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Separation v. Patriotism: Expelling the Pledge from School.

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PERSPECTIVE

SEPARATION v. PATRIOTISM: EXPELLING THE PLEDGE FROM SCHOOL

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I. INTRODUCTION

Imagine the following familiar scene. At eight o'clock every morning, elementary students throughout the nation stand and place their hand over their heart in respect for the American flag; their state-employed teacher leads the children in the Pledge of Allegiance; each child, in unison, recites the following from memory: "'I pledge allegiance to the Flag

of the United States of America, and to the Republic for which it stands, one Nation [without God,[1]] indivisible, with liberty and justice for all.'"[2]

Undoubtedly, many people would feel indignation that any state-sponsored entity promoted a belief so un-American and contrary to basic Judeo-Christian tenets. This revulsion was the very feeling that prompted atheist Michael Newdow[3] to challenge the constitutionality of the 1954 addition of the words "under God" to the Pledge of Allegiance.[4] Newdow brought suit in the United States District Court for the Eastern District of California.[5] After the district judge dismissed the action, Newdow appealed the decision to the Ninth Circuit; a divided three-judge panel agreed with Newdow and held the provision "under God" unconstitutional as violative of the Establishment Clause.[6]

This decision sparked immediate public reaction.[7] Politicians called the decision "ridiculous" and pundits immediately criticized the Democrats for stonewalling the majority of President Bush's conservative judicial nominations.[8] The following morning, House members gathered on the

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1. *See* Newdow v. United States Cong., 292 F.3d 597, 607-08 (9th Cir. 2002) (suggesting that pledging allegiance to "one nation under God" is analogous to substituting the words "Jesus," "Vishnu," "Zues" or "under no God" for Establishment Clause purposes), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay); *see also Hannity & Colmes: Interview with Michael Newdow* (Fox News television broadcast, June 26, 2002), 2002 WL 2789039 (implying "under God" to atheists is like "under Muhammad" or "under Sun Myung Moon" to Judeo-Christians).

2. 4 U.S.C. § 4 (2000).

3. *See Hannity & Colmes: Interview with Michael Newdow* (Fox News television broadcast, June 26, 2002), 2002 WL 2789039 (responding "[t]his is ridiculous. I don't trust in God").

4. *Newdow*, 292 F.3d at 600-01 (challenging the Pledge of Allegiance as codified at 4 U.S.C. § 4 (2000)).

5. *Id.* at 601.

6. *See id.* at 612 (holding that teacher led recitation of the Pledge, with the words "under God," violates the Establishment Clause).

7. *See* Armando Villafranca et al., *Flag Pledge Ban Unfurls Protest: Court Ruling Limited, but Reaction Isn't*, HOUS. CHRON., June 27, 2002, at 1, 2002 WL 23204843 (indicating that the decision elicited criticism across Texas and the nation from politicians, conservative groups, and veterans); *see also USA Polls: Pledge Allegiance to God or Country?*, *at* http://www.internetheaven.net/usapolls.php (last visited Aug. 23, 2002) (finding that four percent answered "yes" and ninety-six percent answered "no" to the question "Should 'Under God' be removed from the pledge of allegiance?").

8. *See* Jane Meredith Adams, *One Nation Divided: Judges Bar Pledge for Kids Out West, Cite Words 'Under God,'* NEWSDAY, June 27, 2002, at A03, 2002 WL 2750909 (reporting President Bush's reaction to the Ninth Circuit decision); David Kravets, *"Under God" Unconstitutional: Appeals Court Rules Phrase in Pledge Endorses Religion*, CHI. SUN-TIMES, June 27, 2002, at 1, 2002 WL 6462933 (reporting the response of Senate Majority Leader, Tom Daschle); Armando Villafranca et al., *Flag Pledge Ban Unfurls Protest: Court Ruling Limited, but Reaction Isn't*, HOUS. CHRON., June 27, 2002, 2002 WL 23204843 (re-

steps of the United States Capitol to recite the Pledge of Allegiance.[9] The public protest was so strong that the House of Representatives voted to deny all courts established by Congress any jurisdiction to hear First Amendment challenges to the Pledge of Allegiance.[10] Consequently, the Ninth Circuit stayed its decision.[11]

Many criticize the decision as untimely because the Ninth Circuit reached its decision less than a year after the World Trade Center tragedy and the resulting military involvement.[12] Moreover, with the numerous school shooting deaths over the past decade, many argue that American children could use more in-school religious cultivation.[13] Besides, this case is the most recent in a long line of decisions slowly eroding the patriotic value of the American Flag.[14]

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porting that republicans criticized the Democrat-controlled senate for refusing Bush's conservative nominations).

9. *See* Armando Villafranca et al., *Flag Pledge Ban Unfurls Protest: Court Ruling Limited, but Reaction Isn't*, HOUS. CHRON., June 27, 2002, at 1, 2002 WL 23204843 (indicating that the Senate voted 99-0 condemning the decision).

10. *See* H.R. 5064, 107th Cong. (2002) (setting forth "[n]o court established by Act of Congress shall have jurisdiction to hear or determine any claim that the recitation of the Pledge of Allegiance . . . violates the first article of amendment to the Constitution of the United States").

11. *See Goodwin Stays Enforcement of Pledge Ruling Pending Rehearing Decision*, METROPOLITAN NEWS-ENTERPRISE, June 28, 2002, *at* http://www.metnews.com/articles/pled062802.htm (indicating that the Ninth Circuit decision will not take effect until the full panel can review the decision and that the decision is in a state of "suspended animation"); MSNBC, *Judge Stays Own Ruling on Pledge*, June 27, 2002, *at* http://stacks.msnbc.com/news/772714.asp (on file with the *St. Mary's Law Journal*) (reporting that the Ninth Circuit stayed their decision for the full court to take action). *Contra* Russell A. Del Torro, *In God We Trust*, 49 FED. LAW., Aug. 2002, at 3, 3, WL 49 FEDLAW 3 (concluding that the Ninth Circuit stayed their decision due to the "well-reasoned dissent" by Fernandez, not as a result of public pressure).

12. *See* Armando Villafranca et al., *Flag Pledge Ban Unfurls Protest: Court Ruling Limited, but Reaction Isn't*, HOUS. CHRON., June 27, 2002, at 1, 2002 WL 23204843 (quoting Texas senatorial candidate Ron Kirk who said "'[w]e have troops fighting the war on terrorism . . . [a]nd the 9th U.S. Circuit Court of Appeals is declaring our Pledge of Allegiance unconstitutional?'").

13. *See* Fern I. Blaine Dauphin, *Patriotism Isn't Wrong*, HARRISBURG PATRIOT, July 15, 2002, at 1, 2002 WL 3001911 (criticizing those who want God banned from school and in the same breath asking "'[h]ow can God let this happen?'" whenever there is a school shooting); *see also* Grace G. Allen, *Court Renders Another Loss of Freedom*, AUGUSTA CHRON., July 9, 2002, at 1, 2002 WL 24512737 (concluding that since the Court removed prayer and the Ten Commandments, guns, knives, and violence have come in); Lee Maitland, *God Is An Important Part of Our Country*, CHI. TRIB., July 6, 2002, at 2, 2002 WL 2672308 (indicating that knives and guns replaced God in schools).

14. *See* United States v. Eichman, 496 U.S. 310, 317-18 (1990) (invalidating the Flag Protection Act since it punishes persons who deface or mutilate the flag); *see also* Texas v. Johnson, 491 U.S. 397, 410 (1989) (recognizing the expressive value in burning the flag); Street v. New York, 394 U.S. 576, 594 (1969) (refusing to uphold the conviction of a man

The decision may also be criticized since Newdow is such an unsympathetic plaintiff. Newdow, who is the non-custodial parent, brought suit on behalf of his estranged eight-year-old daughter claiming that daily recitation of the pledge harmed her.[15] Further, the child's custodial parent, Sandra Banning, had to intervene since she was not made a party to the suit.[16] Contrary to Newdow's assertion, both the mother and daughter profess faith in Christianity and deny any harm resulting from daily recitation; rather they emphasize that the pledge, as it currently stands, remains a valuable part of education.[17]

Judge Goodwin, writing for *Newdow v. United States Congress*,[18] stayed the panel's decision pending further review.[19] California has already filed a motion for rehearing *en banc*.[20] Depending on the decision, both the Justice Department and Michael Newdow will likely appeal to the Supreme Court.[21] This Article will analyze *Newdow*'s consistency with Supreme Court precedent, predict the possible direction the Supreme Court may make in this case, and address the effect of *Newdow* on Establishment Clause jurisprudence.

II. Historical Consideration of the Pledge of Allegiance

To put *Newdow* in its proper light, first consider the foundational principles, history, and reasoning behind the pledge. In 1892, a Baptist socialist minister originally penned the Pledge of Allegiance as it currently

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who publicly renounced the flag, thus failing to show the proper respect); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (discussing circumstances that exempt recitation of the Pledge of Allegiance).

15. *See Out from Under God*, NEWSWEEK, Aug. 19, 2002, at 1, 2002 WL 7294861 (reporting the discussion between Newdow's ex-wife, who is the custodial parent of the child).

16. *See The State Hearing on Pledge Asked of Full Court*, L.A. TIMES, Aug. 11, 2002, at 2, 2002 WL 2495941 (covering the sentiments of Newdow's ex-wife).

17. *Justice Agency Seeks Hearing on Pledge Ruling*, DESERET NEWS, Aug. 10, 2002, at 2, 2002 WL 25300020; *see also Out from Under God*, NEWSWEEK, Aug. 19, 2002, at 1, 2002 WL 7294861 (quoting Sandra Banning, Newdow's ex-wife, as saying she "[does not] want my daughter known as the little girl who killed the pledge").

18. 292 F.3d 597 (9th Cir. 2002).

19. Newdow v. United States Cong., 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay).

20. Petition for Rehearing With Suggestion for Rehearing En Banc of Defendant-Appellee State of California at 14, Newdow v. United States Cong., 292 F.3d 597 (9th Cir. 2002) (No. 00-16423).

21. *See* Russell A. Del Toro, *In God We Trust*, 49 FED. LAW., Aug. 2002, at 3, 3, WL 49 FEDLAW 3 (speculating that the *Newdow* decision will inevitably end up in the Supreme Court); *see also* Jane Meredith Adams, *One Nation Divided: Judges Bar Pledge for Kids Out West, Cite Words 'Under God,'* NEWSDAY, June 27, 2002, at 1, 2002 WL 2750909 (indicating that the Justice Department is expected to ask for a rehearing or appeal to the Supreme Court).

stands minus the words "under God."[22] On the 400th anniversary of Christopher Columbus's voyage, public school children recited the pledge for the first time without the words "under God."[23] In 1954, after a campaign by the Knights of Columbus and others, Congress added the words "under God."[24] To justify this new addition, Congress clearly and unambiguously asserted a sectarian purpose behind the new addition.[25] Specifically, Congress began by discussing national concern for communism, recognizing this tenet as a threat to the "American way of life."[26] Quoting from the Supreme Court decision of *Zorach v. Clauson*,[27] Congress reaffirmed that "[w]e are a religious people whose institutions presuppose a supreme being."[28] Essentially, Congress recognized Americans' historical reliance on a Supreme Creator while at the same time denouncing atheism and communism.[29]

Further, Congress relied on American history to justify its amendment to the Pledge of Allegiance.[30] The Mayflower Compact,[31] the Pledge of Allegiance, as well as Abraham Lincoln's Gettysburg Address,[32] all acknowledge reliance on God for the liberties and freedoms enjoyed by this

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22. Jane Meredith Adams, *One Nation Divided: Judges Bar Pledge for Kids Out West: Cite Words 'Under God,'* NEWSDAY, June 27, 2002, at 3, 2002 WL 2750909; Maura Dolan, *The Pledge of Allegiance: Pledge of Allegiance Violates Constitution, Court Declares Law: The Phrase "Under God" Added In 1954, Undermines the Separation of Church and State, 9th Circuit Panel Decides*, L.A. TIMES, June 27, 2002, at 3, 2002 WL 2486123.

23. Maura Dolan, *The Pledge of Allegiance: Pledge of Allegiance Violates Constitution, Court Declares Law: The Phrase "Under God" Added In 1954, Undermines the Separation of Church and State, 9th Circuit Panel Decides*, L.A. TIMES, June 27, 2002, at 3, 2002 WL 2486123.

24. *Id.*; *see also* Jane Meredith Adams, *One Nation Divided: Judges Bar Pledge for Kids Out West: Cite Words* 'Under *God,'* NEWSDAY, June 27, 2002, at 3, 2002 WL 2750909 (reporting that President Eisenhower approved the legislation by saying, "'Millions of our schoolchildren will daily proclaim . . . the dedication of our nation and our people to the Almighty'") (alteration in original).

25. *See* H.R. REP. NO. 83-1693 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340 (suggesting that the inclusion of the words "under God" would further recognize this Nation's dependence upon the moral direction of God).

26. *Id.*

27. 343 U.S. 306 (1952).

28. 1954 U.S.C.C.A.N. 2339, 2340; Zorach v. Clausen, 343 U.S. 306, 314 (1952), *reprinted in* H.R. REP. NO. 83-1693 (1954).

29. *See* H.R. REP. NO. 83-1693 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340 (suggesting that America's system of government is under attack by communism whose views promote "subservience of the individual").

30. *See id.* at 2340-41 (quoting William Penn, the Declaration of Independence, the Mayflower Compact, George Mason, and others).

