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# Newdow v. Rio Linda Union School District: Religious Coercion in Public Schools Unconstitutional Despite Voluntary Nature of Partially Patriotic Activity

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## NOTE

*NEWDOW v. RIO LINDA UNION  
SCHOOL DISTRICT:*  
RELIGIOUS COERCION IN PUBLIC  
SCHOOLS UNCONSTITUTIONAL  
DESPITE VOLUNTARY NATURE OF  
PARTIALLY PATRIOTIC ACTIVITY

## INTRODUCTION

Every morning before class, public school students in the Rio Linda Union School District in Northern California (hereinafter “School District”) stand, face the American flag, place their hands over their hearts, and recite the Pledge of Allegiance (hereinafter “Pledge”).<sup>1</sup> This daily practice, on its face, is voluntary.<sup>2</sup> However, public school students are a captive audience, one that is highly susceptible to the effects of coercive pressure and indoctrination.<sup>3</sup> Despite its ostensibly voluntary nature, this governmental policy unconstitutionally pressures public school students to state that this nation exists under a monotheistic God.<sup>4</sup> This policy stands in stark contrast to the purpose of the

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<sup>1</sup>Newdow v. Rio Linda Union Sch. Dist. (*Newdow V*), 597 F.3d 1007, 1012 (9th Cir. 2010).

<sup>2</sup>*Id.*

<sup>3</sup>Lee v. Weisman, 505 U.S. 577, 593-94 (1992); Steven D. Smith, *Why Is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem, and the Big Problem*, 87 DEN. U. L. REV. 945, 950 (2010).

<sup>4</sup>*Newdow V*, 597 F.3d at 1012; Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 65 (2004) (citing *Newdow v. U.S. Cong. (Newdow I)*, 292 F.3d 597 (9th Cir. 2002) (“[T]he ‘under God’ amendment not only endorsed religion over nonreligion, it endorsed monotheism over polytheism.”)).

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Establishment Clause<sup>5</sup> of the United States Constitution, which states that “Congress shall make no law respecting an establishment of religion.”<sup>6</sup>

*Newdow v. Rio Linda Union School District*,<sup>7</sup> a Ninth Circuit decision, is an alarming example of Establishment Clause jurisprudence. The court in *Newdow* held that the School District’s policy of requiring daily patriotic exercises, including the recitation of the Pledge, did not violate the Establishment Clause.<sup>8</sup> The decision allows public school districts in California to continue to coerce public school students into reciting the Pledge. This decision and the School District’s policy have the unconstitutional effect of ostracizing nonbelievers and possibly indoctrinating some students with the belief in a monotheistic God. School policies that coerce students to support or participate in religion should be struck down even if student participation is voluntary.

The court’s holding in *Newdow* is wrong because the court incorrectly applied the Coercion Test. The Coercion Test, first stated in *Lee v. Weisman*, is the determinative test in Establishment Clause challenges involving government action in public schools, because the test was specifically developed to address the problem of the captive student audience by analyzing whether the government activity has a coercive effect on students.<sup>9</sup> If the court had applied the Coercion Test properly and examined the effect, not the purpose and primary nature, of the law and policy in question, the court would have properly found that the daily recitation of the Pledge violated the Establishment Clause.

This Note examines *Newdow v. Rio Linda Union School District* and explains why California Education Code Section 52720 and the School District’s policy of reciting the Pledge violate the Establishment Clause. Part I discusses the background facts and procedural history of the case and the three tests that were developed by the United States Supreme Court to analyze Establishment Clause challenges. Part II examines the Ninth Circuit’s application of the three Establishment Clause tests to the facts of this case. Finally, Part III explains why the Coercion Test is the determinative test in the context of government

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<sup>5</sup> State action is subject to Establishment Clause challenges because the First Amendment is incorporated into the Fourteenth Amendment. *E.g.*, *Newdow V*, 597 F.3d at 1017, n.8 (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947)).

<sup>6</sup> U.S. CONST. amend. I.

<sup>7</sup> *Newdow V*, 597 F.3d at 1007.

<sup>8</sup> *Id.* at 1042.

<sup>9</sup> *Modrovich v. Allegheny Cnty.*, 385 F.3d 397, 400-01 (3d Cir. 2004) (citing *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 343 (5th Cir. 1999)); *see Lee v. Weisman*, 505 U.S. 577 (1992).

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action in public schools and why California Education Code Section 52720 and the School District's policy fail this test.

I. BACKGROUND

A. FACTS AND HISTORY OF *NEWDOW V. RIO LINDA UNION SCHOOL DISTRICT*

1. *Procedural History of Newdow v. Rio Linda Union School District*

In 2000, Michael Newdow brought a claim against the Elk Grove Unified School District in California, alleging that the policy requiring recitation of the Pledge violated the Establishment Clause.<sup>10</sup> After the district court dismissed his claim, a panel of the Ninth Circuit reversed, finding Newdow had standing to challenge the policy based on his being a father of a student in the Elk Grove Unified School District and holding that the Elk Grove School District policy violated the Establishment Clause (*Newdow I*).<sup>11</sup> The mother of Newdow's child intervened to challenge the decision and alleged that Michael Newdow lacked standing because she had previously been awarded sole legal custody of the child.<sup>12</sup> Regarding the intervention challenging Newdow's standing, the appellate court held that Newdow's loss of custody did not deprive him of standing (*Newdow II*).<sup>13</sup> The court issued an amended opinion reaffirming the invalidation of the Elk Grove School District policy in *Newdow I*, but it did not reach the question of the constitutionality of the Pledge (*Newdow III*).<sup>14</sup>

The Supreme Court of the United States granted certiorari and reversed the Ninth Circuit's decision in *Newdow III*, holding that Newdow lacked standing because he was the noncustodial parent.<sup>15</sup> Because the Court found that Newdow lacked standing, the Court held that the Ninth Circuit should not have reached the merits of Newdow's Establishment Clause claims.<sup>16</sup>

In January 2005, following the 2004 Supreme Court decision in *Elk*

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<sup>10</sup> *Newdow V*, 597 F.3d at 1015.

