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Lost in the Forest of the Establishment Clause: Elk Grove v. Newdow

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There is an old adage that one should not discuss religion or politics in polite conversation for fear of being offensive.\textsuperscript{1} It has been suggested that talking about these topics should be prohibited from the workplace,\textsuperscript{2} schools,\textsuperscript{3} and even by cab drivers conducting their fares.\textsuperscript{4} Indeed, to criticize one's beliefs in these areas may challenge their upbringing, important values, and one's moral guidance for life itself. This past term, the United States Supreme Court ventured into these

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1. See Mrs. John Sherwood, Manners and Social Usages 323 (1897).
3. See Lavine, 279 F.3d at 727 (Reinhardt, J., dissenting)(noting that “such discussions were likely to lead to hard feelings and disruption.”).
two controversial topics, religion and politics. However, the Court seemed to abide by the old adage of avoiding these topics altogether by dismissing the case on procedural grounds rather than reaching the merits of the constitutional question presented.

Undeniably, politics and religion have been joined together in our nation's past. Religious arguments were made to forward such political causes as the abolition of slavery and the Civil Rights movements of the 1950s and 1960s. The government's role and relationship regarding religion was an important concept to the founding fathers during the creation of the Bill of Rights leading to the Establishment Clause of the First Amendment. Many Establishment Clause cases, which link religion and politics, stem from religious interaction within the public educational setting. The current controversy decided by the Court is no different. In its latest endeavor into this realm, the Supreme Court possessed the opportunity to address the constitutionality of the Pledge of Allegiance, particularly the controversial two words, "under God." Specifically, the High Court could have answered the question, "Does a public school policy that requires teachers to lead willing students in the Pledge of Allegiance, which includes the words 'under God,' violate the Establishment Clause of the First Amendment? The Ninth Circuit Court of Appeals answered this question in the affirmative, finding that 'under God' impermissibly coerces a religious act.

Instead of answering whether the Ninth Circuit reached the correct decision based on the Constitution, five of the Supreme Court Just-

5. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004). For purposes of clarity, the general controversy over the Pledge of Allegiance is referred to as Newdow in this article. However, when a specific opinion is discussed indication will be given for that case. This article employs "Newdow III" to indicate the Supreme Court holding, "Newdow I" for the opinion of the Ninth Circuit in Newdow v. United States Congress, 292 F.3d 597 (9th Cir. 2002) and "Newdow II," for the Ninth Circuit's amended opinion in Newdow v. United States Cong., 328 F.3d 466 (9th Cir 2003).
8. U.S. CONST. amend. I.
11. Id.
12. See Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 384 (2003)(explaining the questions which will be considered on appeal).
13. Newdow v. United States Cong., 292 F.3d 597, 608-09 (9th Cir. 2002)("Newdow I"), amended by 328 F.3d 466, 487 (9th Cir. 2003)("Newdow II").
tices avoided the issue by ruling that the plaintiff lacked standing to bring the challenge.\(^{14}\) By choosing to adhere to the old adage for polite conversation, the Supreme Court left an already murky area of constitutional law in jurisprudential limbo. This is true regardless of whether the Court made this finding based on a true desire to enforce the constitutional requirement of standing or, as some allege, the majority merely tried to avoid a controversial issue during an election year.\(^{15}\)

This article provides an in-depth examination of the Newdow case and High Court's opinion. Although only concerning two words, this controversy could have important implications for American jurisprudence for at least three reasons. First, this issue is likely to be revisited by the federal courts, as new challengers with proper standing assuredly will come forward.\(^{16}\) Second, although the amended Ninth Circuit Court opinion that ultimately reached the Supreme Court utilized only the "coercion test,"\(^{17}\) a future case may similarly force the Supreme Court to clarify which test, if any, is appropriate for Establishment Clause analysis.\(^{18}\) Finally, a similar case may force the Supreme Court to define how it will treat "ceremonial deism," those historical practices and references to religion that are so common they may have lost their religious meaning over time. How the High Court treats the "under God" wording in a future case could open the door to other challenges over references to God in public spheres or it could signal an allowance for these types of references.


\(^{15}\) See Linda Greenhouse, 8 Justices Block Effort To Excise Phrase in Pledge, N.Y. Times, June 15, 2004, A1; see also High Court Ducks, SALT LAKE TRIB., June 17, 2004, at A22.

\(^{16}\) See Greenhouse, supra note 15, at A1 (noting an interview with Michael Newdow in which he stated other parents have contacted him about filing similar suits); see also Charlie Savage, "Under God" To Stay in Pledge of Allegiance, THE BOSTON GLOBE, June 15, 2004, at A2.

\(^{17}\) Newdow II, 328 F.3d at 487.

\(^{18}\) See Kent Greenawalt, Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses, 1995 Sup. Ct. Rev. 328 (1995)(defining constitutional "tests" as "a standard of adjudication that is used by courts to determine whether a practice is constitutional or unconstitutional."). In some sense the Ninth Circuit Court of Appeals' first opinion forced the Supreme Court's hand into more clearly defining what test is appropriate for examining Establishment Clause complaints. By originally deciding the case using three different Establishment Clause tests, the Ninth Circuit may have forced the Supreme Court to decide which test, if any, the Supreme Court would apply in future cases. Newdow I, 292 F.3d at 607. Although the amended Ninth Circuit opinion did not use multiple tests, a future circuit court could adopt the method used in Newdow I, thus again forcing the Supreme Court's hand.
Four points may be gleaned from an in-depth study of this case. First, it is clear based on this and prior cases that the Court has abandoned a strict Lemon test for Establishment Clause cases. However, it is unclear which Establishment Clause test, if any, a majority of the justices would adopt. It is this second point that could have been greatly clarified by the Court in Newdow if the Court had reached the merits of the constitutional claim. The third important point is that at least five Justices appear to accept the constitutionality of "ceremonial deism," or those public activities, such as references to God, that indeed recognize religion but may not violate the Establishment Clause. Lastly, given the voting blocs in Newdow, this article surmises Justice Kennedy will be the important swing vote in similar future cases and practitioners and lower court judges may pay close attention to Justice Kennedy in future cases.

Section I of this article provides a brief overview of the Establishment Clause's history in the High Court, with an emphasis on the different types of tests that have been used by the Court and examines the concept of ceremonial deism. Section II explores a brief history of the Pledge of Allegiance. Section III examines the facts surrounding the Newdow case, including the lower court holdings. Section IV looks at the events in the Supreme Court, including the procedural hurdles leading up to the date of oral arguments, a summary of the arguments themselves, and analysis of the Supreme Court's written opinion. Section V then examines the possible future of this area of law and adds some concluding remarks and examination of this case's importance.

I. ESTABLISHMENT CLAUSE HISTORY

Scholars credit Thomas Jefferson with coining a phrase that symbolizes at least the perceived legal standard when it comes to the government establishing a religion. In 1802, Jefferson wrote, "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." 19

For decades, the idea of a "wall of separation" was included in the everyday language of the Establishment Clause lexicon. As has been noted, this phrase has become as common a legal term as "separate but equal" or "reasonable doubt." 20 However, the Supreme Court has

19. Wallace, 472 U.S. 38, 91-92 (Rehnquist, J., dissenting)(quoting 8 WRITINGS OF THOMAS JEFFERSON 113 (H. Washington, ed. 1861)(emphasis added); see also Lopez, supra note 6, at 167.
20. Lopez, supra note 6, at 168.
at times climbed over that wall, or some would say even taken it apart brick by brick.\textsuperscript{21}

\textit{Pre-Lemon Establishment Clause History}

The Establishment Clause appears in the First Amendment to the United States Constitution, as the very first line of the Bill of Rights, and states, "Congress shall make no law respecting an establishment of religion."\textsuperscript{22} However, during the Colonial Era many thought the Establishment Clause limited only the national government from inhibiting a state's right to establish religion. This fact has been noted by the Court itself, such as in Justice Black's 1947 opinion for the Court in \textit{Everson v. Board of Education}.\textsuperscript{23} In fact, not until \textit{Everson}, did the High Court incorporate the Clause to limit state governments from establishing religions through the Fourteenth Amendment, over a century and a half after ratification.\textsuperscript{24} Justice Black wrote the opinion, stating:

\begin{quote}
The 'establishment of religion' clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and \textit{vice versa}.\textsuperscript{25}
\end{quote}

Justice Black's strong words would seem to indicate that the Court would not tolerate any attachment or association between government

\textsuperscript{21} See, e.g., Charles Warren, \textit{Comment: No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence}, 54 \textit{Mercer L. Rev.} 1669, 1691-93 (2003). In his comment, Warren argues that the current Supreme Court has become more accommodationist, allowing more instances of public religious practices causing harm both to individuals and society.

\textsuperscript{22} \textit{U.S. Const. amend. I.}

\textsuperscript{23} \textit{Everson}, 330 U.S. at 9-11 (noting that individuals in the colonies were jailed for religious beliefs and "compelled to pay tithes and taxes to support government-sponsored churches"). \textit{See also} Michael W. McConnell, \textit{The Origins and Historical Understanding of Free Exercise of Religion}, 103 \textit{Harv. L. Rev.} 1409, 1437 (1990)(noting that several states had established ties with religious organizations at the time of the First Amendment's passage, including direct "legal and financial support for the church.").

\textsuperscript{24} \textit{Everson}, 330 U.S. at 14-15.