31. *Id.*

32. *Id.*

Nation.[33] Citing these and other respected documents and historical

33. *See* H.R. REP. NO. 83-1693 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340 (discussing the Founding Fathers' beliefs). In reaction to *Newdow v. United States Cong.*, 292 F.3d 597 (9th Cir. 2002), Congress reaffirmed the Pledge of Allegiance. Pub. L. No. 107-293, § 2, 116 Stat. 2057, 2060 (2002). Later, in November 2002, President Bush signed this bill into law. Press Release by Deputy Press Secretary, White House Press Release (Nov. 13, 2002), 2002 WL 25974965. Essentially, Congress espoused support for the "under God" and "In God We Trust" language. *See* Pub. L. No. 107-293, §§ 2-3, 116 Stat. 2057, 2060-61 (2002) (reaffirming "One Nation Under God" in the pledge, and "In God We Trust" in the motto); *Almighty to Remain in Pledge and Motto: Bush Signs Bill in Wake of a Court Ruling That References to God Violate Constitution*, L.A. TIMES, Nov. 14, 2002, at A22, 2002 WL 2517825 (considering Congress's reaffirmation "a slap at the U.S. 9th Circuit Court of Appeals"). Congress cited various authorities to defend the current language of the Pledge:

> (1) On November 11, 1620, prior to embarking for the shores of America, the Pilgrims signed the Mayflower Compact that declared: "Having undertaken, for the Glory of God and the advancement of the Christian Faith and honor of our King and country, a voyage to plant the first colony in the northern parts of Virginia."
> (2) On July 4, 1776, America's Founding Fathers, after appealing to the "Laws of Nature, and of Nature's God" to justify their separation from Great Britain, then declared: "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."
> (3) In 1781, Thomas Jefferson, the author of the Declaration of Independence and later the Nation's third President, in his work titled "Notes on the State of Virginia" wrote: "God who gave us life gave us liberty. And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the Gift of God. That they are not to be violated but with His wrath? Indeed, I tremble for my country when I reflect that God is just; that his justice cannot sleep forever."
> (4) On May 14, 1787, George Washington, as President of the Constitutional Convention, rose to admonish and exhort the delegates and declared: "If to please the people we offer what we ourselves disapprove, how can we afterward defend our work? Let us raise a standard to which the wise and the honest can repair; the event is in the hand of God!"
> (5) On July 21, 1789, on the same day that it approved the Establishment Clause concerning religion, the First Congress of the United States also passed the Northwest Ordinance, providing for a territorial government for lands northwest of the Ohio River, which declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."
> (6) On September 25, 1789, the First Congress unanimously approved a resolution calling on President George Washington to proclaim a National Day of Thanksgiving for the people of the United States by declaring, "a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a constitution of government for their safety and happiness."
> (7) On November 19, 1863, President Abraham Lincoln delivered his Gettysburg Address on the site of the battle and declared: "It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased

devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this Nation, under God, shall have a new birth of freedom—and that Government of the people, by the people, for the people, shall not perish from the earth."

(8) On April 28, 1952, in the decision of the Supreme Court of the United States in *Zorach v. Clauson*, 343 U.S. 306 (1952), in which school children were allowed to be excused from public schools for religious observances and education, Justice William O. Douglas, in writing for the Court stated: "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other. That is the common sense of the matter. Otherwise the State and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

(9) On June 15, 1954, Congress passed and President Eisenhower signed into law a statute that was clearly consistent with the text and intent of the Constitution of the United States, that amended the Pledge of Allegiance to read: "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."

(10) On July 20, 1956, Congress proclaimed that the national motto of the United States is "In God We Trust," and that motto is inscribed above the main door of the Senate, behind the Chair of the Speaker of the House of Representatives, and on the currency of the United States.

(11) On June 17, 1963, in the decision of the Supreme Court of the United States in Abington School District v. Schempp, 374 U.S. 203 (1963), in which compulsory school prayer was held unconstitutional, Justices Goldberg and Harlan, concurring in the decision, stated: "But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political, and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so."

(12) On March 5, 1984, in the decision of the Supreme Court of the United States in *Lynch v. Donelly*, 465 U.S. 668 (1984), in which a city government's display of a nativity scene was held to be constitutional, Chief Justice Burger, writing for the Court, stated: 'There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789 . . .

figures, Congress then outlined two secular goals to justify adding "under God" to the Pledge of Allegiance.[34] First, the new phrase would raise national consciousness as to the "true meaning of our country and its form of government."[35] Second, it would impress school children as they pledge allegiance "with a true understanding of our way of life and its origins."[36] Congress then asserted that the 1954 Act is not contrary to the First Amendment of the Constitution.[37] Lawmakers distinguished possessing a belief in God from state actions establishing a religion by relying on Supreme Court precedent and recognizing "that the references to the Almighty which run through our laws, our *public rituals*, and *our ceremonies* in no way flout the provisions of the [F]irst [A]mendment."[38]

The Eighty-Third Congress based much of its action on the holding in *Zorach*, which recognized that the courts cannot completely separate church and state without alienating both and generating hostility and suspicion between them.[39] As such, the Supreme Court has had little prob-

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[E]xamples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust" (36 U.S.C. 186), which Congress and the President mandated for our currency, see (31 U.S.C. 5112(d)(1) (1982 ed.)), and in the language "One Nation under God," as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children—and adults—every year . . . Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages. The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with the Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation."

Pub. L. No. 107-293, § 1, 116 Stat. 2057, 2057-60 (2002).

34. H.R. REP. NO. 83-1693 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2341 (quoting Rep. Louis C. Rabaut who testified at the hearings).

35. *Id.*

36. *Id.*

37. *See id.* at 2341-42 (reaffirming that this Act is not intended to establish a religion or interfere with the free exercise of religion).

38. *Id.* (emphasis added).

39. *See* Zorach v. Clauson, 343 U.S. 306, 314-15 (1952) (upholding a release-time program excusing school children from classes to attend religious instruction). Applicable to the current discussion, when the state accommodates religion and remains neutral, there is no establishment. *Id.* at 314. Quite the contrary, when the state shows callous indifference or refuses to accommodate religious beliefs, they are preferring those with no religion. *Id.* One commentator has expressed the following view: "If the Establishment Clause were interpreted to outlaw voluntary, public, faith-based speech in public schools, this would have the effect of turning school officials into prayer police, religious students into enemies of the state, and public schools into institutions of religious apartheid." Kelly J. Coghlan, *Those Dangerous Student Prayers*, 32 ST. MARY'S L.J. 809, 857 (2001).

lem validating the Pledge of Allegiance. Both *Lynch v. Donnelly*[40] and *County of Allegheny v. ACLU*[41] recognized, in dicta, the consistency between the Pledge and the First Amendment.[42] Likewise, a decade ago, the Seventh Circuit addressed the same challenge to the Pledge as the Ninth Circuit but reached a contrary result.[43] The Seventh Circuit concluded that if the Supreme Court felt the pledge and the national motto were inconsistent with the Establishment Clause they would have said so in *Lynch* and *Allegheny*.[44]

III. ANALYSIS OF *NEWDOW V. UNITED STATES CONGRESS* AS COMPARED WITH PRIOR PRECEDENT

A. *The Freedom of Religion and Establishment Clause Considered*

The Ninth Circuit invalidated the reference to God in teacher-led recitation of the Pledge.[45] Although the court's holding was inconsistent with Supreme Court precedent, supporters of the decision and learned scholars consider it well reasoned and legally viable, and predict a doctrinal change is in the air.[46]

All Establishment Clause and Free Exercise of Religion analyses begin with the First Amendment.[47] The First Amendment states: "Congress

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40. 465 U.S. 668 (1984).

41. 492 U.S. 573 (1989).

42. *See* County of Allegheny v. ACLU, 492 U.S. 573, 602-03 (1989) (suggesting that the Pledge of Allegiance is consistent with the Constitution because there is an obvious difference between the Pledge and a Christmas display featuring a nativity scene erected by the city on the courthouse steps); Lynch v. Donnelly, 465 U.S. 668, 676 (1984) (citing the Pledge of Allegiance and the National Motto, even when recited by school children, as examples of appropriate reference to our Nation's religious heritage); *see also* Newdow v. United States Cong., 292 F.3d 597, 612 n.12 (9th Cir. 2002) (recognizing that the Supreme Court has indirectly upheld the Pledge in dicta), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay).

43. *See* Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 448 (7th Cir. 1992) (upholding the Pledge of Allegiance).

44. *See id.* (acknowledging that the Supreme Court sometimes changes its mind, but until it does, the lower courts must adhere to prior precedent).

45. *See Newdow*, 292 F.3d at 611 (finding the Pledge of Allegiance fails the *Lemon* test, the endorsement test, and the coercion test).

46. *See* Armando Villafranca et al., *Flag Pledge Ban Unfurls Protest: Court Ruling Limited, but Reaction Isn't*, HOUS. CHRON., June 27, 2002, at 1, 2002 WL 23204843 (reporting that the Texas Freedom Network supports the validity of the holding); MSNBC, *Judge Stays Own Ruling On Pledge* (June 27, 2002), *at* http://stacks.msnbc.com/news/772714.asp (on file with the *St. Mary's Law Journal*) (quoting a University of Southern California School of Law professor and a Quinnipiac University professor applauding the Ninth Circuit decision).

47. *Compare* Santa Fe Indep. Sch. Dist. v. Doe, 520 U.S. 290, 301-02 (2000) (considering the First Amendment case law when invalidating a school district policy of electing

shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[48] Free Exercise of Religion is a commendable and necessary ideal.[49] Consequently, the tyrannical commingling of church and state led our forefathers to prohibit any establishment of religion while at the same time granting religious freedom.[50]

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students who will give prayers at football games), *and* Lee v. Weisman, 505 U.S. 577, 586-88 (1992) (applying prior Establishment Clause cases to middle school graduation prayers), *with* Wallace v. Jaffree, 472 U.S. 38, 55 (1985) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968), for the proposition that every analysis in this area must begin with a consideration of prior case law), *and* Lynch v. Donnelly, 465 U.S. 668, 672 (1984) (deciding whether the First Amendment allows a city sponsored nativity scene when also coupled with secular displays such as Santa Claus).

48. U.S. CONST. amend. I.

49. *See Lee*, 505 U.S. at 589-90 (concluding that the Establishment Clause exists to protect religion from state interference, citing James Madison's justification: "'[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation'").

50. *See id.* at 591 (indicating that the Framers considered religious establishment "antithetical to the freedom of all" and thus the government should not participate in religious debate). *See generally* Sch. Dist. v. Schempp, 374 U.S. 203, 214 (1963) (recalling that early religious persecution planted in the hearts of the Founding Fathers the desire to establish a country supportive of religious freedom); Everson v. Bd. of Educ., 330 U.S. 1, 8-13 (1947) (discussing the religious persecution suffered by early settlers). Most settlers left Europe to escape state enforced religious conformity. *Id.* at 8. Depending on the controlling body, Protestants persecuted the Catholics and vice versa, and all of these at one time or another persecuted Jews. *Id.* at 9. The cost of nonconformance was imprisonment, torture, or death. *Id.* Indeed, the government exacted such punishments for disrespecting clerics, and nonattendance at church meetings, and failure to pay church taxes and tithes. *Id.* For example, the story of William Tell demonstrates such persecution. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 n.8 (1943). The law required Tell, a Quaker, to salute a bailiff's hat, and as penalty for refusing, he was forced to shoot the apple off his son's head. *Id.* England punished many Quakers for refusing to remove their hats. *Id.* The same persecution persisted in America. *Everson*, 330 U.S. at 10. People from various sects endured persecution because they steadfastly adhered to their standards rather than conform. *Id.* For example, in the late 1830s and early 1840s, one of the darker times of this nation's history, Governor Lilburn Boggs of Missouri embarked on a campaign to eradicate the Church of Jesus Christ of Latter-Day Saints, also referred to as Mormons. *See* GORDON B. HINCKLEY, TRUTH RESTORED 61 (1979) (indicating that Lilburn W. Boggs was an anti-Mormon, and as governor he allowed mobs to persecute the Mormons). He issued an extermination order, giving Missouri mobs free rein to drive the Latter-Day Saints from its borders. *See id.* (citing Boggs who said, "'The Mormons must be treated as enemies, and must be exterminated or driven from the state if necessary for the public peace'"). Missouri mobs burned homes, drug citizens into the streets to be whipped and beaten, and imprisoned Mormon leaders without trials. *See id.* at 57, 62 (reporting that the leaders escaped execution only because the army commander refused to carry out his orders). Ultimately, the church was so persecuted that they removed to Utah, which at the time was desolate except for native American Indians and secluded by the Rocky Mountains. *See id.* at 81-86 (discussing the assassination of the Mormon leader and his brother while he was imprisoned and the ultimate resolution to leave Nauvou, Illinois). More re-

Arguably, the Establishment Clause and Free Exercise of Religion Clause are distinct facets of the First Amendment.[51] Free Exercise of Religion means that the government will not restrict the exercise of any religion.[52] On the other hand, Establishment Clause jurisprudence provides that the government must remain neutral by not making any sug-

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cent events have further demonstrated the necessity of this Amendment. In *Doe v. Santa Fe Independent School District*, the children protesting the inclusion of prayer at graduation requested anonymity in the proceedings to avoid persecution. *See* Doe v. Santa Fe Indep. Sch. Dist., 933 F. Supp. 647, 651 (S.D. Tex. 1996) (considering whether a possibility of retaliation by militant religious groups existed if the court allowed disclosure of the plaintiff's names). The District Court permitted the plaintiffs to proceed anonymously throughout the trial on liability. *Id.* at 648. The issue of anonymity arose prior to the trial to determine damages. *Id.* Many groups, including administrators, teachers, and other employees, "overtly or covertly" attempted "'to ferret out the identities of the Plaintiffs . . . by means of bogus petitions, questionnaires, individual interrogation, or downright "snooping"'" asserting First Amendment public right to know. Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 809 n.1 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000). Initially, the problem arose when the plaintiff's schoolteacher passed out pamphlets promoting a Baptist revival meeting. *Santa Fe*, 168 F.3d at 810. When the plaintiff, who belonged to the Church of Jesus Christ of Latter-Day Saints, asked for a pamphlet her teacher inquired about her religious affiliation. *Id.* After learning that she was Mormon, he launched into a diatribe about the falsity of her beliefs, classifying Mormons as a "cult." *Id.* Understandably, his comments sparked numerous discussion from her classmates whereby some stated, "'[h]e sure does make it sound evil'" and also "'it's kind of like the KKK, isn't it?'" *Id.* The Supreme Court concludes that the choice of religion is committed to personal agency to protect persons possessing minority viewpoints and "'[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.'" Lee v. Weisman, 505 U.S. 577, 589-90 (1992); *see also Barnette*, 319 U.S. at 642 (concluding that religious freedom is not controlled by public opinion, and not vice versa). Clearly:

> Few of us can look too far back in our personal histories—and the Country certainly cannot ignore the circumstance of its own birth—without acknowledging that our ancestors were people who suffered significantly because of their religious belief and who were ostracized by their national communities or made to suffer poverty or even worse because of their religious beliefs. As one visitor to our shores, himself a refugee from Nazi tyranny, put it, Americans can all say, "We are bruised souls." We each carry "the wounds and sorrows of ancestors, and that memory of the sufferings caused by persecution and prejudice which they left to their progeny" is our "spiritual patrimony."

