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ANALYSIS OF JURISPRUDENCE PRESENTED IN ELK GROVE UNIFIED SCHOOL DISTRICT V. NEWDOW (2004)

by

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Bachelor of Arts
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1975

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A dissertation in partial fulfillment
of the requirements for the

Doctor of Education Degree in Educational Leadership
Department of Educational Leadership
College of Education

Graduate College
University of Nevada, Las Vegas
August 2005

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Dissertation Approval

The Graduate College
University of Nevada, Las Vegas

August 9, 2005

The Dissertation prepared by

DAVID THOMAS SMITH

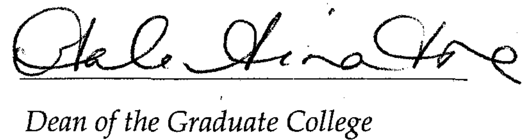
Entitled

ANALYSIS OF JURISPRUDENCE PRESENTED IN
ELK GROVE UNIFIED SCHOOL DISTRICT V. NEWDOW (2004)

is approved in partial fulfillment of the requirements for the degree of

DOCTOR OF EDUCATION IN EDUCATIONAL LEADERSHIP

Examination Committee Chair



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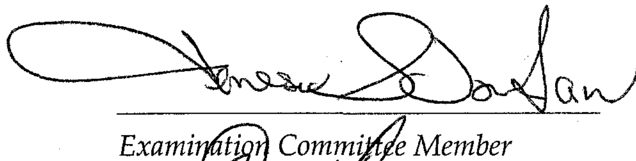

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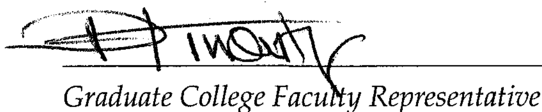

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ABSTRACT

Analysis of Jurisprudence Presented in
Elk Grove Unified School District v. Newdow (2004)

by

David Thomas Smith

Dr. Gerald C. Kops, Examination Committee Chair
Professor of Educational Leadership
University of Nevada, Las Vegas

The United States Congress adopted the Pledge of Allegiance into the United States Flag Code in 1942. The majority of states had adopted a school wide daily recitation of the Pledge into their education statutes to fulfill the teaching of civics. In 1954, Congress added the words "under God" to the Pledge. The insertion of those two words was to distinguish the United States as a religious country as opposed to the atheistic beliefs of the Union of Soviet Socialist Republics. The issue becomes whether or not a government lead recitation of the Pledge constitutes a violation of the Establishment Clause as applied to the states through the Fourteenth Amendment. In 1992, the Seventh Circuit Court of Appeals found the Pledge policy in public schools did not violate the Establishment Clause. In 2004, the Ninth Circuit Court of Appeals found the Pledge policy was a violation. The conflict between the two appellate court decisions was presented before the United States Supreme Court.

The purpose of this study was to examine Supreme Court Establishment Clause jurisprudence regarding the Pledge as applied to the educational setting. Arguments on

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both sides were examined to give administrators insight in the determination of decisions made concerning Establishment Clause issues in their school and district policies. The study also examined the implications of the Court's decision and the issues left unanswered.

The following research questions were addressed to determine an analysis of the issue:

1. How did the Supreme Court resolve the conflict between the lower courts?
2. What were the major arguments that influenced the Court's decision?
3. What was the jurisprudence of the concurring Justices?
4. Has the Court's decision left unresolved issues?
5. Have new issues emerged as a result of the Court's decision?
6. What are the implications of the decision for school leaders and school administration?
7. Does the decision offer guidance for addressing future disputes regarding the interpretation and application of the Establishment Clause?

Because the analysis of this study utilized legal research, the writing style contained in this dissertation was a combination of APA and the Harvard Blue Book.

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I would like to thank the members of my committee, Dr. Robert McCord, Dr. Porter Troutman, and Dr. Teresa Jordan whose support has kept me on track in my educational endeavors. I also want to thank the members of the faculty of the Department of Educational Leadership at UNLV for their individual insights and broadening of my perspective in education. The members of my doctoral cohort program have provided a solid foundation of encouragement and support.

I would like to thank Michael A. Newdow for pursuing his Establishment Clause litigation and, through his website, restorethepledge.com., making available the vast amount of information that assisted me in completing this dissertation. The issues in this dissertation are ones that have been close to my heart throughout my life, and I am thankful that Dr. Newdow provided the chance to pursue them.

I would not have traveled this educational path if it were not for the inspiration of my former principal, Dr. Gail Dixon. She encouraged me to become a school administrator

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and pursue a doctoral degree. I shall always reflect upon the wisdom and prudence that I received under her tutelage.

I would like to thank my family. First, my parents, who raised me to be a conscientious citizen and partake in our country's democratic process; it was they who laid the seeds for this endeavor. Second, I would like to thank my son, Lauren, who has encouraged me to keep going. He has always been a positive force toward my completion of this dissertation. Finally and most importantly, I would like to thank my wife and companion, Saundra, who has practically walked every step of the way with me. She has supported my pursuance of this degree and proof read every piece of this dissertation. Her sustenance and encouragement have enabled me to complete this endeavor.

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CHAPTER 1

INTRODUCTION

History of the Pledge

Francis Bellamy wrote what is now called the Pledge of Allegiance in 1892. As it first appeared in the September 8, 1892 of "The Youth's Companion", the Pledge to the Flag originally read, "I pledge allegiance to my flag and to the Republic for which it stands, one nation, indivisible, with liberty and justice for all." The American Legion and Daughters of the American Revolution changed the word "my flag" to "the flag" in 1923 at the National Flag Conference so that there would not be confusion with the number of immigrants who lived in the United States. At the same conference the following year, 1924, the words, "the United States of America" were added. In 1942, Congress included the Pledge to the Flag in the United States Flag Code (Title 36). The Pledge of Allegiance read, "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one nation, indivisible, with liberty and justice for all." In 1945, the Pledge to the Flag received the official title of "The Pledge of Allegiance" (Baer, 1992) herein referred to as the Pledge.

The Knights of Columbus started a campaign to include the words "under God" in the Pledge. In 1954, the U.S. Congress changed the wording of the Pledge 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." When the

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legislation was introduced in the House of Representatives, Representative Louis C. Rebaut stated, "An atheist American...is a contradiction in terms." He further stated,

> The children of our land, in the daily recitation of the Pledge in school will be daily impressed with a true understanding of our way of life and it origins. As they grow and advance in this understanding they will assume the responsibilities of self-government equipped to carry on the traditions that have been given to us. Fortify our youth in their allegiance to the flag by their declaration to "one Nation, under God". (H.R. 1693, 83rd Cong., 1954, p. 2341)

On the floor of the House it was stated, "The inclusion of God in our pledge further acknowledges the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism" (H.R. 1693, 83rd Cong., 1954, p. 2340). When then President Eisenhower signed the act into law on June 14, 1954, he stated, "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty" (100 Cong. Rec. 7, 8618, June 22, 1954, (As reported by Senator Ferguson)).

The Establishment clause of the First Amendment of the United States Constitution states in part, "Congress shall make no law respecting an establishment of religion." Up until 1940, the Establishment Clause had been a federal restriction on the Congress of the United States. In Cantwell v. State of Connecticut, the Supreme Court applied the Establishment Clause through the Fourteenth Amendment and also made it a restriction on individual states.

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Cantwell v. State of Connecticut, 310 U.S. 296 (1940)

The vote of the Court was nine to zero. Justice Roberts delivered the unanimous opinion. Jessie Cantwell, his father, and brother had been charged with inciting a breach of the peace for stopping two men on the street, asking their permission to play a recording which attacked their religious beliefs, and leaving the two men after being asked. The New Haven County Court of Pleas found the Cantwells guilty of a violation of State statute and of inciting a breach of the peace. The State Supreme Court found all three Cantwells guilty of violating the statute and reversed the lower court's decision of breaching the peace for the father and the brother. The State Supreme Court still found that Jessie had violated a breach of the peace. The family appealed on the basis that the State statute was not valid under the federal constitution and that the breach of peace was not based upon a statute but violated Cantwell's right to free speech. The question before the Court was whether or not the solicitation statute of Connecticut violated Cantwell's rights of free speech and free exercise of the First Amendment as applied to the Fourteenth Amendment.

The Court found that the State statute deprived the Cantwells of their rights without due process of law and reversed the State court's judgment on the two counts. In the opinion for the Court, Justice Roberts stated,

> First. We hold that the statute, as construed and applied to the appellants, deprives them of their liberty with due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or

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prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. (Cantwell, 1940, p. 303)

With the Cantwell decision, the Court incorporated the free exercise of religion into the Fourteenth Amendment. The Establishment Clause posed the same restraint on individual states as it did on the entire nation (Levy, 1986). The reciting of the Pledge of Allegiance is an individual State policy. As a result of the decision in Cantwell, individuals could challenge the Establishment Clause as it applied to State statutes.

Federal District and Appellate Court Actions Against States Involving the Pledge

Smith v. Denny, 280 F. Supp. 651 (1968)

Parents of Jehovah Witness students at Enterprise High School in Redding, California sought relief from a three-judge court in the Eastern District Court of California claiming the California Education Code requiring the voluntary recitation of the Pledge of Allegiance was unconstitutional. They claimed that the Pledge violated the free exercise of religion and the establishment of religion as stated in the First Amendment. The plaintiffs asked that the court direct the principal of the school, the president of the school board of trustees, and the superintendent of the board of trustees to remove the words "under God" from the Pledge. The defendants asked the court to dismiss the action for the plaintiff's failure to state a claim. The plaintiffs used as precedents the cases of Torasco, Abington, and Engel to substantiate their religious grounds. The three-judge panel found in favor of the defendants.

Judge Mac Bride who wrote the opinion stated that there were not any cases of litigation involving the constitutionality of the Pledge as it related to the First

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Amendment. "[P]laintiffs assert that the cases cited above are sufficiently analogous to show that a substantial constitutional question exists" (Smith, 1968, p. 653). The defendants argued that the plaintiff's references were religious in nature and that the Pledge is purely patriotic.

The district court ruled that the plaintiffs' claim presented, "no substantial constitutional question". Judge Mac Bride based the ruling on the *dicta* that had been presented by the Supreme Court with regard to religious references in our country's history. Judge Mac Bride denied the plaintiff's request for a three-judge court and dismissed the motion. Judge Mac Bride did state in his footnote on the ruling,

> While it is alleged that the inclusion of the words "under God" has "necessarily" resulted in the exercise of "coercion" upon plaintiff (amended complaint, para. 15), this appears to be a reference to the feeling of ostracism that are often a by-product of the assertion by minorities of their alleged constitutional rights. Nowhere is it alleged plaintiffs conduct has caused them to be penalized by teachers or school officials. (Smith, 1968, 654)

Smith v. Denny, 417 F. 2d 614, (Ninth Circuit, 1969)

A year later the case reached the Ninth Circuit Court of Appeals. The Ninth Circuit *Per Curium* did not rule on the question. Circuit Judges Chambers and Carter and District Judge Jameson dismissed the appeal. In the *Per Curiam* opinion, the court stated that because the students had graduated and most likely would not have to be placed in a similar situation involving a public school setting in Redding, California, there is little possibility that they would face any future direct harm. "The contention that appellants

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have a standing as taxpayers we regard as too fragile a hook to hang a legal claim on here" (Smith, 1969, p. 615).

Sherman v. Community Consolidated School District 21, 758 F. Supp. 1244 (N.D.Ill. 1991)

In 1989, Robert Sherman and his son, of atheistic belief, filed an action in Federal District Court against the Community Consolidated School District 21 in the State of Illinois for the school curriculum including the Pledge as one of its patriotic exercises. They claimed that the recitation of the Pledge was in violation of the First and Fourteenth Amendments. In the first complaint (714 F. Supp. 932 (1989)), the District Court denied the motion to dismiss the school district defendants. In the second complaint (745 F. Supp. 1371 (1990)), the Shermans amended their complaint to include the office of the State Attorney General. The District Court denied the State Attorney General's motion to dismiss. In the third amended complaint (758 F. Supp. 1244, (1991)) the Shermans asked for Summary Judgment, and the State Attorney General asked for Motion to Dismiss and Summary Judgment. In the cross motion for Summary Judgment, the court had to decide the constitutionality of the Illinois statute requiring the recitation of the Pledge. District Judge Ann C. Williams wrote the opinion for the district court and found in favor of the defendants.

Judge Williams stated that in Smith the court had found that the Pledge did not violate the Establishment Clause. She pointed out that in the first complaint (714 F. Supp. 932 (1989)), the court did find that the Pledge did not violate the Establishment Clause, but the court did not address the question of "outside pleadings" because it could not do so with a Motion to Dismiss. With both parties asking for Summary Judgment in

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the third complaint, the court could evaluate if the Illinois Pledge statute violated the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause.

Judge Williams applied the three-prong test used in Lemon to render her decision of an Establishment Clause violation. She found that the statute had a secular purpose in the legislature adopting the act to instill patriotic values in school children, pointing out that only one senator had linked prayer with patriotism in the adoption. The statute also required school students to be taught and tested on the Declaration of Independence, the U. S. Constitution, and the Illinois Constitution. Judge Williams found that the primary effect of the statute did not advance nor inhibit religion, thus passing the second prong of the test. She found that effect of the statute was to teach children about the principles on which the government operates. Judge Williams found that the statute did not cause an excessive entanglement with government and religion, thus passing the third prong of the test. She found that the statute required the teaching of secular subjects in public schools, not religious schools, so there was no excessive entanglement.

Judge Williams examined the Shermans' claim of a Free Exercise violation. In examining the statutory wording of the Pledge requirement, Judge Williams found the word "shall" did not make the statute unconstitutional as the Shermans had claimed. She pointed out that the statute did not state that "all" students shall say the Pledge, so at face value it was not unconstitutional. The application of the statute must show that it is unconstitutional not that it may be interpreted to cause unconstitutional actions.

Judge Williams examined whether the statute was unconstitutional as applied. She found from the Attorney General's affidavits that Richard Sherman was not required to state the Pledge, and Mr. Sherman's affidavit did not show that he had visited his son's

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school to effectively state that his son had been required to state the Pledge. Thus stated Judge Williams, "Not only does Mr. Sherman's affidavit fail to create a genuine issue of material fact regarding direct coercion, but it also is insufficient to create a genuine issue of fact regarding indirect coercion" (Sherman, 1991, p 1250). She further stated that even if Mr. Sherman had produced evidence in his affidavit that his son had felt he was indirectly coerced from peer pressure to state the Pledge,

> [I]t is doubtful that this would have been sufficient to prove a violation of Richard Sherman's Free Exercise rights. This is because no other court had held that the mere recital of the pledge, without any direct coercion by school officials, violates the First Amendment. (Sherman, 1991, p. 1250)

Judge Williams found, "At most, Richard Sherman faced indirect pressures because all the other children were conforming and saying the pledge and he was not" (Sherman, 1991, p. 1250).

Judge Williams looked at the Shermans' claim of a violation of the Equal Protection Clause of the Fourteenth Amendment. She found that the statute did not violate the religion clauses of the First Amendment, so there was no violation of a fundamental right. She further found that the statute did not discriminate on the basis of any suspect category. Lastly, Judge Williams found that the law was legitimately related to a State interest of instilling patriotic values in school children, and that learning the Pledge was part of a "suitable" school curriculum.

Sherman v. Community Consolidated School District 21, 980 F. 2d 437 (1992)

The following year the case was heard in the Seventh Circuit Court of Appeals before Judges Cummings, Easterbrook, and Manion. The vote of the Appellate Court was two

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to one. Judge Easterbrook wrote the opinion for the Court with Judge Manion concurring. The question before the court was whether or not the policy of the school district requiring the recitation of the Pledge as a school exercise was a violation of the Establishment Clause.

The court found that the Pledge was a patriotic exercise which did not violate the Establishment Clause. The Seventh Circuit found that the Shermans did have standing as stated by Judge Easterbrook,

> Richard Sherman, obliged by the school-attendance laws to be present during the Pledge and the potential object of coercion to participate, has standing to challenge the statute... That school officials do not compel Richard to participate may bear on the merits but does not make the subject less appropriate for decision. (Sherman, 1992, p. 441)

Judge Easterbrook referred to Justice Kennedy in Allegheny in stating,

> The religion clauses of the first amendment do not establish general rules about speech or schools; they call for religion to be treated differently. Recall that for now we are treating the Pledge as a patriotic expression, even though the objections to public patriotism may be religious (as they were in Barnette). Patriotism is an effort by the state to promote its own survival, and along the way to teach those virtues that justify its survival. Public schools help to transmit those virtues and values. Separation of church from state does not imply separation of state from state. Schools are entitled to hold their causes and values out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though

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> those who resist persuasion may feel at odds with those who embrace the values they are taught. (Sherman, 1992, p. 444)

Judge Easterbrook brought out some questions, "Does 'under God' make the Pledge a prayer, whose recitation violates the establishment clause of the first amendment" (Sherman, 1992, p. 445)? He answered this by pointing out that the district court had applied the Lemon test, but also, "Lemon was not devised to identify prayer smuggled into civic exercises" (Sherman, 1992, p. 445). His second question asked, "Must ceremonial references in civic life to a deity be understood as prayer, or support for all monotheistic religions, to the exclusion of atheists and those who worship multiple gods" (Sherman, 1992, p. 445)? In answering this question he referred to the Framers in stating,

> Unless we are to treat the founders of the United States as unable to understand their handiwork (or, worse, hypocrites about it), we must ask whether those present at the creation deemed ceremonial invocations of God as "establishment." They did not. (Sherman, 1992, p. 445)

In the Sherman decision of 1992, the U. S. Seventh Circuit Court of Appeals found that the Pledge did not violate the Establishment Clause.

In 2000, Michael Newdow brought suit against the Elk Grove School District and the Sacramento City Unified School District in the United States District Court for the Eastern District of California. Newdow sought injunctive relief against the two school districts claiming the words, "under God" violated the Establishment Clause of the U. S. Constitution. Newdow filed the action on his own behalf as a citizen and as a "next friend" on behalf of his daughter who was also a citizen. Newdow did not allege that his

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daughter was required to say the Pledge. His complaint centered on the fact that his daughter had to "watch and listen" while her teacher lead the class in a ritual proclaiming that there was a God.

The Eastern District Court of California dismissed Newdow's claim. Newdow appealed to the Ninth Circuit Court of Appeals. In a two to one decision, the Ninth Circuit found that the school policy of requiring students to voluntarily recite the Pledge which contained the words "under God" was a violation of the Establishment Clause. Thus, the Seventh Circuit and the Ninth Circuit Courts of Appeals had rendered contrary opinions. Newdow, Elk Grove Unified School District, and the United States Solicitor General filed petitions for *Writ of Certiorari*. The U. S. Supreme Court granted *certiorari* to hear the Newdow case on October 14, 2003.