\textsuperscript{25} \textit{Id.} at 15-16.
and religious institutions. However, possibly foreshadowing the decades of debate and confusion that followed, even with these strong words a majority of the Court upheld a state-government policy that seemed to, at least indirectly, support a religious institution.\textsuperscript{26} The policy at issue in \textit{Everson} involved a New Jersey statute that allowed a local school district to reimburse parents for transportation costs to take their children to Catholic parochial schools.\textsuperscript{27} A bare majority of the Court upheld the policy, although there was strong dissent joined by four justices.\textsuperscript{28}

\textit{Everson} marked the beginning of the modern era in Establishment Clause cases and opened the door to a bevy of litigation. The next year, the Court confronted the issue of "release time," a practice that allowed students voluntary time out of class to attend religious studies on another part of the public school's campus.\textsuperscript{29} However, unlike the New Jersey reimbursement policy, a nearly unanimous Court in \textit{McCollum} found that release time for religious study on public school grounds violated the Establishment Clause.\textsuperscript{30} The back and forth process of trying to draw the constitutional "line in the sand" continued with \textit{Zorach v. Clauson} in which the Court, four years after deciding \textit{McCollum}, ruled that a similar release time policy was permissible if the religious instruction was held off campus.\textsuperscript{31} Nearly a decade later, the Court appeared to further lower the wall of separation as it upheld a Maryland state law, on a rational basis-type test, that required businesses to close on Sundays.\textsuperscript{32} The Court upheld the policy based on the reasonable secular purpose of providing a day of rest, even though that day coincided with the traditional Christian day of rest.\textsuperscript{33}

The Supreme Court's tennis match with the Establishment Clause continued as it decided a major case in 1962, \textit{Engle v. Vitale}, one year

\begin{itemize}
\item \textsuperscript{27} \textit{Everson}, 330 U.S. at 17. \textit{See also} DAVID O'BRIEN, \textit{CONSTITUTIONAL LAW AND POLITICS}, 665-66 (3d ed. 1995).
\item \textsuperscript{28} \textit{Everson}, 330 U.S. at 44-45 (Rutledge, J., dissenting)(stating "[d]oes New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it . . . . Here parents pay money to send their children to parochial schools and funds raised by taxation are used to reimburse them . . . . It aids them in a substantial way to get the very thing which they are sent to the particular school to secure, namely, religious training and teaching.").
\item \textsuperscript{29} \textit{McCollum v. Bd. of Educ.}, 333 U.S. 203, 205 (1948).
\item \textsuperscript{30} \textit{Id.} at 209.
\item \textsuperscript{31} 343 U.S. 306, 311 (1952).
\item \textsuperscript{32} McGowan v. Maryland, 366 U.S. 420 (1961).
\item \textsuperscript{33} \textit{Id.} at 426.
\end{itemize}
after McGowan.\textsuperscript{34} At issue in \textit{Engle} was a public school's policy of beginning each day with a voluntary nondenominational prayer written by the State Board of Regents.\textsuperscript{35} In finding the school prayer unconstitutional, Justice Black, writing for the Court, noted

[W]e think that the constitutional prohibition . . . must at least mean that in this country it is no part of the business of government to compose official prayers for any group . . . . There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied by the Regents' prayer.\textsuperscript{36}

Justice Black's opinion also expressed the view that the prayer was not saved by its limitations. "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance . . . is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause . . . ."\textsuperscript{37} Justice Stewart, writing the lone dissent, noted the long history of religion in the United States. He compared the prayer to being as harmless as the opening of Congress with a prayer or opening the Court with "God save the United States and this Honorable Court,"\textsuperscript{38} arguments that would continue through the current debate and influence at least some members of the Court in the Newdow case.

Following \textit{Engle}, the Court ruled on the voluntary reading of Bible verses and the recitation of the Lord's Prayer each day before the beginning of class in \textit{Abington School District v. Schempp}.\textsuperscript{39} Similar to \textit{McCollum} and \textit{Engle}, a nearly unanimous Court agreed that these practices violated the Constitution, with only Justice Stewart dissenting.\textsuperscript{40} These decisions also laid out the now familiar standard that a law must have a secular purpose and a primary effect that neither advances nor inhibits religion.\textsuperscript{41}

Following the \textit{Schempp} decision, the Court unanimously struck down an Arkansas policy that banned the teaching of evolution in the classroom.\textsuperscript{42} At this point, the Supreme Court, under Chief Justice Warren, had reinforced the wall of separation and perhaps built it higher as the Court "pushed constitutional law in the direction of

\textsuperscript{34} 370 U.S. 421 (1962).
\textsuperscript{35} \textit{Engle}, 370 U.S. at 422.
\textsuperscript{36} \textit{id.} at 425, 430.
\textsuperscript{37} \textit{id.} at 430.
\textsuperscript{38} \textit{id.} at 446 (Stewart, J., dissenting).
\textsuperscript{39} 374 U.S. 203 (1963).
\textsuperscript{40} \textit{id.} at 208.
\textsuperscript{41} \textit{id.} at 222.
\textsuperscript{42} Epperson v. Arkansas, 393 U.S. 97 (1968).
strict neutrality.” However, the Court’s ad hoc approach failed to provide consistent rulings or clear standards for Establishment Clause litigation. The Supreme Court handed down “seemingly irreconcilable” decisions that would strike down government support of religion in one case while appearing “accommodationist,” or tolerant of such support, in other decisions. However, with a change of membership, the Court attempted to clarify the Establishment Clause jurisprudence with the Lemon test.

A “New Test”: Lemon v. Kurtzman

By 1971, the Supreme Court had experienced significant change from its membership just three years earlier when a unanimous court decided Epperson. In attempting to fulfill his campaign promise of appointing more conservative justices, President Nixon made several changes to the Court’s dominant coalition. Arguably, the most important change was the nomination of Chief Justice Warren Burger, who tried to lessen the restrictions of state support of religious activities and practices. Although the Chief Justice was unable to assemble a stable coalition for some of his causes, he was able to establish a specific test for the Court to utilize in Establishment Clause cases which became know as the Lemon test. In Lemon v. Kurtzman, petitioners challenged laws from Pennsylvania and Rhode Island that

43. O’BRIEN, supra note 27, at 657.
45. See O’BRIEN, supra note 27 at 1521-24 (listing Justices by date of service). Between 1968 and 1971 Chief Justice Warren and Justices Black, Harlan, and Fortas had been replaced on the Court by Chief Justice Burger, and Justices Black, Rehnquist, and Blackmun.
47. See Kobylka, supra note 44, at 550 (noting that Chief Justice Burger assigned himself the majority opinion in twelve (43%) of the twenty-eight Establishment Clause cases decided during the Burger Court, including Lemon). The Chief Justice’s influence, or attempted influence, may be viewed from the fact that a normal distribution would be about three cases per Justice (about 10% of the opinions), if opinion-writing tasks for the Establishment Clause cases were evenly distributed. Even considering a continuous voting bloc of only five Justices, if evenly distributed, each of those five Justices would be responsible for five or six opinions a piece (about 18 to 21%). Burger, however, contributed double that amount.
48. Id. at 548.
50. Two other cases were consolidated with Lemon: Earley v. DiCenso and Robinson v. DiCenso.
allowed both direct and indirect funding to private religious based schools. The Chief Justice, by combining various criteria that had been used in prior cases, created a three prong test to determine the constitutionality of a challenged law or policy. To pass constitutional scrutiny, the policy must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster “excessive government entanglement with religion.” In striking down the Pennsylvania and Rhode Island statutes, Chief Justice Burger determined that these policies failed the third prong of excessive entanglements. He noted the continued involvement over annual appropriations and that future conflicts surrounding the programs could cause “political division[s] along religious lines [which] was one of the principal evils against which the First Amendment was intended to protect.”

Although the pro-religion policies were not allowed to continue in Lemon, the Lemon test and its three prongs did open the door for some other programs to survive constitutional scrutiny that may have been struck down under prior approaches. Chief Justice Burger laid out precisely what states could do in order to hurdle the wall of separation. While Lemon may have been the most comprehensive and thorough Establishment Clause opinion of its time, what appeared to be a clear three part test was all but opaque as the murky waters of Establishment Clause jurisprudence continued to deepen.

Post-Lemon: New Tests or Lemon’s Revision?

Following Lemon, the Court continued to go back and forth, trying to draw the line over unconstitutional government conduct. Voting coalitions changed as some policies were allowed to stand while others were struck down. Practices, such as state-supplied bond money for non-religious buildings at religious schools and the loaning of textbooks from public to private religious schools, were found constitutionally permissible. However, state-funded tuition rebates for

51. Lemon, 403 U.S. at 606.
54. Id. at 620-21.
55. Id. at 622.
56. See Lopez, supra note 6, at 185.
57. See Kobylka, supra note 44, at 555.
attending religious based schools and state funds for religious schools' field trips and classroom equipment were deemed unconstitutional.

As the 1970s moved into the 1980s, the ball continued to bounce back and forth as the Court struggled with the appropriate standards, with Lemon appearing to lose support within the Court. Direct reimbursements to religious schools for record keeping expenses were not allowed in one case, but were upheld where the record keeping was mandated by the state in another case. These conflicts have induced current Justices on the Court to create and advocate at least two, and possibly as many as six, Establishment Clause tests other than Lemon. At least two of these new tests, the "endorsement test" and the "coercion test" have gained some support, although it is unclear where any majority of the Court may actually stand.

The endorsement test was first proposed by Justice Sandra Day O'Connor in a concurring opinion in Lynch v. Donnelly. Lynch concerned a city's Christmas display that included various lights, a Santa Claus, and a nativity scene or creche. Residents brought suit, stating the scene affiliates the city with the Christian religion. The Court, through Chief Justice Burger's opinion, held the creche did not violate

65. See Steven Gey, "Under God," The Pledge of Allegiance, and Other Constitutional Trivia, 81 N.C. L. Rev. 1865, 1883 n.67 (2003); Philip 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, 89-90 (2002). Gey cites six different tests forwarded by current members of the Court. These include the Lemon test; the endorsement test; a narrow view of the coercion test that would be more lenient to government actors and only prohibit direct coercion; a broader coercion test which would prohibit all coercion, no matter how subtle, and government policies that encourage private coercion of religion; a non-preferentialist approach where government can favor "religion" in general as long as it does not favor any particular religion; and a standardless, case-by-case approach. Yannella suggests even another, more recent test bringing the total seven, including Lemon. That test, asserted by Justice Thomas in Mitchell v. Helms, 530 U.S. 793, 809 (2000) noted as the "neutrality test" appears to be merely a rewording or renaming of the "non-preferentialist" approach and would hold that "aid that is offered to a broad range of groups or persons without regard to their religion" would be upheld as neutral and not indoctrinating any religion.
67. Id. at 671-72.
the Constitution, noting that it served a secular purpose of depicting "the historical origins of this traditional event long recognized as a national holiday." 68 Justice O'Connor took the opportunity to cite the shortcomings of the Lemon test and to suggest a new rationale. She had quickly established a leadership role after coming to the Court and attempted to create a middle ground through the endorsement test. 69 In effect, she consolidated the purpose and effect prongs of the Lemon test. "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." 70 Justice O'Connor noted that a policy is not unconstitutional if it merely has the effect of advancing or inhibiting religion, as long as the government is not sending a message of endorsement. 71