Books v. City of Elkhart, 235 F.3d 292, 308 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001) (footnote omitted).

51. *See Lee*, 505 U.S. at 591 (indicating that the Free Exercise Clause protects freedom of conscience, but the Establishment Clause prevents state intervention into religious affairs).

52. *See id.* at 592 (holding that state created religion puts at risk the freedom of conscience and belief which ensures that faith is real, and is the mark of a free people).

gestions or inferences that it prefers one belief or sect over another.[53] However, the Constitution does not require the government to mechanically or absolutely apply the Establishment Clause.[54] Indeed, the Court recognized that complete separation is impossible.[55] Further, "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid."[56] Therefore, instead of invalidating every action that confers a benefit, recognizes, or accommodates religion, the Court scrutinizes the challenged conduct during a constitutional analysis.[57] The Ninth Circuit appropriately applied the following tests,[58] which will be examined hereafter: the *Lemon* Test,[59] the coercion test,[60] and the endorsement test.[61]

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53. *See* Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (suggesting that adding the term "or voluntary prayer" to a statute providing a moment of silence in public schools ignores neutrality); Sch. Dist. v. Schempp, 374 U.S. 203, 218 (1963) (providing that the Constitution does not require the state antagonism toward religion); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (prohibiting the state from forcing children to Pledge Allegiance). In *Barnette*, the Court held:

> 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. If there are any circumstances which permit an exception, they do not now occur to us.

Barnette, 319 U.S. at 642.

54. *See* Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (indicating that, in determining Establishment Clause violations, "no fixed, *per se* rule can be framed").

55. *Compare Lee*, 505 U.S. at 598 (holding that a relentless exclusion of religion from all public life is inconsistent with the Constitution), *and* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (concluding that prior precedent does not require absolute separation of church and state), *with* Zorach v. Clauson, 343 U.S. 306, 312 (1952) (finding that absolute separation would engender hostility and suspicion between these entities).

56. *See Lynch*, 465 U.S. at 683 (discussing the Pawtucket, Rhode Island Christmas display in the downtown shopping district).

57. *See id.* at 678 (suggesting that the purpose of the Establishment Clause is "'not to write a statute'" but to state an objective).

58. *Cf.* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301-08 (2000) (applying the *Lemon*, coercion, and endorsement tests).

59. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (suggesting the following test: (1) whether the state act has a secular purpose; (2) whether the principle and primary purpose is to advance or inhibit religion; and (3) whether the action is an excessive government entanglement with religion).

60. *See Lee*, 505 U.S. at 599 (finding that graduating seniors, who may object to prayer at graduation, are induced to conform by subtle peer pressure).

61. *See* County of Allegheny v. ACLU, 492 U.S. 573, 595, 597 (1989) (holding that Courts must consider whether the government action will be perceived by adherents of the controlling religion as endorsement, and by the nonadherents as disapproval); Wallace v. Jaffree, 472 U.S. 38, 60-61 (1985) (concluding that the Constitution requires neutrality and whenever the state speaks on religion courts must ask whether there is endorsement or disapproval); *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (suggesting that govern-

B. *Applying the* Lemon *Test*

1. Secular Purpose

The *Newdow* decision analyzed Establishment Clause jurisprudence by considering the test announced in *Lemon v. Kurtzman*.[62] The *Lemon* test, although still good law, has recently fallen into disfavor with the Supreme Court.[63] Notwithstanding this disfavor, the Ninth Circuit applied the *Lemon* test.[64] The first prong of the test asks whether the government action has at least one secular purpose.[65] Newdow conceded that the Pledge of Allegiance, instead of exclusively promoting the existence of a Supreme Being, also promotes patriotism, which is a secular value.[66]

The 1954 Act promotes this nation's recognition of the existence of God.[67] However, government action can be upheld if it is not entirely motivated by a purpose to advance religion or if the act has at least one secular purpose.[68] When assessing the secular purpose, courts must "'distinguis[h] a sham secular purpose from a sincere one.'"[69] For example, in *Wallace v. Jaffree*,[70] Alabama amended its statute, which allowed a moment of meditation in school that included "meditation or voluntary prayer."[71] Alabama's expressed purpose was to provide children an opportunity to collect their thoughts and prepare for the day, but the obvi-

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ment endorsement sends the message that nonadherents are outsiders, while "[d]isapproval sends the opposite message").

62. 403 U.S. 602 (1971).

63. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (setting forth the three-part test); *see, e.g.*, Mitchell v. Helms, 530 U.S. 793, 807-08 (2000) (modifying the *Lemon* test in the school aid context); Tangipahoa Parish Bd. of Educ. v. Freiler, 120 S. Ct. 2706, 2708 (2000) (Scalia, J., dissenting) (expressing disfavor for the *Lemon* test); *Lee*, 505 U.S. at 587-88 (refusing to overrule *Lemon*, as suggested by petitioners and amicus, but choosing to analyze the issue without reference to the *Lemon* test); *Sherman*, 980 F.2d at 445 (refusing to resolve the case with *Lemon*).

64. *See generally* Newdow v. United States Cong., 292 F.3d 597, 609-12 (9th Cir. 2002) (applying the *Lemon* test), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay).

65. *Lemon*, 403 U.S. at 612 (establishing the *Lemon* test).

66. *See Newdow*, 292 F.3d at 611 (conceding satisfaction of the secular purpose prong).

67. *See* H.R. REP. NO. 83-1693 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340 (acknowledging the dependence of this nation on the "Creator").

68. *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (invalidating actions that are entirely motivated by a purpose to further sectarian beliefs).

69. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000); Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987); *Wallace*, 472 U.S. at 64; *id.* at 75 (O'Connor, J., concurring).

70. 472 U.S. 38 (1985).

71. Wallace v. Jaffree, 472 U.S. 38, 40 (1985).

ous intent was to return prayer to school.[72] Conversely, the 1954 amendment to the Pledge professes a desire to strengthen our nation's children by alerting them to the true meaning of our country, to educate them concerning national origins, and to further the American way of life in order to prepare them for leadership and future challenges.[73] Essentially, the Pledge of Allegiance is an educational device, and the Supreme Court and others approve such a policy when used for educational purposes even if the policy appears outwardly sectarian.[74]

Likewise, in *Santa Fe Independent School District v. Doe*,[75] the school district amended its school policy to allow elections to determine whether students may offer a prayer at graduation and if so, who should give the prayer.[76] The plain language of the policy in *Santa Fe* promoted prayer.[77] Furthermore, all students knew that the sole purpose of the policy was to promote prayer.[78] In contrast to *Wallace* and *Santa Fe*, the 1954 Act, while promoting sectarian recognition of monotheism, also promotes patriotism and teaches students national heritage.[79]

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72. *See Wallace*, 472 U.S. at 56-57 (concluding that the alternative meditation or voluntary enactment was an effort to return prayer to public schools); *see, e.g.*, *Santa Fe*, 530 U.S. at 308-09 (finding that the school board claimed the pre-game prayer fostered sportsmanship, and solemnized the sporting event, but concluded that the policy was an attempt to preserve pre-game prayer); *Edwards*, 482 U.S. at 587 (citing the author of the bill, which countered the teaching of evolution with Creationism, as saying "'[m]y preference would be that neither [creationism nor evolution] be taught'").

73. *See* H.R. REP. NO. 83-1693 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2341 (professing a desire to arouse a consciousness of the true meaning of our country and government, and to daily impress schoolchildren with understanding of our way of life and origins); *see also* Newdow v. United States Cong., 292 F.3d 597, 611 (9th Cir. 2002) (conceding that the 1954 Act also had the secular purpose of promoting patriotism), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay).

74. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (approving use of the Bible in school if used as an appropriate study of literature, history, and world civilizations); Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963) (admitting that "the Bible is worthy of study for its literary and historic qualities"); Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 444 (7th Cir. 1992) (suggesting that the Pledge of Allegiance is just one of the ways the schools teach children patriotism and an effort to support its own survival).

75. 530 U.S. 290 (2000).

76. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 n.24 (2000) (discussing the school district's graduation and football game prayer policy).

77. *See id.* at 314-15 (finding the plain language of the statute suggests a policy endorsing religious invocation).

78. *See id.* (refusing to "turn a blind eye" to a policy professing First Amendment protection when all students know that the purpose of the policy is to provide prayers at football games and graduation).

79. *See* H.R. REP. NO. 83-1693 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2341 (professing a desire to arouse a consciousness of the true meaning of our country and government and to daily impress schoolchildren with an understanding of our way of life and origins); *see also* Newdow v. United States Cong., 292 F.3d 597, 611 (9th Cir. 2002)

2. Effects Prong

The second prong of *Lemon* permits state action when the primary or principal effect of that action neither advances nor inhibits religion.[80] In *Newdow*, the majority held that given the youth and impressionability of school-age children, the Pledge of Allegiance conveys to children state approval of monotheism but disapproval of atheism.[81] Crucial to this prong is that followers of the promoted belief are left with the impression that the government supports their convictions while concurrently sending a message of disapproval to non-followers.[82] Under this framework, the 1954 Act conflicts with *Lemon* since the legislative intent unequivocally supports monotheism as an accepted and appropriate belief to the exclusion of communism.[83]

However, the Ninth Circuit's reasoning in *Newdow* is not immune to scrutiny. First, the Supreme Court, in dictum, found the Pledge of Allegiance and the national motto consistent with the Establishment Clause.[84] Further, mere accommodation by the government of a particular religion or practice does not invalidate that action.[85] For example, Congress has in the past and without disapproval, appointed Christmas and Thanksgiving as national holidays and provided vacation time *and* pay to federal employees to accommodate these holidays; subsidized art galleries who use federal funds to display and upkeep art with religious themes; and has even commissioned a paid chaplain for Congress and the military.[86] Indeed, the Supreme Court approves reading the Bible in school if examined in the appropriate study of history, ethics, or religious

(conceding that the 1954 Act also had the secular purpose of promoting patriotism), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay).

80. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

81. *See Newdow*, 292 F.3d at 611 (indicating that the teacher led Pledge of Allegiance will give the impression that the state espouses a belief in God over a belief in atheism).

82. *See id.* (citing Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985)).

83. *See* H.R. REP. NO. 83-1693 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340 (acknowledging the dependence of this Nation on the "Creator" but denouncing communism).

84. *See* County of Allegheny v. ACLU, 492 U.S. 573, 602 (1989) (noting the Pledge of Allegiance consistent with the Establishment Clause); Lynch v. Donnelly, 465 U.S. 668, 676 (1984) (concluding that the Pledge, National Motto, and Christmas, although state sponsored, are still consistent with the Establishment Clause).

85. *See Lynch*, 465 U.S. at 677-78 (reaffirming that accommodation of religion follows the best of traditions and respects the religious nature of Americans).

86. *See id.* at 676-77 (discussing constitutionally valid government sponsorship of various religious activities).

comparisons.[87] Thus, as *Lynch v. Donnelly*[88] held, accommodating religious beliefs follows the best of our traditions so long as the accommodation extends to all faiths with "hostility toward none."[89] Here, Pledge recitation supports no hostility but merely accommodates the belief that a majority of Americans follow.[90] Although the Free Exercise of Religion has always been personal and not subject to majority vote,[91] the possibility is unlikely that state sponsorship of the Pledge will create a theocracy or suppress someone's convictions.[92]

3. Excessive Government Entanglement

Finally, *Lemon* permits state action that does not involve an excessive government entanglement with religion.[93] The *Newdow* majority never reached this prong since it invalidated the Pledge of Allegiance under the effects prong.[94] Moreover, the *Lemon* test has, of late, fallen into disfavor,[95] and, in fact, the Supreme Court found little problem with collapsing the first two prongs of the test to form the endorsement test.[96]

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87. *See id.* at 679 (approving the use of religious artifacts if used in the appropriate educational context); Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963) (admitting that "the Bible is worthy of study for its literary and historic qualities").

88. 465 U.S. 668 (1984).

89. Lynch v. Donnelly, 465 U.S. 668, 677 (1984).

90. *See* Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 445 (7th Cir. 1992) (concluding that "[o]bjection by the few does not reduce to silence the many who *want* to pledge allegiance to the flag") (emphasis in original).

91. *See* Wallace v. Jaffree, 472 U.S. 38, 52 (1985) (defining Freedom of Religion as the freedom to refrain from choosing the creed of the majority). *But see* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 304 (2000) (indicating that student elections do not protect minorities but place them "at the mercy of the majority").

92. *See* Newdow v. United States Cong., 292 F.3d 597, 613 (9th Cir. 2002) (Fernandez, J., concurring and dissenting) (doubting that the term "under God" will create a theocracy), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay); *Sherman*, 980 F.2d at 447 (concluding that mottoes and other ceremonial practices that promote deity are *de minimus* because they have lost true religious significance through rote repetition).

93. Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).

94. *See Newdow*, 292 F.3d at 611 (invalidating the 1954 Act solely on the effects prong).