Research Problem

In 1954, the United States congress added the words, "under God" to the Pledge of Allegiance. The Ninth Circuit Court of Appeals and the Seventh Circuit Court of Appeals had rendered conflicting decisions concerning the constitutionality of the legislation adding the words "under God" to the Pledge of Allegiance. The Seventh Circuit Court of Appeals ruled in the Sherman case that the Pledge as modified in 1954 did not violate the Establishment Clause. The Ninth Circuit Court of Appeals ruled in the Newdow case that the words "under God" in the Pledge violated the Establishment Clause of the Constitution. The U.S. Supreme Court granted *certiorari* in the Newdow case. The intent of this study was to analyze how the U.S. Supreme Court resolved the conflict between the two lower circuit courts and assess the impact of that resolution on

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the administration of public schools. Within the resolution of the conflict between the two lower courts, the role of the judge and the role of the judiciary branch of government were analyzed in relation to the U.S. Supreme Court's decision.

Research Questions

This study analyzed how the U.S. Supreme Court addressed and resolved the conflict of the lower circuit courts through the examination of the Newdow case. This study answered the following questions:

1. How did the U.S. Supreme Court resolve the conflict between the lower courts?
2. What were the major arguments that influenced the United States Supreme Court's decision?
3. What was the jurisprudence of the concurring Justices?
4. Has the Court's decision left unresolved issues?
5. Have new issues emerged as a result of the Court's decision?
6. What are the implications of the decision for school leaders and school administration?
7. Does the decision offer guidance for addressing future disputes regarding the interpretation and application of the Establishment Clause?

Conceptual Framework

The balance of powers in our governmental system is three fold. The legislative branch creates laws. The executive branch carries out the laws. The judicial branch interprets and applies laws and weighs the constitutionality of the laws that have been

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enacted and executed. Under this three-fold system each branch of the government has limited powers. Within the framework of the Constitution, each state, in turn, has its own three branches of legislative, executive, and judicial government. The states are given rights to make decisions with regard to domestic issues, property, and education, to name a few. Federalism allows authority for the states to make their own decisions so long as those laws are consistent and do not conflict with the federal laws or the Constitution. As a result, the citizenry of our country is guided under both federal and state laws. "One department of the government may not force upon another its own standards of propriety" (Cardozo, 1991, p. 77). The separation of powers between the three branches of our state and federal governments, as prescribed by our Constitution, provides for checks and balances so that one branch of government does not assume a more powerful role than another. Within this governmental framework, the role of a judge and that of the judiciary are ones that examine and weigh decisions before declaring a statute or law valid or invalid.

Benjamin N. Cardozo in a series of lectures presented at Yale University observed that the judicial process requires a judge to weigh his/her decision upon a variety of factions. Cardozo coined these factions as methods of philosophy from the perspective of the role of a judge within our judicial system. The first being a method of philosophy from which a principle is exerted along a line of logical progression. The second being a method of evolution from which the principle is examined along a line of historical development. The third being the method of tradition from which a principle is viewed along the line of the customs of the community. The fourth being the method of sociology from which a principle is revealed along the lines of justice, morals and social

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welfare, and the *mores* of the day (Cardozo, 1991). The judge must balance the social interest served by symmetry against the social interest served by equity and fairness (Cardozo, 1991). It is in adherence to these factions of decision-making and the balance between social symmetry and the service of equity and fairness that the judge may act as a legislator (Cardozo, 1991).

The role of restraint in the judiciary system requires the judge to stay within the limits of precedent and custom. In doing so, the judge should not sacrifice the general to the particular. He/she should not lose consistency and uniformity of the law in reaching a decision (Cardozo, 1991). "[T]he judge is under a duty within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience" (Cardozo, 1991, pp. 133-134).

Judicial review runs counter to the democratic process (Bickel, 1998). Federal judges are appointed; they are not elected. Judicial review has the power to apply the Constitution against a legislative majority, and, in turn, that majority is powerless to effect the judicial decision (Bickel, 1998). The provision of a constitutional amendment could change a ruling of law that was made by the Court, but the ratification process is a lengthy and cumbersome one. When the Court invalidates a state legislative action, it does so against the majority opinion within that jurisdiction. In doing so, it further invalidates the same legislative action from occurring across the country. In declaring a statute unconstitutional, the judicial process goes against the will of the legislative majority and exercises control against it (Bickel, 1998). Because judicial review is a counter-majoritarian force in our governmental system, the process of judicial review may weaken the democratic process over a period of time (Bickel, 1998). Within the

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perspective of adherence to the constitutional principles in the weighing of decisions, it is prudent for a judge to use restraint in his/her analysis of the law. It is within this perspective of adherence that judges in our democratic system are reluctant to overturn legislative policy.

Since Justice Black affirmatively annunciated the idea of a "wall of separation between church and state" in Everson in 1947, the Court has debated the nature of the "wall" as it pertains to Establishment Clauses cases. As a result, the Court has evaluated each case since Everson on an individual basis. The Court has struggled to find a test. The success of the Lemon test has proved elusive as a majority of the sitting Justices have expressed dissatisfaction with the Lemon test and its application to the "wall". "The Court represents the national will against local particularism, but it does not represent it, as the Congress does, through electoral responsibility" (Bickel, 1998, p. 33). In doing so, the Court has refrained from being a legislative body in its Establishment Clause jurisprudence.

It is within the confines of the Court's previous precedents regarding Establishment Clause issues, and its confines as the Judiciary branch of our government that the Newdow decision will be explored. Analysis of the Court's decision will be examined through the lens of the role of a judge in the decision-making process as prescribed by Benjamin N. Cardozo, The Nature of the Judicial Process, and through the lens of the Court's structural judiciary role as explored by Alexander M. Bickel, The Least Dangerous Branch.

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Methodology

This is a qualitative study. The object of legal research is to determine the legal consequences of an exact set of accurate or potential facts (Wren & Wren, 1986). In this study Supreme Court decisions will be identified through traditional methods of legal research. The researcher gathered materials from court decisions, oral arguments, congressional records, submitted briefs, periodicals, and books. The researcher gathered the facts, identified the legal issues, and arranged them in chronological order to allow the reader to see the progression of jurisprudence as it pertained to the Establishment Clause and the Newdow decision. The case briefing technique (Wren & Wren, 1986) was used in the analysis of prior Establishment Clause decisions. The researcher used the "known topic" approach in developing the dissertation. This study used an internal evaluation in ascertaining which facts were pertinent to the research problem. This study also used an external evaluation to determine the validity of the Court's decision.

This researcher attended the oral argument held before the United States Supreme Court. The attendance of the argument provided a personal perspective from the researcher that would not have been obtained from a reading of the transcripts. The materials used in this study will provide an analysis of Elk Grove Unified School District v. Newdow as it pertained to the Establishment Clause in a public school educational setting.

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Definition of Terms[1]

The following definition of terms are provided for the purpose of this study:

Advocacy: In practice, the espousal of a legal cause. The art of persuasion.

Amicus curiae: A person who is not a party to a lawsuit but who petitions the court to file a brief in the actions because that person has a strong interest in the subject matter.

Appeal: An application to a higher court to amend a lower court's ruling.

Appellant: One who takes an appeal to a higher court. The appellant may have been the plaintiff or defendant in the lower court proceeding.

Appellee: The party in an action against whom an appeal has been sought. Sometimes also called the respondent.

Atheism:[2] Lack of belief in God. There are three types of atheism. The practical atheist unconsciously lives with out recognizing or questioning the existence of God. The pseudo atheist affirms the possibility of God's existence but believes there is insufficient evidence to prove that God exists. The absolute atheist makes a conscious effort to deny God's existence.

Case law: The aggregate of reported cases that form a body of jurisprudence within a given jurisdiction.

Ceremonial Deism:[3] – Reference to a deity used by a United States official at a government function because the reference is a celebration of patriotic values deeply

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[1] Unless otherwise footnoted, the legal definitions were taken from *Black's Law Dictionary*, Garner, B. et al. (7th ed). St. Paul: West Publishing Co.

[2] *Modern Dictionary for the Legal Profession*, Beyer, G. W. et.al. (3rd. ed). Buffalo: William S. Hein

[3] *Id.*

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rooted in the nation's history and traditions, not because the government official wishes to practice or espouse religious beliefs. Common ceremonial deisms are included in the Pledge of Allegiance and the United States national motto.

Certiorari: An original writ or action whereby a cause is removed from an inferior to a superior court for trial. The record of proceedings is then transmitted to the superior court. The term is most commonly used when requesting the U. S. Supreme Court to hear a case from a lower court.

Civic:[4] 1. of a city. 2. of citizens. 3. of citizenship.

Civil:[5] 1. of a citizen or citizens. 2. of a community of citizens, their government, or their interrelations: as *civil* affairs, *civil* service, *civil* war.

Common law: The body of law derived from judicial decisions and opinions, rather than from statutes or constitutions.

Concurring opinion: An opinion written by a judge expressing agreement with the majority's holding. However, the concurring judge may disagree with the majority's reasoning or discuss additional points of law.

Constitution: The supreme fundamental law of a nation or state. Provisions are included to establish and organize the government and to distribute, limit, and prescribe the manner of the exercise of sovereign powers. In addition, basic principles and rights of the citizenry are enumerated.

Dictum: A statement of opinion or belief considered authoritative because of the dignity of the person making it. A familiar rule; a maxim. Plural **Dicta**

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[4] *Webster's New World Dictionary of the American Language*, Friend, J.H. & Guralnik, D.B. (Ed.), (Encyclopedic ed.). New York: World Publishing Company.

[5] *Id.*

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Dissenting opinion: An opinion written by a judge in disagreement with the rationale and/or decision of the majority of judges hearing the case.

En banc: Of or referring to a session in which the full membership of the court participates.

Enjoin: An individual or institution is required by a court of equity to cease or abstain from a particular action.

Establishment Clause: The constitutional provision (U.S. Constitution, Amendment I) prohibiting the government from creating a church or favoring a particular religion. "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof..." (United States Constitution)

Federal Court: A court having federal jurisdiction.

First Amendment: The constitutional amendment, ratified with the Bill of Rights in 1791, guaranteeing the freedoms of speech, religion, press, assembly, and petition. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech, or of the press: or the right of the people to peaceably to assemble, and to petition the Government for a redress of grievances" (United States Constitution).

Fourteenth Amendment: The constitutional amendment, ratified in 1868, whose primary provisions effectively apply the Bill of Rights to the states by forbidding states from denying due process and equal protection and from abridging the privileges and immunities of U. S. citizenship. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to

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any person within its jurisdiction the equal protection of the laws" (United States Constitution).

Free Exercise Clause: The constitutional provision (United States Constitution, Amendment I) from interfering in people's religious practices or forms of worship. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" (United States Constitution).

Fundamental rights: In constitutional law, a right that triggers strict scrutiny of a law to determine whether the law violates the Due Process clause or the Equal Protection clause.

Holding: A court's determination of a matter of law pivotal to its decision; a principle drawn from a decision.

Injunction: A court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted.

Mandate: An order from an appellate court directing a lower court to take a specified action. A judicial command directed to an officer of the court to enforce a court order.

Monotheism:[6] The doctrine or belief that there is only one God.

Neutral principles: *Constitutional Law*. Rules grounded in law, as opposed to rules based on personal interests or beliefs.

Petitioner: A party who presents a petition to a court or other official body, esp. when seeking relief on appeal. Cf. *respondent.*

Plaintiff: The party who brings a civil suit in a court of law.

[6] *Webster's New World Dictionary of the American Language*, Friend, J.H. & Guralnik, D.B. (Ed.), (Encyclopedic ed.). New York: World Publishing Company.

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Private: Relating or belonging to an individual, as opposed to the public or the government.

Public forum: In constitutional law, public property where people traditionally gather to express ideas and exchange views.

Religion:[7] 1. belief in a divine or superhuman power or powers to be obeyed and worshiped as the creator(s) and ruler(s) of the universe. 2. expression of this belief in conduct or ritual. 3. a) any specific system of belief, worship, conduct, etc., often involving a code of ethics and a philosophy: as, the Christian *religion*, the Buddhist *religion*, etc. b) loosely any system of beliefs, practices, ethical values, etc., resembling, suggestive of, or likened to such a system: as, humanism is his *religion.* 4. a state of mind or way of life expressing love for and trust in God, and one's will and effort to act according to the will of God, especially within a monastic order or community: as, he achieved religion. 5. any object of conscientious regard and pursuit: as, cleanliness was a *religion* to him. 6. the practice of religious observances or rites.

Remand: To send (a case or a claim) back to the court or tribunal from which it came for some further action.

Respondent: 1. The party against whom an appeal is taken; *appellee*. 2. The party against whom a motion or petition is filed Cf. *petitioner*.

Sectarian: Of or relating to a particular religious sect.

Secular: Worldly, as distinguished from spiritual.

Standing: A party's right to make a legal claim or seek judicial enforcement of a duty or right. To have standing in federal court, a plaintiff must show (1) that the challenged

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[7] *Webster's New World Dictionary of the American Language*, Friend, J.H. & Guralnik, D.B. (Ed.), (Encyclopedic ed.). New York: World Publishing Company.

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conduct has caused the plaintiff actual injury, and (2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question.

Stay: 1. The postponement or halting of a proceeding, judgment, or the like. 2. An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding.

Summary judgment: A judgment granted on a claim about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law. This procedural device allows the speedy disposition of a controversy without the need for a trial.

Supreme Court of the United States: The court of last resort in the federal system, whose members are appointed by the President and approved by the Senate. The Court was established 1789 by Article III of the U.S. Constitution, which vests the Court with the "judicial power of the United States."

Theism:[8] Belief in one god as contrasted with ***polytheism***, the belief in multiple gods.

United States Court of Appeals: A federal appellate court having jurisdiction to hear cases in one of the 13 judicial circuits of the United States (the First Circuit through the Eleventh Circuit, plus the District of Columbia Circuit and the Federal Circuit).

United States District Court: A federal trial court having jurisdiction within its judicial district.

Writ: A court's written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act.

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[8] *Modern Dictionary for the Legal Profession*, Beyer, G. W. et.al. (3rd. ed). Buffalo: William S. Hein

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Significance of the Study

In referring to the secular purpose of the Endorsement test, Justice O'Connor stated, "It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share" (Wallace, 1985, pp. 75-76). In 1943 the U. S. Supreme Court stated in Barnette that students were not required to say the Pledge of Allegiance. In 1954, the United States Congress added the words "under God" to the Pledge of Allegiance to emphasize the difference between a monotheistic nation, the United States, and an atheistic nation, Union of Soviet Socialist Republic.

The Pledge of Allegiance as amended in 1954 was not challenged until Smith in 1968. In Sherman, 1992, the Seventh Circuit ruled that the Pledge of Allegiance was constitutional and did not violate the Establishment Clause. Almost a decade after Sherman, the Ninth Circuit court ruled in Newdow that the requirement of an elementary school student to listen to the Pledge being lead and recited by a State employee did violate the Establishment Clause.

The U.S. Supreme Court chose to partially examine the Establishment Clause as it pertained to the Pledge in three Justices' concurring opinions. In doing so, the Court examined the country's history in the acknowledgment of a supreme being and to what extent that acknowledgement may or may not be used in a required educational setting. The Court also examined what constituted prayer and if the words "under God" constituted an oath or a prayer. The Court's concurring opinions in the Newdow decision provided some further clarification of previous decisions it had made with regard to the Establishment Clause in an educational setting.

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This study looked at the progression of Newdow from the Federal District Court through the U. S. Supreme Court. It examined U.S. Supreme Court decisions pertaining to the Establishment Clause and their relationship to the arguments presented in Newdow. It also focused on the material presented in Newdow. It provided information for educational leaders in the area of the Establishment Clause jurisprudence as it pertains to the educational setting. This study looked at arguments in Establishment Clause issues that will provide educational leaders with further insight for making decisions in regard to their student populations and school policies.

Limitations of the Study

This study was limited by the amount of relevant material gathered by the researcher. It was limited to the output of U. S. Supreme Court opinions pertaining to the Establishment Clause issue. It was also limited in the scope of material that was presented in the Newdow decision. The briefs, decisions, and arguments presented in this study only dealt with Newdow as it progressed through the judicial system. The legal analysis and interpretation of the data was dependent on the researcher's objectivity. The researcher utilized legal research techniques to maintain his objectivity.

Summary

This chapter presented a brief history of the "Pledge of Allegiance". The Supreme Court decision in Cantwell was addressed and its significance to Establishment Clause cases as applied to individual states. The researcher presented the issues of the Pledge in the lower court cases of Smith and Sherman. The research problem and research

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questions were presented. The conceptual framework and methodology were also presented. The definitions of terms that the researcher felt were pertinent were listed. The significance of the study and its limitations were discussed.

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CHAPTER 2

REVIEW OF THE LITERATURE

When the colonies were settled, they were established on religious principles. Virginia had established the Anglican Church which was derived from the Church of England. The Puritans had established the Congregationalist church in Massachusetts, Connecticut, and New Hampshire (Flowers, 1994). Roger Williams founded Rhode Island on the principles of religious freedom. He believed that the church should be separated from the state and "natural man". Williams advocated that the two entities of church and state operate separately with a "wall of separation" between the "garden" of the spiritual world and the "wilderness" of the mortal world (Feldman, 1997, Hamburger, 2002). As a result, people from other colonies came to Rhode Island because their religion was not being dictated in the Rhode Island colony. William Penn founded Pennsylvania on the principle of religious freedom and the "inner light", a belief that a little bit of God was in every person. Because of the belief in an individual connection to God, Pennsylvania did not have a uniformity of religious practice. Based on this premise, Penn solicited settlers to move into the colony even though one could only run for political office if he were a Christian (Feldman, 1997, Flowers, 1994).

The English Toleration Act of 1689 was applied to all of the colonies. Feldman in Please Don't Wish Me a Merry Christmas pointed out that after the Toleration Act, "[O]ne consistent theme remained in all of the colonies: civil and religious society were

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assumed to be Protestant. Within that context, by around 1700, most Protestants generally agreed to tolerate (Protestant) dissenters" (Feldman, 1997, p. 137). By the middle of the 1700s, the Great Awakening had swept through the colonies (Feldman, 1997, Flowers, 1994). Evangelical ministers began holding services in an open area that attracted larger crowds than could be assembled in a church. A revival in the preaching of spiritual renewal and discipline was obtained in the conversions of people who did not come from the established churches (Flowers, 1994). Feldman stated that the Great Awakening, "[A]cted as a type of social cement...Despite the theological disagreements among revivalists, the evangelical movement helped begin to forge a national consciousness across the boundaries of the various colonies" (Feldman, 1997, p. 142). People realized that they could have religious freedom away from the religious establishments of the different colonies.

Hamburger made the point in Separation of Church and State that the evangelical dissenters, "[D]ominated the antiestablishment struggle that shaped the First Amendment" (Hamburger, 2002, p. 92). In line with the views of Roger Williams, the evangelical dissenters believed that the civil government did not have power over a spiritual authority (Hamburger, 2002). Isaac Backus and John Ireland advocating for the Baptists continued in calling for religious freedom and the multiple establishment of religions within the states (Feldman, 1997, Hamburger, 2002). By the first session of congress, Jefferson and Madison had led the fight for the disestablishment of religion. Feldman (1997) explained that Madison in Memorial and Remonstrance expressed the secular views of Locke, Jefferson, and the Calvinist theology of the Baptists in calling for

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the protection of the religious and political realms. Madison had also passed an Act for Establishing Religious Freedom in the Virginia Assembly.

