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"One Nation, Under God": Discussing the Unsettled Issue of *Elk Grove Unified School District v. Newdow*

by Jeremy D. Bowen[1]

I. Introduction

On September 27, 2007, fifty high school students in Boulder, Colorado walked out of their school during the daily recitation of the Pledge of Allegiance and said their own pledge—the Pledge of Allegiance omitting the clause "under God." One student remarked, "Boulder High has a highly diverse population, not all of whom believe in God, or one God. We didn't think it was fair for the whole school to have to listen to it. It's almost religious oppression."[2] Are students subject to religious oppression when they hear or say that America is a nation "under God?" What about America on a larger scale—do some U.S. citizens feel religiously oppressed by reciting the Pledge of Allegiance?

The case was originally heard before the United States Court of Appeals for the Ninth Circuit in *Newdow v. U.S. Congress* (2002). Michael Newdow sued his daughter's school district over a policy allowing recitation of the Pledge of Allegiance. The Ninth Circuit

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2 Associated Press. *Colorado Students Walk Out During Pledge, Recite Own Version,* Sept. 27, 2007, http://www.foxnews.com/story/0,2933,298336,00.html.

ruled in favor of Mr. Newdow and against the constitutionality of the "under God" clause.[3] The case was then brought before the U.S. Supreme Court on appeal. Although the appealed case suggested a re-evaluation of the "under God" clause, the Supreme Court dismissed the case because, as a noncustodial father, Mr. Newdow did not have legal standing to bring the suit in federal court. The Supreme Court reversed the Ninth Circuit Court's decision and did not address the constitutionality of the "under God" clause in the Pledge of Allegiance.[4] Debate continues to this day throughout the nation over the implications of this clause.

This open-ended debate has had major repercussions—from teenagers walking out of their high school to Congressman lining up on the steps of the state Capitol to recite the Pledge.[5] Such a wide spectrum of actions evinces the feeling that there is strong support on both sides of this issue; however, it is important to realize the consequences of either removing or maintaining the "under God" clause. On one hand, some people feel their beliefs are disrespected if a deity is referred to in the Pledge of Allegiance. On the other hand, if the Ninth Circuit Court's ruling were to be enforced it "would exhibit not neutrality but hostility to religion."[6]

What then was the purpose of the 1954 Act, which inserted the words "under God" into the Pledge of Allegiance? Why was the insertion of these words so important to the members of Congress who signed the Act? What effect does the Act have upon American citizens? Also, in order to understand the effect the Act has upon the American people, it is important to look at the three tests—the coercion test, the endorsement test, and the Lemon test—that the Ninth Circuit used to argue against the constitutionality of the Pledge of Allegiance.[7] By examining these three tests in relation to the Pledge

3 Newdow v. U.S. Congress, 292 F.3d 597, 597–615 (9th Cir. 2002).

4 Elk Grove Unified School District v. Newdow, 542 U.S. 1, (2004).

5 Alex Colvin, The Pledge of Allegiance Controversy: Is America "One Nation Under God?", Religious Freedom Report, Feb. 2003, at 1, 6.

6 Allegheny v. American Civil Liberties Union, 492 U.S. 573, 623, (1989).

7 Newdow, *supra* note 3, at 605.

of Allegiance, there is ample evidence to argue that the pledge is indeed constitutional.

II. The 1954 Act

In *Newdow v. U.S. Congress*, the Ninth Circuit claimed that the 1954 Act was created for the sole purpose of advancing religion.[8] However, two considerations provide a context for the legislative history concerning this clause.

First, we must clearly understand Congress's motivation underlying the 1954 Act. The legislative report states:

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp.[9]

The members of Congress were acknowledging the fact that America was indeed founded on the principles of individual freedom. Similar language was used in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The "concept of the individuality and the dignity of the human being" are maxims that this nation was founded upon and are reiterated in the 1954 Act's reasoning.[10] Members of Congress tacitly acknowledged that the principles of freedom should never be taken away from any man or woman because the right to do so is not in the hands of an

8 Newdow, *supra* note 3, at 610.

9 H.R. Rep. No. 83–1693, at 1–2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340.

10 *Id.*

institution. This acknowledgement by the founding fathers serves not to advance religion, but rather to recognize a fundamental thread that is woven into this nation's historic framework. Does this mean that everyone must embrace one God or one religion? This is not the case. The founders were simply stating that no one entity, be it man or government, had the right to nullify fundamental freedoms. The Ninth Circuit's decision asserts that "the First Amendment requires that a statute must be invalidated if it is entirely motivated by the purpose to advance religion."[11] While this principle is true and should govern our judgment, the Ninth Circuit erroneously interpreted the legislative history and concluded that the 1954 Act was solely an advancement of religion rather than an acknowledgement of the founding principles our founders set forth in their own documents.