95. *See, e.g.*, Tangipahoa Parish Bd. of Educ. v. Freiler, 120 S. Ct. 2706, 2708 (2000) (Scalia, J., dissenting) (expressing disfavor for the *Lemon* test); Lee v. Weisman, 505 U.S. 577, 587 (1992) (refusing to overrule *Lemon*, as suggested by amicus, but also analyzing the issue without reference to the *Lemon* test); Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 445 (7th Cir. 1992) (refusing to resolve the case with *Lemon*).

96. *See* Mitchell v. Helms, 530 U.S. 793, 807-08 (2000) (modifying the *Lemon* test in the school aid context); County of Allegheny v. ACLU, 492 U.S. 573, 592-93 (1989) (paying close attention to whether the state action has either the purpose or effect of endorsing religion); Books v. City of Elkhart, 235 F.3d 292, 301-02 (7th Cir. 2000), *cert. denied*, 532

Consequently, the Ninth Circuit found justification in not reaching this prong.[97] Nevertheless, the Supreme Court explained excessive government entanglement in *Lynch*, upholding a city sponsored Christmas exhibit which displayed a Santa Claus house, Christmas tree, a banner reading "Season's Greetings," and a newly acquired nativity scene.[98] There the Court held, "'not every law that confers an "indirect," "remote," or "incidental" benefit upon [religion] is, for that reason alone, constitutionally invalid.'"[99] Accordingly, while the First Amendment requires neutrality, this does not translate into "an absolutely straight line."[100] Inflexibility in this respect defeats the principle forbidding bias for or against any particular sect.[101] Short of establishment or interference of religion there is wiggle room for "benevolent neutrality" that permits accommodation of religious practice without interference.[102] The Pledge of Allegiance does not involve excessive government entanglement. In fact, suppression of the Pledge at school may favor atheists and other opponents over believers.[103] Moreover, the Supreme Court currently, and in the past, has approved state-sponsored religious programs that involve the same, if not greater, government entanglement than the Pledge.[104]

U.S. 1058 (2001) (reiterating that the Court collapsed the first two prongs of the *Lemon* test to form the endorsement test).

97. *See Newdow*, 292 F.3d at 609-11 (applying only the effects and purpose prong of the *Lemon* test).

98. *See* Lynch v. Donnelly, 465 U.S. 668, 671 (1984) (discussing the Pawtucket, Rhode Island Christmas display in the downtown shopping district).

99. *Id.* at 683.

100. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

101. *Id.*

102. *Id.*

103. *See* County of Allegheny v. ACLU, 492 U.S. 573, 610 (1989) (concluding that a religious state is not the same thing as atheistic or antireligious); Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (finding the addition of the words "or voluntary prayer" to the one minute of meditation policy ignores the established principle of neutrality); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (requiring the neutrality with regards to competition between sects); Newdow v. United States Cong., 292 F.3d 597, 613 (9th Cir. 2002) (Fernandez, J., concurring and dissenting) (reiterating that the Establishment Clause was not written to completely drive out religion but to avoid discrimination), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay).

104. *See, e.g.*, Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2467-68 (2002) (finding a program neutral that granted financial aid to religious schools for tutorial services provided to lower class children because the funds went through a nongovernmental, private organization instead of directly from the government); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 118 (2001) (disapproving the school district's refusal to allow a religious group to conduct meetings on school property after school hours, because refusal would send the impression that the state disfavored that group's views); Mitchell v. Helms, 530 U.S. 793, 809-13 (2000) (supporting a program that lent equipment to both private and public

C. *The Endorsement Test*

The Ninth Circuit next applied the Endorsement Test, first discussed in Justice O'Connor's concurrence in *Lynch*, and later adopted by the *Allegheny* plurality.[105] In *Newdow*, the majority held that by pledging allegiance, a person does not just describe the United States but swears allegiance to certain values-such as liberty, justice for all, indivisibility, and monotheism.[106] Essentially, to atheists, the Pledge's reference to God is to Judeo-Christians like saying one nation "under Zeus," or "Vishnu" for endorsement of religious purposes.[107] The First Amendment allows citizens to subscribe to one creed as may seem appropriate to *them*, or no belief at all.[108]

The Ninth Circuit invalidated the Pledge of Allegiance because the Pledge recognizes God.[109] Such a result promotes atheism to the detriment of those who follow a belief in God.[110] Judge Fernandez, the lone dissenter in *Newdow*, concluded that the Founders never intended for the First Amendment to completely drive all forms of religion from the pub-

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schools because the state allocated resources based on neutral, secular criteria that neither favored or disfavored religion, which did not involve government indoctrination).

105. *See Newdow*, 292 F.3d at 608 (borrowing the holding in *Allegheny* that the state endorses religion if they send "a message to unbelievers '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'").

106. *See id.* at 607 (finding that the Pledge of Allegiance takes a position on monotheism, which is an exclusively religious question).

107. *See id.* at 607-08 (concluding none of these expressions, including under God, are neutral with respect to religion).

108. *See* Wallace v. Jaffree, 472 U.S. 38, 51 (1985) (deciding that freedom of religion means the freedom to choose one's own creed, refrain from accepting the creed of the majority, or following no creed at all); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (concluding that no government may compel a person to profess faith in any belief). Justice Kennedy recognized that when interpreting the Constitution, courts act with absolutely no intermingling whatsoever between church and state or they continue to make exceptions. County of Allegheny v. ACLU, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring and dissenting). Either the First Amendment caters to person offended by these incidental references to God and proscribes the motto, the pledge, and national recognition of Christmas, or the Court continues to carve out exceptions based on "historical antecedent." *Id.* at 674 & n.10. Justice Kennedy found neither approach satisfactory. *Id.* at 674.

109. *See* Newdow v. United States Cong., 292 F.3d 597, 612 (9th Cir. 2002) (concluding that the Pledge of Allegiance violates the Establishment Clause due to the addition of the words "under God"), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay).

110. *See Newdow*, 292 F.3d at 613 (Fernandez, J., concurring and dissenting) (reiterating that the Establishment Clause was not written to completely drive out religion but to avoid discrimination).

lic sphere but was intended to avoid discrimination.[111] The First Amendment is neither atheistic nor anti-religious but establishes neither atheism nor religion,[112] and above all, requires neutrality.[113] Essentially, only those who would object to the inclusion of "under God" are bent on driving religion completely from every corner of public life.[114] In the current case, Newdow appears to be such a person.[115] In his own words, he challenged the constitutionality of the Pledge only because he believed attacking the national motto would be the weaker of the two cases.[116]

For nearly half a century, the Supreme Court has recognized that our institutions presuppose a belief in God.[117] By enforcing complete and absolute separation, the Court would promote indifference between religion and state.[118] Indeed, the Supreme Court, as well as other courts, list

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111. *See id.* (Fernandez, J., concurring and dissenting) (proposing that government can neither discriminate for nor against a particular religion).

112. *Compare* County of Allegheny v. ACLU, 492 U.S. 573, 610 (1989) (concluding that a religious state is not the same thing as an atheistic or anti-religious state), *with* Zorach v. Clauson, 343 U.S. 306, 314 (1952) (suggesting that if the government showed callous indifference to religion, they would be preferring atheists and agnostics over those who follow religion).

113. *See* Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (finding the addition of the words "or voluntary prayer" to the one minute of meditation policy ignores the established principle of neutrality); *see also Zorach*, 343 U.S. at 314 (requiring neutrality with regards to competition between sects).

114. *See Zorach*, 343 U.S. at 313 (concluding that a "fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'"); *see also Newdow*, 292 F.3d at 615 (Fernandez, J., concurring and dissenting) (suggesting that to remove "under God" would "cool the febrile nerves of a few at the cost of removing the healthy glow conferred upon many citizens when the forbidden verses, or phrases, are uttered, read, or seen").

115. *See Newdow*, 292 F.3d at 614-15 (Fernandez, J., concurring and dissenting) (interpreting Newdow's theory of the Constitution to require removal of all references to deity in patriotic hymns such as "God Bless America," "America the Beautiful," and "The Star Spangled Banner").

116. *See Hannity & Colmes: Interview with Michael Newdow* (Fox News television broadcast, June 26, 2002), 2002 WL 2789039 (answering that Newdow's initial offense had been over the national motto on coinage). Newdow claimed that when buying soap on one occasion, he pulled change from his pocket and the words, "In God We Trust" struck him as offensive. *Id.* A professed atheist, he claimed his offense arose because he did not trust in God and felt put upon by this inference. *Id.* Newdow knew that there must be some Constitutional violation but doubted his standing to bring suit regarding the coinage. *Id.* However, his daughter recited the Pledge of Allegiance every day and he felt he had a stronger suit under a theory that as a father, he could challenge the Pledge of Allegiance for harming his daughter. *Id.*

117. *See Zorach*, 343 U.S. at 313 (professing that "[w]e are a religious people whose institutions presuppose a Supreme Being").

118. *See* Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (refusing to mechanically apply the Establishment Clause in a manner that would confer benefits or special recognition on

numerous constitutionally valid situations where the state intermingles religious references. For example, some of these valid situations include: provisions of textbooks by the state to private schools, Sunday Closing laws,[119] the Declaration of Independence, the opening cry in the Supreme Court, "'God save the United States and this Honorable Court,'"[120] legislative prayer,[121] singing the National Anthem and other patriotic songs that reference deity, the national motto and its inclusion on coinage,[122] and proclamations making Christmas and Thanksgiving national holidays.[123] Enforcing absolute separation could create ridiculous results. For example, municipalities would violate the Constitution by sending fire and rescue teams to a burning synagogue, or sending police to direct traffic in and out of busy Sunday church services.[124] The state could not even exact taxes from religious institutions.[125]

Consequently, the Supreme Court requires substance over form.[126] In other words, courts should look at the surroundings and context of the religious reference to determine whether the state truly intended to con-

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a certain religion); *see also Zorach*, 343 U.S. at 312 (concluding that complete separation would result in the alienation of church and state).

119. *See Lynch*, 465 U.S. at 681-82 (suggesting that a nativity scene mingled amongst Santa Claus and other sectarian displays establishes a religion no more than providing tax exemptions to church property or release time seminary programs for school children).

120. *See Zorach*, 343 U.S. at 313 (concluding that a "fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'"); *see also* Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 446 (7th Cir. 1992) (questioning whether the Founding Fathers considered invocations of God as establishment).

121. *See* Marsh v. Chambers, 463 U.S. 783, 792 (1983) (approving legislative prayer before the beginning of the session); *Zorach*, 343 U.S. at 313 (suggesting the ridiculousness of completely separating church and state).

122. *See* County of Allegheny v. ACLU, 492 U.S. 573, 602 (1989) (finding the motto and Pledge of Allegiance consistent with the First Amendment); *see also* Newdow v. United States Cong., 292 F.3d 597, 615 (9th Cir. 2002) (Fernandez, J., concurring and dissenting) (denying that the National Motto nor the Pledge of Allegiance have any tendency to establish religion), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay).

123. *See County of Allegheny*, 492 U.S. at 674 n.10 (Kennedy, J., concurring and dissenting) (questioning the soundness of the majority's application of the endorsement test since it's application would eliminate practices that the Supreme Court would not proscribe).

124. *Zorach*, 343 U.S. at 312-13.

125. *Id.*; *see also* Lynch v. Donnelly, 465 U.S. 668, 681-82 (1984) (listing occasions when the Court has upheld state activities seeming to establish religion).

126. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (finding the endorsement of the message to be established by factors beyond the text of the policy); Lee v. Weisman, 505 U.S. 577, 595 (1992) (suggesting that the law reaches past formalism); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (refusing to engage in a legalistic minuet where precise rules of form govern).

vey a religious endorsement.[127] For example, in *Allegheny*, the Court considered the city-sponsored Christmas crèche that featured a nativity scene.[128] The Court held the nativity scene, by itself, demonstrated that the city favored a belief in Christianity.[129] Similarly, in *Lynch*, the Court found the nativity scene constitutional because the nativity scene also displayed a Santa Claus house and other secular materialistic items.[130] Likewise, secular ideals, such as liberty and justice, surround the reference to God in the Pledge.[131] Arguably, opponents of this conclusion may suggest that courts must consider the particular act of Congress; for it was Congress that added the words "under God" to the original pledge that had no such reference.[132] However, such a diagnosis fails to consider *Lynch* where the city used municipal funds to purchase the nativity scene many years after the first erection of the original Christmas display.[133] The critical element is the context of the religious reference, not when the state implemented the policy.

Even in *Allegheny*, the Court validated a menorah, a religious icon for the Jewish faith, since the city placed the menorah at the base of a decorated Christmas tree along with a sign entitled "Salute to Liberty."[134] The Court held that the religious display, in this context, tended to promote the holiday season instead of endorsing religion.[135] Likewise, the Pledge extols not only monotheism, but also clearly secular virtues such

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127. *See Lee*, 505 U.S. at 595 (acknowledging the voluntary attendance policy at graduation but concluding that, "to say a student has a real choice not to attend her high school graduation is formalistic in the extreme"); *Lemon*, 403 U.S. at 614 (examining the form of the relationship for the light it casts on the substance).

128. *See County of Allegheny*, 492 U.S. at 579-80 (describing the challenged Christmas display).

129. *See id.* at 598-99 (stating that "the effect of a crèche display turns on its setting" and the challenged display excluded items, such as a Santa Claus, reindeer, or other secular items that would detract from the religious setting).

130. *Compare* Lynch v. Donnelly, 465 U.S. 668, 686 (1984) (approving the inclusion of a single symbol of Christianity among numerous secular items), *with County of Allegheny*, 492 U.S. at 598-99 (finding the lack of secular items as an establishment of Christianity).

131. *See* 4 U.S.C. § 4 (2000) (setting forth the Pledge of Allegiance and the appropriate manner of recitation); *see also* Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 444 (1992) (concluding that the Pledge of Allegiance engenders patriotism).

132. *See* H.R. REP. NO. 83-1693 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340 (suggesting that the inclusion of the words "under God" would further recognize this Nation's dependence upon the moral direction of God).

133. *See Lynch*, 465 U.S. at 672 (discussing the city's motivation for the Christmas display).

134. *See County of Allegheny*, 492 U.S. at 619 (approving the display since residents of Pittsburgh would not consider this endorsement of Christian or Jewish beliefs).

