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ARTICLE

ESTABLISHING THE PLEDGE: ON COERCION, ENDORSEMENT, AND THE *MARSH* WILD CARD

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INTRODUCTION

The constitutionality of the Pledge of Allegiance ("the Pledge") has recently received much attention in part because of a Ninth Circuit decision,[1] since reversed,[2] striking down a primary school policy respecting the recitation of the Pledge and in part because of a growing awareness that the Court's jurisprudence in this area is in great disarray. Add to this that two new Justices are now on the Court and it is no wonder that this area of law has been and will continue to be the focus of much debate.

Were the constitutionality of a primary school policy requiring recitation of the Pledge to come before the Court, at least two issues would be of great interest: (1) how that issue in particular would be resolved, and (2) how, if at all, Establishment Clause jurisprudence would be clarified. Predicting how the first issue would be resolved is more difficult to predict than might initially be thought. Various Justices have suggested in dicta that the Pledge passes constitutional muster, although they often were not addressing the specific issue of whether requiring recitation of the Pledge in a primary school violates First Amendment guarantees.[3] Arguably, such a policy fails to pass any of the tests that the Court has articulated for determining Establishment Clause violations, although Justice O'Connor has argued that a primary school Pledge policy need not violate the Endorsement Test[4] and Justice Kennedy dissented in *County of Allegheny v. American Civil Liberties Union*,[5] at least in part, because he believed that the majority decision would result in the Pledge being declared

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1. Newdow v. U.S. Cong. (*Newdow I*), 328 F.3d 466 (9th Cir. 2003), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1 (2004).

2. *See* Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 5 (2004).

3. *See* Myers v. Loudoun County Pub. Schs., 418 F.3d 395, 406 (4th Cir. 2005) (noting that numerous Justices have suggested in dicta that the Pledge is unconstitutional).

4. *See id.* at 33-45 (O'Connor, J., concurring).

5. 492 U.S. 573 (1989).

unconstitutional.[6] As a further complicating factor, the Court has been inconsistent even when applying the tests that it has announced, so it is difficult to predict with confidence what the Court would say were this issue to come before it.

The second issue of great interest is whether the Court would reaffirm the validity of any of the Establishment Clause tests already offered—the *Lemon* Test, the Endorsement Test, or the Coercion Test—or instead offer either a new test or a modified version of one of the existing tests. It is a testament to the utter confusion in this area of law that it is entirely unclear what the Court would do with respect to either the narrow question involving the constitutionality of such a school policy or the broader question involving the appropriate test for determining Establishment Clause violations.

Part I of this Article discusses the legal history of the Pledge, suggesting that an examination of the legal challenges to the Pledge before it included the words "under God" helps clarify the legal issues implicated in the challenges after that inclusion. Part II analyzes the various tests used to determine whether there has been an Establishment Clause violation, arguing that the recitation of the Pledge in primary or secondary schools violates the Establishment Clause in light of each of those tests. Notwithstanding that each of the tests would be violated by such a policy, however, the Article concludes that there is no way to predict with confidence what the Court will in fact say on this issue in particular or how, if at all, the Court will modify the existing jurisprudence. The only matters about which one can be confident are that the Justices will be divided, the opinion will be rancorous, and years of litigation will be required to help clarify the Court's evolving jurisprudence in this area.

I. THE HISTORY OF THE PLEDGE

The Pledge of Allegiance case law is much more involved than is usually appreciated, both because the Pledge did not contain the words "under God" for more than half a century and because the Pledge has been the subject of litigation for almost ninety years.[7] The relevant cases may be divided into two groups: (1) those challenging the constitutionality of a requirement mandating recitation of the Pledge even by those whose religious or political beliefs preclude such a recitation, and (2) those challenging the recitation of the Pledge in a particular setting, notwithstanding the existence of an exception for those who cannot recite it in good faith. The Court has held that the Constitution requires an exception for those who cannot recite the Pledge in good conscience[8] but has not yet

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6. *See id.* at 674 n.10 (Kennedy, J., dissenting).

7. *See infra* notes 11, 15 (The Pledge was adopted in New York in 1898 and in other states subsequently, but the Pledge did not include the words "under God" until 1954.); *see also* Troyer v. State, 29 Ohio Dec. 168 (Ohio Ct. Com. Pl. 1918) (involving prosecution of parent who required his child not to say the Pledge or salute the flag in school).

8. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that school children could not be forced to say the Pledge against their will).

addressed on the merits whether policies with such an exception may nonetheless violate constitutional guarantees.

A. The Early Pledge and Flag Salute Cases

The Pledge of Allegiance was written in 1892 by Francis Bellamy and James Upham in celebration of Columbus's discovery of America,[9] and was officially codified by the Congress in 1942.[10] The original Pledge did not contain the words "under God"—those words did not become part of the Pledge until 1954.[11] Several purposes were cited to justify amending the Pledge to include "under God," such as distinguishing the United States from the atheistic Soviet Union,[12] affirming that this is a religious country, and teaching children that the nation is under God.[13] By amending the Pledge in this way, it was thought that children might come to appreciate the spiritual values underlying this country, including the belief in an all-seeing, all-knowing, all-powerful Supreme Being.[14]

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9. John J. Concannon III, *The Pledge of Allegiance and the First Amendment*, 23 SUFFOLK U. L. REV. 1019, 1021 (1989) ("In 1892, Francis Bellamy and James B. Upham wrote the first Pledge of Allegiance to celebrate the quadricentennial of Columbus' discovery of America."); *see also* Carol McKay, *The Pledge of Allegiance's Long History of Controversy*, 49-AUG FED. LAW. 9, 9 (2002) ("The Pledge of Allegiance . . . began as a project of the National Education Association's celebration of Columbus Day.").

10. John E. Thompson, Note, *What's The Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, 38 HARV. C.R.-C.L. L. REV. 563, 564 (2003) ("As codified by Congress in 1942, the Pledge of Allegiance read: '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.'").

11. McKay, *supra* note 9, at 9 ("[T]he words 'under God' didn't show up until 1954.").

12. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 25-26 (2004) (Rehnquist, C.J., concurring in the judgment) ("The amendment's sponsor, Representative Rabaut, said its purpose was to contrast this country's belief in God with the Soviet Union's embrace of atheism."); *see also* Paul Andonian, Note, *One Nation, Without God?—A Note on the Ninth Circuit's Decision in* Newdow v. United States Congress *Holding that Reciting the Pledge of Allegiance in Public Schools Violates the Establishment Clause and Therefore Unconstitutional*, 33 SW. U. L. REV. 119, 120 (2003) ("[M]any argued that [the amendment to the Pledge] was specifically tailored to encourage children to recite the phrase in classrooms in order to advance a belief in God, as an attempt to distinguish the United States from the atheist beliefs of communist countries."); Linda P. McKenzie, Note, *The Pledge of Allegiance: One Nation Under God?*, 46 ARIZ. L. REV. 379, 410 (2004) ("Godless communism was perceived as the evil; the remedy that Congress devised was to instill a sense of moral superiority in U.S. citizens, based on a national ethic of monotheism.").

13. Thompson, *supra* note 10, at 564 ("According to the amendment's congressional sponsors, its purpose was to distinguish America from atheistic communism, affirm the nation as a religious one, and infuse children with the belief that the United States is under God.").

14. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2121 (1996) ("In floor speech after floor speech, Representatives and Senators asserted that American schoolchildren needed to be indoctrinated with the belief that America is a nation

Many states officially adopted the Pledge long before it was adopted by Congress.[15] Beginning as early as 1918,[16] state laws mandating recitation of the Pledge were challenged as a violation of the Constitution's freedom of religion guarantees,[17] even when the Pledge did not contain the words "under God."

In *Nicholls v. Mayor of Lynn*,[18] an eight-year-old was expelled from school for not participating in the Pledge of Allegiance ceremony at school.[19] The child and his father contended that saluting the flag and reciting the Pledge "constituted an act of adoring and of bowing down to the flag, which is contrary to the religious beliefs of the petitioner."[20] The Supreme Judicial Court of Massachusetts rejected that contention, suggesting that:

> The flag salute and pledge of allegiance here in question do not in any just sense relate to religion. They are not observances which are religious in nature. They do not concern the views of any one as to his Creator. They do not touch upon his relations with his Maker. They impose no obligations as to religious worship. They are wholly patriotic in design and purpose.[21]

The *Nicholls* court explained that the Pledge ceremony was "clearly designed to inculcate patriotism and to instill a recognition of the blessings conferred by orderly government under the Constitutions of the State and nation."[22] Because

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under God. . . . Another Senator happily concurred: 'What better training for our youngsters could there be than to have them, each time they pledge allegiance to Old Glory, reassert their belief, like that of their fathers and their fathers before them, in the all-present, all-knowing, all-seeing, all-powerful Creator.'").

15. *See* Charles J. Russo & Ralph D. Mawdsley, Commentary, *Trumped Again: The Supreme Court Reverses the Ninth Circuit and Upholds the Pledge of Allegiance*, 192 ED. LAW REP. 287, 288 (2004) ("An early sign of support for the Pledge occurred in 1898, the day after the United States declared war on Spain, when the New York State legislature passed the first statute requiring students to recite the Pledge. Similar laws were enacted in Rhode Island in 1901, Arizona in 1903, Kansas in 1917, and Maryland in 1918.").

16. *Id.* at 289 ("Religious opposition to the Pledge and flag salute, albeit absent the words 'under God,' appeared as early as 1918."); *see* Troyer v. State, 29 Ohio Dec. 168 (Ohio Ct. Com. Pl. 1918) (upholding on appeal a conviction for failing to cause one's child to attend school). The defendant told his daughter to go to school but had also instructed her not to salute the flag. *Id.* at *2. When the teacher would begin the day with the Pledge exercise, the child would then be sent out of the room by the teacher for failing to say the Pledge and salute the flag. *Id.* at *1. When the child would return to school after the noon hour, she would again refuse to salute the flag and would then be sent away. *Id.* The same sequence would occur day after day. *Id.*

17. *See* Russo & Mawdsley, *supra* note 15, at 289-90 (discussing "a flurry of judicial activity involving the Pledge and flag salute" in 1936-1939).

18. 7 N.E.2d 577, 578 (Mass. 1937).

19. *Id.* at 577-78.

20. *Id.* at 578.

21. *Id.* at 580.

22. *Id.* at 579.

there "is nothing in the salute or the pledge of allegiance which constitutes an act of idolatry, or which approaches to any religious observance," the court held that the "rule and the statute are well within the competency of legislative authority."[23] Rather than support religion, the salute and pledge "are directed to a justifiable end in the conduct of education in the public schools."[24] The court dismissed the petition for a writ of mandamus to reinstate the child in school.[25]

When examining the constitutionality of a local law requiring recitation of the Pledge in school, a New Jersey court in *Hering v. State Board of Education*[26] echoed the analysis of the *Nicholls* court. The *Hering* court suggested that "[t]he pledge of allegiance is, by no stretch of the imagination, a religious rite. It is a patriotic ceremony which the Legislature has the power to require of those attending schools established at public expense."[27] The court noted that a "child of school age is not required to attend the institutions maintained by the public, but is required to attend a suitable school."[28] Thus, the court suggested, parents have a choice with respect to the education of their children—they can pay for their children to get a private education or they can send their children to a public school. Parents choosing the latter must understand that their children will then have to participate in the Pledge ceremony. The *Hering* court bluntly stated, "Those who do not desire to conform with the commands of the statute can seek their schooling elsewhere."[29] However, that did not mean that parents could simply ignore their duty to educate their children, since a parent who did not provide private schooling and also did not have the child attend public school might be subject to criminal sanction.[30]

The same approach was followed in *Leoles v. Landers*.[31] Here, a twelve-year-old girl was precluded from attending Atlanta public schools,[32] because of her refusal to salute the flag.[33] She and her father explained that saluting the flag would violate their religious beliefs.[34] The *Leoles* court characterized "the use of the free public schools of this state and of the city of Atlanta [as] a privilege extended to the parents or guardians of children upon compliance with the reasonable regulations imposed by the proper school authorities."[35] Among the

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23. *Id.* at 580.

24. *Id.*

25. *Id.* at 581.

26. 189 A. 629 (N.J. 1937).

27. *See id.* at 629.

28. *Id.* at 629-30.

29. *Id.* at 630.

30. *See, e.g.*, Troyer v. State, 29 Ohio Dec. 168, 171 (Ohio Ct. Com. Pl. 1918) (upholding conviction of parent who did not adequately arrange for his child's schooling).

31. 192 S.E. 218 (Ga. 1937).

32. *See id.* at 219-20.

33. *See id.* at 220.

34. *Id.*

35. *Id.* at 221.

state's reasonable demands was the requirement to salute the flag.[36] Those who refuse can "attend a suitable private school."[37] However, because the requirement to salute the flag is "by no stretch of reasonable imagination 'a religious rite,'"[38] but merely "an act showing one's respect for the government, similar to arising to a standing position upon hearing the National Anthem being played,"[39] the state is not violating constitutional guarantees by requiring the flag salute.[40]

Gabrielli v. Knickerbocker[41] involved a nine-year-old girl who had been expelled from school in Sacramento, California, for consistently failing to salute the flag and say the Pledge of Allegiance.[42] She had been willing to stand quietly while others participated in the ceremony,[43] but that did not meet the local requirement.[44] The California Supreme Court held that patriotic and other civic duties "as may have reasonable relations to the maintenance of good order, safety and the public welfare of the nation, may not be interpreted as infringements of the religious freedom clauses of either the state or federal organic law."[45] The court reasoned that saluting the flag and pledging allegiance "tend to stimulate in the minds of youth in the formative period of life sentiments of lasting affection and respect for and unfaltering loyalty to our government and its institutions"[46] and cannot be characterized as an improper exercise of authority.[47] Like the *Nicholls* court, the *Gabrielli* court refused to have a writ of mandamus issued to reinstate the girl in school.[48]

In *State ex rel. Bleich v. Board of Public Instruction*,[49] the Florida Supreme

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36. *Id.* at 222.

37. *Id.* at 223.

38. *Id.* at 222.

39. *Id.*

40. *Id.* Interestingly, Dorothy Leoles did not refuse to pledge allegiance to the flag of the United States. *See id.* at 220 (noting that "she did not refuse to pledge allegiance to her country; she is a good and loyal citizen of the United States and of the City of Atlanta; she believes in the American form of government"); *see also id.* at 219-20 ("The respondents 'have inaugurated in the school system of the City of Atlanta an exercise or ceremony during which all pupils of the said schools are required to salute the United States flag.'").

41. 82 P.2d 391 (Cal. 1938).

42. *Id.*

43. *Id.* at 392.

44. *Id.* Some of the schools in Sacramento County would have permitted her not to participate, but the Sacramento City policy did not include an exemption for those refusing to participate for religious reasons.

45. *Id.* at 394.

46. *Id.*

47. *Id.* ("We see no violation of any article of the federal or state constitutions in its exercise of power in the instant case.").

48. *Id.* at 394.

49. 190 So. 815 (Fla. 1939).

