, such considerations more often than not gain force *because* the family is no longer intact . . . ."[134]

3. *The Ninth Circuit's Interpretation of California Law*

The Ninth Circuit drew on both of these California cases for the proposition "that noncustodial parents maintain the right to expose and educate their children to their individual religious views, even if those religious views contradict those of the custodial parent or offend her."[135] The Ninth Circuit extrapolated from the language in *Mentry* that "*minimum state intervention*" in the domestic realm "surely [did] not permit" state intervention in the form of "official state indoctrination of an impressionable child on a daily basis with an official view of religion contrary to the express wishes of *either* a custodial or noncustodial parent."[136] The Ninth Circuit went on to conclude that while the custody order prevented Newdow from "disrupt[ing] Banning's choice of schools for their daughter," or "nam[ing] his daughter as a party to a lawsuit against Banning's wishes," her standing as sole legal

128. *Id.* at 846–47 (citing Felton v. Felton, 418 N.E.2d 606 (Mass. 1981)).
129. *Id.* at 847.
130. *Id.*
131. *Id.*
132. *Id.* at 848.
133. *Mentry*, 190 Cal. Rptr. at 849.
134. *Id.* The court went on to reason that the "dissolution of the marriage has more formal than substantive significance," and for this reason "[p]roposed interventions in the privacy of the family that would not conceivably be entertained by the courts during the marriage (such as the order here appealed from) are not suddenly tenable simply because the parents have become separated or divorced." *Id.*
135. Newdow v. United States Congress (*Newdow II*), 313 F.3d 500, 504 (9th Cir. 2002).
136. *Id.* at 504–05.

custodian did not "empower[ ] her . . . to defeat Newdow's standing . . . ."[137]

4. *The Supreme Court's Interpretation in* Newdow IV

While Justice Stevens noted that the Supreme Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located," he appeared to have abandoned that custom by taking issue with the Ninth Circuit's interpretation of *Murga* and *Mentry*.[138] Justice Stevens criticized the court for concluding that because the "state law vests in Newdow a cognizable right to influence his daughter's religious upbringing" he had standing to bring his suit.[139] According to Justice Stevens, *Murga* and *Mentry* "do not stand for the proposition that Newdow has a right to dictate to others what they may and may not say to his child respecting religion,"[140] because those cases, in his view, "speak not at all to the problem of a parent seeking to reach outside the private parent-child sphere to restrain the acts of a third party."[141] Justice Stevens concluded that "[n]othing that either Banning or the School Board has done . . . impairs Newdow's right to instruct his daughter in his religious views," and that the relief he sought in bringing suit extended beyond that allowed by *Murga* or *Mentry*.[142]

Chief Justice Rehnquist, however, sharply criticized the majority's interpretation of California law.[143] He stated that he "would defer to the Court of Appeals' interpretation of California law" not only because it is the Court's "settled policy to do so," but because it offered "the better reading of *Murga* . . . and *Mentry*."[144] According to Chief Justice Rehnquist, Newdow did not seek relief beyond the boundaries of *Murga* and *Mentry*, as the majority contended, but wished "to enjoin the School District from endorsing a form of religion inconsistent with his own views because he has a right to expose his daughter to those views without the State's placing its *imprimatur* on a particular religion," a right secured by the California cases, and which in agreement with the Ninth Circuit in *Newdow II*, "Banning's 'veto power' does not override . . . ."[145]

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137. *Id.* at 505.
138. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow IV*), 124 S. Ct. 2301, 2311 (2004).
139. *Id.*
140. *Id.*
141. *Id.* at 2312.
142. *Id.* at 2311.
143. *Id.* at 2315 (Rehnquist, C.J., concurring in the judgment).
144. *Newdow IV*, 124 S. Ct. at 2315 (Rehnquist, C.J., concurring in the judgment).
145. *Id.*

Chief Justice Rehnquist must be right. The Ninth Circuit never argued that *Murga* or *Mentry* squarely solved the standing issues that Newdow raised. Rather, the court recognized that these cases supported the proposition that, absent a showing of harm to the child, noncustodial parents maintained rights to expose their children to their religious views free from government intervention. The conclusion the court drew from *Murga* and *Mentry* was that these rights encompassed a freedom from government-sponsored religious indoctrination over the objection of either parent.[146] Banning could not invoke the power of the state courts to keep Newdow from sharing his atheist beliefs with their daughter absent a showing of harm, because in effect, the courts would be intervening in order to prefer her religious beliefs over his. Thus, if *Murga* and *Mentry* would prohibit that form of state intervention, the Ninth Circuit reasonably deduced that a noncustodial parent must be able to object to a state-sponsored religious exercise, if the Pledge could be so construed, contrary to his or her religious views.[147] This argument gains additional support after considering the source of the standing Newdow asserted.

B. The Source of Newdow's Standing

Although the Ninth Circuit's interpretation of California law led it to conclude that Banning's status did not defeat Newdow's standing, it went on to articulate a separate source of Newdow's standing. As the court noted, when ruling on the custody issues, the Superior Court judge "appropriately declined to rule on whether Newdow has standing in his own right as a parent to maintain this case in federal court."[148] The Ninth Circuit held the following: "Banning has no power, even as sole legal custodian, to insist that her child be subjected to unconstitutional state action. Newdow's assertion of his retained parental rights in this case, therefore, simply cannot be legally incompatible with any power Banning may hold pursuant to the custody order."[149] The court further contended that "Banning may not consent to unconstitutional government action in derogation of Newdow's rights or waive Newdow's right to enforce his constitutional interests. Neither Banning's personal opinion regarding the Constitution nor her state court award of legal custody is determinative of Newdow's legal rights to protect *his own* interests."[150] Thus, accord-

146. Newdow v. United States Congress (*Newdow II*), 313 F.3d 500, 504–05 (9th Cir. 2002).
147. *Id.*
148. *Id.* at 505.
149. *Id.*
150. *Id.*

ing to the Ninth Circuit, no divorce or custody decree could detract from Newdow's ability to protect his rights.

