ORIGINALISM, CEREMONIAL DEISM AND THE PLEDGE OF ALLEGIANCE

*Z. Ryan Pahnke**

I. INTRODUCTION

The original version of the Pledge of Allegiance was approved by Congress on June 22, 1942 as "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all."[1] On June 14, 1954, Congress amended the Pledge to add the words "under God" after the word "Nation."[2] Commenting on the House Report that recommended the addition of the words "under God" to the Pledge, Justice Douglas stated that the new words "in no way run contrary to the First Amendment but recognize 'only the guidance of God in our national affairs.'"[3]

On June 26, 2002, in *Newdow v. United States Congress*,[4] a three judge panel of the United States Court of Appeals for the Ninth Circuit announced a decision holding: (1) that the words "under God" in the Pledge of Allegiance are a violation of the Establishment Clause of the First Amendment;[5] and (2) that it is therefore a violation of the First Amendment for a public school district to have a policy of repeating the Pledge in the classroom each day.[6] Initially, the decision was met with an outcry from politicians, the media, and many Americans,[7] as well as being in direct conflict with an earlier Seventh Circuit decision.[8] Then, as if the Ninth Circuit realized its mistake, the original panel of judges amended their decision by removing reference to the 1954 Act[9] that added the words "under God" to the Pledge.[10] As a result, after granting

* J.D. 2005, William S. Boyd School of Law, University of Nevada, Las Vegas. The author would like to thank Professor Thomas B. McAffee for his contribution and suggestions to early thoughts on the topic as well as his wife for her love and support throughout law school, especially during the development of this note.

[1] Pub. L. No. 623-435, § 7, 56 Stat. 380 (1942) (codified at 36 U.S.C. § 172).

[2] Pub. L. No. 396-297, 68 Stat. 249 (1954).

[3] Engel v. Vitale, 370 U.S. 421, 440 n.5 (1962) (Douglas, J., concurring) (quoting H.R. REP. No. 83-1693, at 3(1954)).

[4] Newdow v. United States Cong., 292 F.3d 597 (9th Cir. 2002) [hereinafter "*Newdow I*"].

[5] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion.").

[6] *Newdow I*, 292 F.3d at 612.

[7] Charles Lane, *U.S. Court Votes to Bar Pledge of Allegiance; Use of "God" Called Unconstitutional*, WASH. POST, June 27, 2002, at A1 (giving examples of President Bush calling the decision "ridiculous" and Senator Tom Daschle saying it was "just nuts").

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

[9] Pub. L. No. 396-297, 68 Stat. 249 (1954).

[10] Newdow v. United States Cong., 328 F.3d 466 (9th Cir. 2003) [hereinafter "*Newdow II*"].

certiorari, the United States Supreme Court was not presented with the issue of whether or not the 1954 Act was constitutional, but was instead faced with two other questions: (1) whether a noncustodial parent has standing to challenge the policy of repeating the Pledge in public schools, and (2) whether the policy itself is a violation of the First Amendment.[11] Unfortunately, after reversing the Ninth Circuit's decision on June 14, 2004, it remains unclear what a majority of the Supreme Court Justices think about the First Amendment issue because the Court concluded that Newdow lacked standing to invoke federal court jurisdiction.[12]

The relationship between religion and the federal government has long been a sensitive subject in the United States, since before the drafting of the Constitution. It is hard to know exactly what the framers of the Constitution meant to say about the proper role of religion in the public realm by their inclusion of the Establishment Clause in the First Amendment. Application of this somewhat vague and ambiguous clause has resulted in a noticeable inconsistency in the Supreme Court's Establishment Clause jurisprudence.[13] The Supreme Court began its career in the Establishment Clause by suggesting that, in the words of Thomas Jefferson, it was meant to erect "a wall of separation between church and State."[14] Ever since the adoption of Jefferson's "separation" language, the idea of separation has continued to expand the scope and influence of the Establishment Clause to the point where, now, almost any action by government that arguably "advances," "coerces," or "endorses" religious faith may be invalidated.[15]

This note will explore the history of Supreme Court Establishment Clause jurisprudence to show that although the Ninth Circuit in *Newdow* arguably applied Supreme Court precedent correctly, the judges blindly applied the Supreme Court's three Establishment Clause tests without looking to the history and context of the Pledge of Allegiance. A well-reasoned Seventh Circuit decision, specifically addressing the Pledge of Allegiance, will be discussed because it incorporated the history and context of the Pledge to reach a result that the Supreme Court could have adopted. This note also will expand on Justice Thomas' originalist view of the Establishment Clause in his *Elk Grove v. Newdow* concurrence to show how the Clause likely became applicable against the states through incorporation into the Fourteenth Amendment. It is unlikely that this view will command a majority of the Court in the near future. Finally, this note will discuss the idea of ceremonial deism that was expounded upon by Justice O'Connor in her *Elk Grove v. Newdow* concurrence to ultimately conclude that the Supreme Court needs to officially adopt a ceremonial deism test to not only uphold the Pledge in the future, but similar ceremonial references to religion as well.

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[11] Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2305 (2004).

[12] *Id.*

[13] *See* discussion *infra* Parts II.A.1-4 and accompanying notes (detailing the evolution of Supreme Court Establishment Clause jurisprudence).

[14] Reynolds v. United States, 98 U.S. 145, 164 (1878).

[15] *E.g.*, Howard Fineman, *One Nation, Under. . . Who?*, NEWSWEEK, July 8, 2002, at 20.

II. BACKGROUND

A. *Supreme Court Establishment Clause Jurisprudence*

1. The Beginnings

a. Everson*: Creating a "Wall of Separation"*

Although the Establishment Clause was drafted by Congress in 1789, the first Supreme Court case to thoroughly focus on the clause was not until 1947 in *Everson v. Board of Education*.[16] In *Everson*, the Court analyzed the history of why the nation needed the Establishment Clause in upholding a New Jersey policy that reimbursed parents for their children's bus transportation to all schools, including religious ones.[17] The Court also adopted Thomas Jefferson's famous words that describe the intent of the clause as being meant to erect "a wall of separation between church and State."[18] The fundamental doctrines that emerged from *Everson* were: (1) the constitutionality of religious neutrality; and (2) the beginning of the Supreme Court's attempt to define the parameters of the Establishment Clause.[19]

b. The School Prayer Cases

In the 1960s, the United States Supreme Court granted certiorari in a pair of school prayer cases that further developed Establishment Clause jurisprudence while moving the doctrine towards strict separation.[20] *Engel v. Vitale*, the first important school prayer case to come before the Court, invalidated a state policy directing students to recite aloud a prayer written by school officials each morning.[21] The Court found that formal prayer is a religious activity and that the Establishment Clause must at least be interpreted to mean that government should have no business in composing official prayers for recital by any group of Americans.[22] The Court also reasoned that its decision was not inconsistent with the fact that groups of Americans often express love for our country by reciting historical documents and singing anthems that contain references to God.[23] The Court recognized a clear distinction between "patriotic invocations of God," on one hand, and the "unquestioned religious exercise" of prayer, on the other.[24] In addition, the Court mentioned, without much discussion, that the Establishment Clause was applicable to state-sponsored religious activities through the Fourteenth Amendment.[25]

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[16] 330 U.S. 1 (1947).
[17] *Id.* at 8-16.
[18] *Id.* at 16.
[19] Ashley M. Bell, *"God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled With the Secularization of Historical Religious Expressions*, 50 AM. U. L. REV. 1273, 1285 (2001).
[20] *See* Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. v. Schempp, 374 U.S. 203 (1963).
[21] 370 U.S. at 422.
[22] *Id.* at 425.
[23] *Id.* at 435.
[24] *Id.* at 435 n.21.
[25] *Id.* at 424-25.

