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The Pledge of Allegiance: 'Under God' is Under Scrutiny

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I. INTRODUCTION: THE "UNDER GOD" PHRASE

This article examines whether the phrase "under God" in the Pledge of Allegiance violates the Establishment Clause of the First Amendment to the United States Constitution. As the Supreme Court has explained, "At a minimum, the Constitution guarantees that government may not coerce anyone to 1) support or participate in religion or its exercise; or 2) otherwise act in a way which (a) establishes a state religion or religious faith, or (b) tends to do so."[1] There are religious connotations behind the phrase "under God" that need to be examined, along with the factual background behind the case that gives rise to this issue. This article will address Supreme Court precedents interpreting the Establishment Clause and the legal standards established in those cases to determine the constitutionality of the phrase "under God" in the Pledge of Allegiance.[2]

The controversy over the "under God" phrase in the Pledge of Allegiance begins with its constitutionality. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." The question in this case is whether or not the Pledge conveys a message of the government respecting an establishment of religion. While this is not an easy question to answer, careful analysis of both sides of the issue reveals that in light of legal standards, the phrase "under God" is indeed unconstitutional.

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[1] Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

[2] See the Pledge of Allegiance to the United States Flag. Available at <http://www.homeofheroes.com/hallofheores/1st_floor/flag/1bfc_Pledge.html> (visited October 21, 2002).

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FACTUAL BACKGROUND

Michael A. Newdow's daughter attends a public elementary school south of Sacramento, California, in the Elk Grove School District. Newdow himself is an atheist who believes religion should be left out of the public school system, and who claims that the phrase "under God" in the Pledge violates his daughter's constitutional rights. Newdow sued various governmental entities on behalf of his daughter, who was asked to participate in reciting the Pledge during class. Newdow contends that there were no religious word in the Pledge before the 1954 Act added the words "under God" after "one nation." Newdow argues the addition of "under God" violates his daughter's rights under the Establishment Clause of the First Amendment.[3]

The elementary school has its own policy that requires that each "class [shall] recite the Pledge of allegiance to the flag once a day".[4] Under the policy, students may refuse to recite the Pledge with the their classmates. Newdow acknowledges that the school district does not require his daughter to participate, since such mandatory recitation was struck down in *West Virginia State Board of Education v. Barnette* as a First Amendment violation. In the *Barnette* case, the Pledge before the court was the version before the 1954 revision, and this demonstrates the strong level of significance that the patriotic message of the Pledge held to the West Virginia Legislature. The statute required all schools to teach the principles of Americanism and "increase the knowledge of the organization and machinery of the government".[5] In this case, any refusal to salute the flag was punished through academic expulsion.

Barnette was a Jehovah's Witness who could not participate in saluting the flag due to his religious conviction that the flag depicts an "image" which their God commands them not to adulate. The school administrators took what they thought were appropriate measures for dealing with the insubordination, and expelled the child. Unlawfully absent from school, the child was then considered a delinquent. The appellees responded by filing a suit to dismiss the enforcement of the expulsion against them. The Supreme Court found that the

[3] See Newdow v. Congress, 292 F.3d 597 (9th Cir.2002).

[4] Id.

[5] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

coercion by West Virginia to force the students to recite the Pledge was a violation of their constitutional rights.

In the case of the Elk Grove School District, there is no mandatory recitation requirement, however the specific school has a policy requiring that the Pledge be recited in class. Even though students do not necessarily have to participate during the Pledge, an employee at a state run school nonetheless leads the class in the Pledge.

Mr. Newdow is disturbed with the "under God" addition to the Pledge. The Pledge, he feels, sends a message that there is a God and that this nation is under that specific God. Mr. Newdow's goal is to have the Pledge revised to its original format before the 1954 Act that added the words "under God" to the Pledge of Allegiance. As the next section will show, prior Supreme Court precedents support the removal of the phrase "under God" from the Pledge.