Although just a concurrence, the endorsement test received further support from the Court's opinion in Allegheny County v. American Civil Liberties Union. 72 Allegheny also concerned holiday displays, including a creche and a menorah display. In writing the opinion for the Court, Justice Blackmun noted "five Justices in concurrence and dissent in Lynch agreed upon the relevant constitutional principles: the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs . . . " 73

Aside from the Lemon and endorsement tests, the Court has also recognized a "coercion test." In Lee v. Weisman the Court determined the constitutionality of a public school's practice of clergy-led prayers at graduation ceremonies. 74 Writing for a bare majority of the Court, Justice Kennedy struck down the school's policy, noting that "subtle coercive pressures exist[ed]" such that "the student had no real alternative which would have allowed her to avoid the fact or appearance of participation." 75 Kennedy did not overturn the Lemon nor the endorsement tests, but instead looked to the coercive effects the policy had on the students. In a strong dissent authored by Justice Scalia and joined by Chief Justice Rehnquist and Justices White and Thomas, Scalia noted the historical importance of prayers in official ceremo-

68. Id. at 680.
71. Id.
73. Id. at 597.
74. 505 U.S. 577 (1992)(5-4 decision).
75. Id. at 588.
nies.\textsuperscript{76} Scalia believed there was no coercion in this case because opposing individuals were free to not participate, and in his view coercion only occurs when those that do not participate face some type of sanctions "by force of law."\textsuperscript{77}

In the current "under God" controversy, the question of which one or combination of tests the Supreme Court should use may have been more important than the outcome of the case itself. Although it is clear that the Court may no longer rely solely on \textit{Lemon}, of the seven possible tests recently forwarded by current members of the Court,\textsuperscript{78} if any one test had been chosen and utilized by the Court, then \textit{Elk Grove} v. \textit{Newdow} could have reestablished the landscape for this bewildering area of law. Yet by avoiding the constitutional issue in this case, the High Court provides no more clarification in this area of jurisprudence.\textsuperscript{79} This outcome will no doubt contribute to the confusion with the Establishment Clause and may have given some credibility to one current Justice's public description of this area of jurisprudence as "embarrassing."\textsuperscript{80} This makes the job of practitioners and lower court judges more difficult as they lack the significant guidance needed from the High Court.

\textit{Ceremonial Deism}

Aside from the aforementioned cases defining the Establishment Clause's treatment by the Court, another line of relevant cases deals with the idea of "ceremonial deism." Ceremonial deism generally

\textsuperscript{76} Id. at 633-36 (Scalia, J., dissenting).
\textsuperscript{77} Id. at 641.
\textsuperscript{78} See supra note 65.
\textsuperscript{79} Other recent cases also provide little guidance through the Establishment Clause jungle. In one recent case concerning student-led prayers before high school football games, the Court appeared to use pieces of the \textit{Lemon}, endorsement, and coercion tests. \textit{Santa Fe Indep. Sch. Dist. v. Doe}, 530 U.S. 290, 299-302, 308, 314-15 (2000). In another case decided this term, concerning both the Free Exercise Clause and the Establishment Clause, the majority opinion failed to use any previously recognized Establishment Clause test. See \textit{Locke v. Davey}, 540 U.S. 712 (2004). In \textit{Locke}, the issue surrounded Washington State's Promise Scholarship which provided college funding to citizens with the stipulation that the money could not be used to pursue a degree in theology, although it could be used at non-public religious colleges. Davey received the scholarship, was seeking a degree in theology, was informed he could not use the scholarship for a theology degree, and sued the state on both Free Exercise and Establishment Clause grounds. Chief Justice Rehnquist, writing for the majority, upheld the state's practice and said it did not violate either clause. Although more focus was on the Free Exercise Clause, when dealing with the Establishment Clause the Chief Justice's language did not signify any specific test.
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refers to long held practices that may contain some religious content but may in fact be constitutionally permissible.\textsuperscript{81} The idea incorporates two arguments: that some practices common in society, containing some reference to religion, merely show religion's place in the founding of the nation and therefore are more akin to historical statements, or the message is so vague and repeated so often that it loses its religious message altogether. This definition stems largely from the Court's first use of the phrase by Justice Brennan, dissenting in \textit{Lynch}.\textsuperscript{82} Justice Brennan noted that some practices "have lost through rote repetition any significant religious content."\textsuperscript{83} Interestingly for the present debate, Justice Brennan included "references to God contained in the Pledge of Allegiance" as one of those practices that has lost its religious content.\textsuperscript{84} Although not using the term ceremonial deism, in the same case Justice O'Connor noted that such practices as printing "In God We Trust" on coins and opening the Court sessions with "God save the United States . . ." may acknowledge religion, but serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.\textsuperscript{85}

The term, however, has not been adopted in a majority opinion by the Court.\textsuperscript{86}

In \textit{Marsh v. Chambers} the Supreme Court upheld the Nebraska state legislature's practice of opening each session with a prayer.\textsuperscript{87} Similar to the Christmas displays at issue in \textit{Lynch}, the Court found

\begin{itemize}
  \item \textsuperscript{81} See, e.g., Steven B. Epstein, \textit{Rethinking The Constitutionality of Ceremonial Deism}, 96 \textit{COLUM. L. REV.} 2083, 2091 (1996)(noting Yale Law School Dean Walter Rostow's 1962 lecture in which he reportedly defined acts of ceremonial deism as a "class of public activity, which . . . could be accepted as so conventional and uncontroversial as to be constitutional."); Arnold H. Loewy, \textit{The Positive Reality and Normative Virtues of a "Neutral" Establishment Clause}, 41 \textit{BRANDEIS L.J.} 533, 541 n.60 (2003).
  \item \textsuperscript{82} \textit{Lynch}, 465 U.S. at 716 (1984)(Brennan, J., dissenting). See also Epstein, supra note 81, at 2091-94 (citations omitted).
  \item \textsuperscript{83} \textit{Lynch}, 465 U.S. at 716 (Brennan, J., dissenting).
  \item \textsuperscript{84} Id.
  \item \textsuperscript{85} Id. at 693 (O'Connor, J., concurring). Chief Justice Burger, writing for the majority in \textit{Lynch}, also noted that the Pledge of Allegiance contains religious references as one of the many examples of official references to the value of Divine guidance. \textit{Id.} at 676.
  \item \textsuperscript{86} See Yannello, supra note 65, at 79, 93.
  \item \textsuperscript{87} 463 U.S. 783 (1983).
\end{itemize}
that the practice was acceptable based in part on the long standing tradition and historical acceptance of the practice and that it had become "part of the fabric of our society." Although not using the specific term, the Court upheld the legislative prayer on what could be described as ceremonial deism grounds of historical usage and religious vagueness.

Ceremonial deism, as can be expected, has been criticized on both sides of the debate. On one hand, allowing certain religious references in public ceremonies could lead to intolerance and ostracism of individuals who may not share such religious beliefs, or any religious beliefs at all. These individuals could radiate into insular groups excluding themselves from other aspects of the public sphere and perhaps make them lose respect for the entire political and legal system. Even if facially neutral toward religion, some have argued that all public religious acts are in some way preferential. Further, one can easily imagine a slippery-slope effect where more religious activities become incorporated into public activities, creating an almost subconscious or subliminal establishment of religion.

On the other hand, to say that terms such as "under God" have lost their religious meaning may undermine the integrity of religion and diminish the ritualistic and symbolic importance of such terms. One can imagine other phrases in our lexicon that have similarly lost some of their meaning due to vast repetition. For example, when a store check-out clerk says "have a nice day" to the three-hundred customers that pass through, does any customer truly feel the well-wishes of that person or has the phrase merely become so common that it is almost, if not totally, ignored? In either event, an appeal to ceremonial deism appears to satisfy neither side of the debate.

The Double-Edged Sword of History

While ceremonial deism is tied partly to an appeal to history, history has also been a means for some practices to be struck-down as

88. Id. at 792.  
89. See Warren, supra note 21, at 1697-1706 (2003).  
90. Hall, supra note 26, at 81.  
91. See Hall, supra note 26, at 56 (noting that, at least for public prayers, "[e]very prayer is preferential, even so called 'nondenomational' or 'nonsectarian' prayers . . . . At best, they create majority support by appealing to a broader coalition of religious faiths.").  
92. See Thomas C. Berg, The Pledge of Allegiance and the Limited State, 8 Tex. Rev. L. & Pol. 41, 48 (2003)(noting that making these words routine may "[empty] religious phrases of their religious meaning. If that is the price of upholding religious elements in government ceremonies, it is not worth paying.").
unconstitutional. The Supreme Court has examined the legislative history of some challenged statutes and if the Court found a religious intent in the passage of the statute, the Court used that intent to find a constitutional violation. A good example of this practice involved the Court’s ruling in Wallace v. Jaffree.\(^3\) Wallace concerned an Alabama statute that required each school day to begin with a moment of silence for “meditation or voluntary prayer.”\(^4\) Looking at the “secular purpose” prong of the Lemon test, the Court examined the legislative history of the statute and found several instances of the legislature’s religious intent in passing the statute, rather than the required secular purpose.\(^5\) Part of the legislature’s religious intent was also shown by the fact that the statute had originally been enacted without the “voluntary prayer” language.\(^6\) This change indicated to the Court “that the State intended to characterize prayer as a favored practice.”\(^7\) Thus, while history and tradition may insulate some practices from constitutional scrutiny under the rubric of ceremonial deism, the legislative history may in fact show a practice or statute to be incompatible with the Constitution.