One year after *Engle*, the Court addressed a similar religious devotional activity issue in *Schempp*.[26] A state statute required the reading of ten verses from the Bible each school morning, followed by a recitation of the Lord's Prayer and then by the Pledge of Allegiance.[27] The Bible reading and recitation of the Lord's Prayer practices were struck down because of their religious nature, but the majority saw no problem with the recitation of the Pledge.[28] Justice Brennan, concurring in the judgment, distinguished the recitation of the Pledge from the other two morning exercises, stating that "[t]he 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] no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address . . . ."[29] The Court in *Schempp* seemed to follow a two-part test in order to determine if a particular practice violates the Establishment Clause: (1) whether there is a secular legislative purpose for the practice; and (2) whether the primary effect of the practice is to advance or inhibit religion.[30]

2. *Development of the Supreme Court's Three Establishment Clause Tests*

The Supreme Court has not failed to articulate standards for deciding Establishment Clause cases. In fact, just the opposite is true; the Supreme Court has created confusion in the area by articulating several different standards. Most of the current Justices seem to adhere to the idea that the Establishment Clause is intended to prevent government harms. To identify those harms, there are three main tests, which appear to reflect different perceptions among the Justices about when governmental actions are harmful.[31] The three main Establishment Clause tests are: (1) the *Lemon* test; (2) the endorsement test; and (3) the coercion test.

a. The "Lemon" *Test*

With an increasing number of Establishment Clause cases coming before the Supreme Court throughout the 1960s, it was time to declare a uniform approach for courts to use when deciding if particular practices violate the First Amendment. The Court therefore provided a formula in its 1971 *Lemon v. Kurtzman* decision.[32] For government action to survive the "*Lemon* test," the government must have acted: (1) with a secular purpose; (2) with an effect that "neither advances nor inhibits religion"; and (3) without encouraging "an excessive governmental entanglement with religion."[33] The Court applied the *Lemon* factors in nearly every Establishment Clause case from the time the decision came down in 1971 until the mid-1980s. Although the *Lemon* test

[26] Sch. Dist. v. Schempp, 374 U.S. 203 (1963).
[27] *Id.* at 205.
[28] *Id.* at 223.
[29] *Id.* at 304 (Brennan, J., concurring).
[30] *See id.* at 222.
[31] Alan E. Garfield, *A Positive Rights Interpretation of the Establishment Clause*, 76 TEMP. L. REV. 281, 285 (2003).
[32] *See* 403 U.S. 602 (1971).
[33] *Id.* at 612-13.

technically remains good law today, the Court places less emphasis on it and has increasingly employed alternative tests in more recent Establishment Clause challenges.[34]

b. The Endorsement Test

Justice O'Connor first articulated the "endorsement test" in her 1984 *Lynch v. Donnelly* concurrence,[35] and a majority of the Court later officially adopted it in *County of Allegheny v. ACLU*.[36] The test combines the first two prongs of the *Lemon* test, asking whether government action has the purpose or effect of either endorsing or disapproving of religion.[37] According to Justice O'Connor, the basic reasoning behind the test is that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[38] The endorsement test does not seem to preclude government from acknowledging religion or from taking religion into account in making law and policy. It does, however, preclude government from conveying or attempting to convey a message that religion, or a particular religious belief, is favored or preferred.

c. The Coercion Test

The "coercion test" was formulated by the Supreme Court in *Lee v. Weisman* after announcing that it was unnecessary to apply the *Lemon* test in order to find a challenged religious practice unconstitutional.[39] Justice Kennedy, writing for the majority, concentrated on the nature of prayer as a religious exercise in reaching the decision to ban a graduation prayer.[40] He looked back to earlier school prayer cases, *Engel* and *Schempp*, to find that "[c]onducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students."[41] In addition to the religious nature of prayer, Kennedy also wanted to avoid the risk of coercing students to adopt a religious perspective in the public school setting.[42] Due to the "heightened concerns" of protecting children from coercive pressure in both elementary and secondary schools, the Court held that the performance of a religious function like prayer at a public school-sponsored activity was unacceptable.[43] The coercion test thus

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[34] Bell, *supra* note 19, at 1288.

[35] 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) (writing separately to suggest a clarification to Supreme Court Establishment Clause jurisprudence in case where Court concluded that a city had not impermissibly advanced religion or created excessive government entanglement between religion and government by including a crèche in its annual holiday display).

[36] 492 U.S. 573, 620 (1989) (affirming an injunction that precluded the display of a crèche on the courthouse steps, but reversing judgment regarding a menorah display because its physical setting was a visual symbol for a holiday with a secular dimension).

[37] *Lynch*, 465 U.S. at 687-90 (O'Connor, J., concurring).

[38] *Id.* at 688.

[39] 505 U.S. 577 (1992).

[40] *See generally id.*

[41] *Id.* at 587.

[42] *Id.* at 592.

[43] *Id.* at 592-93.

requires that public school children not be presented with situations where they must either participate in, or protest against, a religious ceremony.[44] Justice Kennedy, however, emphasized that there were limitations to this holding and that not "every state action implicating religion is invalid if one or a few citizens find it offensive"[45] and that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."[46]

3. The Three Tests in Practice

a. Wallace v. Jaffree – *Purely Religious Legislative Purpose*

In *Wallace v. Jaffree*, the United States Supreme Court confronted an Alabama statute authorizing a one minute period of silence in public schools "for meditation or voluntary prayer."[47] One of the State legislature's purposes for enacting the statute was "to return prayer to the public schools," which ultimately resulted in the practice being declared unconstitutional.[48] Although a mere moment of silence for meditation may have been constitutional, as the original statute called for, it was amended to specifically add the purpose of prayer.[49] The Court concluded that the Alabama legislature passed the amendment with purely religious motives in mind.[50] In conducting a *Lemon* analysis, the Court concluded that because the amended statute did not reflect a clearly secular purpose, consideration of the two remaining prongs of the *Lemon* test was unnecessary.[51]

Justice O'Connor concurred in part in *Wallace* to point out that a mere moment of silence would not be a religious exercise.[52] Furthermore, she would have analyzed the issue using her endorsement test "because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect."[53] In the United States, where church and state inevitably cross paths so that statutes pursuing valid interests often help or hinder religious beliefs, O'Connor opined that chaos would result if all such statutes were invalidated under the Establishment Clause.[54] She also distinguished the Pledge of Allegiance from Alabama's modified moment of silence statute in the same concurrence, reasoning that, although the words "under God" were later added to the Pledge just as the purpose of prayer was later added to the Alabama statute in question, the words "under God" serve to legitimately acknowledge religion's place in "solemnizing public occasions."[55] Ultimately, according to Justice

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[44] *Id.* at 594.
[45] *Id.* at 597.
[46] *Id.* at 598.
[47] 472 U.S. 38, 40 (1985) (quoting ALA. CODE § 16-1-20.1 (Supp. 1984)).
[48] *Id.* at 59-60.
[49] *Id.* at 56-57.
[50] *Id.* at 60.
[51] *Id.* at 56.
[52] *Id.* at 72 (O'Connor, J., concurring).
[53] *Id.* at 69.
[54] *Id.* at 69-70.
[55] *Id.* at 78 n.5.