<sup>11</sup> *Newdow v. U.S. Cong. (Newdow I)*, 292 F.3d 597 (9th Cir. 2002).

<sup>12</sup> *Newdow v. U.S. Cong. (Newdow II)*, 313 F.3d 500, 502 (9th Cir. 2002).

<sup>13</sup> *Id.* at 502-03.

<sup>14</sup> *Newdow v. U.S. Cong. (Newdow III)*, 328 F.3d 466 (9th Cir. 2003).

<sup>15</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004).

<sup>16</sup> *Id.* at 17.

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*Grove Unified School District v. Newdow*, Newdow and other plaintiffs, including Jan Roe, challenged the constitutionality of California Education Code Section 52720 and the related policies of various school districts within the State of California.<sup>17</sup> Plaintiffs argued that the California law and the school districts' policies violate the Establishment Clause of the United States Constitution.<sup>18</sup> The Northern District of California held that *Newdow III*<sup>19</sup> was binding on the district court and concluded that the school's policy requiring recitation of the Pledge violated the Establishment Clause (*Newdow IV*).<sup>20</sup>

2. *Plaintiff Jan Roe's Constitutional Challenge of the School District's Policy*

The school district policies challenged in *Newdow IV* implement California Education Code Section 52720, which, in relevant part, states as follows:

In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.<sup>21</sup>

Pursuant to this state law, every morning in elementary schools in the School District, "willing students, led by their teachers, face the American Flag, place their right hands over their hearts, and recite the Pledge of Allegiance."<sup>22</sup> Plaintiff Jan Roe, whose child attended school in the School District, challenged the School District's policy because the words "under God" in the Pledge offended her belief that there is no God.<sup>23</sup> Therefore, Roe contended, the policy violates the Establishment Clause of the First Amendment.<sup>24</sup>

There was no dispute over the fact that Jan Roe's child never recited the Pledge, but Roe argued that the recitation of the Pledge in public

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<sup>17</sup> *Newdow v. Rio Linda Union Sch. Dist. (Newdow V)*, 597 F.3d 1007, 1015 (9th Cir. 2010).

<sup>18</sup> *Id.*

<sup>19</sup> *Newdow III*, 328 F.3d at 468-69. In *Newdow III*, the Ninth Circuit amended its *Newdow I* opinion and denied petitions for panel rehearing and rehearing en banc.

<sup>20</sup> *Newdow v. U.S. Cong. (Newdow IV)*, 383 F.Supp.2d 1229, 1240-41 (E.D. Cal. 2005).

<sup>21</sup> CAL. EDUC. CODE § 52720 (Westlaw 2011).

<sup>22</sup> *Newdow V*, 597 F.3d at 1012.

<sup>23</sup> *Id.* at 1012-13.

<sup>24</sup> *Id.*

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elementary schools interfered “with her right to direct her child’s upbringing, and indoctrinate[d] her child with the belief that God exists.”<sup>25</sup> The district court, relying on *Newdow III*, held that the School District’s policy did violate the Establishment Clause.<sup>26</sup>

The Ninth Circuit reversed the district court’s ruling in *Newdow IV*,<sup>27</sup> reasoning in part that because *Newdow III* was reversed by the United States Supreme Court, the district court should not have relied on it as binding precedent (*Newdow V*).<sup>28</sup> Additionally, the court of appeals reasoned that Congress changed the law since *Newdow III*, in response to the Ninth Circuit’s decision in *Newdow I*.<sup>29</sup> In *Newdow V*, the Ninth Circuit held that “California Education Code § 52720 and the School District’s Policy of having teachers lead students in the daily recitation of the Pledge, and allowing those who do not wish to participate to refuse to do so with impunity, do not violate the Establishment Clause.”<sup>30</sup>

#### B. THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The Establishment Clause of the First Amendment to the United States Constitution provides the constitutional basis for religious freedom in America.<sup>31</sup> The Establishment Clause states, “Congress shall make no law respecting an establishment of religion.”<sup>32</sup> The Supreme Court of the United States has developed three distinct tests to determine whether a governmental action has violated the Establishment Clause: 1) the *Lemon* Test, 2) the Endorsement Test, and 3) the Coercion Test.<sup>33</sup>

<sup>25</sup> *Id.* at 1012-13; see *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 795 (9th Cir. 1999) (en banc) (“Parents have a right to direct the religious upbringing of their children and, on that basis, have standing to protect their right.”).

<sup>26</sup> *Newdow V*, 597 F.3d at 1015-16.

<sup>27</sup> *Newdow v. U.S. Cong. (Newdow IV)*, 383 F.Supp.2d 1229, 1240 (E.D. Cal. 2005) (holding that despite being reversed on procedural grounds, the decision in *Newdow III* that the school districts’ policies violated the Establishment Clause was binding precedent).

<sup>28</sup> *Newdow V*, 597 F.3d at 1040-41.

<sup>29</sup> *Id.* at 1041; *Newdow v. U.S. Cong. (Newdow I)*, 292 F.3d 597, 612 (9th Cir. 2002) (holding that adding the phrase “under God” to the Pledge was unconstitutional, and the school district’s policy requiring daily recitation of the Pledge violated the Establishment Clause).

<sup>30</sup> *Newdow V*, 597 F.3d at 1042.

<sup>31</sup> U.S. CONST. amend. I.

<sup>32</sup> *Id.*

<sup>33</sup> *Newdow V*, 597 F.3d at 1017.