Second, the presence of religious rationale is not adequate grounds to dismiss the 1954 Act as unconstitutional. Instead, we need to consider the overall effect of the 1954 Act. Professor Thomas C. Berg[12] suggests that we should not look at the "input" of the 1954 Act alone, but we must also consider the "output," or the effect of the Act. He states, " . . . although the rationale or 'input,' for religious freedom may be religious, the 'output'—how government actually treats people of varying views—must be neutral."[13] Professor Berg, referring to the "under God" clause, argues:

> The two short words delve no further into theology than is necessary to establish the transcendent basis for limited government and human rights. The specifics about the nature of the transcendent authority that grounds rights are left to be filled in by individuals and the religious or other ideological communities to which they belong.[14]

11 Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

12 Thomas C. Berg is a St. Ives Professor of Law and Co-Director of the Murphy Institute for Catholic Thought, Law, and Public Policy at the University of St. Thomas School of Law. University of St. Thomas School of Law, http://www.stthomas.edu/law/faculty/bios/bergtom.htm.

13 Thomas C. Berg, The Pledge of Allegiance and the Limited State, 8 Tex. Rev. L. & Pol. 41, 67 (2003).

14 *Id.* at 68.

Congress should be credited for its efforts to repel communistic ideals that threatened to undermine our established religious freedoms. This freedom allots to each one of us the right to believe whatever we want. However, we ought not to impose perspectives on others that would deny the very establishment that renders us the freedom to believe and worship—or not believe and not worship, for that matter—how we wish. Indeed, if religious "input" invalidates all "output," then even Jefferson's historic Virginia Statute for Religious Freedom would be considered unconstitutional due to the statute's use of religious language[15] ("[A]lmighty God," "Holy author," "Almighty power," etc.).[16]

This argument seemingly justifies the religious "input," the clause of the 1954 Act, but does this justify the "output?" In order to answer this question, we need to evaluate the three tests that the Ninth Circuit implemented to determine the proper separation of church and state—the coercion test, the Lemon test, and the endorsement test.

III. The Coercion Test

The coercion test was created in response to the questionable practice of including invocations and benedictions at public school ceremonies. The question proposed in *Lee v. Weisman* (1992) is "whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment. . . ."[17] The coercion test asks if, "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[18] For the clause to be removed it must be proved that a person is coerced into saying the Pledge of

15 *Id.* at 60.

16 The Virginia Statute for Religious Freedom, 16 January 1786, http://www.lva.lib.va.us/whatwedo/k12/bor/vsrftext.htm (last visited Mar. 18, 2008).

17 Lee v. Weisman, 505 U.S. 577, 580 (1991).

18 *Id.* at 587.

Allegiance. In order to examine Newdow's case affirming coercion, it is critical to apply the legal definition of coerce—"to compel by force or threat."[19]

According to California's Education Code, students, including Newdow's daughter, begin each school day with "appropriate patriotic exercises."[20] The recitation of the Pledge of Allegiance can fulfill this requirement. Newdow argued that this routine harmed his child by exposing her to the Pledge. Newdow " . . . claims that his daughter [was] injured when she [was] compelled to 'watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that ours [sic] is "one nation under God."'"[21] Yet, Newdow admits that his daughter was not being forced to recite the Pledge. Though it is certainly true that Newdow's daughter is young and may be vulnerable to unfamiliar beliefs, is it beneficial to insulate her from the inevitable diversity of the world in which she will live? Should the history and foundation of the United States be diminished to avoid exposure?