O'Connor, the United States Congress did not cross the line as Alabama had in "affirmatively endorsing the particular religious practice of prayer."[56]

Chief Justice Rehnquist's dissent in *Wallace* appeared to be an attempt to alter the direction of Supreme Court Establishment Clause jurisprudence. According to Rehnquist, the Establishment Clause was meant to curb the evil of establishing a national church, or at least preferring one religion over another on a national level.[57] The Chief Justice gave a condensed history lesson about the Establishment Clause before ultimately coming to the conclusion that it merely "forbade establishment of a national religion, and forbade preference among religious sects or denominations."[58] He reasoned that the founders never expressed concern about whether the federal government "might aid all religions evenhandedly."[59] If the Establishment Clause was intended to rid government of all references to religion, Rehnquist elucidated, then the Congress that adopted the First Amendment would not have proposed that George Washington create a day of Thanksgiving for the people of the nation to join "in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them."[60]

b. Santa Fe Independent School District v. Doe – *Which Test To Use*

The Supreme Court's most recent school prayer case before *Newdow*, *Santa Fe Independent School District v. Doe*, used all three Establishment Clause tests to invalidate a school district policy allowing students to perform an invocation before high school football games.[61] The Court reasoned that in cases involving facial challenges to state rules on Establishment Clause grounds, the Supreme Court can assess the constitutionality of an enactment by reference to the three *Lemon* factors, "which guide[ ] 'the general nature of inquiry in this area.' "[62] Under the first prong of the *Lemon* test, a court must invalidate a statute if it lacks a secular legislative purpose, and a statute inviting public prayer in a secondary school setting fails this test.[63] The school district policy was also impermissible because it could send the message to students and football fans who did not believe in prayer that they were not full members of the political community. Conversely, those who do believe would feel included, thus failing the endorsement test.[64] Moreover, even if football games are attended more voluntarily than classes or graduation ceremonies, the Court decided that a pre-game prayer would have the improper effect of "coercing

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[56] *Id.* at 84.

[57] *Id.* at 99 (Rehnquist, J., dissenting).

[58] *Id.* at 106; *see also* Lynch v. Donnelly, 465 U.S. 668, 673-74 (1984) ("A significant example of the contemporaneous understanding of the [Establishment] Clause is . . . [that in] the very week that Congress approved the Establishment Clause . . . it enacted legislation providing for paid Chaplains for the House and Senate.").

[59] *Wallace*, 472 U.S. at 99.

[60] *Id.* at 101 (quoting 1 ANNALS OF CONG. 914 (1789)).

[61] 530 U.S. 290 (2000).

[62] *Id.* at 314 (quoting Mueller v. Allen, 463 U.S. 388, 394 (1983)).

[63] *Id.* at 314-15.

[64] *Id.* at 309.

those present to participate in an act of religious worship," thus failing the coercion test as well.[65]

4. Why Marsh v. Chambers *Falls Outside of the Three Tests*

It is apparent that the three Supreme Court Establishment Clause tests are broad enough to be used to invalidate almost any religious practice that the Justices think should be invalidated. However, these tests will not invalidate practices that the Court believes are not sufficiently religious in nature, or that are part of our history and traditions as a nation.

When dealing with certain historical religious practices, the Supreme Court does not always use the three Establishment Clause tests.[66] In *Marsh v. Chambers*, the issue was whether the practice of opening the Nebraska Legislature with a prayer offered by a State-chosen chaplain violated the Establishment Clause.[67] The Court recognized that the "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country" and that "from colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."[68] The Court then noted that in 1774, the first Continental Congress adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain and that Congress has allowed this practice ever since.[69] Justice Burger, writing for the majority, further noted that in the same week members of the First Congress voted to appoint and pay a chaplain for each chamber of Congress, they also approved the draft of the First Amendment which contained the Establishment Clause.[70]

The long history of legislative prayer formed the backbone of the Court's decision in *Marsh* that the Establishment Clause had not been violated by the Nebraska practice.[71] According to the Court, the invocation of Divine guidance on a public lawmaking body was not an establishment of religion, but "simply a tolerable acknowledgment of beliefs widely held among the people of this country."[72] The Court's analysis of historical precedent and context in *Marsh* demonstrates that these two analytical tools can be used as "a vehicle for altering the religiousness of certain practices and symbols."[73] Therefore,

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[65] *Id.* at 312.

[66] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983).

[67] *Id.* at 784.

[68] *Id.* at 786.

[69] *Id.* at 787-88. The Court also pointed out that, "In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded 'God save the United States and this Honorable Court.'" *Id.* at 786. The very same invocation occurs at all sessions before the United States Supreme Court. *Id.*

[70] *Id.* at 790 (reasoning that the First Congress' approval of the First Amendment and appointment of chaplains at virtually the same time could not possibly mean that they intended the Establishment Clause to forbid what they had just declared acceptable).

[71] *Id.* at 791-92.

[72] *Id.* at 792.

[73] Alexandra D. Furth, Comment, *Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court's Secularization Analysis*, 146 U. PA. L. REV. 579, 587 (1998) (explaining

the Court's use of history and context can essentially insulate a practice from the three Establishment Clause tests, making a practice like employing a legislative chaplain sufficiently secular to avoid constitutional scrutiny.

B. *The* Newdow *Decisions*

Michael Newdow is an atheist father whose elementary-aged daughter attends a public school in California.[74] According to both California State and local school district policies, each school day begins with "appropriate patriotic exercises" and "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" this requirement.[75] Although his daughter is not required to participate in reciting the pledge,[76] Newdow filed suit in the Eastern District of California claiming that she is injured nonetheless because each school day she must listen to her State-employed teacher leading her classmates in proclaiming that ours is "one Nation under God."[77] Newdow sought declaratory and injunctive relief in his challenge against: (1) the constitutionality of the 1954 Act of Congress that added the words "under God" to the Pledge; (2) the California statute requiring daily patriotic exercises in schools; and (3) the local school district's policy of requiring teachers to lead their students in reciting the pledge.[78]

Michael Newdow also had previously filed a similar claim in Florida.[79] That claim, however, was dismissed on standing grounds because Newdow's daughter was not yet of school age.[80] Newdow then moved to Sacramento and after his daughter was enrolled in a public school, he filed suit in Federal District Court.[81] According to press accounts, both Newdow's daughter and her mother are practicing Christians who have no problem with the words "under God" in the Pledge.[82] The mother, Sandra Banning, who has never been married to Mr. Newdow, has custody of the child and even sought to intervene in the case to ensure that her daughter would not "be branded for the rest of her life as the girl who was the atheist in the pledge case or the girl who didn't like the Pledge of Allegiance."[83]

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that the Court analyzes history not only for original intent, but also for its perspective on the religious nature of symbols and practices).

[74] *Newdow I*, 292 F.3d at 611.

[75] *Newdow II*, 328 F.3d at 482 (quoting CAL. EDUC. CODE § 52720 (West 1989)).

[76] *See* Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that public school children are not required to participate in pledging allegiance to the Flag in violation of their personal beliefs).

[77] *Newdow II*, 328 F.3d at 483.

[78] *Id.*

[79] Fineman, *supra* note 15, at 20 (referring to *Newdow v. United States*, 207 F.3d 662 (11th Cir. 2000) (seeking to establish the unconstitutionality of the words "under God" in the Pledge of Allegiance)).

[80] *Id.*

[81] *Id.*

[82] *See, e.g.*, Bob Egelko, *Girl in Pledge Case Not an Atheist, Mom to Tell Court*, SAN FRAN. CHRON., July 13, 2002, at A15; Adam Liptak, *Subsidiary Issue Enters Pledge Case*, N.Y. TIMES, Oct. 23, 2002, at A15.

[83] Egelko, *supra* note 82, at A15 (quoting Paul E. Sullivan, attorney for the mother).

