THE PLEDGE OF ALLEGIANCE: ONE NATION UNDER GOD?

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I. INTRODUCTION

On June 26, 2002, Ninth Circuit Judge Alfred T. Goodwin, writing for the majority, held that teachers cannot lead public elementary students in the Pledge of Allegiance ("Pledge").[1] According to the three-judge panel, such conduct violates the Establishment Clause of the First Amendment in two ways.[2] First, the words "under God" constitute religious speech, which public school teachers and other state employees are prohibited from endorsing.[3] Second, the 1954 Congressional Act that inserted the words "under God" into the Pledge was itself unconstitutional.[4]

The Ninth Circuit's ruling was the end result of a complaint filed by Dr. Michael A. Newdow, a forty-nine-year-old emergency room physician and attorney,[5] whose eight-year-old daughter attends an elementary school within the Elk Grove Unified School District.[6] Dr. Newdow brought suit in the United States District Court for the Eastern District of California, challenging both the constitutionality of the 1954 Act and the practice of public school teachers reciting the Pledge in their classrooms.[7] Newdow, a self-described "avowed atheist," specifically objected that his young child was required to listen each day as her

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1. Newdow v. U.S. Cong., 292 F.3d 597, 612 (9th Cir. 2002), *pet. for reh'g en banc denied*, Feb. 28, 2003.

2. *Id.*

3. *Id.* at 605. "The Establishment Clause of the First Amendment states that 'Congress shall make no law respecting an establishment of religion,' U.S. Const. amend. I, a provision that 'the Fourteenth Amendment makes applicable with full force to the States and their school districts.'" *Id.* (quoting Lee v. Weisman, 505 U.S. 577 (1992)).

4. *Id.*

5. Jennifer Garza, *Dad Regards Pledge Case as His "Duty,"* SACRAMENTO BEE, July 16, 2002, at A1. Dr. Newdow was admitted to the State Bar of California on July 29, 2002. State Bar of California, *Michael A. Newdow*, *at* http://members.calbar.ca.gov/search/member_detail.aspx?x=220444 (last visited Apr. 12, 2004).

6. *Newdow*, 292 F.3d at 600; Garza, *supra* note 5.

7. *Newdow*, 292 F.3d 597.

teacher espoused a belief that is "completely antithetical and offensive" to his religious philosophy.[8] The district court rejected Newdow's arguments and granted the school district's motion to dismiss.[9] On appeal, however, the three-judge Ninth Circuit panel reversed and remanded the case to the lower court.[10]

The Ninth Circuit's decision generated intense public interest and debate. In downtown Sacramento demonstrators surrounded the courthouse.[11] Picketers gathered outside the judges' homes[12] as a small plane flew overhead trailing a banner that read "One Nation Under God."[13] Citizens United Foundation, a group dedicated to advancing "traditional American values,"[14] announced a petition drive calling for the immediate retirement of Judge Goodwin and the impeachment of Judge Stephen Reinhardt.[15]

Politicians wasted no time entering the fray. Senate Majority Leader Tom Daschle labeled the ruling "just nuts."[16] To demonstrate government support of the Pledge, he encouraged his colleagues to participate in a longstanding Senate ritual—an opening prayer offered by the Senate Chaplain and group recitation of the Pledge.[17] Although many senators typically forgo the ceremony, after Senator Daschle's appeal the Senate chambers were filled to capacity.[18] Senators stood

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8. Brief of the Plaintiff/Appellant at 7, Newdow v. U.S. Cong., 292 F.3d 597 (9th Cir. 2002) (No. 00-16423).

9. *See Newdow*, 292 F.3d at 601.

10. *Id.* at 612.

11. *Pledge of Allegiance Judges Facing Demonstrators at Courthouse, Plane Trailing Banner*, YORK NEWS-TIMES, July 18, 2002 [hereinafter *Judges Facing Demonstrators*], *available at* http://www.yorknewstimes.com/stories/071802/nat_0718020031.shtml.

12. *Id.*

13. *Id.*

14. Information about the C*itizens United Foundation* is available at the Foundation's website, *at* http://www.citizensunited.org/citizens_united_foundation.html.

> Citizens United Foundation was established in 1992 as a non-partisan, non-profit research and education foundation, under Section 501(c)(3) of the Internal Revenue Code. CUF is dedicated to informing the American people about public policy issues which relate to traditional American values, including: the Constitution as the supreme limit on federal power, a strong national defense as the primary role of the federal government; free enterprise as the economic system that has enabled the American people to attain and maintain an historically high standard of living; belief in God and Judeo/Christian values as the fundamental attribute of our way of life; and the recognition of the family as the basic social unit of our society.

Id.

15. Howard Fineman, *One Nation, Under . . . Who?*, NEWSWEEK, July 8, 2002, at 23.

16. Jim Dallas, *Defense of Pledge Wording Hypocritical*, DAILY COLLEGIAN, July 1, 2002, at 6 (discussing the reaction of Senate Majority Leader Tom Daschle, D.-S.D., to the Ninth Circuit's decision).

17. Fineman, *supra* note 15.

18. *Id.*; *see also Senators Call Pledge Decision 'Stupid,' at* http://www.cnn.com/2002/ALLPOLITICS/06/26/senate.resolution.pledge/index.html (last visited Apr. 12, 2004). "At one point late Wednesday [June 26, 2002], about 100–150 House members, mostly

with hands over hearts and recited the Pledge of Allegiance, proudly proclaiming ours to be "one nation, under God," while cameras recorded the event for television viewers.[19]

The day after the Ninth Circuit announced its decision, a group of thirty-six senators introduced Senate Bill 2690 "to reaffirm the reference to one Nation under God in the Pledge of Allegiance."[20] In addition, two bills were introduced in the House of Representatives: Resolution 459, which "[e]xpress[ed] the sense of the House of Representatives that *Newdow v. U.S. Congress* was erroneously decided,"[21] and HR 5064, entitled the Pledge Protection Act of 2002, which proposed to "amend title 28, United States Code, with respect to the jurisdiction of Federal courts inferior to the Supreme Court over certain cases and controversies involving the Pledge of Allegiance."[22] The Pledge Protection Act, although never passed, proposed to prevent any court other than the U.S. Supreme Court from hearing a challenge to the constitutionality of the Pledge of Allegiance.[23]

The legislative branch of government was not alone in its criticism of *Newdow*. President George W. Bush called the ruling "ridiculous." Attorney General John Ashcroft announced that the government would join the Elk Grove

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Republicans, gathered on the steps outside the Capitol and recited the Pledge of Allegiance in a show of support." *Id.*

19. Fineman, *supra* note 15.

20. S. 2690, 107th Cong. § 2 (2002) (enacted).

> (a) REAFFIRMATION- Section 4 of Title 4, United States Code, is amended to read as follows:
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> Sec. 4. Pledge of allegiance to the flag "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." . . . In codifying this subsection, the Office of the Law Revision Council shall . . . show . . . that the 107th Congress reaffirmed the exact language that has appeared in the Pledge for decades.

Id. S. 2690 passed 99-0. Senator Jesse Helms, R.-N.C., abstained due to illness. Byron York, *The Democrats' Pledge Concession*, NAT'L REV. ONLINE, June 28, 2002, *available at* http://www.nationalreview.com/york/york062802.asp.

21. H.R. Res. 459, 107th Cong. (2002), *available at* http://thomas.loc.gov/ (last visited June 26, 2002).

22. Pledge Protection Act of 2002, H.R. 5064, 107th Cong. § 1 (2002). Missouri Republican W. Todd Akin introduced H.R. 5064 on July 8, 2002. The last major action taken was on July 18, 2002, when H.R. 5064 was referred to the Subcommittee on the Constitution. *Thomas Legislative History on the Internet*, *at* http://thomas.loc.gov/ (last visited July 8, 2002). On May 8, 2003 Representative Akin introduced the same legislation in H.R. 2028. *Id.* The last major action taken on H.R. 2028 was on June 25, 2003, when it was referred to the House Subcommittee on the Constitution. *Id.*

23. H.R. 5064 § 1.

> Sec. 1632. Jurisdiction limitation
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> No court established by Act of Congress shall have jurisdiction to hear or determine any claim that the recitation of the Pledge of Allegiance, as set forth in section 4 of title 4, violates the first article of amendment to the Constitution of the United States.

Id.

School Board in its petition for a new hearing before an eleven-judge panel of the Ninth Circuit.[24]

Seldom has a decision by a U.S. appellate court drawn so much attention and sparked such intense debate among Americans.[25] Citizens from all walks of life weighed in on the issue in polls and on websites.[26] A *Newsweek* survey taken over a two day period immediately following the Ninth Circuit's decision revealed that between eighty-seven and eighty-nine percent of Americans support inclusion of "under God" in the Pledge and eighty-four percent think references to God are acceptable in schools, government buildings, and other public settings so long as no specific religion is mentioned.[27] Yet only twenty-nine percent of these same individuals would classify the United States as a "Christian nation."[28]

Proponents of the Pledge and other forms of "ceremonial deism"[29] contend that the words "under God" should not offend Americans who do not believe in God.[30] They argue that these words have been stripped of religious meaning by years of rote repetition, resulting in nothing more than a secular patriotic exercise.[31] Such an argument, however, begs the question of why Americans are so opposed to removing the words "under God" and restoring the Pledge to its pre-1954 form.

The judicial system has become the battleground upon which this conflict in societal values will be resolved. Courts must interpret the parameters of the First Amendment religion clauses and apply them to modern day problems. The Founding Fathers placed utmost importance on the principle that government may not establish, endorse, or promote religion.[32] However, as the *Newsweek* poll

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24. Dallas, *supra* note 16.

25. *Judges Facing Demonstrators*, *supra* note 11.

26. *See, e.g.*, *Constitutional Americana*, *at* http://groups.msn.com/ConstitutionalAmericana/messageboard.msnw (last visited Feb. 29, 2004).

27. *See* Fineman, *supra* note 15.

28. *Id.*

29. *See generally* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996).

> The phrase "ceremonial deism," was coined by former Yale Law School Dean Walter Rostow in a 1962 lecture he delivered at Brown University . . . . Rostow reconciled the Establishment Clause with a "class of public activity, which . . . c[ould] be accepted as so conventional and uncontroversial as to be constitutional." Rostow labeled this class of public activity "ceremonial deism."

Id. at 2091.

30. *Id.* at 2092.

31. *Id.*

32. *See e.g.*, JAMES A. HAUGHT, 2000 YEARS OF DISBELIEF 82 (1996) (quoting Article 11 of the Treaty of Peace and Friendship Between the United States of America and the Bey and Subjects of Tripoli of Barbary, January 3, 1797). President John Adams signed and the U.S. Congress ratified the Treaty of Peace and Friendship, which states: "[T]he government of the United States of America is not in any sense founded on the Christian Religion." *Id.* James Madison addressed the General Assembly of the Commonwealth of VA, asking, "Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of

clearly indicates, Americans also value expressions of patriotism that have developed through history, even though these expressions include religious references.[33]

The Ninth Circuit was undoubtedly cognizant of the intense public debate generated by *Newdow* when it considered whether to grant the government's motion for rehearing en banc. On February 28, 2003, the court nevertheless denied the motion and ordered the Clerk "not to accept for filing any new petitions for rehearing and petitions for rehearing en banc in this case."[34] The court took this step, however, only after amending the initial opinion of the three-judge panel.[35] The Ninth Circuit's second opinion ("*Newdow II*") held that the school district's policy violated the Establishment Clause,[36] but declined to address the constitutionality of the 1954 enactment adding "under God" to the Pledge.[37] The result of *Newdow II* is that the language of the Pledge remains intact, but recitation of the Pledge is barred from public schools within the jurisdiction of the Ninth Circuit. Ironically, if reciting the Pledge is forbidden in the classrooms of the largest federal circuit, yet remains accepted practice throughout the rest of the country, this expression of patriotism will have achieved a level of divisiveness equal to the national unity anticipated and sought by its creators.