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1. *The Lemon Test*

In *Lemon v. Kurtzman*, decided in 1971, the Supreme Court had to determine, among other issues, whether Pennsylvania and Rhode Island statutes that provided religious elementary and secondary schools with aid for teachers' salaries and educational materials violated the Establishment Clause of the First Amendment.<sup>34</sup> The Rhode Island statute allowed government officials to pay nonpublic school teachers who taught secular subjects up to 15% of the teachers' annual salaries.<sup>35</sup> The statute also required the teachers to teach only secular subjects that were taught in the public schools and to use only materials that were used in the public schools.<sup>36</sup> The statute further specified that the average per-pupil expenditure for secular education at the receiving teacher's school had to be less than the average in the public school system.<sup>37</sup>

The Pennsylvania statute provided direct reimbursement to nonpublic schools for expenses for teachers' salaries, textbooks and instructional materials.<sup>38</sup> Reimbursement was restricted to secular courses available in the public schools, including mathematics, foreign languages, physical science and physical education.<sup>39</sup> The statute set out further restrictions prohibiting the reimbursement for any course that contained "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."<sup>40</sup>

The Rhode Island and Pennsylvania statutes were clear in their intent to advance secular education within each respective state.<sup>41</sup> "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate."<sup>42</sup> In crafting the statutes, the legislatures of both states provided precautions in recognition that the effect of the statutes could cause constitutional concern, because the legislatures were aware that statutes would benefit private schools with religious affiliations.<sup>43</sup> In doing so, the legislatures probably intended to

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<sup>34</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 606-07 (1971).

<sup>35</sup> R.I. GEN. LAWS § 16-51-1 et seq. (repealed 1980); *Lemon*, 403 U.S. at 607.

<sup>36</sup> R.I. GEN. LAWS § 16-51-1 et seq. (repealed 1980); *Lemon*, 403 U.S. at 608.

<sup>37</sup> R.I. GEN. LAWS § 16-51-1 et seq. (repealed 1980); *Lemon*, 403 U.S. at 607.

<sup>38</sup> 24 PA. STAT. ANN. §§ 5601-5609 (repealed 1977); *Lemon*, 403 U.S. at 609.

<sup>39</sup> 24 PA. STAT. ANN. §§ 5601-5609 (repealed 1977); *Lemon*, 403 U.S. at 610.

<sup>40</sup> 24 PA. STAT. ANN. §§ 5601-5609 (repealed 1977); *Lemon*, 403 U.S. at 610.

<sup>41</sup> R.I. GEN. LAWS § 16-51-1 et seq. (repealed 1980); 24 PA. STAT. ANN. §§ 5601-5609 (repealed 1977); *Lemon*, 403 U.S. at 613.

<sup>42</sup> *Lemon*, 403 U.S. at 613.

<sup>43</sup> R.I. GEN. LAWS § 16-51-1 et seq. (repealed 1980); 24 PA. STAT. ANN. §§ 5601-5609 (repealed 1977); *Lemon*, 403 U.S. at 613.

prevent constitutional questions from arising, but in the end, the Supreme Court found “the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.”<sup>44</sup>

While the purpose and primary effect of the statutes may have been secular in nature, the Supreme Court found that the excessive entanglement of government with religion invalidated the two statutes.<sup>45</sup> In deciding to invalidate the two state statutes, the Supreme Court combined criteria that had been developed over years of Establishment Clause cases.<sup>46</sup> The culmination of these developments took form in the three-pronged *Lemon* Test.<sup>47</sup> A governmental action will be upheld under the *Lemon* Test if 1) there is a secular governmental purpose, 2) the principal or primary effect is neutral and neither advances nor inhibits religion, and 3) the action does not excessively entangle the government with religion.<sup>48</sup>

## 2. *The Endorsement Test*

The Endorsement Test finds its origins in a concurring opinion in *Lynch v. Donnelly*.<sup>49</sup> In this concurrence, Justice O’Connor reasoned that if the purpose of an action is not to endorse religion and the effect of the action does not convey a message of endorsing religion, then the challenged action does not violate the Establishment Clause.<sup>50</sup> The central question, then, in the Endorsement Test inquiry is “what viewers may fairly understand to be the purpose of the [government action].”<sup>51</sup> If a reasonable observer would fairly understand a governmental action to be an endorsement of religion over non-religion, or of one religion over another, then the governmental action fails the Endorsement Test.<sup>52</sup>

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<sup>44</sup> *Lemon*, 403 U.S. at 613-14.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 612-13.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring). In *Lynch v. Donnelly*, the Supreme Court held that the city of Pawtucket’s display of a crèche along with other holiday displays did not violate the Establishment Clause. In a concurring opinion, which is the basis for the Endorsement Test, Justice O’Connor reasoned that the display was constitutional because the purpose of the display was not to endorse religion and the effect did not convey a message of endorsement of religion.

<sup>50</sup> *Id.* at 692 (O’Connor, J., concurring).

<sup>51</sup> *Id.*

<sup>52</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O’Connor, J., concurring in part and concurring in judgment)).



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The Supreme Court in *County of Allegheny v. ACLU* adopted Justice O'Connor's "sound analytical framework for evaluating governmental use of religious symbols" from her concurrence in *Lynch*.<sup>53</sup> The Court agreed with the notion that any endorsement of religion is invalid.<sup>54</sup> Accordingly, the Endorsement Test focuses on whether the government action in question has the effect of favoring or preferring religion in general, or favoring a particular religious belief over another.<sup>55</sup> Understanding the context in which the challenged government action took place is extremely important for an Endorsement Test analysis.<sup>56</sup> In *County of Allegheny*, the Court held that the display of a crèche did violate the establishment clause, but the display of a menorah next to a Christmas tree among other winter-holiday-themed items did not.<sup>57</sup>

The concept of the "reasonable observer" has morphed since its inception. Recently, in *Good News Club v. Milford Central School*, a 2001 Supreme Court decision, the Court relied on another concurring opinion of Justice O'Connor, from the case of *Capitol Square Review & Advisory Board v. Pinette*:

[B]ecause our concern is with the political community writ large, the endorsement inquiry is *not about the perceptions of particular individuals* or saving isolated nonadherents from . . . discomfort . . . . It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place].<sup>58</sup>

Thus, the Court in *Good News Club* "decline[d] to employ Establishment Clause jurisprudence using a modified heckler's veto" (i.e., a subjective standard from an individual perspective) in favor of the reasonable-observer standard, "aware of the history and context of the community and forum."<sup>59</sup> Therefore, one person's perception that a governmental action is an endorsement of religion is not enough to invalidate that action.<sup>60</sup> Instead, the objective reasonable-observer standard relies on

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<sup>53</sup> *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989).

<sup>54</sup> *Id.* (citing *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

<sup>55</sup> *Id.* at 593-94.