1. Newdow I

On June 26, 2002, two of three judges on a Ninth Circuit panel held that the 1954 act of Congress which added the words "under God" to the Pledge of Allegiance was unconstitutional and that the California school district's practice of teacher-led recitation of the Pledge was a violation of the Establishment Clause.[84] The majority started its analysis of the Establishment Clause issue with a description of the three primary tests that have been used by the Supreme Court to assess Establishment Clause challenges: (1) the three pronged *Lemon* test; (2) the endorsement test; and (3) the coercion test.[85] The Ninth Circuit panel reasoned that because the Supreme Court had used all three tests in its most recent Establishment Clause decision that they were "free to apply any or all of the three tests, and to invalidate any measure that fails any one of them."[86] Therefore, the Ninth Circuit chose to analyze the claims under all three tests "for purposes of completeness."[87]

Beginning with the endorsement test, the panel found that the inclusion of the words "under God" in the Pledge and the school district's recitation policy were both endorsements of religion.[88] The panel also found "under God" to be a profession of the specific belief of monotheism, refuting the argument that the phrase was merely a description of the historical importance of religion in the United States or an acknowledgment that many Americans believe in God.[89] The two judges took the position that the Pledge does not comport with the principle of governmental neutrality toward religion because it endorses a fundamental religious question; whether God exists.[90] "To recite the Pledge is . . . to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and – since 1954 – monotheism."[91] The two judges opined that the Pledge sends a message to non-believers "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community," which is exactly what the endorsement test is meant to prevent.[92]

The panel then moved on to find that the Pledge itself, along with the California recitation policy, both fail the coercion test.[93] In doing so, the panel followed the Supreme Court's reasoning in *Lee v. Weisman* that a graduation prayer was coercive even though the students were not required to participate.[94] As in *Lee*, the recitation of the Pledge puts "students in the untenable position of choosing between participating in an exercise with religious content or protesting."[95] The majority expressed concern that the Pledge may appear to a

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[84] *Newdow I*, 292 F.3d at 612.
[85] *Id.* at 605-07.
[86] *Id.* at 607 (referring to the Supreme Court's most recent Establishment Clause case: Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310-316 (2000)).
[87] *Id.*
[88] *Id.* at 607-08.
[89] *Id.* at 607.
[90] *Id.*
[91] *Id.*
[92] *Id.* at 608 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984)).
[93] *Id.*
[94] 505 U.S. 577, 599 (1992).
[95] *Newdow I*, 292 F.3d at 608.

non-believer to be "an attempt to enforce a 'religious orthodoxy' of monotheism."[96] *Newdow* also involved schoolchildren, a group that the Supreme Court has found to be particularly susceptible to government-sponsored religious coercion.[97]

The Ninth Circuit panel also analyzed the Pledge under the *Lemon* test and found that the 1954 inclusion of "under God" in the Pledge violated the "purpose" prong.[98] The United States defended the Pledge statute by urging the court to recognize that the Pledge in its entirety has secular purposes, including the solemnization of public occasions.[99] The panel, however, decided to focus on the 1954 Act alone, concluding that its "sole purpose was to advance religion . . . ."[100] The school district's policy, on the other hand, had the secular purpose of fostering patriotism and therefore did not fail the purpose prong of *Lemon*.[101] However, despite the secular purpose, the school district's policy had the impermissible effect of promoting religion, thus failing the second prong of *Lemon*.[102]

The Ninth Circuit's *Newdow* decision swiftly provoked significant criticism. Senators and Representatives took to the congressional floors to condemn the ruling.[103] The Senate denounced the decision by a unanimously approved resolution[104] and the House approved a similar resolution by a vote of 416 to 3.[105] In addition to many major newspapers criticizing the decision,[106] President Bush called it "ridiculous,"[107] while Senate Majority Leader Tom Daschle said it was "nuts," and Senator Robert Byrd called the judges in the *Newdow* majority "stupid."[108]

2. Newdow II

After the original *Newdow I* opinion was issued, Sandra Banning filed a motion to intervene in the case to challenge Newdow's standing.[109] Banning had the responsibility to make important decisions relating to her daughter's "health, education and welfare" because she held sole legal custody of the child.[110] The Ninth Circuit reconsidered Newdow's standing to bring the action and concluded that Banning's right to custody of the child did not deprive Newdow of his right to seek redress from a constitutional harm to his

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[96] *Id.* at 609.
[97] *Id.*
[98] *Id.* Since the 1954 Act failed the "purpose" prong, the panel declined to apply the test's remaining two prongs. *Id.* at 611.
[99] *Id.* at 609-10.
[100] *Id.* at 610.
[101] *Id.* at 611.
[102] *Id.*
[103] *See* 148 CONG. REC. S6105-S6112 (daily ed. June 27, 2002); 148 CONG. REC. H4125-H4136 (daily ed. June 28, 2002).
[104] S. RES. 292, 107th Cong. (2002).
[105] H.R. Res. 459, 107th Cong. (2002).
[106] *See, e.g.*, Editorial, *One Nation Under Blank*, WASH. POST, June 27, 2002, at A30.
[107] Lane, *supra* note 7, at A1.
[108] Carl Hulse, *Lawmakers Vow to Fight Judges' Ruling on the Pledge*, N.Y. TIMES, June 27, 2002, at A20.
[109] *Newdow II*, 313 F.3d at 501-02.
[110] *Id.* at 502.

parental interests.[111] The court held that Newdow still had the right as a non-custodial parent to expose his daughter to his idea of religion without his credibility being destroyed by his daughter's exposure to religious ideas at a state school.[112] Accordingly, the court denied Banning's motion to intervene and affirmed Newdow's standing.[113]

3. Newdow III

On February 28, 2003, the Ninth Circuit panel issued an opinion amending its original opinion.[114] The *Newdow III* decision is significantly narrower than the panel's original *Newdow I* opinion. The panel declined to decide the issue of whether the federal Pledge of Allegiance statue is unconstitutional;[115] and the amended opinion only used the coercion test to find that the school district's recitation policy violated the Establishment Clause.[116] While the panel still felt free to apply any of the Supreme Court's three tests, it emphasized that it was unnecessary to apply the *Lemon* or endorsement tests once the policy was found to be impermissibly coercive.[117] Thus, it appears that the panel may have abandoned its original strategy of completeness in order to focus on the ground it presumably felt was the strongest.

The amended opinion, however, did not entirely ignore the 1954 Act which added "under God" to the Pledge. For example, the amended decision still argued that the added "under God" language expresses a belief in monotheism, and that the Pledge has a normative and ideological character which makes it unconstitutional.[118] The amended opinion also addressed something that was missing from the original opinion: the failure to account for Supreme Court dicta regarding the constitutionality of the Pledge. Consequently, the panel mentioned a couple of the instances of such dicta – in *Lynch*, and *County of Allegheny* – and then summarily dismissed it.[119] According to the two judges, although various Supreme Court Justices have stated that the Pledge itself as amended is constitutional, no justices have ever specifically suggested that it would be constitutional for schools to lead children in recitations of the Pledge.[120]

4. Supreme Court Decision, Elk Grove v. Newdow

On June 14, 2004, the Supreme Court issued an opinion in which five justices managed to avoid the Establishment Clause issue to find instead that Newdow lacked standing to bring his constitutional claim because of the uncertainty about his parental rights.[121] Traditionally, issues of domestic relations

[111] *Id.* at 505.
[112] *Id.*
[113] *Id.*
[114] Newdow v. United States Cong., 328 F.3d 466 (9th Cir. 2003) [hereinafter "*Newdow III*"].
[115] *Id.* at 490.
[116] *Id.* at 487-88.
[117] *Id.*
[118] *Id.* at 487.
[119] *Id.* at 489.
[120] *Id.*
[121] Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2312 (2004).

have been left to the state courts to decide, and at the time the Ninth Circuit addressed Newdow's standing there was a California State court order that gave Banning legal control over their daughter when the two parents could not agree on a course of action regarding her upbringing.[122] Therefore, the judgment of the Ninth Circuit was reversed without a majority of the Court ever reaching the First Amendment issue. The majority's failure to address the Establishment Clause issue did not please all of the members of the Court, evidenced by three Justices writing concurrences in the judgment for three different reasons. There probably would have also been an additional concurrence written by Justice Scalia if he had taken part in the consideration of the issue.[123]