The current Pledge of Allegiance predicament is the direct result of the U.S. Supreme Court's failure to provide adequate direction to the lower courts for determining whether a challenged government action violates the Establishment Clause.[38] In fact, the Court itself has applied no less than three different tests to such challenges.[39] The choice of which test to apply is further complicated by the

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Christians, in exclusion of all other sects?" JAMES MADISON, MEMORIAL AND REMONSTRANCE (1785); *see also* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION 1 (2002).

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State.

Id.

33. *See* Fineman, *supra* note 15.

34. Newdow v. U.S. Cong., 328 F.3d 466, 468 (9th Cir. 2003).

35. *Id.* at 468.

36. *Id.* at 490.

37. *Id.*

38. Ruth Marcus, *Lawyers: A Small Gap in D.C., New York Salaries*, WASH. POST, June 23, 1986, at B2 (quoting Supreme Court Justice Antonin Scalia). Justice Scalia recused himself and will not participate in the Newdow case. *See* Supreme Court of the United States, *Granted & Noted List—Cases to be Argued October Term 2003*, *at* http://www.supremecourtus.gov/orders/03grantednotedlist.html (last visited Apr. 12, 2004).

39. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573 (1989); Lee v. Weisman, 505 U.S. 577 (1992). The tests articulated by the Supreme Court in these three

fact that the Court continues to develop new tests without specifically overruling any of its prior Establishment Clause doctrines.[40] As Justice Antonin Scalia explained, "The fact is that Supreme Court jurisprudence concerning the Establishment Clause in general . . . is in a state of utter chaos and unpredictable change . . . ."[41] This lack of guidance from the Supreme Court has created confusion in the lower courts as to which test governs, resulting in contention between appellate court judges and conflicting opinions from the circuit courts.[42]

Fortunately, the Supreme Court granted certiorari and heard arguments in the *Newdow* case on March 24, 2004.[43] The Court limited its inquiry to (1) whether Dr. Newdow has standing to bring the action and (2) whether the school district's policy of requiring public elementary school teachers to lead their students in a daily Pledge of Allegiance and flag salute ceremony violates the Establishment Clause of the United States Constitution.[44]

This Note examines the history surrounding the introduction of the Pledge into American culture, the 1954 Act adding "under God" to the Pledge, and the Supreme Court cases that directly impact the present challenge to the Pledge in public elementary schools. Part II analyzes the political climate at the time of the Pledge's conception and throughout its process of evolution. It also considers public support for and opposition to the Pledge throughout its history. Part III examines the analyses and holdings in prior Pledge challenges, as well as the analogous cases in which the Supreme Court announced various "tests" to determine whether a government action violates the Establishment Clause. Part IV compares two circuit court opinions related to Pledge challenges: *Sherman* and *Newdow*. Part V weighs the arguments for and against having public school teachers lead students in the Pledge. Finally, Part VI considers the Supreme Court's alternatives and concludes that, under the Court's current jurisprudence, a teacher-led recitation of the current Pledge in public schools violates the Establishment Clause.

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cases have become known as, respectively: i) the three-prong *Lemon* test; ii) the endorsement test; and iii) the coercion test. They will be discussed in detail *infra*.

40. *See, e.g.*, *Lee*, 505 U.S. at 587.

41. Marcus, supra note 39.

42. *See* Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992). *But see Newdow*, 328 F.3d 466.

43. *Newdow*, 328 F.3d 466, *cert. granted* 124 S. Ct. 384 (2003).

44. *Newdow*, 124 S. Ct. 384. In its Supreme Court brief, the United States argued that Dr. Newdow lacked standing because he did not have primary custody of his daughter. Brief for the United States as Respondent Supporting Petitioners, at 4, Elk Grove Unified Sch. Dist. v. Newdow, 328 F.3d 466 (9th Cir. 2003) (No. 02-1624). However, the government acknowledged that Dr. Newdow's custody situation had recently improved, noting that, "[a]t a hearing on September 11, 2003, the state court judge expanded Newdow's visitation time with the child and denominated the new arrangement 'joint legal custody.'" *Id.* n.4. The United States contended that this latest custody development was not sufficient to give Newdow standing because his child's mother still had the final say in decisions concerning the child's education, religious upbringing, and participation in litigation. *Id.*

II. HISTORY OF THE PLEDGE

The Pledge of Allegiance and accompanying flag salute exercise is a fairly new phenomenon in American culture. Nonetheless, pledging allegiance to the flag has become routine in a variety of settings. Children often begin their school day with flag exercises that include reciting the Pledge, and Congress opens each session with the Pledge and a prayer. Yet the custom of pledging allegiance is barely a century old.[45]

A. Late Nineteenth Century: Public Schools Introduce Patriotic Exercises

Schoolchildren did not participate in the daily salute to the flag and the Pledge until around the turn of the twentieth century.[46] Events in the nineteenth century strongly influenced notions of nationalism and led to the development of patriotic exercises, such as flying the flag and reciting the Pledge.[47] The Civil War had threatened to divide the union. In its aftermath Americans celebrated the U.S. Centennial of 1875, an occasion marked by a desire to reunite and to begin the healing process that would make the nation whole again.[48]

American immigration policy further contributed to the popularity of patriotic expression.[49] At the turn of the century the United States experienced a tremendous influx of immigrants from eastern and southern Europe,[50] prompting citizen concern for the assimilation of foreigners into the American culture.[51] Public schools had access to the children of immigrants and could provide instruction in patriotism, thus many Americans saw schools as the logical place for children to develop an appreciation of their country.[52] Consequently, the U.S. Commissioner of Education called upon educators to design programs for instilling loyalty in students, particularly in children of immigrants.[53] In 1887, Colonel George T. Balch, Auditor of the Board of Education for New York City, introduced patriotic exercises that included having the students recite an oath: "We give our heads and our hearts to God and our country; one country, one language, one flag."[54]

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45. *See* Eugene F. Provenzo, Jr., *Columbus and the Pledge*, AM. SCH. BD. J., Oct. 1991, at 24.

46. *See* Morris G. Sica, *The School Flag Movement: Origin and Influence*, SOCIAL EDUC., Oct. 1990, at 380.

47. *See id.*

48. *See id.*

49. *See* Provenzo, *supra* note 45, at 24.

50. Previous immigrants hailed from Northern and Western Europe. The large numbers arriving from other parts of Europe caused the American public some concern. *Id.*

51. *See id.*; *see also* Cecilia O'Leary & Tony Platt, *Pledging Allegiance Does Not a Patriot Make*, L.A TIMES, Nov. 25, 2001, at M6 (quoting Colonel Balch on the role of public education of immigrant children, "His purpose, as he described it, was to instill discipline and loyalty in what he called the 'human scum, cast on our shores by the tidal wave of a vast migration.'").

52. *See* Provenzo, *supra* note 45, at 24.

53. *See id.*; *see also* Sica, *supra* note 46, at 380.

54. Sica, s*upra* note 46, at 380.

Private groups joined rank with schools in an effort to encourage patriotism.[55] The Grand Army of the Republic, a group of Civil War veterans, took an active role in encouraging schools to fly the flag.[56] Aware of the fact that many schools displayed the flag during the war but ceased doing so once the war ended, these soldiers called for schools to fly the flag again.[57] They further promoted patriotism by donating flags to schools.[58]

In 1888, a Boston publication, *Youth's Companion*, joined the Grand Army of the Republic in providing flags to schools.[59] The publication invited schoolchildren to send for flag coupons, which they could sell for ten cents apiece.[60] After students sold ten dollars worth of coupons, *Youth's Companion* would send a nine by fifteen foot flag to the school.[61] Through this program, the publication distributed approximately 30,000 flags to schools during 1891.[62]

In 1892, Americans celebrated the 400th anniversary of Christopher Columbus's first voyage to the Americas. Promoters of school patriotic exercises took this occasion to further their cause.[63] Frances J. Bellamy, an editor at *Youth's Companion* and chair of the Department of Superintendence of the National Education Association's Executive Committee, planned a Columbus Day event for school children across the country.[64] The official program included speeches, poetry readings, patriotic songs, and recitation of a pledge of allegiance written by Bellamy.[65] As the American flag was raised, each child extended his right hand, palm upward, toward the flag and recited, "I pledge allegiance to my Flag and (to) the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all."[66]

After the celebration of 1892, many schools continued to make patriotic exercises part of their daily routine.[67] The Grand Army of the Republic successfully lobbied for legislation that would require patriotic exercises in schools and by 1895 ten states had passed mandatory school-flag laws.[68] By 1935 most states required public schools to conduct patriotic exercises.[69]

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55. *Id.* at 380–81.

56. *Id.* at 380. "This organization of veterans of the Union military forces was formed after the Civil War to influence politics and promote the welfare of former military personnel." *Id.* at 384.

57. *Id.* at 380.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 381.

64. *Id.*

65. *Id.*

66. *See id.*; *see also* John W. Baer, *The Pledge of Allegiance—A Short History*, *available at* http://history.vineyard.net//pledge.htm (last visited Apr. 14, 2004).

67. *See* Sica, *supra* note 46, at 381.

68. *See id.* at 382.

69. *See id.*

Bellamy's original Pledge was modified twice during the 1920s.[70] On Flag Day in 1923, citizens gathered for the first National Flag Conference under the leadership of the American Legion and the Daughters of the American Revolution.[71] Concern over the number of immigrants living in the United States prompted those in attendance to modify the Pledge.[72] "My Flag" was replaced with "the Flag," and "of the United States" was added.[73] On June 14, 1924, at the second Flag Conference, the words "of America" were added.[74] "My Flag" had evolved into "the Flag of the United States of America," reflecting the social values of the time.[75] Thus, by 1924 the Pledge had become: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all."[76]

B. 1942: The Pledge of Allegiance Gains Formal Recognition

In 1942, Congress formally recognized the Pledge of Allegiance to the Flag.[77] The nation was entrenched in a bitter world war and the spirit of nationalism prompted Congress "to codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America."[78] Congress passed legislation adopting the Pledge of Allegiance to the Flag as the official U.S. Pledge and outlining the appropriate manner for its recital.[79]

The original joint legislation, Public Law 623, outlined the proper stance for citizens to assume while reciting the Pledge.[80] The statute specified that the

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70. Baer, *supra* note 66.

71. *Id.*

72. Home of Heroes, *The Pledge of Allegiance*, *at* http://www.homeofheroes.com/hallofheroes/1st_floor/flag/1bfc_pledge.html (last visited Apr. 14, 2004).

73. *Id.*

74. *Id.*

75. *See* Provenzo, *supra* note 45, at 25.