<sup>56</sup> *Id.* at 595.

<sup>57</sup> *Id.* at 578-79.

<sup>58</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring in part and concurring in judgment)).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

the perspective of the hypothetical reasonable person who is aware of the history and context of the governmental action at issue.<sup>61</sup>

### 3. *The Coercion Test*

In an essential Establishment Clause case regarding religious activity and public schools, *Lee v. Weisman*, the Supreme Court had to decide whether a school policy of allowing clergy members to offer prayers at the school's official graduation ceremony violated the First Amendment.<sup>62</sup> In making its decision, the Court declined to reconsider the entire constitutional framework established in *Lemon v. Kurtzman*, because the school policy allowing prayers at an official graduation ceremony was pervasive governmental involvement with religion.<sup>63</sup> Instead, the Court applied the fundamental principle that the government's obligation to accommodate religion in some situations never overcomes the "fundamental limitations imposed by the Establishment Clause."<sup>64</sup> The crux of the Coercion Test is that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."<sup>65</sup>

The Court explained the different mechanisms by which the First Amendment protects speech and religion, to illustrate that the Establishment Clause imposes greater limits on government action regarding religion than it does on government action regarding speech.<sup>66</sup> The First Amendment protects speech by ensuring full expression by all, including the government.<sup>67</sup> The Free Exercise Clause is similar to the speech provisions in that all citizens have the freedom to engage in religious activity without fear of government prohibition.<sup>68</sup> However, unlike the Free Speech Clause, the Establishment Clause specifically prohibits the government from meddling with religion.<sup>69</sup> *Lee* explains that "in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."<sup>70</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Lee v. Weisman*, 505 U.S. 577, 580 (1992).

<sup>63</sup> *Id.* at 587.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 591.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 591-92.

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A federal district court in Florida attempted to clarify the Coercion Test announced in *Lee*.<sup>71</sup> That court defined unconstitutional coercion as occurring when “(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors.”<sup>72</sup> However, the Supreme Court has declined to provide lower courts with a definition of a “formal religious exercise.”<sup>73</sup> Despite failing to define “formal religious exercise,” the Supreme Court has made it clear that “subtle coercive pressure” can be enough to interfere with an individual’s choice to participate in religion or not, and this subtle pressure is enough to make a governmental action unconstitutional.<sup>74</sup>

According to the Second Circuit, the Coercion Test inquiry should be decided based on considerations of “individual conscience and free will.”<sup>75</sup> In contrast, the Fifth Circuit conflates the contextual element of the Endorsement Test with the Coercion Test by requiring the court to examine the context in which the challenged governmental action took place.<sup>76</sup> The Fifth Circuit stated that the “ultimate question is whether ‘the religious component of any government practice or policy . . . overwhelm[s] the nonreligious portions.’”<sup>77</sup> This construction, however, is inconsistent with the Supreme Court’s decision in *Lee*, in which the Court stated the minimal constitutional limitation of the Establishment Clause prevents the government from coercing anyone to participate or support religious activity.<sup>78</sup> *Lee* said nothing about weighing religious and nonreligious components of the activity.

Other circuits have drawn distinctions in Establishment Clause cases involving public universities. The Sixth and Seventh Circuits have highlighted the fundamental difference between cases involving elementary and secondary school children and cases in which adult college-level students are exposed to religion through state action.<sup>79</sup>

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<sup>71</sup> *Adler v. Duval Cnty. Sch. Bd.*, 851 F. Supp. 446, 456 (M.D. Fla. 1994), *aff’d in part and vacated in part on other grounds*, 112 F.3d 1475 (11th Cir. 1997).

<sup>72</sup> *Id.*

<sup>73</sup> *Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 290 (5th Cir. 1999) (striking down the school district’s policy for “Clergy in Schools” volunteer counseling program by focusing on the “design, implementation, and effect” of the challenged conduct, not its “purpose or goal”).

<sup>74</sup> *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 412 (2d Cir. 2001) (citing *Lee*, 505 U.S. at 592, 595; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311-13 (2000)).

<sup>75</sup> *DeStefano*, 247 F.3d at 412.

<sup>76</sup> *Croft v. Perry*, 624 F.3d 157, 170 (5th Cir. 2010) (upholding the recitation of the Texas state pledge of allegiance in public schools).

<sup>77</sup> *Croft*, 624 F.3d at 170 (citing *Beaumont Indep. Sch. Dist.*, 173 F.3d at 291).

<sup>78</sup> *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

<sup>79</sup> *See Chaudhuri v. Tennessee*, 130 F.3d 232, 239 (6th Cir. 1997) (“We may safely assume that doctors of philosophy are less susceptible to religious indoctrination than children are.”); *see also Tanford v. Brand*, 104 F.3d 982, 985 (7th Cir. 1997) (finding that “there was no coercion – real

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Adult students are less susceptible to undue coercion than school children, so the special concerns present in *Lee* are generally absent in the university setting.<sup>80</sup> However, the Fourth Circuit created an exception to this general rule by striking down school-sponsored supper prayer at Virginia Military Institute (VMI) in *Mellen v. Bunting*.<sup>81</sup> In *Mellen*, the Fourth Circuit reasoned that VMI school officials should be prohibited from leading prayer, because of the inherently coercive nature of the military school's educational system.<sup>82</sup> "Because of VMI's coercive atmosphere, the Establishment Clause precludes school officials from sponsoring an official prayer, even for mature adults."<sup>83</sup> Significantly, the court further stated that the voluntary nature of the supper prayer did not prevent it from being unconstitutionally coercive.<sup>84</sup> The court reasoned that despite being nominally voluntary, communal dining was effectively obligatory, and the imposition of a supper prayer "exact[ed] an unconstitutional toll on the consciences of religious objectors."<sup>85</sup>

## II. NINTH CIRCUIT'S APPLICATION OF ESTABLISHMENT CLAUSE TESTS TO CALIFORNIA EDUCATION CODE SECTION 52720 AND RIO LINDA UNION SCHOOL DISTRICT'S POLICY

In making its decision in *Newdow V*, the Ninth Circuit correctly applied the rules developed by the *Lemon* Test and the Endorsement Test, finding that the California statute and the Rio Linda Union School District policy pass those tests.<sup>86</sup> However, the court misapplied the Coercion Test, which is the determinative test in this context, by erroneously focusing on the purpose of the governmental activity and not on the effect of the policy, which is to unconstitutionally coerce elementary and secondary students to support or participate in religious

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or otherwise – to participate" because the special concerns underlying *Lee* were not present at a commencement ceremony at Indiana University).

