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One Nation Under God? A Constitutional Question

Elk Grove Unified School District v. Newdow

On Wednesday, March 24, 2004, the Supreme Court will hear oral argument in *Elk Grove Unified School District v. Newdow* (No. 02-1624). The case involves a challenge by Michael Newdow, an avowed atheist, to state-sponsored recitation of the Pledge of Allegiance in the public school system that his daughter attends. Mr. Newdow asserts that the inclusion of the words “under God” in the Pledge renders it a religious exercise and that government sponsorship of recitals of the Pledge by children in public schools thus violates the Establishment Clause of the First Amendment.

The U.S. District Court for the Eastern District of California ruled against Mr. Newdow, but the U.S. Court of Appeals for the Ninth Circuit reversed that judgment. In its initial opinion, issued on June 26, 2002, a three-judge panel of the Ninth Circuit held unconstitutional the 1954 Act of Congress that added the words “under God” to the Pledge of Allegiance. The court also held unconstitutional the practice of state-sponsored recitation of the Pledge in public schools. Sandra Banning, the mother of Mr. Newdow’s daughter, then challenged his standing to bring the suit. Ms. Banning has no objection to the Pledge or to her daughter’s recitation of it in public school. On December 4, 2002, the Court of Appeals ruled that Mr. Newdow had standing to sue in his own name but not to sue on his daughter’s behalf.

On February 28, 2003, the panel amended its opinion and withdrew its earlier ruling that the 1954 Act of Congress violates the Establishment Clause. The amended opinion left intact, however, the ruling against state-sponsored recitation of the Pledge in public schools. On March 4, 2003 the panel ruled that its order banning recitation of the Pledge would not take effect until all appeals in the case had been concluded. The full Ninth Circuit thereafter denied a petition to rehear the case *en banc* (i.e., before a wider panel of judges). The school district then successfully petitioned the U.S. Supreme Court to hear the case in its 2003–04 term. Justice Antonin Scalia, having criticized in a public speech the Ninth Circuit panel decision in Mr. Newdow’s favor, recused himself from the case.

The Newdow litigation presents the Supreme Court with two distinct issues. First, as a threshold matter, does Mr. Newdow (a father who does not have legal custody of his daughter) have standing to complain about the circumstances of her education? Second, does recitation in public school of the Pledge, containing the words “under God,” violate the First Amendment’s Establishment Clause? If the Court rules against Mr. Newdow on the standing issue, it will overturn the judgment of the Ninth Circuit, but it will not address the issue of the constitutionality of state-sponsored recitals of the Pledge. A brief analysis of the standing issue follows discussion of the constitutional questions.

LEGAL BACKGROUND

Constitutional Backdrop

The original version of the Pledge of Allegiance is attributed to Francis Bellamy, a Baptist minister, and was first published in *The Youth's Companion* in September 1892. Intended to celebrate the 400th anniversary of Columbus's voyage to America, the Pledge was also part of the magazine's broader campaign to promote (and sell) the flag of the United States in public schools. Bellamy's Pledge reads: "I pledge allegiance to my flag and to the Republic for which it stands, one nation, indivisible, with liberty and justice for all."

The Pledge was quickly adopted by schools and civic organizations across the country. The Pledge was changed slightly in the early 1920s, with "the flag of the United States of America" replacing "my flag." In 1942, Congress officially incorporated the Pledge into the statute that governs the presentation and use of the flag of the United States.

The earliest legal challenges to the Pledge arose from students who objected to its mandatory recitation in schools. In *Minersville v. Gobitis*, decided by the U.S. Supreme Court in 1940, two children were expelled from public schools for refusing to say the Pledge. The children claimed that their refusal was required as a matter of their religious belief as Jehovah's Witnesses. The Court, in an opinion written by Justice Felix Frankfurter, held that the students' religious beliefs did not excuse them from complying with the requirement to say the Pledge. The Court found that the state has a paramount interest in nurturing patriotism, especially through the public schools, and that interest outweighs whatever reasons the students might have for remaining silent.

The majority's decision in *Gobitis* provoked a stinging dissent from Justice Harlan Fiske Stone, and three years later a majority of the Court accepted his reasoning. In *West Virginia v. Barnette* (1943), the Court heard another case involving mandatory

recitation of the Pledge. This time, however, the Court overruled *Gobitis* and held that coerced recitation of the Pledge violated the core rights and principles for which the flag stands. Justice Robert Jackson wrote the majority opinion, the core of which is crystallized in a famous passage:

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.