76. *See id.*

77. Joint Resolution to Codify and Emphasize Existing Rules and Customs Pertaining to Display and Use of the Flag of the United States of America, 77 Pub. L. 623, § 7, 56 Stat. 377 (1942). On June 22, 1942, the 77th Congress adopted the following language:

> That the pledge of allegiance to the flag, "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all," be rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words "to the flag" and holding this position until the end, when the hand drops to the side.

Id. In December 1942, Congress amended 77 Pub. L. No. 623, § 7, changing the salute to the flag from the extended right hand to "standing with the right hand over the heart." Congress did not change the wording of the Pledge. 77 Pub. L. No. 829, 56 Stat. 1074 (1942).

78. 77 Pub. L. No. 623, § 7; s*ee also* Restore Our Pledge of Allegiance, *History of the Pledge of Allegiance*, *at* http://www.restorethepledge.com/history.html (last visited Mar. 17, 2004).

79. 77 Pub. L. No. 623, § 7.

80. *Id.*

Pledge, "be rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words 'to the flag' and holding this position until the end, when the hand drops to the side."[81] The "stiff-arm salute" drew public criticism from Americans who were concerned that it too closely resembled the Nazi-Fascist salute.[82] Congress acted quickly to correct this problem, amending Public Law 623, Section 7 to require that the Pledge "be rendered by standing with the right hand over the heart."[83]

The text of the Pledge and the proper manner for reciting it changed several times over the years. Initially, modifications were made by groups of citizens participating in national flag conferences.[84] After enacting legislation to adopt the Pledge, however, Congress itself amended both the text of the Pledge and the accompanying flag salute. In 1954, the salute and the Pledge would undergo further alterations.

C. 1954: The Addition of "Under God" to the Pledge

By 1954, World War II was over, but the nation was in the midst of the Cold War. The McCarthy-Army hearings were in full swing[85] as the government attempted to root out the evil influence of communism.[86] America wanted to distinguish democracy from its "godless, materialistic" enemy—communism.[87] Senator Ralph E. Flanders, a republican from Vermont, proposed a Constitutional Amendment declaring the nation's belief in the authority and law of Jesus Christ and its recognition of God as the source of the nation's blessings.[88]

On February 7, 1954 in a Lincoln Day sermon, Reverend George M. Docherty, pastor of the New York Avenue Presbyterian Church, admonished his congregation about the absence of "God" from the nation's Pledge, stating:

> There is something missing in the pledge, [something that is] . . . the characteristic and definitive factor in the American way of life.

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81. *Id.*

82. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 627–29 (1943).

83. 77 Pub. L. No. 829, § 7.

84. *See* Provenzo, *supra* note 45, at 25.

85. *Proceedings in Washington*, N.Y. TIMES, June 8, 1954, at 16 (describing the activities of Congress on June 7, 1954: the Senate "Investigations [S]ubcommittee received more monitored telephone conversations in Army-McCarthy dispute . . . . The House [p]assed and sent to the Senate a bill to amend the pledge of allegiance to the flag by inserting the words 'under God.'").

86. "The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual." H.R. REP. No. 83-1693 (1954).

87. *See* O'Leary & Platt, s*upra* note 51.

88. *Surpass Orthodoxy, Christianity Urged*, N. Y. TIMES, May 23, 1954, at 30 [hereinafter *Orthodoxy*]. Senator Flanders' proposed amendment read, "This nation devoutly recognizes the authority and law of Jesus Christ, Saviour and Ruler of nations, through whom are bestowed the blessings of Almighty God." *See Biographical Directory of the United States Congress: Flanders, Ralph Edwards*, *at* http://bioguide.congress.gov/scripts/biodisplay.pl?index=F000190 (last visited Apr. 14, 2004).

> Indeed apart from the mention of the phrase "the United States of America" it could be the pledge of any republic. In fact, I could hear little Muscovites repeat a similar pledge to their hammer-and-sickle flag in Moscow.[89]

President Eisenhower attended the Lincoln Day services and heard Reverend Docherty's remarks.[90] Three days later, Senator Homer Ferguson of Michigan introduced a bill in the Senate calling for the addition of the words "under God" to the Pledge.[91] By May 1954, the Senate had adopted a resolution to effect the change and sent the bill to the House of Representatives.[92]

The House Judiciary Committee had already acted on a similar resolution.[93] Representative Louis C. Rabaut, a Michigan democrat, followed the recommendation of a constituent, and introduced a bill adding the words "under God" to the Pledge of Allegiance.[94] Representative Rabaut noted with approval that the proposed words were the same ones Lincoln used in his Gettysburg Address.[95] The bill quickly passed the House of Representatives and President Dwight D. Eisenhower signed the joint Congressional resolution into law on June 14, 1954.[96] The *New York Times* quoted the President's remarks at the signing of the bill: "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural school house, the dedication of our nation and our people to the Almighty."[97]

The introduction of God into the Pledge of Allegiance was achieved in only four months as the President and both houses of Congress moved with

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89. Clayton Knowles, *Big Issue in D.C.: The Oath of Allegiance*, N.Y. TIMES, May 23, 1954, at E7.

90. *Id.*

91. *Id.*

92. *Id.*

93. *See id.*

94. *See id.*

95. *See id.*; *see also* Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *available at* http://www. loc.gov/exhibits/gadd/4403.html. There are five known copies of the Gettysburg Address. *See Gettysburg Address Drafts*, *at* http://www.loc.gov/exhibits/gadd/gadrft.html. Interestingly, there is some question about whether the words "under God" were in Lincoln's famous address. The first two copies were given to John Nicolay and John Hay, Lincoln's private secretaries. *Id.* The Nicolay copy is thought to have been written before the address while the Hay copy was probably written shortly after Lincoln returned to Washington from Gettysburg. *Id.* These two copies differ from the three which Lincoln penned after November 19th. *Id.* The words "under God" are missing from the phrase "we here highly resolve that these dead shall not have died in vain—that this nation [under God] shall have a new birth of freedom—and that government of the people, by the people, for the people shall not perish from this earth." *Id.*

96. *See* Knowles, *supra* note 89.

97. *President Hails Revised Pledge—He Endorses Congress' Action in Inserting "Under God" in Allegiance Vow*, N.Y. TIMES, June 15, 1954, at 31 [hereinafter *Revised Pledge*]. President Eisenhower continued, "In this way we are reaffirming the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource, in peace or in war." *Id.*

unusual haste.[98] Few members of Congress were willing to object to the insertion of "under God" into the pledge, lest they be judged disloyal.[99] Yet despite the appearance of unanimity in the Nation's capitol,[100] not all Americans favored the addition of those two words.[101] Perhaps opponents were simply quieted by a fear of seeming "unpatriotic" to a large and enthusiastic majority.[102]

D. Opposition to the Pledge Throughout Its History

The Pledge has always been controversial. The addition of the phrase "under God" troubled those who were concerned about separation of church and state. However, even before Congress amended the wording in 1954, the Pledge and flag salute ceremony generated disagreement and division.[103] The Pledge was conceived as a means to instill patriotism in school-aged children.[104] Early opponents perceived this as nothing more than coercion through an appeal to the emotions of impressionable youth.[105] They argued that instead of pressuring children to participate in a highly ritualized exercise, schools should teach students about democracy and the values that the flag represents, proposing "social science instruction, accompanied by study of the theory, facts, and duties of citizenship."[106] Proponents of the "rational approach" contended that proper intellectual underpinnings were necessary components of patriotic education; students would be able to embrace the ideology symbolized by the Pledge only if they understood it.[107]

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98. Knowles, *supra* note 89.

99. *See id.*

100. *See id.*

101. *See Orthodoxy*, *supra* note 88; *see also* Martin W. Abel, *Change in Allegiance Pledge*, N.Y. TIMES, June 18, 1954, at 22.

> To The Editor of the New York Times: According to a law that was recently passed everyone now has to believe in God if he wants to pledge allegiance to the flag. How is this consistent with the end of the Pledge of Allegiance, . . . with liberty and justice for all?

Id. Readers responded to Mr. Abel's comments. S*ee, e.g.*, Margaret Sandburg, *Pledge of Allegiance*, N.Y. TIMES, July 12, 1954, at 12:

> In reply to your correspondents who seem to have missed the point concerning the addition of the words "under God" to the pledge of allegiance may I refer them to our Declaration of Independence? In this historical document the founding fathers of the freest country in the world today called upon God to insure the rights of man and placed this country "under God."

Id.

102. *See* Knowles, *supra* note 89.

103. In the 1890s, opponents of patriotic exercises warned that a flag ritual could not substitute for a developed sense of love for country. An editorial in the Boston Herald described the flag exercise as "The Worship of a Textile Fabric." *See* Sica, *supra* note 46, at 381.

104. *See id.* at 381.

105. *Id.* at 382.

106. *Id.*

107. *See id.* at 381. "[U]nless children are given intelligent knowledge and inspiration, 'the flags may as well be left to flutter into shreds.'" *Id.* (citing YOUTH'S

Even some advocates of robust patriotic education opposed legislating flag exercises.[108] Colonel George T. Balch, auditor of the New York City Board of Education and author of one of the first oaths of allegiance, appreciated the potential that a flag ceremony had for indoctrinating students. During his tenure on the New York City Board of Education, Colonel Balch oversaw the task of infusing patriotic principles in the minds of newly arrived immigrant children in the city's public school system.[109] Prior to his position in the public school system, Balch served as a Captain and Brevet Lieutenant Colonel in the United States Army Ordnance Corps.[110] As a result of his military background, Balch understood the power of ritual and encouraged educators to use "devotional rites of patriotism modeled along the lines of a catechism."[111] In a primer for public school teachers Balch commented, "There is nothing which more impresses the youthful mind and excites its emotions than the 'observance of form.'"[112] Even Balch, however, stopped short of endorsing legislative efforts to require flag exercises.[113] In his view, devotion to country could only be acquired through education and experience. Absent an informed desire to honor country, Balch argued, participation in a flag salute was meaningless.[114]

Today, educators and social scientists continue to question the effectiveness of the Pledge as a tool for teaching patriotism. In the 1980s, Carol Seefeldt, Professor of Education at the University of Maryland's Institute for Child Study, authored multiple articles about the Pledge in the classroom setting.[115] Professor Seefeldt described children under seven or eight years as having "no clear idea of what the Pledge is"[116] and pointed to research demonstrating that children do not understand that a flag represents a country until around eleven to twelve years of age.[117] Professor Seefeldt concluded that "[r]ather than risk

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COMPANION, Sept. 18, 1890, at 484). "He indicated that placing flags on schools was commendable but warned that the flag might become a fetish." *Id.* (quoting Brown University President E. Benjamin Andrews).

108. *See id.* at 380–81.

109. *See* O'Leary & Platt, *supra* note 51.

110. *See 2001 Ordnance Corp Hall of Fame*, *at* http://www.goordnance.apg.army.mil/HallofFameBios/HoF01%20Book.doc (last visited Apr. 10, 2004).

111. *See* O'Leary & Platt, *supra* note 51.

112. *See id.*

113. *See* Sica, *supra* note 46, at 381 (citing COL. GEORGE T. BALCH, METHODS OF TEACHING PATRIOTISM IN THE PUBLIC SCHOOLS (1890)).