KEY TESTS ESTABLISHED BY THE SUPREME COURT

There are three main legal standards that will prove the unconstitutionality of the Pledge as it stands today. First, the context and legislative history of the statute and the Pledge must be thoroughly analyzed. In 1892, Francis Bellamy created the original Pledge and some fifty-one years later, in 1943, the Supreme Court held in *West Virginia v. Barnette*[6] that children could not be forced to recite the Pledge. Approximately ten years later, a lay organization related to the Catholic Church, known as the Knights of Columbus,[7] petitioned Congress to add the phrase "under God" to the Pledge. The Knights of Columbus are also referred to as "the strong right arm of the Church" and have been praised by "popes, presidents and other world leaders, for support of Church, programs of evangelization and Catholic education."[8] For three years the Knights of Columbus pushed for the new resolution until it was finally accepted. President Eisenhower signed the legislation instituting the new Pledge and even sent a message of recognition to the Knights of Columbus, acknowledging their movement resulting in the new Pledge. The fact that a religiously motivated organization proposed the revision of the Pledge is significant to Mr. Newdow's legal claim.

[6] Id.

[7] Knights of Columbus main website <www.kofc.org/index_eng.cfm> (visited Feb. 2003).

[8] Id.

A case worthy of examination in light of its relevance to the Pledge is *Santa Fe Independent School District v. Doe*. The mothers of students attending a Texas school brought this suit, arguing successfully that the school's policy authorizing high school student's to deliver "invocation and/or message before home varsity football games"[9] violated the Constitution. The Santa Fe school district had previously implemented policies that allowed prayers to be read at graduation ceremonies and home football games. After the District Court ordered an alteration of the policy, the school decided to allow students to vote either for or against invocations and then select a spokesperson. Although this policy did not include the word "prayer," it still required the students to deliver a statement that would "solemnize the event ... and did not require ... that the content of the invocation be nonsectarian (nondenominational)."[10]

There are a few key points discussed in this case that shed light on the problems inherent in the presence of the "under God" phrase in the Pledge. Here the courts upheld the challenge of a school policy of permitting (but not requiring) prayer at football games. In his opinion for the Court, Justice John Paul Stevens noted that the delivery of a pre-game prayer had the "improper effect of coercing those present to participate in an act of religious worship."[11] Furthermore, Justice Stevens held that the student elections did not protect the minority views and the policy involved constituted an actual endorsement of religion. This opinion recognizes that public school sponsorship of a religious message is impermissible under the Establishment Clause of the Federal Constitution. Justice Stevens found that "such sponsorship sends 1) the ancillary message to members of the audience who are nonadherents that they are outsiders and not full members of the political community; and 2) an accompanying message to adherents that they are insiders and favored members of the political community."[12] Therefore, if people perceive the Pledge as amounting to government-endorsed religion, then on its face it violates the Constitution.

[9] Santa Fe Independent School District v. Doe 530 U.S. 290 (2000).

[10] Id.

[11] Id.

[12] Id.

The Supreme Court has developed several tests that can be applied in Establishment Clause cases. For example, the Lemon test, which was established in *Lemon v. Kurtzman,*[13] determined whether state aid to church-related schools and teachers teaching secular matters is a violation of the Establishment Clause of the First Amendment. In one case cited in *Lemon*, the citizens and taxpayers of Rhode Island brought a suit challenging the District of Rhode Island statute that required the reimbursement of teachers in nonpublic schools for secular subject matter supplementation. The teacher had agreed in writing not to teach a course with religious subject matter when receiving salary supplements and was also subjected to a state audit. The courts, however, were not convinced by her written agreement that religious matter would be kept out of the teachings, considering that the instruction offered in Roman Catholic schools has an integral religious mission in the school system.