In the Supreme Court's majority opinion, however, Justice Stevens posited a different interpretation of the source of Newdow's standing. In his discussion of Newdow's standing, Justice Stevens alluded to the many "interests" implicated by the suit: "Newdow's interest in inculcating his child with his views on religion," the rights of Banning "as a parent generally and under the Superior Court orders specifically," and "most important[ly], . . . the interests of a young child who finds herself at the center of a highly public debate over her custody, the propriety of a widespread national ritual, and the meaning of our Constitution."[151] Considering these interests, which Justice Stevens viewed "in many respects antagonistic," he concluded that Newdow's rights could not be "viewed in isolation."[152] In fact, Justice Stevens concluded that "what makes this case different is that Newdow's standing derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend. . . . the interests of this parent and this child are not parallel and, indeed, are potentially in conflict."[153]

Chief Justice Rehnquist sharply, and quite correctly, criticized the majority's treatment of the source of Newdow's standing: "While she is intimately associated with the source of [Newdow]'s standing . . . the daughter *is not the source* of [Newdow's] standing; instead it is their relationship that provides his standing, which is clear once [his] interest is properly described."[154] While Justice Stevens regarded Newdow's inability to litigate as her next friend as fatal to his standing, Chief Justice Rehnquist explained that once Newdow's suit was

151. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow IV*), 124 S. Ct. 2301, 2310 (2004).

152. *Id.*

153. *Id.* at 2311. Newdow vehemently opposed this characterization of his standing in his brief on the merits submitted to the Supreme Court. *See* Respondent's Brief on the Merits at 39–40, *Newdow IV*, 124 S. Ct. 2301 (No. 02-1624), *available at* 2004 WL 314156 [hereinafter Respondent's Brief]. Newdow first took issue with the characterization that he is a "noncustodial parent." *Id.* He argued that under California law, the terms "custodial" or "noncustodial" parent are undefined, and that because he has joint custody of his child, he is a custodial parent. *Id.* at 40. Moreover, Newdow argued that "[r]egardless of the custodial arrangement, there is no valid state interest whatsoever—much less one that is compelling—in preventing loving parents from suing the courts to protect themselves and their children." *Id.* at 42. Conceding that Banning "obviously, also has a fundamental constitutional right of parenthood," Newdow insisted that her right did not include "having the public schools indoctrinate children with religious dogma," and for that reason "none of her parental rights are affected by recognizing [Newdow's] standing." *Id.* at n.64. He argued that "whatever the custody arrangement, [he] has the right to compete with the mother's indoctrination of their child without the government weighing in." *Id.* at 42.

154. *Newdow IV*, 124 S. Ct. at 2316 (Rehnquist, C.J., concurring).

"properly described," it becomes clear that his suit is "not the same as a next friend suit."[155] He argued, "The California court did not reject Newdow's right as distinct from his daughter's, and we should not either."[156] Moreover, the Chief Justice chastised the majority for not clarifying its position on Newdow's Article III standing: "To be clear, the Court does not dispute that respondent Newdow satisfies the requisites of Article III standing."[157]

The source of Newdow's standing was the subject of intense debate during oral arguments before the Court.[158] Prefacing a question from the Court by noting that Newdow was "asking [it] to exercise the extraordinary, the breathtaking power to declare Federal law unconstitutional," a member of the panel expressed concern that "the common sense of the [standing] matter," was that Newdow's daughter would be "the one that bears the blame for this," that she would "face the public outcry," but that she "probably [did not] agree" with the suit.[159] The Court further stated that "the case ha[d] to be about [Newdow's] rights," and expressed concern that "[he] began this argument by talking about [his] daughter" as opposed to those rights.[160] In response, Newdow maintained he was not bringing the suit on her behalf, that she was a "separate entity," and argued emphatically that he had a right of standing.[161] Newdow clearly asked the Court to answer the question of whether he had an "actual, concrete, discrete, particularized, individualized harm to [him]," when his daughter "goes into the public schools . . . . [and is] told every morning . . . to stand up, put her hand over her heart, and say [her] father is wrong."[162] Thus, Newdow clarified that the injury he sought redressed was the one that he incurred when the government "weighed in" in favor of one religious belief over another:

> I want to be able to tell my child that I have a very valid religious belief system. Go to church with your mother, go see Buddhists, do anything you want, I love that—the idea that she's being exposed to other things, but I want my religious belief system to be given the same weight as everybody else's. And the Government comes in here and says, no, Newdow, your religious belief system is wrong

155. *Id.* at 2316 n.2.

156. *Id.*

157. *Id.* at 2313.

158. *See generally* Transcript of Oral Argument, *Newdow IV*, 124 S. Ct. 2301 (No. 02-1624), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-1624.pdf [hereinafter Transcript of Oral Argument].

159. *Id.* at 24–25.

160. *Id.* at 26.

161. *Id.*

162. *Id.* at 27.

> and the mother's is right and anyone else who believes in God is right.[163]

Phrased in this context, it seems clear that the source of Newdow's standing was not the effect of the Pledge on his daughter, but rather the injury he sustained by its recitation in her classroom.

C. Whose Harm Is Relevant?

In addition to disagreeing about the claimed "source" of standing, the opinions appear at odds over the "harms" at issue in the case, and over what weight to accord them. Although Justice Stevens rejected the Ninth Circuit's interpretation of the California cases discussed above, the language in those cases pertaining to a "showing of harm" still appears to have influenced his reasoning. As discussed above, the Ninth Circuit, following *Murga* and *Mentry*, would not abridge the right of a noncustodial parent to share his religious views with his child absent some showing of harm.[164] While the majority distanced itself from the California cases by explicitly rejecting the Ninth Circuit's interpretation of them (thus finding them inapplicable to Newdow's case), it arguably followed those cases by finding, implicitly, that the harm required by their rules was met.

In the oral arguments before the Supreme Court, the panel couched Newdow's standing to bring suit in terms of his daughter's standing in its very first question to him on the standing issue.[165] As discussed above in the context of the source of Newdow's standing, the panel noted that "the common sense core of the standing rule" is that the litigant who seeks to have "courts . . . exercise [their] awful power [to declare a law unconstitutional]" must be the one to "take the consequences." After establishing this premise, the panel expressed fear that Newdow was putting those consequences on his daughter, rather than taking them on himself.[166] The majority echoed this fear of harm in its opinion in *Newdow IV*. By interpreting Newdow's standing as it related to "the interests of a young child who finds herself at the center of a highly public debate over her custody, the propriety of a

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163. *Id.* at 40–41.

164. *See supra* notes 118–137 and accompanying text.