114. *See id.*

115. *See* Carol Seefeldt, *Perspectives on the Pledge of Allegiance*, CHILDHOOD EDUC., Spring 1989, at 131 [hereinafter Seefeldt, *Perspectives*]; *see also*, Carol Seefeldt, *I Pledge . . .* , CHILDHOOD EDUC., May/June 1982, at 308 [hereinafter Seefeldt, *I Pledge*] ("[A] typical first-grader does not understand the meaning of the words of the Pledge. The fact that an understanding of the meaning of the words and actions has not been developed makes the recitation into an act of indoctrination.").

116. Seefeldt, *Perspectives*, *supra* note 115, at 131.

117. *Id.*

teaching loyalty and patriotism through an act of indoctrination teachers should foster real patriotism through meaningful experiences."[118]

Sociologist Adam Gamoran described the Pledge as a form of "civil religion,"[119] which includes "ideals and observances [that] express collective understanding of the nation's history and its destiny."[120] The problem that Gamoran saw with the Pledge is that it can be "both unifying and divisive at the same time, in that it integrates most school-children into the national community, but highlights the separation of students whose secular principles or sectarian beliefs prohibit them from participating."[121]

The campaign to add "under God" merely intensified the ongoing dispute over the appropriateness of the Pledge in elementary schools. In the spring of 1954, as both houses of Congress prepared legislation to amend the Pledge, some Americans cautioned against what they perceived as a departure from the principles of the Establishment Clause.[122] Citizens, civic leaders, and clergy alike spoke out against the proposed amendment.[123] The *New York Times* provided a forum for citizens to debate the issue in its Letters to the Editor section.[124] In response to a letter stating that the founding fathers would have approved of "under God" in the pledge because they put it on the Nation's currency, one citizen replied:

> The Founding Fathers did not have this motto on their coins; they would have considered it blasphemous to put the name of God on money. . . . [O]n all their coins . . . was the word that represented what they had fought so hard to gain, liberty . . . . And even if the Founding Fathers believed in God, . . . they believed in liberty of conscience, too. They put in the Constitution no requirement of belief in God, but on the contrary they expressly state in the First Amendment to the Constitution, that "Congress shall make no law respecting an establishment of religion."[125]

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118. Seefeldt, *I Pledge*, *supra* note 115, at 308. For a discussion of methods for teaching children the meaning of the flag and the Pledge, *see id.*; *see also* Seefeldt, *Perspectives*, *supra* note 115.

119. Adam Gamoran, *Civil Religion in American Schools*, 51 SOCIOLOGICAL ANALYSIS 235 (1990). Civil religion is the term that Robert Bellah applied to "a set of religious beliefs and practices that are distinct from the various sectarian religions found in the United States and common to a great majority of Americans." *Id.* at 235.

120. *Id.* at 235–36.

121. *Id.*

122. *See Congress Proposals Hit By Unitarians*, N.Y. TIMES, May 22, 1954, at 29 (reporting that "[t]he Unitarian Ministers Association . . . held that [adding under God] was an invasion of religious liberty").

123. *See Teachers Declared to Be Under Pressure In Move to "Get Religion Into Education,"* N.Y. TIMES, Sept. 20, 1954, at 18 (quoting Dr. J. Gordon Chamberlin discussing religion being promoted in America, stating "[t]he current promotion of popular religion, 'endangers education because it deflects concern and effort from the important and central issues of religion in education to the superficial and peripheral ones.'").

124. *See* Abel, *supra* note 101; *see also* Margaret Sandburg, *Pledge of Allegiance*, N.Y. TIMES, July 17, 1954, at 12. *But see* Williams, *supra* note 103.

125. *See* Sandburg, *supra* note 124.

In May 1954, the American Unitarian Association held its 129th annual meeting. At this meeting, civic leader and author Agnes E. Meyer warned members that, "[t]he frenzy which has seized America to legislate Christianity into peoples [sic] consciousness by spurious methods, both at home and abroad, will harm the Christian religion more than the persecution it is now suffering under the tyranny of Communists."[126]

Dr. Quincy Wright, University of Chicago Professor of International Law, cautioned that fear of Russia and the hydrogen bomb was generating "a new intolerance among Americans."[127] Dr. Wright went on to explain to members of the Unitarian Layman's League that some "persons sought to escape reality by 'huddling together under the spell of demagogues.'"[128] The Unitarian Ministers Association adopted a resolution proclaiming their opposition to the addition of "under God" to the Pledge, describing the words as "an invasion of religious liberty."[129]

In spite of compelling concerns voiced over the decades, the Pledge is a widely accepted ritual in most American classrooms today. Surprisingly, there have been only a few legal challenges to the constitutionality of the Pledge in public schools.[130]

III. COURT CHALLENGES TO THE PLEDGE AND OTHER ANALOGOUS CASES

In order to fully understand the legal issues implicated by the *Newdow* decision, it is important to review First Amendment challenges to the Pledge that were raised prior to the *Newdow* case. It is also helpful to examine the cases in which the Court articulated various tests for determining whether government actions violate the Establishment Clause.[131] Finally, it is useful to compare *Newdow* to *Sherman v. Community Consolidated School District 21*,[132] the only other federal appellate decision that addresses an Establishment Clause challenge to the Pledge in public schools.[133]

A. The Supreme Court's Pledge Jurisprudence

The United States Supreme Court has addressed the question whether reciting the Pledge in a public school violates the First Amendment twice—most

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126. *Orthodoxy*, *supra* note 88.
127. *Id.*
128. *Id.*
129. *Unitarians*, *supra* note 122.
130. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973); Smith v. Denny, 280 F. Supp. 651 (E.D. Cal. 1968); Sherman v. Cmty. Consol. Sch. Dist. 21, 758 F. Supp. 1244 (N.D. Ill. 1991); Newdow v. U.S. Cong., 292 F.3d. 597 (9th Cir. 2002).
131. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); Lee v. Weisman, 505 U.S. 577 (1992).
132. 980 F.2d 437 (7th Cir. 1992).
133. *See id.*

recently sixty-one years ago.[134] First, in the 1940 case of *Minersville School District v. Gobitis*,[135] the Court upheld a Pennsylvania statute requiring students to salute the flag and recite the Pledge.[136] Three years later, the Court abruptly reversed itself in *West Virginia State Board of Education v. Barnette*,[137] striking down a West Virginia statute that conditioned public school attendance on compliance with daily flag salute and recitation of the Pledge of Allegiance.[138] The Court held that absent a clear and present danger, a student cannot be compelled to speak.[139]

1. Minersville School District v. Gobitis

In 1940, Walter Gobitis brought suit on behalf of his ten and twelve-year-old children after the children were expelled from the public school system for refusing to recite the Pledge.[140] Mr. Gobitis was a member of the Jehovah's Witnesses and had raised his children according to the doctrines of that faith.[141] An important principle of the Jehovah's Witnesses religion is that the Bible is the Word of God and the supreme authority.[142] Mr. Gobitis believed that reciting the Pledge was forbidden by scripture, specifically *Exodus* 20:3–5:

> 3. Thou shalt have no other gods before me.
>
> 4. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.
>
> 5. Thou shalt not bow down thyself to them, nor serve them.[143]

Mr. Gobitis sought to enjoin school authorities from requiring his children to participate in the flag-salute ceremony as a condition of their attendance at the Minersville public school.[144] After a trial on the merits, the District Court of Pennsylvania granted Plaintiff's request for relief.[145] The Third Circuit Court of Appeals upheld the decision.[146] The U.S. Supreme Court, noting that the lower court decision ran counter to several of their own *per curiam* decisions, granted certiorari to consider the issues.[147]

The specific issue identified by the Court was whether requiring a child to participate in the flag ceremony, when that child objected on religious grounds, contravened his constitutional rights to liberty of conscience, free exercise of

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134. *See Gobitis*, 310 U.S. 586; *see also Barnette*, 319 U.S. 624.
135. 310 U.S. at 598.
136. *Id.*
137. 319 U.S. at 642.
138. *See id.*
139. *Id.* at 633.
140. *See Gobitis*, 310 U.S. at 591–92.
141. *Id.* at 591.
142. *Id.*
143. *Id.* at 592.
144. *Id.*
145. Gobitis v. Minersville Sch. Dist., 24 F. Supp. 271 (E.D. Pa. 1938).
146. Minersville Sch. Dist. v. Gobitis, 108 F.2d 683 (3d Cir. 1939).
147. *Gobitis*, 310 U.S. at 592.

religion, and freedom from state imposition of religion.[148] The Court emphasized the importance of these freedoms noting that, "in safeguarding conscience we are dealing with interests so subtle and so dear, every possible leeway should be given to the claims of religious faith."[149] Noting the enormous importance of the religion clauses to the framers, the Court reasoned that the scope of the First Amendment could only be questioned when, as here, "the conscience of individuals collides with the felt necessities of society."[150]

The Court applied a balancing test, weighing individual rights against society's need for stability, harmony and ultimately, national security.[151] It found that the state had a legitimate interest in maintaining a civil society, noting that in order to accomplish this, the legislature must have power "to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable."[152] Without such a social scheme, the Court reasoned, the issue of religious freedom would be moot.[153] The Court concluded that the rights of the individual, guaranteed by the First and Fourteenth Amendments, must yield to the greater interests of society.[154]

Writing for the dissent, Justice Stone criticized the Pennsylvania legislature for both suppressing free speech and prohibiting the free exercise of religion, in violation of the First Amendment.[155] In his view, the statute sought "to coerce these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions."[156] Justice Stone was not alone in his concern over the implications of the *Gobitis* decision. Just three years later, the Court reconsidered and reversed its decision.[157]

2. West Virginia State Board of Education v. Barnette

In light of the Supreme Court's *Gobitis* decision, the West Virginia legislature passed a statute "ordering that the salute to the flag become a regular part of the program of activities in the public schools," and requiring teachers and students to participate or face expulsion.[158] Parents of the Jehovah's Witnesses faith brought suit in the Southern District of West Virginia on the grounds that the Pledge and flag salute infringed on their religious liberty.[159]

The District Court granted plaintiffs' request for an injunction restraining enforcement of the law against Jehovah's Witnesses.[160] On appeal to the Supreme Court, West Virginia argued that the state had a legitimate interest in promoting

148. *See id.* at 593.
149. *Id.* at 594.
150. *Id.* at 593.
151. *See id.* at 595–97.
152. *Id.* at 595.
153. *See id.* at 594.
154. *See id.* at 596.
155. *Id.* at 601 (Stone, J., dissenting).
156. *Id.*
157. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
158. W. VA. CODE § 1734 (1941).
159. *Barnette*, 319 U.S. at 629–30.
160. *Id.* at 630.

good citizenship.[161] The Court agreed and acknowledged that government could require public schools to teach "'the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country.'"[162]

The Court nevertheless distinguished the Pledge from traditional instruction, noting that it was "dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means."[163] The Court compared the West Virginia law to one of censorship, and found that compelling an individual to speak infringed his rights in the same way that restricting his speech did.[164] Reasoning that the Constitution tolerates censorship "only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish,"[165] the Court concluded that, "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."[166] Unable to find that a clear and present danger would result from public school students refusing to recite the Pledge, the Court affirmed the lower court judgment enjoining enforcement of the West Virginia statute.[167]

Thus, just three years after *Gobitis*, the Court reversed itself, holding that public schools may not compel students to recite the Pledge.[168] It should be noted however, that the Court issued its *Barnette* opinion prior to passage of the 1954 Act adding the words "under God" to the Pledge.[169] Therefore, in deciding both *Gobitis* and *Barnette*, the Court relied primarily on the First Amendment guarantees of freedom of speech and free exercise of religion. To date, the Court has not addressed whether the Pledge, with the added words "under God," violates the Establishment Clause.[170]

Although *Barnette* did not involve an Establishment Clause challenge, it nonetheless stands for the proposition that public school students cannot be compelled to recite the Pledge.[171] Hence, to resolve the issues presented by

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161. *See Barnette*, 319 U.S. at 631.