In *Lemon v. Kurtzman*, a similar situation arose where the taxpayers of Pennsylvania brought suit against their state, which provided reimbursement of nonpublic school costs to teachers. Textbooks and instructional material in secular subjects were reimbursed if they did not contain or express religious teachings. Again, the state would perform audits and require the schools to regulate accounting procedures to identify expenditures. The courts held that both statutes were unconstitutional because of what they term as "excessive entanglement between government and religion."[14] As stated in Chief Justice Warren J. Burger's opinion, a law "may not establish a state religion, [however] it may nevertheless be one respecting that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment."[15] Furthermore, the Court determined that the following factors contributed to its finding of excessive entanglement of church and state in this case:

(1) the religious purpose and operation of church-related schools
(2) the enhancement of the process of religious indoctrination due to the impressionable age of the pupils, and

[13] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[14] Id.

[15] Id.

(3) the necessity of state surveillance to insure that the teachers, who were subject to control by religious organizations, observed the restrictions as to purely secular instruction.

Thereafter, the three-test prong was established in order to determine the constitutionality of state statutes. Its application to the Pledge serves to determine if the statute survives Constitutional scrutiny. Specifically the statute must 1) have a secular purpose, 2) have a principal or primary effect that neither advances nor inhibits religion, and 3) not foster an excessive government entanglement with religion. In concluding his opinion, Justice Burger states "the [C]onstitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn."[16]

Following the Lemon test, a more recent test was developed called the Endorsement test, set forth in *Lynch v. Donnelly*. A suit was brought by residents of the Pawtucket county of Rhode Island and by the American Civil Liberties Union challenging the inclusion of a "crèche or nativity scene in the city's Christmas display in a park owned by a nonprofit organization and located in the heart of the shopping district."[17] The Supreme Court held in this case that the displays did not violate the First Amendment, "because the city had secular purpose for including the crèche, the city had not impermissibly advanced religion, and including the crèche did not create excessive entanglement between religion and government."[18] The logic of the Court was that since Congress recognizes this holiday as being a national tradition and the city was celebrating the event by depicting the origins of said holiday, then it is considered as serving legitimate secular purposes.

The Endorsement test is meant to evaluate whether the government is using its authority to support or endorse religion. Support and endorsement, in the context of church and state, generally refer to the government granting aid to public institutions such as schools. These schools are a mechanism for the government to instill patriotic beliefs in young citizens, and the Pledge

[16] Id.

[17] Lynch v. Donnelly, 465 U.S. 688 (1984).

[18] Id.

included in the school's academic schedule is one form of conveying that message. It would be unconstitutional for an institution receiving aid from the government to deliver sectarian teachings or seek to convey a religious meaning.

The last pertinent test to be discussed is the Coercion test, which was established in *Lee v. Weisman*. This was a case in which Supreme Court held that the 'inclusion of invocation ... by member of clergy at public ... school graduation [is] held forbidden by First Amendment's establishment of religion clause."[19] This test states that a statute may not pressure the individual to do something that is religiously based, nor can it force a person into believing or not believing a certain faith. The individual has religious freedom of choice and the right to be free from government interference.

The Supreme Court uses these three major tests in any situation concerning the Establishment Clause and in determining whether a statute violates the First Amendment. In *Newdow*, the courts applied all three tests outlined above. However, for the purposes of this paper, analysis of two of the three tests is required to better understand the significance of the phrase 'under God".

ORIGINAL INTENT OF CONSTITUTION

The Framers of the Constitution intended the Establishment Clause to prohibit the government from declaring and supporting a national religion, though it is not clear whether or not it was intended to prevent the government from supporting Christianity.[20] Although it is generally understood that at the time of the ratification and adoption of the Constitution, the religious background of the majority of Americans was Christianity, this does not in any way undercut the significance of the constitutional issue at hand. The Framers understood that the English government had forced onto its citizenry an official state church. The essence of the American government was to establish a separation between church and state, where government does not dictate the religious choice of its citizens. This is a crucial difference in interpreting the constitutionality of the Pledge even in modern day.

[19] Lee v. Weisman, 505 U.S. 577 (1992).

[20] John T. Noonan, Religious Freedom: History, Cases, and Other Materials on the Interaction of Religion and Government, Boston, MA: Foundation Press (2001) at 163.

