



# COMMENT

## “UNDER GOD” DOES NOT NEED TO BE PLACED UNDER WRAPS: THE PHRASE “UNDER GOD” USED IN THE PLEDGE OF ALLEGIANCE IS NOT AN IMPERMISSIBLE RECOGNITION OF RELIGION

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## I. INTRODUCTION

On June 26, 2002, a panel of the U.S. Court of Appeals for the Ninth Circuit shocked the nation. In *Newdow v. U.S. Congress* (“*Newdow I*”),<sup>1</sup> the Ninth Circuit declared the inclusion of the phrase “under God” in the Pledge of Allegiance (“the Pledge”) unconstitutional under the First Amendment’s Establishment Clause.<sup>2</sup> The decision received widespread public condemnation, a reaction that was “heightened by the nation’s patriotic mood following the Sept. 11 terror attacks.”<sup>3</sup>

The revised opinion, *Newdow II*,<sup>4</sup> is now pending before the Supreme Court. This Comment will analyze how the Supreme Court should rule on the use of the phrase “under God” in the Pledge under a stringent legal analysis divorced from the knee-jerk, emotional reaction to the Ninth Circuit’s decision. Part II explores the reaction to the *Newdow I* decision declaring the phrase “under God” unconstitutional. Part III details the state of the law on the issue, including how states require or do not require the reading of the Pledge at public schools. Part IV evaluates the Pledge under existing Establishment Clause jurisprudence, considers constitutional objections other than those cited by the Ninth Circuit, but concludes that the “under God” language in the Pledge is constitutional.

1. 292 F.3d 597 (9th Cir. 2002).

2. *Id.* at 612. In the opinion denying rehearing en banc, the majority panel in *Newdow I* substituted its original decision with an amended, more limited ruling in *Newdow II*. *Newdow v. U.S. Congress*, 328 F.3d 466, 468 (9th Cir. 2003), *cert. granted sub nom.* Elk Grove Unified Sch. Dist. v. *Newdow*, 124 S. Ct. 384 (2003). *Newdow II* addresses only the school district’s policy that requires daily recitation of the Pledge of Allegiance, not the Pledge itself. *Id.* at 490 (O’Scannlain, J., dissenting).

3. Robert S. Greenberger, *Appeals Court Strikes Down the Pledge of Allegiance*, WALL ST. J., June 27, 2002, at A4; *see also* Maura Dolan, *Pledge of Allegiance Violates Constitution, Court Declares Law*, L.A. TIMES, June 27, 2002, at A1 (“The decision sparked a swift, angry reaction across the nation . . .”).

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

II. REACTION TO THE *NEWDOW* DECISIONA. *By Politicians*

Soon after the court ruled in *Newdow I*, politicians across the land began to criticize the ruling.<sup>5</sup> President Bush called it "[r]idiculous," Democratic Senator Joseph Lieberman called it "[s]enseless,"<sup>6</sup> and Gray Davis, then governor of California, where the Ninth Circuit sits,<sup>7</sup> said he was "extremely disappointed" with the decision.<sup>8</sup>

Congress was so outraged that it passed resolutions to show support for the Pledge in its then current form. The Senate condemned the decision by a 99-0 vote.<sup>9</sup> The House of Representatives also criticized the ruling, approving a resolution declaring *Newdow I* "erroneously decided" by a vote of 416-3.<sup>10</sup>

B. *By Legal Scholars*

Despite the clear public consensus against the ruling, not every legal scholar thought the court got it wrong. Some legal scholars considered the majority's opinion "a plausible interpretation of U.S. Supreme Court precedent," though they thought it would have little chance of being upheld.<sup>11</sup> Since the days following its original release, the *Newdow I* decision has

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5. See Dolan, *supra* note 3 (noting that the *Newdow* decision created a "flurry of denunciations by public figures including President Bush and Gov. Gray Davis" of California); Vincent J. Schodolski, *Court Strikes Down Pledge; Ruling Based on Words 'under God'*, CHI. TRIB., June 27, 2002, at 1 (claiming that the decision "immediately ignited a political firestorm").

6. Derrick Z. Jackson, Editorial, *Rethinking the Pledge*, BOSTON GLOBE, June 28, 2002, at A23 (confronting many politicians' quick criticism of the *Newdow* decision).

7. Schodolski, *supra* note 5 (noting the Ninth Circuit is based in San Francisco).

8. See Dolan, *supra* note 3.

9. See Schodolski, *supra* note 5. The only Senator not to vote was unavailable due to illness. Stephen Dinan, *Nation Rallies Around Pledge: Court Puts Ruling on Hold in Face of Justice Appeal, Bipartisan Anger*, WASH. TIMES, June 28, 2002, at A1 (explaining that North Carolina Senator Jesse Helms was unable to vote due to poor health).

10. Robert Salladay & Zachary Coile, *Judge in Pledge Case Puts Brakes on Ruling*, S.F. CHRON., June 28, 2002, at A1 (describing the aftermath of the Ninth Circuit's ruling). Two of the three votes against the resolution came from San Francisco Bay Area Democrats. *Id.* The third "no" came from a Virginia Democrat. *Id.*

11. Dolan, *supra* note 3. Specifically, Professor Eugene Volokh, a law professor at U.C.L.A. and Professor Jesse Choper of U.C. Berkeley thought the opinion was legally sound, but would be reversed by the Supreme Court. *Id.* Alternatively, Professor Erwin Chemerinsky, a constitutional law expert from U.S.C. also agreed with the decision, but thought it would be impossible to predict the outcome if heard before the Supreme Court. *Id.* Professor Lawrence Tribe of Harvard quipped that the odds of the Supreme Court upholding the ruling were "about as great as an asteroid hitting Los Angeles" the next day. *Id.*

been cited as an example of how “the stringent application of a bright-line rule may lead to results that seem outrageous to the public eye.”<sup>12</sup>

### C. *By the Media*

Some media commentators expressed concern with the hysterical public reaction to *Newdow I*.<sup>13</sup> Many in the media, however, echoed public sentiment that *Newdow I* was incorrect. For example, a *New York Times* editorial wrote, “This is a well-meaning ruling, but it lacks common sense. A generic two-word reference to God tucked inside a rote civic exercise is not a prayer. . . . In the pantheon of real First Amendment concerns, this one is off the radar screen.”<sup>14</sup>

## III. STATE OF THE LAW

### A. *The Pledge of Allegiance*

1. *Historical Development.* The Pledge of Allegiance was written in 1892 for Columbus Day celebrations marking the five-hundredth anniversary of Columbus’s discovery of America.<sup>15</sup> A Baptist preacher in Boston, who was working for *Youth’s Companion*, penned the Pledge in an attempt to improve the patriotic mood of the nation.<sup>16</sup> The author is attributed with saying, “The time was ripe for a reawakening of simple Americanism and the leaders in the new movement rightly felt that patriotic education should begin in the public schools.”<sup>17</sup>

When the Pledge of Allegiance was first written, it did not make reference to religion or contain recognition of God in any

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12. Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1202 & n.262 (2002); see also William E. Wiggin, *A Civil Liberties Paradox*, DEL. LAW., Fall 2002, at 36, 36 (“A legally sound decision may result in absurdity . . .”).

13. See, e.g., Jackson, *supra* note 6 (expressing disappointment in the near fanatical reaction to the decision and the absence of anything said about Mr. Newdow’s constitutional rights).

14. Editorial, *‘One Nation Under God’*, N.Y. TIMES, June 27, 2002, at A28.

15. See Carol McKay, *The Pledge of Allegiance’s Long History of Controversy*, FED. LAW., Aug. 2002, at 9 (tracing the history of the Pledge).

16. *Id.*; 100 CONG. REC. 15,829 (1954) (statement of Rep. Rabaut) (retelling the history of the Pledge).