Against the backdrop of a worldwide fight against fascism, the *Barnette* decision emphasized the distinctiveness of the American liberal democratic system: the government may not command its citizens to believe or confess any creed, political or religious. School authorities must honor any student's decision not to participate in the Pledge.

A decade after *Barnette*, the Pledge returned to the national spotlight, though now in the context of the Cold War. In the early 1950s, the Knights of Columbus added the phrase "under God" after "one nation" to their recitations of the Pledge, and in 1954 Congress officially adopted the change. For many in Congress, the words "under God" emphasized and celebrated the distinction between the United States and the officially atheistic Soviet Union. President Dwight D. Eisenhower's official statement on signing the new Pledge statute echoes that theme:

Over the globe, . . . millions [have been] deadened in mind and soul by a materialistic philosophy of life. . . . In this [Pledge], we are reaffirming the transcendence of religious faith in America's heritage and future[;] in this way we shall constantly strengthen those spiritual weapons which forever shall be our

country's most powerful resource, in peace or in war.

President Eisenhower's message, as well as comments in the Congressional Record, show that those who favored the amendment intended the revised Pledge to nurture this "powerful resource" through recitation of the Pledge in schools across the nation.

In the half-century since President Eisenhower signed the amended Pledge into law, the U.S. Supreme Court has ruled that the Establishment Clause prohibits a wide range of state-sponsored expressions of religion in public schools. These cases include *Engel v. Vitale* (1962), which prohibited the recitation of a state-composed prayer at the start of the school day; *Abington School District v. Schempp* (1963), which barred state-sponsored reading of the Bible and recitation of the Lord's Prayer in public school; *Wallace v. Jaffree* (1985), which held unconstitutional an Alabama law mandating a moment of silence for meditation or prayer at the beginning of each public school day; *Lee v. Weisman* (1992), which prohibited state-sponsored prayer at public school commencements; and *Santa Fe Independent School District v. Doe* (2000), which enjoined school-sponsored prayer over the public address system at athletic contests in public high schools.

Before *Newdow*, the Supreme Court had never directly confronted the constitutionality of the amended Pledge. However, the Pledge makes frequent appearances in the Court's decisions about religion in public schools. In those cases, the Pledge is typically used to illustrate permissible references to God in the school day, in contrast to the prohibited practice at issue in the case at hand.

In *Engel v. Vitale*, for example, the Court held unconstitutional a government-sponsored school prayer but suggested that the Pledge was different. "Such patriotic or ceremonial occasions," Justice Hugo Black wrote, "bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance."

Prior to the *Newdow* decision, only one federal appellate court had taken up the constitutionality of the Pledge's phrase "under God." In *Sherman v. Community Consolidated School District 21* (1992), the U.S. Court of Appeals for the Seventh Circuit held that the use of the phrase "under God" in the student-recited Pledge does not violate the Establishment Clause. Judge Frank Easterbrook, writing for a panel of the court, surveyed the U.S. Supreme Court's many references to the Pledge

and concluded that the words "under God" reflect "ceremonial deism" rather than a constitutionally prohibited religious exercise. In this respect, the court found, the Pledge falls into the same category as the national motto "In God We Trust" and Presidential Thanksgiving Proclamations. Such expressions of ceremonial deism "have lost their original religious significance," the court held, and thus the state may make use of them for the secular purpose of "solemnizing public occasions."

Mr. Newdow asserts – and the Ninth Circuit ruled – that the current version of the Pledge is, at least in part, a religious message, and therefore recitation of the Pledge is a religious exercise.

Constitutional Arguments

In light of the 1943 *Barnette* decision, Mr. Newdow's daughter is, of course, free to refrain from reciting the Pledge at her school, though she apparently has not done so. She is also free to recite the Pledge but omit the words "under God." Mr. Newdow, however, is asserting a broader constitutional argument than that accepted by the Supreme Court in

the *Barnette* decision. He is asking the Court to rule that public schools may not sponsor the recitation of the Pledge, because the inclusion of the words “under God” render the recitation of the Pledge a religious as well as a patriotic exercise.

Mr. Newdow asserts — and the Ninth Circuit ruled — that the current version of the Pledge is, at least in part, a religious message, and therefore recitation of the Pledge is a religious exercise. The Supreme Court has consistently held that such exercises in public schools, when sponsored by the state, violate the Constitution’s Establishment Clause. Mr. Newdow and the many friend of the Court briefs supporting him argue that the Pledge takes a theological position, namely, that God exists and that there is only one God. This, they contend, is a state-sponsored endorsement of monotheism, and therefore an implicit rejection of atheism and polytheism. The fact that this theological position appears in an exercise whose function is to swear allegiance — spoken while standing at attention, hand over heart — further underscores its character as an official statement of religious belief to which students are being asked to commit themselves.

