Is Including "Under God" in The Pledge of Allegiance Lawful?: An Impeccably Correct Ruling

Peter Brandon Bayer
University of Nevada, Las Vegas -- William S. Boyd School of Law

Follow this and additional works at: http://scholars.law.unlv.edu/facpub

Part of the Constitutional Law Commons

Recommended Citation
http://scholars.law.unlv.edu/facpub/342

This Article is brought to you by Scholarly Commons @ UNLV Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact david.mcclure@unlv.edu.
IS INCLUDING "UNDER GOD" IN THE PLEDGE OF ALLEGIANCE LAWFUL?
AN IMPECCABLY CORRECT RULING

By Prof. Peter Brandon Bayer, Boyd School of Law

On June 26, 2002, in Newdow v. U.S. Congress, a divided panel of the United States Court of Appeals for the Ninth Circuit held that the 1954 Congressional amendment adding the words "under God" to the Pledge of Allegiance violated the First Amendment's prohibition that, "Congress shall make no law respecting an establishment of religion." Because the First Amendment's Establishment Clause applies to the States via the due process clause of the Fourteenth Amendment, the Ninth Circuit likewise found unlawful a California school district's policy encouraging public school students to utter the words "under God" as part of teacher-led daily recitals of the Pledge. Eight months later, the still divided Ninth Circuit panel issued an amended opinion reaffirming its ruling that the school district's policy coerces students to perform a "religious act" in contravention of the Establishment Clause. However, holding that it had exceeded the legal analysis necessary to review the lawfulness of the policy, the Newdow Court vacated its determination that the words "under God" in the Pledge are per se unconstitutional.

The Ninth Circuit's ruling would have been controversial in tranquill times. To a nation reeling under post-9/11 reality, however, the Newdow decision resurrected the often rancorous debate on the lawfulness of governmentally sponsored invocations of God to promote patriotism, unity, morality and national pride. Newdow is not, as some decry, the melancholy triumph of ungracious, unreflective First Amendment literalism. Rather, at this singular juncture when America's fundamental precepts are being challenged with unfamiliar ferocity, Newdow is a courageous, momentous and propitious reaffirmation of the purposes and policies of the Establishment Clause, entirely in step with the Supreme Court's contemporary First Amendment jurisprudence. This article urges, therefore, that the original Newdow decision rightly understood that adding the words "under God" to the Pledge violates the Constitution's anti-establishment principles. Accordingly, government policy encouraging public school students to avow via the Pledge that ours is a nation dependent on or ruled by God, likewise contravenes the First Amendment.

Although space constraints preclude a full discussion of the Newdow majority's seamless legal reasoning, the core is readily expressed. The overarching objective of the Establishment Clause is to promote to the fullest possible extent, "... a course of complete [governmental] neutrality toward religion." While some legal historians dispute whether that sentiment accurately reflects the disposition of the Framers, experience with both the actuality and the threat of neutrality's antithesis - government favoritism for religion - inspired the Supreme Court to affirm that,

... individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. Religious beliefs worthy of respect are the product of free and voluntary choice by the faithful ... [Moreover,] the political interest in forestalling intolerance extends beyond ... intolerance among "religions" to encompass intolerance of the disbelievers and the uncertain.

Thus, according to the Court, the narrow of the anti-establishment neutrality principle is: religions should flourish or fail based on how well their theologies independently capture hearts and minds, an impossibility when a leviathan weighs into the merits of sectarian debates. Indeed, any government stance approving or disapproving sectarian matters exerts an undue influence intimidating, if not outright conveying official disfavor with, and possible negative consequences against, persons who disagree.

continued on page 10
Because government can maximize freedom of conscience only by taking no sides in any substantive religious dispute, even the seemingly innocuous stance of merely encouraging religious faith can induce atheists, agnostics and members of non-traditional creeds to feel separated from and in conflict with the authority that governs them. Similarly, absent constitutionally mandated neutrality, the intolerant may practice invidious discrimination against atheists, agnostics and members of non-traditional faiths, emboldened by what they perceive to be governmental policy of favoring the mainstream religious among us.

In sum, the very government entrusted to protect individual freedom should neither intimidate, nor pressure, nor so much as extol anyone, especially susceptible youth, to choose or to reject religion. The Supreme Court aptly reasoned, therefore, that the three essential Establishment Clause concerns - freedom of conscience, volitional worship, and tolerance - cannot be promoted effectively if government forsakes neutrality to impose its considerable dominion into decisions that rightfully and exclusively belong to, "the home, the church and the inviolable citadel of the individual heart[.]" Accordingly, the Court has adopted, \textit{inter alia}, two discrete but related tests: coercion and endorsement. An official policy or practice violates the Establishment Clause if, even subtly, it coerces individuals toward adopting religious behavior or if it endorses religion in any meaningful fashion.