17. 100 CONG. REC. 7761 (1954) (statement of Rep. Keating) (reading a synopsis of the history of the Pledge written by Francis Bellamy into the record). One commentator claimed that it was written to “assimilate and Americanize immigrant children.” Ute Krüdewagen, *Political Symbols in Two Constitutional Orders: The Flag Desecration Decisions of the United States Supreme Court and the German Federal Constitutional Court*, 19 ARIZ. J. INT’L & COMP. L. 679, 707 n.180 (2002).

way.<sup>18</sup> The Pledge was not written in stone; the First and Second National Flag Conferences modified it in 1923 and 1924, though these versions still contained no reference to "God."<sup>19</sup> In 1942, Congress officially recognized and adopted the Pledge.<sup>20</sup> Not long after the Pledge was officially recognized, the Supreme Court declared that forced recitation of the Pledge was unconstitutional.<sup>21</sup>

The addition of the phrase "under God" came in 1954, partly in response to the Cold War.<sup>22</sup> A Senator speaking in favor of the change explained that one purpose was to strengthen the country against the threat of godless communism: "I believe this modification of the pledge is important because it highlights one of the real fundamental differences between the free world and the Communist world, namely belief in God."<sup>23</sup> The 1954 addition of the words "under God" resulted in the following Pledge, which is the version still in effect: "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."<sup>24</sup>

## 2. Legislative History.

a. Inspiration for the Change. A review of the legislative history of the change does not point to a principal rationale. Several different motivations inspired the decision to introduce

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18. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2118 (1996); see also McKay, *supra* note 15, at 9; *The Story of the Pledge of Allegiance*, at <http://www.flagday.org/Pages/StoryofPledge.html> (last visited Mar. 16, 2004) [hereinafter *Story of the Pledge*]; John W. Baer, *The Pledge of Allegiance: A Short History*, at <http://history.vineyard.net/pledge.htm> (last visited Mar. 16, 2004) (providing the original text of the Pledge).

19. 100 CONG. REC. 6077 (1954) (statement of Rep. Rabaut) (recounting the history of the Pledge); *Story of the Pledge*, *supra* note 18 (explaining how in 1923 the phrase "my flag" was replaced by the phrase "the Flag of the United States", and then a year later "of America" was added).

20. *ACLU v. Capitol Square Review & Advisory Bd.*, 210 F.3d 703, 704, 722 (6th Cir. 2000) (discussing the Pledge while deciding that the Ohio state motto, "With God All Things Are Possible," was unconstitutional); David C. Pulice, *Pledge of Allegiance Unconstitutional, Describes U.S. as "Nation Under God"*, LAW. J., July 26, 2002, at 1, 1 (commenting on the Ninth Circuit's decision to hold the Pledge unconstitutional).

21. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").

22. *See* Epstein, *supra* note 18, at 2118; see also McKay, *supra* note 15, at 9; Pulice, *supra* note 20, at 1, 12.

23. *See* 100 CONG. REC. 1600 (1954) (statement of Sen. Ferguson).

24. 4 U.S.C. § 4 (2000).

legislation adding the phrase “under God” to the Pledge. There were several congressmen who felt there needed to be a statement reacting to the threat of communism.<sup>25</sup> Representative Bolton spoke of how “[u]nder communism, men are mere cogs in a machine, without rights, without souls, without future, without hope.”<sup>26</sup> Other members of Congress did not expressly mention communism, but the message was still quite clear.<sup>27</sup>

But reaction to the increasing fear of communism was far from the only reported inspiration for the change. One source of inspiration was directly related to those fears, but was more closely related to a religious nature of the change because it was delivered by a Christian minister.<sup>28</sup> The sponsor of the Senate’s version of the change attributed the idea to Reverend George M. Docherty, who had delivered a sermon suggesting the inclusion of a reference to God in the Pledge.<sup>29</sup> Still another congressman claimed the inspiration came from an annual dinner that he had attended the previous year honoring the Washington Pilgrimage of American Churchmen.<sup>30</sup> Others have attributed the inspiration to a campaign by the Knights of Columbus.<sup>31</sup> Specifically, the Massachusetts State Council of the Knights of Columbus passed a resolution, put into the record by Senator Saltonstall, supporting the change.<sup>32</sup>

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25. Refer to note 22 *supra* and accompanying text. *See also* 100 CONG. REC. 6231 (1954) (statement of Sen. Ferguson) (referring to the “spiritual bankruptcy of the Communists” as one of the biggest differences between the nations, and because America is godly, it has the advantage).

26. 100 CONG. REC. 7757–58 (1954) (statement of Rep. Bolton).

27. *See, e.g.*, H.R. REP. No. 83-1693, at 1, *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340 (“At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own.”); *see also id.* at 5915 (statement of Sen. Wiley) (“Certainly, in these days of great challenge to America, one can hardly think of a more inspiring symbolic deed than for America to reaffirm its faith in divine providence, in the process of restating its devotion to the Stars and Stripes and all it stands for.”); *id.* at 6231 (statement of Sen. Ferguson) (describing the addition as an act that would “strike another blow against those who would enslave us”).

28. *See* 100 CONG. REC. 6231 (1954) (statement of Sen. Ferguson) (declaring Rev. George M. Docherty as inspiration for the change).

29. *Id.*

30. *See id.* at 2008 (statement of Rep. Bolton).

31. *See* Baer, *supra* note 18 (“Congress after a campaign by the Knights of Columbus, added the words, ‘under God,’ to the Pledge.”); *see also* Steven G. Gey, “*Under God*,” *The Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1876 (2003) (“The Knights of Columbus had begun using the amended pledge in its own assemblies in 1951.”). In fact, in 1952 the Knights of Columbus passed a resolution to urge Congress to formally change the Pledge. *Id.*

32. *See* 100 CONG. REC. 6982 (1954) (statement of Sen. Saltonstall) (entering the resolution into the record).

Yet another claimed originator of the change was an anonymous citizen from Brooklyn, New York.<sup>33</sup> Representative Rabaut received a letter from the unnamed man in April of 1953 proposing the idea.<sup>34</sup> However, any change suggested by Representative Rabaut would likely not have been viewed as secular because he was described as a "deeply religious man."<sup>35</sup>

b. Arguments Supporting the Change Made on the Floor of the House and Senate. To further understand the legislative history of the change, one must look at the statements made by members of Congress and the President in support of it. Much of the support by congressmen came by way of reference to historical statements. One representative used George Washington's reference to God as evidence for why the change made sense.<sup>36</sup> Another declared that "[i]t was Abraham Lincoln who first used the expression 'this Nation under God' in his immortal Gettysburg Address."<sup>37</sup> Still another member of the House brought forth Benjamin Franklin's statement that "God governs the affairs of man."<sup>38</sup> Basically, they were arguing that America had a deeply rooted foundation based on the belief in God, so the recognition of God in the Pledge made sense.<sup>39</sup> Not all support, however, came from references to past political leaders, for example, Representative Angell quoted a passage from Billy Graham, specifically bringing in a Christian perspective.<sup>40</sup>

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33. See *id.* at 7758 (statement of Rep. Rabaut).

34. *Id.*

35. See *id.* at 7762 (statement of Rep. O'Hara) (arguing that Representative Rabaut's efforts to change the Pledge should be recognized).

36. See *id.* at 7763 (statement of Rep. Rodino) (quoting George Washington at the Constitutional Convention as saying, "The event is in the hand of God").

37. See *id.* at 2008 (statement of Rep. Bolton). Representative Rabaut thought Abraham Lincoln's language from the Gettysburg Address was so important he quoted the specific passage. *Id.* at 6078 (statement of Rep. Rabaut) ("That this Nation, under God, shall have a new birth of freedom.").