II. History of the Pledge of Allegiance

In the late 1800s, many fraternal societies and groups were forming with largely immigrant memberships.\(^8\) To diminish their status as immigrants and to promote group unity, many of these groups became publicly patriotic, often using the American flag as a key symbol.\(^9\) Partly due to this wave of flag usage, in 1892 Francis Bellamy wrote what is today known as the “Pledge of Allegiance” which was first published in a magazine called The Youth’s Companion.\(^10\) Originally, the

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94. Id. at 40.
95. Id. at 56-57 (noting the Court found that the bill’s sponsor “inserted into the legislative record . . . a statement indicating that the legislation was an ‘effort to return voluntary prayer’ to the public schools.” The sponsor also testified at the District Court level that he had “no other purpose in mind” when sponsoring the statute other than advancing prayer in school.).
96. Id. at 60.
97. Id.
99. Id.
100. See Gey, supra note 65, at 1874.
Pledge did not mention the words "under God." Congress adopted these words, as written by Bellamy, as the official Pledge of Allegiance by statute in 1942. In 1881, a New Haven, Connecticut Catholic-based fraternal organization called the Knights of Columbus held their first meeting. The group selected Christopher Columbus as their namesake to emphasize that the roots of American society stemmed from its discovery by the heroic Catholic explorer. Within twenty-five years, the organization had grown tremendously and possessed members in every state. In reaction to anti-Catholic sentiment, the Knights of Columbus' patriotic expressions increased, as patriotism became one of the group's four main principles. The Knights of Columbus strongly attacked communism and the American Communist Party, which it viewed as being anti-Catholic, a "Satanic Scourge," and leading to the "decline in the moral fiber in America." 

Out of their patriotism and as a showing against communism, the Knights of Columbus began adding the phrase "under God" during the recitation of the Pledge in their ceremonies. By 1951, the Board of Directors of the Knights adopted the new wording and mandated that all official functions include the new language. In 1952, the Knights of Columbus began lobbying Congress and President Eisenhower to amend the language of the Pledge to include "under God." Appropriately, on Flag Day, June 14, 1954, President Eisenhower signed a bill into law that added the "under God" language to the Pledge.

101. See id. at 1875. As originally written, the Pledge stated, "I pledge allegiance to my flag and to the Republic for which it stands- one nation indivisible - with liberty and justice for all." (emphasis added). 


104. See KAUFFMAN, supra note 98, at 2.

105. KAUFFMAN, supra note 103, at 1.

106. See KAUFFMAN, supra note 98, at 2, 5-7, 14, 19 (noting the four principles as unity, charity, fraternalism, and patriotism). 

107. KAUFFMAN, supra note 103, at 294, 360, 363-65 (noting that the Knights of Columbus conducted several activities in their efforts to thwart the spread of communism in the United States, including producing a series of radio broadcasts indicating the evils of communism and publicly supporting Senator Joseph McCarthy's anti-communist activities from 1950-1953). 

108. KAUFFMAN, supra note 98, at 123.

109. Id.

110. Id. at 124; see also Newdow I, 292 F.3d at 610.
The legislative history of the Pledge’s alteration is rife with reference to religion as the basis for the change, largely in connection with the threat of communism in the United States. Committee reports and floor debates demonstrate many of these references. As one report stated:

Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying the concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights . . . [T]he 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 ...  

In a speech following the passage of the change, President Eisenhower also noted the importance of the religious content as he characterized the change as “reaffirming the transcendence of religious faith in America’s heritage and future.”  

Unlike public prayers, the Pledge of Allegiance has rarely been challenged in the courts or examined by legal scholars, until recently. Since its codification as the official Pledge, the Supreme Court has ruled on its constitutionality in one clear instance with regards to school children, although this was prior to the addition of the “under God” language. In *West Virginia State Board of Education v. Barnette*, a resolution of the state board of education required all teachers and students to say the Pledge of Allegiance each school day. Those students who refused could face expulsion plus the government could charge their parents, subjecting them to fines or even imprisonment. Writing for the majority, Justice Jackson looked at the coercive nature of requiring the Pledge recitation, indicating that the school cannot force patriotism or nationalism on its students. Justice Jackson noted

112. See Gey, supra note 65, at 1878.
113. Hall, supra note 26, at 40.
114. 319 U.S. 624, 625 (1943). Prior to *Barnette*, the Supreme Court did rule on the constitutionality of a city ordinance that compelled students to salute the flag. In *Minersville Sch. Dist. v. Gobits*, 310 U.S. 586 (1940), the Court upheld the city ordinance as constitutional, but this was prior to the passage of now codified 4. U.S.C. § 4, making the Pledge of Allegiance the official pledge and before the Establishment Clause was incorporated to state government action in *Everson*.
116. Id. at 641-42.
Authority here is to be controlled by the public opinion, not public opinion by authority... If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Although this case involved the Pledge, it is important to note that it did not involve voluntary pledges of allegiance nor did it concern religious messages in the Pledge. Because the case dealt with forcing political ideas and not religious ideas onto the students no Establishment Clause analysis arose. Since the "under God" phrase had not been added to the Pledge at the time of the Barnette decision, the case provides an important resource for analysis, but was not binding precedent in the current controversy.

Another case directly on point, but from a lower court, stems from the Seventh Circuit Court of Appeals. In Sherman v. Community Consol. School Dist. 21 of Wheeling Township, the Seventh Circuit was called upon to answer the exact same questions as in the Newdow case. Unlike the Ninth Circuit, however, the Seventh Circuit found that the "under God" phrase of the Pledge did not violate the Constitution. The Seventh Circuit did not resort to the Lemon test, or any test for that matter. The Seventh Circuit looked more at the history of religious practices and concluded that the Pledge is a patriotic exercise in which "whatever may have been their origins, no longer have a religious purpose or meaning." Thus, the Seventh Circuit used a more general ceremonial deism analysis to find that this practice, as dicta from Supreme Court cases has stated, is not in violation of the Establishment Clause.

III. Facts of Newdow

The Victim, Michael Newdow

Almost as controversial as the question of religion's place in society is the respondent himself, Dr. Michael Newdow. Newdow not only

117. Id. at 641.
118. 980 F.2d 437 (7th Cir. 1992).
119. See id.
120. Id. at 445 (noting that at least four current justices have voted to eliminate and one other expressed its doubts about the Lemon test, therefore the Circuit Court was "not disposed to resolve the case by parsing Lemon.").
121. Id. at 447.
122. Id.

http://scholarship.law.campbell.edu/clr/vol27/iss1/1
holds a medical degree but also a law degree. An avowed atheist, Newdow brought the same complaint about the Pledge of Allegiance in the state of Florida, but his case was summarily dismissed. Newdow has admitted that suing the government is somewhat of a hobby, and admits that to him "[i]t's a cool thing to do. Everyone should try it."

Newdow was criticized for merely grandstanding in his daughters' name. Critics pointed to his original denial of being the child's father and his lack of involvement in her life until the chance of suing the government in her name arose. Newdow made no regrets that this was largely his cause. When asked at "what point did your daughter . . . say she was ostracized for not saying the Pledge," Newdow answered

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124. See Newdow v. United States, 207 F.3d 662 (11th Cir. 2000)(affirming the ruling for the Southern District of Florida, 98-06585-CIV-UUB without a published opinion); see also, Chris Taylor, Talking with Michael Newdow, TIME, January 29, 2002. The Pledge, however, is not Dr. Newdow's only line of assault on government action and the Establishment Clause. Newdow also sued President George W. Bush, arguing that the inclusion of a prayer during the 2001 presidential inauguration violated the separation of church and state. As with his first case over the Pledge, Newdow's claim was dismissed by the Federal District Court, a decision subsequently upheld by the Court of Appeals, which found that Newdow lacked sufficient injury to bring an action. See Newdow v. Bush, No. 02-16327, 89 Fed. Appx. 624, 2004 US APP LEXIS 3452 (9th Cir. 2004).

125. See Taylor supra note 124.

126. Litigant Explains Why He Brought Pledge Suit, TALKBACK LIVE (CNN television Broadcast, June 26, 2002), available at http://www.cnn.com/2002/LAW/06/26/Newdow.cnna.index.html (last visited Nov. 6, 2004). Among Newdow's other "hobbies" include a desire to see "In God We Trust" removed from all currency and to replace gender-based pronouns such as "he" and "she" with a gender-neutral pronoun of his own creation, "ree." Taylor, supra note 124. He also has been selling a music compact disc of his own singing and guitar playing to help finance his legal causes. See Pledge of Allegiance Supreme Court Case, RELIGION AND ETHICS NEWS WEEKLY, Feb. 27, 2004, available at http://www.pbs.org/wnet/religionandethics/week726/cover.html (last visited Nov. 6, 2004).

127. See Lane, supra note 123 at A01. In the article, Lane cites Newdow's statements from court documents in the custody suit with the child's mother, Sandra Banning. Lane notes that "He (Newdow) has asserted in court that the child was conceived when Banning forced him to have sex during a trip to Yosemite National Park." Banning also said that Newdow tried to keep the paternity a secret by introducing them as "my friend Sandy and her daughter." Newdow has furnished housing in California for Banning and their daughter, although he did evict Banning in 1999 after the two had an argument. Banning also noted that "each month his child-support checks arrive with the notation 'Under Protest.'"
My daughter is in the lawsuit because you need that for standing. I brought the case because I am an atheist and this offends me, and I have the right to bring-up my daughter without God being imposed into her life by her school teachers. So she did not come and say she was ostracized.128

For his efforts, Newdow received death threats129 and was criticized by public officials.130 On the other side, he has been held as a hero to atheists’ causes and regarded by some as the true champion of the First Amendment.131

Lower Court Holdings

Michael Newdow’s current “hobby” against the government began in the Eastern District of California. After a federal Magistrate Judge recommended dismissal on May 25, 2000,132 the case was headed by District Court Judge Edward J. Schwartz, who dismissed Newdow’s complaint.133 Newdow appealed to the Ninth Circuit Court of Appeals, which filed the opinion of the three judge panel on June 26, 2002 (Newdow I).134 However, this original opinion was later modified by the Ninth Circuit (Newdow II).135

Judge Alfred T. Goodwin, a Nixon appointee,136 wrote the majority opinion and was joined by Judge Stephen Reinhardt.137 Both opinions established that Newdow had standing to bring the suit under “his right to direct the religious education of his daughter.”138 Although the Ninth Circuit originally ruled on the constitutionality of the 1954 Act of Congress that added the phrase “under God,”139 in the amended opinion, the majority limited its analysis to the school’s action of administering the Pledge and withdrew the issue of the con-

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128. TALKBACK LIVE, supra note 126.
129. See Jessica Reaves, Person of the Week: Michael Newdow, TIME, June 28, 2002.
130. See Lane, supra note 123, at A01 (quoting Federal Court of Appeals Judge, Dairmund O'Scannlain who said Newdow was “seeking a right to be fastidiously self-indulgent and intolerant.”).
132. See Newdow I, 292 F.3d at 601.
133. See id.
135. Newdow II, 328 F.3d 466.
136. See Reaves, supra note 129.
137. See Newdow II, 328 F.3d 466; Newdow I, 292 F.3d 597.
138. Newdow I, 292 F.3d at 602; Newdow II, 328 F.3d at 485.
139. Newdow I, 292 F.3d at 602 (stating “[a]lthough the district court lacks jurisdiction over the President and the Congress [due to separation of federal powers], the question of the constitutionality of the 1954 Act remains before us.”).
stitutionality of the 1954 Act.\textsuperscript{140} This effectively limited the holding of the Ninth Circuit in that it would have only excluded the Pledge from school recitations, but would have left the Pledge open for use at other public ceremonies. The \textit{Newdow I} ruling may have brought into question the use of the Pledge in any public ceremony since the Ninth Circuit found the Pledge \textit{as rewritten} by the 1954 Act was unconstitutional, rather than finding the mere use of the Pledge in one instance unconstitutional, as it did in \textit{Newdow II}.