Furthermore, the Supreme Court has on a number of occasions recognized the place of religion in our nation's traditions and institutions. Former Chief Justice Warren Berger argued that "[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders."[22]

Even in a ruling against prayer in public schools, the Supreme Court in *Engel v. Vitale* (1962) argued for the accommodation of a reference to deity in the classroom.[23] Justice Hugo Black, writing for the majority, concluded the following:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country

19 BLACK'S LAW DICTIONARY 275 (8th ed. 2004).

20 Cal. Educ. Code § 52720 (1989).

21 Newdow, *supra* note 3, at 601.

22 Lynch v. Donnelly, 465 U.S. 668, 675 (1984).

23 Engel v. Vitale, 370 U.S. 421, 435 (1962).

> by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God.[24]

These examples are in harmony with the Supreme Court's self-imposed restriction of avoiding a "rigid, absolutist view of the Establishment Clause."[25] Even the Ninth Circuit Court acknowledged that the Supreme Court "has occasionally commented in dicta that the presence of 'one nation under God' in the Pledge of Allegiance is constitutional."[26] For example, Justice William Brennan underlined the minimal religious effect of recitation of the Pledge of Allegiance:

> 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 allusion to the same historical fact.[27]

Again, the Ninth Circuit's main argument, with respect to the coercion test, comes from the *Lee* case. The case involves public prayer at graduation in public schools. Addressing public prayer at a high school graduation ceremony, the Court noted " . . . heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. . . ."[28] In addition, *Lee* states:

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24 *Id.*

25 Lynch, *supra* note 22, at 678.

26 Newdow, *supra* note 3, at 611.

27 School District of Abington Township v. Schempp, 374 U.S. 203, 304 (1963).

28 Lee, *supra* note 17, at 592.

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.[29]

Legal implications do arise when you have someone saying a prayer in front of a student body in elementary and secondary schools, but keep in mind, the Pledge of Allegiance has not been officially deemed a national prayer. It is thus difficult, though apparently possible, to make the necessary jump from the logic of the *Lee* case to the *Newdow* conclusion of blatant coercion. Further, the intensity of the alleged coercion, and the related legal ramifications, are also debatable. Judge Ferdinand F. Fernandez, dissenting from the Ninth Circuit Court's majority decision, highlights the inconsequential nature of Newdow's charge by insisting that the danger of the "under God" clause in the Pledge of Allegiance is "so miniscule as to be de minimis."[30] Truly, the familiarity of the word "God" today by no means compels or influences people to join a church or adhere to Christian principles. Coercion needs to be readily and clearly identifiable if Newdow intends to secure government elimination of the clause. Although the state of California has a policy that the Pledge of Allegiance may be recited at the beginning of each school day, no "force or threat"[31] is compelling Newdow's daughter, nor any other student, to participate in the Pledge of Allegiance.

IV. THE LEMON TEST

Another case, *Lemon v. Kurtzman* (1971), adds to the current discussion. The case developed a test to evaluate and confirm the proper separation of church and state in public schools. There are

29 *Id.* at 593.

30 Newdow, *supra* note 3, at 613.

31 BLACK'S LAW DICTIONARY, *supra* note 19.

three parts to the Lemon test. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[32]

A. The First Prong of the Lemon Test

The first prong of the Lemon test states that the "statute must have a secular legislative purpose."[33] The Ninth Circuit argued that the 1954 Act failed the first prong of the Lemon test. The Court asserted that "[t]he Act's affirmation of a 'belief in the sovereignty of God' and its recognition of 'the guidance of God' are endorsements by the government of religious beliefs."[34] This argument, however, lacks validity when viewed in the light of our nation's history and traditions. Justice William Douglas, writing the majority opinion for the Supreme Court in *Zorach v. Clauson* (1952), stated authoritatively that "[w]e are a religious people whose institutions presuppose a Supreme Being."[35] Consequently, the 1954 Act's simple acknowledgement of commonly accepted history to combat communism is sufficiently secular in purpose to pass the first prong of the Lemon test. The religious rationale supporting the Act serves only to enhance the appropriately secular "output" of defending our nation's traditions and freedoms from a communist threat.

B. The Second Prong of the Lemon Test

The second prong of the Lemon test is that a law's "principal or primary effect must be one that neither advances nor inhibits

32 Lemon v. Kurtzman, 403 U.S. 602, 612–613, (1971).

33 *Id.* at 612.