162. *Id.* at 631 (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 604 (1940)).

163. *Id.*

164. *Id.* at 633–34.

165. *Id.* at 633.

166. *Id.*

167. *Id.* at 642.

168. *Id.*

169. *See id.*; 83 Pub. L. No. 396, 68 Stat. 249 (1954).

170. *See Barnette*, 319 U.S. at 642.

> Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.

Id. at 634–35.

171. *Id.* at 642.

Newdow, the Court must now combine the principles articulated in *Barnette* with those it has recognized in recent Establishment Clause challenges.[172]

B. The Supreme Court's Establishment Clause Cases: The Three Tests

Of the many Establishment Clause challenges the Court has decided in the sixty-one years since *Barnette*, three are particularly relevant to the issues raised by public school teachers leading students in reciting, "one Nation, under God." The following cases announce the variety of tests the Court has devised for determining whether a challenged state activity violates the First Amendment's Establishment Clause.

1. Lemon v. Kurtzman

In 1971, the Court accepted two cases challenging the constitutionality of state aid to nonpublic schools and decided them in tandem.[173] The Court acknowledged the difficulty it faced in attempting to define how far a state could go to assist a religiously-affiliated educational institution without crossing the First Amendment line.[174] Describing the religion clauses as "at best opaque," the Court noted that "[c]andor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[175]

In order to determine whether the statutes in question crossed the line between permissible and impermissible state action, the Court outlined and then applied the following standards, now known as the three-prong *Lemon* test:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years . . . [f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[176]

The *Lemon* cases involved challenges to Rhode Island and Pennsylvania statutes that provided aid directly to, or for the benefit of, private schools.[177] The Rhode Island Act authorized use of state funds to supplement the salaries of teachers of secular subjects in private religious schools.[178] Teachers were eligible to receive extra payments of up to fifteen percent of their salaries directly from the

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172. Since 1971, the Court has applied three tests to Establishment Clause challenges. The three-pronged *Lemon* test, Lemon v. Kurtzman, 403 U.S. 602 (1971), the endorsement test from *Allegheny*, County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573 (1989), and *Lee*'s coercion test, Lee v. Weisman, 505 U.S. 577 (1992), will be discussed *infra*.

173. Lemon v. Kurtzman, 403 U.S. 602 (1971) (judgment in Rhode Island cases affirmed; judgment in Pennsylvania case reversed and case remanded).

174. *See id.* at 612.

175. *Id.*

176. *Id.* at 612–13.

177. *See id.*

178. *Id.* at 607.

State.[179] Similarly, Pennsylvania authorized the Superintendent of Public Instruction to "directly reimburse[] nonpublic schools . . . for their actual expenditures for teachers' salaries, textbooks, and instructional materials."[180]

Under the first prong of the test, the Court considered the legislative purpose of the acts and noted that both statutes were "intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws."[181] Having a legitimate secular purpose, although necessary, was not sufficient to withstand Establishment Clause scrutiny.[182]

The Court then turned to the third prong of the *Lemon* test, which asks whether "the cumulative impact of the entire relationship arising under the statutes in each State involve[d] excessive entanglement between government and religion."[183] In both cases, states directly funded secular courses taught in private religious schools. In order to ensure that government monies were only being used for secular purposes, the states had to monitor the schools. The Court determined that this level of surveillance required excessive entanglement between government and religion.[184] Having made this judgment, the Court concluded that it need not reach a decision as to the second prong, namely whether the principal or primary effect of the statutes was to advance religion.[185] The Court held that both statutes violated the Establishment Clause because they tended to foster excessive government entanglement with religion.[186]

The *Lemon* test became the standard for evaluating Establishment Clause challenges and the Court applied it to every such case between 1971 and 1992, with one exception. In 1983, the Court heard a First Amendment challenge by a member of the Nebraska State Legislature to that state's practice of having a state employed chaplain open each legislative session with a prayer—a practice supported by more than two hundred years of history.[187] The *Marsh* majority declined to apply *Lemon*, opting instead to analyze the Nebraska practice in light of history and tradition.[188] The Court noted that the first Congress, many of whose members took part in framing the Constitution, passed an act allowing legislative prayer.[189] Therefore, the Court reasoned, an act passed by these individuals was "contemporaneous and weighty evidence of [the Constitution's] true meaning."[190] More specifically, the State of Nebraska adopted the practice of "opening

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179. *Id.*

180. *Id.* at 609. When the Court decided *Lemon* the only beneficiaries of the Rhode Island Salary Supplement Act were Roman Catholic elementary schools. *Id.*

181. *Id.* at 613.

182. *Id.* at 614.

183. *Id.* at 613–14.

184. *Id.* at 615.

185. *Id.* at 613–14.

186. *Id.* at 615.

187. Marsh v. Chambers, 463 U.S. 783 (1983).

188. *Id.* The *Marsh* Court recognized that the court of appeals had "prohibited the State from engaging in any aspect of its established chaplaincy practice" because the "practice violated all three elements of the [*Lemon*] test." *Id.* at 786.

189. *See id.*

190. *Id.* at 790 (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888)).

legislative sessions with prayer . . . even before the State attained statehood."[191] Interestingly, the Court distinguished *Marsh* from cases involving students, noting that the suit was brought by an adult who was "presumably not readily susceptible to 'religious indoctrination' . . . or peer pressure."[192]

In dissent, Justice Brennan commented that the majority reached its conclusion without applying any of the tests that the Court traditionally applied to Establishment Clause cases.[193] "That it fails to do so is, in a sense, a good thing, for it simply confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer."[194] Since *Marsh*, the Court has expressly rejected a historical analysis in cases involving religious activities in public schools.[195] "Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted."[196] Likewise, the Pledge was not introduced into public schools until more than one hundred years after the Constitution was adopted.[197]

2. County of Allegheny v. ACLU

In 1986, citizens of Allegheny County, Pennsylvania challenged the constitutionality of a holiday display that included a crèche and a Chanukah menorah at the county courthouse.[198] The Court applied the three-prong *Lemon* test then added that "[i]n recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion."[199] In so stating, the Court essentially combined the "purpose" and "effect" prongs of *Lemon* and asked whether either the purpose or the effect of the contested action was to endorse religion.[200] Under what has

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191. *Id.* at 789.

192. *Id.* at 792 (citing Tilton v. Richardson, 403 U.S. 672, 686 (1971); Colorado v. Treasurer & Receiver Gen., 392 N.E.2d 1195, 1200 (Mass. 1979); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 290 (1963) (Brennan, J., concurring)).

193. *Id.* at 796 (Brennan, J., dissenting).

194. *Id.*

195. *See* Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987).

196. *Id.* (citing Wallace v. Jaffree, 472 U.S. 38 (1985) (O'Connor, J., concurring)). For a discussion of how the Court should expand the principles set forth in *Marsh* to find the Pledge consistent with prior holdings, see Philip N. Yannella, *Stuck in the Web of Formalism: Why Reversing the Ninth Circuit's Ruling on the Pledge of Allegiance Won't Be So Easy*, 12 TEMP. POL. & CIV. RTS. L. REV. 79 (2002).

197. *See* Sica, *supra* note 46.

198. County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 578–81 (1989).

199. *See id.* Justice Sandra Day O'Connor introduced the endorsement inquiry as a means to clarify the *Lemon* test in her 1984 concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 689–92 (1984) (O'Connor, J., concurring). The effect was to collapse the purpose and effect prongs of *Lemon* into one inquiry. *See id.* The quesions are: 1) whether the government intends to convey a message of endorsement or disapproval of religion; and 2) whether the government practice has the effect of communicating a message of government endorsement or disapproval of religion. *See id.* (O'Connor, J., concurring).

200. *Allegheny*, 492 U.S. at 592–93.

become known as the "endorsement test," the key inquiry is whether the challenged practice conveys or intends to convey a message that "religion or a particular religious belief is favored or preferred" by government.[201]

The *Allegheny* Court explained that it was not articulating an entirely new test for Establishment Clause contests. The Court recognized that the word "endorsement" is similar to "promotion," and pointed out that it "long since has held that government may not . . . promote one religion or religious theory against another."[202] Regardless of the term used, the Court held that "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[203]

Applying the test, the Court concluded that by displaying a creche on the main stairway of the courthouse, "the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message."[204] In contrast, the Court found that the menorrah, displayed next to a Christmas tree and a sign saluting liberty, was not likely to cause residents to perceive government endorsement of the Christian or Jewish faiths.[205]

3. Lee v. Weisman

In 1992, Justice Kennedy articulated yet another test for evaluating whether a government action violates the Establishment Clause.[206] In *Lee*, a junior high student objected to a nonsectarian prayer being offered at graduation.[207] The Court found that the outcome of the case was controlled by two facts: (1) "state officials direct[ed] the performance of a formal religious exercise" and (2) "attendance and participation" were obligatory, in spite of the district policy of optional attendance.[208]

Under those facts, the Court declined to apply either the three-prong *Lemon* test or the *Allegheny* endorsement test.[209] The Court focused instead on the likelihood that dissenting students would feel coerced to participate because they would have "no real alternative which would have allowed [them] to avoid the fact or appearance of participation."[210] The Court reasoned that putting vulnerable

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201. *See id.* at 592–93 (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)).

202. *Id.* at 593.

203. *Id.* at 594 (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

204. *Id.* at 600.

205. *Id.* at 620.

206. *See* Lee v. Weisman, 505 U.S. 577 (1992).

207. *Id.* at 581. ("The Guidelines recommend that public prayers at nonsectarian civic ceremonies be composed with 'inclusiveness and sensitivity.'").

208. *Id.* at 586.

209. *Id.* at 587. ("We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accomodate religion are measured.").

210. *Id.* at 588.

young students in a position where they would likely be "induced to conform"[211] violated the Establishment Clause.[212] In ruling, the Court emphasized the State's duty to protect elementary and secondary public school students from subtle coercive pressure.[213] The school's control of the graduation, it said, placed public pressure and peer pressure on students to stand or at least maintain respectful silence during the prayer.[214] The Court pointed to psychological research that supported the "common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention."[215] Government, the Court concluded, "may no more use social pressure to enforce orthodoxy than it may use more direct means."[216]

To date, the Supreme Court has not overruled *Lemon*, *Allegheny*, or *Lee*. This has led to confusion and division in the circuit courts whether to apply one or more of the tests and, if so, which test(s) to apply when deciding Establishment Clause challenges.[217] The *Lemon* and *Allegheny* tests invalidate statutes where excessive government "entanglement with religion" is present and/or the "purpose and effect" of the challenged government activity is to promote religion or to favor one religion over another.[218] On the other hand, the Court's most recent approach in *Lee* deviated from the line of inquiry in *Lemon* and *Allegheny* and focused on whether the plaintiff was "coerced" to attend or participate in a religious exercise.[219]

IV. THE CIRCUIT COURTS SPLIT

Two challenges to the Pledge of Allegiance in public schools have reached the circuit court level to date. In these cases, the respective courts disagreed on which test(s) to apply. This inconsistency among the federal

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211. *Id.* at 599.