Moreover, they argue, the setting in which the Pledge is typically recited, involving all students being asked to say it aloud and in unison, leads to coerced participation. The Supreme Court relied on just such a theory of coercion by peer pressure in *Lee v. Weisman*, which held unconstitutional state-sponsored prayer at public school commencements. Mr. Newdow’s understanding of the Pledge recital is that it is both coercive and theological. Accordingly, Mr. Newdow argues that it is not enough to excuse students who do not wish to recite it; instead, the state must cease sponsoring it entirely.

Mr. Newdow’s adversaries in this litigation include the Elk Grove Unified School District, in which his daughter attends school; the United States, which has entered the litigation on the side of the school district; and the many interest groups that have filed friend of the Court briefs on behalf of the school district. Those who defend the school’s authority to sponsor this exercise rely on two interrelated arguments. First, they follow the same line of argument as that accepted by the Seventh Circuit in the *Sherman* decision. As many members of the Supreme Court have recognized, the United States has a long tradition of including “non-sectarian” references to God in ceremonial settings. These include Presidential Inaugural Addresses; Presidential Thanksgiving Proclamations; the appearance of the national motto “In God We Trust” on the currency of the United States; and the call with which each Supreme Court session opens: “God Save the United States and this Honorable Court.” Defenders contend that such references to God in our public life operate to affirm the solemnity or seriousness of certain occasions or places, rather than to profess specifically religious creeds.

The defenders’ second argument builds upon the first. They argue that the Pledge is best seen as a patriotic statement, not a religious one. Its central affirmation is one of fidelity to the United States, rather than to a particular religious concept of the nation. The phrase “under God” represents a simple acknowledgment of the importance of religion in the history of the United States, and especially the Founders’ understanding that they were acting under God’s guidance. Viewed in this light, the defenders say, the Pledge is an acknowledgment of the religious aspects of our country’s tradition and national character. If the Pledge may not be recited in public school, they assert, students will

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be deprived of this understanding of our historical self-conception, and will thus be left with an impoverished, overly secularized view of American history and ideals. Understood as a whole, the Pledge is designed to promote patriotism and national unity, not to coerce, endorse, or promote any theological understanding.

Mr. Newdow's Standing

As noted above, the Supreme Court may not even address the constitutional issues raised by Mr. Newdow's claim, because the Court may find that he lacks standing to bring the lawsuit. A plaintiff's standing to sue requires a showing that he has suffered an injury caused by the defendant, and that a court order in his favor would cure the injury. If Mr. Newdow had undisputed legal custody of his daughter throughout the litigation, the issue of standing would be easy. He would be able to sue on his daughter's behalf, asserting her right to be free from state-sponsored religion in the public school she attended. He also would be entitled to sue on his own behalf, asserting a parent's right to be free of interference from the state with respect to the inculcation of religious beliefs in his child. If, at the other extreme, he had been completely estranged from his daughter, and had no rights of visitation, physical custody, or legal authority with respect to her upbringing, he would have no standing to bring the suit. Under those circumstances, he could not assert her rights, nor would he suffer his own legal injury as a result of his daughter's educational environment.

The issue of standing in *Newdow* is contentious because the circumstances of Mr. Newdow's legal relationship with his daughter are somewhere between these extremes. Her mother, Sandra Banning, to whom Mr. Newdow has never been

married, is the legal custodian and has the right to make decisions concerning her daughter's education. From the beginning of the litigation, however, Mr. Newdow has had joint physical custody of his daughter. He sees his daughter regularly, and he has manifested interest in her education and religious upbringing. Moreover, he has the right under his current arrangements with Ms. Banning to be consulted on important matters concerning his daughter's life.

On December 4, 2002, after Ms. Banning challenged Mr. Newdow's legal standing to bring suit in the case, the Ninth Circuit ruled that Mr. Newdow did not have standing to sue on his daughter's behalf (as a legal custodian would), but that he nevertheless could maintain the suit on his own behalf, as a parent who did not want his daughter exposed to an unconstitutional practice. The Circuit Court, in rejecting Ms. Banning's challenge, asserted that she "has no power, even as sole legal custodian, to insist that her child be subjected to [arguably] unconstitutional state action."

At the very least, the presence of the standing issue gives the justices a way around deciding the Pledge issue if they choose to take it.

