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"One Nation Under God," Indeed: The Ninth Circuit's Problematic Decision to Change Our Pledge of Allegiance

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NOTES

"ONE NATION UNDER GOD," INDEED: THE NINTH CIRCUIT'S PROBLEMATIC DECISION TO CHANGE OUR PLEDGE OF ALLEGIANCE

TARA P. BEGLIN

The Pledge of Allegiance

"I Pledge Allegiance to the Flag
Of the United States of America
And to the Republic For Which It Stands,
One Nation Under God,
Indivisible,
With Liberty and Justice For All."

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INTRODUCTION

This Note discusses the Ninth Circuit's decision in Newdow v. U.S. Congress, taking the position that the court erred in holding that the Elk Grove School District's policy of reciting the Pledge of Allegiance violated the First Amendment Establishment Clause. Part II provides relevant background information, including an analysis of the Newdow decision and a historical and jurisprudential discussion of the Pledge of Allegiance. Part III discusses the First Amendment Establishment Clause, the theories that have been applied to interpret the Establishment Clause, and the three tests the Supreme Court has used in analyzing the Establishment Clause. Part IV is devoted to analyzing the Newdow case under sound Constitutional principles, suggesting that, if it would not have failed on the issue of standing, the Supreme Court would have reversed the Ninth Circuit's decision. Part V presents the conclusion of this Note.

I. PRELIMINARY INFORMATION

A. Newdow v. U.S. Congress

The Supreme Court granted Michael Newdow's ("Newdow") petition for certiorari on October 14, 2003, thereby agreeing to review the Ninth Circuit's decision of this very complicated case. On behalf of his nine year old daughter, Newdow, an atheist, brought suit against the school district she attends, the school district she previously attended, the United States Congress, and

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3 292 F.3d 597 (9th Cir. 2002).
the President of the United States. Newdow claimed that his daughter suffered injury as a result of having to “watch and listen as her state-employed teacher in her state-run school [led] her classmates in a ritual proclaiming that there is a God, and that our’s [sic] is ‘one nation under God.’”

More specifically, Newdow’s complaint contested the constitutionality of (1) the 1954 Act that amended the Pledge to include the phrase “under God,” (2) the California statute requiring the recitation of the Pledge of Allegiance to the flag once a day in schools, and (3) the school district’s policy of mandating willing students to recite the Pledge under their teacher’s direction. Newdow sought to have the court order both the President and Congress to remove the words “under God” from the Pledge. However, the court held that the President was not a proper defendant in an action disputing the constitutionality of a federal statute. In addition, under the Speech and Debate Clause, federal courts do not have

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8 83 P.L. 396 (1954) (amending Pledge to include the words “under God”).


11 See Newdow, 292 F.3d at 601 (disqualifying the President as an appropriate defendant); Franklin v. Massachusetts, 505 U.S. 788, 803 (1992), (explaining the court has no jurisdiction to enjoin President in performance of his official duties) (quoting Mississippi v. Johnson, 71 U.S. 475, 501 (1866)); Bates v. Taylor, 87 Tenn. 319, 331 (1888) (stating neither Congress nor President “can be restrained in its action by the judicial department”).

12 U.S. CONST. art. I, § 6, cl. 1 (stating that legislative immunity created by clause performs an important function in representative government); see Eastland v. U.S. Servicemen’s Fund, 421 U.S. 491, 502 (1975) (explaining that the Clause provides protection against civil actions, criminal actions and actions brought by private individuals); see also Newdow v. U.S. Congress, 292 F.3d 597, 601 (9th Cir. 2002) (noting that because of art. I, § 6, cl. 1, federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation).
jurisdiction to order Congress to amend or enact legislation.\textsuperscript{13} The court also rejected Newdow's argument that Congress' protection by operation of the Speech and Debate Clause was vitiated because the enactment of the 1954 Act violated the Establishment Clause.\textsuperscript{14}

Newdow was able to successfully overcome certain standing issues even though he lacks full custody of his daughter.\textsuperscript{15} The court found that as a parent, Newdow had standing to challenge any exercise interfering with his right to coordinate the religious instruction of his daughter.\textsuperscript{16} Although Newdow was found to have standing to dispute the policy of the school district that his daughter currently attends,\textsuperscript{17} he was found not to have standing regarding the school district that his daughter previously attended.\textsuperscript{18} In order to have proper standing to sue, the court explained, a plaintiff must prove that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, 'as opposed to merely speculative, that the injury will be redressed by a favorable decision.'\textsuperscript{19} Although the Supreme Court disagreed with the lower court's reasoning and

\textsuperscript{13} See Newdow, 292 F.3d. at 602 (holding that this Court lacks jurisdiction over Congress); see also Eastland, 421 U.S. at 503 (stating that legislature should be protected from the burden of defending themselves in litigation); Louis S. Raveson, \textit{Unmasking the Motives of Government Decision Makers: A Subpoena For Your Thoughts?}, 63 N.C. L. REV. 879, 901 (1985) (noting that legislative immunity derives from Speech or Debate Clause of the Constitution).


\textsuperscript{15} See Newdow, 292 F.3d at 602–04 (analyzing standing issue).

\textsuperscript{16} See id. at 603 (providing that Newdow has standing).

\textsuperscript{17} See id. at 602 (explaining basis for Newdow's standing).

\textsuperscript{18} Newdow v. U.S. Congress, 292 F.3d 597, 603 (9th Cir. 2002) (discussing standing in claims against Newdow's daughter's previous school district).

ultimately found that Newdow lacked standing to bring this suit on behalf of his daughter, an analysis of the lower court's opinion is beneficial to develop a firm understanding of the issues at hand.

With regards to the Establishment Clause challenge, the Ninth Circuit applied the three tests the Supreme Court has traditionally applied to Establishment Clause cases: the three-prong *Lemon v. Kurtzman*\(^2\) test, the "endorsement" test adopted in *Lynch v. Donnelly*,\(^2\)\(^2\) and the "coercion" test relied upon in *Lee v. Weisman*.\(^2\)\(^3\) Under these tests, the Ninth Circuit found that the legislative intent behind the 1954 Act was the promotion of religion as a means of distinguishing the United States from Communist nations.\(^2\)\(^4\) Specifically, the application of the endorsement test led the court to conclude that the Pledge is "an impermissible government endorsement of religion because it sends a message to unbelievers that they are not full members of the community, but are instead 'outsiders.'"\(^2\)\(^5\) The court


\(^2\)\(^1\) 403 U.S. 602 (1971); see Dena S. Davis, *Religious Clubs in the Public Schools: What Happened After Mergens?*, 64 ALB. L. Rev. 225, 239 n.13 (2000) (listing three prongs required under Lemon); see also Jeffrey D. Williams, Humphrey v. Lane: The Ohio Constitution's David Slays the Goliath of Employment Division, Department of Human Resources of Oregon v. Smith, 34 AKRON L. Rev. 919, 946 n.22 (2001) (stating that Lemon Court established three prong test to determine if Establishment Clause has been violated).