Court rejected the argument that a flag salutation has any religious implications.[50] The court stated that "[s]aluting the flag is nothing more than a symbolic expression or a restatement of one's loyalty and fervor for his country and its political institutions. It is patriotism in action. It has no reference to or connection whatever with one's religious belief."[51] Indeed, the court sought to distinguish what was at issue in flag salutes from what was at issue in religious practices by noting that "[s]aluting the flag connotes a love and patriotic devotion to country while religious practice connotes a way of life, the brand of one's theology or his relation to God."[52]

Perhaps realizing that others (like the plaintiff) might not believe the distinction so clear, the Florida court explained that even if the flag salute does implicate religious practices, the state can nonetheless require such salutes.[53] The court noted, "Practices in the name of religion that are contrary to approved canons of morals or that are inimical to the public welfare, will not be permitted even though done in the name of religion,"[54] as if refusing to salute the flag for religious reasons would somehow endanger the public. Yet, even when seeming to countenance the possibility that sincere religious beliefs might preclude an individual from saying the Pledge or saluting the flag, the court then made clear that it could not take such a position seriously—"To symbolize the flag as a graven image and ascribe to the act of saluting it a species of idolatry is too vague and far fetched to be even tinctured with the flavor of reason."[55] Here, too, the *Bleich* court refused to issue a writ of mandamus to have the child reinstated in school.[56]

The difficulties posed for the Jehovah's Witness families in these cases[57] should not be underestimated. It may well not have been financially possible for the families to have sent their children to private school, so the parents might have been forced to choose between criminal sanction and having their children salute the flag. This was made explicit in *Johnson v. Deerfield*,[58] where the father explained that he was "not financially able to provide education at a private school, or furnish tutors, or obtain for [his children] equivalent instruction elsewhere than at a public school."[59] Given that he could not educate his children

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50. *Id.* at 816.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 817.
57. In almost all of the cases discussed here, the plaintiffs were Jehovah's Witnesses. *See* Johnson v. Deerfield, 25 F. Supp. 918, 919 (D. Mass. 1939); Gabrielli v. Knickerbocker, 82 P.2d 391, 392 (Cal. 1938); *Bleich*, 190 So. at 816; Leoles v. Landers, 192 S.E. 218, 220 (Ga. 1937); Nicholls v. Mayor of Lynn, 7 N.E.2d 577, 580 (Mass. 1937). In *Troyer*, the plaintiff was a Mennonite. *See* Troyer v. State, 29 Ohio Dec. 168, 169 (Ohio Ct. Com. Pl. 1918).
58. 25 F. Supp. 918 (D. Mass. 1939).
59. *Id.* at 919.

privately and that the state required that his children receive an education,[60] the Flag Salute law put him in the impossible position of having to violate either his legal or his religious duty. The federal district court in Massachusetts hearing the case rejected the argument that the father had been put in an untenable position.[61] Instead, the court reiterated what had previously been stated by different state courts, namely, that "obedience to the statute in no conceivable sense could be construed as a 'religious rite.' It involved no more than an expression of due respect for the institutions and ideals of the country in which the plaintiffs lived."[62]

In these cases, the courts tended to challenge the reasonableness rather than the sincerity of the belief.[63] Arguably, the courts should have been confining themselves to judging whether the defendant sincerely held the belief at issue, since the court would otherwise be putting itself in a position for which it was ill-suited, namely, judging which religious beliefs themselves are true.[64] In *Johnson*, the plaintiff claimed that it was not for the court to say whether the belief was reasonable but merely to decide whether the belief was sincerely held.[65] The

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60. *See id.*; *cf.* Sheldon v. Fannin, 221 F. Supp. 766, 768 (D. Ariz. 1963) (The plaintiffs "have not the financial means to obtain an adequate education otherwise than in the public schools of the State.").

61. *Johnson*, 25 F. Supp. at 919.

62. *Id.* (citing *Leoles*, 192 S.E. 218; Hering v. State Bd. of Educ., 189 A. 629 (N.J. 1937)); *see also* People v. Sandstrom, 279 N.Y. 523, 529 (N.Y. 1939) ("Saluting the flag in no sense is an act of worship or a species of idolatry, nor does it constitute any approach to a religious observance. The flag has nothing to do with religion . . . .").

63. *See, e.g.*, Gabrielli v. Knickerbocker, 85 P.2d 391, 392 (Cal. 1938) ("There is no suggestion that petitioner's objections are not made in good faith."); State *ex rel.* Bleich v. Bd. of Pub. Instruction, 190 So. 815, 817 (Fla. 1939) (Buford, J., dissenting to denial of petition of rehearing) ("[W]e should not by law require one to affirmatively engage in an act, not essential to the public welfare or the support of the government, which he or she conscientiously believes to be contrary to his or her religious tenets."); Nicholls v. Mayor of Lynn, 7 N.E.2d 577, 580 (Mass. 1937) ("It is assumed that the statement of beliefs of the petitioner made by him is genuine and true and constitutes the ground of his conduct.").

64. *Cf.* United States v. Ballard, 322 U.S. 78, 87 (1944).

> [The Fathers of the Constitution] fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

Id.

65. *Johnson*, 25 F. Supp. at 920 ("Much is made of the argument that the question whether the statute commands an act of patriotic loyalty or an act of religious worship is one upon which the courts have no right to pass. The plaintiffs say that if they honestly and conscientiously believe

court rejected that argument, instead suggesting that the flag salute could not reasonably be thought a religious rite.[66]

In *Minersville School District v. Gobitis*,[67] the United States Supreme Court addressed whether children could be required to salute the flag as a condition of their attending public school.[68] The Court characterized the conflict as between "the liberty of conscience" and the "authority to safeguard the nation's fellowship,"[69] which it believed put the "judicial conscience . . . to its severest test."[70] The *Gobitis* Court did not deny that a flag salute might offend religious beliefs—it instead suggested that the protection of religious practices is not absolute,[71] and that the importance of the implicated state interest must also be considered. The Court made clear that the state's interest in having children recite the Pledge was of the highest order,[72] as if the fabric of the nation would be torn asunder were an exception to reciting the Pledge made for children with religious objections.[73]

At least one reason the *Gobitis* Court believed the interest so important was that public school children are at an especially impressionable age. Further, because "the formative period in the development of citizenship"[74] was at issue, the Court was reluctant to second-guess the judgment of the legislature "that a particular program or exercise will best promote in the minds of children who attend the common schools an attachment to the institutions of their country."[75] Ironically, the very factors which may have convinced the *Gobitis* Court to uphold the Pledge requirement may contribute to the current Court's finding a Pledge requirement unconstitutional in those same circumstances.[76]

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that the salute is a religious rite, then their belief prevails and the law must yield to it.").

66. *See id.* at 919; *but see* Sheldon v. Fannin, 221 F. Supp. 766, 775 (D. Ariz. 1963) ("The First Amendment thus guarantees to the plaintiffs the right to claim that their objection to standing is based upon religious belief, and the sincerity or reasonableness of this claim may not be examined by this or any other Court.").

67. 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

68. *See id.* at 592 ("[Mr. Gobitis] sought to enjoin the authorities from continuing to exact participation in the flag-salute ceremony as a condition of his children's attendance at the Minersville school.").

69. *Id.* at 591.

70. *Id.*

71. *See id.* at 594 ("The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects.").

72. *Id.* at 595 ("We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security.").

73. *See id.* at 596 (discussing how the ultimate foundation of society is fostered).

74. *Id.* at 598.

75. *Id.* at 599.

76. *See infra* notes 301-41 and accompanying text (discussing the Court's willingness to insulate children from religious messages which might be thought unproblematic in a different context).

The children who were being expelled from school in *Gobitis* sincerely believed that reciting the Pledge would violate their religious convictions.[77] Justice Stone in his *Gobitis* dissent argued that the Constitution precluded the legislature from forcing these children to affirm something contrary to their religious convictions,[78] absent "a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection."[79] Thus, both the majority and the dissent in *Gobitis* believed that individuals could not be forced to affirm something contrary to their own religious beliefs, absent some overriding state interest—the difference between the two was in whether the state in fact had a sufficiently important interest implicated.

Justice Stone's view was vindicated a mere three years later in *West Virginia State Board of Education v. Barnette*.[80] At issue in *Barnette* was a West Virginia law requiring children to participate in the Pledge ceremony, where a failure to conform could result in expulsion,[81] and the child would not be permitted to come back until he or she would conform.[82] A child not attending school could be treated as a delinquent,[83] which might result in the child's being sent to a reformatory.[84] The child's parents would be liable to prosecution for contributing to the delinquency of a minor,[85] which might result in a fine or imprisonment.[86]

The *Barnette* Court did not view public school attendance as merely one option among many, as some of the state courts had,[87] instead it suggested that school attendance was "not optional."[88] The Court noted that "the refusal of these persons to participate in the ceremony does not interfere with or deny rights

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77. *See Gobitis*, 310 U.S. at 601 (Stone, J., dissenting) ("It is not doubted that these convictions are religious, that they are genuine, or that the refusal to yield to the compulsion of the law is in good faith and with all sincerity.").

78. *See id.* at 604 (suggesting that the guaranties of civil liberty protect the individual "from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion.").

79. *Id.* at 607.

80. 319 U.S. 624 (1943).

81. *Id.* at 629 ("Failure to conform is 'insubordination' dealt with by expulsion.").

82. *Id.*

83. *Id.* ("[T]he expelled child is 'unlawfully absent' and may be proceeded against as a delinquent.").

84. *Id.* at 630 ("Officials threaten to send them to reformatories maintained for criminally inclined juveniles.").

85. *Id.* ("Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.").

86. *Id.* at 629 ("His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding $50 and jail term not exceeding thirty days.").

87. *See supra* notes 26-40 and accompanying text.

88. *Barnette*, 319 U.S. at 632.

of others to do so"[89] and, further, that "their behavior is peaceable and orderly."[90] Echoing Justice Stone's *Gobitis* dissent, the *Barnette* Court noted that "the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind."[91] However,

> censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish[,] . . . [and it] would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.[92]

The State made no showing, however, that students "remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression."[93]

The *Barnette* Court had no quarrel with the state's end but, rather, with the means chosen to accomplish that end.[94] Basically, the Court suggested that students cannot be compelled to recite the Pledge, notwithstanding the Legislature's decision to impose such a requirement. Rather than adopt the *Gobitis* position that the Legislature's decision should not be second-guessed,[95] the *Barnette* Court explained that certain kinds of decisions should be free from legislative interference. The Court noted:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[96]

The Court understood that one of the reasons that the refusal to salute the flag was upsetting was that "the flag involved is our own."[97] However, the Court simply could not believe that there would be dire consequences were the Pledge made voluntary, arguing that such a view underestimated the American people. "To believe that patriotism will not flourish if patriotic ceremonies are voluntary

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89. *Id.* at 630.

90. *Id.*

91. *Id.* at 633.

92. *Id.*

93. *Id.* at 634.

94. *Id.* at 640 ("National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.").

95. *See supra* note 69.

96. *Barnette*, 319 U.S. at 638.

97. *Id.* at 641.

and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."[98] Yet, the Court also made clear that the Constitution was not merely designed to offer protection of dissenting views which are harmless, since the "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[99] Indeed, the Court emphasized the primacy of the right at issue—"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[100]

The *Barnette* majority opinion did not focus in particular on the burden imposed by the Pledge requirement on religion—the same analysis offers protection to a student who refuses to participate in the Pledge ceremony for non-religious reasons.[101] Justice Black's *Barnette* concurrence discussed the burden on religion more directly. He too suggested that sincerely held religious beliefs do not immunize the adherent from state laws. "Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity."[102] However, where a time-place-manner restriction is not at issue and, for example, the Court "cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation[,]"[103] the regulation must give way to the sincerely held religious beliefs.

Justice Frankfurter dissented in *Barnette* largely because he construed the Pledge requirement as simply "promoting good citizenship and national allegiance[.]"[104] He made clear, however, that an "act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad[,]"[105] or in other words, is unconstitutional. While in the minority in *Barnette*, Justice

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98. *Id.*

99. *Id.* at 642.

100. *Id.*

101. *Cf.* Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973) (upholding right of student not to participate in Pledge of Allegiance ceremony). The student objected to the Pledge for political reasons. *See id.* at 636 ("Plaintiff Theodore Goetz . . . refuses to participate in the Pledge of Allegiance because he believes 'that there [isn't] liberty and justice for all in the United States.'"); Holden v. Bd. of Educ. of Elizabeth, 216 A.2d 387, 390 (N.J. 1966) ("Nor does the issue as we see it turn on one's possession of particular religious views . . . . [M]any citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.").

102. *Barnette*, 319 U.S. at 643-44 (Black, J., concurring).

103. *Id.* at 644.

104. *Id.* at 654 (Frankfurter, J., dissenting).

105. *Id.*

Frankfurter took consolation in the thought that previous Courts had taken his side on this matter.[106] Indeed, he noted, "What may be even more significant than this uniform recognition of state authority is the fact that every Justice—thirteen in all—who has hitherto participated in judging this matter has at one or more times found no constitutional infirmity in what is now condemned."[107]

In the early cases challenging mandatory recitation of the Pledge in primary and secondary schools, the courts were uniform in their unwillingness to find that such policies violated constitutional guarantees. It was only when the United States Supreme Court issued its *Barnette* decision that school children were recognized as having the constitutional right to refuse to participate in Pledge ceremonies. Unlike the state courts addressing this issue, the Supreme Court recognized that some individuals had religious objections to reciting the Pledge of which the Constitution must take account, notwithstanding the patriotic nature of the Pledge. As the Court recognized in *Thomas v. Review Board of Indiana Employment Security Division*,[108]

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[109]

Once *Barnette* was issued, students could no longer be required to affirm beliefs that violated their consciences. Yet, the recognition that recitation of the Pledge implicates religious beliefs may play an important role in any analysis of the current challenges to Pledge policies under the Establishment Clause.[110]

B. The Later Cases

Eleven years after *Barnette* was issued, Congress modified the Pledge to include the words "under God."[111] Challenges to the Pledge after 1954 involved the claim that the State could not require recitation of the Pledge when it

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106. *Id.* at 664-65 ("I am fortified in my view of this case by the history of the flag salute controversy in this Court. Five times has the precise question now before us been adjudicated. Four times the Court unanimously found that the requirement of such a school exercise was not beyond the powers of the states.").

107. *Id.*

108. 450 U.S. 707 (1981).

109. *Id.* at 717-18.

110. *See infra* notes 301-41 and accompanying text (discussing how recognition of the religious implications of the Pledge is important to consider when examining the Pledge policies of primary and secondary schools).

111. *See supra* note 11 and accompanying text (noting that the Pledge was modified in 1954).

included those words.[112] The challenges were sometimes made by individuals who objected to being required to make affirmations concerning God and sometimes by individuals who objected to having to hear such affirmations, even though they themselves were not required to make them.[113] As a general matter, the former but not the latter challenges have been sustained, although courts have been too quick to dismiss the implications of the former for the constitutionality of the latter.

Sheldon v. Fannin[114] involved a refusal by students to stand while the National Anthem was sung.[115] They explained that they could not even stand silently during the Anthem without violating their religious convictions,[116] although they did not feel similar compunctions about standing during the recitation of the Pledge of Allegiance.[117] While *Fannin* did not involve a challenge to the Pledge per se, it nonetheless is helpful to consider because it provides the analysis that will subsequently be used when analogous challenges are made to the Pledge.

The *Fannin* court characterized the singing the National Anthem "[as] not a religious but a patriotic ceremony, intended to inspire devotion to and love of country"[118] and, further, suggested that any "religious references therein are incidental and expressive only of the faith which as a matter of historical fact has inspired the growth of the nation."[119] Indeed, the court suggested that "[t]he Star Spangled Banner may be freely sung in the public schools, without fear of having the ceremony characterized as an 'establishment of religion' which violates the First Amendment[,]"[120] fourth stanza notwithstanding.[121] However, the court

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112. *See, e.g.*, Sherman v. Cmty. Consol. Sch. Dist., 980 F.2d 437, 448 (7th Cir. 1992) (rejecting challenge to the Pledge based on its reference to God).

113. *See* Frazier v. Alexandre, 434 F. Supp. 2d 1350 (S.D. Fla. 2006) (involving a student who challenged his treatment for his refusal to stand and say the Pledge); *Sherman*, 980 F.2d at 437 (challenging the recitation of Pledge, even though child was not forced to say it).

114. 221 F. Supp. 766 (D. Ariz. 1963).

115. *See id.* at 768 ("On September 29, 1961, the plaintiffs were suspended from Pinetop Elementary School for insubordination, because of their refusal to stand for the singing of the National Anthem.").