165. Transcript of Oral Argument, *supra* note 158, at 24–25.

166. *Id.* at 25. Newdow responded that if "there are consequences from people trying to uphold the Constitution, that just happens to happen." *Id.* He argued that he was "not convinced that there [were] going . . . to be adverse consequences to [his] daughter." *Id.* According to Newdow, his daughter was "going to be able to walk around and say that [her] father helped uphold the Constitution of the United States." *Id.* at 25–26.

widespread national ritual, and the meaning of our Constitution," the majority implied that this requisite showing of harm was met.[167]

This implied presumption of harm is troubling. First, if the majority is willing to end its inquiry by finding that the potential harm to Newdow's daughter trumps his individual right to bring suit on his own behalf, the Court should articulate that position clearly. Instead, Justice Stevens styled the majority opinion as one "informed by the *variety* of contexts in which federal courts decline to intervene."[168] Second, presuming "an adverse effect on the person who is the source of the plaintiff's claimed standing,"[169] and then giving decisive weight to that presumption is contradictory to the majority's avowed reluctance to intervene when "the suit 'depend[s] on a determination of the status of the parties.'"[170] Rather than declining to intervene, the Court actually appears to be making that determination on its own.

While the majority in *Newdow IV* concentrated on the harms to Newdow's daughter that the suit posed—harms that may well have existed—both the Ninth Circuit's opinion and Chief Justice Rehnquist's concurring opinion focused on whether the harm Newdow alleged he personally suffered was sufficient to support his standing to bring the suit, the question properly before each court. The harm that was really at issue was whether Newdow has sustained a cognizable injury such that he might challenge the source of the alleged harm.

Recent scholarship discusses the potential "harms" at issue in *Newdow* generally, and one type of harm specifically that accords with Newdow's assertion of an injury in fact.[171] Professor Emily Buss argued that "the state sometimes has a unique opportunity to influence development during children's formative years, and that this potential

167. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow IV*), 124 S. Ct. 2301, 2310 (2004).

168. *Id.* at 2309 n.5 (emphasis added).

169. *Id.* at 2312.

170. *Id.* at 2309 n.5 (citing Ankenbrandt v. Richards, 504 U.S. 689, 706 (1992)).

171. Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 29 (2004). Professor Buss argued that the state, unlike any individual parent, has a special ability to (1) determine how best "to ensure achievement of a successful democratic government, a healthy economy, and a safe society," and (2) "assess societal consensus about child-harm." *Id.* at 32. Buss argued that "[w]hen parents' behavior clearly indicates their developmental incompetence, or when the state has special expertise [as in the two specific areas listed above], the state is justified in taking some control." *Id.* These instances, Buss argued, are "the exceptions to the general rule of *parental deference* in developmental control." *Id.* (emphasis added). This position is in accordance with the California Court of Appeal's "non-interventionist approach" in *Mentry*. *See supra* notes 127–134 and accompanying text. There the Court reasoned that "[t]he vast majority of matters concerning the upbringing of children must be left to the conscience, patience, and self restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children." Mentry v. Mentry, 190 Cal. Rptr. 843, 848 (Cal. Ct. App. 1983).

to influence development creates a unique potential for harm.[172] In her view, "children's exposure to demonstrations of religiosity by the state are likely to have an effect on their emerging conception of their religious identities and of their relationship, as religious beings, to the rest of society."[173] She argued that "precisely because their religious identities are not yet fixed, children are entitled to special protection from religious messages coming from the state."[174]

Buss advocated vesting the right to challenge unconstitutional state influences, the first harm she articulated, in the child, rather than the parent, because she perceives the harm of such influences to affect the child most severely.[175] She conceptualized this right as one of "developmental non-influence," and she argued that as such, it "runs only one way"—to and from the child.[176] According to Buss, Banning would not be free to waive the right on behalf of her daughter because the alleged unconstitutional conduct squares with Banning's own religious beliefs (or even if she does not perceive it to harm her).[177] Under this formulation, Buss argued that a noncustodial parent could assert the right on his or her daughter's behalf so long as "the procedural rules governing litigation on behalf of children as well as the details of the custodial arrangement" so permit.[178] Of course Newdow's inability to litigate on his daughter's behalf as "next friend" would have kept him from bringing such a suit on her behalf. Although Buss advocated vesting the child with the right, her analysis demonstrates the child may not be the only person harmed by the alleged establishment offense. She recognized, for example, that the Pledge practice implicates Newdow's ability to exercise his own rights of free exercise and parental control.[179] It implicates Newdow's rights while it simultaneously threatens his daughter's right of "developmental non-influence." Although Buss focused on the severity of the harm to the child, one harm does not exist at the exclusion of the other. While Banning could not assert her own religious views to defeat a suit brought on behalf of her daughter (by consenting to unconstitutional conduct), she could not do so to defeat a suit brought by Newdow to defend his own interests. This formulation properly fo-

172. Buss, *supra* note 171, at 45.

173. *Id.* at 48.

174. *Id.*

175. *Id.* at 47–48, 53–54.

176. *Id.* at 54.

177. *Id.*

178. Buss, *supra* note 171, at 54.

179. *Id.*

cuses a court's attention on the "harm" the lawsuit seeks to redress, rather than on speculative harm to third parties.

D. Prudential Concerns That Mitigate in Favor or Against Going Forward

In its disposition of the standing issue, the Ninth Circuit in *Newdow I* limited itself to a discussion of Article III standing.[180] Similarly in *Newdow II*, the Ninth Circuit disposed of the standing question without entering into a discussion of the prudential standing doctrine.[181] In the Supreme Court, however, prudential standing concerns proved dispositive.[182] As mentioned above, Chief Justice Rehnquist criticized the majority for not making its finding on Newdow's satisfaction of Article III standing requirements more clear.[183] Justice Stevens began the standing analysis by noting that "the command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake."[184] Reasoning that "even in cases concededly within [the Court's] jurisdiction under Article III," Justice Stevens noted that the Court abides "by a 'series of rules under which [it has] avoided passing upon a large part of all the constitutional questions pressed upon [it] for decision.'"[185] Justice Stevens went on to describe "the variety of contexts in which federal courts decline to intervene" which "informed" its "prudential standing analysis."[186]

While Justice Stevens disavowed any specific reliance on them, both the domestic relations exception to diversity jurisdiction and the abstention doctrine informed the majority's holding.[187] In domestic relations cases, he noted, the Court's "deference to state law" has been "so strong" that it has "recognized a 'domestic relations exception' that 'divests the federal courts of power to issue divorce, alimony, and child custody decrees.'"[188] He maintained that it might also "be appropriate for the federal courts to decline to hear a case involving 'elements of the domestic relationship,' even when divorce, alimony,

180. *See* Newdow v. United States Congress (*Newdow I*), 292 F.3d 597, 603 (9th Cir. 2002).