The amended opinion was further watered-down by the Establishment Clause analysis utilized in \textit{Newdow II}. In \textit{Newdow I}, the court determined that three tests had been used by the Supreme Court, the \textit{Lemon} test, the endorsement test, and the coercion test, and that in \textit{Santa Fe v. Independent School District}, the Supreme Court employed all three.\textsuperscript{141} The court stated it was “free to apply any or all of the three tests, and to invalidate any measure that fails any one of them.”\textsuperscript{142} The opinion examined the Pledge under all three tests and found that it failed each one.\textsuperscript{143} The circuit court held that the Pledge failed the first prong of the \textit{Lemon} test, in that it lacked secular purpose, based on the legislative history of the 1954 change.\textsuperscript{144} The Ninth Circuit further held that the Pledge failed both the endorsement\textsuperscript{145} and coercion tests.\textsuperscript{146}

\begin{itemize}
  \item \textsuperscript{140} Newdow II 328 F.3d at 490 (stating “[i]n addition to the relief that Newdow seeks against the school district—relief to which he is entitled—Newdow seeks a declaration as to the constitutionality of the 1954 Act. The district court did not discuss that question because it dismissed Newdow’s complaint on the basis of its holding that the school district’s policy did not violate the First Amendment. Given our contrary holding, we must consider whether to grant Newdow’s claim for declaratory relief as to the Act. Normally, whether to decide a claim for declaratory judgment is left to the discretion of the district court . . . We doubt that, given the relief to which we decide Newdow is entitled, the district court would have exercised its discretionary power to resolve, in the present case, the additional issue as to which Newdow seeks declaratory relief. Accordingly, we decline to reach that issue here.” (citations omitted)).
  \item \textsuperscript{141} Newdow I, 292 F.3d at 605-07; see also Santa Fe, 530 U.S. 290 (2000).
  \item \textsuperscript{142} Id. at 607.
  \item \textsuperscript{143} Id. at 607-11.
  \item \textsuperscript{144} Id. at 610 (finding that the legislative history “reveals that the purpose of the 1954 Act was to take a position on the question of theism, namely, to support the existence and moral authority of God.”).
  \item \textsuperscript{145} Id. at 608 (stating the recitation of the Pledge is “conveying a message of state endorsement of a religious belief.”).
  \item \textsuperscript{146} Id. at 608-09 (finding that the Pledge “place[s] students in the untenable position of choosing between participating in an exercise with religious content or protesting”). The Ninth Circuit relied on Lee v. Weisman (see note 74, supra, and accompanying text for discussion) and used similar language as it surmised that “the
\end{itemize}
While Newdow I struck down the Pledge under three different Establishment Clause tests, the Ninth Circuit's opinion in Newdow II struck down the school's practice of reciting the Pledge based only on the coercion test. Much of the discussion about the Pledge signaling the endorsement of religion, including the alienation of unbelievers, was included in Newdow II, but only in a footnote. Newdow II did retain the analysis of the legislative history of the 1954 Act, and reiterated that this opinion respects seemingly contrary Supreme Court dicta concerning the Pledge. Aside from the changes, both opinions attempted to separate the Pledge from other language that may be considered ceremonial deism. The Ninth Circuit made clear that in its view

The recitation that ours is a nation “under God” is not a mere acknowledgement 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. 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.

Judge Ferdinand Fernandez dissented as to the Establishment Clause violation. In the dissenting opinion, Judge Fernandez appealed to the “neutrality” test, in that the Establishment Clause requires a government not to discriminate for or against a religion. Judge Fernandez also argued that the danger or threat that the Pledge “will tend to bring about a theocracy or suppress somebody’s beliefs is so minuscule as to be de minimis. The danger that phrase presents to our First Amendment freedoms is picayune at most.” His opinion

'subtle and indirect' social pressure which permeates the classroom also renders more acute the message sent to non-believing schoolchildren that they are outsiders."

147. Newdow II, 328 F.3d at 487 (holding "[w]e are free to apply any or all of the three tests [Lemon, endorsement, or coercion] and to invalidate any measure that fails any one of them. Because we conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional, we need not consider whether the policy fails the endorsement test or the Lemon test as well.").

148. Newdow II, 328 F.3d at 488 n.5.

149. Id. at 488.

150. Id. at 489. This information was included as a footnote in Newdow I, 292 F.3d at 611 n.12.

151. Newdow I, 292 F.3d at 608; Newdow II, 328 F.3d at 489.

152. Newdow II, 328 F.3d at 490 (Fernandez, J., concurring and dissenting)(concurring with the jurisdiction and standing issues, but disagreeing as to the constitutional violation).

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

154. Id. (Fernandez, J., concurring and dissenting).
also cited thirteen members of the Supreme Court, including five current members, as having stated that such a slight danger is not a violation of the Constitution. Judge Fernandez also predicted the litany of other claims that may arise due to the Ninth Circuit's current decision.

Although not on the three-judge Newdow I or II panel, Judge O'Scannlain wrote a scathing dissenting opinion from the denial of hearing the case en banc. O'Scannlain, thought to be one of the most conservative members of the Ninth Circuit, called the opinion "wrong, very wrong -wrong because reciting the Pledge of Allegiance is simply not a 'religious act'... 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 matter of common sense." Judge O'Scannlain examined Supreme Court rulings such as Engle, Schempp, Wallace, and Lee to determine that only formal religious exercises are unconstitutional and that "patriotic invocations of God simply have no tendency to establish state religion."

The Ninth Circuit’s decision created a storm of interest and controversy. Soon after the Ninth Circuit’s ruling, the United States Senate displayed their support for the “under God” wording, voting

155. Id. at n.3 (Fernandez, J., concurring and dissenting).
156. Id. at 492-93 (Fernandez, J., concurring and dissenting)(stating "we will soon find ourselves prohibited from using our album of patriotic songs in many public settings. “God Bless America” and “America The Beautiful” will be gone for sure. . . . And currency beware! Judges can accept those results if they limit themselves to elements and tests, while failing to look at the good sense and principles that animated those tests in the first place. . . . [Striking down these practices] will cool the febrile nerves of a few at the cost of removing the healthy glow conferred upon the many citizens when the forbidden verses, or phrases, are uttered, read, or seen.”).
157. Newdow II, 328 F.3d at 471 (O'Scannlain, J., dissenting from denial of en banc hearing).
159. Newdow II, 328 F.3d at 472 (O'Scannlain, J., dissenting).
160. Id. at 478 (O'Scannlain, J., dissenting).
161. Id. at 481 (O'Scannlain, J., dissenting).
162. One measure of the controversy may be seen by the high number of amicus briefs filed with the Supreme Court that may increase the chances of the Court granting certiorari in a case. See Gregory A. Caldeira & John R. Wright, Organized Interests and Agenda Setting in the U.S. Supreme Court, 82 AM. POL. SCI. REV. 1109-1127 (1988). A total of fifty amicus briefs were filed with the Court, twenty-nine in support of the Pledge’s constitutionality and twenty-one in support of Newdow. See http://supreme.lp.findlaw.com/supremecourt/docket/2003/march.html.
ninety-nine to zero in favor of the phrase.\textsuperscript{163} Other public officials likewise stated their opposition to the Ninth Circuit's ruling, including six federal judges\textsuperscript{164} and President George W. Bush, who called the decisions "ridiculous."\textsuperscript{165}

IV. **Newdow's Day in the Supreme Court**

*Initial Rulings*

Two interesting procedural issues added to the unusual storyline of the Newdow case. First, Justice Scalia, thought to be one of the most accommodationist Justices currently on the Court, based on his prior opinions, recused himself from participation.\textsuperscript{166} In an interesting twist, the Knights of Columbus came back into play concerning the Pledge, fifty years after they originally lobbied Congress to add the "under God" phrasing. It was at a Knights of Columbus rally where Justice Scalia, a guest speaker, made negative statements concerning the Ninth Circuit's Newdow I decision.\textsuperscript{167} These statements induced Michael Newdow to file a motion for Scalia's recusal.\textsuperscript{168} Scalia agreed to recuse himself from the case,\textsuperscript{169} removing one of the most tolerant Justices of the government endorsement of religion\textsuperscript{170} and opening the possibility of an evenly divided Court.

Another procedural issue that the Court was required to address was whether to allow Newdow to represent himself at oral arguments. Generally, an attorney must have been admitted to practice law in some jurisdiction for at least three years before they can argue before the Supreme Court.\textsuperscript{171} Although a law school graduate, Newdow has

\textsuperscript{163.} Richard Willing, *Supreme Court to Consider Pledge*, USA TODAY, October 14, 2003.

\textsuperscript{164.} Id.

\textsuperscript{165.} See Reaves, supra note 129.


\textsuperscript{167.} See Respondent's Suggestion For Recusal of Justice Scalia at 3, Newdow III (No. 02-1624).

\textsuperscript{168.} Id. Interestingly, Newdow used Scalia's own language from an opinion concerning recusals in Liteky v. United States, 510 U.S. 540 (1994), as support for his argument that Scalia should not participate. Id. at 4.

\textsuperscript{169.} *Court to Hear Pledge Case on March 24*, ASSOCIATED PRESS NEWSWIRE, Jan. 12, 2004.

\textsuperscript{170.} Yannella, supra note 65, at 91.