\(^2\)\(^5\) Newdow, 292 F.3d. at 608 (applying endorsement test).
ultimately held that the 1954 Act amending the Pledge of Allegiance, the Elk Grove School District’s policy, and the ensuing recitation of the Pledge, violates the Establishment Clause.\textsuperscript{26}

In his dissent, Judge Fernandez did not apply the religion clause tests, but instead focused on the purpose of both the religion clauses and the Pledge of Allegiance.\textsuperscript{27} He noted that the religion clauses were created to “avoid discrimination,” not to "drive religious expression out of public thought.”\textsuperscript{28} Moreover, Judge Fernandez stressed the lack of substantial danger in using phrases mentioning “God,” noting that they exist throughout American culture and will continue, as they have since 1791,\textsuperscript{29} to be harmless.\textsuperscript{30} In addition, Judge Fernandez commented on the conflict between those who want to get rid of religious phrases and those who want to retain them, noting that the Constitution is “a practical and balanced charter for the just governance of a free people in a vast territory.”\textsuperscript{31} The dissent further highlighted the embellished nature of Newdow’s alleged injury in his insistence that the danger of “under God” in the Pledge of Allegiance is “so miniscule as to be de minimis.”\textsuperscript{32}

In Newdow v. U.S. Congress (Newdow II),\textsuperscript{33} the Ninth Circuit panel refined its decision and refused to rehear the case \textit{en banc}.\textsuperscript{34} In amending its decision, the court did not examine the constitutionality of the federal 1954 Act because it noted that in holding only the school district policy constitutional, the District

\textsuperscript{26} See id. at 612 (stating holding of case); Collins, supra note 20, at 2 (explaining that Act violates Establishment Clause); Andonian, supra note 24, at 133 (noting that Act failed Lemon test, and therefore was unconstitutional).

\textsuperscript{27} See Newdow, 292 F.3d. at 613 (Fernandez, J., dissenting) (disagreeing with application of tests).

\textsuperscript{28} See id. at 613.

\textsuperscript{29} See id. at 614 (commenting that “under God” has been used since 1791); Jacob Pugh, \textit{Wedge of Allegiance: Is the Newdow Case a Portent of Religious Intolerance?}, 63 OR. ST. B. BULL. 15, 16 (2003) (asserting that there is little risk from phrases such as “under God”); Trinh, supra note 14, at 818 (labeling danger to society from use of “God” as de minimis).

\textsuperscript{30} See Newdow v. U.S. Congress, 292 F.3d. 597, 614 (Fernandez, J., dissenting) (9th Cir. 2002) (defending “God” phrases as harmless).

\textsuperscript{31} See id. at 614.

\textsuperscript{32} See id. at 613.

\textsuperscript{33} 328 F.3d 466 (9th Cir. 2003) (hereinafter \textit{Newdow II}).

\textsuperscript{34} See id. at 469 (stating order of case); Collins, supra note 20, at 23 (noting that judicial panel denied hearing case \textit{en banc}); Andonian, supra note 24, at 125 (clarifying that motions for rehearing were denied).
Court had not ruled on the broader federal issue. However, the panel applied only the coercion test in finding that the school district’s policy of reciting the Pledge defied the Establishment Clause. Although the Ninth Circuit panel acknowledged prior statements by the Supreme Court regarding the Pledge, the majority of the panel found that Court has never ruled on the permissibility of the Pledge in either of these instances. As a result of the holding of Newdow II, the Elk Grove School District filed an appeal to the Supreme Court.

The Newdow II decision contained a dissent by both Circuit Judges McKeown and O'Scannlain. While Judge McKeown's dissent expressed the need for an en banc review, Judge O'Scannlain, on the other hand, referred to the court’s decision as a "serious mistake" on multiple fronts. Specifically, Judge O'Scannlain expressed that the rehearing of Newdow should have been en banc due to its overwhelmingly improper holding. This dissent emphasized that a recitation of the Pledge of Allegiance "cannot possibly be an 'establishment of religion' under any reasonable interpretation of the Constitution.”

35 See Newdow II, 328 F.3d at 467-70 (discussing Newdow), see also Andonian, supra note 24, at 119–20 (stating that “[N]inth Circuit’s original decision essentially deemed the Pledge of Allegiance unconstitutional, igniting controversy among legal scholars and citizens across the United States. Then, upon realizing its mistake, the Ninth Circuit amended their decision removing reference to and analysis of the 1954 Act”); cf. Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437, 445 (7th Cir. 1992) (conflicting with Ninth Circuit’s original decision).

36 See Newdow II, 328 F.3d at 466–70 (discussing holding of the case), see also Newdow v. U.S. Congress, 292 F.3d. 597, 607 (9th Cir. 2002) (noting that with respect to Lemon, coercion, and endorsement tests, the Court was “free to apply any or all of the three tests, and to invalidate any measure that fails any one of them”); cf. Andonian, supra note 24, at 129–30 (observing that “of the three tests used to analyze challenges to the Establishment Clause, the coercion test is applied the least frequently; this is because of the high bar it sets”).

37 See Newdow II, 328 F.3d at 466–70 (discussing Supreme Court dicta); see also John E. Thompson, Note, What’s the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance, 38 HARV. C.R.-C.L. L. REV. 563, 569–71 (2003) (analyzing Newdow II).

38 See Thompson, supra note 37, at 571 (commenting on Elk Grove School District's response to Ninth Circuit panel's holding).

39 See Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003) (Newdow II) (O'Scannlain, J., dissenting) (discussing several reasons the Court should have reheard Newdow en banc).

40 See id. (disagreeing with majority).

41 See id. (expressing need for en banc hearing).

42 Id.
B. The Pledge of Allegiance

The original Pledge of Allegiance was written by Francis Bellamy. Bellamy, a socialist, intended for the Pledge to be a "creed that would ... remind those who recited it that the state was to prevail over the individual or any competing source of authority, whether church or family." The Pledge of Allegiance was officially codified in 1942 by Congress and the relevant excerpt was phrased "one Nation indivisible." The adoption of the Pledge manifested Congress' desire to express the government's disdain for improper government expansion and usurpation of purely civil liberties.

The current version of the Pledge of Allegiance is the result of a Congressional addition. In June, 1954 Congress enacted an amendment which added the phrase "under God" following the phrase "one Nation." "Under God" was added to acknowledge that "[Americans] and [United States] Government are dependent upon the moral directions of the Creator." More specifically, the change was made during the United States' Cold War with the atheist Communist Russia and was passed to

43 See Kmiec, supra note 7, at 313–14 (describing origins of Pledge of Allegiance); see also Frain v. Baron, 307 F.Supp. 27, 29 (E.D.N.Y. 1969) (observing that "the pledge of allegiance was written by Frances Bellamy, a Baptist minister, to be used at the Chicago World's Fair Grounds in October, 1892, on the four hundredth anniversary of the discovery of America"); cf. Emily D. Newhouse, I Pledge Allegiance to the Flag of the United States of America: One Nation Under No God, 35 TEX. TECH. L. REV. 383, 386 (2004) (noting that "Bellamy was an assistant editor of a periodical entitled The Youth's Companion, in which the Pledge first appeared in print during the late 19th century").

44 Kmiec, supra note 7, at 313 (discussing Bellamy's intent for the Pledge).

45 See Thompson, supra note 37, at 564 (explaining codification of Pledge of Allegiance); see also Newhouse, supra note 43, at 387 (stating that "as it was originally codified, the Pledge did not include the words ‘under God,’ the Pledge would not be to ‘one Nation under God’ until 1954 when Congress proposed an amendment adding the words"); cf. Lewis v. Allen, 5 Misc.2d 68, 70 (N.Y. Sup. Ct. 1957) (observing case law which points out that "one Nation indivisible" was codified by Congress).