In light of these sound precepts, the Supreme Court has invalidated programs and mandates that evince official religious indoctrination, particularly when directed to minors, often the most impressionable members of a community. For instance, the Court famously ruled that public school sponsored prayers and other invocations of devotion to God constitute unconstitutional proselytizing. Even a seemingly neutral mandated moment of silence is unlawful if effeuctuated to promote prayer. Consistent with its jurisprudence, the Court recently struck officially sanctioned prayers at public high school graduations and at public school football games, concluding that although not compelled to do so, students nonetheless may feel strongly coerced by an apparent governmental policy inducing them at least to feign respect, if not actually pray at a public event.

Furthermore, the inclusion of prayers as part of a public school program evinces government endorsement of piety, thereby impliedly segregating as outsiders those who, for whatever reasons, decline to embrace officially sponsored religiosity. In telling contrast, permitting religious groups use of public school facilities under the same terms and conditions as enjoyed by secular associations fosters freedom of conscience through impartiality, that is, the government treats the religious group neutrally - no better or worse than any other student organization.

Viewed in the paradigm of neutrality it is no puzzle why the original 	extit{Newdown} decision correctly ruled that the inclusion of "under God" in the Pledge violates the Establishment Clause. The language of the Pledge is familiar: "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." The unique significance of the Pledge and every phrase therein is evidenced by the very fact that this vow of fealty to the Nation has been solemnized as an Act of Congress. Although neither an exhaustive nor detailed iteration of fundamental Americanism, the Pledge distills the quintessence of patriotism, domestic loyalty and national purpose. Reciting the Pledge is not merely to list in a detached fashion a few significant American precepts. Rather, recitation is a profoundly normative act by which the affiant deliberately, purposefully and affirmatively swears devotion both to America itself and to four bedrock secular objectives: our republican form of government, the indivisibility of the nation as a conceptual entity, unmixed liberty and undiluted justice.

In 1954, Congress added a new prescription: ours is "one nation under God." As the Ninth Circuit sensibly deduced, there is no plausible explanation for the addition of the words "under God" except to establish a national endorsement of and preference for practicing faith in God. In a remarkably vaporous attempt to evade the Establishment Clause problem, Congress offered, "The phrase 'under God' recognizes only the guidance of God in our national affairs." The assertion that "under God" merely is descriptive defies credibility because, as noted earlier, nothing in the Pledge may be taken as bare description because the overarching Congressional aim is instrumental to foster national pride, to inspire belief in American ideals. Responding to the perceived threat of encroaching Communism, Congress intended "the inclusion of God in our pledge ... [to] further acknowledge the dependence of our people and our Government upon the moral directions of the Creator." Specifically referring to its hoped for effect on America's youth, President Eisenhower exclaimed during the amendment's signing ceremony, "From this day forward, the millions of our school children will daily proclaim ... the dedication of our Nation and our people to the Almighty."

Thus, understanding the term "under God" merely to express a detached observation of widespread Americanism - "by the way, many of us are religious" - not only confounds the very purpose of the Pledge to inculcate values but actually demeans religious faith by removing it from the list of values worth inculcating, thereby according belief in God less importance than the Pledge's secular precepts. Rather, as the above-quoted legislative record reveals, to pledge allegiance "under God" is to avow "the guidance of God in our national affairs" and to embrace "the dedication of our Nation and our people to the Almighty" in light of "the dependence of our people and our Government upon the moral directions of the Creator." No less than republicanism, indivisibility, liberty and
justice, the inclusion of "under God" in the Pledge must be understood both to propound and to promote an integral national purpose, specifically, belief in a supreme being.23

Given the 1954 amendment's meaning, persons who either question the existence of God or believe that Government should take no position on the matter disagree with a Congressionally established tenet of Americanism. To borrow from Justice O'Connor, such dissenters become "outsiders, not full members of the political community."24 They should refrain from taking the Pledge of Allegiance, for uttering an oath of fidelity to "one nation under God" would be deceitful, bordering on perjury.

In its original ruling, the Ninth Circuit correctly concluded, therefore, that "under God" is an unconstitutional establishment of monotheism as a national objective.25 Furthermore, that unconstitutionality, "... is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students."26 Thus, official encouragement of public school children to recite the phrase "under God" in the Pledge violates at least the Supreme Court's "coercion test."