The standing issue in *Newdow* is one that the Supreme Court has never decided. Moreover, Mr. Newdow and Ms. Banning are continuing to litigate in the California courts various details of the custody arrangement. This makes the standing issue something of a moving target, and may itself lead the Supreme Court to dismiss Mr. Newdow's constitutional claim.

It is hard to predict whether the Supreme Court will recognize Mr. Newdow's right to object to state-sponsored exposure of his daughter to what he asserts is a religious exercise. At the very least, the presence of this issue gives the justices a way around deciding the Pledge issue if they choose to take it. If the Court dismisses the case on these grounds, the Ninth Circuit's prior opinion in Mr.

Newdow's favor would be effectively erased, and would no longer represent the governing law in the area within that Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington and the Territory of Guam). Someone else could bring a similar lawsuit in California or elsewhere, but the case would have to be argued anew in the lower courts, and there is no guarantee that the Supreme Court would agree to hear that new case.

Possible Outcomes

In reaching its decision, the Court will choose from a fairly broad range of possible outcomes. First, the Court may find that Mr. Newdow lacks standing to bring this claim, and therefore dismiss his challenge to the Pledge without addressing the First Amendment issue. Such a result would effectively treat the issue as if it had never been raised in the Ninth Circuit, and thus leave public schools in that Circuit free to sponsor recitations of the Pledge.

If the Court does reach the constitutional question, the relative breadth or narrowness of the Court's opinion will determine the significance of the outcome.

At stake, of course, is the extent to which the Constitution will permit the government to sponsor public expressions of religious messages. An opinion that reverses the Ninth Circuit and upholds recitation of the Pledge might do so on narrow grounds. The Court might underscore the limitations on its ruling, by emphasizing that the phrase "under God" is only two words, is "non-sectarian,"

falls in the middle of an otherwise patriotic recitation, and has been recited in public schools for a half-century. Such an opinion would provide little guidance on the constitutional permissibility of public sponsorship of more conventionally religious statements, such as prayer or posting of the Ten Commandments. Moreover, such an opinion would probably take pains to explain that it was not intended to overrule or cast doubt on the Court's prior rulings on school-sponsored prayer.

In contrast, the Court might reverse the Ninth Circuit with an opinion suggesting broader latitude for government-sponsored religious messages. Such an opinion might find that "ceremonial deism" serves a legitimate secular purpose by solemnizing public events. If so, the opinion would reaffirm in principle the practices of legislative prayer and Presidential Thanksgiving Proclamations, and might even suggest that the Court is willing to reconsider the ban on prayer at public school graduations. A more robust reversal might also endorse government-sponsored messages that emphasize the significance of religion in the nation's history. A decision advancing that principle would validate a range of existing governmental references to religion from religious mottos on the official seals of cities or states to older religious displays, such as monu-

ments containing the Ten Commandments, in public buildings. Such an opinion might invite a wider variety of new religious displays by government, so long as the religious materials are connected with other historical content.

A decision by the Supreme Court in favor of Mr. Newdow might affirm the Ninth Circuit on

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either narrow or broad grounds. A narrow opinion would focus on specific features of the Pledge that make it particularly vulnerable to long-accepted Establishment Clause concerns. These include the age of those asked to make the Pledge; the pressure imposed on students by the school environment; the intertwining of patriotism with the religious message; and the fact that students are asked to speak aloud and commit themselves to the Pledge, rather than just listen to it. An opinion restricted to those features would have little impact on other practices, outside of public schools, that involve “ceremonial deism” or government-sponsored religious expression, such as legislative prayer.

A broader opinion affirming the Ninth Circuit, however, might have a much more dramatic effect on those other practices. For example, Congress enacted the national motto “In God We Trust,” found on all coins, two years after “under God” was added to the Pledge. If the Court affirms the Ninth

Circuit in an opinion that signals a broad constitutional prohibition on government endorsement of religious messages, the motto would easily be as vulnerable as the Pledge, and the same would hold true for religious messages on public seals.

Finally, in the event that Justice Scalia’s recusal leaves the Court equally divided, 4–4, it will affirm the Ninth Circuit’s decision without writing an opinion. This outcome would not affect the constitutionality of recitals of the Pledge in other parts of the nation, but would mean that the Ninth Circuit’s *Newdow* decision governs the use of the Pledge in schools within that Circuit’s geographical boundaries.

Whether the decision reverses or affirms the Ninth Circuit, the Supreme Court’s tendency in recent cases involving public sponsorship of religious messages suggests that the Court will resolve the case on narrower rather than broader grounds. A decision is expected by the end of June.

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