46 See Kmiec, supra note 7, at 312 (discussing history of Pledge of Allegiance); McKenzie, supra note 14, at 387–88 (describing circumstances in which Pledge of Allegiance was formally recognized by Congress); see also Russo, supra note 10, at 303–05 (outlining development of Pledge of Allegiance).


48 See Collins, supra note 20, at 16 (noting addition of "under God"); Gey, supra note 20, at 1876 (stating that Congress added "under God" to Pledge of Allegiance in 1954); see also Nichols, supra note 5, at 810 (discussing addition of "under God" to Pledge of Allegiance).

polarize the United States from its Cold War adversary.\textsuperscript{50} At that time, Senator Ferguson reaffirmed that "under the Constitution no power is lodged anywhere to establish a religion"\textsuperscript{51} and declared that this addition was "not an attempt to establish a religion" but to recognize "God's province over the lives of our people and over this great Nation."\textsuperscript{52}

Scholars argue that the recognition of God is important to maintain a balanced government, because acknowledgment of a Supreme Being serves as a check and balance to the secular state.\textsuperscript{53} Furthermore, in her concurrence in \textit{Lynch v. Donnelly}, Justice O'Connor expressed the idea that certain governmentally based references to God merely "[express] confidence in the future, and [encourage] the recognition of what is worthy of appreciation in society."\textsuperscript{54}

\textbf{C. The Pledge of Allegiance as a Supreme Court Issue}

The Pledge of Allegiance is not a stranger to the federal courts.\textsuperscript{55} Even before the addition of "under God" to the Pledge of Allegiance, the Supreme Court ruled on a challenge to the Pledge in \textit{West Virginia State Board of Education v. Barnette}.\textsuperscript{56} In \textit{Barnette}, a Jehovah's Witness brought suit against the school district from which his children were expelled pursuant to regulations requiring students to recite the Pledge of

\textsuperscript{50} See Steven Epstein, \textit{Rethinking the Constitutionality of Ceremonial Deism}, 96 COLUM. L. REV. 2083, 2118–21 (1996) (stating that purpose of amendment was to include definitive factor of American life); Nichols, \textit{supra} note 5, at 810 (suggesting that purpose of amendment was to reflect revival of religiosity in American people); see also Thompson, \textit{supra} note 37, at 564 (noting purpose of amendment of Pledge of Allegiance).


\textsuperscript{52} Id.


\textsuperscript{56} 319 U.S. 624 (1943).
Allegiance. The Court held that such state action violates both the First and Fourteenth Amendments and set the standard for in-school recitation whereby no student thereafter could be compelled to recite the Pledge. There was, however, no mention of whether a student could be compelled to observe respectful silence during the Pledge of Allegiance.

The major problem with the Pledge reciting statute was that the compelled speech proscribed therein is prohibited by the Constitution. The Court referred to the use of symbols such as the flag or emblems to merely be a "shortcut to the mind" and therefore subject to the First Amendment. The actions of the government, in requiring Pledge recitation, were found to "transcend constitutional limitations on their power and invade the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." In his dissent, Justice Frankfurter examined the role of judicial review, judges, and his desire to leave this issue up to the voters, not the Court. Justice Frankfurter viewed the case to be a passing of judgment on State power and thereby outside the role of the Court.

57 See id. at 629–32 (presenting facts of case).
58 U.S. CONST. amend. I.
59 U.S. CONST. amend. XIV.
60 See Barnette, 319 U.S. at 633–44 (analyzing merits of case). See generally Marsha C. Brilliant, Lee v. Weisman: The Establishment Clause: A Consideration of Its Protection Against Allowing Prayer in Public Schools, 15 WHITTIER L. REV. 1193, 1198 (1994) (stating that persuading and compelling students to participate in religious exercise was forbidden by Establishment Clause of First Amendment); Greene, supra note 55, at 452 (noting that Barnette Court held that public-school students could not be compelled to recite the Pledge).
61 See Andonian, supra note 24, at 131 (noting that 1954 Act requires Pledge to be recited at schools, but it does not require citizens to observe or even acknowledge Pledge); Collins, supra note 20, at 38 (acknowledging that Court had missed opportunity to clarify Establishment Clause jurisprudence); Greene, supra note 55, at 462 (declaring that reasonable observer would not necessarily think that non-protesting student is participating in prayer).
62 See West Virginia State Board of Education v. Barnette, 319 U.S. 624, 632 (1943) (discussing actions of State). See generally Nichols, supra note 5, at 821 (reiterating that prayer endorsed religion and violated Establishment Clause); Trinh, supra note 14, at 807 (noting that the words "under God" are violation of Establishment Clause).
63 See Barnette, 319 U.S. at 632 (finding that use of flag symbolizes system or institution).
64 See id. at 642 (affirming judgment enjoining enforcement of West Virginia regulation).
65 See id. at 649 (Frankfurter, J., dissenting) (discussing role of judges).
66 See id. at 653 (stating that the Constitution does not bar the state from carrying out its official duties but for religious influence).
II. THE FIRST AMENDMENT ESTABLISHMENT CLAUSE

A. The First Amendment – As Intended by the Framers of the Constitution

The applicable portion of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Although this clause has been the subject of continuous judicial scrutiny, the enduring interpretation of the clause has relied largely upon determining "what history reveals was the contemporaneous understanding of its guarantees." Therefore, the proper application of the Establishment Clause requires an understanding of what the Framers of the Constitution intended it to demand. It is also important to note that (as with the entirety of the Bill of Rights), the Establishment Clause was not intended to be a statute, but to state an objective.

An investigation into the purpose of the Establishment Clause undoubtedly refers back to the early Americans' fear of bondage from national churches in Europe. More specifically, many


69 See D. Chris Albright, The Words "Under God" Do Not Render the Pledge of Allegiance Unconstitutional, 11 NEV. LAW. 9 (2003) (discussing Framer's intentions for First Amendment); Michael J. Gaynor, Faith of Our Fathers; History Teaches Us that Our Constitution was Written to Support and Encourage Religious Belief, LEGAL TIMES, Nov. 24, 2003, at 50 (noting that Framers of the Constitution recognized their dependence on God); Dahlia Lithwick, Thou Shalt Answer Important Questions: The U.S. Supreme Court Should Stop Side-Stepping the Church-State Debate, TEX. LAW., Dec. 20, 2004, at 51 (posing the question of what Framers of the Constitution intended in terms of religion).

70 See Lynch, 465 U.S. at 678 (discussing purpose of Establishment Clause); Matt Ackerman, Teacher Upheld in Rejecting Bible Story in Public School, N.J.L.J., Jan. 19, 1998, at 4 (stating "[t]he purpose of the Establishment Clause is to stop the establishment of a state religion, not to silence religious citizens"); Melissa Rogers, "Court Defends Religion from Risks of State," N.J.L.J., July 10, 2000, at 1 (explaining that Establishment Clause was enacted to protect rights of members of minority religions).