Part I of Chief Justice Rehnquist's concurrence, joined by Justices O'Conner and Thomas, challenged the majority's reasoning for denying Newdow standing and came to the conclusion that Newdow should have had standing to bring the action.[124] In part II, the Chief Justice told the world where he wanted the Court to go with the Pledge of Allegiance. Not only did Congress pass legislation reaffirming the text of the Pledge with findings after the Ninth Circuit's decision "about the historical role of religion in the political development of the Nation," but the words "under God" serve "to sum up the attitude of the Nation's leaders, and to manifest itself in many of our public observances."[125] Rehnquist then noted many of the references to God in our Nation's past, including: George Washington's first inauguration; Thanksgiving proclamations; the Gettysburg Address; Lincoln's second inaugural address; Woodrow Wilson's speech to Congress in 1917 to request a declaration of war against Germany; statements by President Roosevelt and General Eisenhower; the motto "In God we Trust;" and the Supreme Court marshal's "God save the United States and this honorable Court."[126] According to the Chief Justice, "[a]ll of these events strongly suggest that our national culture allows public recognition of our Nation's religious history and character."[127] Furthermore, the Chief Justice described the difference between an explicitly religious prayer, like the one in *Lee v. Weisman*, and the phrase "under God" in the patriotic exercise of reciting the Pledge.[128] To Rehnquist, there is nothing in the purely patriotic exercise of reciting the Pledge that could ever lead to an establishment of religion.[129] He also discussed the fact that in our system of popular government, there are three levels of government that have collaborated to produce the recital of the Pledge in public schools – the

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[122] *Id.* at 2309-10.

[123] Justice Scalia voluntarily recused himself from consideration of the case "after Pledge opponent Michael A. Newdow noted that the justice had publicly criticized the idea that courts had the power to remove the words "under God" from the Pledge" based on statements Scalia made to an audience about the Ninth Circuit decision on January 12, 2002. Charles Lane & David Von Drehle, *Is Justice Scalia Too Blunt to be Effective?*, WASH. POST, Oct. 17, 2003, at A27.

[124] *Newdow*, 124 S. Ct. at 2312-16 (Rehnquist, C.J., concurring).

[125] *Id.* at 2316-17.

[126] *Id.* at 2317-18.

[127] *Id.* at 2319.

[128] *Id.* at 2319-20.

[129] *Id.* at 2320.

federal, state and local. Thus, "[w]hen courts extend constitutional prohibitions beyond their previously recognized limit, they may restrict democratic choices made by public bodies."[130] Ultimately, giving a child's parent a "heckler's veto" over a patriotic exercise would overextend the reach of the Establishment Clause and "would have the unfortunate effect of prohibiting a commendable patriotic exercise."[131]

Justice O'Connor's concurrence is quite helpful in clarifying the Supreme Court's past Establishment Clause jurisprudence. Unfortunately, at this time she is the only Justice that subscribes to the view she articiculates. O'Connor does not want to reduce the Supreme Court to one test when deciding Establishment Clause issues because different cases call for different approaches.[132] When there are issues concerning "government-sponsored speech or displays," like the Pledge, O'Connor would use her endorsement test because it "captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'"[133] Within the context of the endorsement test, the issue for O'Connor would be whether the words "under God" in the Pledge qualify for treatment as an instance of ceremonial deism, which allows for certain references to things divine without violating the Establishment Clause.[134] O'Connor then evaluated the Pledge under four factors that help determine whether a practice is ceremonial deism and so does not violate the Constitution.

The first factor is the "*History and Ubiquity*" of the Pledge.[135] For a practice to be valid under the idea of ceremonial deism it must have been in place for much of our nation's history and it must be familiar enough to our nation's citizens that it can be called ubiquitous.[136] During the fifty years that have passed since "under God" was added to the Pledge, "a span of time that is not inconsiderable given the relative youth of our nation," it has been recited "by millions of children" and has become a routine patriotic act, thus satisfying this first part of the ceremonial deism test.[137]

The second ceremonial deism factor is the "*Absence of worship or prayer*."[138] Here, the relevant viewpoint for deciding if something is in the nature of worship or prayer is that of a reasonable observer of the practice who is aware of its history and context.[139] The Pledge meets this factor because "under God" is not an invocation of God, but is descriptive in nature and is not conducted by church leaders, but by public school teachers.[140] Even if some of

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130 *Id.*
131 *Id.*
132 *Id.* at 2321 (O'Connor, J., concurring).
133 *Id.* (quoting County of Allegheny v. ACLU, 492 U.S. 573, 627 (1989) (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring))).
134 *Id.* at 2323.
135 *Id.*
136 *Id.*
137 *Id.* at 2323-24.
138 *Id.* at 2324.
139 *Id.* at 2325.
140 *Id.*

the legislators who voted to add "under God" to the Pledge in 1954 were attempting to convey a religious message, the continued repetition of the Pledge over the years in a secular context has made it a cultural, as opposed to a religious, exercise.[141]

The third factor is the "*Absence of reference to particular religion.*"[142] The phrase "under God" was added to the Pledge at a time when this nation was not as religiously diverse as it is today and O'Connor concluded, that at that time the words represented "a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system."[143]

O'Connor's fourth and final ceremonial deism factor is that a practice must have "*Minimal religious content.*"[144] The Pledge meets this factor because the brevity of the reference to God in the Pledge (1) is meant to solemnize an event instead of endorse religion; (2) makes it easy for observers to "opt out" of offensive language without rejecting the entire practice; and (3) limits the chance for the government to show a preference for one religion over another.[145]

Based on her analysis of ceremonial deism, O'Connor would also uphold the practice of reciting the Pledge in schools under the coercion test, just as she would under the endorsement test.[146] Ceremonial deism essentially classifies a practice as non-religious in character and, as a result, participation in a non-religious act does not cause coercion in the Establishment Clause sense of coercion, even in a public school setting.[147]

The last concurrence was written by Justice Thomas, who would prefer to alter current Supreme Court Establishment Clause jurisprudence and replace it with an originalist view of religion in our nation. Thomas admitted that the Ninth Circuit adopted a "persuasive reading" of Supreme Court precedent, specifically *Lee v. Weisman*, in striking down the practice of reciting the pledge.[148] Thomas would thus overturn *Lee* because he does not believe that the Pledge would pass the coercion test. In his view, the Supreme Court already held that the Pledge coerces an affirmation of belief in its 1943 *Barnette* decision, where the Court held that children could not be forced to recite the Pledge.[149] Thomas then went on to explain how the Establishment Clause was originally a federalism provision, meant to protect the state governments from national establishments of religion, which should not be incorporated into the Fourteenth Amendment to be applicable against the states.[150] Thomas ultimately

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[141] *Id.*
[142] *Id.*
[143] *Id.* at 2326.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.* at 2327.
[148] *Id.* (Thomas, J., concurring).
[149] *Id.* at 2328-29 (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that public school children are not required to participate in pledging allegiance to the Flag in violation of their personal beliefs).
[150] *Id.* at 2330-33.

concluded that the state had not created a religious establishment and that the state had not coerced anyone to participate in an established religion.[151]

III. ANALYSIS

Elk Grove v. Newdow represents the first time that the Supreme Court has been presented with a direct attack on the Pledge of Allegiance. Although Michael Newdow did not have standing, the issue will most likely come before the Court again. Whenever that may be, the Court will have to decide to either uphold the recitation of the Pledge in public schools or to strike it down. Based on the concurrences in *Newdow*, as well as past history and precedent, the Court has various choices about which route to take if it desires to uphold the recitation of the pledge, some more likely than others.