116. *Id.* ("This refusal to participate, even to the extent of standing, without singing, is said to have been dictated by their religious beliefs as Jehovah's Witnesses . . . .").

117. *Id.* ("[B]y some process of reasoning we need not tarry to explore, they are willing to stand during the Pledge of Allegiance, out of respect for the Flag as a symbol of the religious freedom they enjoy.").

118. *Id.* at 774.

119. *Id.* (comparing Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962)).

120. *Id.*

121. The fourth stanza of the Star Spangled Banner reads:

O thus be it ever when free-men shall stand
Between their lov'd home and the war's desolation;
Blest with vict'ry and peace, may the heav'n-rescued land
Praise the Pow'r that hath made and preserve'd us a nation!

distinguished between the requirements of the Establishment and Free Exercise Clauses[122] and held that the students could not be expelled "solely because they silently refuse to rise and stand for the playing or singing of the National Anthem."[123]

Smith v. Denny[124] involved one of the first challenges to the Pledge of Allegiance based on its inclusion of the words "under God."[125] The *Denny* court cited with approval *Fannin*'s treatment of the religious references in the Star Spangled Banner—"Any religious references therein are incidental and expressive only of the faith which as a matter of historical fact has inspired the growth of the nation."[126] Interestingly, the court also cited an interpretation of

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Then conquer we must, when out cause is just,
And this be our motto: "In God is our trust!"
And the star-spangled banner in triumph shall wave
O'er the land of the free and the home of the brave.

Francis Scott Key, *The Star Spangled Banner* (1814), *available at* www.infoplease.com/ipa/A0194015.html. The fourth stanza of My Country Tis of Thee reads:

Our fathers' God, to thee,
author of liberty,
to thee we sing;
long may our land be bright
with freedom's holy light;
protect us by thy might,
great God, our King.

Samuel Francis Smith, *My Country Tis of Thee* (1832), *available at* http://cityofoaks.home.netcom.com/tunes/MyCountryTisOfThee.html. For comments about how these would fare were the recitation of the Pledge of Allegiance in public schools declared unconstitutional, see Newdow v. U.S. Cong. (*Newdow I*), 328 F.3d 466, 492-93 (9th Cir. 2003) (Fernandez, J., concurring and dissenting), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1 (2004).

> My reading of the stelliscript suggests that upon Newdow's theory of our Constitution, accepted by my colleagues today, we will soon find ourselves prohibited from using our album of patriotic songs in many public settings. "God Bless America" and "America The Beautiful" will be gone for sure, and while use of the first three stanzas of "The Star Spangled Banner" will still be permissible, we will be precluded from straying into the fourth. And currency beware!

Id.

122. *Fannin*, 221 F. Supp. at 774-75 ("[I]t should be observed that lack of violation of the 'establishment clause' does not ipso facto preclude violation of the 'free-exercise clause.'").

123. *Id.* at 775; *see also* Circle Sch. v. Phillips, 270 F. Supp. 2d 616, 622 (E.D. Pa. 2003) ("[I]f the Act does not allow students to opt out of reciting the Anthem, it violates their First Amendment rights.").

124. 280 F. Supp. 651 (E.D. Cal. 1968).

125. *See id.* at 652 ("Plaintiffs assert that the regulation, by requiring inclusion of the words 'under God' violates the first and fourteenth amendments.").

126. *See id.* at 654 (citing *Fannin*, 221 F. Supp. at 774).

the National Anthem suggested in *Engel v. Vitale*,[127] in which Justice Black referred to "officially espoused anthems which include the *composer's* professions of faith in a Supreme Being."[128] In addition, the *Denny* court cited Justice Brennan's concurrence in *School District of Abington v. Schempp*[129] in which Justice Brennan suggested that it had not been shown that daily recitation of the Pledge "may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government."[130]

Yet, someone reciting the Pledge—"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"[131]—would be unlikely to believe that she, by reciting the words "under God," was merely acknowledging the beliefs of the Pledge's composer[132] or merely acknowledging that faith has inspired many Americans.[133] Rather, she presumably would believe that she, herself, was making a statement involving God,[134] e.g., that the nation was under God.[135] Just as a flag salute involves a personal statement by the saluter which,

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127. 370 U.S. 421 (1962).

128. *See Denny*, 280 F. Supp. at 653 (citing *Engel*, 370 U.S. at 435 n.21) (emphasis added).

129. 374 U.S. 203 (1963).

130. *Denny*, 280 F. Supp. at 653 (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 281 (1963) (Brennan, J., concurring)).

131. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 6 (2004).

132. Newdow v. U.S. Cong. (*Newdow I*), 328 F.3d 466, 489 (9th Cir. 2003), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1 (2004) ("The Pledge differs from the Declaration and the anthem in that its reference to God, in textual and historical context, is not merely a reflection of the author's profession of faith.").

133. *See id.* at 487 ("The recitation that ours is a nation 'under God' is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic."); *see also* Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 224 (2004) ("The Pledge has no statement about what many Americans believe, or about what the Founders believed.").

134. *Newdow I*, 328 F.3d at 489 ("The Pledge . . . is, by design, an affirmation by the person reciting it."); *see also* Steven G. Gey, *"Under God," the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1917 (2003) ("The formal recitation of a patriotic affirmation is different in kind from other manifestations of religion in coins or songs because it involves the government seeking a direct affirmation of religious belief by all those saying the Pledge."); Laycock, *supra* note 133, at 224 ("There is only a profession of what each person taking the Pledge believes: 'I pledge allegiance to . . . one Nation under God.'").

135. *Cf.* Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 26 (2004) (Rehnquist, C.J., concurring) ("To the millions of people who regularly recite the Pledge, and who have no access to, or concern with, such legislation or legislative history, "under God" might mean several different things: that God has guided the destiny of the United States, for example, or that the United States exists under God's authority.").

when forced, can be a serious infringement of personal liberties,[136] being forced to utter the words in the Pledge might involve a serious infringement of personal liberties.

The jurisprudence in this area makes little sense if the words of the Pledge are interpreted merely to reflect *others'* beliefs. Individuals who refused to say the Pledge were sincerely claiming that the words of the Pledge did not represent their *own* beliefs—these individuals were not arguing that the words of the Pledge did not represent the beliefs of others.

Even Justice Brennan's *Schempp* concurrence is not particularly persuasive for the proposition that the Pledge passes muster when one considers some of the alternative ways that the state can instill patriotism in children.[137] For example, the state could have children recite the Pledge as it existed in 1950, i.e., before the words "under God" were added. Indeed, it is not at all clear what additional patriotism would be inculcated by including the words "under God" within the Pledge.[138] If, however, no additional patriotism would be instilled by adding those words, then the State can achieve the desired secular purposes without entering the thicket created when God and the State are linked. By choosing to incorporate a religious message when the state could have achieved the same secular end without incorporating such a message, the state violates the Establishment Clause.[139]

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136. *See* Wooley v. Maynard, 430 U.S. 705, 715 (1977) (discussing the serious infringement upon personal liberties which may be involved in cases in which an individual is compelled to salute the flag). *But cf. id.* at 722 (Rehnquist, J., dissenting) ("The fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto 'In God We Trust.'").

137. Indeed, Justice Brennan may have been attempting to be reassuring rather than persuasive. *See* Gey, *supra* note 134, at 1909.

> [C]onsider the tentative phrasing of his comments. . . . [T]he possibility that he and a majority of the Court would approve many common religious exercises would reassure skeptical members of the public that the Court's new school-prayer and school-Bible-reading decisions would not lead to the extirpation of all evidence of religiosity from public life.

Id.

138. *See id.* at 1907 ("[I]t is implausible that the addition of the words 'under God' in 1954 added any solemnity to a Pledge that had seen the country through two world wars without those words; the words 'under God' added something else in addition to solemnity—that is, a religious gloss on an already solemn affirmation.").

139. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 281 (1963) (Brennan, J., concurring) ("[I]t seems to me that the State acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends where secular means would suffice."); Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 383 (1963) ("[W]hen a secular activity by government results not only in attainment of a civil objective, but also promotes religion, the establishment clause is violated if the civil goal may be accomplished *just as well* by means that do not promote religion."); *see also* Gey, *supra* note 134, at 1911-12 (discussing Brennan's *Schempp*

In *Sherman v. Community Consolidated School District*,[140] a federal district court addressed whether an Illinois statute requiring the daily recitation of the Pledge of Allegiance in elementary schools violated constitutional guarantees.[141] On appeal,[142] the Seventh Circuit Court of Appeals affirmed that the state statute did not violate constitutional guarantees,[143] characterizing the Pledge as secular,[144] rejecting that "ceremonial references in civic life to a deity [must] be understood as prayer, or support for all monotheistic religions, to the exclusion of atheists and those who worship multiple gods[,]"[145] and suggesting that a much different analysis would have been appropriate had it instead been a prayer.[146]

The *Sherman* court offered several justifications for its position. For example, it noted that there were numerous instances throughout our history in which references to God were made, sometimes by the Framers,[147] and also that members of the Court had indicated in dicta that they believed the Pledge constitutional.[148] The court also feared that striking the Pledge as

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concurrence).

140. 758 F. Supp. 1244 (N.D. Ill. 1991), *aff'd in part, vacated in part*, 980 F.2d 437 (7th Cir. 1992).

141. *Id.* at 1245 ("Plaintiffs Robert Sherman and his minor son Richard Sherman are atheists and they allege that the Illinois statute which provides for the daily recitation of the Pledge of Allegiance in public elementary schools violates their rights under the First and Fourteenth Amendments to the Constitution.").

142. Sherman v. Cmty. Consol. Sch. Dist., 980 F.2d 437 (7th Cir. 1992).

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

144. *Id.* at 445 ("All of this supposes that the Pledge is a secular rather than sectarian vow.").

145. *Id.*

146. *Id.* ("Everything would be different if it were a prayer or other sign of religious devotion. Does 'under God' make the Pledge a prayer, whose recitation violates the establishment clause of the first amendment?").

147. *Id.* at 445-46.

> James Madison, the author of the first amendment, issued presidential proclamations of religious fasting and thanksgiving. Thomas Jefferson, who refused on separationist grounds to issue thanksgiving proclamations, nonetheless signed treaties sending ministers to the Indians. The tradition of thanksgiving proclamations began with President Washington, who presided over the constitutional convention. From the outset, witnesses in our courts have taken oaths on the Bible, and sessions of court have opened with the cry "God save the United States and this honorable Court." Jefferson's Declaration of Independence contains multiple references to God (for example: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."). When Madison and Jefferson wrote their famous declarations supporting separation of church and state, they invoked the name of the Almighty in support.

Id.

148. *Id.* at 447-48.

unconstitutional would have other implications for what might be taught in school, for example, in the sciences.[149]

In *Newdow v. United States Congress*,[150] the Ninth Circuit struck down a school policy mandating recitation of the Pledge in public schools as a violation of constitutional guarantees.[151] The court held that the "school district policy impermissibly coerces a religious act" and thus violated the First Amendment.[152] The United States Supreme Court reversed, holding that the plaintiff did not have standing to bring the action.[153]

In *Myers v. Loudoun County Public Schools*,[154] the plaintiff asserted that "because of the inclusion of the words 'under God,' the Pledge is a religious exercise and that, accordingly, the Recitation Statute violates the Establishment Clause."[155] The *Myers* court rejected the constitutional challenge, echoing the *Sherman* court by noting the many historical practices involving references to God[156] and that members of the Court have consistently suggested that the Pledge

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> An outcry in dissent that one or another holding logically jeopardizes the survival of this tradition always provokes assurance that the majority opinion carries no such portent. *Engel* was the first of these, and *Allegheny* the most recent: "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that the government may not communicate an endorsement of religious belief . . . . We need not return to the subject of 'ceremonial deism,' . . . because there is an obvious distinction between creche displays and references to God in the motto and the pledge."

Id. (citations omitted).

149. *Id.* at 444.

> The diversity of religious tenets in the United States ensures that *anything* a school teaches will offend the scruples and contradict the principles of some if not many persons. The problem extends past government and literature to the domain of science; the religious debate about heliocentric astronomy is over, but religious debates about geology and evolution continue. An extension of the school-prayer cases could not stop with the Pledge of Allegiance. It would extend to the books, essays, tests, and discussions in every classroom.

Id.

150. 328 F.3d 466 (9th Cir. 2003), *rev'd* 542 U.S. 1 (2004).

151. *Id.* at 487 ("[W]e conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional.").

152. *Id.*

153. *See* Elkgrove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 5 (2004) ("We conclude that Newdow lacks standing and therefore reverse the Court of Appeals' decision.").

154. 418 F.3d 395 (4th Cir. 2005).

155. *Id.* at 399.

156. *Id.* at 403-04. The *Myers* court cited *Sherman* for the proposition that it is important to consider the practices of the Framers. *See id.* at 404 ("The recognition of religion in these early public pronouncements is important, unless we are to presume the 'founders of the United States [were] unable to understand their own handiwork.'" (citing Sherman v. Cmty. Consol. Sch. Dist., 980 F.2d 437, 445 (7th Cir. 1992))).

passes constitutional muster.[157] Indeed, the *Myers* court remarked that "it is perhaps more noteworthy that, given the vast number of Establishment Clause cases to come before the Court, *not one Justice has ever suggested that the Pledge is unconstitutional.* In an area of law sometimes marked by befuddlement and lack of agreement, such unanimity is striking."[158]

Yet, the *Myers* court's point is somewhat misleading, because the Justices were sometimes upholding the constitutionality of the Pledge, current jurisprudence notwithstanding. For example, in his *Newdow* concurrence, Justice Thomas wrote, "I conclude that, as a matter of our precedent, the Pledge policy is unconstitutional."[159] Thus, while it is correct to say that Justice Thomas would not strike down a policy requiring recitation of the Pledge,[160] that is because he rejects the existing jurisprudence.[161] If Justice Thomas's understanding of the relevant jurisprudence is accurate, however, then those non-activist Justices who wish to apply rather than recreate the relevant constitutional law, and those inferior courts who wish to follow their duty and apply existing law, are required to strike policies mandating the recitation of the Pledge in primary schools. At the very least, such a surprising result suggests that the current jurisprudence in this area should be examined carefully to see whether Justice Thomas's analysis is correct.

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157. *Id.* at 405.

> [T]he Court and the individual Justices thereof have made clear that the Establishment Clause, regardless of the test to be used, does not extend so far as to make unconstitutional the daily recitation of the Pledge in public school. Beginning with *Engel,* in every case in which the Justices of the Court have made mention of the Pledge, it has been as an assurance that the Pledge is not implicated by the Court's interpretation of the Establishment Clause.

Id.; *see also* Tara P. Beglin, Note, *"One Nation Under God," Indeed: The Ninth Circuit's Problematic Decision to Change Our Pledge of Allegiance*, 20 ST. JOHN'S J. LEGAL COMMENT. 129, 153 (2005) ("On numerous occasions, Supreme Court Justices have reflected in dicta upon the constitutionality of the Pledge of Allegiance and have noted that the Pledge is not a prayer and is thereby constitutionally sound.").

158. *Myers*, 418 F.3d at 406.

159. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 49 (2004) (Thomas, J., concurring); *see also infra* notes 350-51 and accompanying text (discussing Justice Kennedy's belief that the *Allegheny* majority opinion required the constitutional invalidation of the Pledge); *infra* note 318 and accompanying text (discussing Justice Scalia's comments about *Lee*'s implications for the constitutionality of the Pledge).

160. *Newdow II*, 542 U.S. at 45 (Thomas, J., concurring) ("We granted certiorari in this case to decide whether the Elk Grove Unified School District's Pledge policy violates the Constitution. The answer to that question is: 'no.'").

161. *Id.* at 49 ("I conclude that, as a matter of our precedent, the Pledge policy is unconstitutional. I believe, however, that *Lee* was wrongly decided.").