71 See Everson v. Bd. of Educ. of the Twp. of Ewing, 330 U.S. 8 (1947) (citing historical implications of First Amendment); Lithwick, supra note 69, at 51 (noting that history of Establishment Clause should be examined since some American law has its roots in Napoleonic code); Alan Sears, Not a Religion-Free Land, NAT'L L.J., Dec. 20, 2004,
early Colonists and Settlers were Catholic dissenters of the Church of England's hostile infringement upon their religious beliefs.\footnote{See Everson, 330 U.S. at 8 (discussing Colonists); Joel Chineson, The Politics of Enlightenment, AM. LAW., May 1994, at 46 (stating that writings of Jefferson and Madison were influenced by Colonists); Joel Chineson, Do You Believe in God-Talk? The Culture of Disbelief by Stephen L. Carter, LEGAL TIMES, Feb. 21, 1994, at 50 (hereinafter God-Talk) (noting that writings of influential presidents and columnists were influenced by Colonists).} European and American history is fraught with tragic examples of religious persecution resulting from one's indifference to a national church or religion.\footnote{See Everson, 330 U.S. at 8-9 (referring to hardships faced due to religious persecution); see also Dahlia Lithwick, High Court Should Seek Middle Ground in Church-State Cases, RECORDER, Dec. 3, 2004, at 5 (hereinafter Middle Ground) (noting that not seeking a middle ground in terms of religion could lead to a lifetime of religious persecution); Lithwick, supra note 69, at 51 (stating that "honor thy father and mother" will either turn their children into mad evangelicals or open the door to a lifetime of religious persecution and ostracizing).} Therefore, as fellow dissenters, the Framers created the Establishment Clause with the "inten[t] . . . to prohibit the designation of any church as a 'national' one,"\footnote{Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).} whereby there is "neither orthodoxy or heterodoxy."\footnote{See West Virginia State Board of Education v. Barnette, 319 U.S. 624, 653 (1943) (Frankfurter, J., dissenting) (explaining that First Amendment "terminated disabilities" and did not "create new privileges").}

A review of the events surrounding the passing of the Bill of Rights exposes the large role played by James Madison.\footnote{See Wallace, 472 U.S. at 92-93 (Rehnquist, J., dissenting) (discussing James Madison).} Madison is credited with proposing the following words, which eventually were revised to become the First Amendment Religion Clauses: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."\footnote{See id. at 96 (Rehnquist, J., dissenting) (explaining origin of Religion Clauses).} This language demonstrates that Madison, "undoubtedly the most important architect among the Members of the House of Amendments which became the Bill of Rights,"\footnote{See id. at 98 (Rehnquist, J., dissenting) (noting history of Bill of Rights).} intended the First Amendment to serve as a means to prohibit the creation of any national religion and inter-sect discrimination, not as requiring
the government to behave in a strictly neutral manner towards religion and irreligion.79

B. Judicial Interpretation of Establishment Clause

Establishment Clause jurisprudence has treated Constitutional challenges under three different theories: separation, neutrality, and accommodation.80 This Note argues that accommodation is the best approach and therefore should be applied as the standard in analyzing challenges involving the Establishment Clause.

1. Separation and its Use of the Mythical "Wall"

Justice Black first promulgated the erroneous separation theory in *Everson v. Bd. Of Educ. Of The Township of Ewing.*81 In *Everson*, the Court held that public tax funds could be used to fund the transportation of parochial school students.82 However, even after upholding the use of public funds to transport children to a religiously-based school, Justice Black went on to define the Establishment Clause in light of the separation theory, whereby "Neither a state nor a government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."83

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81 330 U.S. 1 (1947).


83 *Everson*, 330 U.S. at 15.
Perhaps the incongruent analysis and holding of *Everson* is telling, for it demonstrates that the theory of separation is not only inaccurate, but also impossible.\(^8^4\) Various courts have since struck down the separation theory, citing that no societal segment nor institution can “exist in a vacuum . . . . Nor does the Constitution require complete separation of church and state.”\(^8^5\) An investigation into our Nation’s historical formation demonstrates the pervasive recognition and appreciation of a Supreme Being throughout our government.\(^8^6\) Such allusions include: the mention of God in the Declaration of Independence,\(^8^7\) the use of a Bible to swear in the President,\(^8^8\) President Washington’s establishment of a day of Thanksgiving to give thanks for God’s gifts,\(^8^9\) the phrase “In God We Trust” on our

\(^{84}\) See Loewy, supra note 79, at 534–35 (discussing separation); see also Felsen, supra note 80, at 404–05 (stating that separation doctrine is unrealistic); Horowitz, supra note 80, at 617–18 (acknowledging that Supreme Court quickly realized that the separation doctrine is impractical).


\(^{87}\) THE DECLARATION OF INDEPENDENCE para. 1, 2, 32 (U.S. 1776) (acknowledging existence of a supreme deity in the following instances: (1) preamble speaks of “Nature’s God,” (2) second paragraph states that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights,” and (3) final paragraph makes a reference to the “Supreme Judge of the world” and “divine Providence”).


coinage, and the Supreme Court’s invocation of God’s guidance before commencing judicial proceedings. Such treatment belies separation, which requires the elimination of any connection between government and religion.

In reality, separation is impractical, mainly because the United States government is concerned with general public welfare and the funding of entities. As applied, strict separation would require the withholding of benefits and funding to all religious groups. Also, a strict application of the separation concept would mandate that churches, as separated from the state, would not even be eligible for the protection from municipal police and fire companies. This exclusion of religious groups from funding and governmental privileges is exactly the sort of “callous

90 See Newdow, 124 S. Ct. at 2318 (explaining that “In God We Trust” has been on every U.S. coin since 1938 and subsequently appeared on paper currency); Lynch, 465 U.S. at 676 (outlining specific references to religion, including the slogan “In God We Trust” on our nation’s coinage); Engel v. Vitale, 370 U.S. 421, 440 n.5 (1962) (Douglas, J., concurring) (highlighting process by which “In God We Trust” became mandatory on United States coinage and ultimately became the nation’s motto).


93 See Esbeck, supra note 92, at 290 (maintaining that high governmental taxes and regulation resulted in “a near monopoly over the resources available for social welfare spending”); Gedicks, supra note 92, at 1088 (commenting on unsatisfactory application of strict separation); Donald A. Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development Part II. The Nonestablishment Principle, 81 HARV. L. REV. 513, 515 (1968) (announcing significant state involvement in “allocating resources and actively structuring social order”).

94 See Esbeck, supra note 92, at 290 (emphasizing that “[n]o-aid separationism demands that religious ministries either secularize and thereby qualify for government aid, or close their doors for lack of funding”); Gedicks, supra note 92, at 1088 (criticizing separation); Giannella, supra note 92, at 515 (arguing that heightened state involvement in distributing resources raises an issue of whether to provide benefits to religious groups).

indifference” that the Court has found to be contrary to the Establishment Clause.

In Everson, Justice Black inappropriately alluded to Thomas Jefferson's “wall of separation between church and state” metaphor as supporting the separation theory. Thomas Jefferson’s “misleading metaphor” has frequently been the subject of criticism for its application to the Establishment Clause. The phrase “wall of separation” is not mentioned anywhere in the Constitution of the United States but has nevertheless been applied as constitutional doctrine in analyzing First Amendment issues. In order to explain the mythical nature of the “wall of separation,” it is necessary to examine its author and its improper permeation of Establishment Clause jurisprudence.