181. Newdow v. United States Congress (*Newdow II*), 313 F.3d 500, 504–05 (9th Cir. 2002). If anything, the Appeals Court in *Newdow II* flatly held that neither Banning's opinions nor custody awards could outweigh "Newdow's legal rights to protect *his own* interests." *Id.* at 505.

182. *See supra* note 100 and accompanying text.

183. *See supra* note 157 and accompanying text.

184. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow IV*), 124 S. Ct. 2301, 2308 (2004).

185. *Id.* (quoting Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)).

186. *Id.* at 2309 & n.5.

187. *Id. See also supra* notes 94–95 and accompanying text.

188. *Newdow IV*, 124 S. Ct. at 2309 (quoting Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992)).

or child custody is not strictly at issue."[189] While acknowledging that "rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue," the majority concluded that Newdow's case was not such an instance:

> [I]t is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.[190]

Thus, according to the majority, the Court should decline to intervene when the "disputed family law rights are entwined inextricably with the threshold standing inquiry," and where, as here, "[t]he *merits* question undoubtedly transcends the domestic relations issue, but the *standing* question surely does not."[191]

Chief Justice Rehnquist sharply criticized the majority's "prudential standing principle" as a novelty.[192] Because the domestic relations exception is not a prudential limitation, the Chief Justice reasoned that it provides "no basis" for denying standing to bring suit when, on the merits, a case "presents a substantial federal question that transcends the family law issue."[193] Moreover, the Chief Justice contended that abstention forms no basis for denying standing when "the state of [Newdow and Banning's] domestic affairs has nothing to do with the underlying constitutional claim."[194] Finally, the Chief Justice argued that under the majority's formulation of this prudential standing principle, the Court would have had to dismiss a case such as *Palmore v. Sidoti*, where the Court found the alleged "effects of racial prejudice resulting from the mother's interracial marriage could not justify granting custody to the father."[195] Under the majority's rule, Chief Justice Rehnquist argued, the Court would have "stayed out of the 'domestic dispute' in *Palmore* no matter how constitutionally offensive the result would have been."[196] In Chief Justice Rehnquist's con-

189. *Id.*
190. *Id.* at 2312.
191. *Id.* at 2309 n.5.
192. *Id.* at 2313 (Rehnquist, C.J., concurring).
193. *Id.* at 2314.
194. *Newdow IV*, 124 S. Ct. at 2314 (Rehnquist, C.J., concurring).
195. *Id.* (citing Palmore v. Sidoti, 466 U.S. 429 (1984)).
196. *Id.*

currence, prudential considerations seemed to mitigate in favor of the Court "exercising the jurisdiction given [it]."[197]

Chief Justice Rehnquist, again, has the better argument. Without a clearer expression from Justice Stevens about the precise source of the majority's prudential standing doctrine, these prudential concerns should not displace Newdow's Article III standing. On its own, the domestic relations exception to diversity jurisdiction could not provide the Supreme Court a sufficient basis on which to deny Newdow standing because Newdow's was not a suit in diversity, nor did he ask for a divorce, child custody, or alimony decree.[198] Further, the Supreme Court's jurisprudence makes clear that abstention is the exception rather than the rule.[199] While Justice Stevens wisely disavowed specific reliance on any one of these doctrines—possibly for these very reasons—the Court should not deny Newdow or any litigant standing without articulating on what basis the Court specifically relies.[200]

D. Standing Apart From the Merits

While scholars characterize standing principles as "eminently reasonable" in the abstract, they often criticize the use of the doctrine as a tool for achieving a certain outcome.[201] Common is the belief that the political proclivities of individual judges tend to dictate standing decisions.[202] While this belief is open (and has been subject) to great debate, "the extant empirical studies indicate that politics govern at every level of the judicial hierarchy."[203] While it may be an overstatement to argue that "politics" dictated the outcome in *Newdow IV*, it seems significant that there are instances in the Ninth Circuit's and Supreme Court's opinions where discussions of the merits intermingle

197. *Id.*

198. *See supra* note 94 and accompanying text.

199. *See supra* note 95 and accompanying text.

200. *See Newdow IV*, 123 S. Ct. at 2309 n.5.

201. Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 614–15 (2004) (providing an empirical analysis of the political motivations behind the standing doctrine in the context of taxpayer lawsuits challenging government spending). Professor Staudt noted that "virtually every published article on the topic seems to argue that the law of standing is at best confusing and at worst a serious impediment to fair and just outcomes." *Id.* at 613–14.

202. *Id.* at 614–15. Professor Staudt suggested that in areas of the law where "legal rules are vague" and when "little or no judicial monitoring exists," politics will play a stronger role in judicial outcomes. *Id.* at 648.

203. *Id.* at 615.

with the standing analysis. This may beg the question of just how easy it is to divorce the two.[204]

For instance, after the Ninth Circuit found the Pledge policy and the 1954 Act an unconstitutional violation of the Establishment Clause in *Newdow I*, one might wonder how willing this same panel would be to conclude that Newdow lacked standing to bring those very challenges when, in *Newdow II*, Banning brought the narrow standing question before it.[205] In fact, in framing the question, the Ninth Circuit characterized the standing issue in *Newdow II* as whether "the grant of sole legal custody to Banning deprive[d] Newdow, as a noncustodial parent, of Article III standing to object to *unconstitutional* government action affecting his child."[206] The Ninth Circuit did not limit such references to the characterization of the issue; the constitutionality of the Pledge crept into its holding as well.[207] After "hold[ing] that Banning has no power, even as sole legal custodian, to insist that her child be subjected to unconstitutional state action," the Ninth Circuit went on to characterize the message of endorsement it found latent in the Pledge policy and Pledge itself.[208] Concurring in the disposition of the standing issue (though he dissented on the merits in *Newdow I*), Judge Fernandez wrote separately in *Newdow II* to emphasize that "[d]espite the order's allusions to the merits of the controversy, we decide nothing but that narrow standing issue."[209]