II. THE EXISTING ESTABLISHMENT CLAUSE JURISPRUDENCE

Numerous jurists and commentators have noted that the existing Establishment Clause jurisprudence is confused and in need of either clarification or, perhaps, a fundamental rethinking.[162] The Court has offered several tests to determine whether an action by the State violates the Establishment Clause without clearly specifying the conditions under which particular tests should be applied. The Court has thereby created the possibility that a particular state action would pass one test but fail another, making that action's constitutionality indeterminate. Of course, in some cases, it will not matter which test is applied because the implicated state action violates each of them. Arguably, the recitation of the Pledge in primary schools is such a case, as will become clear when each of the tests is examined.

A. *The* Lemon *Test*

In *Lemon v. Kurtzman*[163] the Court set out its three-part test to determine whether the Establishment Clause has been violated: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an 'excessive government entanglement with religion.'"[164] The Court has made clear that "[s]tate action violates the Establishment Clause if it fails to satisfy any of these prongs."[165]

These factors require further explanation. On the one hand, as Justice Powell made clear, it will not suffice to establish that there was a religious purpose to fail the first prong—that religious purpose must have been the predominant purpose behind the challenged action.[166] On the other hand, the mere existence of a secular purpose will not immunize the state action if religious purposes

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162. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) ("[T]he incoherence of the Court's decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application."); Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (discussing "the type of unprincipled decisionmaking that has plagued our Establishment Clause cases since *Everson*"); William P. Marshall, *"We Know It When We See It" The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 495 (1986) ("From the outset it has been painfully clear that logical consistency and establishment clause jurisprudence were to have little in common."); Jay A. Sekulow & Francis J. Manion, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 WM. & MARY BILL RTS. J. 33, 33 (2005) (discussing "the fog obscuring . . . Establishment Clause jurisprudence generally"); Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 294 (2003) (describing the Court's Establishment Clause jurisprudence as "confused").

163. 403 U.S. 602 (1971).

164. *Id.* at 612-13 (citations omitted).

165. Edwards v. Aguillard, 482 U.S. 578, 583 (1987).

166. *Id.* at 599 (Powell, J., concurring) ("A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate.").

dominate.[167] As the Court recently confirmed in *McCreary County v. ACLU*,[168] "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides."[169]

By the same token, if the principal effect of a particular action is to promote religion, then that act cannot pass constitutional muster. However, there has been an evolving standard with respect to what in fact would violate the standard. For example, in *Meek v. Pittenger*,[170] the Court struck down a Pennsylvania law authorizing public funding of auxiliary services such as guidance counseling and testing services to children in religious schools.[171] The Court feared either that these personnel would impermissibly foster religious belief or that the state would have to engage in continuing surveillance to make sure that no impermissible fostering occurred.[172] The former would violate the effects provision while the latter would violate the entanglement provision. In *School District of Grand Rapids v. Ball*,[173] the Court struck down a program in which classes were taught at public expense by public employees in classrooms located in and leased from religious schools.[174] The Court again worried that public employees might be offering religious instruction.[175] Yet, the understanding of *Lemon* that prevailed in *Meek* and *Ball* no longer reflects the current jurisprudence.

The effects provision of the *Lemon* Test was somewhat modified in *Agostini v. Felton*.[176] The *Agostini* Court explained that while "government inculcation of religious beliefs has the impermissible effect of advancing religion,"[177] the Court has "abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."[178] The Court further explained that it no longer subscribed to the view that "all government aid that

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167. Lynch v. Donnelly, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring) ("The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes.").

168. 545 U.S. 844 (2005).

169. *Id.* at 860.

170. 421 U.S. 349 (1975), *overruled in part by* Mitchell v. Helms, 530 U.S. 793 (2000).

171. *See id.* at 353 n.2.

172. *See id.* at 372.

173. 473 U.S. 373 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

174. *Id.* at 375.

175. *Id.* at 387.

176. 521 U.S. 203 (1997).

177. *Id.* at 223.

178. *Id.*

directly aids the educational function of religious schools is invalid."[179] The Court instead seems to have adopted a kind of neutrality principle whereby funding of religious activity is permissible if a variety of secular activities are also being funded.[180]

The entanglement provision of *Lemon* sought to prevent two evils. First, where the state would have to monitor constantly to ensure that government funds were not being used to promote religion, there was some fear that the religious institution itself would be changed.[181] Second, there was a fear that excessive connections between the state and religion might foster the view that religion was being given a special political role or, perhaps, that political constituencies might be forged along religious lines.[182] Both of these fears might be characterized as possible effects of excessive entanglement and, ultimately, the *Agostini* Court suggested that the entanglement prong of *Lemon* is better analyzed "as an aspect of an inquiry into a statute's effect."[183]

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179. *Id.* at 225.

180. *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 875-76 (2005) ("Given the variety of interpretative problems, the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause."); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839 (1995) ("We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."); Engel v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) ("The First Amendment teaches that a government neutral in the field of religion better serves all religious interests."); *see also* 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, 90 (2002) ("The trend for the past decade has been for the Court to invoke the so-called 'neutrality' test in order to bypass the more rigid requirements of *Lemon*.").

181. Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring) (discussing "excessive entanglement with religious institutions, which may interfere with the independence of the institutions").

182. *Id.* at 687-88 (1984) (O'Connor, J., concurring) (discussing how "excessive entanglement with religious institutions . . . may . . . give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines.").

183. *Agostini*, 521 U.S. at 233; *see also* Mitchell v. Helms, 530 U.S. 793, 807-08 (2000).

> [I]n *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors. . . . [O]ur cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect.

Id. (citation omitted). However, some lower courts continue to analyze entanglement as a separate prong. *See, e.g.*, Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1261 (10th Cir. 2005) ("*Lemon*'s final prong provides that a challenged governmental action 'must not foster "an excessive government entanglement with religion."'" (citation omitted)).

To make matters even more confusing, the weight of the test has itself varied across decisions. Professor Marshall explains that the role of the *Lemon* "test in resolving the establishment inquiry is ambiguous. At times the Court has described the test as a helpful signpost, at other times the Court has suggested that it can be discarded in certain circumstances, at still other times the Court has held that it must be rigorously applied."[184]

Suppose that the constitutionality of the statute mandating that the Pledge incorporate the words "under God" were to be evaluated in light of the *Lemon* Test. It is quite unlikely that the statute could survive examination under the first prong, since the historical evidence that the Pledge was intended to promote religion is very strong.[185] First, the precipitating cause of the addition of these words to the Pledge was a sermon in which the Reverend George M. Docherty complained that the Pledge did not contain the "definitive factor in the American way of life [which] was God Himself."[186] As a result of this sermon, "no fewer than seventeen bills were introduced to incorporate God into the Pledge of Allegiance."[187] When Congress was debating whether to include "under God," it was suggested that God is the source of all of the country's power and should be recognized as that source.[188] The House[189] and Senate[190] Reports regarding the addition of "under God" made their religious objectives clear. Even the President when signing the relevant bill into law made clear the religious nature

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184. Marshall, *supra* note 162, at 497.

185. *See* Epstein, *supra* note 14, at 2151-52 ("The addition of the words 'under God' to the Pledge of Allegiance . . . was intended to [] have the effect of endorsing religion. . . . As the sponsor of the Pledge amendment stated, the legislation was intended to contrast America's embrace of Almighty God with Communist Russia's embrace of atheism."); Gey, *supra* note 134, at 1907 (discussing "the evidence in the record as to the clear-cut religious purpose motivating the 1954 statute"); Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1658 (2006) ("The particularly religious significance of the words 'under God' is apparent not only in the fact that Congress specifically added those words to the Pledge twelve years after first enacting it without religious references, but also on the face of the Pledge, which declares the speaker's affirmative belief that the 'United States of America' is 'one nation, under God.'"); Yannella, *supra* note 180, at 79-80 ("A very good argument can be made that the language was included in the Pledge for the purpose of endorsing religion, which is a clear violation under the *Lemon* test.").

186. Epstein, *supra* note 14, at 2119.

187. *Id.*

188. Walter Lynch, Comment, *"Under God" Does Not Need to Be Placed Under Wraps: The Phrase "Under God" Used in the Pledge of Allegiance Is Not an Impermissible Recognition of Religion*, 41 HOUS. L. REV. 647, 655 (2004) ("Another theme throughout the congressional debates was that God is the source of the power of the United States and should be recognized for it."); *see also* Epstein, *supra* note 14, at 2119-20 ("Repeated reference was made to America as a religious, and to some, a Christian, nation, which was morally compelled to incorporate that spirituality into its national pledge.").

189. *See* Gey, *supra* note 134, at 1876-77.

190. *See id.* at 1877-78.

of the addition.[191] Thus, the officials instrumental in the addition of "under God" to the Pledge made no attempt to hide their religious purposes.[192] Further, lest it be argued that this is not the kind of evidence that the Court is permitted to consider, one need only consider the Court's comments in *Santa Fe Independent School District v. Doe*:[193] "We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer."[194]

Presumably, it would not even be necessary to consider the second prong. As the Court suggested in *Edwards v. Aguillard*,[195] "A governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose. This intention may be evidenced by promotion of religion in general . . . or by advancement of a particular religious belief."[196] Further, as the *Aguillard* Court made clear, "If the law was enacted for the purpose of endorsing religion, 'no consideration of the second or third criteria [of *Lemon*] is necessary.'"[197]

In order to determine whether the Pledge violates the first prong of the *Lemon* Test, one must characterize the predominant purpose behind the Pledge.[198] Consider the claim that the purpose behind amending the Pledge was political *rather* than religious, because the United States was attempting to differentiate itself from the Soviet Union in 1954 when adding the words "under God" to the Pledge.[199]

Yet, this is a false dichotomy, because these are not mutually exclusive categories. The Pledge can be both political and religious, a point which the Fourth Circuit seems not to have appreciated in *Myers v. Loudoun County Public Schools*.[200] The *Myers* court recognized that "the Pledge contains a religious phrase, and [that] it is demeaning to persons of any faith to assert that the words 'under God' contain no religious significance[,]"[201] but then decided that the "inclusion of those two words . . . does not alter the *nature* of the Pledge as a

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191. *Id.* at 1878 ("A brief perusal of Eisenhower's official statement explaining his support for the legislation reveals that the President shared the deep religious sentiments expressed by those in the legislative branches . . . .").

192. *Id.* at 1873 ("[T]he elected officials responsible for adding the two words to the existing Pledge specifically and repeatedly announced that strong religious sentiments motivated their action.").

193. 530 U.S. 290 (2000).

194. *Id.* at 315.

195. 482 U.S. 578 (1987).

196. *Id.* at 585 (citations omitted).

197. *Id.* (citing Wallace v. Jaffree, 472 U.S. 38, 56 (1985)).

198. *See supra* note 166 and accompanying text.

199. *See* David A. Toy, *The Pledge: The Constitutionality of an American Icon*, 34 J.L. & EDUC. 25, 42 (2005) ("Congress' motive in adding the words 'under God' to the pledge was political, not religious.").

200. 418 F.3d 395 (4th Cir. 2005).

201. *Id.* at 407.

patriotic activity."[202] The court implied that the Pledge passes constitutional muster because "the Pledge, unlike prayer, is not a religious exercise or activity, but a patriotic one[,]"[203] as if a patriotic activity could not also be religious[204] and as if religious affirmations are permissible as long as they are in the context of a patriotic activity. However, such a view implies that the government can endorse a variety of religious beliefs as long as it does so in the context of some patriotic exercise[205] and potentially constitutionally immunizes a linking which can be especially worrisome.[206]

If the goal behind amending the Pledge in 1954 had been strictly political, there would have been ways to emphasize the differences between the United States and Soviet Union without affirming theistic beliefs. For example, language might have been included in the Pledge to emphasize that the United States protects the right of all individuals to worship or not worship as they choose. Such a focus would have emphasized the liberty upon which this country was founded rather than particular theistic beliefs. Further, a pledge that instills and inspires patriotism by emphasizing a respect for religious liberty is much more likely to be viewed as not favoring one religion over another,[207] as well as

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202. *Id.*

203. *Id.*

204. *Id.* at 410 (Motz, J., concurring) ("To suggest that a pledge to a country 'under God' does not constitute a religious activity might seem to denigrate the importance and sanctity of the belief in God held by many.").

205. Such a view has surprising implications. *See* Laycock, *supra* note 133, at 231.

> But supporters of the Pledge argued that its patriotic elements determined the character of the Pledge as a whole . . . . If accepted, that argument would lead to a regime in which government could freely sponsor religious observances, so long as each religious observance was combined with a sufficient quantity of political observance to bring the combined whole under the rule for government-sponsored political speech instead of the quite different rule for government-sponsored religious speech.

Id.

206. *Myers*, 418 F.3d at 410 (Motz, J., concurring) ("[I]t is the conjunction of religion and the state that affronts Myers' deeply-held religious convictions and the teachings of his Anabaptist Mennonite faith."); *cf.* McCollum v. Bd. of Educ., 333 U.S. 203, 227 (1948) (Frankfurter, J., dissenting) ("Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally."); Adland v. Russ, 307 F.3d 471, 486-87 (6th Cir. 2002) ("As a general matter, the inclusion of secular symbols in a display may dilute a message of religious endorsement. In this case, however, the monument's combination of revered secular symbols like the American flag and the Ten Commandment [sic] serves to link government and religion in an impermissible fashion."); Pnina Lahav, *The Republic of Choice, the Pledge of Allegiance, the American Taliban*, 40 TULSA L. REV. 599, 602 (2005) ("Dr. Newdow wants the Court to remove the generally beloved, awe-inspiring phrase 'under God' from the Pledge of Allegiance. The resulting surgery performed upon the Pledge would be dramatic. It would force the severance of the formal ties between God and Nation."); Laycock, *supra* note 133, at 229 ("The Pledge expressly links not just religion and government, but also religion and loyalty.").

207. *See infra* note 244 and accompanying text (discussing Justice O'Connor's admission that

not favoring religion over non-religion than is a pledge which instills and inspires patriotism by emphasizing a belief in God.

Some commentators suggest that the current Pledge passes constitutional muster because it merely establishes that the nation is "under God," meaning it is a limited government subject to rights (and presumably duties) created by God.[208] Yet, there are a host of reasons that this cannot be correct. Such a view commits the state to a variety of theistic beliefs, for example, that there is a God (rather than no god or many gods),[209] that God has created or imposed human rights and duties (rather than having been concerned with other matters), and that those rights and duties are superior rather than subservient to those created or imposed by the State.

Others believe that the Pledge passes muster because it merely asserts that God is guiding the Nation,[210] as if acknowledgment of God's existence and active role in the state's affairs do not qualify as religious beliefs. If there is no violation of the Establishment Clause when the state asserts that it is limited by God-given rights (whose contents are defined by majority view?) or that it is subject to God's authority[211] or even that it acts with God's guidance,[212] then the Establishment Clause protections are very weak indeed.

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the Pledge might seem to favor certain religions over others).

208. Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41, 67 (2003) ("It is quite plausible to argue that the inclusion of the phrase is permissible because it does no more than express a religious rationale for the ideal of limited government and inalienable rights."); Emily D. Newhouse, Comment, *I Pledge Allegiance to the Flag of the United States of America: One Nation Under No God*, 35 TEX. TECH L. REV. 383, 400 (2004) ("[T]he statement that the United States is a nation under God-even in the context of the Pledge of Allegiance—is not a profession of any religious belief. Rather, the phrase is an acknowledgment of a more fundamental belief—that because individuals are endowed with certain inalienable rights by God, the authority of government with respect to such rights must necessarily be limited.").

209. Gey, *supra* note 134, at 1906 ("Although Senator Bennett may be correct that the word 'God' is comprehensive enough to satisfy theists (or at least monotheists), it defies logic to assert that the word 'God' is 'sufficiently universal and nonspecific' to encompass the concepts of agnosticism or atheism. The term 'God' cannot be stretched to mean 'the absence of God.'").