> The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise.

Id.

212. *Id.* at 587 ("[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.").

213. *Id.* at 593.

214. *Id.* ("This pressure, though subtle and indirect, can be as real as any overt compulsion.").

215. *Id.* at 593.

216. *Id.* at 594.

217. *See, e.g.*, Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992). The Seventh Circuit found it unnecessary "to resolve this case by parsing Lemon. Our approach is more direct. Must ceremonial references in civic life to a deity be understood as prayer, or support for all monotheistic religions, to the exclusion of atheists and those who worship multiple gods?" *Id.* But see *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002), in which the Ninth Circuit applied *Lemon*, *Allegheny*, and *Lee*.

218. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 592–93 (1989).

219. *Lee*, 505 U.S. at 592–94.

circuits[220] presents the opportunity for the Supreme Court to offer needed guidance.

A. Sherman v. Community Consolidated School District

In 1991, Robert I. Sherman brought an action in behalf of himself and his minor son, Richard. Mr. Sherman named the Illinois Attorney General, the school district, its superintendent, and the principal of the school Richard attended, challenging the constitutionality of an Illinois statute providing for daily recitation of the Pledge of Allegiance in public elementary schools.[221] The district court granted the defendants' motions for summary judgment after determining that the statute satisfied all three prongs of the *Lemon* test.[222] In addition, the court found that the statute was not coercive as written or applied.[223]

On appeal, the Seventh Circuit declined to apply the *Lemon* test, noting that *Lemon*'s "status as a general-purpose tool for administering the establishment clause is in doubt."[224] The Seventh Circuit took the position that the Supreme Court granted certiorari in *Lee v. Weisman* to reconsider the *Lemon* test and with their decision, the Court failed to "renew[] *Lemon*'s lease."[225] The court reasoned that since the Supreme Court justices were divided on the value of *Lemon*, it was not required to apply its test in order to decide the issues presented in *Sherman*.[226] Indeed, the Seventh Circuit resolved *Sherman*'s First Amendment challenge to the Pledge without applying any of the tests announced by the Supreme Court.[227]

The Seventh Circuit's rationale for rejecting all the Supreme Court's established tests was that the Pledge is "a secular rather than sectarian vow," and that the words "under God" are a mere ceremonial reference to deity, similar to other such references in civic life that do not require an analysis under the Court's Establishment Clause jurisprudence.[228] Ultimately, the Seventh Circuit's decision was informed by two critical considerations: 1) "[c]eremonial references" to God existed during the earliest part of American history; and 2) in dicta, the Supreme

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220. *See Sherman*, 980 F.2d 437. *But see Newdow*, 292 F.3d 597.

221. Sherman v. Cmty. Consol. Sch. Dist. 21, 758 F. Supp. 1244 (N.D. Ill. 1991).

222. *Id.* at 1248.

223. *Sherman*, 980 F.2d at 442. The court reasoned that although the statute stated that the "shall be recited each school day by pupils," it did not specify "all pupils." *Id.* This language taken together with the absence of a penalty for refusing to recite the pledge led the court to conclude that students were not coerced. *Id.*

224. *See id.* at 445.

225. *See id.* (noting that in *Lee* four justices wanted "to jettison *Lemon* forthwith," one disparaged it, one wrote a concurring opinion without relying on *Lemon*, and only three favored it).

226. *See id.* (stating that "we are not disposed to resolve this case by parsing *Lemon*.")

227. *See id.*

228. *See id.* The majority seemed to be taking its cue from Justice Brennan's dissent in *Lynch v. Donnelly*, wherein he wrote, "the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as [ ] form[s of] 'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content." 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

Court said that the Pledge is consistent with the principles of the Establishment Clause.[229] Based on these considerations, the Seventh Circuit upheld the Illinois statute, finding no violation of the First Amendment's Establishment Clause.

B. Newdow v. U.S. Congress

Dr. Michael Newdow recently brought an action challenging the constitutionality of a teacher-led Pledge of Allegiance in his daughter's public school classroom.[230] Dr. Newdow argued that the practice was unconstitutional for two reasons. First, the 1954 Act adding the words "under God" to the Pledge violated the Establishment Clause because the purpose and effect of the added words was to "endors[e] theistic religious belief."[231] Second, the words "under God" constitute religious speech, which the State is forbidden from using or endorsing.[232] Even if the Court found the 1954 Act constitutional, Newdow reasoned that the California public school system violated the First Amendment every time one of its teachers recited "under God" in a public classroom.[233] For these reasons, Dr. Newdow asked the court to enter an injunction preventing California schools from using what he labeled the "now-sectarian" Pledge.[234]

In ruling, the district court accepted the findings of U.S. Magistrate Judge Peter Nowinski, who recommended Newdow's complaint be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.[235] The magistrate based his recommendation on four Supreme Court cases where, in dicta, the Court suggested that the Pledge does not violate the Establishment Clause.[236] The magistrate also

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229. *Sherman*, 980 F.2d at 447–48 (quoting County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 602–03 (1989): "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that the government may not communicate an endorsement of religious belief."). *But see Allegheny*, 492 U.S. at 672–73 (noting that hearing the Pledge with the phrase "under God" recited would cause the "reasonable" atheist to feel "less than a 'full membe[r] of the political community.'" (Kennedy, J., dissenting)).

230. *See* Newdow v. U.S. Cong., 292 F.3d 597 (2002).

231. *See id.* at 602.

232. *See* Complaint, Newdow v. U.S. Cong., 292 F.3d 597 (9th Cir. 2002), at ¶ 82 (No. 00-16423), *available at* http://www.restorethepledge.com/.

> When teachers . . . lead their students in a daily recitation that states in part that we are "one Nation under God," they endorse religious doctrine and inculcate a belief that not only is there a God, but that we are one nation "under" that entity. This is unconstitutional. ("As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion.").

Id. (quoting Agostini v. Felton, 521 U.S. 203, 223 (1997)).

233. Newdow v. U.S. Cong., No. Civ. S-CO-0495 MLS PAN PS (S.D. Cal. July 2, 2000) (order granting motion to dismiss).

234. Complaint at ¶ 128, *Newdow* (No. 00-16423). Dr. Newdow coined the term "now-sectarian" to describe the Pledge of Allegiance after Congress added "under God" in 1954. *Id.*

235. U.S. Magistrate's Findings and Recommendations, Newdow v. U.S. Cong. (May 25, 2000) (No. Civ. S-CO-0495 MLS PAN PS), *available at* http://www.restorethepledge.com/.

236. *Id.* at 2.

cited two federal Court of Appeals opinions that stated in dicta that the Pledge was not an endorsement of religion.[237] Finally, the magistrate found the Seventh Circuit's *Sherman v. Community Consolidated School District*[238] opinion to be directly on point.[239] The magistrate cited *Sherman* for the proposition that "schools may lead the Pledge of Allegiance without violating the First Amendment so long as pupils are not compelled to participate, because the ceremonial reference to God in the Pledge does not convey endorsement of particular religious beliefs."[240] The district court accepted the magistrate's legal analysis and issued an order on July 21, 2000, dismissing Newdow's complaint.[241]

In June 2002, a three-judge panel of the Ninth Circuit reversed the district court and granted Dr. Newdow's request for injunctive relief.[242] The panel concluded that both the addition of "under God" to the Pledge, and the school district's policy of teachers leading the Pledge in public schools, violated the First Amendment to the Constitution.[243] The court acknowledged that over the past thirty years the Supreme Court had utilized three different tests to analyze alleged Establishment Clause violations in the realm of public education.[244] They noted that lower courts had not consistently applied these tests, leaving open the question of which test(s) to apply.[245]

In light of this inconsistency and confusion, the Ninth Circuit looked to the Supreme Court's most recent school prayer decision, *Santa Fe Independent School District v. Doe*.[246] *Santa Fe* presented an Establishment Clause challenge to voluntary, student-initiated, student-led prayers at high school football games.[247] The Court expressly stated that the analysis in such a case was "properly guided by

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237. *Id.*

238. Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992).

239. Findings and Recommendations, *Newdow* (No. Civ. S-CO-0495 MLS PAN PS).

> The only federal Court of Appeal directly to address this issue held that schools may lead the pledge of allegiance without violating the First Amendment so long as pupils are not compelled to participate, because the ceremonial reference to God in the pledge does not convey endorsement of particular religious beliefs.

Id. (citing *Sherman*, 980 F.2d at 442–48).

240. *Id.* (citing *Sherman*, 980 F.2d at 442–48).

241. Newdow v. U.S. Cong., No. Civ S-CO-0495 MLS PAN PS (S.D. Cal. July 2, 2000) (order granting motion to dismiss).

242. *See* Newdow v. U.S. Cong., 292 F.3d 597 (9th Cir. 2002). The following day the court issued a stay pending the outcome of defendant's motion for a rehearing en banc. Newdow v. U.S. Cong., No. 00-16423, D.C. No. CV-00-00495-MLS/PAN (June 27, 2002) (order staying June 26, 2002 opinion), *available at* http://www.restorethepledge.com/. On February 28, 2003, the Ninth Circuit denied appellee's request for a rehearing en banc. Newdow v. U.S. Cong., No. 00-16423 (9th Cir. Feb. 28, 2003) (Order and Amended Opinion and Amended Concurrence/Dissent), *available at* http://www.restorethepledge.com/.

243. *See Newdow*, 292 F.3d 597.

244. *See id.* at 605.

245. *Compare Sherman*, 980 F.2d 437, *with Newdow*, 292 F.3d 597.

246. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

247. *Id.* at 310.

the principles that we endorsed in *Lee*."[248] The Court then applied *Lee*'s coercion test, *Allegheny*'s religious endorsement test, and the third prong of the *Lemon* test, which evaluates the level of government entanglement with religion.[249]

Based on the Supreme Court's analysis in *Santa Fe*, and in the interest of completeness, the Ninth Circuit panel employed the three-prong *Lemon* test, *Allegheny*'s endorsement test, and *Lee*'s coercion test. The court ultimately concluded that both the legislative act, which added "under God" to the Pledge, and the practice of a teacher-led pledge in public elementary schools failed each test.[250]

C. Comparing the Sherman and Newdow Opinions

The *Newdow* Court applied each of the tests articulated by the Supreme Court for deciding challenges to the Establishment Clause, while the *Sherman* Court applied none of them.[251] Yet the facts of *Newdow* are indistinguishable from *Sherman*: both involved parental objection to daily recital of the Pledge in their child's public school classroom.[252] The Ninth and Seventh Circuits took distinct analytical approaches because of differences in: (i) the way the courts conceptualized the words "under God"; (ii) the weight the courts afforded to stare decisis versus dicta in cases involving the Establishment Clause; and (iii) the Supreme Court's jurisprudence at the time that each of these cases was decided.