At the time the First Amendment was drafted, Thomas Jefferson was in France and therefore did not play any part in its drafting. The actual phrase “wall of separation” was extracted from a courtesy letter Jefferson wrote to the Danbury Baptist Association in response to a discussion nearly fourteen years previously.

96 Zorach, 343 U.S. at 314.
100 See Engel, 370 U.S. at 93-95 (disqualifying Jefferson’s “Wall of Separation” as unsound constitutional doctrine); McCollum v. Bd. of Educ., 333 U.S. 203, 247 (1948) (Reed, J., dissenting) (stating that Establishment Clause cases should not be decided according to Jefferson’s figure of speech); Wallace, 472 U.S. at 92 (Rehnquist, J., dissenting) (commenting on misapplication of Jefferson’s metaphor to Establishment Clause cases).
102 See Reynolds, 98 U.S. at 163 (noting Jefferson’s presence in France during drafting of the First Amendment); Wallace, 472 U.S. at 92 (Rehnquist, J., dissenting) (commenting on application of “wall” metaphor to Establishment Clause); see also John S. Baker, Jr., The Religion Clauses: Since the mid-1980s, the Supreme Court Has Chartered an Inconsistent Course that Sometimes Does, and Sometimes Does Not, Apply Strict Separation of Church and State, WORLD AND I, Jan. 1, 2004, at 20 (discussing original meaning of religion clauses).
after the Congress enacted the Amendments.\textsuperscript{103} It is nevertheless unlikely, however, that strict separation was the goal of a man who, in both of his inaugural addresses, acknowledged the need for divine guidance and rested assurance in "the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations . . . and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future."\textsuperscript{104}

Various Courts have affirmatively discredited the application of the "wall" metaphor in Establishment Clause cases.\textsuperscript{105} Justice Rehnquist referred to the use of Jefferson's metaphor as constitutional doctrine as a "mistaken understanding of Constitutional history."\textsuperscript{106} Justice Rehnquist's insightful dissent in \textit{Wallace} adamantly rejects the use of the "wall" metaphor in Constitutional disputes, suggesting that "It should be frankly and explicitly abandoned."\textsuperscript{107} Moreover, in rejecting the "wall" metaphor Justice Rehnquist quotes Benjamin Cardozo's observation that "metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they often end by enslaving it."\textsuperscript{108}

2. Neutrality

The erroneous theory of neutrality can be attributed to the Court's holding in \textit{School District of Abington Township v. Schempp},\textsuperscript{109} where the Court held that a Pennsylvania statute requiring Biblical readings at the opening of each school day was


\textsuperscript{104} Lee v. Weisman, 505 U.S. 577, 634 (1992) (Scalia, J., dissenting) (citing Inaugural Addresses of the Presidents of the United States, S. Doc. 101-10, p. 28 (1989)).

\textsuperscript{105} \textit{See} Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (stating that "wall" metaphor is not wholly accurate); \textit{Wallace}, 472 U.S. at 92 (Rehnquist J., dissenting) (criticizing Court's application of "wall of separation" to Establishment Clause cases); Zorach v. Clauson, 343 U.S. 306, 312–15 (1952) (noting that First Amendment does not mandate complete separation between Church and State).


\textsuperscript{107} \textit{Id.} at 107.

\textsuperscript{108} \textit{Id.} (quoting \textit{Berkey v. Third Avenue R. Co.}, 244 N.Y. 84, 94 (1926)).

an unconstitutional violation of the Establishment Clause.\textsuperscript{110} Justice Clark called for "wholesome neutrality" to be maintained, whereby "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."\textsuperscript{111}

Neutrality was also the preferred theory used by the Court in \textit{Wallace v. Jaffree},\textsuperscript{112} where the Court struck down a school moment of silence law (found to effectively foster mandatory prayer) as inconsistent with the "government [practicing] a course of complete neutrality toward religion."\textsuperscript{113} Although the Court properly reasons that the First Amendment "freedom of conscience" additionally "embraces the right to select any religion or none at all,"\textsuperscript{114} it errs in holding that this freedom can only be upheld by applying the theory of neutrality.\textsuperscript{115} Contrary to the reasoning of the \textit{Wallace} majority, neutrality does not simply enable citizens freedom of conscience; it dangerously borders on the possibility of promoting hostility towards those who have conscientiously chosen religion over non-religion.\textsuperscript{116}

The neutrality theory is improper for numerous reasons, most especially for its potential to foster hostility toward religion.\textsuperscript{117} As noted by various courts, hostility against religion is just as severely prohibited by the Constitution as an outright

\begin{footnotesize}
\begin{enumerate}
\item See id. at 205 (stating holding of case).
\item Id. at 222.
\item 471 U.S. 38 (1985).
\item Id. at 60.
\item Id. at 53.
\item See \textit{Schempp}, 374 U.S. at 306 (Goldberg, J., concurring) (warning application of neutrality to Establishment Clause may have dangerous repercussions); \textit{see also Thomas C. Berg, Religion Clause Anti-Theories}, 72 \textit{NOTRE DAME L. REV.} 693, 724 (1997) (positing enforcement of neutrality standard will lead to "active suppression" of religion, moral truths and insight into human nature). \textit{See generally Zorach v. Clauson}, 343 U.S. 306, 313-15 (1952) (discussing importance of not favoring secular values over religious beliefs or religious beliefs over secular values).
\item See \textit{Schempp}, 374 U.S. at 306 (Goldberg, J., concurring) (criticizing neutrality and fear of hostility); \textit{see also Berg, supra note 115, at 724 (cautioning neutrality may dangerously suppress religious and moral discourse). See generally William A. Galston, Expressive Liberty and Constitutional Democracy: The Case of Freedom of Conscience, 48 \textit{AM. J. JURIS.} 149, 175 (2003) (discussing neutrality's effect of either favoring or inhibiting free expression of religious belief). \end{enumerate}
\end{footnotesize}
establishment of religion. Chief Justice Rehnquist has disqualiﬁed the theory of neutrality on multiple occasions, noting that “nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion.” As mandated by Constitutional law theory, the interpretation of the Constitution must not deviate from the original intentions of the Framers. To act otherwise will “lead to the type of unprincipled decision-making that has plagued our Establishment Clause cases.” Chief Justice Rehnquist further rejects neutrality by reasoning that the principle is properly applied only in First Amendment speech cases, where it is used to determine when courts should apply strict scrutiny.

Reviewing the objective of the Establishment Clause offers additional evidence of the inapplicability of neutrality. Whereas neutrality calls for impartial treatment of all religions as well as irreligion, the Establishment Clause merely aims to “prevent any national ecclesiastical establishment, which should

118 See Wallace, 472 U.S. at 85–86 (Burger, C.J., dissenting) (objecting to majority’s holding); see also Schempp, 374 U.S. at 306 (Goldberg, J., concurring) (emphasizing Constitution prescribes hostility toward religion). See generally Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 15–16 (1947) (noting Establishment Clause meant to prohibit punishment for religious belief).

119 Wallace, 472 U.S. at 113 (Rehnquist, J., dissenting) (adding Framer’s drafted Establishment Clause with intent to prevent national religion and domination of one religious sect over others).