For instance, the Court could agree with the Seventh Circuit's holding in *Sherman v. Community Consolidated School District 21 of Wheeling Township*.[152] In *Sherman*, the Seventh Circuit wrote a well-reasoned opinion that is consistent with the Supreme Court's *Marsh* decision because it looked to the history and context of the practice of reciting the Pledge, factors outside of the three primary Establishment Clause tests.

Next, is Justice Thomas' argument about the original meaning of the Establishment Clause in *Newdow*. Although it is unlikely that a majority of the Court would support Thomas' view and the implications of altering years of Supreme Court precedent, this is not the first time that a Supreme Court justice has urged the other members of the Court to return to an original reading of the Establishment Clause.[153] In his *Wallace* dissent, Justice Rehnquist argued that a textual and historical view of the First Amendment Religion Clauses leads to the conclusion that the Establishment Clause was not meant to create a wall of separation between church and state, but was meant to forbid preference among existing religious sects or denominations.[154] Again, even with the Chief Justice, and possibly Justice Scalia on his side, Thomas' argument will most likely lack the support needed to carry the rest of the Court.

The most likely savior of the Pledge of Allegiance is the notion of ceremonial deism, as articulated most recently by Justice O'Connor. Her concurrence in *Newdow* set forth a four-factor test that the Court could use to determine whether a practice is ceremonial deism. If a practice is ceremonial deism, the Court could uphold the practice as constitutional and bypass the thorny issues presented by the Establishment clause altogether.

A. *Why the Seventh Circuit Already Had it Right*

The United States Court of Appeals for the Seventh Circuit directly confronted the Establishment Clause issue created by the words "under God" in the Pledge of Allegiance in *Sherman*, ten years before *Newdow* reached the Ninth Circuit.[155] In upholding the constitutionality of an Illinois act very similar to

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[151] *Id.* at 2333.
[152] 980 F.2d 437 (7th Cir. 1992).
[153] *See, e.g., Wallace*, 472 U.S. at 91-114 (1985) (Rehnquist, J., dissenting).
[154] *See id.*
[155] Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992).

the California act in *Newdow*, as well as holding that the 1954 Act did not violate the Establishment Clause, the Seventh Circuit framed the issue as whether a student who objects to the content of the Pledge should be able to prevent everyone else at school from reciting it in his presence.[156]

The Seventh Circuit began its analysis by acknowledging that the school prayer cases seem to suggest that any invocation led by a teacher or school official involving unwelcome words amounts to a constitutional violation:[157] a point critical to the Ninth Circuit's reasoning. However, the Seventh Circuit, unlike the Ninth, questioned whether Establishment Clause Jurisprudence could be applied mechanically because, arguably, the established tests were "not devised to identify prayer smuggled into civic exercises."[158] For instance, *Lemon* presented the Supreme Court with whether a state statute providing aid to sectarian schools violated the Establishment clause.[159] The Seventh Circuit's approach was more direct, framing the issue as "[m]ust ceremonial references in civic life to a deity be understood as prayer, or support for all monotheistic religions, to the exclusion of atheists and those who worship multiple gods?"[160] The Seventh Circuit cautioned that certain phrases cannot be understood in a vacuum without an appreciation of their context.[161] "Words take their meaning from social as well as textual contexts, which is why 'a page of history is worth a volume of logic.'"[162] In other words, even in a public school setting, the real issue is whether the Establishment Clause bars ceremonial references to God.

The Seventh Circuit held that the Establishment Clause does not bar ceremonial references to God.[163] In reaching this conclusion, the court referred to many enduring traditions of the founding fathers. For example, James Madison, who authored the Establishment Clause, issued presidential proclamations of religious thanksgiving and fasting.[164] Thomas Jefferson, who refused on separationist grounds to issue thanksgiving proclamations as President, wrote the Declaration of Independence which explicitly refers to the "Creator."[165] Also, the Seventh Circuit followed the Supreme Court's *Engel v. Vitale* decision by recognizing that ceremonial references to deity are different from prayers, which are defined as "supplications for divine assistance."[166] Far from calling upon God for His help or blessings, the reference to divinity in the Pledge recognizes the historical fact that our nation is believed by many to be founded "under God" and thus "may be no more of a religious exercise that the

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[156] *Id.* at 439.
[157] *Id.* at 444.
[158] *Id.* at 445.
[159] Lemon v. Kurtzman, 403 U.S. 602, 620 (1971).
[160] *Sherman*, 980 F.2d at 445.
[161] *Id.*
[162] *Id.* (quoting N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.)).
[163] *Id.*
[164] *Id.* (citing LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 100 (1986)).
[165] *Id.* at 446. Specifically, the Declaration of Independence states, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that amongst these are Life, Liberty and the Pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[166] *Sherman*, 980 F.2d at 446.

reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact."[167]

Moreover, after discussing the same line of Supreme Court school prayer cases that are discussed in the *Newdow* decisions, the Seventh Circuit concluded that if those cases were to be extended to the Pledge then the extension could not stop there.[168] The reasoning would have to be extended to its logical extreme: "to the books, essays, tests, and discussions in every classroom" that offend someone's beliefs.[169] Among the public school students in a population as large as ours, there are bound to be those who do not agree with the ideas being taught by teachers and that are contained in the textbooks which students are required to read and learn.[170] However, even in a diverse society, where people are free to believe in what they want, state governments retain the right to establish curricula in their schools. Those who object to opposing ideas can exercise their right to send their children to private schools or to teach them in the home.[171] Ultimately, the Seventh Circuit came to the conclusion that "[o]bjection by the few does not reduce to silence the many who want to pledge allegiance to the flag 'and to the Republic for which it stands.'"[172]

The Seventh and Ninth Circuits ended up on opposite ends of the spectrum with regard to the Pledge partly because each framed the issue differently. As a result, both circuits could be correct in their legal analysis, affecting in turn how they approached the constitutionality of the Pledge.[173] If the majority of the Court were to feel obligated to analyze the Pledge under one of the current Establishment Clause tests, then the Ninth Circuit had a good argument, unless it adopted Justice O'Connor's view of the endorsement and coercion tests. The Court, however, could also follow the Seventh Circuit's position, because it looks to the history and context of the Pledge itself, along with Supreme Court dicta specifically targeted at the Pledge. The Ninth Circuit should have followed suit with the Seventh Circuit which stated that "an inferior court had best respect what the majority says rather than read between the lines. If the [Supreme] Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so."[174] Consequently, the Seventh Circuit took the Supreme Court Justices seriously regarding the Justices' statements that there is nothing unconstitutional about "under God" in the Pledge.

The Seventh Circuit is thus in line with the principle discussed above in *Marsh*, that merely speaking religious words is not enough to violate the Estab-

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[167] *Id.* at 447 (quoting Sch. Dist. of Abington Township. v. Schempp, 374 U.S. 203, 303-304 (1963) (Brennan, J., concurring).

[168] *Id.* at 444.

[169] *Id.*

[170] *Id.*

[171] *Id.* at 445.

[172] *Id.* (quoting the Pledge of Allegiance, 4 U.S.C. § 4 (2002)).

[173] Philip N. Yannella, *Stuck in the Web of Formalism: Why Reversing the Ninth Circuit's Ruling on The Pledge of Allegiance Won't Be So Easy*, 12 TEMP. POL. & CIV. RTS. L. REV. 79, 87 (2002).