> The importance of these events is not only that Virginia became a trailblazer in the American movement toward the separation of church and state, but it also gave Madison the opportunity to crystallize and articulate his thought on the question of religious liberty before he went to Philadelphia to work on the Constitution. (Flowers, 1994, p. 15)

The founding fathers only made one reference to religion in the United States Constitution. That reference was in Article VI, clause 3, "No religious test shall ever be required as a qualification to any office or public trust under the United States" (United States Constitution). At the time of ratification of the Bill of Rights, three states had government support for Protestantism, and three had support for Christianity. The rest of the states all had multiple establishments. In the final draft of the First Amendment, the separationist view was that the government was not to establish one religion, nor was it to establish multiple religions. There was "no law respecting an establishment of religion" (Flowers, 1994).[9]

Wall of Separation

The "wall of separation between church and state" was articulated in a letter that Jefferson had written to the Danbury Baptists. In the letter Jefferson stated:

> Believing with you that religion is a matter which lies solely between Man and his God, that he owes account to none other for his faith or his worship, that the

[9] First Amendment, United States Constitution

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legitimate powers of government reach actions only and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting and establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of these sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties. (Peterson, 1975, p. 303-304)

The concept of separation gathered support from the Republicans at the beginning of the nineteenth century. When cholera had threatened the United States in 1832, President Andrew Jackson refused to proclaim a fast day claiming that it transcended the limits of the Constitution (Hamburger, 2002). The increase of Catholicism was becoming more apparent in the middle of the nineteenth century. The Protestants started to advocate for the idea of a separation of church and state. The liberal Protestants began questioning the authority of churches, creeds, and clergyman. This individualistic approach towards mental freedom was in response to the perception of the Catholic Church being a threat to individual thought (Hamburger, 2002).

In the 1840s Protestants and Catholics began to argue over the use of public funds for education. The Catholics wanted the same privledges as the Protestants. This drove the Protestants to start demanding a stricter scrutiny of the separation between church and state (Hamburger, 2002). The Catholics argued that the real threat of a church and state union came "[F]rom the publicly funded schools, which, under the guise of neutrality,

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imposed a nondenominational Protestantism on New York's children" (Hamburger, 2002, p. 225).

During the 1870s and 1880s, a movement of anti-Christian secularists organized a nation wide campaign. Francis Ellingwood Abbot in Toledo, Ohio founded a periodical entitled Index. Through his diverse following, Abbot discovered that his readers shared the trepidations of Christianity's influence on government (Hamburger, 2002). It was with Abbot that the Liberal League organized to have a true separation of church and state. With American Protestants trying to implement an amendment to recognize the Almighty in the preamble of the U. S. Constitution, the liberals rallied around the Protestant's vague plan to further their strength in a true separation. In opposition to the Christian amendment, Abbot proposed an amendment that would broaden the secularity of government and the separation of church and state. The pursuit of this goal resulted in the forming of the National Liberal League (Hamburger, 2002).

The Liberals proposed an expansion of the First Amendment that guaranteed the separation of church and state. The Protestants had also proposed a similar expansion but one that was aimed specifically at the restriction of government funding of religious schools through taxation. The proposed Blaine amendment still allowed the Protestants control over the public schools which did not achieve the true separation that the liberals wanted (Hamburger, 2002, & Jacoby, 2004). The Blaine amendment passed the House but fell short in the Senate and did not attain fruition.

The issues of separation had gained political strength. Political parties appealed to the separation vote but did not advocate a secular separation rather only a Protestant

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separation. As a result, the Liberals did not have the political support to maintain strength in their presidential bid for the 1880 election (Hamburger, 2002).

In the following decade, the successors of the National Liberal League focused on legislation of separation that could be affected at the local levels. They wanted to keep museums open on Sundays in New York. They wanted to keep the Bible out of public schools. In focusing on local issues, the Liberals achieved some successes. At the end of the nineteenth century, "[A]mericans spoke of separation in a manner that suggested this ideal had been secured in the U. S. Constitution and even the First Amendment" (Hamburger, 2002, p. 342).

The Freethinkers of America had its roots in the 1920s in New York. The organization advocated for a true secular separation of church and state and contained notable persons of the day including Bertrand Russell and Clarence Darrow. The Protestants and the Freethinkers continued to advocate for a separation, but the Protestants still felt they had individual rights which remained contrary to the secular ideal of separation advocated by the Freethinkers (Hamburger, 2002, & Jacoby, 2004). Thus, the ideal of separation of church and state was limited in its interpretation of separation of Christianity and state. During the same period, the Ku Klux Klan accumulated a large membership and advocated for a separation of church and state particularly aimed at the Catholic Church and the need for free public schools which were the foundation of American liberty (Hamburger, 2002).

The opening door in the application of the individual rights guaranteed by the First Amendment as applied to the states in the Fourteenth Amendment occurred in <u>Near v. State of Minnesota Ex Rel. Olson</u>, 283 U.S. 697 (1931) (Jacoby, 2004). In a five to four

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decision the Court ruled that the Minnesota statute prohibiting the censorship of a tabloid which was to discuss a local political figure was unconstitutional. In delivering the majority opinion of the Court, Chief Justice Hughes wrote, "It is no longer open to doubt that the liberty of the press and speech is within the liberties safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action" (Near, 1931). During the 1930s and 1940s, the Court justices differed in their interpretations of the Bill of Rights as applied to the Fourteenth Amendment.

> Nonetheless, the justices increasingly agreed that, in one way or another, the Fourteenth Amendment applied to the states at least some of the liberties secured in the U. S. Bill of Rights, and they particularly agreed that it applied First Amendment freedoms to the states. (Hamburger, 2002, p. 439)

As discussed in Chapter One, the unanimous Court decision in Cantwell, 1940, set the precedent for the Establishment Clause application to the states.

The Seventh Circuit found in Sherman, 1992, that the Pledge policy was a patriotic exercise, and, as such, it was constitutional. The Seventh Circuit based its ruling on Supreme Court case law precedents since Cantwell, 1940. Starting with Barnette, 1943, the Seventh Circuit addressed the cases of Engel, 1962, Abington, 1963, Lemon, 1971, Marsh, 1983, Lynch, 1984, Wallace, 1985, Allegheny, 1989, and, the then recently delivered opinion, Lee, 1992. Newdow utilized the same Court opinions in addition to others. As a result of Newdow's argument, the Ninth Circuit reached a different conclusion in finding that the Pledge policy was unconstitutional. The above listed cases and others that were pertinent in the arguments presented in Newdow, 2004, will be explored in the following section.

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Relevant United States Supreme Court Decisions/Opinions Pertaining to the Arguments Presented in Elk Grove School District v. Newdow

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

The vote of the Court was six to three. Justice Jackson delivered the majority opinion. Justice Black and Justice Douglas wrote a concurring opinion as well as Justice Murphy. Justice Frankfurter wrote the dissenting opinion. The posture of the case was that state law required students to state the "Pledge of Allegiance" in public schools. Citizens of West Virginia brought suit in United States District Court asking for restraint of the law against Jehovah's Witnesses. The Board of Education moved to dismiss the complaint. The district court consisting of three judges restrained the enforcement of the law to the Jehovah's Witnesses. The Board of Education brought the case to the Supreme Court by direct appeal. The Court addressed the rights of the individual as it pertained to the state mandatory attendance laws, and its right to coerce an individual's belief. The majority of the Court found that the law violated the First Amendment. The Court found that the state could not coerce an individual to affirm against his/her beliefs.

The West Virginia Board of Education ordered the salute to the flag and the reciting of the Pledge of Allegiance to become, "[a] regular part of the program of activities in the public schools, supported in whole or in part by public funds" (Section 1734, West Virginia Code (1941. Supp). Students in West Virginia were being expelled for holding to their religious beliefs and not reciting the Pledge. A suit was brought by Walter Barnette, a Jehovah's Witness, against the West Virginia State Board of Education for an injunction to restrain the enforcement of the public schools requiring its children to salute the American flag and state the Pledge. The religious beliefs of Jehovah's Witnesses

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forbid them from making graven images, and they consider the flag an image. Justice Jackson wrote the majority opinion for the court. He stated,

> Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question. (Barnette, 1943, p. 634)

In his concluding remarks, Justice Jackson wrote,

> 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 any word or act their faith therein... We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control. (Barnette, 1943, p. 642)

Justice Murray stated in his concurring opinion,

> Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship...Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. (Barnette, 1943, p. 646)

The majority opinion of the court found that the students did not have to recite the Pledge.

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Everson v. Board of Education of Ewing TP., 330 U.S. 1 (1947)

The vote of the Court was five to four. Justice Black delivered the majority opinion. Justice Jackson wrote the dissenting opinion. Justice Frankfurter wrote a concurring dissenting opinion. The State of New Jersey authorized its school districts to make rules and contracts for the transportation of children to and from school. The township reimbursed the money to parents whose children used public transportation. Part of the reimbursement went to parents whose children went to Catholic schools. The appellant filed suit against the State for the reimbursement of money to parochial school parents claiming that the New Jersey statute created a law which established religion. The State court found that the legislature did not have the power to authorize payment under the State constitution. The New Jersey Court of Errors and Appeals found that the state law satisfied a public need, and the reimbursement did not violate the State constitution, nor did it violate the issues under the Federal Constitution. The issue before the Court was whether or not the reimbursement supported government subsidy to private schools was a violation of the establishment of religion. The Court found that the subsidy was not a violation of the First Amendment because it served a public need that did not favor one religion over another.

In writing the majority opinion for the Court, Justice Black stated,

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church

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against his will or force him to profess a belief or disbelief in any religion. (Everson, 1947, p. 15)

Justice Black stated that free exercise may not exclude anyone because of his/her faith. Therefore, any one is entitled to the benefits of "public welfare legislation". In his conclusion, Justice Black wrote,

> State power is no more to be used so as to handicap religions, than it is to favor them...The State contributes no money to the schools. It does not support them. Its legislation, as applied, does not more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools. The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. (Everson, 1947, p. 18)

In writing his dissenting opinion, Justice Jackson emphasized the importance of parochial school to the Catholic Church by stating, "Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself" (Everson, 1947, p. 24). Justice Jackson added that the state may not pay to "induce or reward piety". He went on to say that the state,

> [C]annot make public business of religious worship or instruction, or of attendance at religious institutions of any character. There is no answer to the proposition more fully expounded by Mr. Justice Rutledge that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and

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thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today. (Everson, 1947, p. 26)

Everson was important because it was the first case in which the Court applied the Establishment Clause through the Fourteenth Amendment (Flowers, 1994, Goldwin and Kaufman, 1987). It overturned the precedent that had allowed the states to determine their own church-state relationships (Goldwin and Kaufman, 1984). It also described the scope and power of the Establishment Clause and set the tone for further Establishment Clause decisions (Flowers, 1994, Goldwin and Kaufman, 1984). In Everson, the Court recognized the separation of church and state as a part of constitutional law (Hamburger, 2002). It laid down principles of the Establishment Clause that have not been abandoned by the Court (Levy, 1986).

McCollum v. Board of Education, 333 U.S. 203 (1948)

The vote of the court was eight to one. Justice Black wrote the majority opinion for the Court. Justice Frankfurter wrote a concurring opinion joined by Justice Jackson, Justice Rutledge and Justice Burton. Justice Jackson also wrote a separate concurring opinion. Justice Reed wrote the dissenting opinion. The State of Illinois required that all children between the ages of seven to sixteen attend state tax supported public schools or attend private or parochial schools which met the state educational requirements. In Champaign District 71, teachers employed by religious groups were allowed to come into the public schools during regular school hours and substitute thirty minutes of religious teaching for secular teaching provided for under the compulsory attendance law.

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McCollum, an atheist, filed suit in the Circuit Court of Champaign County claiming that the joint religious public school program violated the First and Fourteenth Amendments. The County Circuit Court upheld the policy because the children who were released from the regular school hours had the permission of the parents. The County Circuit Court also found that the religious program did not violated federal or state constitutional provisions. The State Supreme Court of Illinois confirmed the lower court's decision. The U. S. Supreme Court accepted the case for probable jurisdiction. The issue before the Court was whether or not a state statute that granted a school board the authority to establish a religious pullout program within its public schools violated the Establishment Clause through the Fourteenth Amendment. The majority of the Court found that the statute was a violation.

Justice Black stated in the majority opinion, "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith" (McCollum, 1948, p. 210). In referring to the Court's decision the previous year in Everson and "the wall of separation", Justice Black stated, "For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its perspective sphere" (McCollum, 1948, p. 212). To further support the Court's ruling in Everson Justice Black concluded,

> Here not only are the state's tax supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through the

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> use of the state's compulsory public school machinery. This is not a separation of Church and State. (McCollum, 1948, p. 212)

Justice Frankfurter's concurring opinion which was joined by Justice Jackson, Justice Rutledge, and Justice Burton iterated the role of public education with regard to religion in stating,

> Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other that religious, leaving to the individual's church and home, indoctrination in the faith of his choice. (McCollum, 1948, pp. 216-217)

In concluding his opinion Justice Frankfurter wrote, "In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart" (McCollum, 1948, p. 231).

Three of the four dissenting Justices in Everson supported the majority in McCollum. The McCollum case clarified that the Court would go beyond the Protestant version of separation of church and state. Everson dealt with parochial aid; McCollum dealt with Protestant children having release time from public schools. As a result of the McCollum decision, Protestants faced a threatened nonsectarian religiosity of public institutions (Hamburger, 2002).

Zorach v. Clauson, 343 U.S. 306 (1952)

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The vote of the Court was six to three. Justice Douglas delivered the majority opinion for the Court. Justice Black wrote the dissenting opinion. Justice Frankfurter and Justice Jackson wrote concurring dissenting opinions. Zorach and another brought action against Clausen and the Board of Education of the City of New York for establishing a "release time program" which allowed for the religious instruction of public school children. The New York State Court issued an order for the defendants. The State Appellate Division also found in favor of the defendants. The New York Court of Appeals affirmed the Appellate Division. It was petitioned to be heard by the Court. The issue before the Court was whether or not children released from public school during the school day to attend religious classes was constitutional. Students in the city of New York were being given "release time" from the regular public school education day to receive religious instruction.

The majority opinion of the Court found that the release of students from school attendance to attend religious classes was constitutional. In writing the majority opinion for the Court, Justice Douglas found that the decision rested on "[W]hether New York by this system has either prohibited the 'free exercise' of religion or has made a law 'respecting an establishment of religion' within the meaning of the First Amendment" (Zorach, 1952, p. 310). The Court found that no student was forced to partake in any religious activity so there was no violation of the "free exercise" clause, nor did the majority see that by allowing the "release time" did the State of New York make a law establishing religion. Justice Black in writing one of the dissenting opinions stated,

> The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools. Any use of such coercive power by the state to help or hinder

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some religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids. (Zorach, 1952, p. 318)

Justice Black went on to state in his concluding remarks,

Before today, our judicial opinions have refrained from drawing invidious distinctions between those who believe in no religion and those who do believe. The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under the law. (Zorach, 1952, p. 320)

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

The vote of the Court was six to one. Justice Black wrote the majority opinion for the Court. Justice Douglas wrote a concurring opinion. Justice Stewart wrote the dissenting opinion. Justices Frankfurter and White took no part in the decision of the case. The state of New York required that the students in public schools recite a Regents' State prayer at the beginning of each school day. Ten pupils' parents brought suit in New York State Court. The State court upheld the use of the state prayer. The New York Court of Appeals, with two judges dissenting, upheld the lower court's decision so long as no student was compelled to recite the prayer. The question before the Court was whether or not a State prayer required to be recited in public schools violated the First and Fourteenth amendments. The Court found that the requirement violated the Establishment Clause as applied to the Fourteenth Amendment.

In writing the majority opinion for the Court, Justice Black stated,

[W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of

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government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government. (Engel, 1962, p. 425)

Justice Black also pointed out,

> Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause... When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. (Engel, 1962, p. 430)

In writing the dissenting opinion, Justice Stewart stated practices which he viewed as, "the spiritual heritage of our nation" that had not been challenged in the Court. Justice Stewart stated,

> At the opening of each day's Session of the Court we stand, while one of our officials invokes the protection of God. Since the days of John Marshall our Crier has said, "God save this Honorable Court." Both the Senate and the House of Representatives open their daily Sessions with prayer... In 1954 Congress added a phrase to the Pledge of Allegiance to the Flag so that it now contains the words "one Nation under God, indivisible, with liberty and justice for all". (Engel, 1962, pp. 446-449)

Abington School Dist. V. Schempp, 374 U.S. 203 (1963)

This case was a combination of two different State cases which required the reading of the Bible in public schools. The vote of the Court was eight to one. Justice Clark wrote the majority opinion of the Court. Justice Douglas wrote a concurring opinion.

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Justice Brennan wrote a detailed concurring opinion, and Justices Goldberg and Harlan also wrote a concurring opinion. Justice Stewart wrote the dissenting opinion. The State of Maryland had a law requiring the reading of a chapter of the Bible or the use of the Lord's Prayer at the beginning of each school day without comment. An atheistic family brought suit in Baltimore. The trial court upheld the law. The Maryland Court of Appeals in a four to three decision found no First Amendment violation. The Court granted *certiorari.* The State of Pennsylvania required that verses from the Bible be read without comment each day at the beginning of school. In many instances the readings occurred over the intercommunication system. Students were allowed to excuse themselves from the classroom or not participate in the readings. The Schempp family filed suit against Abington High School. The trial court found that the readings constituted a religious observance. The question before the Court was whether or not a State could require religious readings in a public school.

The Court found that the requirement was a violation of the Establishment Clause. In writing the majority opinion of the Court Justice Clark stated,

> The test may be stated as follows: what are the primary purpose and the primary effect of the enactment? If either the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion... These exercises are prescribed as part of curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers

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employed in those schools… the exercises and the law requiring them are in violation of the Establishment Clause. (Abington, 1963, pp. 222-223)

Justice Clark concluded the majority opinion in stating,

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment. (Abington, 1963, p. 226)

Justice Douglas stated in his concurring opinion,

> These regimes violate the Establishment Clause in two different ways. In each case the State is conducting a religious exercise; and, as the Court holds, that cannot be done without violating the 'neutrality' required of the State by the balance of power between individual, church and state that has been struck by the First Amendment… Thus, the present regimes must fall under that clause for the additional reason that public funds, though small in amount, are being used to promote a religious exercise. Through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others. (Abington, 1963, p. 229)

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Justice Brennan in his concurring opinion also expressed views with specific regard to public schools in stating,

> It is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort – an atmosphere in which children may assimilate a heritage common to all American groups and religions... The choice between these very different forms of education is one – very much like the choice of whether or not to worship – which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election. The lesson of history – drawn more from the experiences of other countries than from our own – is that a system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent. (Abington, 1963, pp. 241-242)

Justice Brennan further explored some of the same questions that were addressed by Justice Clark in Abington,

> It has not been shown that reading from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government... While I do not question the judgment of

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experienced educators that the challenged practices may well achieve valuable secular ends, it seems to me that the State acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends where secular means would suffice. (Abington, 1963, p. 281)

Abington clarified the "secular purpose" and "primary effect" tests that were to be used in later Establishment Clause decisions. In order for a law to be considered constitutional, it must have a secular purpose and must not have a primary effect that does not advance nor hinder religion (Flowers, 1994). In both Engel and/or Abington, the Court stated that prayer may not exist in the public school context. One could pray silently if one chose to do so, but neither teachers nor students could pray audibly in the classroom setting (Flowers, 1994).