210. Andonian, *supra* note 12, at 120 ("Furthermore, the House Report explicitly states that the addition of the phrase 'under God' is not an endorsement of a religious institution but merely recognizes the guidance of God in national affairs."); Newhouse, *supra* note 208, at 388 ("Finally, the conference report specifically stated: . . . The phrase 'under God' recognizes only the guidance of God in our national affairs." (citation omitted)).

211. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 40 (2004) (O'Connor, J., concurring) ("Even if taken literally, the phrase is merely descriptive; it purports only to identify the United States as a Nation subject to divine authority.").

212. Berg, *supra* note 208, at 70 ("If the Court struck down the acknowledgment [of God], it would have to rule explicitly that the Constitution forbids the state to recognize that it is limited by divine authority.").

B. The Endorsement Test

The Endorsement Test, often associated with Justice O'Connor,[213] has sometimes been described as an alternative to *Lemon*[214] and sometimes as a part of *Lemon*.[215] The test focuses on the reactions of a reasonable, knowledgeable observer to the action at issue.[216] The relevant question is whether the action at issue would make that observer feel like a political outsider.[217] As Justice O'Connor explains in her *Newdow II* concurrence, "the endorsement test 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."[218]

Justice O'Connor specifically addresses how the reasonable observer would react to various patriotic songs and oaths containing references to God. "The reasonable observer . . . , fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over non-religion."[219] Because such acknowledgments "serve the secular purposes of 'solemnizing public occasions' and 'expressing confidence in the future'"[220] and

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213. *See, e.g.*, Steven A. Seidman, County of Allegheny v. American Civil Liberties Union*: Embracing the Endorsement Test*, 9 J.L. & RELIGION 211, 224 (1991) ("The majority opinion [in *Allegheny*] written by Justice Blackmun adopted the Endorsement test set forth by Justice O'Connor in her concurring opinion in *Lynch*.").

214. *See, e.g.*, Freethought Soc'y of Greater Philadelphia v. Chester County, 334 F.3d 247, 261 (3d Cir. 2003) ("Under the 'endorsement' approach, we do not consider the County's purpose in determining whether a religious display has violated the Establishment Clause; instead, we focus on the *effect* of the display on the reasonable observer, inquiring whether the reasonable observer would perceive it as an endorsement of religion.").

215. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 787 (1995) (Souter, J., concurring) ("Effects matter to the Establishment Clause, and one, [sic] principal way that we assess them is by asking whether the practice in question creates the appearance of endorsement to the reasonable observer.").

216. *Newdow II*, 542 U.S. at 35 (O'Connor, J., concurring) ("The reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape.").

217. *See* Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (O'Connor, J., concurring) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.").

218. *Newdow II*, 542 U.S. at 33-34 (O'Connor, J., concurring) (citation and internal quotation marks omitted).

219. *See id.* at 36.

220. County of Allegheny v. ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring) (citing *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring)).

because "the Pledge has become . . . our most routine ceremonial act of patriotism,"[221] the reasonable observer would simply view the ceremonial references to God as "the inevitable consequence of the religious history that gave birth to our founding principles of liberty."[222]

Justice O'Connor explains that where there has been no endorsement, the state's acknowledgment of religion can pass constitutional muster.[223] However, where the government endorses or takes a position on questions of religious belief, it violates the Establishment Clause,[224] at least if that endorsement "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."[225]

Yet, Justice O'Connor's characterization of the reasonable observer is a little misleading. She is not concerned with whether sincere individuals would in fact feel disfavored because of their religious beliefs. She notes, "Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement."[226] She cites her own discussion in *Capitol Square Review and Advisory Board v. Pinette*[227] to explain her point, where she noted that there "is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion."[228]

Justice O'Connor is implicitly suggesting that the person with the particular quantum of knowledge is misconstruing an action by the state as an endorsement because the quantum of knowledge possessed by that person is too small. If the person knew more, one might conclude, then she would not misconstrue the state's action as an endorsement. Justice O'Connor explains that

> because the "reasonable observer" must embody a community ideal of social judgment, as well as rational judgment, the test does not evaluate a practice in isolation from its origins and context. Instead, the

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221. *Newdow II*, 542 U.S. at 38 (O'Connor, J., concurring).

222. *Id.* at 44.

223. *Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring) ("Clearly, the government can *acknowledge* the role of religion in our society in numerous ways that do not amount to an endorsement.").

224. *Id.* at 593-94 ("The [Establishment] Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" (citing *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring))).

225. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

226. *See Newdow II*, 542 U.S. at 34-35 (O'Connor, J., concurring) (citing Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring)).

227. 515 U.S. 753 (1995).

228. *See id.* at 780 (O'Connor, J., concurring).

> reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape.[229]

Justice O'Connor seems to be suggesting that an individual with sufficient knowledge of the Pledge's origin and context could not believe it an endorsement of religion. Yet, someone aware of the history of the amendment to the Pledge might well construe the addition of "under God" as an endorsement.[230] Indeed, some would argue that only those with a less than full quantum of knowledge would be tempted to believe that it was not an endorsement.[231]

Justice O'Connor does not attempt to explain why the reasonable observer would think that the Pledge's inclusion of "under God" is an inevitable consequence of the nation's religious history, given that the Pledge did not include a reference to God for over half a century. Suppose however, that such an explanation could be offered. Suppose further that some, but not all, observers accepted Justice O'Connor's claim that the inclusion of "under God" is an inevitable consequence of the nation's religious history. Even so, that would not be enough to save Justice O'Connor's claim that the addition of "under God" to the Pledge passes the Endorsement Test.

The Endorsement Test does not require that *all* knowledgeable, reasonable persons see the Pledge as an endorsement of religion in order for the Pledge to violate the Establishment Clause. On the contrary, the test merely requires that a reasonable person with a full appreciation of the Pledge's origin and context might see it that way. Given the stated purposes behind adding "under God" to the Pledge,[232] it seems difficult to deny that some (even if not all) reasonable, knowledgeable individuals would see the addition of those words as an endorsement of religion.

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229. *See Newdow II*, 542 U.S. at 35 (O'Connor, J., concurring).

230. *See supra* notes 185-207 and accompanying text (discussing why the purpose behind amending the Pledge violates the Purpose prong of *Lemon*).

231. *See* Gey, *supra* note 134, at 1912-13.

> In the end, the biggest problem with the various attempts to argue that the phrase "under God" in the context of the Pledge is a nonreligious concept is that these attempts are all utterly implausible except as mechanisms to avoid the clear application of the Establishment Clause. The notion that "under God" is not religious is inconsistent with any non-tendentious effort to define the key term—"God"—and with any reasonable reading of the stated intentions of the relevant political actors in both 1954 and 2002, when politicians throughout Washington rushed to expend legislative time and governmental dollars to defend the linkage of God and country. These politicians used "God in its religious context and said so publicly."

Id.

232. *See supra* notes 186-92 and accompanying text (discussing the context in which the amendment to the Pledge was adopted).

C. Ceremonial Deism

Justice O'Connor has suggested that the Pledge is an example of Ceremonial Deism,[233] a term which suggests that a passage incorporating a religious reference may have lost its religious significance over time and thus is not constitutionally objectionable.[234] While the term's first appearance in a Supreme Court opinion was in Justice Brennan's dissent in *Lynch v. Donnelly*,[235] it plays an important role in Justice O'Connor's endorsement theory because it allegedly explains why a reasonable observer would not think a reference to God involves an endorsement of religion by the State. The Court has neither explicitly embraced nor explicitly rejected the notion of ceremonial deism.[236] In his *Lynch* dissent, Justice Brennan wrote,

> While I remain uncertain about these questions, I would suggest that such practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood, in Dean Rostow's apt phrase, as a form a "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.[237]

The first point to note, however, is that Justice O'Connor has a somewhat different understanding of ceremonial deism than does Justice Brennan. To Justice Brennan, but not Justice O'Connor, a phrase can be understood as a form of ceremonial deism when it has been drained of significant religious content. While Justice O'Connor suggests that "the appearance of the phrase 'under God' in the Pledge of Allegiance constitutes an instance of . . . ceremonial deism,"[238] she also recognizes that this reference "speak[s] in the language of religious belief,"[239] and that this is an acknowledgment of or reference to "the divine."[240] She does not claim that the word "God" has lost its religious meaning[241]—she

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233. *See Newdow II*, 542 U.S. at 37 (O'Connor, J., concurring).

234. Andrew Rotstein, *Good Faith? Religious-Secular Parallelism and the Establishment Clause*, 93 COLUM. L. REV. 1763, 1772 (1993) (describing phrases including "God" that "have largely or totally lost their religious significance because of their passive character or their longstanding repetition in a civic context").

235. 465 U.S. 668 (1984).

236. *See* County of Allegheny v. ACLU, 492 U.S. 573, 603 (1989) ("We need not return to the subject of 'ceremonial deism,' because there is an obvious distinction between creche displays and references to God in the motto and the pledge. However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." (citation omitted)).

237. *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting) (citation omitted).

238. *See Newdow II*, 542 U.S. at 37 (O'Connor, J., concurring).

239. *Id.* at 35.

240. *See id.* at 37.

241. *Id.* at 35; *see also* Freethought Soc'y of Greater Philadelphia v. Chester County, 334 F.3d

instead suggests that observers would not perceive this religious reference "as signifying a government endorsement of any specific religion, or even of religion over non-religion."[242] Thus, her use of "ceremonial deism" seems to indicate that religious terms are being used in a way which does not constitute an endorsement rather than that the terms have lost all religious significance.

Justice O'Connor emphasizes that the Pledge does not attempt to single out the belief of a particular religion, for example, by referring "to a nation 'under Jesus' or 'under Vishnu,' but instead acknowledges religion in a general way: a simple reference to a generic 'God.'"[243] She understands that this reference excludes some religions,[244] but concludes that the "phrase 'under God,' conceived and added at a time when our national religious diversity was neither as robust nor as well recognized as it is now, represents a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system."[245] Yet, this account of the purposes behind the inclusion of "under God" does not reflect the articulated purposes of those instrumental in modifying the Pledge.[246] Nor does Justice O'Connor's account capture the function of the phrase "under God," which is not merely to acknowledge religious beliefs but to affirm them.[247] Further, while that phrase may not favor any *single* belief system, it certainly favors certain belief systems over others.

According to Justice O'Connor, certain "government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate

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247, 264 (3d Cir. 2003).

> Of course, we agree that her examples of "ceremonial deism" are not violations of the Establishment Clause. . . . But we do not think this is so because the phrases themselves have lost their religious significance. Indeed, it is hard to imagine that these two phrases invoking God would not be perceived as religious. . . . [T]he reasonable observer, aware of the history of these invocations of God, views the religious language as tempered by the secular meaning that has emerged over the passage of time; the overall effect is that the reasonable person would not perceive in these phrases a government endorsement of religion (despite the clear use of the word "God."

Id.; Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 448 (7th Cir. 1992) (Manion, J., concurring) ("[A] court cannot deem any words to lose their meaning over the passage of time. Each term used in public ceremony has the meaning intended by the term."); Epstein, *supra* note 14, at 2166 ("And although oaths, the judicial invocation, "under God" in the Pledge of Allegiance, and the national motto seem fairly innocuous at first blush, they pack a powerful religious punch to both the most and the least devout members of the American population.").

242. *See Newdow II*, 542 U.S. at 36 (O'Connor, J., concurring).

243. *Id.* at 42.

244. *Id.* ("Of course, some religions—Buddhism, for instance—are not based upon a belief in a separate Supreme Being.").

245. *Id.*

246. *See supra* notes 186-92 and accompanying text.

247. *See supra* notes 132-36 and accompanying text (discussing what the Pledge means when affirmed by someone).

secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."[248] Because such acknowledgments have this secular purpose and "because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs."[249] O'Connor argues that the "constitutional value of ceremonial deism turns on a shared understanding of its legitimate nonreligious purposes."[250] Such an understanding develops over time and can only occur when the practice at issue is widespread.[251]

Yet, even if Justice O'Connor is correct that government acknowledgment of religion can serve those secular purposes, a separate question is whether the "under God" phrase in the Pledge can plausibly be thought to be performing that function. At issue here is a pledge made by children daily rather than, for example, a graduation which occurs but once a year.[252] The function of the phrase within the Pledge is not to express confidence about the future or to make judgments about what is and is not worthy in society. Instead, it is to describe a belief of the person making the pledge.[253] Precisely because of the phrase's testimonial quality, one cannot plausibly describe "under God" as merely serving the secular purposes which Justice O'Connor describes.

Justice O'Connor offers four factors to help determine whether a practice falls into the ceremonial deism category:

a. History and ubiquity;[254]
b. Absence of prayer or worship;[255]
c. Absence of reference to particular religion;[256] and
d. Minimal religious content.[257]

Professor Laycock suggests that one lesson to be learned from Justice O'Connor's first factor is that it "confines her opinion to a rather short list of existing practices that have long gone unchallenged."[258] Of course, there have been many challenges to the Pledge, including *Barnette*, which establishes the right not to say the Pledge.[259] While it is fair to say that there have been

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248. Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

249. *Id.*

250. *Newdow II*, 542 U.S. at 37 (O'Connor, J., concurring).

251. *See id.* at 37 ("That sort of understanding can exist only when a given practice has been in place for a significant portion of the Nation's history, and when it is observed by enough persons that it can fairly be called ubiquitous.").

252. For a discussion of why this might be relevant, see *infra* notes 335-36 and accompanying text (comparing *Lee* and a hypothetical Pledge case).

253. *See supra* notes 132-36 and accompanying text.

254. *See Newdow II*, 542 U.S. at 37 (O'Connor, J., concurring).

255. *Id.* at 39.

256. *Id.* at 42.

257. *Id.*

258. Laycock, *supra* note 133, at 232.

259. *See supra* notes 80-107 and accompanying text (discussing *Barnette*).

relatively few constitutional challenges to the Pledge since *Barnette*, that may not be because individuals have understood the Pledge to be secular but instead because they have thought that they would be unable to successfully challenge the invocation of God's name in the Pledge where they, themselves, were not being forced to participate.

Justice O'Connor's second factor questions whether there is prayer or worship involved. Certainly, she is correct that the Pledge is not itself a prayer,[260] although that hardly immunizes the Pledge from constitutional invalidation. As Justice Thomas notes, the "Court has squarely held that the government cannot require a person to 'declare his belief in God.'"[261]

In *Wallace v. Jaffree*,[262] the Court discussed the "established principle that the government must pursue a course of complete neutrality toward religion."[263] The Court's comments could easily have been written in the context of discussing whether the addition to the Pledge of only two words—"under God"—is constitutionally significant. The *Wallace* Court noted,

> The importance of [the neutrality] principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is "whether the government intends to convey a message of endorsement or disapproval of religion."[264]

Where government intends to convey its approval or disapproval of religion, the First Amendment is violated. Thus, merely because the Pledge is not a prayer as such does not mean that it cannot violate constitutional guarantees.

Justice O'Connor's third factor, which examines whether there has been a reference to a particular religion, seems to understate the relevant requirement. Given that the "touchstone for [the Court's] analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion,'"[265] one would expect that it

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260. *See Newdow II*, 542 U.S. at 40 (O'Connor, J., concurring in the judgment) ("[T]he relevant viewpoint is that of a reasonable observer, fully cognizant of the history, ubiquity, and context of the practice in question. Such an observer could not conclude that reciting the Pledge, including the phrase 'under God,' constitutes an instance of worship."); Laycock, *supra* note 133, at 232 ("Justice O'Connor's second factor is 'Absence of worship or prayer.' She quite plausibly found the Pledge to be neither.").