<sup>80</sup> *Chaudhuri*, 130 F.3d at 239; *Tanford*, 104 F.3d at 985.

<sup>81</sup> *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003).

<sup>82</sup> *Id.* at 371-72.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 372.

<sup>85</sup> *Id.*

<sup>86</sup> *Newdow v. Rio Linda Union Sch. Dist. (Newdow V)*, 597 F.3d 1007, 1037-38 (9th Cir. 2010). The Ninth Circuit concluded that under the *Lemon* Test, the School District's policy had a secular purpose to encourage patriotic exercises, the primary effect was to conduct patriotic exercises and there was no excessive entanglement with religion. Under the Endorsement Test, the Ninth Circuit concluded that a reasonable observer, aware of the history of the Pledge, would be aware that the phrase "under God" is meant not as an endorsement of religion, but rather as a patriotic reflection on the political philosophy of our founding fathers. *Id.*

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activity.<sup>87</sup>

The Ninth Circuit held that the School District's policy does not violate the Coercion Test because the voluntary recitation of the Pledge is a patriotic exercise, not a religious exercise.<sup>88</sup> The court relied heavily on the distinction between patriotic mentions of God and "unquestioned religious exercise[s]," like prayer.<sup>89</sup>

The court supported its position by reasoning that children are routinely coerced to do things in school, including listening to other students recite the Pledge.<sup>90</sup> The court found that in this case, "the students are being coerced to participate in a patriotic exercise, not a religious exercise."<sup>91</sup> The court explained that the indirect-psychological-coercion analysis of *Lee* only applies to religion or its exercises, which carry "a particular risk of indirect coercion."<sup>92</sup> According to the court, this indirect coercion does not apply to patriotic exercises.<sup>93</sup> In support of this conclusion, the court cited a Fourth Circuit case in which a parent challenged a Virginia statute that required the recitation of the Pledge in Virginia's public schools, for the notion that "[e]ven assuming that the recitation of the Pledge contains a risk of indirect coercion, the indirect coercion is not threatening to establish religion, but patriotism."<sup>94</sup> Similarly, the Ninth Circuit cited *Engel v. Vitale*, a 1962 school prayer case in which the Supreme Court distinguished reciting historical documents or singing patriotic songs with religious overtones from prayer in public schools.<sup>95</sup> The Ninth Circuit referred to this distinction as the difference between prayer and "a ceremonial reference to God."<sup>96</sup>

The Ninth Circuit found it proper to limit the indirect-coercion analysis of *Lee* to religious exercises.<sup>97</sup> In addition to this limitation, the court stated that when there is not a requirement to recite the Pledge, the Establishment Clause is violated "only if the government coerces students to engage in a religious exercise."<sup>98</sup> The court found that patriotic activities, such as recitation of the Pledge, are not religious and

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<sup>87</sup> *Id.* at 1038-40.

<sup>88</sup> *Id.* at 1040.

<sup>89</sup> *Id.* at 1038-40.

<sup>90</sup> *Id.* at 1038.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1038-39 (citing *Lee v. Weisman*, 505 U.S. 577, 592 (1992)).

<sup>93</sup> *Id.* (citing *Lee*, 505 U.S. at 592).

<sup>94</sup> *Id.* at 1040 (citing *Myers v. Loudoun Cnty. Pub. Sch.*, 418 F.3d 395, 408 (4th Cir. 2005)).

<sup>95</sup> *Id.* (quoting *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962)).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1039.

<sup>98</sup> *Id.* at 1040.

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therefore not analyzed under the Coercion Test.<sup>99</sup> Because the court was able to make a distinction between “patriotic mentions of God” and religious exercises, the Ninth Circuit held that the “School District’s Policy providing for the voluntary recitation of the Pledge does not violate the *Lee* Coercion Test.”<sup>100</sup>

### III. CRITIQUE OF THE NINTH CIRCUIT’S ESTABLISHMENT CLAUSE ANALYSIS

#### A. THE COERCION TEST IS THE DETERMINATIVE TEST IN ESTABLISHMENT CLAUSE CHALLENGES TO GOVERNMENTAL ACTION IN PUBLIC SCHOOLS

Despite the Ninth Circuit’s accurate analysis of this case’s facts under the *Lemon* Test and the Endorsement Test, that analysis was unnecessary and misleading. Since its inception in *Lee v. Weisman*, the Coercion Test has been the applicable test in First Amendment Establishment Clause challenges to government actions related to public schools.<sup>101</sup> “[The Coercion Test] focuses primarily on government action in public education and examines whether school-sponsored religious activity has a coercive effect on students.”<sup>102</sup> For consistency and clarity, the Coercion Test should have been the only Establishment Clause test applied in *Newdow V*, because the government action challenged was an establishment of religion in public schools.<sup>103</sup> Analysis involving three different tests creates confusion and only leads to uncertainty in future Establishment Clause challenges related to public schools. Courts should use the test specifically developed for this situation, the Coercion Test, so everyone knows what the proper standard is.

One main purpose of the Establishment Clause is to guarantee that the government does not coerce free citizens to unwillingly support or

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Lee v. Weisman*, 505 U.S. 577, 580 (1992); see *Modrovich v. Allegheny Cnty.*, 385 F.3d 397, 400 (3d Cir. 2004) (citing *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 343 (5th Cir. 1999)).

<sup>102</sup> *Modrovich*, 385 F.3d at 400 (citing *Freiler*, 185 F.3d at 343, *cert. denied*, 530 U.S. 1251 (2000)).