Epperson v. Arkansas, 393 U.S. 97 (1968)

The vote of the Court was nine to zero. Justice Fortas wrote the majority opinion for the Court. Justices Black and Harlan wrote concurring opinions. A biology teacher, Susan Epperson, brought suit against the State of Arkansas regarding her possible dismissal for teaching the theory of evolution in the public schools. The Chancery Court held that the State statute violated the Fourteenth Amendment. The Supreme Court of Arkansas found that the State could specify its curriculum in the public schools and reversed the lower court's opinion. The question before the Court was whether or not the State's statute restriction on the teaching of evolution was a violation of freedom of speech and thought as granted by the First Amendment.

The Court found that the statute was a violation of the First Amendment. Justice Fortas delivered the majority opinion for the Court,

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> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of noreligion; and it may not aid, foster or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. (Epperson, 1968, pp. 103-104)

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

The vote of the Court was eight to one. Chief Justice Burger wrote the majority opinion for the Court. Justices Douglas and Black wrote concurring opinions. Justice Brennan wrote a concurring opinion. Justice Marshall wrote a concurring opinion in the Rhode Island case but did not take part in the Pennsylvania case. Justice White wrote a concurring opinion in the Pennsylvania case and a dissent in the Rhode Island case. A Salary Supplement Act was passed in the State of Rhode Island in 1969. The act provided for a fifteen percent salary supplement to be paid to teachers in non-public schools. A large majority of the teachers who were receiving the supplement were teachers in Roman Catholic affiliated schools. The three-judge United States District Court found that the supplement was a violation of the Establishment Clause. The State of Pennsylvania Nonpublic Elementary and Secondary Education Act authorized the State superintendent to purchase educational services from non-public schools. The United States District Court for the Eastern District of Pennsylvania dismissed the complaint of a violation. The Court took the appeals. The question before the Court was whether the two statutes constituted an excessive entanglement between church and state

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with regard to the Establishment Clause of the First Amendment. The Court found that both statutes were in violation.

This case set a precedent that had been established in previous decisions for future cases that dealt with the separation of church and state. The "secular purpose" and "primary effect" tests had been established in Abington. A third test of "excessive entanglement" was established in Walz v. Tax Commission of City of New York, 397 U.S. 664 (1970). In writing the majority opinion for the Court, Chief Justice Burger laid out the three-prong Court precedent, "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'" (Lemon, 1971, pp. 612-613).

Justice Douglas in his concurring opinion with Justice Black stated, "[I]t is clear that once one of the States finances a private school, it is duty-bound to make certain that the school stays within secular bounds and does not use the public funds to promote sectarian causes" (Lemon, 1971, p. 633).

Justice Brennan in his concurring opinion further explored the meaning of the Establishment Clause,

> What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there

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inhere in the relationship precisely those dangers – as much to church as to state – which the Framers feared would subvert religious liberty and the strength of a system of secular government. (Lemon, 1971, p. 643)

The Court crafted a test in Lemon that would remain as a standard for Establishment Clause cases for almost two decades (Feldman, 1997).

Marsh v. Chambers, 463 U.S. 783 (1983)

The vote of the Court was six to three. Chief Justice Burger wrote the majority opinion for the Court. Justice Brennan and Justice Marshall wrote a critical dissenting opinion. Justice Stevens also wrote a dissenting opinion. The State of Nebraska began each of its legislative sessions with a prayer led by a chaplain who was paid by the State. A member of the legislature sought injunctive relief in Federal District Court claiming that the practice violated the Establishment Clause. The district court found that the paying of the chaplain from public funds was a violation. The Eighth Circuit Court of Appeals found that the practice violated the three elements established in Lemon and violated the Establishment Clause. The question before the Court was whether or not legislative prayer sponsored by the State was a violation of the Establishment Clause. The majority of the Court found that the legislative prayer was not a violation.

The U. S. Supreme Court reversed the lower courts' rulings. In writing the majority opinion, Chief Justice Burger pointed out that the Bill of Rights was written after the first congress had authorized the appointment of paid chaplains. He stated,

> Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended

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the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent. (Marsh, 1983, p. 790)

Justice Brennan wrote the dissenting opinion for the Court with Justice Marshall concurring. In writing the opinion, Justice Brennan referred to the precedents that had already been established by the Court. He stated,

> The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause. That it fails to do so is, in a sense, a good thing, for it simply confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer. For my purposes, however, I must begin by demonstrating what should be obvious: that, if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause. (Marsh, 1983, p. 796)

In supporting his convictions, Justice Brennan remarked, " I have no doubt that, if any group of law students were asked to apply the principles of Lemon to the question [463 U.S. 783, 801] of legislative prayer, they would nearly unanimously find the practice to be unconstitutional" (Marsh, 1983, pp. 800-801).

Justice Brennan pointed out four relevant purposes of "separation" and "neutrality" in the Establishment Clause. The first purpose was

> [T]o guarantee the individual right to conscience. The right to conscience, in the religious sphere, is not only implicated when the government engages in direct or

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indirect coercion. It is also implicated when the government requires individuals to support the practices of faith with which they do not agree. (Marsh, 1983, p. 803)

The second purpose was "[T]o keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious [463 U.S. 783, 804] issues, or by unduly involving itself in the supervision of religious institutions or officials" (Marsh, 1983, pp. 803-804). The third purpose was "[T]o prevent the trivialization and degradation of religion by too close an attachment to the organs of government" (Marsh, 1983, p. 804). The fourth purpose was to

> [H]elp assure that essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena... With regard to matters that are essentially religious, however, the Establishment Clause seeks that there should be no political battles, and that no American should at any point feel alienated [463 U.S. 783, 804] from his government because that government has declared or acted upon some "official" or "authorized" point of view on a matter of religion. (Marsh, 1983, p. 805)

Justice Brennan also pointed out, "[T]he argument tendered by the Court is misguided because the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers" (Marsh, 1983, p. 816). He continued the point of the flexibility of the Constitution by reinforcing that, "The inherent adaptability of the Constitution and its amendments is particularly important with respect to the Establishment Clause" (Marsh, 1983, p. 817).

Flowers (1994) states in That Godless Court that he felt there were two reasons for the majority not applying the Lemon test in Marsh. First, he thought that Justice Burger

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might have felt that the historical significance was strong enough that he did not need to apply the test. Secondly, if the Lemon test were applied, the program of legislative chaplains may not have stood.

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

The vote of the Court was five to four. Chief Justice Burger wrote the majority opinion for the Court. Justice O'Connor wrote a concurring opinion. Justice Brennan filed a dissenting opinion joined by Justices Marshall, Blackmun, and Stevens. Justice Blackmun wrote a dissenting opinion joined by Justice Stevens. An action was brought against the City of Pawtucket, Rhode Island for displaying a nativity scene, crèche, in its annual Christmas display. The petitioners claimed that the displaying of the crèche violated the Establishment Clause. The Federal District Court found the display was a violation. The Court of Appeals affirmed the district court's decision. The question before the Court was whether or not the display of the crèche in a Christmas display sponsored by the city was a violation of the Establishment Clause. The Court found that the display of the crèche did not violate the Establishment Clause. In writing the majority opinion, Chief Justice Burger stated,

> No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government... Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. (Citations omitted) Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. (Lynch, 1984, p. 673)

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To elaborate on his point of non-separation of church and state, Justice Burger wrote,

> Our 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... Thus it is clear that the Government has long recognized – indeed it has subsidized – holidays with religious significance. Other examples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust"... 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. (Lynch, 1984, p. 675)

Justice O'Connor wrote a concurring opinion in which she wanted to clarify the Court's Establishment Clause doctrine. It was this clarification of governmental endorsement that became another precedent in courts examining Establishment Clause violations. Justice O'Connor stated,

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion and foster the creation of political constituencies defined along religious lines. (Citations omitted) The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that

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> they are insiders, favored members of the political community. (Lynch, 1984, pp. 687-688)

Justice O'Connor stated,

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community. (Lynch, 1984, p. 692)

In her concluding remarks, Justice O'Connor summarized,

> Every government practice must be judged in its unique circumstance to determine whether it constitutes an endorsement of disapproval of religion. In making that determination, courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded. Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny. (Lynch, 1984, p. 694)

Justice Brennan in writing the dissenting opinion discussed the sensitive line between the religious and secular aspects of holidays,

> The Court apparently believes that once it finds that the designation of Christmas as a public holiday is constitutionally acceptable, it is then free to conclude that virtually every form of governmental association with the celebration of the holiday is also constitutional. The vice of this dangerously superficial argument is that it overlooks the fact that the Christmas holiday in our national culture contains both secular and

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sectarian elements. To say that government may recognize the holiday's traditional secular elements of giftgiving, public festivities, and community spirit, does not mean that government may indiscriminately embrace the distinctively sectarian aspects of the holiday… the Court's logic is fundamentally flawed both because it obscures the reason why public designation of Christmas Day as a holiday is constitutionally acceptable, and blurs the distinction between the secular aspects of Christmas and its distinctively religious character, as exemplified by the crèche. (Lynch, 1984, pp. 709-710)

Justice Brennan later in his dissenting opinion went on to state,

It is equally true, however, that if government is to remain scrupulously neutral in matters of religious conscience, as our Constitution requires, then it must avoid those overly broad acknowledgements of religious practices that may imply governmental favoritism toward one set of religious beliefs. (Lynch, 1984, p. 714)

Justice Blackmun in joining the dissent with Justice Stevens stated,

Not only does the Court's resolution of this controversy make light of our precedents, but also, ironically, the majority does an injustice to the crèche and the message it manifests. While certain persons, including the Mayor of Pawtucket, undertook a crusade to 'keep "Christ" in Christmas,' App. 161, the court today has declared that presence virtually irrelevant… The import of the Court's decision is to encourage the use of the crèche in a municipally sponsored display, a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence. Surely, this is a misuse of a sacred symbol. (Lynch, 1984, p. 726)

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

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The vote of the Court was six to three. Justice Stevens wrote the majority opinion of the Court. Justices Powell and O'Connor filed concurring opinions. Chief Justice Burger wrote a dissenting opinion, and both Justices White and Rehnquist wrote dissenting opinions. The parents of public school children in Alabama filed a complaint against school officials and Alabama state officials in Federal District Court. The complaint challenged the constitutionality of the Alabama statute requiring a one minute period of silence "for meditation or voluntary prayer" in public schools. The Federal District Court dismissed the complaint. It was appealed. The Eleventh Circuit Court of Appeals affirmed in part, reversed in part, and remanded with directions. The question before the Court was whether or not the State statute requiring prayer activities at the beginning of each school day constituted a violation of the First Amendment. The Court found that the statute was an endorsement of religion and a violation of the Establishment Clause.

In writing the majority opinion for the court, Justice Stevens stated,

> The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law... Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the

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infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, 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. (Wallace, 1985, p. 50)

Justice O'Connor in the writing of her concurring majority opinion once again referred to the endorsement test that she had elaborated in Lynch,

> The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred... While the secular purpose requirement alone may rarely be determinative in striking down a statute, it nevertheless serves an important function. It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share. In this sense the secular purpose requirement is squarely based in the text of the Establishment Clause it helps to enforce. (Wallace, 1985, p. 70)

In addressing Justice Rehnquist's dissenting opinion, which discussed the historical intent of the Framers, Justice O'Connor made a distinction between adults and children with regard to prayer,

> At the very least, Presidential Proclamations are distinguishable from school prayer in that they are received in a noncoercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination. This Court's decisions have recognized a distinction when government-sponsored

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religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs... A government that confers a benefit on an explicitly religious basis is not neutral toward religion. (Wallace, 1985, p. 81)

All of the authors of opinions in Wallace agreed that silent meditation was acceptable. Because the state used the term “voluntary prayer”, that created the endorsed practice instead of just a moment of silence (Flowers, 1994).

Allegheny County v. ACLU, 492 U.S. 573 (1989)

The vote of the Court was five to four with a few justices concurring and dissenting in part. Justice Blackmun wrote the majority opinion for the Court. Justice O’Connor wrote a concurring opinion joined in part by Justices Brennan and Stevens. Justice Brennan wrote a concurring in part and a dissenting in part opinion joined by Justices Marshall and Stevens. Justice Stevens wrote a concurring in part and dissenting in part opinion that was joined by Justices Brennan and Marshall. Justice Kennedy wrote a concurring in part and dissenting in part opinion joined by Chief Justice Rehnquist and Justices Scalia and White. The A.C.L.U. and individuals brought an action against a city and county in Pennsylvania which challenged the displaying of a crèche in a county courthouse and the displaying of a menorah outside a city and county building. The Federal District Court found in favor of the city and county. The Court of Appeals reversed and remanded the district court’s decision. The question before the Court was whether or not the city and county displays of a crèche and menorah established a government endorsement of religion.

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The Court found that the displaying of the crèche violated the Establishment Clause, but the Court found that the displaying of the menorah did not violate the Establishment Clause because of the location and other seasonal items that were also involved in the display. In writing the majority opinion, Justice Blackmun stated,

> Thus despite divergence at the bottom line, the five Justices in concurrence and dissent in Lynch agreed upon the relevant constitutional principles: the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends on its context. (Allegheny, 1989, p. 597)

The key to both Lynch and Allegheny was that the displays which were found constitutional contained secular messages of the season (Flowers, 1994).

Later on in another part of the opinion, Justice Blackmun referred to the Pledge,

> Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement... However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed... The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically. (Citation omitted) Some of these examples date back to the Founding of the Republic, but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause. Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion

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> (Citation omitted), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). (Allegheny, 1989, pp. 602-603)

Justice O'Connor, concurring in part, stated,

> Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs without sending a message to nonadherents that they are outsiders or less than full members of the political community. An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at governmental proselytization... but fails to take account of the numerous subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. (Allegheny, 1989, pp. 627-628)

Continuing in reference to "In God We Trust" and "God save the United States and this honorable Court", Justice O'Connor stated,

> These examples of ceremonial deism do not survive Establishment Clause scrutiny simply by virtue of their historical longevity alone. Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of

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racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment. (Allegheny, 1989, p. 630)

Justice O'Conner went on to state, "[T]he endorsement standard recognizes that the religious liberty so precious to the citizens who make up our diverse country is protected, not impeded, when government avoids endorsing religion or favoring particular beliefs over others" (Allegheny, 1989, p. 631).

Lee v. Wiseman, 505 U.S. 577 (1992)

The vote of the Court was five to four. Justice Kennedy wrote the majority opinion for the Court. Justice Blackmun wrote a concurring opinion joined by Justices O'Connor and Stevens. Justice Souter wrote a concurring opinion joined by Justices O'Connor and Stevens. Justice Scalia wrote the dissenting opinion joined by Chief Justice Rehnquist and Justices Thomas and White. A public school student, Deborah Weisman, and her father brought action against a school district in Providence, Rhode Island. The permanent injunction asked the Federal District Court to prevent schools from inviting clergy members to give benedictions and invocations at graduation ceremonies. The district court found in favor of Weisman. The U. S. Court of Appeals affirmed the district court's decision. The question before the Court was whether or not the provision of nonsectarian prayer at graduations violated the Establishment Clause.

The Court found that the school could not provide for "nonsectarian" prayer to be given by clergymen who were selected by the school and affirmed the lower courts' decisions.

In writing the majority opinion, Justice Kennedy stated,

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> The First Amendment's Religious Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the state. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same clauses exist to protect religion from government interference. (Lee, 1992, p. 589)

Justice Kennedy further stated,

> The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions... A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed. (Lee, 1992, p. 591)

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000)

The vote of the Court was six to three. Justice Stevens wrote the majority opinion joined by Justices Breyer, Ginsburg, Kennedy, O'Connor, and Souter. Chief Justice Rehnquist wrote the dissenting opinion joined by Justices Scalia and Thomas. A student council elected chaplain delivered a prayer over the public address system before each home game at Santa Fe High School. Students and their mothers filed a suit challenging the practice as a violation of the Establishment Clause. After the first suit was filed, the district changed its policy to allow student held elections to authorize the prayers and

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select a spokesman. The District Court ordered the policy to permit nonsectarian, nonproselytizing prayer. The Fifth Circuit Court of Appeals held that the football prayer policy was a violation. The question before the Court was whether or not nonsectarian, nonproselytizing prayer initiated by students before a football game was a violation of the Establishment Clause.

The Court found that the prayer was a violation. In writing the majority opinion for the Court, Justice Stevens stated,

> Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship. (Santa Fe, 2000, p. 312)

Each of the preceding Establishment Clause cases established precedents that were used in the arguments of the Newdow case. Barnette dealt directly with a state's Pledge policy and established that the Pledge did not have to be recited. Everson was a landmark decision dealing directly with schools and the incorporation of the Establishment Clause as applied through the Fourteenth Amendment. Marsh was significant because it relied on the practices of the founding fathers in determining that legislative prayer was constitutional. McCollum and Zorach involved religious teaching during school time. With McCollum the Court found that a religious pullout program was a violation. In Zorach the Court found that the release time was constitutional because it did not violate the Free Exercise Clause and the State was not establishing a religion. Epperson found that the teaching of evolution was a violation of freedom of speech and thought as granted by the First Amendment. Prayer and or religious readings

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in a school setting were addressed by the Court in Engel, Abington, Wallace, Lee, and Santa Fe. In all of those cases the Court found the practices of the individual school districts to be a violation of the Establishment Clause. Lemon, Lynch, Allegheny, and Lee allowed the Court to define tests of Establishment Clause jurisprudence to determine what constituted a constitutional violation, and what did not constitute a violation. Lemon created the three-prong Lemon test standard in the Court's examination of a statute having a secular legislative purpose, a primary effect in not advancing nor inhibiting religion, and not fostering an excessive entanglement with religion. Lynch and Allegheny utilized the Endorsement test in determining whether or not a reasonable observer would find religious displays on government property as a violation of the Establishment Clause. The Court found that if a religious symbol such as a crèche or a Menorah were part of a seasonal display it was not a violation. If the religious symbol were in isolation, it constituted a violation. Lee established the Coercion test of a non-believer acknowledging a religious exercise while in attendance of a non-religious event. EGUSD and Newdow utilized the overall rulings of the Court and the individual Justices' opinions in these cases to support whether or not EGUSD's Pledge policy was a violation of the Establishment Clause.

Newdow

California Eastern District Federal Court

On March 8, 2000, Rev. Dr. Michael A. Newdow, Plaintiff, filed a complaint in the California Eastern District Federal Court. Newdow named himself as a plaintiff in being a citizen of the United States, and a resident of the State of California. He also named his

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daughter, as an unnamed plaintiff whom he represented as "next friend" who was also a citizen of the United States, and a resident of California. Newdow named as defendants in the complaint, the Congress of the United States, William J Clinton, President of the United States, the State of California, the Elk Grove Unified School District (EGUSD), David W. Gordon, Superintendent, EGUSD, the Sacramento City Unified School District (SCUSD), and Dr. Jim Sweeney, Superintendent, SCUSD.