123 See Zelman v. Simmons-Harris, 536 U.S. 639, 728 (2002) (Breyer, J., dissenting) (arguing that neutrality is at odds with Establishment Clause goal of social concord); see also Gedicks, supra note 92, at 1100 (arguing that Establishment Clause protects fundamental value of separation of church and state while neutrality only ensures equal treatment of religion and social welfare). See generally Anastasia P. Winslow, Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites, 38 ARIZ. L. REV. 1291, 1305–06 (1996) (suggesting neutrality not sole concern under Establishment Clause and adding government cannot favor non-religion over religion even if it does so evenhandedly).
give to an hierarchy the exclusive patronage of the national government." A straight comparison of these two objectives exposes the over-burdensome nature of neutrality.

3. Accommodation: The Proper Analytical Route

In upholding the public school practice of early dismissal for students attending religion classes outside of school, the Court in *Zorach v. Clauson* found the proper analysis of the Establishment Clause to be the accommodation theory. The Court interpreted the Establishment Clause as requiring the government to "[respect] the religious nature of our people and [accommodate] the public service to their spiritual needs" because "[anything else] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups."

The Court in *Lynch v. Donnelly* also applied the accommodation theory in finding that the city's display of a creche was not a violation of the Establishment Clause. Chief Justice Burger appropriately reasoned that the deciding of an Establishment Clause case requires a "[reconciliation of] the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the

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125 See Gedicks, *supra* note 92, at 1100 (positing satisfaction of neutrality principle does not ensure compliance with Establishment Clause); see also Steven K. Green, *Of (Un)Equal Jurisprudence: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C.L. REV. 1111, 1136 (2002) (arguing neutrality, especially in religious funding cases, has anti-Establishment Clause effects such as government attribution of religious messages and dependency of religious entities on government). See generally Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 573 (2004) (criticizing neutrality as an "empty concept" and positing there is no neutral baseline from which to gauge claims of neutrality).
128 Zorach, 343 U.S. at 314 (setting forth holding of the Court).
other, and the reality that, as the Court has so often noted, total separation of the two is not possible.” In effectively reconciling this tension, the Court applied the constitutionally mandated accommodation theory, not hostility, towards religion.

Accommodation is also verified by the United States’ historic tradition of prayer. As previously noted, throughout American history, society and government have embraced references to God. Numerous Supreme Court Justices have even recognized these references as benign. This pervasive embrace of religion from the founding of the United States until the present day clearly demonstrates that the Establishment Clause was intended to accommodate religion. Moreover, it reveals that the Religion Clauses were “not designed to drive religious expression out of public thought; they were written to avoid discrimination.” In keeping with this design, accommodation clearly poses no threat to religious and non-religious liberty.

130 Lynch, 465 U.S. at 672 (stating that the Court has consistently recognized that there cannot be complete separation between state and religion).
131 See Lynch, 465 U.S. at 673 (discussing permissible accommodation under the Establishment Clause); Santa Fe, 530 U.S. at 323 (Rehnquist, C.J. dissenting) (noting that Lynch decision utilized accommodation theory to determine the validity of the display); Tangipahoa, 530 U.S. at 1254 (citing Lynch for position that accommodation is required under the Constitution).
132 See Allegheny v. American Civil Liberties Union, 492 U.S. 573, 672 (1989) (stating that there are accommodations within House and Senate Chambers for Members of Congress to be able to pray while at work); Lee v. Weisman, 505 U.S. 577, 645 (Scalia, J., dissenting) (referring to mention of God in government practices); Santa Fe, 530 U.S. at 323 (Rehnquist, C.J. dissenting) (noting that there is nothing in the Constitution to prevent public school students from praying at any time during school).
133 See Duncan, supra note 53, at 618 (stating that despite the Constitutional guarantee of separation between church and state, Christianity is pervasive in public life); H. Wayne House, A Tale of Two Kingdoms: Can There be Peaceful Coexistence of Religion with the Secular State?, 13 BYU J. PUB. L. 203, 203–04 (1999) (quoting President John Quincy Adams and discussing close ties between government and religion in early American life); Kmiec, supra note 7, at 307–10 (noting religious references throughout American politics).
134 See Allegheny, 492 U.S. at 672 (asserting that religion is so pervasive in American life that federal government has acted in order to accommodate federal lawmakers desire to pray close to the floor); Lee, 505 U.S. at 645 (Scalia, J., dissenting) (noting that mentioning religion is common in United States governmental functions); Newdow v. U.S. Congress, 292 F.3d 597, 613 (9th Cir. 2002) (Fernandez, C.J., dissenting) (citing religious references).
135 See Lee, 505 U.S. at 645 (Scalia, J., dissenting) (promoting propriety of accommodation). See generally, Duncan, supra note 53, at 618 (discussing privileged position that Christianity has enjoyed in America); House, supra note 133, at 204 (noting historical connection between Christianity and United States government which has existed since the Nation’s founding).
136 Newdow, 292 F.3d at 613 (Fernandez, J., dissenting) (explaining that religion clauses were not supposed to stamp out all religion, but rather to prevent establishment of an official, national religion).
This is further evidenced by the United States’ continuous growth as a religiously diverse nation inhabited by numerous religious sects, including non-believers.\textsuperscript{137}

\textbf{C. The Three Tests as Applied by the Ninth Circuit}

Although the Court has cited the terms “separation,” “neutrality,” and “accommodation” in First Amendment cases, Establishment Clause cases have typically applied each of the three different tests.\textsuperscript{138} As the Ninth Circuit’s decision in \textit{Newdow} was based upon the application of all three tests, the following overview and discussion in light of the \textit{Newdow} decision serves to facilitate an understanding of exactly where the majority in \textit{Newdow} went wrong in applying the tests to the Pledge of Allegiance.

1. The \textit{Lemon v. Kurtzman} Test

In holding that granting state aid to non-public schools was unconstitutional, the court in \textit{Lemon} formulated a three part test for assessing possible Establishment Clause violations.\textsuperscript{139} In order to be constitutionally sound, the government conduct must “[f]irst . . . have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster ‘an excessive

\textsuperscript{137} See id. at 614 (Fernandez, J., dissenting) (noting that phrases such as “In God We Trust” have not caused any harm upon religious liberties); see also Albright, supra note 69, at 9 (establishing that religious diversity has not diminished as result of Pledge of Allegiance amendment to include “under God”). See generally Akhil Reed Amar, \textit{The Fifty-Seventh Cleveland-Marshall Lecture: The Bill of Rights and Our Posteriority}, 42 CLEV. ST. L. REV. 573, 578 (1994) (recognizing that “America is and always has been a religiously diverse nation – and religious liberty is among the most prized jewels of the American Constitution”).


government entanglement with religion.”\textsuperscript{140} The Ninth Circuit improperly found that the 1954 Act violated the second prong, holding that the legislation effectively promoted religion when it amended the Pledge of Allegiance to include “under God.”\textsuperscript{141} This analysis is incorrect, as Congressional records and Supreme Court dicta demonstrates, the Pledge of Allegiance and its “under God” phraseology is not a religious activity, but an act of patriotic expression.\textsuperscript{142}

2. The “Endorsement Test” from Lynch v. Donnelly

The “endorsement” test was suggested by Justice O’Connor’s concurring opinion in Lynch as a “clarification” of Establishment Clause jurisprudence.\textsuperscript{143} More specifically, the endorsement test interprets the Establishment Clause as “[prohibiting] government from making adherence to a religion relevant in any way to a person’s standing in the political community.”\textsuperscript{144} Justice O’Connor also cited two ways in which government action fails the test, namely “excessive entanglement with religious institutions” and “government endorsement or disapproval of religion.”\textsuperscript{145} In applying this test, the Ninth Circuit found that the reference in the Pledge to “God” professed a belief in monotheism and thereby violated government neutrality because it affirmed belief in the existence of God.\textsuperscript{146} Once again, this

\textsuperscript{140} Newdow v. U.S. Congress, 292 F.3d 597, 612–13 (9th Cir. 2002) (quoting Walz v. Tax Comm’n, 397 U.S. 664, 668 (1970)).