Perhaps such allusions to the merits should be expected from a panel who just six months earlier had resolved the constitutional questions the case presented. But what about the Supreme Court? After setting out the questions for which the Supreme Court granted certiorari in *Newdow IV* (only one of which, of course, the majority would resolve), Justice Stevens prefaced his resolution of the standing issue

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204. For a discussion of the relationship between political science and the standing doctrine, see Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999). Pierce described standing as dependent on "the degree of congruence between the political and ideological goals of the plaintiff and those of the judges who answer the standing question." *Id.* at 1742. Pierce argued that students and practitioners can more accurately predict judicial decisions on standing issues by "ignor[ing] doctrine and rely[ing] entirely on a simple description of the law of standing that is rooted in political science: judges provide access to the courts to individuals who seeks to further the political and ideological agendas of judges." *Id.* at 1742–43.

205. Newdow v. United States Congress (*Newdow I*), 292 F.3d 597, 612 (9th Cir. 2002). *See supra* notes 52–59 and accompanying text.

206. Newdow v. United States Congress (*Newdow II*), 313 F.3d 500, 503 (9th Cir. 2002) (emphasis added).

207. *See infra* note 210 and accompanying text.

208. *Newdow II*, 313 F.3d at 505. ("[Newdow] can expect to be free from the government's endorsing a particular view of religion and unconstitutionally indoctrinating his impressionable young daughter on a daily basis in that official view.").

209. *Id.* at 506 (Fernandez, J., concurring).

with a brief history of the evolution of the Pledge.[210] Unlike the Ninth Circuit in *Newdow I*, Justice Stevens stressed that the Pledge first appeared in positive law in 1942, "in the midst of World War II[211] . . . confirm[ing] the importance of the flag as a symbol of our Nation's indivisibility and commitment to the concept of liberty."[212] Justice Stevens then briefly mentioned that the 1954 Act "amended the text to add the words 'under God,'" and cited to a handful of lines from the House Report accompanying it.[213] Justice Stevens's discussion of the legislative history notably omitted any reference to the stated purpose of "deny[ing] the atheistic and materialistic concepts of communism with its attendant subservience of the individual," set forth in the legislative history as it was discussed in *Newdow I*.[214] Finally, Chief Justice Rehnquist, in his concurring opinion, criticized the majority for relying:

> on Banning's view of the merits of [the] case to diminish respondent's interest, stating that the respondent "wishes to forestall his daughter's exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and Banning disagree."[215]

Also instructive, perhaps, is that the clearest articulations of the basis for Newdow's Article III standing are accompanied by a sharp decision on the merits. As discussed above, both the Ninth Circuit in *Newdow II* and Chief Justice Rehnquist's concurrence in *Newdow IV*, advance the better-reasoned approaches to California law and more clearly articulated bases for Newdow's standing. Ironically, while the two opinions would agree that Newdow had standing to bring suit in the federal courts, this is where their agreement ends, as they set forth

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210. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow IV*), 124 S. Ct. 2301, 2305 (2004). Justice Stevens began this discussion with a quote from his own dissenting opinion in *Texas v. Johnson*, 491 U.S. 397, 405 (1989): "[T]he very purpose of a national flag is to serve as a symbol of our country." (internal quotation marks omitted). Justice Stevens also noted that the "Pledge of Allegiance evolved as a common public acknowledgement of the ideals that our flag symbolizes." *Newdow IV*, 124 S. Ct. at 2305. When Congress amended the Pledge, adding the words "under God," the accompanying House Report noted that the amended text was meant to reflect the "traditional concept that our Nation was founded on a fundamental belief in God." *Id.* at 2306 (citing H.R. REP. No. 1693, at 2 (1954)).

211. *Id.* at 2305.

212. *Id.* at 2306.

213. *Id.*

214. Newdow v. United States Congress (*Newdow I*), 292 F.3d 597, 610 (9th Cir. 2002).

215. *Newdow IV*, 124 S. Ct. at 2315 (Rehnquist, C.J., concurring in the judgment).

intensely different understandings of the underlying constitutional issues.[216]

V. IMPACT

At first glance, it would seem that the outcome for Michael Newdow would have ultimately been the same had a majority of the Supreme Court sided with Chief Justice Rehnquist rather than majority author Justice Stevens: the Ninth Circuit's opinion in *Newdow II* would have been reversed under either opinion. In fact, disappointed court watchers characterized the decision as breaking "no new ground" in First Amendment jurisprudence because the Court "ducked" the Establishment Clause issue.[217] Because it is such a recent decision, the effects of *Newdow IV* are at best speculative. But because the Supreme Court decided the case on standing grounds, *Newdow IV* may have ramifications beyond its anticipated realm, and might prove to make a real difference for noncustodial parents like Newdow in constitutional challenges to come. This section will identify the potential implications *Newdow IV* may have in cases involving the rights of noncustodial parents, and will address its significance in the area of standing jurisprudence generally.[218]

A. Newdow *and Family Law: Abridging the Rights of Noncustodial Parents or Preventing a Heckler's Veto?*

In advance of the oral argument before the Supreme Court in *Newdow IV*, dozens of interested parties filed briefs on the Establishment Clause issue.[219] While the Pledge policy itself seemed to raise the most concern among the friends of the Court, several parties opined as to the repercussions the decision on standing might have in family law cases. In a brief filed jointly by the United Fathers of

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216. *See* Egelko, *supra* note 59 (quoting House Speaker Dennis Hastert as referring to the Ninth Circuit as "the liberal court in San Francisco").

217. Perry A. Craft & Michael G. Sheppard, *Framed by the Times*, 40 TENN. B.J. 14, 19 (2004) (summarizing the Court's main cases from the 2004 term and offering perspectives on developments in the law).

218. *See infra* notes 219–274 and accompanying text.