\textsuperscript{171.} Rules of the Supreme Court of the United States, Part II, Rule 5-1 (1999).
never actually practiced law. However, the Court did issue an order allowing Michael Newdow to represent himself pro se.

Arguments for Each Side: the Briefs

Both the school and Newdow filed written briefs with the Supreme Court examining the arguments in support of each side. Elk Grove first argued that Newdow lacked standing to bring the case because, not having legal custody over his daughter, he does not have the right under California law to direct the child’s welfare, education, or religious upbringing, and thus Newdow has not suffered an injury. Next, the school argued several grounds for ruling that the Pledge as conducted was not a violation of the Constitution. First, Elk Grove argued that in *West Virginia State Board of Education v. Barnette*, the Supreme Court ruled that a state cannot compel a student to take the Pledge, but that voluntary recitation is not coercive. Second, mirroring prior language used for ceremonial deism, the school argued that, looking at our nation’s history, this was a patriotic act and not a religious act. Third, Elk Grove argued, citing *Marsh v. Chambers*, the Ninth Circuit failed to recognize that the Supreme Court is not limited by the three Establishment Clause tests, but rather the Court can apply a flexible test, taking into consideration the history of the practice. Under the more flexible test, Elk Grove claimed the Pledge did not violate the Establishment Clause, as it is shown to be part of the “fabric of our society.”

Michael Newdow’s arguments mirrored the reasoning of the Ninth Circuit opinion. Newdow argued that the Pledge violated every Establishment Clause test, was more than a mere acknowledgement of the founding of the nation, and that it perpetuated prejudices suffered by atheists. He also asserted that the Pledge affected his ability to educate his child in the way he saw fit. Concluding his brief, Newdow argued that “rather than being ‘one nation indivisible,’ America is now divided on the basis of religion by its very own ‘symbol.’”

174. Petitioner’s Brief on the Merits at 19, *Newdow* III (No. 02-1624).
175. *Id.* at 23.
176. *Id.* at 30.
177. *Id.* at 41.
178. *Id.* at 34.
179. Respondent’s Brief on the Merits at 8, 9, 12, 15, *Newdow* III (No. 02-1624).
180. *Id.* at 24.
181. *Id.* at 50.
Oral Argument

Oral arguments occurred on March 24, 2004. Much of both parties' time before the Court was devoted to standing, predicting the possibility that the Court would not reach the merits.\textsuperscript{182} Petitioners argued that Newdow lacked standing to bring the case and that the Pledge is a "patriotic exercise that is part of an unbroken history of official government acknowledgment of the role of religion in American life."\textsuperscript{183} Similar to Judge Fernandez at the circuit court level, the petitioners noted that fourteen Justices had indicated, at least in \textit{dicta}, that the Pledge was not a religious exercise and that there was a difference between "purely religious exercise \ldots and the ceremonial reference in solemn public occasions."\textsuperscript{184} Elk Grove attempted to persuade the Court that the "under God" language is merely "an acknowledgment of the religious basis of the framers."\textsuperscript{185} The petitioners attempted to undermine the 1954 legislative history, which seemed to show religious intent, with legislative history of 2002, at which time Congress reaffirmed the importance of the Pledge as a patriotic, not religious, exercise.\textsuperscript{186} Overall, the petitioners faced few tough questions, seeming to get several "softball" questions that they answered in their Brief and that they were clearly prepared to answer.\textsuperscript{187}

Newdow appeared to face more difficult questions. As for the constitutional argument, he tried to downplay the fact that the child can refuse to repeat the Pledge.\textsuperscript{188} He began to make an analogy to \textit{Lee v. Weisman}, where the Court held coercion existed even when one did not have to participate.\textsuperscript{189} Cutting him off abruptly, Justice O'Connor noted, "That was a prayer," at which time Newdow replied that the

\textsuperscript{182} The majority text of sixteen of the fifty-three substantive pages of the written transcript were devoted to the issue of standing.

\textsuperscript{183} Oral Argument Transcript at 3, Newdow III (No. 02-1624).

\textsuperscript{184} \textit{Id.} at 16.

\textsuperscript{185} \textit{Id.} at 19.

\textsuperscript{186} \textit{Id.} at 19-20. Justice Ginsburg asked the Elk Grove if there is a stronger case for the constitutionality of the Pledge today than fifty years ago, and Elk Grove argued that there was a stronger case today, because "under God" is only a "descriptive phrase." \textit{Id.} at 21.

\textsuperscript{187} See \textit{id.} at 18. For example, Chief Justice Rehnquist asked why the Pledge was not a "prayer or not an exercise," a question that should have clearly been anticipated by the Petitioners and was detailed in their Brief.

\textsuperscript{188} \textit{Id.} at 27.

Establishment Clause did not require there to be a prayer. The Chief Justice questioned Newdow repeatedly about why the Pledge is not merely descriptive. The Respondent argued that it is not the government's role to put the idea of "God" into the mind of his child and that it interfered with his "absolute right to raise my child as whatever I see fit." At that point, Justice Ginsburg returned to the standing argument by stating, "No, you don't, you don't . . . . [T]here is another custodian of this child who makes the final decision who doesn't agree with you." Thus, again signifying the trouble that several Justices appeared to have with Newdow's standing.

Newdow was also asked about other references to God, such as on coins and the opening of the Court. He answered that those would not violate the Establishment Clause as long as no one is required or coerced into affirming those beliefs. Justice Breyer also raised the issue that the terms used were so broad and generic that it may lack a religious tone and really be inclusive of everyone, using the language of ceremonial deism. Newdow answered by saying, "I don't think that I can include under God to mean no God, which is exactly what I think."

There was some indication that Justice Souter may have been leaning toward Newdow's side when the Justice said:

I will assume, and I - - I do assume, that - - that if you read the pledge carefully, the - the reference to under God means something more than a mere description of how somebody else once thought. We're pledging allegiance to the flag and to the republic. The republic is then described as being under God, and I think a fair reading of that would - - would be I think that's the way the republic ought to be conceived, as under God. So I think - - I think there's some affirmation there. I will grant you that.

But even Justice Souter seemed to indicate that the phrasing was just ceremonial deism, or that the religious nature is "so tepid, so diluted" that it is constitutionally permissible. However, just as

190. Oral Argument Transcript at 27, Newdow III (No. 02-1624). Newdow attempted to analogize to Lee again and Justice O'Connor pointed out that the two cases are distinguishable since Lee involved prayer. Id. at 33.
191. Id. at 28-29.
192. Id. at 31.
193. Id.
194. Id. at 32.
195. Id. at 34-36.
196. Id. at 36.
197. Id. at 38-39.
198. Id. at 39.
with the Chief Justice's question to the Petitioner, Souter had to know that the Respondent was prepared to answer this question, so Justice Souter may have been giving Newdow the opportunity to answer a question he clearly should have been prepared to answer. Yet, the other justices, especially the Chief Justice, continually raised the notion that the Pledge is not a prayer, is said in a ceremonial context, and has a long history of usage, indicating an acceptance of ceremonial deism.199

A Flag Day Surprise: Elk Grove v. Newdow Decided

Fittingly, on Flag Day, June 14, 2004, the Supreme Court released the opinion for Elk Grove Unified School District v. Newdow.200 In reversing the Ninth Circuit's decision, a five-member majority avoided the constitutional question by finding that Michael Newdow lacked standing, either as a "next friend" or on his own, to raise his claims since his legal rights as the child's father were uncertain.201 Justice Stevens, writing for the Court, decided:

In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.... We conclude that, having been deprived under California law of the right to sue as next friend, Newdow lacks prudential standing to bring this suit in federal court.202

The majority opinion did not discuss the Establishment Clause in any respect, but limited itself to an examination of standing and the importance "for the federal courts to leave delicate issues of domestic relations to the state courts."203 Thus, even though the father had "joint legal custody" and the father possessed the ability to provide input and influence over his child's religious upbringing,204 the fact

199. See id. at 40-42.
200. 124 S. Ct. 2301.
201. Id. at 2312.
202. Id.
203. Id. at 2309.
204. Id. at 2311 (finding that the California "cases create a zone of private authority within which each parent, whether custodial or noncustodial, remains free to impart to the child his or her religious perspective.") (citing In Re Marriage of Mentry, 142 Cal. App. 3d 260, 267-268 (1983)).
that someone other than the father had "a form of veto power" over all decisions concerning the child negated the father's standing.

Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas concurred with the outcome of reversing the Ninth Circuit, but all would have done so on the merits of the constitutional claim. The Chief Justice noted that the Supreme Court had produced a "novel prudential standing principle in order to avoid reaching the merits of the constitutional claim," and provided his detailed reasoning why Michael Newdow possessed standing. Justice O'Connor and Justice Thomas agreed with the Chief Justice as to standing, but focused their opinions on the constitutional issue.

As to the constitutional issue, Chief Justice Rehnquist noted the many references to God in the Nation's past, such as the national Thanksgiving Day holiday and various religious references in presidential speeches. In finding the Pledge constitutionally permissible, the Chief Justice distinguished the recitation of the Pledge from the prayer at issue in *Lee v. Weisman*. Rehnquist also appealed to the majoritarian process of the government system. Thus, we have three levels of popular government—the national, the state, and the local—collaborating to produce the Elk Grove ceremony. The Constitution only requires that schoolchildren be entitled to abstain from the ceremony if they chose to do so. To give the parent of such a child a sort of "heckler's veto" over a patriotic ceremony willingly participated in by other students, simply because the Pledge of Allegiance contains the descriptive phrase "under God," is an unwarranted extension of the Establishment Clause, an extension which would have the unfortunate effect of prohibiting a commendable patriotic observance.

Justice O'Connor wrote perhaps the most direct opinion that would add some clarity to Establishment Clause jurisprudence. Her

205. *Id.*

206. *Id.* at 2312 (Rehnquist, J., concurring)(finding "[w]hile she is intimately associated with the source of respondent's standing (the father-daughter relationship and respondent's rights thereunder), the daughter is not the source of respondent's standing; instead it is their relationship that provides respondent his standing, which is clear once respondent's interest is properly described."). *Id.* at 2316.

207. *Id.* at 2317-319 (Rehnquist, J., concurring).

208. *Id.* at 2319 (Rehnquist, J., concurring)("I do not believe that the phrase 'under God' in the Pledge converts its recital into a 'religious exercise' of the sort described in *Lee*. Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. . . . Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.").