\textsuperscript{141} See Newdow, 292 F.3d at 610 (applying purpose prong to Pledge of Allegiance); see also Brett G. Scharffs, Foundations of Church Autonomy: The Autonomy of Church and State, 2004 BYU L. REV. 1217, 1338 (2004) (analyzing Court’s holding in Newdow regarding the purpose of Pledge of Allegiance); Trinh, supra note 14, at 830 (concluding that Ninth Circuit “was incorrect to hold that the Pledge was coercive in nature”).

\textsuperscript{142} See Kmiec, supra note 7, at 312–13 (disagreeing with Ninth Circuit’s holding); see also Lynch v. Donnelly, 465 U.S. 668, 676 (1984) (including the Pledge of Allegiance, “recited by many thousands of public school children – and adults – every year,” among examples of references to religious heritage that, like the celebration of Thanksgiving, are secular and patriotic); Allegheny v. American Civil Liberties Union, 492 U.S. 573, 631 (1989) (O’Connor, J., concurring) (stating that certain practices, despite religious roots, are now “generally understood as a celebration of patriotic values rather than particular religious beliefs”).

\textsuperscript{143} See Lynch, 465 U.S. at 687–88 (O’Connor, J., concurring) (clarifying Establishment Clause jurisprudence).

\textsuperscript{144} Id. at 688 (reviewing fundamental prohibitions of Establishment Clause).

\textsuperscript{145} Id. (identifying governmental endorsement or disapproval as the “more direct” of the two categories).

\textsuperscript{146} See Newdow, 292 F.3d at 607–08 (applying endorsement test); see also Thompson, supra note 37, at 566 (understanding Ninth Circuit as holding that “the Pledge takes a position with regard to a fundamental religious question, whether God exists, in
holding was improperly based upon a distorted interpretation of the purpose of the Pledge as a religious act. It is even recognized within the origin of school prayer cases, Engel v. Vitale, that the holding therein is not “inconsistent with the fact that [people] are officially encouraged to express love for our country by reciting historical documents . . . which contain references to the Deity or . . . with the fact that there are many manifestations in our public life of belief in God.”

3. The “Coercion Test” from Lee v. Weisman

In determining that the invitation of clergy members to offer prayers at public school graduation violated the Establishment Clause, the Court in Lee formulated the “coercion” test. An action fails this test if it is found that “citizens are subjected to state-sponsored religious exercises, [whereby] the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.” Consistent with the facts of Lee, the concentration in Newdow was on the special risk of “indirect coercion” that occurs with young school children, where there is a fear of the “[imposition] upon schoolchildren [of] the . . . unacceptable choice between participating and protesting.” Again, the Ninth Circuit improperly applied this test to the Pledge of Allegiance because it inequitably compared outright prayer to the recitation of a patriotic statement. On the contrary, the reference to “God” in contravention of the principle of government neutrality toward religion); Clay Calvert & Robert D. Richards, Defending the First in the Ninth: Judge Alex Kozinski and the Freedoms of Speech and Press, 23 LOY. L.A. ENT. L. REV. 259, 290 (2003) (observing that Ninth Circuit held, in Newdow, that “the reference to a single ‘God’ was tantamount to endorsing monotheism as the national religious preference”).


150 Lee, 505 U.S. at 592.

151 See Newdow v. U.S. Congress, 292 F.3d 597, 609 (9th Cir. 2002).

152 See Newdow, 292 F.3d at 613 (Fernandez, J., dissenting) (disagreeing with majority about coercive effect of Pledge of Allegiance); see also Kmiec, supra note 7, at 312.
the Pledge does not disqualify the recitation of the Pledge from being a purely patriotic act.\footnote{See \textit{Newdow}, 292 F.3d at 614 (determining that Pledge of Allegiance is not a religious act); \textit{see also} Thompson, supra note 37, at 563 (commenting that Pledge of Allegiance is a "patriotic ritual" and that "most Americans had probably never considered that the routine recitation of the Pledge in the public schools might violate the Constitution's prohibition on government establishments of religion"). \textit{But see} Berg, supra note 116, at 46-47 (positing that although the dissent in \textit{Newdow} argues that Pledge of Allegiance is a purely patriotic act, "the person reciting the Pledge, the panel majority said, is making a series of affirmations, expressing belief in each value and proposition, including that there is a God above the nation").}

\section{Properly Applying the Lemon, Endorsement, and Coercion Tests Within the Accommodation Theory to \textit{Newdow} Would Have Ultimately Achieved the Proper Result in the Supreme Court.}

The Supreme Court was not likely to have agreed with the arguments set forth by Newdow. On numerous occasions,\footnote{See \textit{School Dist. of Abington Twp. v. Schempp}, 374 U.S. 203, 304 (1963) (highlighting that "the reference to divinity in the revised pledge of allegiance... may merely recognize the historical fact that our Nation was believed to have been founded 'under God' and is therefore not a religious exercise"); \textit{see also} Lynch, 465 U.S. at 716 (Brennan, J., concurring) (positing that "the Pledge of Allegiance to the flag can best be understood... as a form a "ceremonial deism," protected from Establishment Clause scrutiny"). \textit{See generally} \textit{Engel v. Vitale}, 370 U.S. 421, 435 n.21 (1962) (proffering that "school children and others are officially encouraged to express love for our country by reciting historical documents... which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being").} Supreme Court Justices have reflected in dicta upon the constitutionality of the Pledge of Allegiance and have noted that the Pledge is not a prayer and is thereby constitutionally sound.\footnote{See \textit{Newdow}, 292 F.3d at 614 (Fernandez, C.J., dissenting) (commenting on dicta regarding Pledge of Allegiance); \textit{see also} Thompson, supra note 37, at 568 (noting that "Judge Fernandez pointed to relevant dicta in five Supreme Court cases" to demonstrate that religious language in Pledge of Allegiance is so miniscule that it can not rationally be regarded as a prayer). \textit{See generally} \textit{Kmiec}, supra note 7, at 312 (citing views on Pledge of Allegiance).} In addition, an analysis of Supreme Court Establishment Clause jurisprudence provides a broad spectrum of behavior that the Court has upheld, which is much more (proffering that "[t]he dissent in \textit{Newdow II} does an admirable job of illustrating not only that the pledge is not a religious act, but also how that fact puts it outside the discussion of the Court's school prayer cases"). \textit{See generally} Walter Lynch, \textit{"Under God" Does Not Need to be Placed Under Wraps: The Phrase "Under God" Used in the Pledge of Allegiance is Not an Impermissible Recognition of Religion}, 41 HOUS. L. REV. 647, 660 (2004) (positing that \textit{Newdow} court improperly reasoned that the phrase "under God" in the Pledge is a profession of a religious belief and further noting that the phrase merely serves as a "description of the undeniable historical significance of religion in the founding of the Republic").}
religiously centered than the Pledge of Allegiance.\textsuperscript{156} It is clear that a rote expression, such as the Pledge, is much less of an expression or evidence of an attempt at governmental establishment of a religion.\textsuperscript{157}