261. *Newdow II*, 542 U.S. at 48 (Thomas, J., concurring) (citing Torasco v. Watkins, 367 U.S. 488, 489 (1961)); *see also* Myers v. Loudoun County Pub. Schs., 418 F.3d 395, 410 (4th Cir. 2005) (Motz, J., concurring) ("First, a pledge to a country "under God" might be regarded as religious activity. Certainly, the Supreme Court has clarified that prayer is not the only religious activity with which the First Amendment is concerned.").

262. 472 U.S. 38 (1985).

263. *Id.* at 60.

264. *Id.* at 60-61.

265. McCreary County v. ACLU, 545 U.S. 844, 860 (2005) (quoting Epperson v. Arkansas,

would be impermissible to favor some religions over others. As Justice O'Connor herself notes, the Pledge does do that.[266] But if that is so, the Establishment Clause guarantees are being ignored. It is not at all clear that the Pledge is saved because it refers to God rather than Vishnu or Jesus.[267] Further, as Justice Kennedy points out, atheists may well not feel particularly welcome while the Pledge is said.[268]

Justice O'Connor's fourth factor is that there be a minimal reference to religion. She argues that the "reference to 'God' in the Pledge of Allegiance qualifies as a minimal reference to religion; respondent's challenge focuses on only two of the Pledge's 31 words."[269] Yet, what might seem like a minimal reference to one individual might not seem minimal to another. As Professor Laycock points out, many religious individuals believe the Pledge sufficiently suffused with religious content that they would be very angry were that content deleted, while many non-religious people feel the Pledge is sufficiently suffused with religious meaning that they are angry about the reference to God being retained.[270] For many individuals, the reference to religion in the Pledge is not merely minimal.[271]

A brief examination of the Pledge litigation through *Barnette* helps illustrate that Justice O'Connor's claim that this is a minimal reference to religion simply is not credible.[272] While the state courts had consistently maintained that the Pledge was patriotic rather than religious, the *Gobitis* Court recognized the religious implications of the Pledge even when it did not contain the words "under God."[273] It is difficult indeed to understand how adding the words "under God" would not make the Pledge implicate religion even more. It is a separate issue whether the Pledge's constitutionality can be upheld even if its religious

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393 U.S. 97 (1968); Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947)).

266. *Newdow II*, 542 U.S. at 42 (O'Connor, J., concurring) ("Of course, some religions—Buddhism, for instance—are not based upon a belief in a separate Supreme Being.").

267. *See* Newdow v. U.S. Congress (*Newdow I*), 328 F.3d 466, 487 (9th Cir. 2003), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1 (2004) ("A profession that we are a nation 'under God' is identical, for Establishment Clause purposes, to a profession that we are a nation 'under Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no god,' because none of these professions can be neutral with respect to religion.").

268. County of Allegheny v. ACLU, 492 U.S. 573, 603 (Kennedy, J., concurring in part and dissenting in part).

269. *Newdow II*, 542 U.S. at 43 (O'Connor, J., concurring).

270. *See* Laycock, *supra* note 133, at 233 ("The most committed believers and the most committed nonbelievers are thus united in taking the religious language of the Pledge seriously.").

271. *Cf.* Van Orden v. Perry, 545 U.S. 677, 697 (2005) (Thomas, J., concurring) ("The Court's foray into religious meaning either gives insufficient weight to the views of nonadherents and adherents alike, or it provides no principled way to choose between those views.").

272. *See supra* notes 18-107 and accompanying text (discussing the case law through *Barnette*).

273. *See supra* note 71 and accompanying text.

nature is recognized,[274] but the religious implications of the words "under God" should not be denied.[275]

Ceremonial deism should be distinguished[276] from the view that some violations of the Establishment Clause are so inconsequential that they should be viewed as "de minimis"[277] and hence not constitutionally barred.[278] While some might claim that the Pledge should be so viewed, that is not the position taken by Justice O'Connor.[279] Further, the Court has not been sympathetic to de minimis

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274. *See, e.g.*, Berg, *supra* note 208, at 68 ("[I]f this argument is correct, 'under God' can be upheld without implausibly viewing it as merely a historical or ceremonial reference and stripping it of its religious meaning.").

275. Some would deny that "one nation under God" involves a religious belief. *See, e.g.*, Newhouse, *supra* note 208, at 404. Yet, presumably, it is difficult to deny that the implicit statements, for example, that there is one God and that this nation is under that God are religious in nature.

276. *But see* Laycock, *supra* note 133, at 223-24 ("'Ceremonial deism' has been another label for this de minimis exception.").

277. Newdow v. U.S. Cong. (*Newdow I*), 328 F.3d 466, 493 (9th Cir. 2003) (Fernandez, J., concurring and dissenting), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1 (2004) ("I cannot accept the eliding of the simple phrase 'under God' from our Pledge of Allegiance in any setting, when it is obvious that its tendency to establish religion in this country or to interfere with the free exercise (or non-exercise) of religion is de minimis."); *but see* Laycock, *supra* note 133, at 224 ("No matter how the Court defines a de minimis exception, it would be hard to fit the Pledge of Allegiance within it."); Thompson, *supra* note 10, at 586 ("To say that the impact of the religious language in the Pledge is de minimis ignores its potential impact. 'Under God' may be only two words, but they reflect a pervasive pattern of government behavior that suppresses the development of atheistic and nontheistic beliefs. The words limit, rather than promote, religious pluralism."); *see also* Epstein, *supra* note 14, at 2168 ("It is all too simple for those in the religious mainstream to argue that pledging allegiance to a nation 'under God,' whose motto is 'In God We Trust,' produces at most a de minimis endorsement. The magnitude of the endorsement, however, is enhanced significantly for those for whom 'God' has either no meaning or a meaning wholly inconsistent with strongly held religious beliefs.").

278. *See* Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 521 (1992) ("One way to reconcile these instances of 'de facto establishment' [including the Pledge] with the principle of non-establishment is to call them 'de minimis.'").

279. *Newdow II*, 542 U.S. at 36-37 (O'Connor, J., concurring) ("There are no *de minimis* violations of the Constitution-no constitutional harms so slight that the courts are obliged to ignore them. Given the values that the Establishment Clause was meant to serve, however, I believe that government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of 'ceremonial deism' most clearly encompasses such things as the national motto ('In God We Trust'), religious references in traditional patriotic songs such as the Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions ('God save the United States and this honorable Court.'). These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all." (internal citation

claims in the Establishment context. As the Court suggested in *School District of Abington v. Schempp*,[280] "[I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . . ."[281]

Justice O'Connor's Endorsement Test is attractive, at least in part, because it takes into account the views of religious minorities, seeking to assure that state practices do not make them feel like second-class citizens. Yet, built into this test is an analysis of what a reasonable person would feel, and Justice O'Connor sometimes implies that a reasonable, knowledgeable individual could only have one reaction,[282] as if a reasonable evangelical and a reasonable atheist would react in the same way to the inclusion or exclusion of particular words such as "under God" in the Pledge. It would be much more plausible to believe that the reasonable atheist and the reasonable evangelical, even with all of the relevant knowledge,[283] would have opposite reactions to the deletion of the words "under God" from the Pledge, although they might well agree that such language is in fact religious.[284]

Another difficulty with the Endorsement Test's reliance on the reasonable person is that the state action at issue may be directed to children rather than adults. The question then becomes whether one should be discussing what the informed reasonable elementary or high school child would think.[285] Courts have had some difficulty in applying the reasonable person standard when schoolchildren[286] are the target audience.[287] Yet, if a primary school policy is at

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omitted)).

Some commentators suggest that O'Connor's position would have been more credible had she subscribed to the "de minimis" view. *See* Laycock, *supra* note 133, at 235 ("Justice O'Connor would surely have done better to concede that observances within the de minimis exception are religious, and to simply say that she viewed them as so nearly harmless that the Court should not interfere.").

280. 374 U.S. 203 (1963).

281. *Id.* at 225.

282. *Newdow II*, 542 U.S. at 40 (O'Connor, J., concurring) ("But, as I have explained, the relevant viewpoint is that of a reasonable observer, fully cognizant of the history, ubiquity, and context of the practice in question. Such an observer could not conclude that reciting the Pledge, including the phrase 'under God,' constitutes an instance of worship.").

283. *See supra* notes 228-31 and accompanying text (discussing quanta of knowledge).

284. Laycock, *supra* note 133, at 233 ("The most committed believers and the most committed nonbelievers are thus united in taking the religious language of the Pledge seriously.").

285. *Cf.* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) ("[A]n objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.").

286. Skoros v. City of New York, 437 F.3d 1, 24 (2d Cir. 2006) ("[W]e do not attempt to cast schoolchildren of widely varying ages and religious backgrounds in the role of one or more reasonable objective observers.").

287. *See, e.g.*, *id.* at 23 ("We cannot conclude that it makes . . . sense to treat a first or second

issue, it is not at all clear why the relevant concern would be how a very knowledgeable adult observer would react to a practice which was being used to instill particular religious beliefs within impressionable and malleable schoolchildren.

On any plausible understanding of the Endorsement Test,[288] requiring the recitation of the Pledge as currently constituted in primary and secondary schools cannot pass constitutional muster. Justice O'Connor's protestations to the contrary, both knowledgeable reasonable adults and knowledgeable reasonable children might see the current Pledge as endorsing particular religious beliefs. If that is all that is required to violate the Establishment Clause, then the Pledge does not pass constitutional muster.

D. The Coercion Test

An alternative to the Endorsement Test has been proposed by Justice Kennedy, namely, the Coercion Test.[289] That test would seem to permit much more than the Endorsement Test, which seems to be why some on the Court have embraced it[290] and why others believe that it will greatly dilute Establishment Clause protections.[291]

One of the criticisms sometimes made of the Endorsement Test is that it cannot account for all of the practices that the Court has upheld. For example, Justice Kennedy has pointed out that legislative prayer fails the Endorsement

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grader as the 'objective observer' who can take account of the text, history, and implementation of a challenged policy.").

288. Some commentators have noted that the endorsement test has indeterminate results and thus might be thought to permit state action which even the coercion test would not. *See* Kevin P. Hancock, Comment, *Closing the Endorsement Test Escape-Hatch in the Pledge of Allegiance Debate*, 35 SETON HALL L. REV. 739, 741-42 (2005) (noting Justice O'Connor's suggestion that the Pledge passed muster under the endorsement test even though it presumably would not pass the coercion test).

289. *See* County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part) ("[G]overnment may not coerce anyone to support or participate in any religion or its exercise . . . .").

290. Some on the Court embrace a very narrow notion of what would constitute coercion for Establishment purposes. *See* Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) ("[O]ur task would be far simpler if we returned to the original meaning of the word 'establishment' than it is under the various approaches this Court now uses. The Framers understood an establishment 'necessarily [to] involve actual legal coercion.'" (quoting Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 52 (2004) (Thomas, J., concurring) (alteration in original))).

291. *Allegheny*, 492 U.S. at 609 ("Thus, when all is said and done, Justice Kennedy's effort to abandon the 'endorsement' inquiry in favor of his 'proselytization' test seems nothing more than an attempt to lower considerably the level of scrutiny in Establishment Clause cases. We choose, however, to adhere to the vigilance the Court has managed to maintain thus far, and to the endorsement inquiry that reflects our vigilance.").

Test[292] and, indeed, that many practices currently accepted would be held unconstitutional on any principled application of the Endorsement Test.[293] He suggests that the Coercion Test, coupled with another test involving aid to religion, more accurately reflect the relevant jurisprudence.[294]

Justice Kennedy explains that coercion does not only involve "a direct tax in aid of religion or a test oath."[295] He notes, "Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case. . . . [F]or example, . . . the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall."[296] However, in most cases, "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal."[297] Thus, Justice Kennedy suggests, unless the state is somehow coercing those who disagree to do something which violates their beliefs, most cases involving the accommodation of religious beliefs will not violate Establishment Clause guarantees.

Justice O'Connor has criticized the Coercion Test because she does not believe that it would "adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community."[298] Of course, figuring out whether a particular test offers adequate protection requires some notion of first, what the Coercion Test protects,[299] and second, what would count as adequate protection. As will be made clear in the next section, the Coercion Test is much more protective in some settings than others.

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292. *Id.* at 673-74 (Kennedy, J., concurring in part and dissenting in part) ("Even accepting the secular-solemnization explanation at face value, moreover, it seems incredible to suggest that the average observer of legislative prayer who either believes in no religion or whose faith rejects the concept of God would not receive the clear message that his faith is out of step with the political norm.")

293. *Id.* at 674 ("Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent.").

294. *See id.* at 659 ("Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)) (alteration in original)).

295. *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part).

296. *Id.*

297. *Id.* at 662.

298. *Id.* at 628 (O'Connor, J., concurring).

299. For further discussion of what constitutes coercion, see *infra* notes 301-38 and accompanying text.

E. The School Setting

While the Coercion Test as a general matter may offer a much less strict Establishment hurdle than either the *Lemon* Test or the Endorsement Test, that same test is still more protective in particular contexts. Indeed, the Coercion Test may be as protective as the Endorsement Test, if not more so, in a school setting, if only because the Court treats the primary and secondary school setting as one which has the potential to be especially coercive.[300]

At issue in *Lee v. Weisman*[301] was whether a school's inclusion of "clerical members who offer[ed] prayers as part of the official school graduation ceremony [was] consistent with the Religion Clauses of the First Amendment."[302] A rabbi had delivered an invocation[303] and benediction[304] that seemed to reflect

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300. *See infra* notes 310-12, 331 and accompanying text (discussing the heightened concerns implicated in the primary and secondary school setting).

301. 505 U.S. 577 (1992).

302. *Id.* at 580.

303.

> INVOCATION
>
> God of the Free, Hope of the Brave:
>
> For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.
>
> For the liberty of America, we thank You. May these new graduates grow up to guard it.
>
> For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.
>
> For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.
>
> May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.
>
> AMEN

Id. at 581-82.

304.

> BENEDICTION
>
> O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.
>
> Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.
>
> The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.
>
> We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.
>
> AMEN

Id. at 582.

the school policy that they be composed with inclusiveness and sensitivity and that they be nonsectarian.[305]

The Court struck down the policy at issue, offering several reasons. First, the Court noted that with respect to "those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma."[306] Further, the Court suggested, "[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[307]

The petitioners had asked the Court "to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint."[308] However, the Court rejected the invitation, instead suggesting, "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere . . . ."[309]

The Court noted that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools,"[310] worrying that "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."[311] Indeed, the Court worried that nonconsenting students might feel coerced into giving apparent approval of a message which they did not believe.

> The . . . school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. . . . [F]or the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not

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305. *See id.* at 581.

306. *Id.* at 586.

307. *Id.* at 587 (citing Lynch v. Donnelly, 465 U.S. 668, 678 (1984)) (alteration in original).

308. *Id.* at 589.

309. *Id.*

310. *Id.* at 592. Some commentators argue that primary and secondary school students are relevantly dissimilar and, thus, the constitutional issues implicated when discussing each group should be viewed separately. *See* Martin Guggenheim, *Stealth Indoctrination: Forced Speech in the Classroom*, 2004 U. CHI. LEGAL F. 57, 70 ("But not all age groups of children are alike, and what may be impermissible for adolescents may be acceptable for primary school-age children.").

311. *Lee*, 505 U.S. at 592.

> allow, the injury is . . . real. . . . It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.[312]

It might be argued that students voluntarily attend graduation and thus are not being coerced into doing anything—if religious invocations or benedictions offend them, they can simply choose not to attend. However, the Court rejected this approach, suggesting that "to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme."[313] Indeed, the Court contrasted this setting to a session of a state legislature, where adults might leave freely,[314] thereby suggesting that upholding the legislative prayer in *Marsh v. Chambers*[315] was perfectly compatible with striking the benediction and invocation at issue in *Lee*. By the same token, the Court can strike down a policy mandating recitation of the Pledge in primary and secondary schools without needing to revisit the issue of legislative prayer.[316] It is precisely because of the importance of the context in which the action was occurring, namely, in school, that the Court could strike down a Pledge policy without being forced to revisit a whole host of practices that the Court has already suggested are constitutionally permissible.[317]

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312. *Id.* at 593.