219. *See, e.g.*, Brief for Historians and Law Scholars as Amicus Curiae Supporting Respondent, *Newdow IV*, 124 S. Ct. 2301 (No. 02-1624), *available at* 2004 WL 298112; Brief for Religious Scholars and Theologians as Amicus Curiae Supporting Respondent, *Newdow IV*, 124 S. Ct. 2301 (No. 02-1624), *available at* 2004 WL 298113; Brief for American Atheists as Amicus Curiae Supporting Respondent, *Newdow IV*, 124 S. Ct. 2301 (No. 02-1624), *available at* 2004 WL 314151; Brief for Focus on the Family, Family Research Council, and Alliance Defense Fund as Amicus Curiae Supporting Petitioners, *Newdow IV*, 124 S. Ct. 2301 (No. 02-1624); Brief for the United States as Respondent Supporting Petitioners, *Newdow IV*, 124 S. Ct. 2301 (No. 02-1624), *available at* 2003 WL 23011474.

America and Alliance for Non-Custodial Parents Rights (UFA-NCP Brief), these parties expressed great concern that a dismissal of the case on standing grounds would severely abridge the rights of noncustodial parents.[220] Advocating a contrary position, Professor Joseph Grodin, filing a brief in support of neither party, wrote to encourage the Court to vacate the Ninth Circuit's decision, and to remand the standing issue for consideration to the California Supreme Court.[221] Professor Grodin argued that a decision "that the Constitution overrides a state's allocation of parental rights and responsibilities could have sweeping consequences for state family law nationwide, extending far beyond claims under the Establishment Clause."[222] Each prediction of the potential implications of the Court's decision deserves attention here.

Taking "no position on whether the words 'under God' belong" in the Pledge, the UFA-NCP wrote to address what they described as the "monumental travesty of justice" that would result in a finding that Newdow lacked standing or "in any way ha[d] rights inferior to the mother with regard to seeking the aid of the courts in protecting his child from harm."[223] Although the UFA-NCP, like Newdow, maintained that Newdow was not a noncustodial parent, and that his rights were "essentially equal to that of the mother," they assumed for the purpose of argument that Newdow "might be found to have legal characteristics similar to that of a garden-variety 'non-custodial' parent."[224] The rights of these "garden-variety" parents, the UFA-NCP feared, would be "irretrievably hobbled" by what they characterized as "unbridled zeal to seek to avoid . . . an adverse determination on the merits" of the Establishment Clause issue.[225]

Criticizing Newdow's opponents, the UFA-NCP argued that the "incredible irony" in the case was that "by attacking Newdow's standing, Petitioners and their amici [did] not advance the merits of their cause, but instead [sought] to avoid the merits" by stripping Newdow and similarly situated parents of their rights.[226] Unlike Petitioners, the UFA-NCP contended that Newdow had Article III standing to

220. Brief for United Fathers of America and Alliance for Non-Custodial Parents as Amicus Curiae Supporting Respondent at *3–4, *Newdow IV*, 124 S. Ct. 2301 (No. 02-1624), *available at* 2004 WL 298109 [hereinafter UFA-NCP Brief].

221. Brief for Joseph R. Grodin as Amicus Curiae Supporting Neither Party (Vacatur) at *2, *Newdow IV*, 124 S. Ct. 2301 (No. 02-1624), *available at* 2003 WL 23010746 [hereinafter Grodin Brief].

222. *Id.* at *3.

223. UFA-NCP Brief, *supra* note 220, at *2.

224. *Id.* at n.2.

225. *Id.* at *4.

226. *Id.*

"challenge a government policy denigrating the religious views of the 'non-custodial parent' in a child's public school education."[227] They maintained that he "suffer[ed] that injury regardless of his custody rights," stressing that their "sole and only point is their vehement objection to the assertions . . . that because Newdow is a 'non-custodial parent' . . . he would supposedly have no 'injury.'"[228] The UFA-NCP warned that the Court "should not permit parental rights to be destroyed as a perceived 'easy way out' of resolving thorny Constitutional issues."[229] The "unintended consequences conceivable from the kind of draconian procedural ruling" that Newdow lacked standing would be to prevent noncustodial parents from seeking redress for a perceived harm.[230] Illustrating the point, the UFA-NCP argued:

> Whether he determines in his good conscience . . . that her being led in a Pledge of Allegiance to a nation "under God" is harmful—or whether the issue instead might have been that he had decided in his good conscience as her father that she should not be participating in "sleep-overs" at Michael Jackson's Neverland Ranch—is quite beside the point. The point in this case is the unbridled and thoughtless attack by Petitioners and their amici—including the United States itself—upon fathers' and [non-custodial parents'] rights as such to protect their children by means of legal redress in the courts of this country.[231]

While the UFA-NCP maintained that a finding that Newdow lacked standing could function to block the rights of parents concerned with a perceived injury from seeking redress in the federal courts, Professor Grodin advanced a counterargument, and opposite fears.[232] He advocated remanding the case to the California Supreme Court to determine whether a parent has a right "to challenge government action affecting his child, after the state has vested in the other parent sole legal custody of the child or final decision-making authority with respect to the child."[233] Professor Grodin argued that if California law did not recognize "Newdow's right to challenge [the School District's] Pledge policy, Newdow would have standing to do so only if this Court were to decide that he has a federal constitutional right to challenge the policy that California's allocation of rights between him and Banning cannot negate."[234] Professor Grodin viewed such a decision

227. *Id.* at *8.
228. *Id.* at *12 n.6.
229. UFA-NCP Brief, *supra* note 220, at *26.
230. *Id.* at *20.
231. *Id.* at *5–6.
232. *See generally* Grodin Brief, *supra* note 221.
233. *Id.* at *2.
234. *Id.* at *14.

as one "with enormous consequences for state family law nationwide," and argued that there were strong reasons not "[t]o read such a right into the Constitution."[235] Grodin feared that such a decision would "open up the federal courts nationwide as forums for parents to litigate, contest, and control choices made by those other parents who have been awarded full custody rights or final decision-making authority with respect to a child."[236] He argued that "[t]he text of the Establishment Clause does not vest parents with a special right to bring suit on their own behalf as parents even if stripped of their right to bring suit on behalf of their children."[237] He further feared that "[r]ecognizing a constitutionally guaranteed right to bring such lawsuits, regardless of the state's allocation of rights between father and mother, would result in 'the federalization of family law.'"[238] He argued that "[s]uch lawsuits could conflict with a state's interest in the finality of its child custody arrangements and other determinations based on the best interests of the child."[239] Maintaining that