135. *See id.* (concluding that since the Christmas tree by itself is not an endorsement of religion when coupled the "Salute to Liberty" sign, the city need not exclude the menorah); Books v. City of Elkhart, 235 F.3d 292, 305 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058

as liberty, justice for all, unity, and patriotism.[136] Before anything else, the Pledge promotes patriotism.[137]

Similarly, the Court in *Lee* looked past the graduation policy making attendance at graduation voluntary.[138] The Court found the policy formalistic and ridiculous that students would not feel compelled to attend graduation.[139] Likewise, the Seventh Circuit upheld the Pledge of Allegiance, not because the Pledge lacked meaning, but because all religious significance has been lost through its rote repetition, much like the motto "In God We Trust" and Christmas trees.[140] Essentially, the form of the Pledge of Allegiance denotes a belief in God, but its actual religious substance or meaning is either: (1) lost and thus undeserving of invalidation, risking offense to most Americans in order to pacify a few objectors; or (2) focused more on nationalism and patriotism than deism.[141]

Notably, opponents of the Pledge may use this reasoning against supporters: why should the Court support the inclusion of language that has become rote and lacking in meaning?[142] However, such a result fails to

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(2001) (agreeing with the Court's assessment of the menorah in *County of Allegheny v. ACLU* since that display did not have the primary effect of endorsing religion).

136. *See Sherman*, 980 F.2d at 444 (acknowledging that schools transmit important patriotic virtues via the Pledge).

137. *See id.* (suggesting that the Pledge of Allegiance is just one of the ways the schools teach children patriotism to further national survival).

138. *See* Lee v. Weisman, 505 U.S. 577, 595 (1992) (disagreeing with the school board statement that attendance at graduation is voluntary since graduation is one of life's most momentous occasions).

139. *See id.* (refusing to believe a teenager feels there is a real choice in attending their own graduation).

140. *See Sherman*, 980 F.2d at 447 (recognizing that courts should protect ceremonial deism because most of the significance is lost through repetition).

141. *See* County of Allegheny v. ACLU, 492 U.S. 573, 674 n.10 (1989) (Kennedy, J., dissenting) (concluding that Thanksgiving Proclamations, invocations of God in Congress, and referencing God in the Pledge of Allegiance are all practices that the Court will not proscribe); Marsh v. Chambers, 463 U.S. 783, 818 (1983) (suggesting that the motto and Pledge of Allegiance are constitutional not because their value is *de minimus*, but because all true religious significance has been lost); Sch. Dist. v. Schempp, 374 U.S. 203, 303 (1963) (Brennan, J., concurring) (suggesting that patriotic expression such as the motto have become so interwoven into society that they do not raise First Amendment concerns); *Sherman*, 980 F.2d at 447-48 (upholding the Pledge of Allegiance because, among other things, the Pledge of Allegiance has lost its religious purpose much like the National Motto and Christmas trees).

142. *See* Lee v. Weisman, 505 U.S. 577, 594 (1992) (concluding that the prayers offered at graduation may not be labeled as *de minimus*, since that would be offensive to the rabbi who offered the prayer); Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963) (invalidating the argument that religious practices in the school setting was only a relatively minor breach of the First Amendment).

take into account that removal would be offensive to proponents.[143] The Ninth Circuit, in effect, has done the very thing it condemned.[144] Like *Good News Club v. Milford Central School*,[145] by removing "under God," the Ninth Circuit sends a message to schoolchildren that the state opposes a belief in God.[146]

D. *Coercion Test*

The Ninth Circuit counters the Pledge of Allegiance most persuasively by applying the coercion test as adopted in *Lee v. Weisman*.[147] The Ninth Circuit refused to accept the argument that nonbelievers should simply respect the believer's religious desire to recite the Pledge.[148] Although such a request may seem like a reasonable and minor concession to followers of Judeo-Christian beliefs, to nonbelievers this appears as "an attempt to employ the machinery of the state to enforce religious orthodoxy" in the classroom context.[149] Essentially, a coercive effect exists since the child must recite the Pledge daily, acknowledging the existence of God.[150] The Ninth Circuit looked no further than President Eisenhower's pronouncement while signing the Act into law: "From this day forward, the millions of our school children will daily proclaim in

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143. *See* Newdow v. United States Cong., 292 F.3d 597, 614 (9th Cir. 2002) (Fernandez, J., concurring and dissenting) (recognizing that some may feel uncomfortable about the term "under God" used in their presence, but others may take offense if these words are omitted), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay).

144. *See id.* at 608 (advocating neutrality in government action to avoid making nonadherents to majoritarian beliefs feel like outsiders). *But see Schempp*, 374 U.S. at 225 (refusing to establish a secular state preferring atheists to those who do believe in religion); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (finding that callous indifference to religion prefers those who do not believe in religion over those who do).

145. 533 U.S. 98 (2001).

146. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 118 (2001) (concluding that exclusion of the Christian club would be perceived as viewpoint discrimination since other clubs are given use of the facilities). The school district allowed various clubs to meet, after school hours on school premises. *Id.* at 102. The Good News Club applied for the opportunity to conduct meetings on campus but were denied. *Id.* at 103. The school board was attempting to avoid any Establishment Clause complications. *Id.*

147. *See* Lee v. Weisman, 505 U.S. 577, 599 (1992) (forbidding public schools from persuading, inducing, or compelling a student to participate in school activities that they object to).

148. *See Newdow*, 292 F.3d at 608-09 (citing *Lee*, 505 U.S. at 592, 599).

149. *See id.* (recognizing the impressionability of school children and their perception that they must follow the rules).

150. *See id.* (referencing the legislative history and the context of the 1954 Act).

every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty."[151]

Since *Barnette*, all school districts attempt to rebut the coercive effect by classifying attendance or participation as voluntary.[152] For example, in *Santa Fe* and *Lee*, the school district policy made participation at football games and graduation ceremonies noncompulsory.[153] Likewise, in *Schempp*, the school district policy excused students, with parental permission, from participation in daily recitation of the Lord's Prayer and the Pledge of Allegiance following a reading, via loudspeaker, of ten verses from the King James version of the Bible.[154] The Supreme Court held that, although the school board permitted nonparticipation, it was not dispositive.[155]

Further, *Lee* discusses at length the social pressure to conform felt by students possessing minority viewpoints.[156] Research suggests that teenagers are particularly susceptible to pressure from peers to conform—especially in matters of social normalcy.[157] The disappointment felt by students who must miss graduation is obvious; for they miss the culmination of their primary education and the opportunity to receive their diplomas along with their closest associates and peers because religious tenets compel absence.[158] Accordingly, attendance at high school football games is no less mandatory.[159] Many students participate as cheerleaders, in the band, or on the team for class credit, but many others have truly genuine desires to meet with their associates and communities to

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151. *Id.*

152. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311 (2000) (suggesting that high school football games are extracurricular and not required); *Lee*, 505 U.S. at 587 (reporting that the school district does not require attendance at graduation as a prerequisite to receiving one's diploma).

153. *Santa Fe*, 530 U.S. at 311; *Lee*, 505 U.S. at 587.

154. *See* Sch. Dist. v. Schempp, 374 U.S. 203, 207-08 (1963) (discussing the school district policy).

155. *Compare Santa Fe*, 530 U.S. at 311 (refuting the contention that students do not feel immense social pressure to attend extracurricular activities), *with Lee*, 505 U.S. at 596 (finding the risk of coercion is especially high in a classroom setting), *and Schempp*, 374 U.S. at 208 (reporting that the children's father acquiesced to participation, although contrary to their beliefs, to prevent disenfranchisement between his children and their teachers and peers).

156. *See Lee*, 505 U.S. at 593 (discussing the social pressure compelling students to participate in high school graduation).

157. *See id.* (citing research that concludes teenagers are susceptible to peer pressure, especially "in matters of social convention").

158. *See id.* at 595 (finding graduation virtually mandatory due to peer pressure).

159. *See Santa Fe*, 530 U.S. at 312 (concluding that teenagers feel immense social pressure to participate in extracurricular activities such as football, and to call these activities "voluntary" is unacceptable legal formalism).

participate in an activity that has become a Friday night tradition.[160] When the loudspeaker brings the crowd to attention, and the student offering the prayer requests that all bow their heads, the nonbeliever must make the crucial decision either to bow his head and show the proper respect—and in a sense conform—or must defiantly stand firm to his beliefs and refuse to worship in a ritual he does not endorse.[161] At best, refusal may only result in personal discomfort; at worst, the student would be derogatorily labeled an atheist or nonconformist, ultimately risking the loss of friends and their respect.[162]

There can be no doubt that other students will take notice of the child who exercises his right to abstain from pledging allegiance.[163] At the cost of persecution, ostracism, jibes, jokes, or the risk of being labeled a communist or un-American, that child would rather jettison his religious scruples for momentary reprieve from scorn or, at least, judgmental and condescending glances from his teachers and peers.[164] Comparatively, many recognize that sects often differ in methods of worship,[165] but there

160. *See id.* at 311-12 (reporting that many students are required to attend football games for school credit, while others feel immense social pressure to attend).

161. *Compare Santa Fe*, 530 U.S. at 312 (finding that objectors to the prayer must make the difficult choice to attend the game or avoid personally offensive religious ceremonies, and this decision is not one the First Amendment allows schoolchildren to make), *and id.* at 295 n.2 (describing the graduation prayer), *with Lee*, 505 U.S. at 593 (finding students in fact participate, even if they object, in the group religious exercise merely by standing quietly and showing the proper respect during the graduation prayer).

162. *See Lee*, 505 U.S. at 594 (concluding nonconforming children required to listen to graduation prayer surely experience embarrassment and intrusion); Sch. Dist. v. Schempp, 374 U.S. 203, 208 & n.3 (1963) (expressing concern that refusal to participate would harm the teacher-student relationship).

163. *See Santa Fe*, 530 U.S. at 312 (noting that pregame prayer coerces those in attendance to participate in a religious ceremony).

164. *See Lee*, 505 U.S. at 596 (reiterating that "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice"); *Schempp*, 374 U.S. at 208 (reciting plaintiff's concern over his children's ostracism). The parents finally acquiesced and allowed their children to participate in the Bible reading, prayer, and Pledge of Allegiance, although contrary to their beliefs. *Id.* at 208. Plaintiffs were members of a specific religious doctrine which forbade a literal reading of the Bible. *Id.* at 208. The children's father testified that "if Roger and Donna were excused from Bible reading they would have to stand in the hall outside their 'homeroom' and that this carried with it the imputation of punishment for bad conduct." *Id.* at 208 n.3 (citations omitted).

165. *See Schempp*, 374 U.S. at 209 (citing to the expert testimony of Dr. Solomon Grayzel). The expert witness indicated that some parts of the New Testament contradict many Jewish beliefs. *Id.* In fact, Jews find blasphemous the Christian idea that Jesus is the Son of God, and many parts of the New Testament bring Jews into ridicule and scorn. *Id.* Grayzel further testified that the derogatory effect of reading passages of the New Testament may be explained to Jewish children, alleviating the negative effects, but a reading without any explanation serves to alienate Jewish children. *Id.*

are few with patience for those who appear unpatriotic, which is the perception when one refuses to recite the Pledge of Allegiance.[166]

Furthermore, as some nonbelievers yield to the siren call of conformity, the sense of isolation becomes real to those who continue to adhere to their faith and refuse to attend activities of which the state endorses tenets contrary to their own.[167] In such situations, the state may not argue that the intrusion lacked effect or did not infringe rights.[168] Indeed, as *Lee* stated, compulsion is especially high in the classroom.[169] As such, the state may not require religious conformity or forfeiture of rights as the cost of joining classmates at state sponsored activities.[170]

Overcoming the coercive effect attached to teacher-led pledge recitation requires revisiting previously established points, as well as appreciating the real life, non-legal context of the classroom.[171] First, as previously discussed, the Supreme Court addressed the Pledge's consistency with the Establishment Clause. Indeed, the Court uses the Pledge to illustrate the

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166. *See id.* at 208 n.3 (arguing that atheism is viewed as "un-American," "anti-Red," communistic, and immoral); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) (reporting the state's argument that refusal to salute the flag and recite the Pledge of Allegiance presents a clear and present danger); Newdow v. United States Cong., 292 F.3d 597, 608 (9th Cir. 2002) (citing *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring), stating that the Pledge of Allegiance sends a message to nonparticipants "that they are outsiders, not full members of the political community"), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay); Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 443 (7th Cir. 1992) (noting that other students may have hassled Richard Sherman on the playground for refusing to recite the Pledge).

167. *See* Lee v. Weisman, 505 U.S. 577, 594 (1992) (clarifying that simply because the activity is marketed as civic or nonsectarian, it does not serve to ameliorate the isolation to nonadherents, but "[a]t best it narrows their number, at worst increases their sense of isolation and affront"); *Barnette*, 319 U.S. at 641 (condemning those who begin "coercive elimination of dissent [by] . . . exterminating dissenters" because "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard").

168. *Compare Santa Fe*, 530 U.S. at 312 (finding that objectors to the prayer must make the difficult choice to attend the game or avoid personally offensive religious ceremonies, and this decision is not one the First Amendment allows schoolchildren to make), *with Lee*, 505 U.S. at 593 (finding that students participate, even if they object, in the group religious exercise merely by standing quietly and showing the proper respect during the graduation prayer).

169. *Lee*, 505 U.S. at 596.

170. *See Santa Fe*, 530 U.S. at 312 (referring to attendance at varsity football games); *Lee*, 505 U.S. at 594-95 (invalidating the prayer at graduation ceremonies).