313. *Id.* at 595.

314. *See id.* at 597.

315. 463 U.S. 783 (1983). For discussion of this case and its implications for Establishment Clause jurisprudence, see *infra* notes 342-61 and accompanying text.

316. An additional way to distinguish between legislative prayer and the issues implicated in a Pledge challenge would be to point out that legislative prayer has been an ongoing tradition since the founding of the country whereas recitation of the Pledge is of much more recent vintage. *See* Thompson, *supra* note 10, at 580 ("Of course, unlike legislative prayer, the Pledge of Allegiance did not exist at the time of the framing of the Constitution . . . .").

317. Some jurists and commentators seem not to appreciate this point. *See, e.g.*, Newdow v. U.S. Cong. (*Newdow I*), 328 F.3d 466, 473 (9th Cir. 2003) (O'Scannlain, J., dissenting from the denial of rehearing en banc), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1 (2004).

> If reciting the Pledge is truly "a religious act" in violation of the Establishment Clause, then so is the recitation of the Constitution itself, the Declaration of Independence, the Gettysburg Address, the National Motto, or the singing of the National Anthem. Such an assertion would make hypocrites out of the Founders, and would have the effect of driving any and all references to our religious heritage out of our schools, and eventually out of our public life.

Id. (footnotes omitted); *id.* at 492-93 (Fernandez, J., concurring and dissenting).

> [U]pon Newdow's theory of our Constitution, accepted by my colleagues today, we will soon find ourselves prohibited from using our album of patriotic songs in many public

The fact that *Lee* might have implications for the Pledge of Allegiance did not go unnoticed by members of the Court. In his *Lee* dissent, Justice Scalia noted:

> [S]ince the Pledge of Allegiance has been revised since *Barnette* to include the phrase "under God," recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction. If students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge. Must the Pledge therefore be barred from the public schools (both from graduation ceremonies and from the classroom)? . . . Logically, that ought to be the next project for the Court's bulldozer.[318]

Of course, *Lee* left some questions unanswered. For example, it might be argued that it was crucial in *Lee* that the benediction and invocation were delivered by a member of the clergy. Yet, the Court subsequently made clear in *Santa Fe Independent School District v. Doe*[319] that this would be a misunderstanding of the jurisprudence. In *Doe*, the Court struck down a policy whereby a student elected by the student body would deliver a "statement or invocation"[320] prior to home football games, the purpose of which was "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."[321] Here, the Court noted that a "religious message is the most obvious method of solemnizing an event"[322] and inferred that "an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."[323]

The *Doe* Court focused on the "religious messages"[324] that would be delivered at home football games—the Court was not limiting its decision to a case involving religious prayers.[325] The Court was concerned that various

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> settings. "God Bless America" and "America The Beautiful" will be gone for sure, and while use of the first three stanzas of "The Star Spangled Banner" will still be permissible, we will be precluded from straying into the fourth. And currency beware!

Id. (footnotes omitted); Berg, *supra* note 208, at 45 ("Tradition and precedent make it very unlikely that all [the] invocations of God [listed by Justice O'Scannlain] are unconstitutional.").

318. *Lee*, 505 U.S. at 639 (Scalia, J., dissenting).

319. 530 U.S. 290 (2000).

320. *Id.* at 306.

321. *Id.*

322. *Id.*

323. *Id.* at 308.

324. *Id.* at 316.

325. Thus, the Court does not require that the religious activity be similar to what was at issue in *Lee* in order for the Establishment Clause to be violated. Some commentators seem not to appreciate this. *See* Newhouse, *supra* note 208, at 404 ("Even conceding for the sake of argument

individuals do not attend these games voluntarily. "There are some students . . . such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit."[326] Yet, even if attendance were purely voluntary, that would not have saved the practice at issue. The *Doe* Court explained, "Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship."[327]

Lee and *Doe* together have important implications for a school policy mandating that the Pledge of Allegiance be recited in school, since children are especially vulnerable in that setting.[328] Indeed, the *Gobitis* Court recognized that children are especially impressionable, which was one of the reasons that it *upheld* the Pledge requirement in school,[329] although it bears repeating that the Pledge at issue in *Gobitis* did not contain the words "under God."[330] The *Aguillard* Court suggested that the school setting requires special vigilance because "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."[331]

The kind of coercion at issue in *Lee* and *Doe* cannot be understood to be legal coercion—rather, what is at issue is a form of psychological coercion,[332] which covers much more than would legal coercion.[333] Further, that students were permitted to remain respectfully silent rather than participate did not cure

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that the statement is a profession of a religious belief, it certainly does not rise to the level of state-sponsored formal religious exercise that would make it unconstitutional under *Lee*.").

326. *Doe*, 530 U.S. at 311.

327. *Id.* at 312.

328. Yannella, *supra* note 180, at 89 ("The facts are on the side of the Ninth Circuit insofar as the Pledge of Allegiance involves schoolchildren, a group that the Supreme Court has stated are uniquely susceptible to the subtle persuasion of government endorsed prayer."); Thompson, *supra* note 10, at 566-67 ("*Lee* is especially apropos because, like *Newdow*, it involved schoolchildren, whom the Supreme Court had found particularly susceptible to government coercion.").

329. *See supra* notes 74-75 and accompanying text.

330. *See* McKenzie, *supra* note 12, at 396 (noting that both *Gobitis* and *Barnette* were decided before the words "under God" were added to the Pledge).

331. Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

332. Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 454 (1995) ("[T]he majority opinion in Weisman . . . rests . . . on equating psychological coercion with legal coercion in the public school setting."); *see also id.* at 471 ("Even if the action of nonparticipation cannot be equated with a declaration of disbelief, students undoubtedly feel strong pressure not to opt out, if only for fear of being branded as weirdos or losers or otherwise ostracized.").

333. Thompson, *supra* note 10, at 567 (noting that the *Lee* Court employed "a broad concept of coercion").

the constitutional difficulty in *Lee*.[334] Indeed, there are a variety of respects in which it would seem easier to uphold what was at issue in *Lee* than what would be at issue in a Pledge case, since the former occurs but once a year while the latter involves a daily event.[335] As Justice Thomas explained in his *Newdow II* concurrence:

> Adherence to *Lee* would require us to strike down the Pledge policy, which, in most respects, poses more serious difficulties than the prayer at issue in *Lee*. A prayer at graduation is a one-time event, the graduating students are almost (if not already) adults, and their parents are usually present. By contrast, very young students, removed from the protection of their parents, are exposed to the Pledge each and every day.[336]

By the same token, the hypothesized Pledge scenario would seem at least as coercive as what was at issue in *Doe*,[337] if only because of the relative frequency of the occurrences. Further, it would not be surprising were students subjected to a variety of pressures were they to consistently refuse to make the Pledge.[338]

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334. Berg, *supra* note 208, at 50-51 ("If a broad understanding of coercion applies to graduation, it applies even more strongly to the Pledge, whose recitation occurs in school classrooms, where the Court says the risk of compulsion is the highest. Moreover, as in *Weisman*, it might be insufficient for an objecting student to simply fall silent during 'under God' because other students might take her to be approving the whole Pledge including that phrase." (footnote omitted)); Gey, *supra* note 134, at 1894 ("In this respect, *Newdow* and *Lee* are indistinguishable. If the ability to sit silently and unobtrusively in a graduation ceremony fails to render that claim trivial, then the same is true of a claim arising from a classroom of students saying the Pledge."); Greene, *supra* note 332, at 469 ("Giving students the option not to participate in group utterances is insufficient, for the very existence of a government-led group utterance in public school is sufficiently coercive to violate either the Establishment Clause or the Free Speech Clause.").

335. *Cf.* Hancock, *supra* note 288, at 787 ("But at the least, forcing the Court to somehow explain away the rationale of Lee while upholding 'under God' may expose the hypocrisy of claiming that a one-time prayer containing secular and religious messages can coerce a middle-school student, but yet a daily Pledge containing similar secular and religious messages cannot coerce a five-year-old.").

336. Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 46 (Thomas, J., concurring in the judgment); *see also* Hancock, *supra* note 288, at 742 ("Any principled application of Lee's coercion test to Newdow's claim necessarily leads to the conclusion that the use of 'under God' in public schools is unconstitutional.").

337. *See* Gey, *supra* note 134, at 1896 ("It is impossible to seriously argue that the social pressure on a student in a classroom reciting the religious component of the Pledge is more trivial than the pressure imposed in graduation ceremonies and football games. Indeed, the pressure may be even greater in the Pledge case because dissenting students will be doubly ostracized: A student who refuses to recite the Pledge will be tainted as both unreligious and unpatriotic.").

338. *See, e.g.*, Sherman v. Cmty. Consol. Sch. Dist. 21, 758 F. Supp. 1244, 1250 (N.D. Ill. 1991) (citing R. Sherman Aff. ¶¶ 8, 10), *aff'd in part and vacated in part*, 980 F.2d 437 (7th Cir. 1992) ("Mr. Sherman states in his affidavit that his 'son has been knocked down by other children who are angered at his opposition to pledging' and that his son has suffered 'embarrassment and

The Court's special solicitude for protecting students in the school context helps explain why requiring the Pledge in that context cannot pass muster under the Coercion Test even if such a requirement could pass muster in a different context.[339] But this means that someone, such as Justice Kennedy, who believes that the Pledge passes muster as a general matter,[340] might nonetheless not believe that it passes muster when required in the primary school setting, even if there is an exception built in for those who object to saying it on political or religious grounds. The kind of coercion at issue in *Lee* and *Doe* which made those practices unconstitutional would be as strong if not stronger in a Pledge case,[341] and thus a Pledge requirement in a primary or secondary school would not pass the Coercion Test.

F. The Marsh *Exception*

This Article suggests that requiring recitation of the Pledge in primary or secondary schools violates the three Establishment Clause tests articulated by the Court—the *Lemon* Test, the Endorsement Test and the Coercion Test. However, before concluding that the issue therefore is resolved, another case must be considered.

In *Marsh v. Chambers*,[342] the Court upheld "the practice of opening legislative sessions with prayer."[343] The Court noted "the unambiguous and unbroken history of more than 200 years"[344] and reasoned that "opening legislative sessions with prayer has become part of the fabric of our society."[345] The Court reconciled its position with the Establishment Clause jurisprudence by saying, "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."[346]

Marsh has been open to a variety of interpretations. Some read it as grandfathering long-established customs.[347] Others suggest that it provides an

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humiliation . . . when the pledge ceremony is conducted.'" (alteration in original)).

339. *See* Newdow v. U.S. Cong. (*Newdow III*), 383 F. Supp. 2d 1129, 1243 (E.D. Cal. 2005) ("It cannot be gainsaid that the practice of reciting the Pledge in the context of adults attending a school board meeting tenders a different question than the recitation of the Pledge in a classroom.").

340. See *infra* notes 349-51 and accompanying text for a discussion of Justice Kennedy's worry, expressed in his *Allegheny* concurrence and dissent, that the Court's approach would lead to invalidation of the Pledge.

341. *See supra* notes 335-38 and accompanying text.

342. 463 U.S. 783 (1983).

343. *Id.* at 792.

344. *Id.*

345. *Id.*

346. *Id.*

347. *See* Van Orden v. Perry, 545 U.S. 677, 688 (2005) (citing *Marsh*, 463 U.S. at 786) ("This

illustration of how repetition can secularize what might otherwise be considered religious.[348] Still others have suggested that it provides a standard for what the Establishment Clause must be thought to allow. For example, Justice Kennedy suggests in his *Allegheny* concurrence and dissent that:

> *Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.[349]

Indeed, Justice Kennedy worries that unless the Court adopts this broad interpretation of *Marsh*, the Pledge of Allegiance may be in constitutional jeopardy.[350] With respect to the Endorsement Test in particular, he notes that

> by statute, the Pledge of Allegiance to the Flag describes the United States as "one Nation under God." . . . [I] t borders on sophistry to suggest that the "'reasonable'" atheist would not feel less than a "'full membe[r] of the political community'" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.[351]

If Justice Kennedy is correct that practices with no greater potential for establishing religion than legislative prayer do not violate the Establishment Clause, then that Clause would not seem to do much work. Indeed, as other members of the Court have pointed out, Justice Kennedy's *Marsh* gloss on the Establishment Clause would basically nullify that clause. As the *Allegheny* Court noted, "Justice Kennedy's reading of *Marsh* would gut the core of the Establishment Clause, as this Court understands it. The history of this Nation,

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recognition has led us to hold that the Establishment Clause permits a state legislature to open its daily sessions with a prayer by a chaplain paid by the State. Such a practice, we thought, was "deeply embedded in the history and tradition of this country." (footnotes omitted)).

348. Yannella, *supra* note 180, at 92 ("The Court can use *Marsh*, not simply for the proposition that context is critical, but to advance the proposition that sheer repetition of a phrase can dilute meaning.").

349. County of Allegheny v. ACLU, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in part and dissenting in part) (footnote omitted).

350. *Id.* at 602 ("In *Marsh*, the Court relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights. Justice Kennedy, however, argues that *Marsh* legitimates all 'practices with no greater potential for an establishment of religion' than those 'accepted traditions dating back to the Founding.' Otherwise, the Justice asserts, such practices as our national motto ('In God We Trust') and our Pledge of Allegiance (with the phrase 'under God,' added in 1954) are in danger of invalidity." (citations omitted)).

351. *Id.* at 672-73 (Kennedy, J., concurring in part and dissenting in part) (quoting 36 U.S.C. § 172 (2000)).

it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically."[352] Thus, if historical practice were the only limitation set by the Establishment Clause, then the State not only could favor religion over non-religion but could also favor one religion over another.

Justice Scalia suggests that "with respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."[353] However, as Justice Stevens points out, "[T]he original understanding of the type of 'religion' that qualified for constitutional protection under the Establishment Clause likely did not include those followers of Judaism and Islam who are among the preferred 'monotheistic' religions Justice Scalia has embraced . . . ."[354] Lest it be thought that the Constitution therefore privileges Christianity, the *McCreary County* Court explained that "history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, *a fact that no Member of this Court takes as a premise for construing the Religion Clauses.*"[355]

Marsh makes Endorsement Clause jurisprudence even more difficult to understand because it does not offer a principle upon which members of the Court can agree. Perhaps it can be limited to grandfathering those religious practices countenanced by the Framers on the theory that the Framers would not have engaged in practices which they knew violated the very Establishment Clause principle which they themselves had written into the Constitution.[356] Perhaps it does not even stand for that.[357] In any event, it adds a wild card to Establishment Clause jurisprudence. Precisely because the *Marsh* Court did not analyze the action before it in terms of the existing Establishment Clause tests[358]

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352. *Id.* at 604.

353. McCreary County v. ACLU, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

354. Van Orden v. Perry, 545 U.S. 677, 728-29 (2005) (Stevens, J., dissenting).

355. *McCreary County*, 545 U.S. at 880 (emphasis added).

356. *See* Myers v. Loudoun County Pub. Schs., 418 F.3d 395, 404 (4th Cir. 2005) ("The recognition of religion in these early public pronouncements is important, unless we are to presume the 'founders of the United States [were] unable to understand their own handiwork.'" (quoting Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 445 (7th Cir. 1992) (alteration in original)).

357. *See* Marsh v. Chambers, 463 U.S. 783, 814-15 (1983) (Brennan, J., dissenting).

> [T]he Court assumes that the Framers of the Establishment Clause would not have themselves authorized a practice that they thought violated the guarantees contained in the clause. This assumption, however, is questionable. Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact, and this must be assumed to be as true of the Members of the First Congress as any other.

Id. (citations omitted).