38. *Id.* at 6919 (statement of Rep. Angell). Others made reference to predecessors of the Declaration of Independence and that Declaration itself. See, e.g., *id.* at 7759-60 (statement of Rep. Oakmon).

39. See *id.* at 7591 (statement of Rep. Pillion) ("Our western civilization is a product of the Christian-Judaic conception of the individuality and dignity of every human soul. . . . The inclusion of God in our pledge would acknowledge the dependence of our people, and our Government upon the moral direction and the restraints of religion."). Representative Pillion went further to compare this seemingly theistic intent of recognition of God with the purpose of denying communism. *Id.* ("[T]his action would serve to deny the atheistic and materialistic concept of communism. It would condemn the absolute and concentrated power of the communistic slave state with its attendant subservience to the individual.").

40. *Id.* at 6919 (statement of Rep. Angell) ("We are directing the Ship of State, unassisted by God, past the reefs and through the storms of time. We have dropped our pilot, the Lord Jesus Christ, and are sailing blindly on without divine chart or compass,

Along the same lines as the historical support, one representative analogized the Pledge to this country's coins.<sup>41</sup> He contended that because coins already had as the motto "In God We Trust," the addition of "under God" to the Pledge was consistent with that expression.<sup>42</sup> The analogy to coins was even included in the House's final report on the measure.<sup>43</sup>

Another source of support for the change came from previous Supreme Court decisions. The House Report on the change included reference to two previous Supreme Court opinions that seemed to support the idea of adding the phrase "under God."<sup>44</sup> Additionally, the House sponsor of the change, Representative Rabaut, specifically quoted the following language from *Zorach v. Clauson*: "We are a religious people . . . whose institutions presuppose a Supreme Being."<sup>45</sup> Members of Congress evidently felt these cases provided valuable support as other members also relied on them.<sup>46</sup>

Even though there seemed to be a great deal of legitimate support justifying the addition to the Pledge, there was concern that the change might be seen as a violation of the Establishment Clause. Senator Ferguson, the Senate sponsor, attempted to discount this fear.<sup>47</sup> Not only did Senator Ferguson argue that adding the phrase "under God" was in no way an establishment of religion, but he also claimed it would not force an atheist to profess belief in God.<sup>48</sup> Senator Knowland was also careful to express that it would not amount to a constitutional violation.<sup>49</sup>

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hoping somehow to find our desired haven." (quoting evangelist Billy Graham)).

41. See *id.* at 6085 (statement of Rep. Dorn) (stating in further support for the addition that the Great Seal of the United States states "Annuit Coeptis," meaning "He [God] has favored our undertakings" (alteration in original)).

42. See *id.*

43. See H.R. REP. No. 83-1693, reprinted in 1954 U.S.C.C.A.N. 2339, 2341.

44. See *id.* at 2340, 2342 (emphasizing both *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892) (declaring "this is a religious nation"), and *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

45. 100 CONG. REC. 6077 (1954) (statement of Rep. Rabaut); see also *Clauson*, 343 U.S. at 313 (holding that a New York statute allowing the release of public school students to attend religious classes was constitutional).

46. See, e.g., 100 CONG. REC. 7763 (1954) (statement of Rep. O'Hara).

47. See *id.* at 6231 (statement of Sen. Ferguson) ("Adoption of the resolution would in no way run contrary to the provisions of the first amendment to the Constitution. This is not an act establishing a religion. . . . The phrase 'under God' recognizes only the guidance of God in our national affairs, it does nothing to establish a religion.").

48. See *id.* ("Neither will this resolution violate the right of any person to disbelieve in God or reject the existence of God. The recognition of God in the pledge . . . does not compel any individual to make a positive affirmation in the existence of God in whom one does not believe.").

49. See *id.* at 6348 (statement of Sen. Knowland) ("This is not an attempt to establish a religion; it has nothing to do with anything of that kind.").



Other support is seen through the championing of the proposal by a variety of religious faiths.<sup>50</sup> It seems clear that Congress was concerned with the perception of a constitutional violation; otherwise, it would not have been discussed.

Another theme throughout the congressional debates was that God is the source of the power of the United States and should be recognized for it.<sup>51</sup> Some provided the seemingly secular reason to have children better understand the Nation's origins as support for the change.<sup>52</sup> To many there seemed to be something incomplete about the Pledge. As it stood, Senator Ferguson reasoned it was not specific enough to show support for American ideals.<sup>53</sup> Also, the then existing form of the Pledge was described as "not complete without a recognition of our basic faith."<sup>54</sup> Another argued, however, that it was "not a confession of faith[, but] an affirmation of loyalty to a nation symbolized by its flag."<sup>55</sup> Also, one representative argued for the change on the ground that "[o]ur founders and great Presidents and military leaders have been men of strong religious convictions and devotion, and the most rousing slogans of our warfare call upon this spirit, from 'In the name of the great Jehovah and the Continental Congress,' to 'Praise the Lord and pass the

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50. See *id.* at 2008 (statement of Rep. Bolton). Rep. Bolton stated,

I am able to report that the suggestion appears to have the support of Protestants, Catholics, and Jews alike, and I believe that there is strong public sentiment in favor of adding a recognition of the Deity to this pledge which is recited daily in schools across the Nation and on many patriotic occasions.

*Id.*; see also *id.* at 6231 (statement of Sen. Ferguson) (explaining how there had been support for the change "from people of all faiths from all sections of the Nation."). Because there was support from several religions, it is obvious that the change was not intended to promote any religion in particular.

51. See *id.* at 5069 (statement of Rep. Rodino) (comparing the recognition of God in the Declaration of Independence and how he would like it expressed in the Pledge of Allegiance by stating, "This recognition of God as the Creator of mankind, and the ultimate source both of the rights of man and of the powers of government, is common to all the constitutions of the Thirteen Original States"); *id.* at 6348 (statement of Sen. Ferguson) (arguing that the Pledge "should recognize the Creator who we really believe is in control of the destinies of this great Republic").

52. See *id.* at 6078 (statement of Rep. Rabaut) ("More importantly, the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins."); see also *id.* at 6348 (statement of Sen. Ferguson) ("Therefore, we should remind the Boy Scouts, the Girl Scouts, and the other young people of America, who take pledge of allegiance to the flag more often than do adults, that it is not only a pledge of words but also of belief.").

53. *Id.* at 6231 (statement of Sen. Ferguson) ("[A]part from the mention of the phrase 'the United States of America,' it could be pledge of any republic. In fact, I could hear little Moscovites repeat a similar pledge to their hammer-and-sickle flag in Moscow with equal solemnity." (quoting Dr. Docherty's inspirational sermon)).

54. *Id.* at 2009 (statement of Rep. Bolton).

55. *Id.* at 7759 (statement of Rep. Oakman).

ammunition.”<sup>56</sup> He even went on to quote directly from the Old Testament.<sup>57</sup>

c. What They Were Hoping to Achieve Through the Change. There were at least seventeen different versions of the proposed change introduced by different members of Congress.<sup>58</sup> There was also serious debate over who should receive credit for the change.<sup>59</sup> It was certainly a very positive political move to be the one most closely associated with such a patriotic act. Ultimately, Senator Ferguson, who sponsored the first resolution to be passed, Senate Joint Resolution 126, convinced his chamber to pass the identical House joint resolution, even though this was not normal procedure.<sup>60</sup> Following Senator Ferguson’s words, the House Joint Resolution was passed and ready for President Eisenhower’s signature.<sup>61</sup>

One reason the measure to change the Pledge needed to be passed quickly was that Congress wanted to have it ready for a presidential signature by Flag Day.<sup>62</sup> Like much of what was said by Congress, President Eisenhower’s statements made during the bill signing show a sense of faith in God.<sup>63</sup> After his statements and the signing, the new Pledge was recited, and “Onward, Christian Soldiers” was played by a bugler.<sup>64</sup>

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56. See *id.* at 7763 (statement of Rep. Rodino).