171. *See* Newdow v. United States Cong., 292 F.3d 597, 613 (9th Cir. 2002) (Fernandez, J., concurring and dissenting) (arguing that the court should set aside "legal world abstractions" and acknowledge that the Pledge of Allegiance does not have the tendency to establish a theocracy), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay); Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 444 (7th Cir. 1992) (indicating that students, at one time or another, will more than likely be offended by ideas taught in the classroom that conflict with their own personal convictions).

impossible task of completely divorcing the state from any recognition of religion.[172] The Court cites numerous examples, besides the Pledge of Allegiance, when the government officially sanctioned religious activities.[173] Justice Brennan, in *Schempp*, said it best when he suggested that references to God in the National Motto and the Pledge have become "so interwoven" into American culture that their present use will not rise to the level of a constitutional violation even if employed in the public classroom.[174]

Also, simply because the state may support or accommodate religion, individual agency is not nullified.[175] *Barnette* held that the state may not force any person to espouse views that he does not believe, namely the Pledge of Allegiance.[176] However, the *Barnette* Court never held that the child be absolutely shielded from listening to or observing his classmates recite the Pledge.[177] Often, the price of conscience is isolation and an-

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172. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 602-03 (1989) (recognizing that the Court has found the Pledge of Allegiance consistent with the First Amendment); Lynch v. Donnelly, 465 U.S. 668, 676 (1984) (citing the Pledge of Allegiance and National Motto as examples when the government need not separate church and state).

173. *See Lynch*, 465 U.S. at 676-77 (listing as examples of constitutionally valid state actions: executive orders and Congressional actions declaring Christmas and Thanksgiving national holidays; providing paid vacation to federal employees to enjoy this holiday; art galleries displaying and maintaining upkeep of "explicit" Christian artwork such as the "Last Supper" and the "Crucifixion"; commemorations of Jewish Heritage Week and National Day of Prayer; and the display of Moses and the Ten Commandments on the wall of the Supreme Court).

174. Sch. Dist. v. Schempp, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring) (suggesting that the words in the National Motto or Pledge of Allegiance have not become *de minimus*, but that they are so integral to our national fabric as to create no constitutional concern).

175. *See Lee*, 505 U.S. at 593 (expressing concern that peer pressure will induce children to conform and participate in ceremonies that they do not believe in); Wallace v. Jaffree, 472 U.S. 38, 53 (1985) (recognizing an individual's freedom to choose his own creed or to refrain from accepting the creed of the majority); *Schempp*, 374 U.S. at 218 (establishing that the First Amendment embraces the freedom to believe and the freedom to act); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (concluding that the Establishment Clause means that neither the state nor Federal government can force or influence a person to go to or abstain from attending any church).

176. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (concluding that the substance of the First Amendment "is the right to differ as to things that touch the heart of the existing order").

177. *See Barnette*, 319 U.S. at 641-42 (prohibiting compulsory recitation of the Pledge of Allegiance and Flag salute); *see also* Newdow v. United States Cong., 292 F.3d 597, 614 (9th Cir. 2002) (Fernandez, J., concurring and dissenting) (confirming that *Barnette* never suggested that children must be precluded from listening to the Pledge; only that they not be compelled to recite it), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay).

ger.[178] Apparently, Newdow's ultimate concern was that neither he, nor his child, be made to feel uncomfortable about their beliefs.[179] Newdow's answer was to remove all references to God that made *him* uncomfortable.[180] However, the First Amendment is not threatened when state endorsement of some religious activity makes someone feel uncomfortable, but rather when the state (either subtly or directly) coerces a person to abandon his morals in order to gain acceptance.[181] As established in *Lee*, offensiveness alone does not demonstrate a violation of First Amendment rights.[182] If such subjective discomfort was the only criteria, that discomfort would invalidate most of the previous case law heretofore discussed.[183]

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178. *Lee*, 505 U.S. at 597-98.

179. *See Newdow*, 292 F.3d at 601 (asserting that the state harms children by requiring them to watch and listen as teachers lead the class in the Pledge of Allegiance); *id.* at 614 (Fernandez, J., concurring and dissenting) (recognizing that some people, like Newdow, may not feel "good" about references to God in their presence); *see also Hannity & Colmes: Interview with Michael Newdow* (Fox News television broadcast, June 26, 2002), 2002 WL 2789039 (complaining that the phrase "under God" harmed Newdow's child because saying the term "under God" to atheists is like saying "under Muhammad" or "under Sun Myung Moon" to Judeo-Christians).

180. *See Newdow*, 292 F.3d at 614-15 (Fernandez, J., concurring and dissenting) (interpreting Newdow's theory of the First Amendment as prohibiting the use of patriotic songs in public settings such as "God Bless America" and "The Star Spangled Banner," as well as eliminating the National Motto on coinage); *see also Hannity & Colmes: Interview with Michael Newdow* (Fox News television broadcast, June 26, 2002), 2002 WL 2789039 (expressing Newdow's desire to eliminate "In God We Trust" from all coinage because he does not trust in God).

181. *See, e.g.*, *Lee*, 505 U.S. at 597-98 (affirming "that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity"); Marsh v. Chambers, 463 U.S. 783, 792 (1983) (approving legislative prayer since invoking divine help upon a lawmaking body is not an establishment of religion but an acknowledgment of beliefs felt by most people in the country); Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963) (approving use of the Bible in school to teach history of civilization or literature); Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 444-45 (7th Cir. 1992) (contending that students will be subject to school materials they disagree with or find offensive, but this does not invalidate the use of those materials). The Court in *Lee* concluded that the conformity required of students wishing to attend graduation was "too high an exaction to withstand the test of the Establishment Clause" and found that the state compelled attendance. *Lee*, 505 U.S. at 598. *But see* Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 McGEORGE L. REV. 837, 873-74 (2001) (quoting Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring)); *id.* at 844 (suggesting that religious favoritism is the critical element in the First Amendment, and focusing on the assertion that coercion alone does not adequately protect religious liberty).

182. *Lee*, 505 U.S. at 597.

183. *See, e.g.*, Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2468 (2002) (invalidating the argument that the school voucher creates a public perception that the state endorses religion); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 118 (2001) (permitting a

Additionally, as part of a primary education curriculum, children are often exposed to ideas contrary or repugnant to those taught at home.[184] Indeed, some religions oppose reading literature which may be contrary to the faith.[185] Even though parents may disagree with the concept of evolution, they may not prohibit the school from teaching this theory.[186] Consequently, the Supreme Court has refused to allow schools to counter the evolution theory with creationism.[187] Likewise, atheists may not object when the school employs the Bible for a study in history or comparative world religions.[188] Furthermore, the state can require students to memorize and learn these objectionable tenets and provide answers on tests for a grade.[189] Those parents who remain firm in their objection to such exposure may register their child in a private institution favorable to their ideology.[190] The only requirement is that school districts not coerce or force students to espouse these ideas.[191]

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religious organization to use school premises after hours since refusal may be perceived as establishment); *Marsh*, 463 U.S. at 795 (dismissing the plaintiff's concern that legislative prayer is the beginning of the Establishment of Religion since such prayer is not a threat but a "mere shadow"); *Lynch*, 465 U.S. at 686 (concluding that if the Court invalidated the nativity display accompanied by Santa Claus and reindeer, they must also invalidate a host of other religious practices approved of by the Court); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (approving release time for religious instruction because children are not required to attend, and mere accommodation of religious beliefs does not invalidate the state action); *Newdow*, 292 F.3d at 614 (Fernandez J., concurring and dissenting) (recognizing that the Constitution "is not primarily a feel-good prescription" but "is a practical and balanced charter for the just governance of a free people in a vast territory").

184. *See* Sch. Dist. v. Schempp, 374 U.S. 203, 208 (1963) (reporting that the school policy ran contrary to the religious doctrines espoused by the Schempps, and that policy placed the children and parents in an untenable position).

185. *See Schempp*, 374 U.S. at 208 (indicating that the Schempps belonged to the Unitarian faith which forbade a literal reading of the Bible); *Sherman*, 980 F.2d at 444 (citing to the Roman Catholic Church and others who forbid their parishioners from reading literature that undermines or misrepresents their religion).

186. *See* Epperson v. Arkansas, 393 U.S. 97, 107-09 (1968) (invalidating the Arkansas statute forbidding teachers from teaching evolution and comparing it to Tennessee "monkey law" prohibiting teaching of any theory that denies the theory of "Divine Creation" as taught in the Bible).

187. *See* Edwards v. Aguillard, 482 U.S. 578, 596-97 (1987) (abrogating the Louisiana Creationism Act that forbade teaching evolution without also teaching Creationism); Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 348 (5th Cir. 1999) (striking down school board's policy that allowed teachers, when teaching evolution, to preface the lecture with a disclaimer instructing children to consider Creationism as set forth in the Bible).

188. *See Schempp*, 374 U.S. at 225 (approving study of the Bible in classroom settings for a study of literature, history, and world civilization).

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

190. *Id.* at 445 (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925)).

191. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (concluding "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or

The secular and educational value of the Pledge can best be summarized as follows:

> The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an illusion to the same historical fact.[192]

The question of constitutionality necessitates distinguishing a real threat from a shadow of a threat.[193] Even minor violations of the Establishment Clause deserve scrutiny, as history has amply demonstrated.[194] "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'"[195] However, in *Lynch*, the Court observed that we no longer live in the 18th Century, when every religious expression by the state was stamped with tyranny.[196] In approving the Christmas display, that Court doubted that the symbols employed by the city would lead to an establishment by the state.[197] The dissent in *Newdow* also implores the majority to use common sense in

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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").

192. *Schempp*, 374 U.S. at 304 (Brennan, J., concurring).

193. *Id.* at 308 (Goldberg, J., concurring) (acknowledging that tremendous consequences may result from small beginnings); *Barnette*, 319 U.S. at 642 (concluding that more than inconsequential beliefs are protected by freedom of religion; otherwise there is a mere shadow of freedom); *see also* Lynch v. Donnelly, 465 U.S. 668, 683 (1984) (recognizing that every state action is not unconstitutional if it confers only a minor or incidental benefit on a sect or religion); Newdow v. United States Cong., 292 F.3d 597, 613 (9th Cir. 2002) (Fernandez, J., concurring and dissenting) (questioning the soundness of the argument that the Pledge of Allegiance will bring about a theocracy), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay); *Sherman*, 980 F.2d at 447 (noting Justice Brennan's approval of the Pledge of Allegiance in *Marsh v. Chambers*, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting) not because the meaning of the ritual has become *de minimus*, but because the practice has lost all religious meaning).

194. *See Schempp*, 374 U.S. at 214 (recalling that religious persecution planted the desire in the Founding Fathers' hearts to establish a country supportive of religious freedom). *See generally* Everson v. Bd. of Educ., 330 U.S. 1, 8-13 (1947) (discussing how the religious persecution suffered by early settlers led to the establishment of First Amendment protection for freedom of religion).

195. *Schempp*, 374 U.S. at 225.

196. *See Lynch*, 465 U.S. at 686 (refusing to see the Archbishop of Canterbury or the Bishop of Rome behind every reference to America's religious heritage).

197. *See id.* (doubting that a single reference to Christianity in a Christmas display set among other secular images would establish religion).

applying the Establishment Clause tests.[198] Although school-led recitation of the Pledge *may* have some coercive significance, common sense dictates that the Pledge should be upheld.[199] The phrase "under God" merely recognizes that the forefathers acknowledged the existence of God.[200] Like discussing the Bible or the Koran as a lesson in world history, reciting the Pledge of Allegiance is not a method of indoctrination, but rather a lesson in patriotism.[201]

E. *Summary*

The result reached by the Ninth Circuit provides an issue ripe for Supreme Court intervention, especially since the Ninth Circuit differs from the Seventh.[202] While many dispute the reality of the threat the Pledge of Allegiance may pose to religious freedoms, the argument to the contrary

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198. *See* Newdow v. United States Cong., 292 F.3d 597, 615 (9th Cir. 2002) (Fernandez, J., concurring and dissenting) (disparaging those who strictly apply all Establishment Clause cases without considering the good sense principles behind the tests), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay); *see also Lynch*, 465 U.S. at 683 (recognizing that every state action is not unconstitutional that confers a minor or incidental benefit on a sect or religion).

199. *See Newdow*, 292 F.3d at 615 (Fernandez, J., concurring and dissenting) (discussing the unsavory effects that would result if judges refused to consider common sense in strictly applying Establishment Clause tests such as prohibition of the national anthem); *see also* Lee v. Weisman, 505 U.S. 577, 597-98 (1992) (affirming "that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity"); *Schempp*, 374 U.S. at 304 (Brennan, J., concurring) (concluding that the Pledge of Allegiance and National Motto have become so interwoven into American heritage that the recitation thereof could hardly be considered unconstitutional and is much like the reading of the Gettysburg Address); *cf.*, Marsh v. Chambers, 463 U.S. 783, 792 (1983) (approving of legislative prayer since invoking Divine help upon a lawmaking body does not establish religion but acknowledges beliefs held by most people in the country); *Schempp*, 374 U.S. at 225 (approving use of the Bible in school if used to teach history of civilization or literature); Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 444-45 (7th Cir. 1992) (contending that the state curriculum often subjects students to materials they disagree with or find offensive, but it does not invalidate the curriculum).

200. *See Schempp*, 374 U.S. at 304 (Brennan, J., concurring) (suggesting that the Pledge of Allegiance "may merely recognize the historical fact that our Nation was believed to have been founded 'under God'").

201. *See Lynch*, 465 U.S. at 679 (approving the use of religious artifacts if used in the appropriate educational context); *Schempp*, 374 U.S. at 225 (admitting that "the Bible is worthy of study for its literary and historic qualities"); *Sherman*, 980 F.2d at 444 (suggesting that the Pledge of Allegiance transmits patriotic values by devoting time for reciting the Pledge).