> [i]n a case such as this, the parent's rights are not truly distinct from the child's. . . . [t]o say that a parent who may not challenge government action on the child's behalf may challenge it on his own behalf may be thought to involve a form of double-counting that permits evasion of the state's determination that the parent may no longer act on behalf of the child.[240]

While both positions advance legitimate concerns, those expressed by the UFA-NCP are more grave. A proper characterization of Newdow's injury, and the relief he requested, quiets some of the fears expressed by Professor Grodin. First, by finding that Newdow had standing to challenge an injury resulting from a perceived violation of the Establishment Clause, the Court would not be reading such a right into the Constitution, but rather would be recognizing one that is already there.[241] Second, Newdow did not enlist the federal courts to undercut the allocation of rights between him and Banning; he sought their help to enjoin the state from a practice he regarded as unconstitutional.[242] Moreover, if the Court found the Pledge policy unconstitutional, Banning could not lawfully insist on its implementation regardless of the allocation of custodial rights. Finally, while the fear

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235. *Id.*

236. *Id.*

237. *Id.*

238. Grodin Brief, *supra* note 221, at *15 (citing Santosky v. Kramer, 455 U.S. 745, 773 (1982) (Rehnquist, J., dissenting)).

239. *Id.*

240. *Id.* at *16.

241. *See supra* note 235 and accompanying text.

242. *See supra* note 234 and accompanying text.

that granting Newdow standing would spawn meritless suits might be reasonable, the proper response to this fear would be for the courts to dismiss meritless suits on that basis. Certainly this seems a better result than stripping noncustodial parents of their standing to bring suit to protect their interests in the first place.

In addition, finding that Newdow had standing to bring suit on his own behalf to challenge governmental conduct he perceived as injuring him is not "a form of double-counting," as Grodin argued.[243] Rather, such a finding would be an expression that the individual rights of noncustodial parents count too. While it might be reasonable for a custody order or divorce decree to deprive a noncustodial parent from taking certain action on a child's behalf, it is unreasonable to ask that parent to forfeit the right to protect his or her own rights. Such an order might diminish a parent's rights vis-à-vis his or her child, but it should not diminish one's access to the federal courts.

Newdow IV concededly arose from a background of what Justice Stevens termed "disputed family law rights."[244] But Michael Newdow did not ask the Supreme Court for a resolution of those particular custody issues.[245] Rather, he asked the Supreme Court to enjoin conduct he perceived as infringing on his constitutional rights.[246] By advocating abstention when a case arises from such a background, but not seeking or requiring the resolution of those issues, the Supreme Court creates an opportunity to disenfranchise a large number of people.[247]

"The most noticeable trend," in a 2003 survey issued by the United States Census Bureau, was "the decline in the proportion of married-couple households with their own children."[248] The Census Bureau also reported an increase in families "whose householder was living with children or other relatives but had no spouse present."[249] The Bureau reported that the percentage of single-parent family households was not statistically different between 1995 and 2003, but that number is certainly statistically significant—at nine percent of house-

243. *See supra* note 240 and accompanying text.

244. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow IV*), 124 S. Ct. 2301, 2310 n.5 (2004).

245. *See* Transcript of Oral Argument, *supra* note 158, at 26.

246. *Id.*

247. *See Newdow IV*, 124 S. Ct. at 2312.

248. *See* U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003, at 2 (2004), *available at* http://www.census.gov/population/www/socdemo/hh-fam.html [hereinafter CENSUS REPORT]. The proportion of households of married couples living without children "dropped only slightly." *Id.* There was a large increase in the number of one-person households; that is, people living alone. *Id.* at 2–3.

249. *Id.* at 2. This percentage of households "increased from 11 percent of all households in 1970 to 16 percent in 2003." *Id.*

holds.[250] The Bureau reported that "[i]n 2003, the number of households in the United States reached 111 million."[251] Of those 111 million households, nearly twenty-six million are married-couple households with their own children.[252] Over ten million of the 111 million households are made up of "other families" led by either a male or female householder with their own children present.[253] Newdow's family, like millions of others, fits into this growing "other family" category. Ostensibly, any of these "other families" could have family rights issues in dispute. Should the male or female leaders of these households have reduced access to the federal courts by virtue of their "other" status?

Some commentators suggest that by failing to recognize the interests of "noncustodial and nonresident fathers" in its decision in *Newdow IV*, the Court's decision cements this "other" status and sends a powerful, normative message about "the parenting role that those fathers play in their children's lives."[254] Given the large number of children living in homes without their fathers, such a message from the Court might not only serve to perpetuate stereotypes about those fathers, but it may actually "discourage the involvement of noncustodial fathers in the upbringing of their children" at a grave impact to those children and to society at large.[255]

B. Newdow *in the Context of Standing Jurisprudence Generally*

It is not yet clear what place *Newdow IV* will ultimately take in the Supreme Court's standing jurisprudence generally. Depending on how the lower courts construe *Newdow IV*, the Supreme Court's opinion may prove to have at once addressed, and yet failed to satisfy, the concerns expressed on the standing issue in both the UFA-NCP and Grodin Briefs. While the majority opinion based its characterization of the standing issues on the "inextricably intertwined" domestic relations issues between the parties, it also left open the door for those "rare instances" when "it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue."[256]

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250. *Id.*

251. CENSUS REPORT, *supra* note 248, at 2.

252. *Id.* at 3 tbl.1. The report defines "own children" as those who "identify the householder or a family reference person as a parent in a household, family, or family group." *Id.* at 2. "[O]wn children are limited to those children who are never-married and under age 18." *Id.*

253. *Id.* at 3 tbl.1.

254. *See, e.g.*, Gloria Chan, Comment, *Reconceptualizing Fatherhood: The Stakes Involved in* Newdow, 28 HARV. J.L. & GENDER 467, 468 (2005).

255. *Id.* at 476.

256. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow IV*), 124 S. Ct. 2301, 2309 n.5 (2004).

Future parties may therefore use this language to argue that the Court should limit its holding in *Newdow IV* to the unique facts of that case. Such parties may argue that their cases surely present the very "rare instance" the Court referred to.

Chief Justice Rehnquist described the majority's opinion as embodying a "novel" standing principle, narrowly confined enough to be considered "like the proverbial excursion ticket," good for one day only.[257] Because the majority seemed to loosely rest its opinion on a number of different principles, going forward it would be wiser for the lower courts to construe it as good for one day only.