In his claim for relief, Newdow stated that the Congress of the United States violated the Religion Clauses of the First Amendment by altering the Pledge of Allegiance to include the words "under God." The California State Education Code, Section 52720, states, "In every public secondary school there shall be conducted daily appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy such requirement." Newdow stated,

> The effect of the insertion of the words "under God" into the Pledge of Allegiance has been for theistic Americans to perceive the Pledge as an endorsement of their theism, and for atheistic Americans, including the plaintiff, to perceive the Pledge as a disapproval of their atheism. (Newdow, Original Complaint, p. 7)

He also stated, "By placing the religious words 'under God' into the Pledge, Congress not only interfered with the patriotism and nationality the Pledge was meant to engender but it actually fostered divisiveness...in a manner expressly forbidden by the Constitution" (Newdow, Original Complaint, 2000, p. 25).

Newdow claimed that under the Constitution the religious belief of atheism was as protected as the belief of theism. He stated,

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> To tell Plaintiff and his daughter that there is a God and enroll them in a governmentally-sponsored theistic milieu is no less an affront than it is to tell a Buddhist there is no Buddha, a Christian, there is no Jesus, a Muslim there is no Allah, and so on for every other faith. (Newdow, Original Complaint, p. 11)

Under the policy of the EGUSD and SCUSD, Newdow stated,

> Plaintiff's daughter has been, currently is, and will in the future be subjected to the teacher-led recitation of the now-sectarian Pledge of Allegiance every day she attends the public schools...every school morning – under the aegis of the state- this child 'of tender years' is compelled to watch and listen as her state-employed teacher in her state-run school leads her and her classmates in a ritual proclaiming that there is a God, and that ours is "one Nation under God". For the State to ever subject Plaintiff's daughter to such dogma – expressing the inculcating purely religious beliefs that are directly contrary to the religious beliefs of Plaintiff and the religious ideals he wishes to instill in his child – would be of questionable constitutionality. For it to do this every single school day for thirteen years – using Plaintiff's tax dollars, no less to accomplish this affront – is an outrageous and manifest abuse of power in direct violation of the Religion Clauses of the constitutions of both the United States and the Sate of California. (Newdow, Original Complaint, 2000, p. 14)

Newdow claimed that the recitation of the Pledge at school district meetings made the "Plaintiff feel like an 'outsider' due to his religious beliefs" (Newdow, Original Complaint, p. 16). Even though Newdow's daughter could "opt out" of saying the Pledge, for her to do so would send the message to her classmates that she was "an outsider". Newdow attacked the defendants' future claim that the policy did not involve

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"coercion". In doing so, Newdow stated that one did not need to prove "coercion" for an Establishment Clause violation, and, furthermore, that "coercion" did exist when elementary school students were led by their teachers in the daily recitation of the Pledge.

The School District filed a motion to dismiss on April 12, 2000. In its motion the defendants argued that in Smith v. Deny and in Sherman it was ruled that the Pledge did not violate the Establishment Clause. They brought out, as stated in Barnette, that the district does not compel the plaintiff's daughter to participate in the Pledge in any way. The defendants argued the plaintiff's standing as "next friend". They stated,

> No guardian ad litem has been appointed and there are no allegations which would reasonably indicate that plaintiff himself is an injured party. A next friend is defined as "one acting for the benefit of an infant without regularly being appointed guardian. A next friend is not a party to an action but is an officer of the court, specially appearing to look after the interests of the minor whom he represents Youngblood v. Taylor, 89 S.O. 2d 503, 505. (Defendant's Motion to Dismiss, 2000, p. 8-9)

They also pointed out that the EGUSD, SCUSD, and their respective superintendents were barred from being sued by the Eleventh Amendment. In the conclusion, the defendants requested that the court dismiss, or if not, that the plaintiff submit a more concise statement of the case that does not reflect, "a veritable historical treatise couched in argumentative and conclusionary language" (Defendant's Motion to Dismiss, 2000, p. 9).

In the Opposing Memorandum for the Motion to Dismiss filed on April 20, 2000, Newdow cited Smith v. Deny as the case of precedent, pointing out that the judge in the case did not have Lemon nor any of the cases that followed and had based his decision on

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the *dicta* at the time which was 1968. Newdow rebutted the distinction that was reached in Sherman in that the Pledge was viewed as a patriotic exercise and not a religious exercise, by reaffirming that it is a patriotic exercise with inserted religious dogma. Newdow stated the Sherman court did not have the advantage of Lee in its interpretation.

With regard to the question of standing, Newdow argued as a taxpayer, he had standing and quoted that the "State Department of Education spends more than $1,700,000 annually solely for the recitation of the words, 'under God'" (Opposing Memorandum for Motion to Dismiss, 2000, p.10). Newdow reiterated he had standing as stated in Abington,

> The parent is surely the person most directly and immediately concerned about and affected by the challenged establishment, and to deny him standing either in his won right or on behalf of his child might effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment. Abington (1963)

Newdow concluded his memorandum in reminding the court that none of the previous Pledge cases had been examined, "[f]rom the standpoint of the 'effects' prong of Lemon or under the 'endorsement' test" (Opposing Memorandum for Motion to Dismiss, 2000, p.14).

The Defendant's Reply Brief in Support of Motion to Dismiss, filed May 4, 2000, referred to dicta from previous U. S. Supreme Court cases. The Defendants stated that the U. S. Supreme Court had looked to Lemon in various cases and had examined,

> [I]n dicta, upheld the pledge of allegiance as not being in violation of the Establishment Clause just as they have upheld the terms "In God We Trust" as the statutorily prescribed national motto, legislative prayer, and the invocation regularly

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made at the commencement of each session of the Supreme Court. (Defendants' Reply Brief, 2000, p. 2)

In quoting the opinion in Lynch, the Defendants reiterated, "[A]bsolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the court" Lynch (1984) (Defendants' Reply Brief, 2000, p. 9).

The Defendants' conclusion stated, once again, that references to God have been recognized by the Supreme Court as an "[a]cknowledgment of the religious history of our Nation and do not constitute an endorsement of nor an establishment of religion" (Defendants' Reply Brief, 2000, p. 14). They further claimed that a "fair" reading of the Pledge leads one to think of it as a patriotic exercise. The Defendants added,

> If one analyzes individually all words of the Pledge of Allegiance, the logical conclusion is that each word is an affirmation of the heritage of this country...all of these terms have historical roots dating back to the founding of this country. To acknowledge those roots including the term "under God' cannot...without extreme and rigorous twisting of the language of the many courts of the United States come to the conclusion that there is a violation of the Establishment Clause. (Defendant's Reply Brief, 2000, p. 15)

On May 15, 2000, the argument was heard before Magistrate Judge Nowinski. On May 25, 2000, Judge Nowinski upheld the motion to dismiss. In his findings and recommendations, Judge Nowinski referred to Sherman and Allegheny and found that the ceremonial reference to God in the Pledge did not endorse religious beliefs. Judge Nowinski wrote,

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> The Seventh Circuit decision in Sherman and the statements in dicta...while not binding on this court, are persuasive and directly on point. Whether the court employs the test set forth in Lemon v. Kurtsman, 403 U.S. 602, 612-613 (1971), or the more recent endorsement test, see Allegheny, supra, 492 U.S. at 593-594, the Pledge does not violate the Establishment Clause of the First Amendment. (Findings and Recommendations, 2000, p. 2)

Newdow filed Plaintiff's Objection and Memorandum of Law in Response to Judge Nowinski's Finding and Recommendations on May 31, 2000. In his objection, Newdow reiterated the fact that the record of the 1954 Act stated, "an atheistic American...is a contradiction in terms" and was a signal of disapproval for atheistic citizens. He pointed out that the Supreme Court has stated,

> [T]hat any coercion on the part of the government that forces a citizen to endure religious dogma violates the Establishment Clause...The government may not inculcate religious belief. The insertion of the words 'under God' into the Pledge of Allegiance, followed by the use of that pledge – especially its daily use in the public schools – inculcates the religious belief that there is a god" (Objection and Memorandum of Law, 2000, p. 5).

In referring to Judge Nowinski's failure to pass the Endorsement test, Newdow stated, "where constitutional liberty interests are involved, the government must meet every requirement" (Objection and Memorandum, 2000, p. 7).

Newdow brought out that in Plessy v. Ferguson, 163 U.S. 537 (1896), African Americans were alleged to be treated equally, but atheistic Americans are not being treated equally when the national pledge incorporates a religious view that atheists deny.

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He refuted Judge Nowinski's reference to Allegheny by citing examples of the opinion which supported the unconstitutionality of the Pledge and brought out that Justice Blackmun stated,

> The Pledge of Allegiance to the Flag describes the United States as "one Nation under God." To be sure, no one is obligated to recite this phrase, but it borders on sophistry to suggest that the reasonable atheist would not feel less than a "full member of the political community" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false. Allegheny (Objection and Memorandum, 2000, p 16-17)

Newdow argued that Judge Nowinski agreed that the Supreme Court has not directly addressed the issue of the Pledge, but that Newdow failed to make a claim. Newdow stated that Judge Nowinski based the failure on what multiple courts have said in the Pledge being constitutional.

> It is noteworthy to point, however, that nobody ever actually said that at all. What each court has said is that someone else made this preposterous statement. Judge Nowinski says that Sherman said it. Sherman said that Allegheny said it. Allegheny said that Lynch said it. But Justice O'Connor in Lynch specifically left the Pledge out of her discussion, and Justice Brennan wrote that he "remain[ed] uncertain" about the question. (Objection and Memorandum, 2000, p. 22)

At the conclusion of his objection, the plaintiff asked that the case go to trial.

The Defendant's response, June 5, 2000, to the Objection and Memorandum was quite simple. They stated the plaintiff had repeated his argument. Unless they were asked by the court, they did not see any reason to file any further documentation.

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On June 20, 2000, the plaintiff submitted a Notice of Supplemental Authority which contained excerpts of the Supreme Court decision from the day before of Santa Fe Independent School District v. Doe. The plaintiff stated in the submission,

> [A]s has been the case for every other Establishment Clause case in which the Supreme Court has ruled – applying the principles enunciated in Santa Fe to the insertion of the words "under God" into the Pledge of Allegiance leaves no room for discussion: Congress's Act of 1954 was and is patently unconstitutional. (Submission of Supplemental Authority, 2000, p. 2).

On July 21, 2000, United States District Judge Schwartz filed an order to uphold the motion to dismiss. Judge Schwartz stated, "IT IS HEREBY ORDERED that: 1. The Findings and Recommendations filed May 25, 2000, are adopted in full; and 2. Plaintiff's complaint is dismissed" (Judgment to Dismiss, 2000, p. 2).

Newdow

Ninth Circuit Court of Appeals

On July 26, 2000, Newdow filed his notice of appeal in the Ninth Circuit Court of Appeals. Newdow filed his Brief for the Plaintiff/Appellant Appealing the District Court's Order Granting Defendants' Motion to Dismiss on November 20, 2000. In the Appellant Brief, Newdow referred to Justice Douglas's clarification of his view on the First Amendment in Zorach as was discussed in McGowan v. Maryland, "The idea as I understand it, was to limit the power of government to act in religious matters not to limit the freedom of religious men to act religiously not to restrict the freedom of atheists or agnostics" McGowan, (1961). Newdow stated that the Pledge in its current form did

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restrict the freedom of atheists and agnostics. Newdow explained that with the Act of 1954,

> Congress suddenly deemed it necessary to infuse 'God' into a previously nonsectarian statement that had served its patriotic purposes perfectly well for the preceding sixty-two years...Under each and every Establishment Clause principle that the Supreme Court has ever set forth, the Act of 1954 fails miserably. This case, therefore, is not about that statute's constitutionality. Rather, what it concerns is only the behavior of judges. Will those individuals – like the Congress in 1954 – allow their personal religious predilections to further the will of the majority? Or will they protect a minority population – spurned only because of its heartfelt religious convictions and uphold the Constitution as they swore they would forever do? (Brief for Plaintiff Appealing District Court, 2000, p. 5)

In his summary of the arguments, Newdow brought out the point of substituting other words in the Pledge for "under God". This part of his argument was carried throughout the history of the case. Newdow questioned whether our society would tolerate,

> Public teachers directing their students to recite "one Nation under Allah" every day of the school year: Having our country's Jewish, Muslim, and other non-Christian public school students assembled each morning to join in pledging that we are "one Nation under Jesus"; A Pledge of Allegiance stating that we are "one Nation under no god." When congress in 1954 declared that we are "one Nation under God," it made a "law respecting an establishment of religion," with theism being the established faith. (Brief for Plaintiff Appealing District Court, 2000, p. 12)

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He further stated, "The placement of 'under God' in the Pledge was an establishment of religion unmatched by any in our nation's history, and the fact that those words persist is an egregious violation of the very principles towards which the Pledge is directed" (Brief for Plaintiff Appealing District Court, 2000, p. 14).

Newdow reminded the court of the fact that the District Court never examined the history of the Act of 1954. He stated,

> Thus, as is facially evident from the Act, itself – not to mention the evidence revealed by its supporters' own statements – the 1954 legislation was about religion, not patriotism. To be sure, it s was flamed by a nationalistic fervor to differentiate us from "the commies", but the entire episode was based on an illegitimate premise: that belief in God is morally superior to atheism. For government to champion such a notion – abhorrent, insulting and offensive to atheistic American citizens everywhere – is a blatant Establishment Clause violation. (Brief for Plaintiff Appealing District Court, 2000, p. 20)

Newdow went on to point out that the Motion to Dismiss was inappropriate due to the fact that the Act of 1954 endorses a religious belief, provides entanglement when stated by a government employee, makes the plaintiff feel like "an outsider", coerces citizens to "endure religious dogma", signals a "disapproval" of religious choice, and places government "imprimatur" on a religious belief.

Newdow's argument discussed the Act of 1954 failing all three prongs of the Lemon test. The Act of 1954 had a religious purpose. This was obvious when the legislative accounts of the Act were addressed. The Act's purpose was to advance theism and inhibit atheism. Although not addressed directly in the brief, the Act provided

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entanglement between religion and government. According to Santa Fe, "Under the Lemon standard, a court must invalidate a statute if it lacks 'a secular legislative purpose', Santa Fe, 2000" (Brief for Plaintiff Appealing District Court, 2000, p. 27).

The argument addressed the question of inculcating religious belief in the public schools. The State mandates attendance; therefore, student attendance in public schools is compensatory. Teachers are viewed as role models, particularly in younger aged students. Students are susceptible to peer pressure. He stressed, "[T]he Court has been required often to invalidate statues which advance religion in public and elementary schools" (Brief for Plaintiff Appealing District Court, 2000, p. 36).

Newdow directed the Court's attention to cases that validated his argument. Engel v. Vitale struck down the daily recitation of "Almighty God, we acknowledge our dependence upon thee", which Newdow claimed was identical to his argument. "'Almighty God' – the very same term used by President Eisenhower upon signing the Act of 1954 into law – is certainly no less 'nonsectarian' than the 'God' the Pledge promotes" (Brief for Plaintiff Appealing District Court, 2000, p. 38). Newdow distinguished that even though Abington, Epperson, Stone, and Edwards dealt with "sectarian" issues, they still highlighted the point that a belief or disbelief in the creation, the Bible, or the Ten Commandments is not any stronger than a belief or disbelief in God. Wallace found a violation of the First Amendment in a moment of "meditation or voluntary prayer". Lee found coercion in a graduation prayer which was far less coercive than a "voluntary daily recitation".

In surmising his conclusion, Newdow reminded the court,

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> What's really at issue here is whether or not the jurists from the Court of Appeals – like those of the court below – will permit prejudice to be their guide and concoct a scheme to avoid their sworn duty because "No one wants to take that step". Each judge reading this brief took an oath upon the Constitution. Powerless minorities – such as atheists – look to those individuals to afford them the protections guaranteed by that remarkable document. Although majority rule is a proper consequence of our democracy, it must always be limited by the constitutional rule our system values so highly. (Brief for Plaintiff Appealing District Court, 2000, p. 62)

On December 21, 2000, the United States Attorney filed a Brief for Appellees The Congress of the United States of America; The United States of America; and William J. Clinton, President of the United States. The Appellees stated that as a parent, Newdow had standing. They argued that Newdow did not have standing as a taxpayer because he did not identify tax dollars that he solely spent on the "challenged conduct". They argued that because Newdow did not suffer a direct injury from someday wanting to run for the school board, he did not have standing to suffer an injury. They argued that the Pledge was not unconstitutional because it had a secular purpose in the encouragement of patriotism and should be considered a form of ceremonial deism.

The Appellees claimed that even though the Supreme Court has never ruled on the constitutionality of the Pledge, its *dicta* in its decisions conclude that the "Pledge passes constitutional muster" (Brief for Appellees The Congress of the United States of America; The United States of America; and William J. Clinton, President of the United States, 2000, p. 11). In referring to Justice O'Connor's opinion in Lynch, the Appellees stated, "[T]he significance of this language is the Court's recognition that government

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acknowledgements of our religious heritage often have a legitimate secular purpose" (Brief for Appellees The Congress of the United States of America; The United States of America; and William J. Clinton, President of the United States, 2000, p. 12). Having stated that, the Appellees argued that under Lemon the *dicta* of the Supreme Court have found that the Pledge serves a secular purpose and is constitutional. The Appellees argued that the Appellant's reference to Supreme Court decisions were not the same as the Pledge because those decisions involved religious practices that violated the Establishment Clause. The Appellees stated,

> Certainly, daily prayer to God; daily readings from the Bible; the posting of words from the Old Testament; a moment of silence for prayer; and prayer at graduation ceremonies are quintessential religious practices that differ in nature and purpose from a daily patriotic exercise where a teacher recites the Pledge of Allegiance **to the flag** (bold emphasis), not allegiance to God. (Brief for Appellees The Congress of the United States of America; The United States of America; and William J. Clinton, President of the United States, 2000, p. 16)

The Defendants/Appellees Answering Brief for EGUSD and SCUSD was filed on February 5, 2001. In their brief, the Defendants reviewed the history of the district court's ruling. The Defendants discussed Smith which had challenged a former California Education Code involving the use of the Pledge as an appropriate patriotic exercise. The Defendants claimed that the Pledge was an exercise that a school district could use to meet the requirement of patriotic exercises. They pointed out that it was not the "exclusive method". In referring to Smith, the Defendants stated, "[T]hat there was no penalty attached to the student's failure to recite the pledge other than alleged

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ostracism as a result of exercising his or her constitutional rights" (Defendants/Appellees Answering Brief, 2001, p. 5). They pointed out that the court dismissed the Smith case and also pointed out that the Seventh Circuit Court of Appeals dismissed the Sherman case.