<sup>103</sup> See generally *Adler v. Duval Cnty. Sch. Bd.*, 851 F. Supp. 446, 450-51 n.5 (M.D. Fla. 1994), *aff’d in part and vacated in part on other grounds*, 112 F.3d 1475 (11th Cir. 1997). The Supreme Court has decided Establishment Clause cases without using all three Establishment Clause tests.

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participate in religion or the exercise of religion.<sup>104</sup> Religious coercion of school children by the government is unacceptable because parents have the right to decide whether to raise their children to be religious and to believe in God.<sup>105</sup> The fundamental right of parents to direct the religious upbringing of their children has significance in our society.<sup>106</sup> In *Wisconsin v. Yoder*, the Supreme Court struck down a Wisconsin law because it violated Amish<sup>107</sup> parents' First Amendment right to religious freedom by requiring students to remain in school until age sixteen.<sup>108</sup> Similarly, in *Grove v. Mead School District No. 354*, the Ninth Circuit determined that a parent had standing to challenge the use of a book in the school district's English curriculum, based on her right to "direct the religious training of her child."<sup>109</sup>

The Coercion Test was developed in *Lee* to protect the individual's freedom of conscience.<sup>110</sup> Federal, state and local governments of the United States have the affirmative duty to protect American citizens' freedom to choose their religious beliefs.<sup>111</sup> If the government fails to protect "that sphere of inviolable conscience and belief which is the mark of a free people," the United States loses its power to influence other nations to afford equivalent fundamental rights to their citizens.<sup>112</sup> When the government coerces citizens to participate in religion, the government compromises freedom of belief and conscience, "which are the sole assurance that religious faith is real, not imposed."<sup>113</sup>

The concern over freedom of conscience is certainly not limited to the public school context, but it is "most pronounced" there.<sup>114</sup> The

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<sup>104</sup> *Lee*, 505 U.S. at 587.

<sup>105</sup> See *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 795 (9th Cir. 1999) (en banc) ("Parents have a right to direct the religious upbringing of their children and, on that basis, have standing to protect their right." (citing *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985); *Zorach v. Clauson*, 343 U.S. 306, 309 n.4 (1952))).

<sup>106</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972).

<sup>107</sup> *Id.* at 211 ("Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life.").

<sup>108</sup> *Id.*

<sup>109</sup> *Grove*, 753 F.2d at 1532 (citing *Yoder*, 406 U.S. 205; *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963)).

<sup>110</sup> *Lee v. Weisman*, 505 U.S. 577, 592-93 (1992).

<sup>111</sup> *Id.* at 592 ("One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.").

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

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Establishment Clause prohibits the government from putting elementary and secondary school students in the position of choosing whether to participate in or protest activities contrary to their religious convictions.<sup>115</sup> “What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.”<sup>116</sup> When the potential for “subtle coercive pressure” occurs in public schools, there are profound concerns with protecting elementary and secondary school students from such coercion.<sup>117</sup> In the school context, “subtle and indirect” government pressure can effectively coerce a student to engage in activity that is contrary to the dissenting student’s conscientious convictions, a result the Establishment Clause was designed to prevent.<sup>118</sup>

B. *NEWDOW’S APPLICATION IS INCORRECT, AND CALIFORNIA EDUCATION CODE SECTION 52720 AND THE SCHOOL DISTRICT’S POLICY ARE UNCONSTITUTIONAL UNDER THE COERCION TEST*

The *Newdow* court incorrectly applied the Coercion Test by focusing on the purpose and nature of the activity rather than the effect. The majority decision in *Newdow v. Rio Linda Union School District (Newdow V)* expressly recognized the fact that elementary school children “unaware of its history may perceive the phrase ‘under God’ in the Pledge to refer exclusively to a monotheistic God of a particular religion.”<sup>119</sup> The California statute and the School District’s policy should be invalidated under the Coercion Test because an elementary school student, unaware of the history, might believe the phrase “under God” refers to the God of a particular religion. This is the type of effect that the Coercion Test is designed to protect against and why California Education Code Section 52720 and the School District’s policy are unconstitutional.

School policies that impermissibly coerce students to support or participate in religion should be struck down even if student participation is ostensibly voluntary. In *Santa Fe Independent School District v. Doe*, the United States Supreme Court invalidated a school policy that allowed student-led prayers at high school football games, because the policy

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<sup>115</sup> *Id.* at 593.

<sup>116</sup> *Id.* at 592.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 593.

<sup>119</sup> *Newdow v. Rio Linda Union Sch. Dist. (Newdow V)*, 597 F.3d 1007, 1038 (9th Cir. 2010).



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violated the Establishment Clause.<sup>120</sup> The Court found that “the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.”<sup>121</sup> Similarly, the daily recitation of the Pledge has the improper effect of coercing public school children to declare that this nation exists “under God.” It is difficult, if not impossible, to separate the idea that this nation exists under God with the notion that the individuals of this nation also exist under God.<sup>122</sup> Forcing students to state the existence of God impermissibly coerces students to accept religion over non-religion (and monotheism over polytheism), which, under the First Amendment, should be done freely, not at the risk of ostracism.<sup>123</sup>

The voluntary nature of a school policy does not exclude the possibility of unconstitutional coercion. In *Santa Fe*, the Court stated that although the football games were voluntary school-sponsored events, many students were effectively forced through social norms to attend the games.<sup>124</sup> In *Newdow*, the School District’s policy allowed voluntary student participation.<sup>125</sup> However, unlike in *Santa Fe*, students in the Rio Linda Union School District must attend school during the time the Pledge is recited.<sup>126</sup> Despite being a voluntary recitation of the Pledge, elementary school students are unlikely to act out by electing not to participate,<sup>127</sup> especially when the teacher is leading and the other students are following, as the court in *Newdow* acknowledged.<sup>128</sup> As in *Lee v. Weisman* and *Santa Fe Independent School District v. Doe*, the voluntary nature of the school-sponsored event is not a determinative factor when deciding whether unconstitutional religious coercion took place.<sup>129</sup> The determining factor is whether the government action has the *effect* of coercing anyone “to support or participate in religion or its exercise.”<sup>130</sup>

<sup>120</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000).

<sup>121</sup> *Id.*

<sup>122</sup> Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 69-70 (2004).