202. *Compare Newdow*, 292 F.3d at 612 (concluding that the Pledge of Allegiance violates the Establishment Clause), *with Sherman*, 980 F.2d at 447 (approving the Pledge of Allegiance because the practice has lost all religious meaning).

is equally persuasive.[203] The Pledge evokes the same participation via subtle coercive pressure that concerned the Court in cases involving prayer at high school football games and graduations.[204] Unlike attendance at a football game or graduation, schoolchildren are actually required by the state to attend school and are punished for tardiness.[205] Under such circumstances, participation seems inescapable since they must make the decision to stand and recite with their classmates or respectfully remain seated.[206] Further, the fact that children participate in this ceremony on school grounds, led by an employee of the state, suggests that the state approves monotheism to the exclusion of those who choose to abdicate this belief.[207] Arguably, this practice furthers the compelled confession of beliefs frowned upon by the Court in *Barnette*.[208]

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203. *See Schempp*, 374 U.S. at 303-04 (Brennan, J., concurring) (suggesting that the words in the National Motto or Pledge of Allegiance have not become *de minimus*, but that they are so a part of our national fabric that there is no constitutional concern); *Newdow*, 292 F.3d at 613 (Fernandez, J., concurring and dissenting) (recommending that the majority should set aside "legal world abstractions" and acknowledge that the Pledge of Allegiance does not have the tendency to set up a theocracy); *Sherman*, 980 F.2d at 444 (contending that state curriculum may subject students to materials they disagree with or find offensive, but this exposure does not invalidate the act). *But see Newdow*, 292 F.3d at 609 (worrying that recitation of the Pledge of Allegiance is particularly pronounced in school settings where impressionable children, who believe they must follow classroom procedures and norms, feel compelled to stand and participate).

204. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311 (2000) (finding ridiculous the contention that students do not feel immense social pressure to be involved in extracurricular activities); *Lee*, 505 U.S. at 596 (concluding that the risk of coercion is especially high in a classroom setting).

205. *See Santa Fe*, 530 U.S. at 312 (recognizing that some students feel no pressure to attend football games, but many others feel immense pressure to attend); *Lee*, 505 U.S. at 596-97 (acknowledging that attendance at graduation was not mandatory like attendance by legislators at the legislature, but the coercive pressure left little option but to attend graduation); *see also Newdow*, 292 F.3d at 609 (stating that children are not required to participate in the Pledge, but are required to sit and listen as their classmates do).

206. *See Newdow*, 292 F.3d at 609 (worrying that compulsory recitation of the Pledge of Allegiance is particularly pronounced in school settings where impressionable children, who believe they must follow classroom procedures and norms, feel compelled to stand and participate).

207. *See id.* at 608 (finding that the school district sends a message of endorsement when they require teachers to lead the class in the Pledge).

208. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that requiring a compulsory flag salute and Pledge of Allegiance is unconstitutional); *Newdow*, 292 F.3d at 609 (refusing to differentiate *Barnette* from *Newdow* based on mandatory participation since the children must sit and listen to their classmates recite the Pledge).

If children are coerced to recite the pledge, the question turns on whether the words "under God" actually espouse religion.[209] One cannot dispute the emotional and patriotic value of the Pledge, but it may have become so interwoven into American culture that whatever religious value may have existed in 1954 no longer exists.[210] Above all, the Pledge endorses patriotism.[211] Further, *Barnette* never suggested that schools should shield objecting students from any exposure to the Pledge of Allegiance, only that the state should not force children to swear allegiance to the flag.[212] The Court must have realized that the disapproving stares and pressure to conform—sure to accompany abstention—would make objecting Jehovah's Witness children feel uncomfortable.[213] Presently, since schoolchildren have recited the current Pledge for almost three generations, and patriotic fervor is at its height, removing the Pledge sends a discriminatory message to subscribers of Judeo-Christianity that the state has permanently expelled God from public education.[214] Essentially, the message sent is that the minority controls the majority.[215]

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209. *See* Sherman v. Cmty. Consol. Sch. Dist 21, 980 F.2d 437, 445 (7th Cir. 1992) (posing the question: "Does 'under God' make the Pledge a prayer, whose recitation violates the [E]stablishment [C]lause of the [F]irst [A]mendment?").

210. Sch. Dist. v. Schempp, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring) (suggesting that the words in the National Motto or Pledge of Allegiance have not become *de minimus*, but that they are so integral to our national fabric as to create no constitutional concern); *Sherman*, 980 F.2d at 447 (concluding that a phrase like "In God We Trust" and Christmas trees have become secular, "having lost their original religious significance").

211. *See Schempp*, 374 U.S. at 303-04 (Brennan, J., concurring) (recognizing that the Pledge of Allegiance and similar patriotic exercises used in schools lost their original sectarian meaning and now merely recognize that the Founding Fathers believed in God).

212. *See Barnette*, 319 U.S. at 642 (asserting that requiring a compulsory flag salute and Pledge is unconstitutional); *Newdow*, 292 F.3d at 614 (Fernandez, J., concurring and dissenting) (recalling that the Supreme Court in *Barnette* exempted children from compelled recitation).

213. *See Barnette*, 319 U.S. at 634-35 (understanding that the Jehovah's Witness faith "supplies appellees' motive for enduring the discomforts of making the issue in this case," while many who do not share this faith feel participation should be mandatory); *see also Schempp*, 374 U.S. at 208 (expressing concern that the children's relationship with classmates and teachers would be harmed by refusal to participate).

214. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 118 (2001) (assuming that if the religious organization were excluded, the message sent to students could be that the state prefers no religion over religion); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (criticizing absolute separation of church and state because this would create a "callous indifference," which in turn would be preferring nonbelievers over believers); *Newdow*, 292 F.3d at 614 (Fernandez, J., concurring and dissenting) (recognizing that those who would prohibit the Pledge are those who wish to drive religion from every aspect of public life).

215. *See Newdow*, 292 F.3d at 615 (Fernandez, J., concurring and dissenting) (concluding that prohibiting the Pledge "will cool the febrile nerves of a few at the cost of removing the healthy glow conferred upon many citizens when the forbidden verses, or phrases, are

IV. TRENDS IN THE SUPREME COURT

The ultimate validity of the holding in *Newdow* can only be answered by the Supreme Court. However, predicting the path the Supreme Court chooses may be difficult. The Court maintains vigilant guard over schoolchildren regarding state-sponsored religious activity.[216] Nevertheless, two distinct approaches exist on the Supreme Court: Justices Rehnquist, Scalia, and Thomas all favor broader accommodation of religion in public schools and support a traditional separationist approach joined by Justices Stevens, Ginsberg, and Souter.[217] Therefore, in order to decide the constitutionality of the Pledge of Allegiance, one school of thought requires votes from two of the three remaining judges.[218] Justice Kennedy and Justice O'Connor often cast deciding votes in crucial religion and education cases.[219] Several commentators attempt to analyze the voting tendencies of these justices to predict the likely outcome of Supreme Court issues.[220] To reach the solution, a similar path becomes necessary.

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uttered, read, or seen"); *Sherman*, 980 F.2d at 445 (suggesting that "[o]bjection by the few does not reduce to silence the many who *want* to pledge allegiance to the flag") (emphasis in original).

216. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000) (prohibiting a school district from exacting religious conformance from students as the cost of attending football games); Lee v. Weisman, 505 U.S. 577, 597 (1992) (recognizing that compulsion is especially high in classroom settings); *Schempp*, 374 U.S. at 224-25 (condemning the defense that children may be excused from participation by presenting a note from their parents).

217. *See* Martha McCarthy, *Preserving the Establishment Clause: One Step Forward and Two Steps Back*, BYU EDUC. & L.J. 271, 295-97 (2001) (discussing the two views of the Supreme Court regarding church and state separation).

218. *See id.* at 295-96 (debating which side of the dispute Justice O'Connor or Justice Kennedy may join).

219. *See id.* (indicating that Justice Kennedy steadfastly votes with the majority in all education/church and state cases while Justice O'Connor generally sides with accommodationists in school aid cases); Charles D. Kelso & R. Randall Kelso, *Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law*, 32 MCGEORGE L. REV. 915, 935 (2001) (suggesting that both Justices O'Connor and Kennedy casted critical votes that resulted in a five-four decision).

220. *See, e.g.*, Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 873-74 (2001) (discussing Justice O'Connor's and Justice Kennedy's interpretation of the Establishment Clause); R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in* Casey *and Its Progeny*, 29 PEPP. L. REV. 637, 678-80 (2002) (comparing the various ideologies of Justices Souter, O'Connor, and Kennedy); Martha McCarthy, *Preserving the Establishment Clause: One Step Forward and Two Steps Back*, BYU EDUC. & L.J. 271, 295-97 (2001) (analyzing Justice O'Connor's and Justice Kennedy's ideologies to predict which ideology they will endorse).

A. *Justice O'Connor and Justice Kennedy: Ideologies and Decisions*

1. Ideologies

One commentator delineates the ideologies of Justice O'Connor and Justice Kennedy by suggesting judges interpret the Constitution depending on the natural law they perceive the Founding Fathers adhered to, namely the Enlightenment or Classical-Christian approach.[221] The enlightened tradition promotes a "wall of separation between church and State" since state intervention impairs religious liberty.[222] This social contract view suggests that "rights derive from man and man's reason."[223] The Classical-Christian approach, however, recognized that the law emanates from Divine reason and will.[224] Naturally, this approach accommodates religion.[225]

Justice O'Connor tends to favor the Enlightenment view, as demonstrated in her concurrence in *Lynch*, which set forth the endorsement test.[226] She stated that direct government endorsement of a religion "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."[227] This test focuses on equality and attempts to prevent the government from making someone's standing in society contingent on his religious affiliation.[228] Justice O'Connor most recently followed this view in *Santa Fe*, joining the majority in concluding that students attending a football game preceded by prayer would perceive the state's endorsement of a particular religious viewpoint.[229]

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221. *See* R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in* Casey *and Its Progeny*, 29 PEPP. L. REV. 637, 659 (2002) (indicating a judge will view the text, structure, and history of the Constitution differently depending on his perception of the Founding Father's intent).

222. *Id.* at 663.

223. *Id.* at 659.

224. *Id.*

225. R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in* Casey *and Its Progeny*, 29 PEPP. L. REV. 637, 663 (2002).

226. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

227. *Id.*

228. *See* Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 844 (2001) (suggesting that endorsement is synonymous with favoritism).

229. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000); *see also* R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in* Casey *and Its Progeny*, 29 PEPP. L. REV. 637, 663 (2002) (concluding that Justice O'Connor's endorsement test underlies the *Santa Fe* decision).

Justice Kennedy, on the other hand, appears to strike a balance between the two approaches, believing the Founders shared both Enlightenment and Classical-Christian views.[230] In school aid cases, Justice Kennedy supported a program that distributed aid evenly to both public and private programs, demonstrating an accommodationist viewpoint.[231] However, Justice Kennedy joined the majority opinion in *Lee* that reached past formalism to determine whether the state truly endorsed a particular belief even though the school board asserted a voluntary participation policy.[232]

2. Endorsement vs. Coercion

The Justices part ways when dealing with absolute application of the endorsement test.[233] Justice Kennedy requires the complainant to show subtle coercive pressure because he believes that the First Amendment protects only against coercive action.[234] Justice O'Connor, on the other

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230. *See* R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in* Casey *and Its Progeny*, 29 PEPP. L. REV. 637, 679 (2002) (concluding that Kennedy adopts a mixture of the Enlightenment and Classical-Christian approaches).

231. *See* Mitchell v. Helms, 530 U.S. 793, 801 (2000) (holding that a law which allowed the disbursement of federal funds to public and private schools did not respect an establishment of religion); *see also* R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in* Casey *and Its Progeny*, 29 PEPP. L. REV. 637, 679 (2002) (suggesting that the *Mitchell* decision demonstrates Kennedy's adoption of an accommodationist viewpoint).

232. *See* Lee v. Weisman, 505 U.S. 507, 595 (1992) (rejecting the formalist view that students have a choice not to attend school ceremonies); *see also* R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in* Casey *and Its Progeny*, 29 PEPP. L. REV. 637, 663-64 (2002) (indicating that Kennedy would adopt an intermediate approach such as the proselytizing test as opposed to the coercion test).

233. *See* Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 873-74 (2001) (reporting that Justice O'Connor rejected Justice Kennedy's reliance on coercion in applying the endorsement test). *But see* Richard Collin Mangrum, Good News Club v. Milford Central School: *Teaching Morality from a Religious Perspective on School Premises After Hours*, 35 CREIGHTON L. REV. 1023, 1063 (2002) (concluding that Justice Kennedy often supports Justice O'Connor's endorsement test).

234. *See Lee*, 505 U.S. at 597-98 (recognizing that people may be offended by any number of religious activities "but offense alone" does not equate with a violation, and often nonadherents must endure isolation); *see also* Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 873-74 (2001) (reporting that Justice O'Connor rejected Justice Kennedy's reliance on coercion in applying the endorsement test); Richard Collin Mangrum, Good News Club v. Milford Central School: *Teaching Morality from a Religious Perspective on School Premises After Hours*, 35 CREIGHTON L. REV. 1023, 1063 (2002) (quoting *Lee* for the proposition that graduation prayer involved

hand, frowns upon ceremonies in all situations when the child's status in the community rests on participation.[235] Justice O'Connor rejects the idea that coercion is the critical test, and relies on state-sponsored favoritism instead.[236]

In the school aid context, Justice O'Connor expresses a willingness to depart from her endorsement test.[237] She reduces the standard to a more formalistic approach, and would find endorsement when the aid actually has been used to further religious purposes or if the private institutions benefit indirectly.[238] This approach requires extensive fact-finding.[239] In

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subtle coercive pressure as well as peer pressure to participate); Martha McCarthy, *Preserving the Establishment Clause: One Step Forward and Two Steps Back*, BYU EDUC. & L.J. 271, 296 (2001) (reporting that Justice Kennedy found evidence of coercion sufficient to support endorsement).

235. *See* County of Allegheny v. ACLU, 492 U.S. 573, 628 (1989) (O'Connor, J., concurring) (concluding that the court never relied on the coercion test alone in Establishment Clause analysis); *see also* Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 873-74 (2001) (reporting Justice O'Connor's belief that reliance on proof of coercion alone would render the Establishment and Free Exercise Clauses redundant).