57. See *id.* at 7764 (declaring the Pledge should mirror the language of David the Psalmist in recognizing God’s authority over mankind).

58. See *id.* at 7758 (statement of Rep. Rabaut); *id.* at 7935 (statement of Rep. Rabaut) (requesting that the eighteen members of Congress who introduced similar measures be invited to the President’s signing of the resolution (quoting a letter written to President Eisenhower from Rep. Rabaut)).

59. See *id.* at 7758–59 (statement of Rep. Rabaut) (debating over whether the House should adopt a resolution already passed by the Senate or attempt to have the Senate adopt a resolution created in the House, so the House members could receive the most credit). Representative Oakmon specifically requested that Representative Rabaut “waive the pride of authorship.” *Id.* at 7759 (statement of Rep. Oakmon).

60. See *id.* at 7833 (statement of Sen. Ferguson) (viewing the timeliness of the change as more important than the credit received for authoring the change).

61. See *id.* at 7834 (statement of the Presiding Officer).

62. See *id.* at 7757 (statement of Rep. Bolton); *id.* at 7935 (statement of Rep. Rabaut) (quoting a letter written to President Eisenhower by Rep. Rabaut).

63. See *id.* at 14,919 (statement of Rep. Wolverton) (quoting President Eisenhower). President Eisenhower stated that,

From this day forward the millions of our schoolchildren will daily proclaim in every city and town, every village and rural schoolhouse the dedication of our Nation and our people to the Almighty.

....

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.*

64. Books v. City of Elkhart, 235 F.3d 292, 324 (7th Cir. 2000) (discussing the

One commentator has concluded that analysis of the legislative history of the 1954 change shows a theistic intent.<sup>65</sup> Alternatively, the Sixth Circuit described the legislative history as "skirting close to giving an impermissible religious cast to the inclusion" of the phrase "under God," but concluded that the 1954 inclusion did not appear to go over the Establishment Clause line.<sup>66</sup> Indeed, as the above discussion demonstrates, the legislative history does not appear to reveal a discernible principal intent of the 1954 addition.

3. *Statutes Applying the Pledge to the States.* A full understanding of the Pledge of Allegiance would be incomplete without understanding how the language is expressed in public schools. Many States require some form of observance.<sup>67</sup> For instance, in California, each public elementary and secondary school is required to begin each day with "patriotic exercises," which is satisfied by the recitation of the Pledge.<sup>68</sup> Unlike California's general advisory to administer some form of patriotic expression, Illinois specifically requires the Pledge to be recited every day.<sup>69</sup> Texas requires school districts to implement a policy making Pledge recitation a daily occurrence.<sup>70</sup> New York recognizes a pledge to the United States flag, but does not

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legislative history of the Pledge).

65. See Epstein, *supra* note 18, at 2119–20.

66. *ACLU v. Capitol Square Review & Advisory Bd.*, 210 F.3d 703, 722, 725 (6th Cir. 2000) (comparing the Pledge to the state motto of Ohio).

67. See, e.g., CAL. EDUC. CODE § 52720 (West 1989); 105 ILL. COMP. STAT. ANN. 5/27-3 (West Supp. 2003); TEX. EDUC. CODE ANN. § 25.082(b) (Vernon Supp. 2004).

68. CAL. EDUC. CODE § 52720. Section 52720 states the following,

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

In every public secondary school there shall be conducted daily appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy such requirement. Such patriotic exercises for secondary schools shall be conducted in accordance with the regulations which shall be adopted by the governing board of the district maintaining the secondary school.

*Id.*

69. 105 ILL. COMP. STAT. ANN. 5/27-3 ("The Pledge of Allegiance shall be recited each school day by pupils in elementary and secondary educational institutions supported or maintained in whole or in part by public funds.").

70. TEX. EDUC. CODE ANN. § 25.082(b) ("The board of trustees of each school district shall require students, once during each school day at each school in the district, to recite: (1) the pledge of allegiance to the United States flag . . .").

specifically call upon use of the federal Pledge.<sup>71</sup> Florida is more like Illinois and calls for the Pledge to be recited at schools every day.<sup>72</sup> Many other states have laws concerning recitation of the Pledge. As the representative state laws discussed above demonstrate, there are important differences among the states on the issue of whether, how, and when the Pledge should be recited.<sup>73</sup>

### *B. Judicial Interpretation*

#### *1. Newdow v. U.S. Congress.*

a. *The Majority Opinion.* The controversy that erupted over the Pledge in 2002 originated when Michael Newdow, an atheist whose daughter was going to public elementary school in California, objected to his daughter's teacher reciting the Pledge every day, as was required by school district policy ("the Policy").<sup>74</sup> Newdow filed suit contending that recitation of the words "under God" in the Pledge, and the school district's recitation policy, violated the Establishment Clause.<sup>75</sup> The district court dismissed Newdow's claims.<sup>76</sup>

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71. N.Y. EDUC. LAW § 802 (McKinney 2000). The New York statute states the following.

It shall be the duty of the commissioner to prepare, for the use of the public schools of the state, a program providing for a salute to the flag and a daily pledge of allegiance to the flag, and instruction in its correct use and display which shall include, as a minimum, specific instruction regarding respect for the flag of the United States of America, its display and use as provided by federal statute and regulation and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools.

*Id.*

72. FLA. STAT. ANN. § 1003.44 (West Supp. 2004). Florida law states the following.

Each district school board may adopt rules to require, in all of the schools of the district, programs of a patriotic nature to encourage greater respect for the government of the United States and its national anthem and flag, subject always to other existing pertinent laws of the United States or of the state. . . . The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state.

*Id.*

73. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 71, § 69 (West 1996) (mandating that the Pledge be recited daily and providing for fines when teachers do not read the Pledge as prescribed); N.H. REV. STAT. ANN. § 194:15-c (Supp. 2003) (placing the responsibility with the individual school district to plan for the Pledge); VA. CODE ANN. § 22.1-202 (Michie Supp. 2003) (mandating instruction on the flag and its history and requiring students to "demonstrate" knowledge of the Pledge).

74. *Newdow v. U.S. Congress*, 328 F.3d 466, 482–83 (9th Cir. 2003).

75. *Id.* at 482.

76. *Id.* at 483.

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Mr. Newdow appealed to the Ninth Circuit, which reversed the district court.<sup>77</sup> The panel majority held that "the school district's policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words 'under God,' violates the Establishment Clause."<sup>78</sup>

The court determined it had jurisdiction to address the constitutionality of the Policy, but lacked jurisdiction to require the President or Congress to repeal the Pledge itself, as Newdow had requested.<sup>79</sup> Additionally, the court refused to consider the California statute requiring the recitation of the Pledge, as it was not addressed by the district court.<sup>80</sup>

After determining it had proper jurisdiction and Mr. Newdow had proper standing,<sup>81</sup> the court proceeded to discuss the Establishment Clause issue.<sup>82</sup> It began by describing what it claimed to be the three tests established by the Supreme Court to analyze Establishment Clause challenges in the public education arena.<sup>83</sup> These are the *Lemon* test, the endorsement test, and the coercion test.<sup>84</sup> The *Lemon* test requires that "the government conduct in question (1) must have a secular purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion."<sup>85</sup> The endorsement test notes that the government violates the Establishment Clause in two primary ways: (1) through excessive entanglement between the government and religious groups, and (2) through endorsement or disapproval of religion by the government.<sup>86</sup> Lastly, the *Newdow II* court recognized the coercion test, which restricts the government from putting primary or secondary school children in

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77. *Id.* at 490.

78. *Id.*

79. *Id.* at 484.