[174] *Sherman*, 980 F.2d at 448.

lishment Clause: history and context matter.[175] At first glance, *Marsh* may not appear to be applicable to the facts of *Newdow* because *Marsh* involved adults, not children. Also, legislative prayer has a long history because federal and state legislatures have been led in opening prayer since the mid to late 1700s, while the words "under God" in the Pledge of Allegiance were not added until 1954.[176] Nevertheless, *Marsh* is a useful case for showing the potential problem with the blind application of Supreme Court Establishment Clause precedent that led to the Ninth Circuit's *Newdow* decisions.

Marsh stands for the principle that a formal utterance of religious words is not necessarily an Establishment Clause violation because the history and context of the practice may suggest otherwise. The *Marsh* Court's use of history essentially bypassed the Establishment Clause tests and proved that the use of history can be "a vehicle for altering the religiousness of certain practices and symbols."[177] The Ninth Circuit panel majority also could have better heeded the context of the Pledge. Although the Pledge was being recited in a public school setting, merely mentioning the fact that many of our founding fathers believed this nation to be founded "under God" is very different from a formal utterance of prayer. Taken out of their historical context, the words "under God" could be seen as offensive to some, but when they are examined in the entirety of the Pledge they are different because they express a belief of those who founded our nation and thus serve a secular purpose. Just as singing the National Anthem and reciting such documents as the Gettysburg Address serve the same purpose. Furthermore, calling upon God in the solemn act of prayer and the historical mentioning of deity in the context of the Pledge are very different things.

B. Historical Origin of the Establishment Clause

As Justice Thomas argued in his *Newdow* concurrence, Establishment Clause jurisprudence would be much different if the Supreme Court were to recognize the original intent of those who framed the First Amendment. Chief Justice Rehnquist made a similar argument in his *Wallace* dissent when he discussed the history and traditions leading to the Establishment Clause, especially the understanding of those who actually promulgated it. An originalist could argue that the Supreme Court started off on the wrong foot when dealing with the Establishment Clause in *Everson* by failing to conduct an adequate historical analysis of the clause itself.[178] The Establishment Clause had basically been dormant from its inception until the 1940s when the Supreme Court said that it should be "incorporated" into the Fourteenth Amendment making it applicable against the states.[179] This was done without adequately considering the historical purpose of the clause, or even the likely consequences of judicial

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[175] *See* discussion *supra* Part II.A.4 and accompanying notes (detailing the Supreme Court's reasoning in *Marsh v. Chambers*).

[176] Yannella, *supra* note 173, at 89.

[177] Marsh v. Chambers, 463 U.S. 783, 793 (1983); Furth, *supra* note 73, at 587 (explaining that the Court analyzes history not only for original intent, but also for its perspective on the religious nature of symbols and practices).

[178] STEVEN D. SMITH, FOREORDAINED FAILURE 4 (1995).

[179] *Id.*; *see also* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

intervention in the area.[180] Two legal scholars have expressed their frustration that "it is striking in retrospect to observe how little intellectual curiosity the members of the Court demonstrated in the challenge presented by the task of adapting, for application to the states, language that had long served to protect the states against the federal government."[181]

There is evidence that the Establishment Clause was originally promulgated to prevent our newly created federal government from establishing a national religion that would have political and governmental privileges like the Anglican Church in England.[182] Originally, there was a distinction between "separation of church and state" on one hand, and the constitutionally based freedom from a national religious establishment on the other.[183] The Establishment Clause was not created to disestablish the official Protestant religions that existed in many of the states at the time.[184] There is also evidence that many of the founders believed that nonpreferential aid to religion by the Federal government was permissible.[185] Essentially, the Establishment Clause seemed to be an assignment of jurisdiction to the states to deal with religious matters.[186] By outlawing only national religious establishments, the framers intended to leave the question of state establishment of religion to the judgment of the states themselves.[187] The framers were not alone in their belief, historians have contended that Americans from the founding era understood "establishment of religion" to refer to the prohibition against the national government's funding of, or coercing belief in, a particular religious sect.[188]

Congress was not only prohibited from establishing a national church, but was also barred from disestablishing, or otherwise interfering with, churches that had been established by various state and local governments.[189] When the First Amendment was adopted in 1789 at least six states had government-supported churches.[190] Joseph Story summed up the obvious point of the Establishment Clause to him when he wrote that "the whole power over the subject of religion is left exclusively to the state governments."[191] While that point may be easy to see, it raises a problem because the special nature of this state right makes it problematic for the Supreme Court to mechanically incorporate the Establishment Clause into the Fourteenth Amendment with the rest of the Bill of Rights.[192] Incorporation of the Establishment Clause into the Four-

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[180] SMITH, *supra* note 178, at 4.

[181] *Id.* (quoting Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 481 (1991)).

[182] FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 14 (1995).

[183] PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 479 (2002).

[184] GEDICKS, *supra* note 182, at 14.

[185] *Id.*

[186] SMITH, *supra* note 178, at 18.

[187] GEDICKS, *supra* note 182, at 14.

[188] *Id.* at 15.

[189] AKHIL REED AMAR, THE BILL OF RIGHTS 32 (1998).

[190] *Id.*

[191] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1879 (Melville M. Begelow ed., William S. Hein & Co., Inc., 1994).

[192] AMAR, *supra* note 189, at 33.

teenth Amendment eliminates a state's right to choose whether to establish a religion, a right the Clause gave to the states in the first place.[193]

In the nineteenth century, religious minority groups who emphasized their Americanism, as opposed to their religion, pushed to make separation of church and state a central tenet of the American constitutional creed.[194] However, the Constitutional authority for this separation was without historical foundation.[195] Therefore, those with dreams of separation pushed for a constitutional amendment that would officially recognize the separation ideal, but when it never came to fruition they changed their strategy by claiming that the First Amendment already embodied the idea of separation from the beginning.[196] These early "separationists" claimed that Thomas Jefferson had defined the true meaning of the Establishment Clause through his words: "a wall of separation between Church and State."[197] Then, in 1947, the Supreme Court also adopted Jefferson's words to serve as proof of the "contemporaneous understanding" of the founders.[198] The Court mistakenly overstated Jefferson's role, however, in defining the meaning of the Establishment Clause.[199] Jefferson was in France at the time Congress actually passed the Bill of Rights.[200] Therefore, the Court would have been better served by looking to the understanding of someone who actually was present, like James Madison.[201] Madison was involved in preparing various drafts of the First Amendment and was on the committee that drafted its final language, thus making him a more reliable source into the minds and wills of the founders' intent.[202] Madison "saw the [First] Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects . . . [instead of] requiring neutrality on the part of government between religion and irreligion."[203] Complete separation between church and state as adopted by the Supreme Court could, therefore, be viewed with suspicion, having no real authority.[204]

Separation of church and state has become an attractively simple metaphor and its adoption by the Court has essentially swallowed up the original meaning of the Establishment Clause.[205] This metaphor has seemingly come to be the only alternative to another metaphor – the union of church and state.[206] The problem with this thinking is that these are not the only two options. However, their simplicity has caused an increasing number of Americans to forget that there have been, and are meant to be, numerous connections between religion and government.[207] By using their common sense, many Supreme Court Jus-

193 *Id.* at 34.
194 HAMBURGER, *supra* note 183, at 481.
195 *Id.* at 482.
196 *Id.*
197 *Id.* at 483.
198 Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).
199 HAMBURGER, *supra* note 183, at 483.
200 Wallace v. Jaffree, 472 U.S. 38, 91-112 (1985) (Rehnquist, C.J., dissenting).
201 *Id.*
202 *Id.* at 97-98.
203 *Id* at 98.
204 HAMBURGER, *supra* note 183, at 483.
205 *Id.* at 486.
206 *Id.*
207 *Id.*

tices have recognized that there are certain religious practices that are not establishments of religion. Nevertheless, under the Court's current Establishment Clause jurisprudence it is becoming increasingly more difficult to protect these basic American practices like the recitation of the Pledge. By beginning Supreme Court Establishment Clause jurisprudence with *Everson*, which adopted the overly simplistic view of separation as a wall, the Supreme Court has effectively eclipsed all other points of view,[208] including the views of many of the framers as well as probably most early Americans. Separation has ended up barring otherwise constitutional connections between church and state.[209]