236. *See Allegheny*, 492 U.S. at 627-28 (O'Connor, J., concurring) (criticizing the sole application of the coercion test because it "fails to take account of the numerous more subtle ways that government can show favoritism"); *see also* Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 844 (2001) (suggesting that religious favoritism is the critical element in the First Amendment, and a sole focus on coercion does not adequately protect religious liberty).

237. *See* Mitchell v. Helms, 530 U.S. 793, 855-56 (2000) (O'Connor, J., concurring) (rejecting the idea that state funded secular aid in any form that might conceivably have a religious use should be treated as suspect); *see also* Charles D. Kelso & R. Randall Kelso, *Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law*, 32 MCGEORGE L. REV. 915, 945 (2001) (reporting Justice O'Connor's view that endorsement occurs when the aid is actually used for religious purposes).

238. *See* Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 864 (2001) (quoting Justice O'Connor's conclusion in *Mitchell* that when independent parties make the decision to provide aid to private schools, even though the aid came from the government, no reasonable person would perceive government endorsement of a religious belief); Charles D. Kelso & R. Randall Kelso, *Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law*, 32 MCGEORGE L. REV. 915, 945 (2001) (noting Justice O'Connor's view on endorsement); Richard Collin Mangrum, Good News Club v. Milford Central School: *Teaching Morality from a Religious Perspective on School Premises After Hours*, 35 CREIGHTON L. REV. 1023, 1061 (2002) (reviewing Justice O'Connor's consideration of whether religious institutions would benefit indirectly from state financial support).

239. *See* Charles D. Kelso & R. Randall Kelso, *Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law*, 32 MCGEORGE L. REV. 915, 945 (2001) (informing that Justice O'Connor considered whether any incidents of religious indoctrina-

contrast, Justice Kennedy would not find establishment if the state provides aid on a neutral, non-secular basis regardless of whether the funds could be diverted to further religious purposes.[240]

3. Attention to Ceremonial Deism

Justices O'Connor and Kennedy also differ on ceremonial deism, the repetition of phrases like "God save the United States and this honorable Court," legislative prayer, and possibly the current Pledge question.[241] Justice O'Connor cast the deciding vote in *Allegheny*, a critical five-four decision.[242] In her concurrence, she indicated that historical longevity adds no legitimacy to the practice if that practice violates values protected by the Establishment Clause.[243] Justice Kennedy harshly dissented in *Allegheny*.[244] He was concerned that the test promoted too much hostility toward religion since many time-honored traditions would be stricken simply because they reference a religious tenet.[245]

4. Past Voting Records

One commentator suggests that Justice O'Connor is the "wild card" who may assist the accommodationists in adopting the neutrality principle in the school aid context.[246] However, Justice O'Connor voted in *Lee*

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tion existed in *Aguilar v. Felton*, 473 U.S. 402 (1985), there the state provided parochial schoolteachers to public schools for remedial education).

240. *Id.* at 945; *see also Mitchell*, 530 U.S. at 829 (approving student aid programs that determine eligibility "without regard to their religious affiliations or lack thereof").

241. *See* Charles D. Kelso & R. Randall Kelso, *Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law*, 32 McGEORGE L. REV. 915, 934 (2001) (citing *Allegheny v. ACLU*, in which Justice O'Connor joined the majority opinion, but elicited an objection from Justice Kennedy).

242. *See id.* (discussing Justice O'Connor's vote in *Allegheny*).

243. County of Allegheny v. ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring).

244. *See Allegheny*, 492 U.S. at 673 (Kennedy, J., concurring and dissenting) (concluding that "it borders on sophistry to suggest that" an atheist would not feel excluded from the political community every time his fellow Americans recite the Pledge of Allegiance); Charles D. Kelso & R. Randall Kelso, *Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law*, 32 McGEORGE L. REV. 915, 934 (2001) (discussing Justice Kennedy's opposition to Justice O'Connor's and the majority's position).

245. *See Allegheny*, 487 U.S. at 672 (Kennedy, J., concurring and dissenting) (providing traditional examples of our government recognizing religious practices); Charles D. Kelso & R. Randall Kelso, *Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law*, 32 McGEORGE L. REV. 915, 934 (2001) (voicing Justice Kennedy's concern that the Supreme Court's and legislature's traditional practices will be invalidated).

246. Martha McCarthy, *Preserving the Establishment Clause: One Step Forward and Two Steps Back*, BYU EDUC. & L.J. 271, 294 (2001).

and *Santa Fe* to apply more strict standards when evaluating student devotionals; therefore, she may side with the separationists in the current quandary.[247] Historically, the accommodationists have advocated application of the neutrality principle to student devotionals, while Justice O'Connor stood firmly against such application.[248]

Justice Kennedy, on the other hand, continues to require evidence of coercion before invalidating student devotionals.[249] Further, he continues to side with the accommodationists in student aid cases, and as one commentator speculates, he may be willing to side in favor of religious devotionals.[250] Conversely, Justice Kennedy sided with the majority, striking down the pregame prayer in *Santa Fe*.[251] Furthermore, he wrote the opinion in *Lee*, which struck down graduation prayer.[252] Incidentally, in every education church/state case, Justice Kennedy sided with the majority whether upholding or invalidating the contested issue.[253] Thus, Justice Kennedy may be willing to uphold the Pledge of Allegiance with majority approval, but this would require Justice O'Connor's vote.[254]

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247. *See id.* at 296-97 (doubting that Justice O'Connor would withdraw her support of "private-choice neutrality").

248. *See id.* at 295 (indicating that only Justices Thomas, Scalia, and Chief Justice Rehnquist uniformly advocate applying the neutrality principle to in-school religious expression).

249. *See* Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 McGEORGE L. REV. 837, 873-74 (2001) (reporting that Justice O'Connor rejected Justice Kennedy's reliance on coercion in applying the endorsement test); Richard Collin Mangrum, Good News Club v. Milford Central School: *Teaching Morality from a Religious Perspective on School Premises After Hours*, 35 CREIGHTON L. REV. 1023, 1063 (2002) (citing Justice O'Connor's opinion in *Lee* for the proposition that graduation prayer involved subtle coercive pressure as well as peer pressure to participate); Martha McCarthy, *Preserving the Establishment Clause: One Step Forward and Two Steps Back*, BYU EDUC. & L.J. 271, 296 (2001) (reporting that Justice Kennedy found evidence of coercion sufficient to support endorsement).

250. *See* Martha McCarthy, *Preserving the Establishment Clause: One Step Forward and Two Steps Back*, BYU EDUC. & L.J. 271, 295-96 (2001) (stating the possibility that Justice Kennedy may be willing to side with the accommodationists since he requires a showing of coercion).

251. *Id.* at 296.

252. *See* Lee v. Weisman, 505 U.S. 577, 580 (1992) (discussing the graduation prayer policy).

253. Martha McCarthy, *Preserving the Establishment Clause: One Step Forward and Two Steps Back*, BYU EDUC. & L.J. 271, 295 (2001).

254. *See id.* at 296-97 (indicating that Justice O'Connor would be needed to affirm student religious activities). *But see* Allegheny v. ACLU, 492 U.S. 573, 673 (1989) (Kennedy, J., concurring and dissenting) (concluding that "it borders on sophistry to suggest that" an atheist would not feel alienated from the political community every time his fellow Americans recite the Pledge of Allegiance).

Based on the preceding conclusions, the tide appears to favor the validity of the Ninth Circuit decision in *Newdow*.[255] Justice O'Connor would undoubtedly have concerns that the Pledge of Allegiance endorses religion and conveys the message that adherents to monotheism are favored, whereas, those who do not participate possess inferior religious views.[256] As *Newdow* queried, how can one help but feel less than a full member of the political society as he listens to classmates recite, in relation to a political affirmation, the words "under God"—a phrase he feels is contrary to his personal beliefs?[257] Incidentally, Justice Kennedy, in his dissent in *Allegheny*, agreed with this assessment regarding the Pledge.[258] Further, Justice O'Connor concluded that the patriotic or historical traditions of certain phrases or practices may still violate the First Amendment, even though Americans have participated in such practices for years.[259] Although Justice Kennedy disagrees with the breadth of such a proposition, he still opposes coerced participation in state-endorsed religious activities.[260] Essentially, affirming the Ninth Circuit would invalidate a time-honored patriotic icon at an extremely inopportune time. To save the Pledge, however, the Court must recognize that the patriotic assertions predominate, while this single religious reference has become so commonplace and so culturally interwoven that the Pledge, as a whole, lacks any actual religious meaning.[261]

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255. *See* Newdow v. United States Cong., 292 F.3d 597, 612 (9th Cir. 2002) (invalidating the 1954 addition of the words "under God" to the Pledge of Allegiance), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay).

256. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309-10 (2000) (joining the majority opinion striking down the pregame prayer policy because it sent a message to nonadherents "that they are outsiders"); *Allegheny*, 492 U.S. at 595 (joining the majority which adopted Justice O'Connor's concurrence in *Lynch v. Donnelly*); Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (concluding the Establishment Clause is violated when the state makes conformance relevant to that person's standing in the community).

257. *Newdow*, 292 F.3d at 609.

258. *See Allegheny*, 492 U.S. at 673 (Kennedy, J., concurring and dissenting) (concluding that "it borders on sophistry to suggest that" an atheist would not feel alienated from the political community every time his fellow Americans recite the Pledge of Allegiance).

259. *See id.* at 630 (O'Connor, J., concurring) (refuting the ceremonial deism argument proffered by Justice Kennedy, because this concept "shortchanges" the endorsement test and voicing her objections to historical practices that the Court approves simply because of their longevity).

260. *Compare Santa Fe*, 530 U.S. at 309-10 (joining the majority, which struck down the school board policy allowing students to elect whether to have pre-game prayers and who should offer them), *with Allegheny*, 492 U.S. at 674 (Kennedy, J., concurring and dissenting) (disapproving of the endorsement test because that test would invalidate many longstanding national traditions).

261. *See* Sch. Dist. v. Schempp, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring) (suggesting that the words in the National Motto or Pledge of Allegiance have not become

V. CONCLUSION

At first blush, the path the Ninth Circuit takes in *Newdow* seems inconsistent with many traditional American values.[262] Michael Newdow seems determined to remove religion from public life. Indeed, some feel that individuals like Newdow create the morality crisis permeating every aspect of American life—from Columbine to the recent Enron fiasco.[263] Nevertheless, as *Barnette* held over half a century ago, "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes."[264]

Before casting judgment on the Ninth Circuit decision, the reader must remember that the Establishment Clause protects all religions and favors none.[265] The majority of Americans oppose this decision today because the current tide of popular sentiment leans heavily in favor of Judeo-Christianity.[266] We need look no further than pre-1990s Russia, or current-day China and the Middle East to recognize that the tables do not always turn in favor of Judeo-Christianity.[267] If America ever reached a

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de minimus, but they are such a part of our national fabric that there is no constitutional concern); Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 447 (7th Cir. 1992) (concluding that phrases like "In God We Trust" and Christmas trees have become secular, "having lost their original religious significance").

262. *See* Newdow v. United States Cong., 292 F.3d 597, 614-15 (9th Cir. 2002) (Fernandez, J., concurring and dissenting) (criticizing the majority opinion that would prohibit singing patriotic songs in public such as God Bless America, America the Beautiful, and the Star Spangled Banner), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay).

263. *See* Jim Galloway, *Voters Turn Away Confrontation for Consensus*, ATLANTA J. & ATLANTA CONST., Aug. 25, 2002, at A1, 2002 WL 3735202 (reporting favorable votes for Sen. David Scott of Atlanta who favors returning a moment of silence to schools after the terrorist attacks on the World Trade Center and the Enron dilemma); Lee Maitland, *Voice of the People*, CHI. TRIB., July 6, 2002, at 24, 2002 WL 2672308 (pointing out that since God was removed from schools, "in his place are guns, knives and drugs"); *Patriotism Isn't Wrong*, HARRISBURG PATRIOT, July 5, 2002, at A07, 2002 WL 3001911 (criticizing those who favor removing God from school and the wake of the terrorist attacks on the World Trade Center ask "How can God let this happen?").

264. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943).

265. Sch. Dist. v. Schempp, 374 U.S. 203, 216 (1963); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

266. *See Schempp*, 374 U.S. at 213 (reporting that, in 1963, sixty-four percent of Americans had church membership, while only three percent adhered to no religion); *see also USA Polls: Pledge Allegiance to God or Country?*, *at* http://www.internetheaven.net/usapolls.php (last visited Aug. 23, 2002) (on file with the *St. Mary's Law Journal*) (finding that four percent answered "yes" and ninety-six percent answered "no" to the question, "Should 'Under God' be removed from the [P]ledge of [A]llegiance?").

267. *See* Steven Wales, Comment, *Remembering the Persecuted: An Analysis of the International Religious Freedom* Act, 24 HOUS. J. INT'L L. 579, 586-88 (2002) (discussing

similar juncture, those who vehemently condemn the *Newdow* decision today will then clamor for greater First Amendment protection from state interference or endorsement of religion, as well as state policies that condition social and political acceptance on religious (or atheistic) conformity.

Finally, the arguments for and against the Pledge of Allegiance have been laid out, and the Court may find either side equally persuasive. Since the question is so close, the Court must decide whether it is willing to invalidate the Pledge only to "cool the febrile nerves of a few at the cost of removing the healthy glow conferred upon many citizens when the forbidden verses, or phrases, are uttered, read, or seen."[268] Regardless of the final verdict, one commentator suggests that so long as the state continues to give exams, prayer will always exist in school.[269] As long as patriotic Americans attend schools, the Pledge of Allegiance will remain in some form—student-sponsored or not.

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the worldwide religious persecution of Christians and particularly referring to incidents in China and the Soviet Union).

268. Newdow v. United States Cong., 292 F.3d 597, 615 (9th Cir. 2002) (Fernandez, J., concurring and dissenting), *stay granted*, 2002 U.S. App. LEXIS 12826 (9th Cir. June 27, 2002) (order granting stay).

269. *See* Bill Haltom, *One Nation Under Judges*, 38 TENN. B.J. 33, 33-34 (2002) (indicating that the author prayed especially hard prior to exams).