Although correct, Newdow's original rationale was too limited. Even if understood to encourage belief in any faith, including creeds that either are polytheistic or eschew a supreme being, "under God" would still be an unlawful endorsement favoring religion over atheism and agnosticism. Of equal importance, as the above-discussed legislative history shows, the drafters of the 1954 amendment intended recitation of the term "under God" to evince acceptance of and dependence on a supreme being. It is not too much to assert, therefore, that the phrase "under God," in fact, is a prayer of adoration sandwiched among the Pledge's secular affirmations. In that regard, the phrase "under God" recalls the constitutional infirmity described in Engel v. Vitale, the premier Supreme Court decision invalidating officially mandated prayer in public schools. Adapting the dispositions of Engel, uttering "under God," is a religious activity. It is a solemn avowal of divine faith []."27 In that regard, reciting "under God" is a greater Constitutional offense than a seemingly neutral minute of silent contemplation which the Wallace v. Jaffree court invalidated due to its overarching religious purpose. Conceivably, a minute of silence may be nonsectarian depending on the discrete inclination of the particular silent individual. But, formal recitation of the Pledge always connotes the reciter's personal allegiance to its teachings, including believing that our nation is "under God."

It is no retort to suppose that "under God" expresses a harmless national tradition with de minimis if any actual religious impact.28 As explained above, the 1954 amendments converted the Pledge into a national prayer of devotion to God. Surely, Congress cannot draft a national prayer regardless whether that prayer actually inspires any religious adherents.29 Furthermore, not withstanding the probability that adults and children alike often recite the Pledge carelessly, taking little note of its depth and meaning, that very formality and regularity comprises State coercion to conform with religious advocacy or rank the stigma of becoming an outsider.30 Indeed, daily recital is more likely to have a religious impact on susceptible students than occasional prayers during football games or graduation ceremonies, two practices struck as unequivocal establishments of religion.31 Moreover, to atheists, agnostics and believers in non-Judeo-Christian creeds, encouraging children to pledge allegiance to a nation "under God" may reasonably appear to be an attempt to enforce a 'religious orthodoxy'.32

Turning to another argument, despite the protestations of the dissenters, pledging allegiance to a nation "under God" is hardly akin to studying references to God contained in the Declaration of Independence, the Gettysburg Address and similar documents of significant national importance.33 Because each such document is a "reflection of the author's profession of faith," discussing a particular document requires neither embracing nor feigning to embrace the author's predilections, sectarian or otherwise.34 By contrast, the Pledge of Allegiance is this Nation's Congressionally legislated official oath by which persons confirm their national loyalty - an oath now containing an avowal that belief in God is a precept of the very Americanism to which the affiant swears.

The Ninth Circuit understood that enforcing the Constitution's provision that forestalls State sponsorship of religion requires an unrelenting commitment to the principle that Government must not promote religion. More than cogent legal analysis, for a nation undergoing a somber reevaluation of core precepts, the Newdow opinions are impeccably correct. n.

ENDNOTES
1. 292 F3d 597(9th Cir. 2002), amended, 321 F. 3d. 772 (9th Cir. 2003). At the time of submission no page numbers have been assigned to the new opinion in the Federal Reporter, nor did Lexis and Westlaw provide specific page cites. The new opinion can be found by accessing the Ninth Circuit’s website: www.ca9.uscourts.gov/ca9/ newopinionsandfil/1ca9E7EB89D8D688256CDB000 APCF48f5d/00166423/pdf/openelement, Page numbers to the revised Newdow decision come from designations provided by the Circuit at its website.
3. Newdow, at 2725. With nine judges dissenting, the Ninth Circuit denied en banc rehearing. Id.
4. Granted, in dicta, the Supreme Court has posited that reciting the Pledge presents no First Amendment difficulties. E.g., Co. of Allegheny v. ACLU, 492 U.S. 573, 602-03 (1989). However, unlike the Ninth Circuit, the Court has never squarely addressed the matter based on a full record of evidence and thoroughgoing argument.
Pledge of Allegiance by Prof. Peter Brandon Bayer

continued from page 12

9. E.g., Lee, 505 U.S. at 590-93.
12. "[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." Lee, 505 U.S. at 592.

---

You’re no longer alone.

Introducing LawyersChoice — the health care program with innovative benefit solutions.

LawyersChoice offers your company high quality benefits—including health, dental, vision and life—at a discount, from Anthem Blue Cross and Blue Shield.

Available to State Bar of Nevada members only, LawyersChoice is “the choice” for the flexibility and savings that you and your employees desire.

In Las Vegas/Southern Nevada
702-796-9100

In Reno/Northern Nevada
866-204-1441

A MEMBER BENEFIT OF

Anthem.

Orgill/Singer and Scott Kulla are independent authorized agents of Anthem Blue Cross and Blue Shield.

[see rebuttal on pg. 16]