Recent scholarship has described the *Newdow IV* decision as "notable" for precisely this reason.[258] The majority "incorporate[ed] the normative and procedural dimensions of both abstention and standing jurisprudence," but it failed to explain on which peg it hung its hat.[259] In a have-your-cake-and-eat-it-too fashion, the majority is seen as having "styled its holding as a prudential standing one," but also as having revealed "the composite nature of its new rule" by installing principles of abstention "at the core of its new prudential standing rule."[260] The "practice of judicial self-restraint," the criticism goes, "maintains credibility only if it is reasoned."[261]

As for Michael Newdow, the Supreme Court's decision in *Newdow IV* has certainly not made him any less litigious, nor less dedicated to challenging the Pledge. It does, however, appear to have instructed him to err on the side of safety where standing is concerned. On January 3, 2005, Newdow filed another suit in the United States District Court for the Eastern District of California.[262] Newdow, the sole named plaintiff, joined a number of unnamed plaintiffs in opposition to the inclusion of the words "under God" in the Pledge of Allegiance as a violation of the First Amendment, the California Education Code requirement of daily patriotic exercises in the public schools, and the requirement of each of the plaintiff's school districts that the school children recite the Pledge.[263]

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257. *Id.* at 2316 (Rehnquist, C.J., concurring).

258. *See Leading Cases—Standing*, 118 HARV. L. REV. 426, 432 (2004).

259. *Id.*

260. *Id.* at 435.

261. *Id.*

262. *See* Original Complaint, Newdow v. Congress of the United States (E.D. Cal. Jan. 3, 2005), *available at* http://www.restorethepledge.com/litigation/pledge/docs/2005-01-03%20complaint.pdf. [hereinafter Complaint].

263. *Id.* at 9–13. The unnamed plaintiffs include adults and their children, who are enrolled in area school districts with similar Pledge policies to the one at issue in *Newdow IV*. *Id.* The unnamed plaintiffs are: Jan Doe, Pat Doe, their minor child (called Doe/Child); Jan Poe and

The complaint advanced a number of grounds on which each or some combination of the plaintiffs might base their standing to bring the First Amendment challenge. First, each of the adult plaintiffs, four atheists and one agnostic, claimed injury in the form of "political outsider" status they alleged that the government endorsement of monotheism embodied in the Pledge confers on them.[264] Newdow also alleged injury in the form of his "annihilated" political opportunities now that "his Atheism is known."[265] The adult plaintiffs alleged that their outsider status forces them to choose between advocating their children's educational best interests and exercising their religious beliefs.[266] The complaint described two of the children as "staunch Atheists in their own right" who "have also been made to feel like 'political outsiders'" by their opposition to the Pledge.[267] They argued that they are "adversely affected as well by the message they receive vis-à-vis their parents' religious beliefs."[268] The complaint further alleged that the recitation of the Pledge works an injury to both the children and the parents by telling the children that "their parents' religious choices are wrong."[269]

In September 2005, the United States District Court for the Eastern District of California held that Newdow lacked standing to pursue what had become his "cause celebre."[270] Because it was bound by the Supreme Court's decision in *Newdow IV*, the district court granted the motion to dismiss against Newdow on standing grounds.[271]

In addition to their motion against Newdow, the defendants challenged the standing of the unnamed parent Jan Roe to bring suit. The district court's analysis of Roe's standing—in the context of a motion to dismiss—may be instructive for noncustodial parents facing similar jurisdictional hurdles. Although Roe had full joint legal custody of the Roe children, the defendants maintained that, under *Newdow IV*, Jan Roe had failed to allege that he had "final-decision-making au-

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Poe's minor child (called Poe/Child); and Jan Roe and Roe's minor children (called Roe/Child 1 and 2, respectively). *Id.*

264. *Id.* at 14.

265. *Id.* at 15.

266. Complaint, *supra* note 262, at 14–15.

267. *Id.* at 15.

268. *Id.*

269. *Id.*

270. *See* Newdow v. Congress of the United States, 383 F. Supp. 2d 1229, 1231 (E.D. Cal. 2005).

271. *Id.* at 1239. The district court also rejected Newdow's assertion of standing based on his attendance at school board meetings, taxpayer status, and assertion of "political outsider" status. *Id.* at 1237–39.

thority regarding the educational upbringing of Roe Children."[272] Evidently this "final-decision-making authority" is what the defendants gleaned from *Newdow IV* as a necessary requirement to support standing for a noncustodial parent. The district court, however, seemed to find the language of *Newdow IV* inapplicable to Roe's standing, reasoning that "there is no indication that family rights are in dispute with regard to the Roe children" sufficient to defeat Roe's standing.[273] The district court was satisfied that because Roe "properly alleged that he has custody of his children and thus by reasonable inference decision-making power over them," he sufficiently pled standing.[274] Thus, the district court found standing on some measure of custody and decisionmaking power without requiring exclusive custody and final decisionmaking power.

V. CONCLUSION

Elk Grove Unified School District v. Newdow demonstrates both the jurisprudential and political complexities of the standing doctrine. Justice Stevens's majority opinion, while dodging the ramifications likely to be caused by *any* decision on the Establishment Clause issue in this highly publicized case, muddied the waters of an already murky standing doctrine, and may have done so at the expense of the rights of noncustodial parents. While future decisions may, and certainly should, limit the holding of *Newdow IV* to its narrow facts, for now the Supreme Court has left uncertainty in its wake. Without a willingness to clearly articulate the basis for its new "prudential standing principle" the majority would have done better to side with the Ninth Circuit and Chief Justice Rehnquist whose respective treatments of the standing issues in this case offered a better-reasoned approach. Regardless of the Supreme Court's decision on the merits, Michael Newdow and noncustodial parents like him, would still have been better off.

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272. *Id.* at 1239.

273. *Id.*

274. *Id.* at 1240.

* J.D., expected May 2006, DePaul University College of Law. I would like to thank the editors of the *DePaul Law Review* and Professor Allison Ortlieb for their thoughtful comments and suggestions in the drafting and editing of this Note. I would also like to thank Brian Wade and my parents—Ellen Clarke, John Byrd, Tony Sayer, and Cindy Smith—for their love and support in all things.