In the foundational school prayer case, \textit{Engel v. Vitale} held that the school policy requiring daily invocation of God's blessing in classrooms was a religious activity that violated the Establishment Clause.\textsuperscript{158} In \textit{Engel}, the defendant Board of Education mandated that the following prayer be said aloud at the commencement of the school day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."\textsuperscript{159} The parents of ten students brought suit in response to this daily prayer recitation, citing its violation of the First Amendment of the Constitution.\textsuperscript{160} The Court agreed with the parents and held

\textsuperscript{156} See Albright, supra not 69, at 13 (suggesting that previous Establishment Clause decisions do not provide that Pledge of Allegiance is unconstitutional); \textit{see also} Douglas Laylock, \textit{Theological Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty}, 118 HARV. L. REV. 155, 223 (2004) (highlighting that "the Justices have always assumed that some modest degree of government-sponsored religious observance is permissible" and that repeated dicta by the Court suggests that it "would not invalidate 'In God We Trust' on the currency, presidential Thanksgiving Day proclamations, or the opening invocation at the Court's own sessions: 'God save the United States and this honorable Court'"). \textit{See generally} Alexandra D. Furth, \textit{Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court's Secularization System}, 146 U. PA. L. REV. 579, 579-80 (1998) (positing that Supreme Court has engaged in a pattern of justifying several state sponsored religious displays by concluding that they have lost any true religious significance).

\textsuperscript{157} See Lynch v. Donnelly, 465 U.S. 668, 717 (1984) (Brennan, J., dissenting) (highlighting that "references [such as the Pledge of Allegiance] are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge"); \textit{see also} Thompson, supra note 37, at 576-78 (discussing arguments against \textit{Newdow}). \textit{But see} Laylock, supra note 156, at 224 (positing that "[t]o recite that the nation is 'under God' is inherently a religious affirmation" and that "[t]he politicians who added 'under God' to the Pledge openly announced their religious purposes, including religious indoctrination of the nation's children").

\textsuperscript{158} See Engel v. Vitale, 370 U.S. 421, 435-36 (1962) (holding that while children are encouraged to express love for United States, often through recitation of documents that contain reference to the deity, official prayer in school violates Establishment Clause, no matter how brief); \textit{see also} John D. Thompson, \textit{Student Religious Groups and the Right of Access to Public School Activity Periods}, 74 GEO. L.J. 205 (1986) (noting that, in \textit{Engel}, "the Court struck down state policies that provided for voluntary student participation in school sponsored religious exercises at the beginning of each school day"). \textit{See generally} Matthew D. Donovan, \textit{Religion, Neutrality and the Public School Curriculum: Equal Treatment or Separation}, 43 CATH. L. REV. 187, 190 (2004) (highlighting that Engel Court "established a standard of neutrality forbidding any law, the "purpose and a primary effect" of which amounts to "the advancement or inhibition of religion").

\textsuperscript{159} See \textit{Engel}, 370 U.S. at 422.

\textsuperscript{160} See \textit{id.} at 424 (discussing facts of case).
that the use of the public school system to promote the narration of a prayer was "wholly inconsistent with the Establishment Clause."161

During its discussion, the Court noted that the Framers of the Constitution wrote the First Amendment to "quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and pray only to the God that government wanted them to pray to."162 Then, the Court in Engel purposely distinguished invalid school prayer from recitation of the Pledge of Allegiance, noting that "[t]here is nothing in the decision reached here that is inconsistent with the fact that children and others are . . . encouraged to express love for our country by reciting historical documents . . . which contain references to the Deity . . . . Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise [here]."163 To further emphasize the removal of deific references from the holding of this case, the Court also noted the significance of religion in the United States and noted that the histories of both are "inseparable."164

As previously suggested in Part III, the Supreme Court's proper application of the Lemon, endorsement, and coercion tests would have resulted in the reversal of the Ninth Circuit's Newdow judgment. Although the Ninth Circuit properly defined all of the tests, the court incorrectly framed the purpose behind the Pledge of Allegiance, bringing about an improper result.165 Moreover, the accommodation theory clearly promotes practices such as the recitation of the Pledge of Allegiance.166

161 Id.
162 Id. at 435.
163 Id. at 435 n.21.
164 Id. at 434 (stating "[t]he history of man is inseparable from the history of religion").
165 See Newdow v. U.S. Congress, 328 F.3d. 466, 478 (Newdow II) (O'Scannlain, J., dissenting) (arguing that Pledge is not a religious act); Bill W. Sanford, Jr., Separation v. Patriotism: Expelling the Pledge From School, 34 ST. MARY'S L.J. 461, 465 (2003) (noting that purposes of Pledge include denouncing atheism and communism); see also Kmiec, supra note 7, at 311–15 (discussing Newdow II).
166 See Albright, supra note 69, at 9–14 (arguing that Pledge remains constitutionally sound); see also Sanford, supra note 165, at 475–76 (noting that "mere accommodation by the government of a particular religion or practice does not invalidate that action;" rather, "accommodating religious beliefs follows the best of our traditions so long as the
It is interesting to note that, even if the Pledge was religiously oriented, it could possibly survive under the accommodation theory. Pledge recitation is consistent with the view taken in Zorach, that there is "no constitutional requirement which makes it necessary for government to be hostile to religion" and holding otherwise would be to "[prefer] those who believe in no religion over those who do believe." If it were to strike down the Pledge, the Court would, theoretically, be discriminating against religion.

CONCLUSION

The study and interpretation of Constitutional law requires a thorough inspection of the intentions of its Framers. The errors made by the Ninth Circuit in Newdow expose improper Constitutional analysis. The court not only misinterpreted the purpose behind the Establishment Clause, but also failed to properly understand the intentions and meaning of the Pledge of Allegiance as a means to promote patriotism. Nevertheless, the Court has held before and will continue to uphold the fact that "We are a religious people whose institutions presuppose a Supreme Being." Although Newdow's day in Court was denied due to his lack of standing, similar cases will surely follow which will allow the Court to correctly interpret the Establishment Clause and its proper application to the Pledge's "under God" language.

accommodation extends to all faiths with 'hostility toward none.' Here, Pledge recitation supports no hostility but merely accommodates the belief that a majority of Americans follow'). See generally Gordon, supra note 53, at 187 (explaining accommodationists believe that Establishment Clause was intended to prevent government from favoring one sect over another, not forbid neutral government support for religion as a whole).


169 See Gordon, supra note 53, at 187 (arguing purpose of establishment clause is to prevent government from favoring one sect over another); Thompson, supra note 37, at 594 (noting purpose of Pledge is to promote patriotism). See generally Newdow II, 328 F.3d at 471-82 (O'Scannlain, J., dissenting) (disagreeing with majority's analysis).

170 Zorach, 343 U.S. at 313.