The Defendants argued the Supreme Court had referred to the Pledge in *dicta* in several of its decisions although not having ruled directly on the Pledge. They used the same argument in reference to the Pledge in *dicta*, "[T]hat the inclusion of "under God" in the Pledge passes constitutional muster" (Defendants/Appellees Answering Brief, 2001, p. 6). In showing examples of the *dicta*, the defendants stated that "under God" is a "mere acknowledgement" of the religious history of our country and the use of ceremonial deism does not constitute an endorsement of religion. The Defendants' argument displayed a different interpretation of the Pledge than Newdow. They argued,

> If one analyzes all words of the Pledge of Allegiance, the logical conclusion is that each word is an affirmation of the heritage of this country. Clearly, our founding fathers believed we were "one nation". Our founding fathers believed we were "indivisible". Our founding fathers believed in the heritage of "liberty and justice for all". All of these terms have historical roots dating back to the founding of this country. To acknowledge those roots including the term "under God" cannot, without extreme and rigorous twisting of the language of the many courts of the United States, come to the conclusion that there is a violation of the Establishment Clause. (Defendants/Appellees Answering Brief, 2001, p. 10)

Newdow's Reply Brief pointed out that the Defendants had not identified any secular purpose in the Act of 1954 and, as he deduced, the Act was enacted "[t]o convey a

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message of state endorsement and promotion of prayer, or the statute was enacted for no purpose" (Reply Brief of the Appellant, 2001, p. 1). Newdow argued that Reverend Bellamy did not see any reason for including religious references in the Pledge. The idea of the Pledge serving a secular function when it was enacted for religious purposes should render it void under Wallace. The Defendants did not dispute that the word "under God" were solely implemented to serve as a recognition of a Supreme Being.

In disputing the Defendants' interpretation of the Pledge reflecting the nation's history, Newdow specifically referred to the accounts and the purpose for the Act of 1954,

> When the President states that 'under God' in the Pledge will allow "the millions of our school children [to] daily proclaim...the dedication of our Nation and our people to the Almighty" it is ludicrous to assert that that phrase is but one of many "expressions of this country's religious heritage". When the House Report on the Act, itself, proclaims that "[t]he 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", and that "[t]he phrase 'under God' recognizes only the guidance of God in our national affairs", or any attempt to portray the insertion of these words as merely an acknowledgement of our history must be readily seen for what it is...It is truly outrageous that those sworn to defend our Constitution utilize these tactics to abridge the very rights we so nobly hold out as showing our moral superiority to our "atheistic and materialistic" rivals. (Reply Brief for the Appellant, 2001, p. 12-13)

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Newdow repudiated the Defendants' claim that their argument was supported in previous Supreme Court decisions because they were "solely or primarily religious" by pointing out that the Defendants only referred to the Pledge as a whole rather than the "solely or religious" purpose of the Act of 1954. Newdow referred to Abington, Santa Fe, and Lee as examples of mandating that "under God" be excised "from the secular activity of pledging allegiance." Newdow stated,

> When Congress placed the words 'under God' into the Pledge of Allegiance, its was stating that God exists. Whether or not that is so is a religious question, and – under the Establishment Clause – government is prohibited from taking any position as to its correct resolution. (Reply Brief for the Appellant, 2001, p. 21)

Newdow posed a hypothetical argument to the court at the conclusion of his brief. He stated if the court upheld the Act of 1954 then under Lemon, there would be no religious effect for the words "under God" so; therefore, any insertion of substitution would be appropriate such as "under Jesus" because a teacher has that right to Free Exercise. If "God" were to be considered sectarian and "Jesus" referred to a particular religion, then the teacher could lead the Pledge with "one Nation under no God". After a series of complaints and sanctions for using "under no God" reached the court, Newdow asked how the court would respond. "Clearly, if 'under God' is permissible because it does not advocate, inculcate or endorse a religious view, then the same must hold true for 'under no God'" (Reply Brief for the Appellant, 2001, p.33).

On February 16, 2001, Newdow filed Plaintiff/Appellant's Statement Setting Forth Reasons Why Oral Argument Should Be Heard. Newdow based his request on the

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"overwhelming mass of dicta" that supported his claim and that the case arrived at the Court of Appeals on a Motion to Dismiss. He stated,

> Were this a case of government advocating a religious view particularly offensive to Jews, Muslims, Mormons or any other theistic class, there would be no question about how to rule. However, none of those religious denominations have been impugned by the placement of the words "under God" into the nation's sole Pledge. Rather, the citizens who have had their right abridged are atheists: a religious minority discriminated against so pervasively in America that most people – including those who engage in the offensive behaviors – are often oblivious to its presence. (Reasons Why Oral Argument Should Be Heard, 2001, p. 2)

Newdow argued,

> [Oral argument] will force those jurists to confront the unrecognized prejudices that exist in each of us, and ensure that all such biases are thoroughly examined before the Court of Appeals mistakenly rules – as did court below – that the Establishment Clause is limited only to the protection of those who adhere to the day's preponderant religious views. (Reasons Why Oral Argument Should Be Heard, 2001, p. 7)

Newdow also noted in his footnote to the court, Magistrate Judge Nowinski's open admission that,

> "In this day and age, no one wants to [remove God from the Pledge]. I don't think anybody is going to" (Cite omitted) reveals that judges begin their analyses biased with the expectation that they will uphold theistic utterances irrespective of the constitutional ramifications. This is but one more bit of evidence that cries out for oral argument. (Reasons Why Oral Argument Should Be Heard, 2001, p. 7)

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On November 2, 2001, three Ninth Circuit Judges entered an Order for the appointment of pro bono counsel for Newdow. Newdow submitted Appellant's Objection to Appellate Court's Order Appointing Pro Bono Counsel on November 13, 2001. In his objection Newdow informed the court that he had a law degree from the University of Michigan Law School. He had submitted all of the briefs and was well versed with the arguments of his case. He also felt that he knew all of the aspects of the material involved with the Act of 1954. He further felt that the subject matter of the case involving the conflicting views of religion made him "uniquely qualified to advocate for the view underlying his position" (Appellant's Objection to Appellate Court's Order Appointing Pro Bono Counsel, 2001, p. 4). Newdow informed the court that if it did feel the need to provide counsel that he would still be able to address the court personally. The order for pro bon counsel was subsequently vacated on November 21, 2001.

On March 14, 2002, oral arguments were heard in the Ninth Circuit Court of Appeals before Circuit Judges Goodwin, Reinhart, and Fernandez. On June 26, 2002, Judge Goodwin filed the opinion with partial concurrence and partial dissent by Judge Fernandez. The court found that it had jurisdiction over the question of the constitutionality of the 1954 Act. The court found that under Doe v. Madison School District. No. 321, 177, F.3d, 789,795 (9th Cir. 1999), Newdow had standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter. The court quoted Doe v. Madison, "Parents have a right to direct the religious upbringing of their children, and, on that basis, have standing to protect their right." Doe, (1999). The court examined Newdow's standing in challenging the 1954 Act, and found, "The mere enactment of the 1954 Act in its particular context constitutes a religious

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recitation policy that interferes with Newdow's right to direct the religious education of his daughter. Accordingly, we hold that Newdow has standing to challenge the 1954 Act" (Newdow I, 2002, p. 605).

The court looked at the 1954 Act as a violation of the Establishment Clause. It approached its evaluation in applying three tests of precedent. The first was the Lemon test, which was the Lemon v. Kurtzman, 403 U.S. 602 (1971) decision that established three prongs in evaluating Establishment Clause violations, "[T]he government conduct in question (1) must have a secular purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion." Lemon, (1971). The second test was the Endorsement test derived in a decision written by Justice O'Conner in Lynch v. Donnelly, 465 U.S. 668, 694 (1984) which stated, " The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, and an accompanying message to adherents that they are insiders, favored members of the political community." Lynch, (1984) The third test was the Coercion test that was established in Lee v. Wiseman which stated, "[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith or tends to do so" Lee, (1992).

The Ninth Circuit Court of Appeals in its majority opinion stated that, "In the context of the Pledge, the statement that the United States is a nation 'under God' is an endorsement of religion" (Newdow I, 2002, p. 607). It further stated, "To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values

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for which the flag stands: unity, indivisibility, liberty, justice, and – since 1954 – monotheism" (Newdow I, 2002, p. 607). The court stated the 1954 Act failed the Endorsement test. The court wrote, "Although students cannot be forced to participate in recitation of the Pledge, the school district is nonetheless conveying a message of state endorsement of a religious belief when it requires public school teachers to recite, and lead the recitation of, the current form of the pledge" (Newdow I, 2002, p. 608). The court cited Lee in the 1954 Act's failure to pass the Coercion test in stating, "[T]he policy and Act place students in the untenable position of choosing between participating in an exercise with religious content or protesting" (Newdow I, 2002, p. 608). It further stated, "The coercive effect of the Act is apparent from its context and legislative history, which indicate that the Act was designed to result in the daily recitation of the words 'under God' in school classrooms" (Newdow I, 2002, p. 609). In applying the Lemon test, the majority of the court found that, "Historically, the primary purpose of the 1954 Act was to advance religion" (Newdow I, 2002, p. 609). The opinion quoted the 1954 Act and stated, "[T]his language reveals that the purpose of the 1954 Act was to take a position on the question of theism, namely, to support the existence and moral authority of God, while deny[ing] … atheistic and materialistic concepts'" (Newdow I, 2002, p. 610). In his closing opinion remarks, Justice Goodwin footnoted,

> [T]he Court has never been presented with the question directly, and has always clearly refrained from deciding it. Accordingly, it has never applied any of these three tests to the Act or to any school policy regarding the recitation of the Pledge. That task falls to us, although the final word, as always, remains with the Supreme Court. (Newdow I, 2002, p. 612)

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The decision of the district court was reversed and remanded.

In the concurring dissenting opinion written by Justice Ferdinand F. Fernandez, he concurred the court had jurisdiction over the case, the California statute did not have validity, and Newdow had standing as a parent to challenge the policy and Act. Justice Fernandez disagreed that the Pledge violated the Establishment Clause of the First Amendment. He stated, "We should, instead, recognize that those clauses were not designed to drive religious expression out of public thought; they were written to avoid discrimination" (Newdow I, 2002, p. 613). He further wrote, "[W]hen all is said and done, the danger that 'under God' in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody's beliefs is so miniscule as to be de minimus" (Newdow I, 2002, p. 613).

The following day an order staying the Ninth Circuit opinion was issued. On August 5, 2002, (certified mail declaration dated July 31, 2002) the Defendants of EGUSD and SCUSD filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. In the petition the Defendants noted the Ninth Circuit opinion was in conflict with the Seventh Circuit opinion in Sherman. They believed the majority of Circuit Judges would agree with Judge Fernandez's dissent. They also noted that Sandra Banning, the mother of Newdow's daughter, had filed a motion to intervene.

In the Petition for Rehearing, the Defendants stated that Sandra Banning's motion to intervene claimed that Newdow did not have standing to challenge the constitutionality of the Pledge or the school district policy concerning the Pledge. Sandra Banning had received sole legal custody from the Sacramento County Superior Court on February 6, 2002. This gave Sandra Banning the sole right to represent her daughter in legal and

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educational matters. The Defendants claimed that even though Newdow was the parent, he did not have the ability or right to control his daughter's education. As a result, claimed the Defendants, Newdow did not have standing "[T]o interfere with his daughter's ability to recite the Pledge or interfere with EGUSD's recitation policy. Newdow also does not have standing to represent his daughter's interest since his right to do so has been eliminated pursuant to the custody agreement" (Petition for Rehearing and Suggestion for Rehearing *En Banc*, EGUSD and SCUSD, 2002, p. 3). According to the information provided by Sandra Banning, Newdow's daughter did not object to the recitation of the Pledge in its current form; therefore, Newdow could not contend that his daughter had been injured.

The Defendants used the examples of Lemon, Lynch, and Lee to argue that the Court had not always limited its examination of the Establishment Clause to those three tests. The Defendants used Marsh as an example decision which did not follow the three tests. The Defendants referred to the Supreme Court's recognizing the historic role of religion in our country's history. The Defendants cited *dicta* in which the Court had viewed references to "God" as a "fabric" of our society. The Defendants referred to the decision in Sherman which examined the Founding Fathers' references to "God" and concluded that the ceremonial invocations did not violate the Establishment Clause. The Defendants argued,

> [T]he Legislative Reference Service considered the intent of Congress in including the language in the Pledge and determined that the phrase 'under God' was a modifier to the phrase 'one Nation' because the addition was intended to affirm that the United

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States was founded on a fundamental belief in God. (Petition for Rehearing and Suggestion for Rehearing *En Banc*, EGUSD and SCUSD, 2002, p. 10)

Thus, the insertion of the words "under God" was added to recognize the role of religion in the history of our country which is an addition for secular purpose and passes the Lemon test. The Defendants argued the Ninth Circuit assumed that the Pledge "[T]akes a position with respect to the existence of God" (Petition for Rehearing and Suggestion for Rehearing En Banc, EGUSD and SCUSD, 2002, p. 12), instead of recognizing the role of God in our nation's history. This fact, according to Allegheny, does not "convey a message of endorsement". Allegheny, (1989) The Defendants argued the Pledge failed the Coercion test because it is a patriotic exercise containing the idea that this country was founded on a fundamental belief in God, not a religious exercise. The Defendants concluded because the recitation of the Pledge fails all three of the "tests" and because Newdow did not have standing, the rehearing should occur.

The Petition of the United States for Rehearing and Rehearing *En Banc* was submitted on August 9, 2002. The Defendants referred to the same arguments of the Supreme Court that had been stated in the school districts' petition. The Defendants argued the Ninth Circuit should not have reached the decision that Newdow had standing because he had not alleged any "cognizable" injury as a result of the Pledge. They argued the statute's "mere enactment" did not cause Newdow the direct kind of injury which was required for Article III standing. The Defendants argued the Ninth Circuit cited Santa Fe and Wallace in rendering its decision while neither of those cases had any discussion of standing. They pointed out that just because the Supreme Court did not discuss standing, it did not mean that the Court found standing to exist. Finally, they

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argued because Sandra Banning had sole custody of Newdow's daughter, it was questionable if Newdow had standing to challenge the policy at all.

Two Amicus briefs were filed for the Defendants supporting a petition for rehearing *En Banc*. The first was the Brief of *Amici Curiae* Christian Legal Society, et al. submitted on August 16, 2002. The brief claimed the clause "under God" refers to a higher authority than the government. The brief continued to illustrate references made by the Founding Fathers to the Creator and the Almighty. The brief made the distinction that "under God" was inserted to distinguish the difference between our government's political theory and the communist theory, that our inalienable rights come from God.

The second brief was submitted by the Claremont Institute Center for Constitutional Jurisprudence in Support of Petition for Rehearing *En Banc*. The brief referred to the history of religion in our country as well as the fact that religion was also a part of our country's educational history. It restated the same references to a supreme being made by the Founding Fathers as mentioned in the Christian Legal Society et al. brief and quoted Washington's Thanksgiving Proclamation in its entirety. The brief argued that many individual state preambles acknowledge a supreme being. It claimed those same states did not see any conflict in ratifying the Fourteenth Amendment. It gave examples of state constitutions with strong antiestablishment clauses but still made references to a supreme being. It argued the Establishment Clause intruded upon the areas of state authority, pointing out the Pledge policy comes from the state statute, not the Act of 1954.

Newdow filed a Response to Sandra Banning's Motion for Leave to Intervene or, Alternatively, to Dismiss the Complaint on September 27, 2002. In the response,

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Newdow reminded the court that the deadline to file was almost two years earlier. He severely questioned the timeliness of Banning's motion and stated precedents for it to be dismissed. Newdow refuted Banning's claim that she knew very little about his lawsuit in giving examples of her knowledge that dated back to 1999. Newdow pointed out he had never referred to his daughter by name and any publicity or labels towards his daughter were a result of Banning coming forward after the Ninth Circuit opinion. Because Banning admitted she had not suffered any injury, Newdow stated she did not have standing to be a party in the case.

EGUSD and SCUSD submitted a Supplemental Brief Regarding Standing and Constitutionality Issues on November 6, 2002. The brief dealt with the question of Newdow's standing. Because Sandra Banning had sole custody of the daughter, the districts' question was whether the sole custody deprived Newdow from his standing to object to the facts affecting his daughter's education. The brief claimed according to the California Family Code, Banning had all educational and religious control over the daughter. It also stated in reviewing the case law concerning the statutes, it could not find any cases of sole custody depriving the other parent from making decisions regarding his/her child's education. The brief requested that the State of California be given an opportunity to intervene with regard to the constitutionality issue of the statutes involved.

The Ninth Circuit issued an order concerning the standing issue on December 4, 2002 (Newdow v. U.S. Congress et al., 313 F. 3d 500, 2002). In writing the opinion, Circuit Judges Goodwin, Reinhardt, and Fernandez (concurring) had examined the sole legal custody order and "reconsidered" the question of Newdow's standing. The Judges found

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Newdow had Article III standing because the formal custody order had not occurred until February 6, 2002. The custody order occurred after Newdow had appealed the dismissal of the suit in District Court. Newdow did not claim to represent his daughter, but he did "retain standing" as a parent to challenge the Pledge policy of EGUSD. The judges relied on a similar set of circumstances which were involved in a Seventh Circuit decision, Navin v. Park Ridge School District 64, 270 F. 3d 1147, (2001). Judge Goodwin stated in the opinion, "We hold that a noncustodial parent, who retains some parental rights, may have standing to maintain a federal lawsuit to the extent that his assertion of retained parental rights under state law is not legally incompatible with the custodial parent's assertion of rights" (Newdow II, 2002, p. 503-504). The sole custody order, "[D]oes not strip Newdow of all of his parental rights. Rather, that order establishes that Newdow retains rights with respect to his daughter's education, and general welfare" (Newdow II, 2002, p. 504). The court further found,

> Ms. Banning may not consent to unconstitutional government action in derogation of Newdow's rights or waive Newdow's right to enforce his constitutional interests. Neither Banning's personal opinion regarding the Constitution nor her state court award of legal custody is determinative of Newdow's legal rights to protect his own interests. (Newdow II, 2002, p. 505)

Banning's motion to intervene was denied because she did not have an "interest at stake" in Newdow's suit.

On December 12, 2002, Newdow filed Plaintiff/Appellant's Response to the Petitions for Rehearing and Rehearing *En Banc* filed by the State and Federal Defendants. In the response Newdow argued the *dicta* in Lynch and Allegheny did not uphold the insertion

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of "under God" in the Pledge; in fact, the *dicta* demonstrated that it was unconstitutional. Newdow reminded the court of the religious intent in speeches that had occurred with the implementation of the 1954 Act, in reference to the Defendants' statement that the Ninth Circuit panel had relied on a "faulty presumption". Newdow asked the panel for atheists to receive the same respect as other religious beliefs and not rehear the case because it would force the issue through other Circuit Courts before reaching the Supreme Court.

On February 28, 2003, the Ninth Circuit amended the Newdow decision it had reached in the previous June, Newdow v. U.S. Congress et al., 328 F. 3d 466 (2003). The Court had voted on whether to rehear the case *en banc*. "The matter failed to receive a majority of the votes of the nonrecused active judges in favor of *en banc* consideration" (Newdow III, 2003, p. 468). Judge Reinhardt wrote the amended opinion with an amended concurrence/dissent by Judge Fernandez and two dissents by Judges O'Scannlain and McKeown. Judge Reinhardt concurred with the first opinion written by Judge Goodwin. Judge Reinhardt found issue with Judge O'Scannlain's suggestion that the court should rehear because of the public reaction to the initial decision. Judge O'Scannlain stated the first decision was "an exercise in judicial legerdemain" that had produced a "public outcry". Judge O'Scannlain stated if the Pledge is a violation of the Establishment Clause, then so is the Constitution, Declaration of Independence, the Gettysburg Address, the National Motto, and the National Anthem because of their references to God.