80. *Id.*

81. The court held that "Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter." *Id.* at 485 (citing *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 795 (9th Cir. 1999) (en banc) ("Parents have a right to direct the religious upbringing of their children and, on that basis, have standing to protect their right.")). Furthermore, the court held that Newdow had proper standing to challenge the Policy of the school district in regard to the Pledge, as his daughter attended elementary school in the district. *Id.*

82. *Id.* at 485-90.

83. *Id.* at 485-86.

84. *Id.*

85. *Id.* at 485 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

86. *Id.* at 486 (citing *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring)).

the position of having to choose between participating in or protesting a particular religious ceremony.<sup>87</sup>

In addition to introducing the three tests used “to analyze alleged violations of the Establishment Clause in the realm of public education,”<sup>88</sup> the court explained how the Supreme Court applied all three tests in *Santa Fe Independent School District v. Doe*,<sup>89</sup> its most recent school prayer case.<sup>90</sup> However, the *Newdow II* court explained that it was

free to apply any or all of the three tests, and to invalidate any measure that fails any one of them. Because [the court] conclude[d] that the school district policy impermissibly coerces a religious act and accordingly [held] the policy unconstitutional, [it did not need to] consider whether the policy fails the endorsement test or the *Lemon* test as well.<sup>91</sup>

To begin its analysis, the *Newdow II* court reasoned that the phrase “under God” in the Pledge

is a profession of a religious belief, namely, a belief in monotheism. The recitation that ours is a nation “under God” is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase “one nation under God” in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism.<sup>92</sup>

The court next applied the coercion test, which it applied exclusively, and held that the Policy failed it.<sup>93</sup>

The defendants argue that the religious content of “one nation under God” is minimal. To an atheist or a believer in non-Judeo-Christian religions or philosophies, however, this phrase may reasonably appear to be an attempt to enforce a “religious orthodoxy” of monotheism, and is therefore impermissible.

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87. *Id.* (citing *Lee v. Weisman*, 505 U.S. 577, 594 (1992)).

88. *Id.* at 485.

89. 530 U.S. 290, 317 (2000) (holding unconstitutional the school district’s tradition of allowing student-led “invocations” before football games).

90. *Newdow*, 328 F.3d at 486–87.

91. *Id.* at 487.

92. *Id.*

93. *Id.* at 488.

The coercive effect of the policy here is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students.<sup>94</sup>

Furthermore, according to the *Newdow II* court, "even without a recitation requirement for each child, the mere presence in the classroom every day as peers recite the statement 'one nation under God' has a coercive effect."<sup>95</sup> Concluding its coercion test analysis, the *Newdow II* court attempted to link parts of the legislative history of the 1954 Act to an intent to coerce schoolchildren into reciting the Pledge.<sup>96</sup>

The *Newdow II* majority then differentiated previous Supreme Court opinions that seem to approve of the Pledge in dicta.<sup>97</sup> The court claims that *County of Allegheny v. ACLU*<sup>98</sup> and *Lynch v. Donnelly*,<sup>99</sup> which appear to approve of the Pledge, did not present the same issue as was before the *Newdow II* court.<sup>100</sup> The *Newdow II* majority also explained that its decision was not inconsistent with *Engel v. Vitale*,<sup>101</sup> "which approved of encouraging students to 'recit[e] historical documents such as the Declaration of Independence which contain references to the Deity or . . . sing[] officially espoused anthems which include the composer's professions of faith in a Supreme Being.'"<sup>102</sup> The *Newdow II* court differentiated the Pledge from the approved recitals in *Engel* on the grounds that a pledge "is, by design, an affirmation by the person reciting it" and not simply "the author's profession of faith."<sup>103</sup>

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94. *Id.*

95. *Id.*

96. *Id.* But this argument seems disingenuous because schoolchildren were already reciting the Pledge before the 1954 Act modified it, and, under *Barnette*, they were protected from forced recitation. Refer to note 21 *supra* and accompanying text (discussing *Barnette*); refer also to note 50 *supra* (noting implicitly that schoolchildren commonly recite the pledge).

97. *Newdow*, 328 F.3d at 489 ("The Supreme Court has addressed the Pledge in passing, and we owe due deference to its dicta.").

98. 492 U.S. 573, 598 (1989) (holding that a city's Christmas display of a crèche standing alone was unconstitutional because it gave "praise to God in Christian terms").

99. 465 U.S. 668, 687 (1984) (holding that the city of Pawtucket, R.I. did not violate the Establishment Clause by including a crèche amongst a variety of traditional figures and decorations in its Christmas display).

100. *Newdow*, 328 F.3d at 489.

101. 370 U.S. 421, 436 (1962) (holding that daily prayer encouraged by public schools was unconstitutional).

102. *Newdow*, 328 F.3d at 489 (alterations in original) (quoting *Engel*, 370 U.S. at 435 n.21).

103. *Id.* ("To pledge allegiance to something is to alter one's moral relationship to it, and not merely to repeat the words of an historical document or anthem.").

Lastly, the *Newdow II* court criticized the only other appeals court that had considered the constitutionality of the Pledge, the Seventh Circuit.<sup>104</sup> According to *Newdow II*, the Seventh Circuit failed to apply the appropriate Supreme Court tests to the issue.<sup>105</sup>

b. The Dissenting Opinion. In concurrence and dissent, Judge Fernandez explained that “what the religion clauses of the First Amendment require is neutrality.”<sup>106</sup> He explained that the “[religion] clauses are, in effect, an early kind of equal protection provision and assure that government will neither discriminate for nor discriminate against a religion or religions.”<sup>107</sup> Further, he presented that “when all is said and done, the danger that ‘under God’ in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody’s beliefs is so minuscule as to be de minimis. The danger [‘under God’] presents to our First Amendment freedoms is picayune at most.”<sup>108</sup>

Judge Fernandez continued, arguing that

such phrases as “In God We Trust,” or “under God” have no tendency to establish a religion in this country or to suppress anyone’s exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity.<sup>109</sup>

He admitted that “some people may not feel good about hearing the phrases recited in their presence, but, then, others might not feel good if they are omitted.”<sup>110</sup>

Judge Fernandez then warned that if something like the Pledge is found to be unconstitutional, other traditional patriotic activities may find their end.<sup>111</sup> Songs such as “God Bless America” and “America The Beautiful” will be gone for sure, and while use of the first three stanzas of “The Star Spangled Banner” will be permissible, we will be precluded from straying into the fourth. And currency beware!<sup>112</sup>

Additionally, Judge Fernandez cited several prior Supreme Court decisions that specifically address the “under God”

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104. *Id.* at 489–90.

105. *Id.* at 490.

106. *Id.* at 491 (Fernandez, J., concurring and dissenting).

107. *Id.* (Fernandez, J., concurring and dissenting).

108. *Id.* (Fernandez, J., concurring and dissenting).

109. *Id.* at 492 (Fernandez, J., concurring and dissenting).

110. *Id.* (Fernandez, J., concurring and dissenting).

111. *Id.* at 492–93 (Fernandez, J., concurring and dissenting).

112. *Id.* (Fernandez, J., concurring and dissenting) (footnote omitted).



language of the Pledge.<sup>113</sup> One highlighted case, *Lynch*, determined that a city was not violating the Establishment Clause by including a crèche as part of its Christmas display.<sup>114</sup> Although the Court approved the nativity scene, it reasoned that ceremonial recognition of this country's religious heritage, including the phrase "under God" found in the Pledge of Allegiance, does not "establish[] a religion or religious faith or tend[] to do so."<sup>115</sup>

Furthermore, the *Lynch* Court noted the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."<sup>116</sup> It also noted that the history of the United States "is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders."<sup>117</sup> The *Lynch* Court provided examples of these historical references, including President Washington's proclamation of a day of thanksgiving and similar proclamations that have been repeated by many others after him.<sup>118</sup>

Because of these and "countless other illustrations of the Government's acknowledgment of our religious heritage," including references to a higher power at the birth of the nation, the Court reasoned that ceremonial acknowledgments of our nation's religious heritage are not unconstitutional under the Establishment Clause.<sup>119</sup> Included within its discussion, the *Lynch* Court made specific reference to the use of God in the national motto,<sup>120</sup> on our coins and currency,<sup>121</sup> and in the Pledge of Allegiance.<sup>122</sup>

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113. *Id.* at 491 (Fernandez, J., concurring and dissenting).

114. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984).

115. *Id.* at 676, 678.

116. *Id.* at 674.

117. *Id.* at 675.

118. *See id.* at 675 n.2 (noting soon "after the First Amendment was proposed, Congress urged President Washington to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favours of Almighty God'" (quoting A. STOKES & L. PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 87 (rev. 1st ed. 1964)).

119. *See id.* at 677-78.

120. *Id.* at 676; *see also* 36 U.S.C. § 302 (2000) ("'In God we trust' is the national motto.").

121. *Lynch*, 465 U.S. at 676; *see also* 31 U.S.C. § 5112(d)(1) (2000) ("United States coins shall have the inscription 'In God We Trust.'"); 31 U.S.C. § 5114(b) (2000) ("United States currency has the inscription 'In God We Trust' . . .").

122. *Lynch*, 465 U.S. at 676; *see also* 4 U.S.C. 4 (2000) (codifying the Pledge). Many other similar references to God can be seen in things not mentioned by the *Lynch* Court. One is the Constitution itself, where reference is made to the "Year of our Lord" in Article VII. U.S. CONST. art. VII. Another reference is in the opening cry of the Supreme Court, "God save the United States and this Honorable Court." *See Zorach v. Clauson*, 343 U.S. 306, 313 (1952). A third example not mentioned by the *Lynch* court, but often referred to,

In *Newdow II*, Judge Fernandez also mentioned *County of Allegheny v. ACLU*.<sup>123</sup> In *Allegheny*, the Supreme Court commented on *Lynch*'s approval of the reference to God in the Pledge, remarking that in *Lynch* the Justices unanimously regarded the Pledge and the national motto "as consistent with the proposition that government may not communicate an endorsement of religious belief."<sup>124</sup>

Another case Judge Fernandez mentioned, but did not give much attention to, is *Wallace v. Jaffree*,<sup>125</sup> in which a mandatory moment of silence designated for voluntary prayer or meditation was held unconstitutional.<sup>126</sup> In her concurring opinion, Justice O'Connor addressed the possibility that "under God" found in the Pledge could be seen as unconstitutional using a *Jaffree* standard and commented, "In my view, the words 'under God' in the Pledge . . . serve as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'"<sup>127</sup> It thus appears that the Court has repeatedly addressed the issue of the Pledge's constitutionality, albeit in dicta. Therefore, absent a compelling new argument, the Court will very likely find the Pledge constitutional if it reaches the question.<sup>128</sup>

c. The Dissent from Denial En Banc. In addition to Judge Fernandez's dissent, Judge O'Scannlain penned a very impassioned dissent from the denial of rehearing en banc.<sup>129</sup> He argued:

We should have reheard *Newdow I* en banc, not because it was controversial, but because it was wrong, very wrong—wrong because reciting the Pledge of Allegiance is simply

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is the use of God in Lincoln's Gettysburg Address. *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 446 (7th Cir. 1992). Still other examples of the accepted use of God in national traditions include a variety of patriotic songs, notably the "Star Spangled Banner," "America the Beautiful," and "God Bless America." See *Newdow*, 328 F.3d at 492–93 (Fernandez, J., concurring and dissenting).

123. *Newdow*, 328 F.3d at 491 (Fernandez, J., concurring and dissenting). The Court in *Allegheny* held that a city's Christmas display, including a crèche, was unconstitutional because, unlike in *Lynch*, its nativity scene gave "praise to God in Christian terms." See *County of Allegheny v. ACLU*, 492 U.S. 573, 598 (1989).

124. 492 U.S. at 602–03.

125. 472 U.S. 38 (1985).

126. *Id.* at 60–61.

127. *Id.* at 78 n.5 (O'Connor, J., concurring) (third alteration in original) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984)).

128. The Court could decide the *Newdow* case on litigant standing and never reach the substantive Establishment Clause issue. Refer to note 132 *infra*.

129. *Newdow*, 328 F.3d at 471 (O'Scannlain, J., dissenting from the denial of rehearing en banc).

not 'a religious act' as the two-judge majority asserts, wrong as a matter of Supreme Court precedent properly understood, wrong because it set up a direct conflict with the law of another circuit, and wrong as a matter of common sense. . . . Reciting the Pledge of Allegiance cannot possibly be an "establishment of religion" under *any* reasonable interpretation of the Constitution.<sup>130</sup>

*Newdow II* does not appear to be the end of the line in terms of the Pledge's constitutionality. The Supreme Court granted certiorari on October 14, 2003<sup>131</sup> to review the following two questions: (1) whether Mr. Newdow had standing,<sup>132</sup> and (2) "[w]hether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words 'under God,' violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment."<sup>133</sup>

2. *Sherman v. Community Consolidated School District 21*. The *Newdow II* court was the second federal Court of Appeals to address the constitutionality of the Pledge's phrase "under God."<sup>134</sup> The Seventh Circuit, in *Sherman v. Community Consolidated School District 21*, addressed the issue in 1992.<sup>135</sup> The *Sherman* court determined that schools could recite the Pledge of Allegiance at the beginning of each day, provided *all* students were not required to follow along.<sup>136</sup> It first determined that the plaintiff had proper standing.<sup>137</sup> Next, the court discussed whether the Illinois statute requiring the recital of the

130. *Id.* at 472 (O'Scannlain, J., dissenting from the denial of rehearing en banc).

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

132. The standing issue is beyond the scope of this Comment, which addresses the Establishment Clause issues related to the Pledge, and thus is not addressed further. It should be noted, however, that a Supreme Court ruling adverse to Mr. Newdow on the standing question would mean the Establishment Clause issue would remain unresolved.

133. *Newdow*, 124 S. Ct. at 384.

134. *Newdow v. U.S. Congress*, 292 F.3d 597, 611 n.12 (9th Cir. 2002) ("The only other United States Court of Appeals to consider the issue is the Seventh Circuit . . ."). In addition to the Seventh Circuit, scholars had also considered the problem before the Ninth Circuit got involved. *See, e.g.*, Epstein, *supra* note 18, at 2151-53 (arguing that the legislative history points to the Pledge as an endorsement of religion); Abner S. Green, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451, 451 (1995) ("It is probably unconstitutional for teachers to lead the pledge of allegiance to the United States flag in public school classrooms, even if students have the option not to participate.").

135. 980 F.2d 437, 437 (7th Cir. 1992).

136. *Id.* at 439 ("We conclude that schools may lead the Pledge of Allegiance daily, so long as pupils are free not to participate.").

137. *Id.* at 441 (finding the child had standing due to school attendance laws and the father had derivative standing as the son's guardian).

Pledge meant that all students must recite it.<sup>138</sup> It determined that an examination of the legislative history of the statute did not disclose who is required to recite the Pledge.<sup>139</sup>

The court explained that “[s]chools are entitled to hold their causes and values out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who resist persuasion may feel at odds with those who embrace the values they are taught.”<sup>140</sup> The court argued that there is no reasonable means of not offending at least someone with just about any school activity.<sup>141</sup> If the Pledge was held unconstitutional, the court could not see an end to the attacks.<sup>142</sup>

Ultimately, the court concluded that

so long as the school does not compel pupils to espouse the content of the Pledge as their own belief, it may carry on with patriotic exercises. Objection by the few does not reduce to silence the many who *want* to pledge allegiance to the flag “and to the Republic for which it stands.”<sup>143</sup>

The *Sherman* court chose not to apply the *Lemon* test because it did not consider *Lemon*—which was articulated to evaluate whether the direction of government funds to religious entities violated the Establishment Clause—to be the appropriate standard.<sup>144</sup> Rather, *Sherman* framed the issue as follows: “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?”<sup>145</sup> The court argued that the founding fathers did not treat “ceremonial invocations of God as ‘establishment.’”<sup>146</sup> Furthermore, the Supreme Court has “distinguished ceremonial

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138. *Id.* at 441–45.