34 Newdow, *supra* note 3, at 609.

35 Zorach v. Clausen, 343 U.S. 306, 313 (1952).

religion."[36] The key word is "primary" (i.e. of chief importance). What is the "primary effect" of the Act of 1954?

The Ninth Circuit Court claims that, according to legislative history, "the Act's sole purpose was to advance religion."[37] Therefore, the Act violates the Establishment Clause with its promotion of "religion at the expense of atheism."[38] However, the words "atheistic and materialistic" are adjectives connected to the "primary intent"—i.e. defense against communism. For example, the Act's legislative history states that one of the main reasons the 1954 Act was put in place was to "serve to deny the atheistic and materialistic concepts of communism. . . ."[39] Communism was the main threat addressed by the Act of 1954. Even if the primary purpose of condemning communism is couched in religious language, the primary and secular intent is to condemn communist influence. Since 1954, the Act has also played another important role in our society.

Concurring with the opinion in *Allegheny v. American Civil Liberties Union* (1989), Judge O'Connor stated that certain practices, despite religious roots, are now "generally understood as a celebration of patriotic values rather than particular religious beliefs."[40] The 1954 Act's inclusion of the "under God" clause in the Pledge of Allegiance has fulfilled this purpose of celebrating patriotic values. Judge Fernandez reaffirmed, in his dissent from the Ninth Circuit Court, that "the de minimis tendency of the Pledge to establish a religion or to interfere with its free exercise is no constitutional violation at all."[41] In essence, the "under God" clause passes the second prong of the Lemon test because it neither tends to advance nor prohibit religion. Rather, this clause reminds us and serves to protect the accommodation of a wide range of beliefs.

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36 Lemon, *supra* note 32.

37 Newdow, *supra* note 3, at 610.

38 *Id.*

39 *Id.*

40 Allegheny, *supra* note 6, at 631.

41 Newdow, *supra* note 3, at 615.

C. The Third Prong of the Lemon Test

The third prong of the Lemon test prohibits the excessive entanglement of church and state.[42] As previously stated, Newdow's daughter was not forced to say the Pledge of Allegiance. In addition, a complete separation of church and state is not possible; rather, an accommodation of differing beliefs is in order. Justice Black of the Supreme Court argued that the "history of man is inseparable from the history of religion."[43] The Supreme Court has found "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."[44] Judicial hostility toward religion, as manifest by a proposed elimination of the "under God" clause from the Pledge of Allegiance, would be "preferring those who believe in no religion over those who do believe."[45] The "under God" clause does not excessively entangle government with religion and therefore passes the third prong of the Lemon test. As a result, the "under God" clause successfully survives all three prongs of the Lemon test.

V. The Endorsement Test

In the 1984 case, *Lynch v. Donnelly*, which was mentioned previously, Justice Sandra Day O'Connor developed the "endorsement" test.[46] O'Conner states:

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion

42 Lemon, *supra* note 32, at 613.

43 Engel, *supra* note 23, at 434.

44 Zorach, *supra* note 35, at 314.

45 *Id*.

46 Lynch, *supra* note 22, at 687.

> relevant, in reality or public perception, to status in the political community.[47]

In relation to the Newdow case and the Act of 1954, no political standing is affected by the inclusion of the "under God" clause. People are not changing their beliefs about theology because of the mere mention of the words "under God." In reference to Newdow's daughter, her decision to say the Pledge or not will not affect her political standing nor her educational opportunities. Other than a political consideration, there is little or no need to delve further into the endorsement test.

VI. CONCLUSION

In summary, a closer examination of the coercion, the Lemon, and the endorsement tests confirms the constitutionality of the "under God" clause in the Pledge of Allegiance. The Ninth Circuit Court's arguments ignited an important debate over the role and meaning of the 1954 Act's insertion of the "under God" clause. This clause, in conjunction with other similar historically recognized references to our nation's religious heritage, serves to provide a religious rationale for the defense of our individual freedoms. We have acknowledged, however, that this power of preservation is not in the hands of any one man or institution—nor should it ever be. The "under God" clause simply represents the ideal of religious freedom and should therefore be maintained within the Pledge of Allegiance.

47 Lynch, *supra* note 22, at 692.