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Newdow

U.S. Supreme Court

Writs of Certiorari

The Petition for a Writ of *Certiorari* filed by EGUSD, Terence Cassidy, Counsel of Record, presented the history of the case and the policies that pertained to the case. In stating why *certiorari* should be granted, the Writ first turned to the Seventh Circuit's decision in Sherman. The writ pointed out that the Seventh Circuit used history as a guide in determining its decision. It reminded the Court the Ninth Circuit's decision was in direct conflict with the Seventh Circuit's decision. It claimed that the Ninth Circuit "ran afoul" in interpreting the Court's opinions with regard to the constitutionality of the Pledge. It reminded the Court that it had allowed the Pledge to be recited by willing students. It stated that if students felt the content of the Pledge violated their constitutional rights, those rights were protected by their not being required to recite the Pledge.

In arguing that the Pledge is not a profession of religious belief, the writ presented the opinion of the Legislative Reference Service to the Library of Congress which stated that the phrase "under God" was a modifier to the phrase "one Nation." The writ claimed that the phrase was inserted for a secular purpose. It stated, "In contrast, patriotic invocations of God do not attempt to establish a state religion, nor suppress the exercise of non-exercise of religion" (Petition for Writ of *Certiorari*, EGUSD, 2003, p. 10). It asked the Court to "[C]larify the difference between the traditional role of religion in our national life and what constitutes the establishment of religion or interference with the free

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exercise or non-exercise of religion" (Petition for Writ of *Certiorari*, EGUSD, 2003, p. 14).

With regard to the question of Newdow's standing, the writ pointed to California statutes. It stated,

> No California court has addressed whether an award of sole legal custody to one California parent deprives the non-custodial California parent of his ability to affect decisions concerning the health, education or welfare of a child. However, California statutes addressing custody dictate that a non-custodial parent such as Respondent, does not have the ability to affect decisions relating to the child's health, education or welfare. (Petition for Writ of *Certiorari*, EGUSD, 2003, p. 16)

It claimed Newdow did not have a legal right under California law to direct matters related to his daughter's education. It stated by the Ninth Circuit finding a contrary decision, it opened the door for plaintiffs to file "meritless" lawsuits. It asked the Court to review the Ninth Circuit's decision, "[B]ecause the decision makes moot a state's custody determinations of a noncustodial parent can bring suit in contradiction of decisions made by the custodial parent" (Petition for Writ of *Certiorari*, EGUSD, 2003, pp. 16-17).

The Petition for a Writ of *Certiorari* filed by the Solicitor General, Theodore B. Olson admitted the Act of 1954 was to establish that the United States was founded on a belief in God. It further admitted the congressional record reflected the intent of the act to differentiate between American beliefs and the communists. It stated California law does require each public school to conduct appropriate patriotic exercises at the beginning of each school day, and EGUSD had adopted a policy which directed each of

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its schools to recite the Pledge. It noted the Ninth Circuit was in disagreement with the Seventh Circuit over the constitutionality of the Pledge. The Writ pointed out that the Ninth Circuit stated Newdow did have standing in his own right to challenge the government affecting his child.

The Writ stated the Ninth Circuit's ruling was contrary to precedent. It reminded the Court of its rulings in previously cited cases and quoted *dicta* which supported its contention the Pledge was constitutional. The Writ claimed Newdow had not suffered any legally protected interest. It stated Newdow did not have any legal right to sue as his child's next friend nor could he seek to vindicate his child's legal interests. It claimed, contrary to the Ninth Circuit's decision, Newdow did not have any right to "steward" the religious education of his child. The Writ stated the Ninth Circuit's allowance for standing was influenced by the merits of the case. It pointed out that injury under Article III must be separate from the resolution of the case.

The Writ of *Certiorari* filed by Newdow addressed the Pledge as a violation of the Establishment Clause and Newdow's standing under Article III. Newdow claimed the school board meetings of which he attended began with the recitation of the Pledge. Newdow stated he named the school board in his claim because he was made to feel a "political outsider." Newdow further claimed because his tax dollars were used to support the religious message of the Pledge, he had taxpayer standing in California and under the Federal government. He also claimed standing as a parent who did not want the public schools sending a religious message to his daughter.

Newdow summarized the events that had led to the Writ. He pointed out in the amended Ninth Circuit opinion, it found the Pledge was not a violation of the

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Establishment Clause, but the school district's policy with the inclusion of the words "under God" was a violation of the Establishment Clause. As a result, Newdow claimed he had true injury because he was made a "political outsider." Newdow gave examples which supported the Constitution was written without an acknowledgement of God. He reminded the Court of the conflicting decisions between the Seventh and Ninth Circuits. He stated the Seventh Circuit did not examine the text of the Pledge, but only focused on coercion. Newdow stated only forty-nine percent of Americans would vote for an atheistic candidate. He informed the Court that at least eight states had provisions which denied atheists the right to hold public office.

Newdow reminded the Court that the Ninth Circuit found he had standing. He also argued he had standing in his own right because he has been turned into a "second class" citizen on the basis of his religious beliefs. He supported his argument in citing, Santa Fe, Allegheny, Lee, Texas Monthly, Wallace, and Lynch where the Court found that "individualized harm" was necessary to meet the "injury-in-fact" requirement of standing. He claimed this was an equal protection case because atheists were unable to join with other Americans in pledging allegiance to their flag. Newdow also reiterated even though he did not have legal custody of his daughter, the Ninth Circuit found he did have standing in the directing of his child's educational interests.

Newdow filed the Brief in Opposition for Respondent Michael A. Newdow to further request that the Court grant *certiorari*. The brief stated the *dictum* of the Court did not support that the Pledge was constitutional. Newdow referred to previously cited cases that had been before the court. He also quoted writings from each of the nine Justices on the Court which supported the religious presence of the words "under God" were in

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conflict with the Establishment Clause. He stated even if the State had forbid Newdow from naming his daughter in the litigation, he still had the right to "vindicate" his own interest in guarding her welfare. He clarified even though the child's mother's religious views differed from his, he supported his daughter being exposed to different religious viewpoints. His contention was the government was taking the mother's views into consideration which in itself proved that Newdow had standing because it constituted an injury-in-fact.

Newdow reminded the Court that even though he did not have custody of his daughter, his rights in directing her education had not been "abrogated" to deprive him of standing as a parent. Newdow pointed out that the Ninth Circuit stated in California religious decisions regarding the upbringing of children are reserved to both parents, and the state may not indoctrinate religious views over the objection of either parent.

Other Motions Submitted to the Court

In September of 2003, Newdow filed a Suggestion for Recusal of Justice Scalia. After the Ninth Circuit's decision was reached, Justice Scalia made some remarks that called his impartiality into question. Justice Scalia was the main speaker at Religious Freedom Day which was partially sponsored by the Knights of Columbus. At that event, "Justice Scalia apparently indicated that the Ninth Circuit decision in the instant case was based on a flawed reading of the Establishment Clause" (Suggestion for Recusal of Justice Scalia, 2003, p. 3). Newdow pointed out that Justice Scalia's remarks violated the Code of Conduct for United States Judges. Newdow cited specific instances where recusal of judges had occurred. Newdow stated, "In January 2003, he (Justice Scalia) indicated that he has already applied his Establishment Clause analysis to the case at bar

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and reached his conclusion before ever reading the briefs or hearing the arguments. That is what provides the grounds for recusal" (Suggestion for Recusal of Justice Scalia, 2003, p. 6). The Court accepted Newdow's suggestion for recusal.

In December 2003, Newdow filed a Motion to Add Parties. Newdow stated that he had temporarily lost "legal custody" during the process of his litigation. Newdow stated that his standing had become an issue after the Ninth Circuit opinion. Newdow wanted to emphasize the issue of his litigation had always been that the Pledge was an Establishment Clause violation. As a result, Newdow asked the Court if other parents who were in the same situation as he, except for the issue of custody, could join him in the action for the case at bar. "With their involvement, the standing/custody issue would become moot, and the Court would be able to attend to the extremely important Establishment Clause issues without the needless dilution of its limited and valuable resources" (Motion to Add Parties, 2003, p. 2). Newdow presented cases that were similar to his in which the Court allowed the addition of parties. Newdow stated that he could have attempted to add parties during the litigation before the Ninth Circuit, but the Motion to Intervene from Sandra Banning was never granted. Newdow wrote, "Here, this Court has certified the specific question of standing in its grant of certiorari" (Motion to Add Parties, 2003, p. 5). Newdow concluded,

> Even if (under current standing doctrine) he lacks some formalistic criteria, there is adequate law to allow for other parties meeting those criteria to be added at this stage. Certainly, this is preferable to detracting from the momentous Establishment Clause issues at hand (by unnecessarily expending precious judicial resources, and delving

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> into a completely ancillary – yet exceeding consequential in its own right – issue such as the rights of noncustodial parents. (Motion to Add Parties, 2003, p. 6).

Newdow attached to the motion a declaration of parents who stated their reasons for being added as parties to the case.

Theodore B. Olson, Solicitor General filed the Opposition of the United States to Respondent Newdow's Motion to Add Parties. The Opposition reminded the Court that the Ninth Circuit found Newdow had standing to challenge the Pledge policy even though he did not have legal custody of his daughter. The Opposition argued when the Court granted *certiorari*, one of the questions before the Court was Newdow's standing. The Opposition stated, "Respondent Newdow's motion to add parties should be denied because (i) the addition of new parties before this Court cannot cure the jurisdictional defect in the court of appeals' judgment" (Opposition of the United States to Respondent Newdow's Motion to Add Parties, 2004, p. 4). The Opposition gave examples of when the Court had granted the addition of parties and pointed out the different circumstances than those of Newdow. The Opposition argued even if the Court were to grant Newdow's motion to add parties, the Court would still have to answer the initial question of Newdow's standing when the Ninth Circuit amended its opinion. "Granting Newdow's motion cannot retroactively create jurisdiction that never existed, and thus it would not avert this Court's consideration of the 'weighty' (Motion at 1) standing question presented in this case" (Opposition of the United States to Respondent Newdow's Motion to Add Parties, 2004, p. 6). The Opposition claimed Newdow's motion was untimely, and he should have filed the motion at the *certiorari* stage.

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Amicus Curiae Briefs for the Petitioners

The brief filed by the Claremont Institute claimed the writers of the Establishment Clause never intended it should forbid the rights of the states or a school district from encouraging respect for the "Creator". The brief stated the Establishment Clause was written to "Prohibit federal government from interfering with state encouragement of religion" (Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence in Support of the Petitioners, 2003, p. 6). It went on to state the examples in history where the Founding Fathers made references to a superior being. It pointed out that when the Fourteenth Amendment was adopted that none of the members of Congress saw a problem with the Establishment Clause and State constitutions that mentioned God. With regard to Newdow's standing, the brief explained to the Court that if the Court found in favor of standing based on a "non-particularized structural harm" then, it would need to clarify the legal powers of the federal courts.

The brief filed by the Liberty Counsel reiterated previous decisions by the Court. It brought out that the framers did not oppose chaplains offering prayers in congress. It emphasized Justice Rehnquist's claim that there was no intent of the framers to build a "wall of separation between church and state". It presented a list of quotations involving past presidents in history who made references to a superior being. The brief claimed the legal system and the constitution "were established to govern a religious people" (Brief of Liberty Counsel, WallBuilders and William J. Federer as Amicus Curiae in Support of Petitioners, 2003, p.23).

The brief filed by the Congress Member Ron Paul et al stated that the phrase "under God" did not impart any specific theology. It emphasized that the Pledge is not forced on

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anyone. In its footnoted clarification of the Pledge not violating Lemon, the brief stated the Pledge has not converted anyone to a Judeo-Christian view, nor has it inhibited any person from joining any religious affiliation, nor has it converted any person to a monotheistic view. It went on to state the time it takes to say the Pledge does not equal that of a "religious activity". It made the correlation that the Pledge is no different than teaching the Theory of Evolution in a classroom of students who believe in Creationism.

There were two different briefs filed by some United States Senators and United States Representatives. Some of the individual senators and representatives were listed on more than one brief. The brief in conjunction with the American Center for Law and Justice stated, "The First Amendment affords atheists complete freedom to disbelieve; it does not compel the federal judiciary to redact religious references in patriotic exercises in order to suit atheistic sensibilities." (Brief of *Amici Curiae* of United States Senators Sam Brownback, et al, 2003, p. 5). It made the same argument that if the Pledge violated the constitution then, the recitations of other national documents would also violate the constitution. They claimed if the Court found in favor of Newdow, that public school music programs would not be able to sing patriotic songs, African-American spirituals, or choral arrangements of Johann Sebastian Bach because an atheistic student might feel coerced to sing with the rest of the group. It stretched the music class involvement a little further in claiming, "[T] hat students may refuse to 'perform' the Pledge of Allegiance but they do not have the same constitutional right to refuse to sing 'America the Beautiful' in a music class (Brief of *Amici Curiae* of United States Senators Sam Brownback, et al, 2003, p. 8). The brief claimed the Ninth Circuit misinterpreted Lee because it did not make a distinction between religious exercises and patriotic exercises.

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It concluded by asking the Supreme Court to resolve the difference in rulings by the Seventh and Ninth Circuits.

The senators' and representatives' brief filed in conjunction with the Committee to Protect the Pledge addressed the issue of Newdow's standing. It argued because Newdow was a noncustodial parent with no decision making authority over his daughter, he did not have standing. It pointed out that Newdow's injury was not "distinct" and "palpable". It stated, "In fact, Newdow's alleged injury is nothing more than psychological offense at the historical fact that this Nation was founded upon a belief in monotheism, and that the Pledge of Allegiance reflects that fact. Psychological offense alone does not suffice to confer Article III standing" (Brief of *Amici Curiae* of United States Senators, George Allen, Sam Brownback, James Inhofe, Trent Lott, Zell Miller, and Ted Stevens, and United States Representatives Robert Aderholt, et al, 2003, p. 2). The brief did not dispute that Newdow's custodial rights had varied during the course of the dispute, but it did point out Newdow's relationship to his daughter was not "revealed" to the district court and during the appeal to the Ninth Circuit, Sandra Banning had sole custody of the daughter. The brief claimed, "The Ninth Circuit conflated its consideration of the merits of this case with its resolution of the question of Newdow's standing" (Brief of *Amici Curiae* of United States Senators, George Allen, Sam Brownback, James Inhofe, Trent Lott, Zell Miller, and Ted Stevens, and United States Representatives Robert Aderholt, et al, 2003. p. 5). The brief claimed if Newdow did have a right to standing, the "right" should yield to the "competing right" of the mother, Sandra Banning, and because she had sole custody, her "right" had precedence. It further argued because Newdow was a noncustodial parent, his injury was not "redressable" in

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federal court, "Redressability cannot rest on the assumption that a nonparty to the action will act in a certain way on the basis of a decision in plaintiff's favor, and that such action would ultimately redress plaintiff's injury" (Brief of *Amici Curiae* of United States Senators, George Allen, Sam Brownback, James Inhofe, Trent Lott, Zell Miller, and Ted Stevens, and United States Representatives Robert Aderholt, et al, 2003, p. 9). The brief reiterated the point that recitation of the Pledge did not constitute coercion. It addressed its historical significance and stressed that the Pledge was a patriotic exercise and not religious. It stated if the Court overturned constitutionality of the Pledge, school practices of memorizing historic speeches would be "suspect".

The brief for the Senate Subcommittee on the Constitution reminded the Court that all 100 senators co-sponsored Senate Resolution 292 which expressed strong support for the Pledge in its existing form the same day that the Ninth Circuit issued its first opinion. It further reminded the Court of Pub. L. 107-293, 116 Stat. 2057, (2002) in which the act established that the recitation of the Pledge in public schools was a patriotic exercise. The brief went on to reiterate the same historical references to a supreme being, and the Court had not found that references to God established a national religion. The brief again reiterated the recitation of the Pledge was an act of patriotism and not an expression of religious faith.

The brief filed by the Eagle Forum and Legal Defense Fund pointed out that public life in the United Sates has many references to God. It claimed,

> Judicial censorship of "under God" cannot be rationalized on the ground that some may perceive it as too religious for their liking. It is irreplaceable. No other succinct phrase exists to express our nation's reliance on the Rule of Law rather than

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dictatorship, equality of opportunity rather than nobility, and religious freedom rather than oppression. It does not establish or endorse religion to recognize the basis on which our nation was founded. (Brief of Amicus Curiae Eagle Forum Education and Legal Defense Fund in Support of the Petitioners, 2003, p. 4)

It asked the Court to resolve the dispute between the Seventh and Ninth Circuits. It asked for a review of clarification in the recitation of the Gettysburg Address. It brought out the point in the Ninth Circuit's reference to Allegheny, "[E]very statement of American history of politics could be censored" (Brief of Amicus Curiae Eagle Forum Education and Legal Defense Fund in Support of the Petitioners, 2003, p. 13).

The brief filed by the National Jewish Commission on Law and Public Affairs did not directly address the question of Newdow's standing. The brief did point out if the Court did decide that Newdow lacked standing, it should still address the merits of the case. The brief stated that the constitutional issues might be repeated again. The brief defended the argument of our nation being one "under God" in citing the historical references. It stated that in upholding the Ninth Circuit decision, the Court would be sending a message to the citizenry, "[A]s a blow to those who do believe in God and view their country as 'one nation under God'" (Brief of the National Jewish Commission on Law and Public Affairs ("COLPA") as *Amicus Curiae* in Support of Petitioners, 2003, p. 17).

The brief filed by the fifty States Attorneys General addressed the question of the school district policy violating the Establishment Clause. The brief was written by the State of Texas on behalf of all fifty states. The brief expressed concern to the Court because the case before it affected forty-three state statutes. The brief advocated that the

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Pledge was a patriotic exercise and did not violate the Establishment Clause. It presented *dicta* of previous Court decisions that upheld the history of the nation recognizing a supreme being. The brief stated, "[T]hat between the two extremes of government endorsement of religion and government hostility against religion, there lies a broad zone in which government may recognize or acknowledge the important foundational role that religion has played in our Nation's history and heritage" (Brief of Texas, Alabama, Alaska, Arizona, Arkansas, et al as *Amici Curiae* in Support of Petitioners, 2003, p. 13). In the brief's appendix, the Attorneys General enclosed forty-three individual state statutes (Hawaii, Iowa, Maine, Michigan, Nebraska, Vermont, Wyoming not included) regarding public school policy in the recitation of the Pledge of Allegiance.