209. *Id.* at 2320 (Rehnquist, J., concurring).
opinion, if accepted by a majority of the Court, would uphold the Pledge based on the endorsement test and establish a constitutional exception for references that can be defined as ceremonial deism.\textsuperscript{210} However, even Justice O'Connor would not limit all Establishment Clause analyses to the endorsement test, but rather noted that the Court must employ different tests in different situations.\textsuperscript{211} She came to the conclusion that when government-sponsored speech or displays are challenged, the endorsement test “captures the essential command of the Establishment Clause.”\textsuperscript{212}

Justice O'Connor described four factors that should be used to define something as ceremonial deism, making it constitutionally permissible. She began by commenting on the importance of religion in the nation’s founding and history and as an important patriotic exercise.\textsuperscript{213} She noted the phrase or practice must be longstanding and regularly practiced throughout the country. Although no set time limit was given, apparently fifty years (the time since “under God” was added to the Pledge and practiced by “millions of children” with relatively little objection) appears to satisfy this prong of the ceremonial deism test.\textsuperscript{214}

A second factor to be defined as ceremonial deism requires that the phrase or act not be prayer or worship. Justice O'Connor noted that this factor must be based on the standard of a reasonable observer who is fully aware of the history of the phrase or act.\textsuperscript{215} The Pledge meets this requirement because it is merely descriptive, it is conducted by teachers, not religious leaders, and even though the legislative history shows a non-secular purpose for adding “under God,” “[a]ny religious freight the words may have been meant to carry originally has long since been lost.”\textsuperscript{216}

The third factor is that the phrase or act must not reference any particular religion. Here, Justice O'Connor turns an argument used by the circuit court on its head. While the Ninth Circuit found that the phrase “under God” was just as constitutionally offensive as “under

\textsuperscript{210} Id. at 2323.
\textsuperscript{211} Id. at 2321 (O'Connor, J., concurring).
\textsuperscript{212} Id. (O'Connor, J., concurring)(quoting Cty of Allegheny v. A.C.L.U., 492 U.S. 573, 627 (1989)).
\textsuperscript{213} See id. at 2323-324 (O'Connor, J., concurring).
\textsuperscript{214} Id. at 2324 (O'Connor, J., concurring)(noting that over the fifty-year period, with so many school children reciting the Pledge, there had only been three reported challenges)(citations omitted).
\textsuperscript{215} Id. at 2321-322 (O'Connor, J., concurring).
\textsuperscript{216} Id. at 2325 (O'Connor, J., concurring).
Jesus” or “under Vishnu,”217 Justice O’Connor used the exact same language to distinguish “under God” as permissible since it “represents a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system.”218

The final requirement is that the phrase or act must have only minimal religious content.219 This factor may be satisfied when the reference to religion is very brief or it is not an essential part of the entire exercise or statement.220 Justice O’Connor explained that while she limited her analysis to the endorsement test, properly identified instances of ceremonial deism would likewise survive constitutional scrutiny under the coercion test as well.221

Justice Thomas authored perhaps the most radical concurring opinion, suggesting the overturn of Lee v. Weisman and that the Establishment Clause created no individual rights at all.222 Justice Thomas began his analysis by showing how under the Lee analysis the Pledge could not pass the coercion test, giving credence to Newdow’s arguments and to the Ninth Circuit’s opinion.223 Thomas suggested that finding the Pledge not coercive in this instance would be inconsistent with the prior holding in Barnette, which held that the required Pledge did coerce an affirmation of belief.224 Thomas then laid out his analysis of why the Establishment Clause was not intended to be applied to individual state actions. Looking at history, he noted that the purpose of the Establishment Clause was to prohibit the federal government

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217. Newdow II, 328 F.3d at 487.
218. Newdow III, 124 S. Ct. at 2326 (O’Connor, J., concurring).
219. See id. (O’Connor, J., concurring).
220. Id. (O’Connor, J., concurring).
221. Id. (O’Connor, J., concurring).
222. See id. at 2327 (Thomas, J., concurring).
223. Id. at 2328 (Thomas, J., concurring)(“Adherence to Lee would require us to strike down the Pledge policy, which, in most respects, poses more serious difficulties than the prayer at issue in Lee. A prayer at graduation is a one-time event, the graduating students are almost (if not already) adults, and their parents are usually present. By contrast, very young students, removed from the protection of their parents, are exposed to the Pledge each and every day.”).
224. Id. at 2329 (Thomas, J., concurring)(“It is difficult to see how [the Pledge of Allegiance] does not entail an affirmation that God exists . . . [T]he Court has squarely held that the government cannot require a person to ‘declare his belief in God’ . . . I conclude that, as a matter of our precedent, the Pledge policy is unconstitutional.”) (citing Torcaso v. Watkins, 367 U.S. 488, 489 (1961)).
from creating a national religion, a protection that was intended to benefit state governments, not individuals. 225

However, his opinion went further to state that, even if the Establishment Clause did protect an individual's right against a state government action, the requirement of the Pledge is not coercive. He explained that this stems from a false definition of "coercion" as applied in Lee. 226 In his view, coercion requires a threat of legal penalty, not just peer pressure. 227 Without this "actual legal coercion," Justice Thomas would hold that the voluntary Pledge of Allegiance conducted at the school was constitutional. 228

V. THE "LESSONS" OF NEWDOW III?

With this information as background, one has to ask, "Did our understanding of Establishment Clause jurisprudence grow through the Pledge of Allegiance controversy?" It was clear from the oral arguments that Dr. Newdow did not appear to have many allies on the Bench. Given the Court's continual references to the ceremonial nature of the pledge, questions about his standing even from more liberal members of the Court, and the repeated references that the Pledge is not prayer, it was not difficult to determine that the Ninth Circuit opinion would be overturned. However, the grounds upon which the Supreme Court selected to overturn that decision did nothing to settle the constitutional issue at hand, nor did it provide guidance in this murky area of law.

With all the uproar on both sides of the debate concerning the Pledge of Allegiance, the Court's Newdow opinion did nothing more than maintain the status quo. Just as before, schools are free to allow voluntary recitations of the Pledge. Those opposed to the "under God" language are free to say that it is unconstitutional, since the Court stopped short of addressing the issue. Clearly, the Supreme Court's avoidance of the constitutional question will do little to quell or pacify the parties on either side of the dispute. Likewise, it gives little guidance to lower courts who will be forced to address similar claims. The Supreme Court, or rather all the actors that must follow precedent, including attorneys, school boards, legislatures, and lower court judges, lost the opportunity to clarify an area of law that has been

225. See id. at 2331 (noting that if incorporated against the states, the Establishment Clause would "prohibits exactly what the Establishment Clause protected - state practices that pertain to 'an establishment of religion.'").
226. See id. at 2330 (Thomas, J., concurring).
227. Id. (Thomas, J., concurring)(citing Lee, 505 U.S. at 640 (Scalia, J., dissenting)).
228. See id. (Thomas, J., concurring).
unclear for decades. This point is further magnified given the Supreme Court norm of accepting and deciding cases in order to resolve conflicts among the circuit courts. 229

Yet, some constitutional guidance concerning the Pledge and ceremonial deism may be deciphered from this case. Four justices currently appear to support the constitutionality of voluntary school recitations of the Pledge on ceremonial deism grounds. The Chief Justice and Justices Thomas and O'Connor indicated their support for the constitutionality of the Pledge through their concurring opinions in Newdow III. Justice Scalia, who recused himself in the current case but presumably would participate in future cases, would doubtlessly join the Chief Justice, Thomas, and O'Connor based on his statements at the Knights of Columbus rally and his past voting record in similar cases. 230 These four would need to add one more justice to form the five-member voting bloc needed to create binding majority precedent.

Of the five remaining Justices, one may speculate about the possible fifth member that may in the future vote to support the constitutionality of the Pledge. Possibly more importantly, some guidance may be found as to which member may utilize ceremonial deism or join Justice O'Connor in her creation of a constitutional exception for such activities. To examine this point, one may look to the opinions written by the Justices to determine their dispositions on this issue and by exploring voting coalitions or how often a group of Justices will join together on the outcomes of cases. These voting blocs may assist in displaying like preferences on the Court and predicting possible future cases. 231

A survey of twelve Establishment Clause and First Amendment cases during the current Court's membership may provide some clues as to the language used by Justices in authoring opinions and as to possible voting groups. 232 The voting blocs that stem from these case

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230. See, e.g., Lee, 505 U.S. at 640 (Scalia, J., dissenting) (stating that a prayer at a graduation ceremony is not coercive). Clearly, if Scalia would not find a prayer as coercing religion, the more informal inclusion of religion in the phrase "under God" would not pose a problem for him.

231. See Jeffrey Segal and Harold Spaeth, The Supreme Court and the Attitudinal Model Revisited 388, 394-404 (2002).


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outcomes fall neatly into two groups, signified by those that most often vote with the two most senior members of the current Court: the Chief Justice Rehnquist group and the Justice Stevens group. These groupings, and the language used by the authors, may indicate general trends or at least determine which Justice may emerge as influential in future cases.

Justice Stevens would be an unlikely addition to the voting bloc given his prior voting history and his favoring a strong separation of church and state. He also authored the Santa Fe opinion, finding

(1997), Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995), and Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995). Most of these cases were directly decided on Establishment Clause grounds. In Southworth, the Supreme Court did not conduct a tradition Establishment Clause analysis, the decision relied heavily on the Rosenberger decision. Both cases dealt with university funding of student speech. While Rosenberger involved the funding of a religious student paper, Southworth did not directly involve religious speech. However, since the Court utilized a similar analysis in each, Southworth is included because it is clear the Court most likely would have taken the same approach if religious speech was involved in both cases.

233. In these twelve cases, the Chief Justice and Justice Stevens agreed on the outcome only three times, or 25% of the time. In the Rehnquist group, the Chief Justice joined in the outcomes with Justice O'Connor nine times (75%), Justice Scalia ten times (83%), Justice Kennedy ten times (83%), and Justice Thomas eleven times (92%). In the Justice Stevens group, Stevens joined in the outcomes with Justices Souter ten times (83%), Ginsberg twelve times (100%), and Justice Breyer eight times (67%).