139. *Id.* at 443 (discussing the law’s compulsory nature, the court found that “[s]tatements on the floor of the state’s lower chamber may be read either way”).

140. *Id.* at 444.

141. *Id.* (“The diversity of religious tenets in the United States ensures that *anything* a school teaches will offend the scruples and contradict the principles of some if not many persons.”).

142. *Id.* (“An extension of the school-prayer cases could not stop with the Pledge of Allegiance. It would extend to the books, essays, tests, and discussions in every classroom.”).

143. *Id.* at 445.

144. *Id.* (“Of course *Lemon* was not devised to identify prayer smuggled into civic exercises, and its status as a general-purpose tool for administering the establishment clause is in doubt.”). Refer to note 85 *supra* and accompanying text (discussing the *Lemon* test).

145. 980 F.2d 437, 445 (7th Cir. 1992).

146. *Id.* at 445–46.

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references to God from supplications for divine assistance."<sup>147</sup> The court referenced *Lynch* as a case that implied the permissibility of the Pledge.<sup>148</sup> The *Sherman* court further explained that although the Supreme Court's pronouncements on the "under God" portion of the Pledge were dicta, "an inferior court had best respect what the majority says rather than read between the lines."<sup>149</sup> With that, the Seventh Circuit concluded that the Pledge was not unconstitutional.<sup>150</sup>

#### IV. ANALYSIS

##### A. *Application of Relevant Supreme Court Tests*

In order to understand how to analyze the constitutionality of the Pledge, one must first realize that the Supreme Court has stated that there is no one *right* test to be used in determining Establishment Clause violations.<sup>151</sup> The following is a discussion of the tests the Supreme Court may decide to use, including the coercion test, the endorsement test, and the "original understanding" rationale.

1. *Coercion Test.* A likely test the Supreme Court may use is the coercion test, as this was the same test used by the *Newdow II* majority. Such use should allow the inclusion of "under God" within the Pledge. The coercion test provides that the state cannot coerce someone to act, or not act, if it interferes with the free exercise of religion.<sup>152</sup> In *Engel*, the Court held that a school district's policy requiring teachers to lead students in government-composed prayer at the commencement of the school day violated the Establishment Clause.<sup>153</sup> The Court indicated, however, that its ruling was not incompatible with circumstances where "school children and others are officially encouraged to

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147. *Id.* at 446 (noting the Declaration of Independence's acknowledgment of God, including the often quoted: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").

148. *Id.* at 447.

149. *Id.* at 448.

150. *Id.*

151. *See Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.").

152. *See Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448-49 (1988) (citing *Bowen v. Roy*, 476 U.S. 693, 699-700 (1986)) (holding that the building of a road through Native American ritual grounds was not unconstitutional because the Native Americans were not being coerced into doing or not doing anything).

153. *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962).

express love for our country by reciting historical documents . . . which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being."<sup>154</sup> According to the *Engel* Court, those kinds of ceremonial occasions and patriotic exercises do not have "true resemblance to the unquestioned religious exercise" that prayer at commencement did.<sup>155</sup>

This reasoning from *Engel* may also apply to the phrase "under God" in the Pledge. Because the phrase is a permissible recognition of our nation's religious heritage, reciting the Pledge is a permissible patriotic exercise—similar to singing "God Bless America"—and not a religious exercise, such as the recitation of the government-composed prayer in *Engel*.<sup>156</sup> Furthermore, the same point was made in *School District of Abington v. Schempp*.<sup>157</sup> In *Schempp*, Justice Brennan, in concurrence, explained that it had not been demonstrated that

readings from the speeches and messages of great Americans . . . or from the documents of our heritage of liberty, [or] daily recitation of the Pledge of Allegiance . . . may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.<sup>158</sup>

Justice Goldberg, also concurring, commented on the government neutrality required by the Establishment Clause.

[T]he attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the

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154. *Id.* at 435 n.21.

155. *Id.*

156. *See id.*; see also Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 793 (2001). Professor Lupu stated:

These requirements of vocal participation made the intrusion on religious autonomy far more severe than would be the case in a regime involving silent acquiescence alone; to express aloud a religious sentiment is to affirm it or to openly violate one's conscience by uttering what one believes to be a religious falsehood.

*Id.* (noting the presence of government compulsion and psychological pressure in the *Engel* case).

157. 374 U.S. 203 (1963) (holding the requirement to read from the Bible or recite the Lord's Prayer at the beginning of the class day unconstitutional).

158. *Id.* at 281 (Brennan, J., concurring).

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secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but . . . are prohibited by it.

Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so.<sup>159</sup>

Therefore, it appears that the Supreme Court views recital of passages like the Pledge, the Declaration of Independence, and the Gettysburg Address—which all contain references to God—to be patriotic exercises, and not a form of coerced religious expression like those the Court held unconstitutional in *Engel*<sup>160</sup> and *Schempp*.<sup>161</sup>

2. *Endorsement Test.* According to the endorsement test, state action violates the Establishment Clause if the action “convey[s] or attempt[s] to convey a message that religion or a particular religious belief is *avored* or *preferred*.”<sup>162</sup> With the endorsement test in mind, the Supreme Court addressed the addition of “under God” to the Pledge in *County of Allegheny v. ACLU*, concluding that such a phrase was not a government endorsement of religion.<sup>163</sup> The *Allegheny* Court went as far as to remind the reader that its “previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief.”<sup>164</sup> The Court has already implied that the Pledge is valid under the Endorsement Test, therefore if it decides to use this test when evaluating Newdow’s claims, the Pledge will likely pass.

3. *“Original Understanding.”* Another methodology the Supreme Court could decide to employ in deciding the fate of the Pledge is the “original understanding” approach to

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159. *Id.* at 306 (Goldberg, J., concurring).

160. 370 U.S. at 436 (disallowing school encouraged prayer).

161. 374 U.S. at 205 (holding that the requirement to read from the Bible or recite the Lord’s Prayer at the beginning of the class day is unconstitutional).

162. *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989).

163. *Id.* at 602–03.

164. *Id.* (citing *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring)); *id.* at 716–17 (Brennan, J., dissenting).

Establishment Clause issues, which the *Newdow II* majority seemed to ignore.<sup>165</sup> The Supreme Court has applied an “original understanding” approach in evaluating whether government acknowledgments of our nation’s religious heritage are constitutional. The Court used this approach in *Marsh v. Chambers*,<sup>166</sup> allowing Nebraska’s “practice of opening legislative sessions with prayer” led by clergymen.<sup>167</sup> The Court did not apply any of the previously developed Establishment Clause tests.<sup>168</sup> Instead, the Court found that “historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also how they thought that the Clause applied to the practice authorized by the First Congress—their actions reveal their intent.”<sup>169</sup> Because the First Congress passed a bill appointing a chaplain and approved the draft of the First Amendment in the same week, the original understanding of the Establishment Clause cannot find Nebraska’s actions unconstitutional.<sup>170</sup> The *Lynch* Court primarily relied on *Marsh*’s “original understanding” approach in approving the Pledge.<sup>171</sup> The Supreme Court has not repudiated this approach, and it could also be used to determine the Pledge’s constitutionality.