<sup>123</sup> *Id.* at 62.

<sup>124</sup> *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 312.

<sup>125</sup> *Newdow v. Rio Linda Union Sch. Dist. (Newdow V)*, 597 F.3d 1007, 1016 (9th Cir. 2010).

<sup>126</sup> *Id.* at 1012; CAL. EDUC. CODE § 48200 et seq. (Westlaw 2011).

<sup>127</sup> See generally B. Bradford Brown et al., *Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents*, 22 DEV’L PSYCHOL. 521 (1986) Respondents in this study of 1,027 students from grades 6-12 were more willing to follow peers in neutral, socializing behavior activities than antisocial, misconduct activities.

<sup>128</sup> *Newdow V*, 597 F.3d at 1038.

<sup>129</sup> *Lee v. Weisman*, 505 U.S. 577, 586, 595 (1992); *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290.

<sup>130</sup> *Lee*, 505 U.S. at 587.

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There are profound concerns with protecting public elementary and secondary school students from “subtle coercive pressure” because public school students are subjected to the voice of the government.<sup>131</sup> As the dissent in *Newdow* noted:

The Supreme Court has never lost sight of the special danger presented by the promotion of religious views by public school teachers: In over six decades of adjudicating Establishment Clause challenges, the Supreme Court has *never once* upheld a statute or practice that promotes religion or religious beliefs in public schools or that coerces students to express or adopt any religious views.<sup>132</sup>

California Education Code Section 52720 and the School District’s policy directly infringe on the individual conscience of a group especially susceptible to that type of “subtle coercive pressure,” namely, elementary school students.<sup>133</sup>

While the pressures that exist to recite the Pledge may not be blatant, the indirect effects of peer pressure and teacher acceptance are enough to make a non-religious public school student feel pressured to participate in activity that is contrary to that student’s religious beliefs. Subtle, indirect coercion can be “as real as any overt compulsion.”<sup>134</sup> “What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.”<sup>135</sup> A policy that requires voluntary recitation of the Pledge fails the Coercion Test because it produces an unconstitutionally coercive effect on students to participate in the “voluntary” recitation and state that the United States of America exists under God.

The *Newdow* court’s acknowledgment that children are coerced to do things in school constantly, like learning to read and solve math problems,<sup>136</sup> failed to address the core issue of whether requiring

<sup>131</sup> *Id.* at 592.

<sup>132</sup> *Newdow V*, 597 F.3d at 1095-96 (Reinhardt, J., dissenting) (citing *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290; *Lee*, 505 U.S. 577; *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962)).

<sup>133</sup> Steven D. Smith, *Why Is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem, and the Big Problem*, 87 DENV. U. L. REV. 945, 950 (2010).

<sup>134</sup> *Lee*, 505 U.S. at 593.

<sup>135</sup> *Id.* at 592.

<sup>136</sup> *Newdow V*, 597 F.3d at 1038 (majority opinion).

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voluntary recitation of the Pledge in public schools violates the Establishment Clause because the recitation coerces pupils to support or participate in religion. While the court conceded that elementary school children *are coerced* to listen to the teacher and other students recite the Pledge, the court determined that the recitation of the Pledge is a patriotic exercise, not a religious one.<sup>137</sup> The court ignored the effect of the recitation of the Pledge and neglected to recognize that “a program’s purpose [can be] logically distinct from the program’s actual character.”<sup>138</sup> While the recitation of the Pledge is certainly a patriotic exercise whose purpose is facially patriotic in nature,<sup>139</sup> the actual character of the Pledge has strong religious overtones that should not be ignored.<sup>140</sup>

There is a particular risk of indirect coercion through peer pressure and teacher acceptance in *Newdow* specifically because the Pledge is not an explicitly religious exercise. The court erroneously stated that the “indirect psychological analysis” in *Lee v. Weisman* only applies to “religion or to religious exercises, which carry ‘a particular risk of indirect coercion.’”<sup>141</sup> The court skirted the real issue that because the students are effectively coerced to recite the Pledge or to hear other students recite the Pledge, led by the authority of a public school teacher, the students are at an unconstitutionally high risk of indirect coercion to make the statement that this nation exists under God. The high risk of coercion stems from the fact that public school students are a captive audience,<sup>142</sup> compelled by law to attend school under California’s compulsory education law.<sup>143</sup>

In *Newdow v. Rio Linda Union School District*, the coercion may be indirect, but it is also real and apparent because elementary and secondary school students are effectively pressured to state that this nation exists under God. For some students, this will undoubtedly be contrary to their and their parents’ religious beliefs or nonbeliefs and will alienate them from their peers. For others, especially young elementary

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<sup>137</sup> *Id.*

<sup>138</sup> *Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 290 (5th Cir. 1999) (striking down the school district’s policy for “Clergy in Schools” volunteer counseling program by focusing on the “design, implementation, and effect” of the challenged conduct, not its “purpose or goal”).

<sup>139</sup> Whether or not the Pledge, as amended in 1954, is constitutional under the Establishment Clause is beyond the scope of this Case Note.

<sup>140</sup> *Newdow V.*, 597 F.3d at 1095-96 (Reinhardt, J., dissenting) (citing H.R. Rep. 107-659, at 5) (“[T]he Pledge ‘is a recognition of the fact that many Americans believe in God.’”).

<sup>141</sup> *Id.* at 1039 (majority opinion) (citing *Lee v. Weisman*, 505 U.S. 577, 586, 592 (1992)).

<sup>142</sup> Steven D. Smith, *Why Is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem, and the Big Problem*, 87 DEN. U. L. REV. 945, 950 (2010).