234. While twelve cases indeed encompass a small sample to locate voting blocs, an examination of the outcomes in this fashion, if anything, over estimates the cohesiveness of the Supreme Court as a whole and may underestimate the distinction between the Justices' voting blocs. For example, in Southworth, all nine Justices agreed that a university's policy of assessing student activity fees, that would be used to support student speech activities, was permissible. However, the Justices disagreed as to the reasoning, with the majority, including Chief Justice Rehnquist, Justices O'Connor, Scalia, Kennedy, Thomas, and Ginsburg, applying a "viewpoint neutrality test." Southworth, 529 U.S. at 233. Concurring in the result, Justice Souter, joined by Justices Stevens and Breyer, agreed that the policy was permissible, but would not set such an overarching rule as would the majority. Id. at 236. While the outcome in Southworth appears to show consistency across the Court, the question of what First Amendment test to use in this and future cases was in dispute. This factor, of over-estimating cohesiveness, may actually increase the implications of low voting cohesion, such as between Justice Stevens and Justices Scalia who only joined in the outcome of two cases or Justice Ginsburg and the Chief Justice who only joined together in three case outcomes. Thus, this analysis may be more useful as a tool to show who does not vote together rather than who does votes together.

235. See Zelman, 536 U.S. at 686 (Stevens, J., dissenting). In Zelman, the Court ruled on a constitutional challenge to tuition vouchers provided by Ohio that were subsequently used at religious private schools. Along voting blocs that may be similar
that pre-game student-lead prayers at school football games "encourages divisiveness along religious lines" and "has the improper effect of coercing those present," even though attendance at the games is "purely voluntary." Justice Souter is also an unlikely candidate given his voting record. One example may stem from Justice Souter's adamant opposition to public funding for religious schools, even when a majority of the Court has allowed the funding on neutrality grounds. These past actions, along with his somewhat favorable comments and questions to Newdow at oral argument, make it highly unlikely that he would support the constitutionality of the Pledge in a future case.

to future ceremonial deism challenges, the Court, including the Chief Justice and Justices O'Connor, Scalia, Kennedy, and Thomas, upheld the vouchers on a neutrality test. Justices Stevens, Souter, Ginsburg, and Breyer dissented. In this dissent, Justice Stevens commented on the importance of remembering the religious conflict that can occur within a society and noted that, "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy." See also Greenawalt, supra note 18, at 328.

236. Santa Fe Indep. Sch. Dist., 530 U.S. at 311.
237. Id. at 312. Justice Stevens has also consistently disfavored any government support for religious symbols. He dissented with the Court's holding that holiday displays were constitutional in Allegheny, 492 U.S. at 654-655 (Stevens, J., concurring in part and dissenting in part), and in Capital Square Review & Advisory Bd., 515 U.S. at 797 (Stevens, J., dissenting). In Capital Square, the Court struck down a city's denial of granting a permit to the Klu Klux Klan to place a cross on public property. In dissent, Stevens noted, "A paramount purpose of the Establishment Clause is to protect such a person from being made to feel like an outsider in matters of faith, and a stranger in the political community. If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display. No less stringent rule can adequately protect non-adherence from a well-grounded perception that their sovereign supports a faith to which they do not subscribe. . . . [The Establishment Clause] proscribes state action supporting the establishment of a number of religions as well as the official endorsement of religion in preference to nonreligion." Capital Square, 515 U.S. at 799-800, 809 (Stevens, J., dissenting). From these statements, it is clear that the tenets of ceremonial deism, such as neutrality and secular purposes, would not be supported by Justice Stevens.

238. Justice Souter joined with Justice Rehnquist in the outcome of these cases only three times, or 25% of the time, Justices Scalia and Thomas only twice (17%), and Justice O'Connor six times (50%).
239. See, e.g., Zelman, 536 U.S. at 686-717 (Souter, J., dissenting); Mitchell, 530 U.S. at 867-913 (Souter, J., dissenting); Agostini, 521 U.S. at 240-260 (Souter, J., dissenting).
Justice Breyer also appears an unlikely candidate to join the conservative voting bloc on the ceremonial deism issue. He also dissented in Zelman with strong language recognizing the need for the separation of church and state and rejecting neutrality in government aid to religion. Justice Ginsburg is also unlikely to join a majority supporting ceremonial deism, given her alignment with the more liberal members of the Court in this issue, although she twice joined the more conservative group on the outcome of a case, over the dissent of the more liberal bloc.

Out of the five Justices who voted to avoid the constitutional issue, Justice Kennedy would appear the best possible choice to join the more conservative bloc. Often thought of as an important “swing vote” along with Justice O'Conner, he also has voted consistently with the more conservative members of the Court in this area. However, Justice Kennedy authored the opinion in Lee v. Weisman, striking down graduation prayers based on the indirect coercive effects. As noted in Justice Thomas's concurring opinion in Newdow III, it would be difficult for Justice Kennedy to agree that the Pledge is not coercive, given the wide definition of coercion he penned in Lee. His decisions reflect that the importance for Justice Kennedy may be the setting of the constitutional issue.

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240. Justice Breyer joined with the Chief Justice as to the outcome of cases five times (42%), with Justices Scalia and Thomas four times (33%), and with Justice O'Connor eight times (67%).

241. Zelman, 536 U.S. at 728-729 (Breyer, J., dissenting) ("[The Supreme Court] adopts, under the name of 'neutrality,' an interpretation of the Establishment Clause that this Court rejected more than half a century ago . . . . An earlier Court found that 'equal opportunity' principle insufficient; it read the Clause as insisting upon greater separation of church and state, at least in respect to primary education . . . . In a society composed of many different religious creeds, I fear that this present departure from the Court's earlier understanding risks creating a form of religiously based conflict potentially harmful to the Nation's social fabric . . . ." (citations omitted)). But see Good News Club v. Milford Cent Sch., 533 U.S. 98 (2001), where Justice Breyer did join the more conservative group as to the outcome of the case.

242. Justice Ginsberg joined Justice Stevens twelve times (100%), Justice Souter ten times (83%), and Justice Breyer eight times (67%).

243. See Southworth, 529 U.S. 217; Flores, 521 U.S. 507. Overall, however, Justice Ginsberg joined with the Chief Justice as to the outcome of these cases three times (25%), joined Justice O'Connor four times (33%), and Justices Scalia and Thomas only two times (17%).

244. See Greenawalt, supra note 18, at 360.

245. Justice Kennedy joined with the Chief Justice as to outcome in ten cases (83%), and with Justices O'Connor, Scalia, and Thomas nine times (75%), with Justices Stevens, Souter, and Ginsburg five times (42%), and Justice Breyer seven times (58%).

246. 505 U.S. at 588.
action. Thus, it appears that Justice Kennedy may be the compass that guides future decisions through this area. If future litigants can sway Justice Kennedy that their practices are constitutionally acceptable, they are likely to win in the Supreme Court. Further, as circuit court judges and state supreme court judges formulate and write their opinions, they may strategically focus on Justice Kennedy’s past opinions in this area to sway his vote. On issues of ceremonial deism, future actors may pay heed to Justice Kennedy’s opinion in Allegheny v. ACLU, where he appears supportive of ceremonial deism, at least in some instances.

More important than the Pledge itself, the Court’s future treatment of ceremonial deism could have more wide-ranging effects on the daily lives of individuals. If the Court were to adopt Justice O’Connor’s view that acts of ceremonial deism are exceptions to the Establishment Clause, many more instances of government action could fall under this rubric and therefore be constitutionally permissible. Things such as the singing of patriotic songs, including “God Bless America” or the National Motto, could potentially be effected by how the Supreme Court treats future challenges to the Pledge. With five Justices, including Justice Kennedy, appearing to support ceremonial deism in some respect, it is clear from Newdow that, given the right set of facts, a majority of the Court could in the near future officially recognize ceremonial deism as either an exception to the First Amendment or as no constitutional violation at all.

247. At least where there is a possibility that school children may be coerced by an act, Justice Kennedy seems to raise a “higher” wall of separation. He has consistently been less tolerant of prayers at schools, such as in Lee and Santa Fe Indep. Sch. Dist. In other aspects, Justice Kennedy has voted in a more accommodationist fashion, such as with public displays containing religious themes as in Alleghany and Capital Square, with tuition voucher programs that help pay for tuition at religious schools as in Zelman, and tax exemptions for religious charities as in Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564 (1997).

248. See Greenawalt, supra note 18, at 360-61.


250. Alleghany, 492 U.S. at 657, 679 (Kennedy, J., concurring in part and dissenting in part)(stating “the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. . . . [T]he principles of the Establishment Clause and our Nation’s historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation of acknowledgement of holidays with both cultural and religious aspects.”)(noting that adherence to the endorsement test would deem many historical and patriotic activities unconstitutional).
Conclusions

The Supreme Court missed an opportunity to clarify Establishment Clause jurisprudence, which leaves important issues in limbo. It will be interesting to observe how lower courts now deal with similar issues that are sure to arise. If another court follows the *Newdow I* approach and strikes down the school-led Pledge on one or more Establishment Clause tests, it could force the Supreme Court into more clearly defining the law.

A future case decided on grounds similar to *Newdow I*, but with proper standing, will leave the Supreme Court with three options. First, the Court may uphold or strike down the Pledge using an existing test. Although it is unclear at this time which one of the many tests may gain acceptance by a majority of the Court, it will not be the *Lemon* test on its own. This may provide further clarity of ceremonial deism issues but may open the Court to critics pointing to the fact that the analysis would change under alternative tests. Second, the Court may employ no test at all and again suffer criticism and provide less precision in this legal area. Finally, as it appears five members may be willing to do, the Court may follow Justice O'Connor and carve out an exception to the Establishment Clause for ceremonial deism or find that ceremonial deism is not a violation and thus there is no need for an exception. In any event, it appears that Justice Kennedy may provide future guidance in this area, as his swing vote may also grant him opinion writing responsibilities.

Whatever the future outcome, hopefully the High Court will bring some measure of stability and clarity to Establishment Clause jurisprudence. It is a complicated area of law, requiring some type of guidance to avoid inconsistencies. While avoiding controversial or uncomfortable topics may be accepted, and in fact desired in social settings, it is up to the Supreme Court — the final legal authority — to answer difficult questions. Although it will be a difficult task, hopefully the Court will be more willing in the future to provide guidance to all parties involved and establish some consistency and lucidity to the Establishment Clause.