The American population of today does not consist exclusively of people professing Christian beliefs. "Only eighty-one percent of the American population are Christian, [whereas] over thirteen million Americans do not believe in God at all, and six million Muslim Americans and four to five million Buddhist Americans do not believe in the Judeo-Christian concepts of God."[21] This means that members of modern society hold an array of religious beliefs that need to be considered equally. In the case of the Pledge and the phrase "under God," it is argued that there is a misrepresentation that the government is under a particular God. Such a narrow view fails to include non-believers or believers of non-monotheistic faiths. The word "God" has historically been associated with the Judeo-Christian god and this makes sense when considering the context of the time period during which the phrase was added to the Pledge. Steven Epstein writes in his article "Rethinking the Constitutionality of Ceremonial Deism" that it was not "until June 1954, at the height of the Cold War with the Soviet Union, that this reference to God was added."[22] Therefore, the need for amending and reevaluating, by use of the tests established by the Supreme Court, the language of the Pledge of Allegiance is understandable when times have changed dramatically since the Establishment Clause principles were put into law.

APPLICATION OF KEY TESTS TO THE PLEDGE

Through case precedent, the Pledge is evaluated in light of the Establishment Clause to determine if the phrase "under God" violates the Constitution. As outlined above, case law has established tests for determining the secular purposes of statutes. This section will examine specific tests such as the Lemon test and the Endorsement test, while other case law serves to explain the rationale behind the Pledge's analysis.

In the Establishment Clause cases, the Court seeks to render interpretations that not only fit the individual facts of each case but also delineate principles that the lower courts can apply to a wide range of factual circumstances. In *Wallace v. Jaffree*, the state statute that authorized a moment of silence in the public schools for meditation or voluntary prayer was held to

[21] Steven B. Epstein, "Rethinking the Constitutionality of Ceremonial Deism", *Columbia Law Review,* December 1996, at 27.

[22] Id. at 15.

violate the Establishment Clause. The Court in *Wallace* interpreted the First Amendment as follows:

> The Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom on conscience, but also from the conviction that religious beliefs worthy of respect are the product of a free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects-or even intolerance among "religions"-to encompass intolerance of the disbeliever and the uncertain.[23]

In the present case, the exact meaning of the Pledge of Allegiance for the American people must be discerned. The Supreme Court considered the words "one nation under God" to mean one of the many "illustrations of the Government's acknowledgment of our religious heritage."[24] However, this is the form of traditional heritage that needs to be examined with scrutiny in order to differentiate between what is and what is not. The addition of "under God" to the Pledge altered its original meaning. By adding specific reference to God, the government used its authority to send a message to non-believers that they are outsiders. Including this phrase conveys the idea that belief in a Judeo-Christian god is central in being a loyal, patriotic American, and those who do not believe in the Judeo-Christian concept of God are not included in this core group. The Pledge Act of 1954 has to pass two tests challenging the language of the statue, the context in which the statue was enacted, and its legislative history.

[23] Wallace v. Jaffree, 472 U.S. 38 (1985).

[24] ACLU v. Capitol Square Review and Advisory Board, 2001 Fed App. 0073P (6th Cir. 2001).

A. The Pledge Fails the Three Prong Lemon Test

The *Lemon* test has three prongs; violation of any of the three prongs means the Act fails the Lemon test. To determine whether each prong is satisfied, they will be examined one at a time.

The first prong asks whether the statue has a secular legislative purpose. The Pledge, according to Newdow, has a legislative history with the "sole purpose ...to advance religion, in order to differentiate the United States from nations under communist rule."[25] The Act states:

> Our American government is founded on the concept of the individuality and the dignity of the human being...that the human person is important because he was created by God and endowed by Him with certain inalienable rights ...the inclusion of God in our Pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator... [26]

It is plainly stated that the purpose of the addition was to send a religious message that this is a nation under a deity. In Newdow, the courts affirmed that, "the mere enactment of the 1954 Act in its particular context constitutes a religious recitation policy that interferes with Newdow's right to direct the religious education of his daughter."[27] The disputed clause demonstrates support for the moral authority of God; therefore, under the first prong, the "under God" phrase of the Pledge fails to establish a non-sectarian purpose.