<sup>143</sup> CAL. EDUC. CODE § 48200 et seq. (Westlaw 2011).

school students, the belief or nonbelief in God may not yet have formed. By forcing these students to recite, or at least to hear other students recite, the Pledge led by their teacher, the School District is engaging in activity that violates the Establishment Clause and interferes with the parents' right to direct the religious upbringing of their children.<sup>144</sup>

An additional roadblock often encountered in Coercion Test analysis is the fact that the Supreme Court has failed to define "formal religious exercise."<sup>145</sup> Instead, lower courts are left to guess at its meaning. At the very least, "formal religious exercise" must include prayer and worship services, because these activities are the essence of outward manifestations of religion. However, the phrase "formal religious exercise" could also encompass a broad spectrum of "exercise" including the profession of a belief in the existence of God. Because the choice to accept or reject religion is guaranteed by the Constitution,<sup>146</sup> it is best to define "formal religious exercise" broadly to include expressing a belief in the existence of God. After all, expressing such belief is a tenet of Islam, Christianity and Judaism, three major world religions.<sup>147</sup>

The dissenting opinion in *Newdow* points out two Supreme Court cases, decided before the Coercion Test was announced in *Lee*, that struck down state practices because of coercive effects on students despite not being religious exercises.<sup>148</sup> In *Stone v. Graham*, the Supreme Court invalidated a Kentucky statute that required the posting of the Ten Commandments in public school classrooms, because the statute had the effect of "[inducing] the school-children to read, meditate upon, perhaps to venerate and obey, the [Ten] Commandments."<sup>149</sup> Sitting in a room with a copy of the Ten Commandments is not likely to be considered a religious exercise, no

<sup>144</sup> Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 795 (9th Cir. 1999) (en banc).

<sup>145</sup> Doe ex rel. Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274, 290 (5th Cir. 1999).

<sup>146</sup> Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 65 (2004).

<sup>147</sup> Richard Hooker, *The Five Pillars*, WASHINGTON ST. U., <http://www.wsu.edu/~dee/GLOSSARY/SPILLARS.HTM> (last updated July 14, 1999) (stating that Shahadah is the core of Islamic faith and requires Muslims to express, "There is not God but God and Muhammad is the messenger of God"); Charles Hedrick, *What Are Major Christian Beliefs?*, SOC.RELIGION.CHRISTIAN, <http://geneva.rutgers.edu/src/christianity/major.html> (last visited Apr. 6, 2011) (stating that many of the basic Christian beliefs can be found in the common Christian prayer, the Apostles' Creed, "I believe in God, the Father Almighty, creator of Heaven and Earth"); Tracey Rich, *What do Jews Believe?*, JUDAISM 101, <http://www.jewfaq.org/beliefs.htm> (last visited Apr. 6, 2011) (stating that Rambam's thirteen principles of faith include the belief that God exists).

<sup>148</sup> *Newdow v. Rio Linda Union Sch. Dist.* (*Newdow V*), 597 F.3d 1007, 1098-1100 (9th Cir. 2010) (Reinhardt, J., dissenting) (quoting *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Stone v. Graham*, 449 U.S. 39 (1980)).

<sup>149</sup> *Id.* at 1099 (quoting *Stone*, 449 U.S. at 42).

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matter how broadly construed.<sup>150</sup> As an example of where “subtle coercive pressure” can arise, the Court in *Lee* cited *Edwards v. Aguillard*.<sup>151</sup> In *Edwards*, the Court invalidated a Louisiana statute that required creation science to be taught in public schools.<sup>152</sup> Including teaching the critiques of scientific theory from a religious viewpoint in a definition of “religious exercise” would require a very broad definition of that term,<sup>153</sup> rendering the term nearly meaningless. While these two cases were decided before the Coercion Test was announced in *Lee*, they do give weight to the reasoning that “*Lee* must be understood to hold, as it explicitly states, ‘that government may not coerce anyone to *support or participate in religion or its exercise.*’”<sup>154</sup> Using this logic, the voluntary recitation of the Pledge, whether a religious exercise or not, led by teachers in Rio Linda Union School District should be invalidated as unconstitutional coercion to support or participate in religion.

## CONCLUSION

Public school students are a captive audience whose minds the government has broad power to shape and influence in a number of ways. Even though the recitation of the Pledge is voluntary, public school students should not be coerced to support or participate in the religious activity of acknowledging the existence of God, which is an integral part of reciting the Pledge. Religious freedom requires governmental neutrality to ensure citizens the right to practice religion as well as the right not to practice religion.<sup>155</sup> The Establishment Clause is meant to ensure these rights.<sup>156</sup> A policy that effectively forces elementary school children to state a belief in a monotheistic God is in direct conflict with this principle of American democracy.

Despite strenuous efforts by proponents of reciting the Pledge in public schools, there is not one compelling argument that the phrase “under God” is not religious in nature. While there is historical significance in the phrase “under God” regarding the history of the formation of our country, there can be no doubt that the word God denotes religion. Not only is the phrase “under God” religious in nature,

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1099 n.86 (quoting *Lee v. Weisman*, 505 U.S. 577, 592 (1992)).

<sup>152</sup> *Id.* at 1098-99 (citing *Edwards*, 482 U.S. 578).

<sup>153</sup> *Id.* at 1099.

<sup>154</sup> *Id.* at 1090 (quoting *Lee*, 505 U.S. at 587).

<sup>155</sup> *McCreary Cnty., Ky. v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

<sup>156</sup> *Id.* at 860 (quoting *Epperson*, 393 U.S. at 104).

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it is monotheistic in nature.<sup>157</sup> The monotheistic nature of the phrase “under God”<sup>158</sup> compounds the Establishment Clause violation. The phrase favors not only religion over non-religion, but monotheistic religion over polytheistic religion.<sup>159</sup>

Under the Establishment Clause, and particularly under the Coercion Test, public school students should not be forced to support or participate in this religious activity. Undoubtedly, supporters of the California law and the School District’s policy will continue to point to the patriotic purpose and the voluntary nature of the policy. These arguments, however, are not enough to protect religious freedom in the way the Constitution mandates. The Constitution requires that the government not establish or favor religion over non-religion, or one religion over another. California Education Code Section 52720 and the School District’s policy do both, thus violating the Establishment Clause.

DANIEL D. BLOM\*

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<sup>157</sup> Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 65 (2004) (citing *Newdow v. U.S. Cong. (Newdow I)*, 292 F.3d 597, 607-08 (9th Cir. 2002) (“[T]he ‘under God’ amendment not only endorsed religion over nonreligion, it endorsed monotheism over polytheism.”)).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

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