Originally, the Establishment Clause stood for a decision by our national government to stay out of anything concerning the proper relationship between government and religion.[210] There never should have been any constitutional law, theory, or principle dealing with the proper relationship between religion and the national government. By incorporating the Establishment Clause into the Fourteenth Amendment the Supreme Court has overlooked that original understanding.[211]

Now, Justice Thomas favors the Supreme Court changing some of its past thinking about the Establishment Clause. This would entail looking to the meaning of the Establishment Clause as it was originally promulgated to avoid the endless litany of cases that are likely to keep coming in the future, attacking everything from the Pledge to our national coinage. Under this argument, if the State of California does not want to allow its children to recite the Pledge each day, then that is perfectly allowable and consistent with the original intent and meaning of the Establishment Clause. But, a federal court should not call into question the constitutionality of reciting the Pledge. Combining this originalist view with the idea of ceremonial deism leads to the conclusion that while our national government has every right to maintain certain ceremonial references to deity, it should be up to the states to see how these practices are handled within their own borders.

The problem with the above argument, however, is that there would possibly be only two Justices besides Justice Thomas who would subscribe to it, Chief Justice Rehnquist and Justice Scalia. Moreover, it would require overruling years of Supreme Court precedent. Hence, O'Connor's view of ceremonial deism is the most likely option under which the Supreme Court will choose to uphold the constitutionality of the Pledge.

C. Ceremonial Deism & O'Connor

The phrase "ceremonial deism" was coined by former Yale Law School Dean Walter Rostow in a 1962 lecture he delivered at Brown University.[212] Rostow wanted to reconcile the Establishment Clause with a "class of public activity which . . . could be accepted as so conventional and uncontroversial as

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[208] *Id.* at 488.

[209] *Id.* at 484.

[210] SMITH, *supra* note 178, at 49.

[211] *Id.*

[212] Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2091 (1996).

to be constitutional."[213] He labeled this class "ceremonial deism."[214] Rostow's combination of the words "ceremonial" and "deism" was most likely intended to describe expressions of and to God in ceremonial, instead of theological, settings.[215] While Rostow's original definition describes the concept he was expounding upon, it will only get us so far in actual Supreme Court Establishment Clause jurisprudence. Therefore, it is more useful to examine how the Supreme Court has actually dealt with ceremonial deism.

The phrase, "ceremonial deism," has only been discussed in two Supreme Court opinions prior to *Elk Grove v. Newdow*: *Lynch*; and *County of Allegheny*.[216] In *Lynch*, Justice Brennan's dissent discussed practices such as "the designation of 'In God We Trust' as our national motto, or the references to God contained in the Pledge of Allegiance to the flag;" he thought that these practices could best be understood as forms of "ceremonial deism."[217] Justice Brennan stated that practices such as the Pledge are "uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases."[218] Brennan further opined that such practices are "probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning."[219]

In *Allegheny*, the plurality opinion specifically referred to the Pledge of Allegiance, legislative prayer, and the Supreme Court's own invocation, as examples of "ceremonial deism" because they serve the legitimate secular purpose of solemnizing public occasions as well as expressing confidence in the future and encouraging citizens to recognize what is worthy of appreciation in our society.[220] Justice O'Connor concurred in the opinion suggesting that such ceremonial references to God are permissible because of their nonsectarian nature and their long-standing existence along with the fact that they are "generally understood as a celebration of patriotic values rather than particular religious beliefs."[221]

Although Supreme Court opinions explicitly have used the phrase "ceremonial deism" on only a few occasions, the Court implicitly has relied on the concept at various times throughout its Establishment Clause jurisprudence to successfully immunize a certain class of activities from Establishment Clause scrutiny.[222] For example, while Chief Justice Burger did not specifically refer to ceremonial deism in his *Lynch* majority opinion, he used five pages to create a thorough listing of government practices that all embrace religion. Among

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[213] Arthur E. Sutherland, *Book Reviews*, 40 IND. L.J. 83, 86 (1964) (reviewing WILBER G. KATZ, RELIGION AND AMERICAN CONSTITUTIONS (1963)).
[214] *Id.*
[215] Epstein, *supra* note 212, at 2091.
[216] *Id.*
[217] Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).
[218] *Id.* at 717.
[219] *Id.*
[220] County of Allegheny v. ACLU, 492 U.S. 573, 603-04 (1989).
[221] *Id.* at 630-31 (O'Connor, J., concurring).
[222] *See, e.g.*, Zorach v. Clauson, 343 U.S. 306, 312-13 (1952); McCollum v. Bd. of Educ., 333 U.S. 203, 253-55 (1948) (Reed, J., dissenting).

these practices are the Thanksgiving and Christmas holidays, the national motto, the Pledge of Allegiance, congressional and military chaplains, the Congressional prayer room, and presidential proclamations for a national day of prayer.[223] The former Chief Justice seemed to be implying that all of these practices are permissible notwithstanding the Establishment Clause. More recent Supreme Court Establishment Clause cases have employed similar implicit references to the concept of ceremonial deism.[224] But perhaps the best example of the implicit use of the idea of ceremonial deism is in *Marsh*. The Court in *Marsh* did not merely discuss the constitutionality of historical religious practices in a hypothetical sense; the Justices looked at the history and context of legislative prayer to avoid using the recognized Establishment Clause tests.

Not only did Justice O'Conner discuss the history and context of the Pledge in relation to its recital in public schools in her *Newdow* concurrence, but she also sought to guide future references to ceremonial deism. Although past cases have referred to the idea of ceremonial deism, O'Connor's concurrence sets forth four factors that have been discussed *supra*. For a majority of the Court to endorse ceremonial deism, it is important that there be some kind of test or standard with which the Justices can compare a practice that arguably violates the protection of the Establishment Clause. Justice O'Connor's ceremonial deism test is something that the other members of the Court can use in future cases to advance the idea of ceremonial deism, just as her concurrence in *Lynch* originated the often-used endorsement test to enhance Establishment Clause jurisprudence. Such a test fills a gap in Supreme Court jurisprudence because it analyzes when a practice should be protected by ceremonial deism instead of just referring to ceremonial deism in the "I know it when I see it" sense.

IV. CONCLUSION

It is only a matter of time before the practice of reciting the Pledge of Allegiance is brought before the Supreme Court again. When that happens, the Justices can uphold the practice in one of a few ways. The Court could take a strict originalist approach to the Establishment Clause. However, this is unlikely because it would entail changing decades of established, although sometimes confusing, Establishment Clause jurisprudence. To successfully uphold the Pledge, the Justices will need to analyze the history and context of the Pledge. To conduct this analysis, the Court should analyze the practice under the four factors provided by Justice O'Connor in her *Newdow* concurrence or use a similar test. Having an officially recognized formula for decid-

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[223] Lynch v. Donnelly, 465 U.S. 668, 674-78 (1984).

[224] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 633-35 (1992) (Scalia, J., dissenting) (recounting historical interactions between government and religion, including President Washington's oath on the Bible and the Judicial invocation); Wallace v. Jaffree, 472 U.S. 38, 84-89 (1985) (Burger, C.J., dissenting) (noting an inconsistency between the invalidation of a moment of silence and acceptance of such practices as legislative prayer, the Congressional prayer room, and the Pledge of Allegiance).

ing when a practice fits within the definition of ceremonial deism will serve to save other important practices in our nation that surely will be attacked in the future.