*B. Alternative Arguments to Find the Pledge Unconstitutional*

1. *Extra Protection to States with Vast Religious Diversity.* An argument the *Newdow II* court did not make, but could possibly be considered by the Supreme Court, is that because California has such a diverse population in terms of religious beliefs, its citizens deserve special protection. Historically, California has been recognized for its religious diversity.<sup>172</sup> It

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165. *Newdow v. U.S. Congress*, 328 F.3d 466, 485 (2003) (discussing what it felt were the three applicable tests: the *Lemon* test, the endorsement test, and the coercion test).

166. 463 U.S. 783 (1983).

167. *Id.* at 792–94 (“In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.”).

168. *See id.*

169. *Id.* at 790.

170. *Id.* at 790–91.

171. *See Lynch v. Donnelly*, 465 U.S. 668, 674–77 (1984) (asserting that the phrase “under God” in the Pledge is a “reference to our religious heritage” comparable to recognized references to “Divine guidance” common throughout our nation’s history).

172. *See FERENC MORTON SZASZ, RELIGION IN THE MODERN AMERICAN WEST* 198 (2000) (“California never produced any religious mainstream. From the beginning, the various faiths have all been ‘minority’ faiths, juxtaposed against a dominant secular culture.”); *see also SANDRA SIZER FRANKIEL, CALIFORNIA’S SPIRITUAL FRONTIERS: RELIGIOUS ALTERNATIVES IN ANGLO-PROTESTANTISM, 1850–1910*, at ix–xv (1988) (introducing the various early migrations to California and the diverse religions



continues to have a great deal of tolerance for other faiths beyond Christianity and other monotheistic religious groups.<sup>173</sup> Statistics show that California is more diverse than most states in regard to the variety of religions practiced there.<sup>174</sup> Specifically, Southern California has been recognized as the most religiously diverse area in the world.<sup>175</sup> Nonmonotheistic Buddhists are particularly well represented, with Southern California accounting for forty percent of all Buddhists living in the United States.<sup>176</sup>

California has a diverse religious population, including a great number of faiths that are not monotheistic,<sup>177</sup> and as a result, the Court could view California or the Ninth Circuit differently than the rest of the country. The Supreme Court could adopt a "religious diversity" standard, which would protect areas with significant populations of nonmonotheists and atheists. This would not be the first time the Court used community standards to apply the Constitution differently to different sets of people.<sup>178</sup> Using a geographical standard, the Supreme Court would not be addressing the constitutionality of the Pledge itself, but rather only the Policy,<sup>179</sup> thus it could view the Policy in that particular school district as unconstitutional, without deciding that all similar policies in all areas are unconstitutional as well. This

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associated with them).

173. See Don Lattin, *Boomers Abandoning Mainline Churches: Scholars Record "Market Mentality" About Religion*, S.F. CHRON., Jan. 14, 1995, at A17 (describing the baby boomer generation's search for their own spiritual homes and finding that California has "higher percentages of the total U.S. membership of some nontraditional religions and of nonbelievers" than other states). California has been described as having a "pluralistic religious community." The Center for Religion and Civic Culture, *Many Faiths, One State: Building Bridges of Understanding in California*, at [http://www.usc.edu/dept/LAS/religion\\_online/manyfaiths/aboutus.html](http://www.usc.edu/dept/LAS/religion_online/manyfaiths/aboutus.html) (last visited Mar. 18, 2004).

174. See BARRY A. KOSMIN & SEYMOUR P. LACHMAN, *ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY* 98 tbl.3-2 (1993). To view a sampling of the diversity of a few non-Christian faiths, see The Center for Religion and Civic Culture, *California's Religious Profile*, at [http://www.usc.edu/dept/LAS/religion\\_online/manyfaiths/profile\\_California.html](http://www.usc.edu/dept/LAS/religion_online/manyfaiths/profile_California.html) (last visited Mar. 18, 2004).

175. See Larry B. Stammer, *From Buddhists to Jews to Minor Sects, L.A.'s the Place for Faiths*, L.A. TIMES, June 22, 1998, at A1 ("Southern California has emerged in recent years as the most religiously diverse metropolitan area in the world. . . . 600 distinct religious traditions have been identified in the region."); see also SZASZ, *supra* note 172, at 197-98 (describing the vast variety of religious traditions practiced in the Los Angeles area).

176. Stammer, *supra* note 175.

177. See KOSMIN & LACHMAN, *supra* note 174, at 98 tbl.3-2.

178. See Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1135, 1149-52 (1999) (arguing that regional differences have been recognized by the Court previously, like with the obscenity standard, to accommodate different communities).

179. Refer to note 133 *supra* and accompanying text.

would likely mean, if other policies are challenged, district courts would need to evaluate the “religious diversity” of the school district in question.

2. *“Under God” Language in Pledge Not Old Enough to Be Longstanding Tradition.* Another mode of analysis the Supreme Court could use in ruling the Pledge of Allegiance unconstitutional is based on the relatively short period of time the Pledge has included the words “under God.”<sup>180</sup> In stating that legislative prayers, Thanksgiving proclamations, and “opening Court sessions with ‘God save the United States and this honorable Court’” are ceremonial expressions of our country’s religious heritage that do not offend the Establishment Clause, the Court has relied on the longstanding nature of the practice.<sup>181</sup> Because the Pledge changed less than fifty years ago, the Court might not find its lineage old enough to constitute “ceremonial deism” rather than endorsement of religion.

#### IV. CONCLUSION

It is clear that much of America has rather strong views in support of the Pledge.<sup>182</sup> But many prominent Court decisions, such as *Brown v. Board of Education*<sup>183</sup> and *Texas v. Johnson*,<sup>184</sup> provoked similar public condemnation, but are almost universally accepted as correct interpretations of the Constitution by legal scholars. With regard to *Newdow II*, however, the Constitution supports the public’s knee-jerk opposition to the Ninth Circuit’s decision. Although recitation of the Pledge might make a remote few children feel uncomfortable when the Pledge is recited around them, no one is required to participate in its recitation.<sup>185</sup> Recitation of the Pledge’s phrase “One Nation under God,” which has been commonplace in the nation’s schools for almost fifty years, has not tended to promote a particular religion.<sup>186</sup> As Judge O’Scannlain noted, “generations

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180. The current form of the Pledge has only been around since 1954. Refer to notes 22–24 *supra* and accompanying text.

181. *County of Allegheny v. ACLU*, 492 U.S. 573, 630–31 (O’Connor, J., concurring). *See also Marsh v. Chambers*, 463 U.S. 783, 788 (1983) (emphasizing the fact that “the practice of opening [congressional] sessions with prayer has continued without interruption ever since [1789]”).

182. Refer to Part II.

183. 347 U.S. 483 (1954).

184. 491 U.S. 397 (1989).

185. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding it unconstitutional to compel schoolchildren to recite the Pledge).

186. *See Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 445 (7th Cir. 1992) (“Objection by the few does not reduce to silence the many who *want* to pledge allegiance

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of Americans have grown up reciting the Pledge, [and during that time] religious tolerance and diversity has flourished in this country, and we have become a beacon for other nations in this regard.”<sup>187</sup> The Pledge of Allegiance, as a traditional expression of our religious heritage, should be upheld as constitutional.

*Walter Lynch*

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to the flag ‘and to the Republic for which it stands.’”); *see also* *Newdow v. U.S. Congress*, 328 F.3d 466, 481 (9th Cir. 2003) (O’Scannlain, J., dissenting from the denial of rehearing en banc) (“[A]most *every* cultural practice is bound to offend *someone’s* sensibilities.”); *id.* at 492 n.4 (Fernandez, J., dissenting) (“[I]t is difficult to detect any signs of incipient theocracy springing up since the Pledge was amended in 1954.”).

187. *Newdow*, 328 F.3d at 481 (O’Scannlain, J., dissenting from the denial of rehearing en banc).