358. *See id.* at 796 ("The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the

and did not offer a new test but nonetheless upheld a practice which appeared to fail the existing tests,[359] *Marsh* may be viewed by some as an exception to Establishment Clause jurisprudence[360] and by others as setting a new and very forgiving standard[361] by which to determine whether the Establishment Clause has been violated.

CONCLUSION

Arguably, a policy requiring recitation of the Pledge of Allegiance in primary and secondary schools is unconstitutional according to each of the Establishment Clause tests articulated by the Court. However, as the *Lynch* Court noted, "the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause,"[362] explaining that the Court has "refused 'to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history.*'"[363] Perhaps ironically, the *Lynch* Court justified its approach by claiming that in "our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court."[364] Yet, the diversity of religious viewpoints in America would seem to support deleting "under God" from the Pledge so as not to alienate those with minority viewpoints on religious matters.[365]

Establishment Clause.").

359. *See id.* ("[T]he practice of official invocational prayer, as it exists in Nebraska and most other state legislatures, is unconstitutional. It is contrary to the doctrine as well [as] the underlying purposes of the Establishment Clause, and it is not saved either by its history or by any of the other considerations suggested in the Court's opinion.").

360. *See id.* ("[T]he Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer.").

361. *See* County of Allegheny v. ACLU, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in part and dissenting in part) ("*Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." (footnote omitted)).

362. Lynch v. Donnelly, 465 U.S. 668, 678 (1984).

363. *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970)).

364. *Id.*

365. McKenzie, *supra* note 12, at 413.

> The demographic makeup of the United States is vastly different than it was when Congress last amended the Pledge in 1954. The Cold War is over and Americans no longer need to distinguish their cherished values from those they associate with communism. Additionally, Americans are more diverse in all aspects, including religion. Predictably, some of those who do not embrace monotheistic ideals object that

It is one thing to point out that "the Court has found no single mechanical formula that can accurately draw the constitutional line in every case."[366] It is quite another when the Court fails to follow all of the tests that it has thus far articulated. Yet, ever since *Everson v. Board of Education*,[367] the Court's Establishment Clause jurisprudence has been far from consistent.

The *Everson* Court suggested, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[368] Yet, the Court itself has admitted that it has not consistently followed *Everson*. Indeed, the *Lynch* Court noted

> The metaphor [of a wall between church and state] has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.[369]

Thus, the *Lynch* Court suggests that *Everson* is not to be taken literally but instead is merely a reminder about what the Establishment Clause precludes. Yet, at other times, the Court has taken *Everson* quite seriously.[370] Further, members of the Court have occasionally wished that the *Everson* doctrine would be reinstated. For example, Justice Stevens worried that *Lemon* was too malleable and longed for the days of *Everson*—"Rather than continuing with the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon v. Kurtzman*, I would resurrect the 'high and impregnable' wall between church and state constructed by the Framers of the

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> their children are required to listen each day as their teachers proclaim that the United States is a "nation under God." It is time to amend the Pledge once more to accommodate the views of all Americans, so that school children are free to participate in an expression of patriotism without religious overtones.

Id.

366. Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring).

367. 330 U.S. 1 (1947).

368. *Id.* at 18.

369. *Lynch*, 465 U.S. at 673; *see also* Zorach v. Clauson, 343 U.S. 306, 317 (1952) (Black, J., dissenting) ("Our insistence on 'a wall between Church and State which must be kept high and impregnable' has seemed to some a correct exposition of the philosophy and a true interpretation of the language of the First Amendment to which we should strictly adhere. With equal conviction and sincerity, others have . . . pledged continuous warfare against it." (footnotes omitted)).

370. *See* McDaniel v. Paty, 435 U.S. 618, 637 (1978) ("Our decisions interpreting the Establishment Clause have aimed at maintaining erect the wall between church and state."); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) ("For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.").

First Amendment."[371]

One difficulty in predicting whether a particular policy will pass muster under the Establishment Clause is that the Court has articulated various tests and has never been clear about which to apply in particular situations. Yet another difficulty is that the Court has signaled that the Religion Clause Jurisprudence itself has to be understood in a particular way so that argumentation that in other areas of law might be persuasive or dispositive would nonetheless not win the day in this area of law. The *Sherman* court reasoned,

> [P]erhaps the rationale of *Barnette,* when joined with the school-prayer cases, equates social pressure with legal pressure. If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words *is* coercion, then the Pledge of Allegiance becomes unconstitutional under all circumstances, just as no school may read from a holy scripture at the start of class.
>
> As an analogy this is sound. As an understanding of the first amendment it is defective—which was Justice Kennedy's point in *Allegheny*. The religion clauses of the first amendment do not establish general rules about speech or schools; they call for religion to be treated differently.[372]

The *Sherman* court failed to make sufficiently clear the respect in which religion is to be treated differently. For example, one way in which a particular area of law might be treated "differently" is simply to use a test which is peculiarly suited to that area of law. That test would determine which acts pass muster and which do not, but because this test is used only in this particular area of law, this area is treated "differently" from others. Another way (suggested by the *Sherman* court) is to apply the relevant test (which may or may not be applicable in other contexts, e.g., in the context of free speech), but to reject that "failing the test" has the same implication in the Establishment Clause context as it does in others. It is as if the Court should not strike down a longstanding practice,[373] for example, even if the relevant test indicates that the practice cannot

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371. Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (citing *Everson*, 330 U.S. at 18) (citations omitted); *see also* Wolman v. Walter, 433 U.S. 229, 257 (1977) (Marshall, J., concurring in part and dissenting in part) ("I am now convinced that *Allen* [Board of Education v. Allen, 392 U.S. 236 (1968)] is largely responsible for reducing the 'high and impregnable' wall between church and state erected by the First Amendment to 'a blurred, indistinct, and variable barrier' incapable of performing its vital functions of protecting both church and state." (citations omitted)).

372. Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 444 (7th Cir. 1992) (emphasis added).

373. *See* Marsh v. Chambers, 436 U.S. 783, 796 (1983) (Brennan, J., dissenting) (describing *Marsh* as an exception for a longstanding practice). A separate question is how longstanding a practice must be before it falls into this exception. *Cf.* Elk Grove Unified Sch. Dist. v. Newdow (*Newdow II*), 542 U.S. 1, 38 (2004) (O'Connor J., concurring) ("Fifty years have passed since the

be squared with the Constitution.

What will the Court do if a case comes before it in which the constitutionality of a primary school policy requiring daily recitation of the Pledge of Allegiance is at issue? One possibility would be for the Court to require that the Pledge be returned to its pre-1954 version.[374] Justice O'Connor noted that "the presence of those words [under God] is not absolutely essential to the Pledge, as demonstrated by the fact that it existed without them for over 50 years."[375] Her point was that even those objecting to the inclusion of those words "still can consider themselves meaningful participants in the exercise if they join in reciting the remainder of the Pledge."[376] Yet, *Doe* and *Lee* counsel that the state is not permitted to endorse religious beliefs merely because it is willing to permit those who disagree to remain respectfully silent. Thus, Justice O'Connor's point that the Pledge existed without "under God" for fifty years at least suggests that the Pledge could serve useful purposes even without "under God" included and that a reinstatement of the pre-1954 version might merit serious consideration.

It might be argued that the pre-1954 Pledge puts students who believe that the nation is under God at a disadvantage.[377] However, in his *Lee* concurrence, Justice Souter suggests:

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words 'under God' were added, a span of time that is not inconsiderable given the relative youth of our Nation.").

374. *Cf.* Ward, *supra* note 185, at 1638 ("[T]he words 'under God' were added in 1954 as a congressional afterthought. Not only can the Pledge exist independently of those two words, but it did so exist, as a purely patriotic exercise to which religious language was subsequently added during the Cold War for the political purpose of distinguishing American political culture from 'atheistic Communism.'").

375. *Newdow II*, 542 U.S. at 43 (O'Connor, J., concurring).

376. *Id.* (O'Connor, J., concurring); *see also* Berg, *supra* note 208, at 73 ("Note that the two kinds of dissenters to the Pledge may face unequal burdens. The student who objects to "under God" can still affirm loyalty to the nation by reciting most of the Pledge and simply staying silent for the two objectionable words.").

377. *See* Berg, *supra* note 208, at 73.

> Note that the two kinds of dissenters to the Pledge may face unequal burdens. The student who objects to "under God" can still affirm loyalty to the nation by reciting most of the Pledge and simply staying silent for the two objectionable words. But the theistic student who objects to the Pledge without "under God" cannot insert the phrase into the recitation if the prescribed words do not include it. It is more likely that this dissenter will have to opt out of the ceremony entirely—with attendant costs to the student herself (she may wish to affirm loyalty to the nation) and to her reputation with others. This, then, seems to be another argument for upholding the Pledge with "under God." The theistic student can silently affirm that the nation is under God; but such "mental reservations" have not been viewed as sufficient to excuse coerced speech. If they were, they could serve as an excuse in every case.

Id.

> Religious students cannot complain that omitting prayers from their graduation ceremony would, in any realistic sense, "burden" their spiritual callings. . . . Because they . . . have no need for the machinery of the State to affirm their beliefs, the government's sponsorship of prayer at the graduation ceremony is most reasonably understood as an official endorsement of religion and, in this instance, of theistic religion.[378]

By the same token, Justice Souter might suggest that students do not need the state to affirm their belief that the country is subordinate to God. Arguably, where the Pledge would neither affirm nor deny God's existence, the state would simply be remaining neutral on that question.

To some extent, the question is whether by omitting "under God" the State is offering a neutral position or, instead, one which is hostile to religion,[379] where no one is being forced to say the Pledge in any event.[380] However, were the Pledge modified to say, "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," it still would not be saying "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, *under no God*, indivisible, with liberty and justice for all."[381] To hold that the deletion of "under God" is the equivalent of saying "under no God" would mean that the Pledge could not help but either promote or undermine religion, which might mean that the Establishment Clause would bar its being said in public schools whether or not it included a reference to God.

One possibility would be for the Court to offer a hybrid Establishment Clause Test, for example, by combining the Endorsement and Coercion Tests.[382]

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378. Lee v. Weissman, 505 U.S. 577, 629-30 (1992) (Souter, J., concurring).

379. *Cf.* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 118 (2001) ("[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.").

380. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

381. Thompson, *supra* note 10, at 594 ("But removing 'under God' is not the same as inserting 'under no God.' Removing 'under God' seems to be the best, if not the only, way to truly accommodate religious pluralism. Often the only way not to express a preference is to remain silent.").

382. *See, e.g.*, Ward, *supra* note 185, at 1665-66.

> This suggests a two-step structure to the analysis of state action under the Establishment Clause. In a first, threshold inquiry, the Court asks whether the challenged state action is either directly or indirectly coercive under the coercion test as conceptualized above. If the answer to that initial inquiry is "yes," then the state's action is unconstitutional and no further inquiry is necessary. If the answer to the coercion question is "no," then the Court proceeds to a second level of inquiry, under which it asks whether the challenged state action, although concededly not coercive, violates the endorsement test by creating political hierarchies based on religion. . . . Would a reasonable observer

But a much more likely possibility would be for the Court to adopt a standard which would be more lax with respect to the kinds of religious messages that might be sent by the State without offending constitutional guarantees.[383] Yet another possibility is that the Court will continue to eschew an approach using one or even a few principles, instead opting for a case-by-case approach that requires "the exercise of legal judgment."[384]

Ironically, some believe that the best basis for affirming the constitutionality of the Pledge is that numerous Justices have so intimated in dicta.[385] Yet, especially in the context of deciding this particular issue, a survey of past dicta may not yield a reliable result. In his *Barnette* dissent, Justice Frankfurter noted, "What may be even more significant than this uniform recognition of state authority is the fact that every Justice—thirteen in all—who has hitherto participated in judging this matter has at one or more times found no constitutional infirmity in what is now condemned."[386] Thus, in the case of the Pledge, past declarations of the Pledge's constitutionality provide no guarantee that it will be so found in the future, especially if the issue is the constitutionality of its required recitation in primary schools.

It is very difficult to predict whether the Court would uphold the constitutionality of a primary school Pledge requirement, much less whether it would modify the existing jurisprudence. However, one can predict with some confidence that should the Court actually reach the merits, one or more Justices will invoke the *Lemon* Test (if only because the purpose behind amending the

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> conclude that the state, by engaging in the challenged action, has demonstrated partiality either toward or against religion, or toward or against a particular religion? If so, the action is unconstitutional; if not, it is not.

Id.

383. Cf. Erwin Chemerinsky, *Why Justice Breyer Was Wrong in* Van Orden v. Perry, 14 WM. & MARY BILL RTS. J. 1, 16 (2005) ("When Sandra Day O'Connor announced her resignation on July 1, and with her vote being the fifth to affirm the Lemon test and the symbolic endorsement approach, it is apparent that worse may happen quite soon.").

384. *See* Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J. concurring) ("If the relation between government and religion is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases. And in such cases, I see no test-related substitute for the exercise of legal judgment."); *see also* Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 825 (1999) ("The Establishment Clause does not lend itself to a 'Grand Unified Theory.' Rather, it charges the courts with delineating the boundaries between church and state over time. This is an arena where lamentations over inconsistent doctrine are beside the point." (footnote omitted)).

385. Myers v. Loudoun County Pub. Schs., 418 F.3d 395, 411 (4th Cir. 2005) (Motz, J., concurring) ("[T]he Justices of the Supreme Court have stated, repeatedly and expressly, that the Pledge of Allegiance's mention of God does not violate the First Amendment. I would affirm the district court's judgment solely on the basis of this considerable authority.").

386. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 664-65 (1943) (Frankfurter, J., dissenting).

Pledge was so clearly religious),[387] one or more will invoke the Endorsement Test, and Justices will disagree among themselves as to whether requiring non-participating students to listen respectfully to the Pledge is coercive. Further, one or more Justices will play the *Marsh* wild card, wondering how legislative prayer can be upheld if something as innocuous as including "under God" in the Pledge could somehow be viewed as unconstitutional even in the primary school setting. The Court will be divided, and either the majority[388] or the dissent[389] will accuse one or more Justices of being hostile to religion. Those charges will be denied,[390] perhaps accompanied by the suggestion that those making such an accusation assume either that a respect for pluralism is somehow hostility to religion[391] or that a refusal to support religion must be equated with hostility to religion.[392] The Court will be divided with respect to the correct test to use and whether the relevant test establishes the constitutionality or unconstitutionality of the policy at issue. Perhaps the only matters about which one can be very confident are that the separate opinions will manifest hostility to one or more views expressed in the opinion and that the time when the Court can present a coherent test for determining whether the Establishment Clause has been violated will have to wait for another day.

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387. *Cf.* McCreary County v. ACLU, 545 U.S. 677, 900-01 (2005) (Scalia, J., dissenting) (discussing the Court's application of *Lemon*).

388. Mitchell v. Helms, 530 U.S. 793, 827-28 (2000) ("[I]t is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously . . . .").

389. County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part) ("The majority holds that the County of Allegheny violated the Establishment Clause by displaying a creche in the county courthouse . . . . This view of the Establishment Clause reflects an unjustified hostility toward religion . . . .").

390. *Cf.* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 246 (1963) ("Inevitably, insistence upon neutrality, vital as it surely is for untrammeled religious liberty, may appear to border upon religious hostility. . . . Freedom of religion will be seriously jeopardized if we admit exceptions for no better reason than the difficulty of delineating hostility from neutrality in the closest cases."); *see also* Engel v. Vitale, 370 U.S. 421, 433-434 (1962) ("It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, or course, could be more wrong.").

391. *Allegheny*, 492 U.S. at 610 ("Justice Kennedy apparently has misperceived a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion. No misperception could be more antithetical to the values embodied in the Establishment Clause.").

392. *Id.* at 653 n.11 (Stevens, J., concurring in part and dissenting in part) ("The suggestion that the only alternative to governmental support of religion is governmental hostility to it represents a giant step backward in our Religion Clause jurisprudence.").