Under the second prong, the principal or primary effect of the statute cannot advance nor inhibit religion. To evaluate whether or not the Pledge gives the impression of the government supporting a religion, the context of application needs examination. In the *Newdow v. U.S. Congress* case, the school policy states "Each elementary school class [shall] recite the Pledge of

[25] Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002).

[26] Id.

[27] Id.

allegiance to the flag once each day"[28] because the California Education Code orders:

> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period... there shall be ... patriotic exercises. The ... Pledge of Allegiance to the Flag of the United States of America shall satisfy ... this section.[29]

The school policy and the California Educational Code state that the Pledge is a requirement. The requirement takes place at schools, which are government-based institutions at which the teacher lead the children in the recitation of the Pledge. The phrase "under God" in the Pledge is not a political message, but a religious one. When the teacher leads the recitation of the Pledge, it gives the impression that a government employee is advancing a specific type of religion. The primary purpose of the Pledge in the beginning was to be patriotic. In *Newdow*, the courts held that the 1954 Act had the "sole purpose...to advance religion, in order to differentiate the United States from nations under communist rule." Following this line of reasoning, the Pledge fails the second prong of the Lemon test.

B. The Pledge Fails the Endorsement Test

The Pledge of Allegiance is unconstitutional not only for failing to pass the *Lemon* test, but also because it fails the Endorsement test. The Endorsement Test originated with the purpose of determining whether an act or statute sends a message that the government gives approval of a specific religion. In the present case, the Court stated that any "government conduct must not endorse or disapprove of religion" and a message of endorsement would cause those outside of the message to feel excluded from the political community while portraying a message of acceptance to "adherents that they are insiders, favored members."[30] Under the Endorsement test, the Pledge was

[28] The SCUSD, the school district that Newdow claims his daughter may attend in the future, has this rule.

[29] California Education Code Section 52720.

[30] Newdow, 292 F.3d at 181 (quoting Lynch).

found to endorse religion and religious belief. The reasoning behind this is that when the phrase "under God" is supplanted with "under no god," the result implies a discouragement of religion. Using this logic, the rejection of religion is unconstitutional; therefore, the endorsement offered by "under God" should be considered unconstitutional as well.

The Pledge of Allegiance with the phrase "under God" is usually recited in public schools where the environment consists of a captive audience of children. Through the 1943 *Barnette* case, we can understand the significance of the Pledge in serving its Americanism purposes. In *West Virginia v. Barnette*, the Court stated that, "the flag salute is form of utterance ... [and] symbolism is ... [an] effective way of communicating ideas.… [S]ymbols of State often convey political ideas just as religious symbols come to convey theological ones."[31]

In a case regarding prayer at high school football games, *Santa Fe Independent School District v. Doe*,[32] the courts used all three tests to strike down the student-led "invocations" for numerous reasons. Initially, they held that the school district policy in this case was facially unconstitutional since it had no secular purpose, and the language was endorsing school prayer. Even though prayer is not the same as the Pledge, the phrase "under God" seems to be making an assertion through reciting the Pledge that the government and the school recognizes believers of God, and excludes those who do not.

CONCLUSION

Through the Lemon and Endorsement tests, the Pledge of Allegiance after the 1954 Act is found to be in violation of the Establishment Clause in the First Amendment. The 'under God' phrase signifies an unconstitutional governmental endorsement of religion and it has become necessary for remedial action in order to establish a neutral Pledge that honors patriotic values. Francis Bellamy had the intention of bringing patriotic values of life, liberty and justice to all without religious connotation. The Pledge should revert to its original format because just as one citizen pledges allegiance to this nation, his neighbor should not feel left out due to a religious revision that alienates him from those who believe in the God specified in the Pledge.

[31] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

[32] Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).