1. The Nature of the Challenged Speech Determined the Circuit Courts' Analysis

Perhaps the most significant difference between the approaches taken by the *Newdow* and *Sherman* Courts stemmed from their differing views about the nature of the challenged speech. The *Newdow* Court classified "under God" as religious speech[253] while the *Sherman* Court categorized the same language as a "secular rather than sectarian vow," noting that "everything would be different if it were a prayer, or other sign of religious devotion."[254] As a result, the courts' respective analyses were quite distinct. The Ninth Circuit applied each of the Supreme Court's tests for evaluating challenges to religious speech. The Seventh Circuit conceptualized "under God" as a historical reference to deity similar to that found in Lincoln's revered Gettysburg Address, and therefore concluded that it need not apply any Establishment Clause tests.[255]

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248. *Id.* at 302.

249. *See id.*

250. *Newdow*, 292 F.3d at 607. As discussed *supra*, the court did not address the question of whether Congress' 1954 Act violated the Establishment Clause.

251. *See* Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992). *But see Newdow*, 292 F.3d 597; *see also* Newdow v. U.S. Cong., 328 F.3d 466 (9th Cir. 2003).

252. *Sherman*, 980 F.2d at 439; *Newdow*, 292 F.3d at 597.

253. *Newdow*, 328 F.3d 466.

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

255. "[U]nder God" was added in 1954, just thirty six years before the Sherman challenge. *See* Knowles, *supra* note 89.

The *Sherman* Court failed to consider three important differences between the Pledge, as a patriotic exercise, and the proclamations of the nation's Founding Fathers. The first difference is contextual. In the early elementary grades, children learn the words of the Pledge but are not taught about nineteenth century developments that led to the Pledge being introduced into public schools. As Justice Jackson noted in *Barnette*, "[t]hey are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means."[256]

Second, school children are expected to adopt the values of the Pledge. They are not taught that the words simply express the ideals of the author. As the Court recognized in *Barnette*, "[h]ere . . . we are dealing with a compulsion of students to declare a belief."[257] In contrast, students may be asked to memorize President Abraham Lincoln's Gettysburg Address, for example, but they are not required to espouse Lincoln's sentiments as their own. Further, teachers do not lead school children, from the earliest grades throughout their elementary education, in daily recital of the Gettysburg Address.

Third, the Pledge differs from a historical address in the way it is delivered.[258] Students do not merely memorize and recite the words of the Pledge. Rather, students are taught *to pledge*, in a highly ritualized ceremony that requires an erect posture, a salute, and a respectful attitude.[259] Supporters of the daily Pledge ceremony in public schools argue that the Pledge is not a prayer and should therefore be exempted from Establishment Clause analysis. Although the Pledge is not a prayer, neither is it a historical reference to deity. The unique nature of the Pledge ceremony requires application of an Establishment Clause analysis similar to that used by the Court in other cases where it has assessed the constitutionality of state-sponsored religious speech.

Given the similarities between the issues raised in *Lee* and the Pledge cases, the *Lee* coercion test seems to be a particularly appropriate tool for measuring the constitutionality of the Pledge. In *Lee*, the Court analyzed the constitutionality of coercing children to participate in school-related prayers, concluding that such a practice violates the First Amendment's Establishment Clause.[260] In Pledge cases, courts must determine whether coercing young students to participate in recital of the Pledge, vowing that ours is "one Nation, under God," violates the Constitution. Rather than merely being asked to listen to a religious prayer, a Pledge participant must publicly take an oath promising to faithfully adhere to the principles for which the flag stands. Since 1954, American children cannot take this oath of loyalty to country without also proclaiming that the United States is subordinate to divine authority.[261]

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256. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943).

257. *Id.*

258. *See* Gamoran, *supra* note 119, at 236.

259. Pledge is defined as "a formal promise to do something, as the performance of an obligation or duty, or to refrain from doing something." AMERICAN HERITAGE DICTIONARY (William Morris ed., 1991).

260. *See* Lee v. Weisman, 505 U.S. 577 (1992).

261. *See* Gamoran, *supra* note 119, at 238.

2. The Doctrine of Stare Decisis Versus Dicta

In deciding *Newdow*, the Ninth Circuit applied each of the tests that the Supreme Court has historically used in analyzing Establishment Clause challenges.[262] Conversely, the *Sherman* Court ignored the doctrine of stare decisis and decided the constitutionality of the Pledge on the basis of dicta.[263] The Seventh Circuit rationalized its departure from time-honored judicial practice, claiming that it was free to reject the *Lemon* test because the Supreme Court was divided as to the benefit of the *Lemon* test as a tool.[264] It is less clear how the circuit court reached the conclusion that it could likewise ignore *Lee*'s coercion test, which the Court had announced just five months before.[265] The *Sherman* Court barely mentioned *Lee*, noting only that the purpose of *Lee* was to reconsider *Lemon* and that *Lee* had left the *Lemon* test intact.[266]

The Seventh Circuit elected to rely on *Allegheny*, where the Supreme Court said in dicta that its "previous opinions ha[d] considered . . . the motto and the pledge, characterizing them as consistent with the proposition that the government may not communicate an endorsement of religious belief."[267] The Seventh Circuit did not address all of the dicta found in *Allegheny*, however. Four justices argued that the Pledge could not withstand *Allegheny*'s endorsement test because a "'reasonable atheist' would . . . feel less than a 'full membe[r] of the

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262. Newdow v. U.S. Cong., 292 F.3d 597 (9th Cir. 2002).

263. Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 446–48 (7th Cir. 1992).

264. *Id.* at 445.

265. *Id.* The *Sherman* court did not specifically address the coercion test. Rather it announced:

> Our approach is more direct. Must ceremonial references in civil life to a deity be understood as prayer . . . ? . . . You can't understand a phrase . . . by syllogistic reasoning. Words take their meaning from social as well as textual contexts . . . . Unless we are to treat the founders of the United States as unable to understand their handiwork . . . we must ask whether those present at the creation deemed ceremonial invocations of God as "establishment." They did not.

Id. at 445.

266. *Id.* at 445.

267. *Id.* at 447 (quoting County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 602–03 (1992)). The *Allegheny* Court cited Justice O'Connor's concurrence and Justice Brennan's dissent in *Lynch v. Donnelly*, 465 U.S. 668 (1984). Justice O'Connor found the crèche to be no more of an endorsement of religion than legislative prayers, government declaration of the Thanksgiving holiday, "In God We Trust" on coins, and opening Court sessions with "God save the United States and this honorable court." *Id.* at 693. Justice Brennan remarked:

> [S]uch practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood . . . as a form of "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.

Id. at 716–17.

political community' every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false."[268]

It is troubling that the Seventh Circuit summarily rejected applicable case law in favor of dicta. Mr. Sherman argued that dicta was not controlling because "the Court sometimes changes its tune when it confronts a subject directly."[269] While agreeing that this may be so, the Seventh Circuit reasoned that "an inferior court had best respect what the majority says rather than read between the lines."[270] Although an inferior court ought to respect dicta, under the policy of stare decisis, it must certainly show greater deference to the holdings of the high court.[271]

3. The Supreme Court's Recent Jurisprudence

The Ninth Circuit handed down its *Newdow* opinion in July 2002. In crafting its opinion, that court had the benefit of ten years of Supreme Court jurisprudence not available to the Seventh Circuit when it decided *Sherman* in 1992. In the years following the *Sherman* decision, the Court addressed various forms of religious speech in the public school setting.[272] In 2000, the Court decided a challenge to a school district's policy of allowing student-led, student-initiated prayer before high school football games.[273] The Court applied *Lee*'s coercion test along with *Allegheny*'s endorsement test and *Lemon*'s government entanglement analysis.[274]

In light of the Supreme Court's continued reliance on all three of its Establishment Clause tests, it is clearer today than ever that the *Sherman* Court erred by failing to apply these tests. Although the court may have acted on the belief that the Supreme Court would soon overturn *Lemon*, its misjudgment resulted in a holding that is entirely inconsistent with precedent.

The holdings of *Newdow* and *Sherman* cannot be reconciled because the circuit courts disagreed about whether "under God" is religious speech and about which test(s) apply to a Pledge challenge. They disagreed about whether a teacher-led pledge coerces or compels student participation and ultimately about whether recitating the Pledge in public schools contravenes the Establishment Clause. In light of the confusion, the lengthy interval since the Court last considered the practice of a teacher-led recitation of the Pledge in public schools, and the intense public interest in the outcome of the *Newdow* case, the Court was correct to grant certiorari to decide whether the present-day Pledge violates the First Amendment's Establishement Clause.

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268. *Allegheny*, 492 U.S. at 672–73 (Kennedy, J., dissenting).
269. *Sherman*, 980 F.2d at 447–48.
270. *Id.* at 448.
271. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000).
272. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
273. *Id.* at 297–98.
274. *Id.* at 302, 306, 309.

V. THE FATE OF THE PLEDGE: WHAT SHOULD THE SUPREME COURT DO?

In *Gobitis*, the Supreme Court stated: "Certainly the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law. Government may not interfere with organized or individual expression of belief or disbelief."[275] Since the Court delivered these words sixty-four years ago, it has consistently recognized the individual's fundamental right to pursue his or her convictions in matters of conscience.[276] In order to assess the potential harm that reciting the Pledge poses to this fundamental right, the Court must first determine whether "under God" is religious speech, and then decide whether a school child offers the speech voluntarily, free from coercive influences of teachers or peers.[277]

A. Is "Under God" Religious Speech?

The fate of the Pledge of Allegiance in our public schools may well rest on the way the Court defines the challenged speech. The Court may classify "under God" as religious speech or alternatively, like the *Sherman* Court, find that it is merely a ceremonial reference to deity.[278]

Proponents of the Pledge insist that "under God" is not religious speech when viewed in context of the entire Pledge ceremony. This position suffers from three faults: (1) history does not support it; (2) it defies logic; and (3) it offends Americans who value the words *because of* their religious meaning. Additionally, social science research demonstrates that children, who arguably recite the Pledge more than any other group and who are the subject of the current litigation, understand "under God" as religious speech.[279]

An examination of the legislative history surrounding the passage of the 1954 Act[280] adding the phrase "under God" illustrates that the sole purpose for adding these words was to distinguish the United States from its ideological adversary, the Soviet Union.[281] The House Judiciary Committee report contained the following:

> Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this

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275. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 593 (1940). In *Gobitis*, the Court found that the individual liberty of conscience was limited and could be circumscribed to protect superior national interests such as national security. *Id.* at 594–95.

276. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631–35 (1943).

277. *See* Lee v. Weisman, 505 U.S. 577, 592–93 (1992).

278. *See* Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 446–48 (7th Cir. 1992). In *Sherman*, the Seventh Circuit suggested that "under God" had lost all religious meaning and become simply "ceremonial deism." *Id.*

279. Eugene H. Freund & Donna Givner, *Schooling, The Pledge Phenomenon and Social Control*, Presented at the 1975 Meetings of the American Educational Research Association (Mar. 31–Apr. 3, 1975) (available at the University of Arizona Library).

280. Act of June 14, 1954, 83 Pub.L. No. 396, 68 Stat. 249.

281. *Id.*

> concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights . . . . The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.[282]

Godless communism was perceived as the evil; the remedy that Congress devised was to instill a sense of moral superiority in U.S. citizens, based on a national ethic of monotheism.[283]

The Pledge of Allegiance served as a means for indoctrinating public school children with these values. President Eisenhower's statement when he signed the bill reinforced Congress' rationale for enacting the bill:

> From this day forward the millions of our school children will daily proclaim in every city and town, every village and rural school house, the dedication of our nation and our people to the Almighty . . . . In this somber setting, this law and its effects today have profound meaning. In this way we are reaffirming the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource, in peace or in war.[284]

In light of these observations by Congress and the Executive, it is clear that the purpose for placing the words "under God" in the Pledge was purely religious, serving to impress upon Pledge participants that national leaders considered "God" an important figure in American government.[285]

The second problem with labeling the phrase "under God" in the Pledge as a mere ceremonial reference to deism in a primarily patriotic exercise is that it defies logic to do so. As the concurring opinion in *Sherman* recognized, the concept of ceremonial deism "selects only religious phrases as losing their significance through rote repetition."[286] Other words and phrases, such as "[i]ndivisible" and "liberty and justice for all" retain their significance in spite of rote repetition.[287] The words of the original Pledge are as meaningful today as when they were penned in the late nineteenth century. Likewise, "under God," which was added in 1954, cannot reasonably be said to have lost its intended meaning. In his concurrence in *Sherman*, Judge Manion concluded that "[a] court cannot deem any words to lose their meaning over the passage of time. . . . Each term used in public ceremony has the meaning intended by the term."[288]

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282. *Id.*
283. H.R. REP. 83-1693 (1954).
284. *Revised Pledge*, *supra* note 97.
285. *See id.*
286. *See* Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d. 437, 448 (7th Cir. 1992) (Manion, J., concurring).
287. *Id.*
288. *Id.*

Third, under the theory of ceremonial deism, a civic reference to God becomes permissible under the First Amendment only after it has been repeated so often that it is sapped of religious significance.[289] Legal scholars have referred to such civic references as "hollow gestures"[290] that are "innocuous and inconsequential in the grand constitutional scheme."[291] This causes concern as it admits that a phrase like "under God" violates the Establishment Clause,[292] but suggests that at some arbitrary point the phrase ceases to do so because it loses "any significant religious content."[293] Under this reasoning, an Establishment Clause challenge to the Pledge would leave the Court in a position to decide only whether the Pledge is religious speech or meaningless speech. Proponents of leaving "under God" in the Pledge would be offended to learn that these words are constitutional only because they have lost the very meaning they were intended to convey.

Finally, the present court challenge is limited to the practice of teachers leading the Pledge in public elementary schools; it does not question the appropriateness of the Pledge outside of that environment. In prior cases involving practices in public schools, the Court has taken the age and developmental level of the affected children into account.[294] Here, the Court will have access to an abundance of relevant research that has attempted to discover how children of various ages understand the words in the Pledge.[295]

In the pending *Newdow* case, qualifying the words of the Pledge may prove to be the Court's most difficult challenge. The Court will have to ascertain whether the Pledge is more like a prayer or Lincoln's Gettysburg Address, whether the phrase "under God" constitutes religious speech or purely patriotic speech, and whether the Pledge is a vow or merely a summary of our nation's heritage.[296]

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289. Epstein, *supra* note 29, at 2088 n.28 (citing Andrew Rotstein, *Good Faith? Religious-Secular Parallelism and the Establishment Clause*, 93 COLUM. L. REV. 1763, 1772–73 (1993) (describing references to the deity in the national motto, the judicial invocation, and the Pledge as "hollow gestures-an accepted part of civic life, with only a literary or historical connection to theology as such")).

290. *Id.*

291. *See id.* at 2089.

292. *See id.* at 2088 n.28.

293. Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

294. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992); *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

295. Freund & Givner, *supra* note 279 (quoting a first grade student who was asked about the meaning of "God" in the Pledge: "We better be good cause God is watching us even if He is invisible." A kindergarten student commented: "The most important part is . . . talking about God.").

296. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943). "'[L]iberty and justice for all,' if it must be accepted as descriptive of the present order rather than an ideal might to some seem an overstatement." *Id.* at 634 n.14.

> As the present Chief Justice said in dissent in the Gobitis case, the State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of

B. Voluntary, Coerced, or Compelled Speech

While classifying "under God" will be a key component of the Court's analysis, that alone may not be sufficient to determine whether teachers may constitutionally lead public elementary students in reciting the Pledge. When the Court decided *Barnette* in 1943, the Pledge did not yet include a reference to God.[297] Still, the Court held that compelling a student to recite it violated the First Amendment proscription against state interference with freedom of conscience.[298]

In the two post-*Barnette* Pledge challenges reaching the circuit courts, the states argued that students are no longer compelled to participate in the Pledge because children, regardless of their age, can leave the classroom during the ceremony.[299] The Supreme Court's school prayer decisions over the last decade suggest, however, that even government action that falls short of compelling speech may not withstand an Establishment Clause challenge where children are involved.[300] The Court has recognized that children and adults are inherently different and that what may not coerce an adult might well coerce a child.[301] The Court seems to be saying that coercion is a function of a student's age, pressure from teachers and peers to conform, plus the mandatory nature of attendance in the elementary and middle school grades.[302] The Court's message is clear—the State "may no more use social pressure to enforce orthodoxy than it may use other more direct means."[303]

The ultimate question in the *Newdow* case is whether public school children can be coerced to profess personal beliefs that are not their own. When the belief is religious, the answer is "no"; the State cannot coerce a child to take part or even to maintain respectful silence while peers participate.[304] The harder constitutional question will arise if the Court categorizes the Pledge and the phrase "under God" as ceremonial reference to diety. While not the same as prayer, arguably any reference to diety that a child feels compelled to accept as his own presents a problem under *Barnett*e and the Court's other Establishment Clause jurisprudence.

Barnette held that a child cannot be compelled to espouse an idea, even absent any religious conotation, that is not his own.[305] *Lee* identified children as a special class, more susceptible to coercive influences than adults, noting that there are "heightened concerns with protecting [a child's] freedom of conscience from

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> country." Here, however, we are dealing with a compulsion of students to declare a belief.

Id. at 631 (citation omitted).

297. *Id.* at 626 n.2.

298. *See id.* at 642.

299. Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 439 (7th Cir. 1992); *see* Newdow v. U.S. Cong., 292 F.3d 597, 608–09 (9th Cir. 2002).

300. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12 (2000).

301. Lee v. Weisman, 505 U.S. 577, 592–93 (1992).

302. *See id.*; *Santa Fe*, 530 U.S. at 311–12.

303. *Lee*, 505 U.S. at 594.

304. *See, e.g.*, *id.*

305. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

coercive pressure . . . ."[306] Since the level of pressure necessary to coerce a child depends in large part on his or her age, it is easier to find an Establishment Clause violation where teachers lead the Pledge in an elementary school setting. *Santa Fe* applied *Lee*'s coercion test to voluntary, student-initiated prayer at high school extracurricular events, concluding that even students in their mid to late teens would feel coerced under these circumstances.[307]

Combining the alnalyses of *Barnett* and the school prayer cases leads to the conclusion that a teacher-led Pledge, in public elementary schools, violates the Establishment Clause. Although it determined that the Pledge was constitutional in even the earliest grades, the *Sherman* Court arrived at that conclusion by denying the religious nature of "under God." The court acknowledged that if those words were construed as religious, the Pledge would be unconstitutional, noting that:

> If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher . . . of unwelcome words is coercion, then the Pledge of Allegiance becomes unconstitutional under all circumstances, just as no school may read from a holy scripture at the start of class.[308]

VI. CONCLUSION

From its inception in the late nineteenth century, the Pledge of Allegiance and flag salute have maintained two distinct characteristics. First, they have engendered controversy and division. Second, and perhaps due in part to the controversy surrounding them, both the Pledge and flag salute ceremony have been subject to change. Today this tradition of a patriotic exercise, evolving to reflect shifting societal values, is facing a challenge. The demographic makeup of the United States is vastly different than it was when Congress last amended the Pledge in 1954. The Cold War is over and Americans no longer need to distinguish their cherished values from those they associate with communism. Additionally, Americans are more diverse in all aspects, including religion. Predictably, some of those who do not embrace monotheistic ideals object that their children are required to listen each day as their teachers proclaim that the United States is a "nation under God." It is time to amend the Pledge once more to accommodate the views of all Americans, so that school children are free to participate in an expression of patriotism without religious overtones.

The Court's First Amendment jurisprudence, from *Barnette* through *Santa Fe*, has distilled fundamental principles that apply to the current Pledge challenge. The First Amendment guarantees the freedom to speak and correlating freedom not to be compelled to speak.[309] The Pledge is particularly potent speech because it requires the participant to espouse a belief.[310] The Court has said that

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306. *Lee*, 505 U.S. at 592.

307. *Santa Fe*, 530 U.S. 290.

308. Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 444 (7th Cir. 1992).

309. *Barnette*, 319 U.S. at 634 ("To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.").

310. *Id.* at 633.

when young children are involved, as was the case in *Barnette*, the school prayer cases, and *Newdow*, the option to remain silent or leave the classroom while peers participate in an activity that offends the child's beliefs is inadequate.[311]

The Court's three Establishment Clause tests counsel that (1) government may not endorse one religion over another or religion over non-religion, and (2) that government must take special care not to coerce vulnerable children. Whether an activity endorses religion depends on the government's purpose, the effect of the activity, and how entangled government becomes with the practice. Leading young school children in the Pledge may promote the State's legitimate interest in fostering patriotism,[312] but this would be no less true if the Pledge were restored to its pre-1954 form. It is difficult to imagine any legitimate secular purpose for the words "under God" in an already solemn oath. Thus, the Pledge arguably violates both *Lemon* and the endorsement test.

Under *Lee*, the Court will inquire whether the Pledge coerces young children to participate in religious activity.[313] Proponents seem to accept that the Pledge ceremony is coercive; they argue primarily that the Pledge is not religious. While it is clear that the Pledge is not a prayer, neither can it be accurately categorized as non-religious speech. The relevant analysis should address how young children perceive the Pledge and the words "under God." Social science research demonstrates that children in the elementary school grades may very well construe the Pledge as religious speech.[314]

In deciding *Newdow*, the Court should weigh the value of the Pledge, as a tool for teaching patriotism, against the First Amendment rights of parents to keep their children free from state coercion to profess a conviction that they do not hold. Considering the Court's holdings in the prior Pledge cases, the tests it has developed and applied to Establishment Clause challenges, and its recognition of the vulnerable nature of children, consistency requires the Supreme Court declare unconstitutional the practice of a teacher-led Pledge in public elementary school classrooms.

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311. *Lee*, 505 U.S. at 588 (holding prayer at junior high school graduation in violation of the Establishment clause even though ceremony was not mandatory and student could have sat down during the prayer while the other students stood. "[S]ubtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.").

312. *Barnette*, 319 U.S. at 640.

313. The Court has expressed concern over a child's ability to "avoid the fact or appearance of participation." *Lee*, 505 U.S. at 588. Mandatory school attendance laws require children to attend the elementary grades; proponents of the Pledge argue that a child can leave the classroom each day during the exercise.

314. "The children reveal [their] misconceptions about the Pledge. 'Well, I think it's like a prayer to God,' explains one girl. 'No, no,' another attempts to clarify, 'it's a song, that's all, just a song.'" Seefeldt, *I Pledge*, *supra* note 115.