The brief filed by the Rutherford Institute proposed solutions for the question before the Court. It presented evidence of *dicta* in Marsh that the Pledge is part of the "fabric" of our society. It stated only applying Marsh would not "[R]esolve the core-level tension between the Court's three Establishment Clause tests and forty years of its own dicta" (Brief *Amicus Curiae* of the Rutherford Institute in Support of Petitioner, 2003, p. 8). The brief proposed that the Court could answer the question in "vindicating its dicta" by finding the Pledge as a patriotic and ceremonial exercise. If the Court used Everson to uphold the Pledge, then the meaning of "under God" would have "[L]ost all meaning to modern American ears and constitutes nothing more than a lifeless relic from a discarded age" (Brief *Amicus Curiae* of the Rutherford Institute in Support of Petitioner, 2003, p. 9). The brief suggested that in order for the Court to "reconcile the Pledge with its understanding of the Constitution", it should "disavow the Everson dicta" and "[M]aintain a posture of symbolic neutrality between theism and atheism and reconstitute

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its Establishment test to accommodate a more historically accurate understanding" (Brief *Amicus Curiae* of the Rutherford Institute in Support of Petitioner, 2003, p. 10). The brief concluded with quotations from authors supporting the point that the nation was based on a belief in monotheism.

The brief filed by the American Jewish Congress asked the Court to look at the intent of the Pledge as it pertained to the present day and not the intent when it was implemented. It also asked the Court to look at the Pledge in a historical and sociological context. It regarded the Pledge as ceremonial deism and did not address God as prayer. It claimed ceremonial deisms, "[C]reate no lasting or meaningful religious commitments and are 'expression[s] of society's integration, rather than [a] source' of it" (Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of the American Jewish Congress in Support of Petitioners, 2003, p. 14). It stated that public speakers who make personal references to a supreme being did not help the petitioners because the remarks were personal in nature and addressed to adults. The brief considered the Pledge constitutional because it had no coercive effect. It asked the Court to look at the Pledge as a reasonable observer. In doing so, a reasonable observer would look at the Pledge in its patriotic context as he/she does at other references to religion in other patriotic exercises. As a result a reasonable person does not suffer an injury. The brief did not contest Newdow's assertion that the Pledge is hostile to atheistic beliefs, but it did not feel that the hostility determined the Pledge's constitutionality. It made the argument that the reasonable observer views the Pledge as a ceremonial deism and because of its "repeated rote recitation" drains the Pledge "of substantial religious significance". The Pledge's secular context overrides its religious context. The brief claimed that the Pledge

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was not a prayer because, "It does not call upon God to do anything in response, if only to listen, as a prayer necessarily does" (Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of the American Jewish Congress in Support of Petitioners, 2003, p. 28). It viewed the reference to God as a description of the "supposed historical motivations of the nation's founders". It stated that ceremonial deisms do not promote the "threat of an established church". It claimed that the Pledge was not unconstitutional because it did not create or espouse a "full-blown creedal statement" of a religious exercise. The brief put the Pledge into the category of "American Civic Religion". It defined the Civic Religion as ideas, days, and ceremonies which celebrated the nation. As a result, this Civic Religion serves a secular purpose.

The brief filed by the Center for Individual Freedom claimed that the Ninth Circuit decision was flawed because it assumed that the Pledge was a religious exercise. It stated that the Ninth Circuit focused on the historical reference to God as opposed to the whole statement which serves a patriotic purpose. In supporting its claim, the brief used examples of *dicta* that had been used in previous U. S. Supreme Court decisions. It made the analogy to the sacred components displayed in Allegheny in that the Court did not look at each component of the display but rather focused on the display as a whole in determining its constitutionality. As such the same consideration should be made when looking at the Pledge as a whole and not its individual parts. In doing so, the Court should view the Pledge as a swearing of allegiance to the values for which the flag stands.

The brief filed by the Christian Legal Society advocated that the Pledge is not an endorsement of monotheism but a proposition from the Declaration of Independence that

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is theological and political. It stated that the Pledge does not violate the Establishment Clause requirement for neutrality, "The focus of Establishment Clause neutrality is on government action and policy at the 'operational' level, not on the principles underlying such action and policy – where to fact neutrality is not possible" (Brief *Amici Curiae* of Christian Legal Society, et al in Support of Petitioners, 2003, p. 3). It stated that Congress wanted to create a distinction in political philosophy between the former Soviet Union and the United States. The brief argued,

> [T]here is a fundamental difference between a statement that "there is one and only one God" and a statement that "inalienable rights come from God." To the extent that the phrase "under God" refers to the proposition that inalienable rights come from God, the phrase is a statement of foundational principle about which the government cannot be neutral. (Brief *Amici Curiae* of Christian Legal Society, et al in Support of Petitioners, 2003, p. 9)

As a result, the brief claimed that the Pledge is constitutional because the government must remain neutral with respect to religion.

The brief filed for Sandra Banning by Kenneth Starr stated Ms. Banning had the right to make the ultimate decisions regarding her daughter's education. Newdow could not override any decisions made by Banning concerning her daughter's education. The brief stated Newdow had no right to represent his daughter in court, and Banning did not want her daughter involved with the litigation. The brief claimed, "Ms. Banning believes that the Pledge is an important patriotic expression of American ideals that reflects the democratic beliefs of a diverse society. Ms. Banning wants her daughter to appreciate, and participate in, the traditional recitation of the Pledge" (Brief for Sandra L. Banning as

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Amicus Curiae in Support of Petitioners, 2003, p. 1). It further stated that Newdow violated the California Superior Court's custody order when he included his daughter as "next friend" without consulting Banning in his litigation. The brief pointed out,

> The court made clear that regardless of what "technical title" it might use to describe the custody arrangement, Ms. Banning has the right to "make final decision" if she and Mr. Newdow are not able to reach mutual agreement on issues concerning their daughter's upbringing. According to the court, Mr. Newdow is not able to co-parent, as evidenced by his decision to involve the child in his lawsuit without Ms. Banning's consent. (Brief for Sandra L. Banning as *Amicus Curiae* in Support of Petitioners, 2003, p. 3)

The brief informed the Court,

> If Mr. Newdow has any right to challenge the Pledge at all, it must be a right grounded in a case brought in his own name and based on injuries (if any) he himself may have suffered...Because neither Ms. Banning nor her daughter objects to the Pledge, and because Ms. Banning has the right to make final decisions regarding her daughter's upbringing, Mr. Newdow should not be permitted to use the child as a surrogate for his *own* private agenda of imposing certain beliefs on the Nation's schoolchildren. (Brief for Sandra L. Banning as *Amicus Curiae* in Support of Petitioners, 2003, p. 5-6)

After discussing the issues of standing, the Banning brief went on emphasize the points that had been made in the other briefs for the petitioners. It brought up the *dicta* of previous U.S. Supreme Court decisions. It advocated that the Pledge is a patriotic exercise and not a religious exercise. It stated the idea of a supreme being reappears

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throughout history and is a reflection on "American self-government". The brief elaborated on famous speeches with references to a supreme being that had been made by prominent figures in history. It referenced people in history who did not believe in a personal God. It brought out that the Universal Life Church, of which Newdow is a minister, makes reference to a "God-given right". The brief stated the Ninth Circuit was mistaken in its definition of God by looking it as proper noun instead of a common noun, "The 'under God' of the Pledge thus refers not to the Ninth Circuit's linguistic abstractions, but to the concrete system of American belief" (Brief for Sandra L. Banning as *Amicus Curiae* in Support of Petitioners, 2003, p. 24). It suggested that if the Court nullified the Pledge, it would put into question a number of patriotic exercises that made reference to God.

Amicus Curiae Briefs for the Respondent

The brief filed by the clergy members and the Unitarian Universalist Association expressed concern that some of the briefs filed on behalf of the plaintiffs did not seriously view the religious content of the Pledge. Douglas Laycock who had appeared in the Supreme Court as counsel on prior occasions filed the brief. The monotheistic clergy members did not wish for the government to impose its religious beliefs on children whose parents did not share the same beliefs. The brief took the position that "under God" was a religious affirmation of faith whether it was taken seriously or not. If it were an affirmation, then, the government is asking children to reaffirm their belief that the nation is under a single God regardless of the children's personal beliefs. If "under God' was not considered an affirmation of faith, then, the government is asking children to take the name of the Lord in vain. The distinction between the Pledge and other governmental

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uses of religion is the fact that the Pledge requires one to affirm his/her religious belief. If one had a doubt about God, one should not have any less standing in the political community.

The brief stated if there is only one true God, then worshipers of other gods are worshiping false gods. It claimed, "[T]he United States, California, the Elk Grove Unified School District, and the teacher in each classroom all ask each student to affirm a formulation that encapsulates the four most basic points: there is a God, there is only one God, this is the one true God, and this nation is under the one true God" (Motion for Leave to File Brief and Brief of Rev. Dr. Betty Jane Bailey, Rev. Dr. J. Martin Bailey, Rabbi Leonard I. Beerman, Rev. Terry N. Cantrell, Rev. Dr. Harvey Cox, et al as *Amici Curiae* Supporting Respondent Michael A. Newdow, 2004, p. 5). Given that the history of the nation is that of Christian heritage, the government is asking children to pledge allegiance to a Christian god. The brief argued the government's claim that the Pledge merely acknowledges the historical fact that the nation was founded by those who believed in God. "But that is not what the Pledge says. Teachers might easily ask children to pledge allegiance to 'one Nation, most of whose citizens believe in God,' or to 'one Nation, founded by a generation that mostly believed in God'" (Motion for Leave to File Brief and Brief of Rev. Dr. Betty Jane Bailey, Rev. Dr. J. Martin Bailey, Rabbi Leonard I. Beerman, Rev. Terry N. Cantrell, Rev. Dr. Harvey Cox, et al as *Amici Curiae* Supporting Respondent Michael A. Newdow, 2004, p. 7). The brief argued that the operative words at issue are: "I pledge allegiance to … one Nation, under God". It further stated that if the language of the Pledge is not intended to be religious then it is a vain reference to God, "'Thou shall not take the name of the Lord thy God in vain.'

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Exodus 20:7. If the briefs of the school district and the United States are to be taken seriously, then every day they ask school children to violate this commandment" (Motion for Leave to File Brief and Brief of Rev. Dr. Betty Jane Bailey, Rev. Dr. J. Martin Bailey, Rabbi Leonard I. Beerman, Rev. Terry N. Cantrell, Rev. Dr. Harvey Cox, et al as *Amici Curiae* Supporting Respondent Michael A. Newdow, 2004, p. 8). The government is asking the children to take the religious "under God" seriously or not to take it seriously and recite it without meaning.

The brief referred to Santa Fe and Allegheny as examples of students who may or may not be "outsiders" of the political community. It also referred to Lee in not requiring students to stand for the prayer let alone affirm the prayer.

> This case is worse than any of those. Unlike any previous case in this Court, the Pledge explicitly links religious faith to political loyalty and thus so standing in the political community...[G]overnment requests simultaneous affirmation of both the patriotic and religious professions of faith. The message of exclusion is unmistakable. (Motion for Leave to File Brief and Brief of Rev. Dr. Betty Jane Bailey, Rev. Dr. J. Martin Bailey, Rabbi Leonard I. Beerman, Rev. Terry N. Cantrell, Rev. Dr. Harvey Cox, et al as *Amici Curiae* Supporting Respondent Michael A. Newdow, 2004, p. 11)

In referring to Lynch and Allegheny, the brief disputed the plaintiff's claim that the Pledge should be considered as a whole. It reminded the Court that the religious message of the Pledge was in the middle of a single sentence expressing a patriotic message. "The governmental demand to affirm both messages neither neutralizes the religious affirmation nor offers an alternative. Instead, it casts doubt on the patriotism and political

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allegiance of those who cannot in good faith affirm the religious portion of the message" (Motion for Leave to File Brief and Brief of Rev. Dr. Betty Jane Bailey, Rev. Dr. J. Martin Bailey, Rabbi Leonard I. Beerman, Rev. Terry N. Cantrell, Rev. Dr. Harvey Cox, et al as *Amici Curiae* Supporting Respondent Michael A. Newdow, 2004, p. 14).

The brief for the Americans for Separation of Church and State and the American Civil Liberties Union addressed the question of standing. It stated the arguments against Newdow's standing ignored the Ninth Circuit Court's "reliance" on the laws of California. It pointed out the Court recognized in Barnette that the Pledge is a "ceremony of assent", and that "Reciting the Pledge thus became a religious exercise – not because it refers to 'God", but because it is a pledge" (*Amicus Curiae* Brief of Americans United for Separation of Church and State, American Civil Liberties Union, and Americans for Religious Liberty in Support of Affirmance, 2004, p. 3). The brief claimed Newdow's injury was the government's sponsorship of the exercise of the Pledge which coerces children to participate in the exercise of reciting the Pledge.

The brief of the Historians and Law Scholars stated the Framers of the Constitution would have opposed the policy of the EGUSD because they generally viewed oath taking as a religious expression. It pointed out that Article VI of the Constitution expressly states, "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The Framers had seen more than enough oaths from the British and the British American colonies that they used oaths quite sparingly. The Constitution only has two oath requirements, the Presidential oath of office and the oath to support the Constitution. After the Constitution was drafted, several states altered their own constitutional religious tests. It reminded the Court in Barnette, Justice Jackson

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stated the Pledge, "requires affirmation of a belief and an attitude of mind." The brief reinforced the point that after 1954, the Pledge was a swearing of allegiance to the belief in monotheism. It reiterated the fact that the Pledge makes one choose between expressing his/her patriotism or religion. The brief pointed out the Act of 1954 was designed specifically to be recited by children, and the Court has always recognized the coercive rights of students in the public school setting. It stated a student who refused to recite the Pledge would risk being labeled irreligious and unpatriotic. For that risk not to occur, the Framers specifically wrote, Article VI, clause 3.

The brief for the Humanist groups argued that the Pledge is not "ceremonial deism." It stated the Pledge failed the Endorsement test because its intent was to favor monotheism. It reminded the Court that the Ninth Circuit found the Pledge was a "performative statement." It clarified that the 1954 Act did not include the words "founded under God" which the plaintiffs had argued was the intent, but rather inserted the words "under God." For that reason, the brief concluded the Pledge was not a form of "ceremonial deism".

The brief for the Religious Scholars and Theologians supported the claim that recitation of the Pledge is an expression of personal belief contrary to other historical documents which are read in the classroom. It stated, "The Pledge puts schoolchildren who do not embrace monotheism to the Hobson's choice of affirming religious belief they do not hold and foregoing participation in a patriotic ritual" (*Amicus Curiae* Brief of Religious Scholars and Theologians in Support of Respondent, 2004, p, 5). The brief presented the history of the Pledge. It stated before 1954 the word of "liberty" and "justice" distinguished the United States from its enemies. After 1954 as a result of the

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"godless communism" the words "under God" were inserted. The brief pointed out that Justice Black in Everson stated the state should be neutral in its relations with groups of religious believers and non-believers. It emphasized that Congress in 1954 wanted schoolchildren to acknowledge the nation was under God, and the recitation of the Pledge affirms a belief in monotheism. It brought out the act of students standing and placing their hands over their hearts is definitely a ceremonial ritual to which the words "under God" were added. Furthermore, teachers who are seen by children as authority figures lead this ritual. It reminded the Court atheists such as Hegel, Espinoza, and Einstein would not have been comfortable with the insertion of the words "under God". It stated the petitioners were asking the Court to link "under God" to the country's roots of the Puritan theology and to endorse that theology.

The brief referred to a study done by the Graduate Center of the City University in New York where it found one in seven of Americans has no religious identification. It mentioned another survey done by the National Opinion Research Center at the University of Chicago which reported the growth of Buddhists, Hindus, and other non-monotheistic religions in the United States. The brief stated the addition of fourteen percent of non-religious Americans to the six percent of non-monotheistic Americans equals roughly to one in five Americans who does not endorse the affirmation of "under God" in the Pledge. The break down of one in five children in the classroom does not trivialize the religious content of the Pledge. It claimed even though Barnette does not require the citation of the Pledge, under Lee and Santa Fe, the Pledge is indirectly coercive.

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The brief filed by the Freedom from Religion Foundation stated the Government endorsement of the belief in God as an integral part of the system of government has created the impression that the rejection of this belief is considered by some tantamount to treason. It stated the ubiquity of governmental references to a divinity has created, "[T]oo much religion being espoused by government. Excessive government involvement with religion is particularly sinister because it goes against the grain of the freedoms guaranteed by our Constitution which includes the freedom not to believe in God" (*Amicus Curiae* Brief of the Freedom from Religion Foundation, Inc. in Support of the Rev. Dr. Michael A. Newdow, Respondent, 2004, p. 3). The brief pointed out in the wake of the McCarthy era with its fear of un-American atheistic belief, the Congress passed the Act of 1954 and two years later, enacted legislation to make "In God We Trust" the nation's national motto. The Foundation did a survey in 1994 and found seventy percent of the people who responded felt that the national motto constituted an endorsement of a belief in God and attached the results as an appendix to its brief. It also attached as an appendix the Apostles' Creed from the Roman Catholic Church to point out the dichotomy of the Court in stating that prayer is a violation of the Establishment Clause while declaring a belief or allegiance to God are not a violation.

The brief of the Secular Humanism Council argued if the Court upheld recitation of the Pledge, then, it would have to address the difference in the rights of believers versus non-believers. It asserted, "If the government can in any way favor the believer more than the nonbeliever, there is then the ominous shadow of shunting the nonbeliever off into second-class citizenship, which, itself, would signify the onset of religious tyranny" (Brief of the Council for Secular Humanism as *Amicus Curiae* in Support of Respondent

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Michael A. Newdow, 2004, pp. 3-4). It argued that "under God" is a religious expression, and the government acted with a theological intent in 1954. The brief claimed government should be neutral in representing believers and nonbelievers equally. It stated "under God" is not just an historical religious reference, "It affirmatively asserts that there is a God. This the First Amendment forbids, because it is not the business of government to officially declare that God does or does not exist" (Brief of the Council for Secular Humanism as *Amicus Curiae* in Support of Respondent Michael A. Newdow, 2004, p. 7). It alleged for the government to acknowledge religious heritage, it has sided with believers which is a violation of the First Amendment.

The brief brought out the point that it is extremely difficult for a six year old child to differentiate himself/herself from the rest of the children in refusing to recite the Pledge. It emphasized if the government affirms that the nation is under God, then it is sending a message to nonbelievers that they are outsiders. The brief stated, "In the public school system, there is the overwhelming danger that it will indoctrinate young children to grow up intolerant of non-believers and other religious dissenters" (Brief of the Council for Secular Humanism as *Amicus Curiae* in Support of Respondent Michael A. Newdow, 2004, p. 17). It argued that the government is not "permitted to indoctrinate" children that patriotism is defective if one does not accompany that patriotism with a belief in God.

The brief of the Anti-Defamation League further carried the argument of the Pledge's impression on children. It argued there is coercive pressure on school children, "[T]o embrace as truth the views, beliefs, and norms that they learn from their teachers and peers...This places the objecting student in an untenable position, and thereby exacts

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religious conformity in a manner that the Constitution forbids" (Brief *Amicus Curiae* of Anti-Defamation League in Support of Respondent, 2004, p. 4). It reiterated the point that the intent of the Act of 1954 was to have children recite there was a belief in God. It referred to the coercion principle established in Lee. The brief stated, "In simplest terms, a schoolchild's recital of the government-prescribed Pledge affirms a belief in the existence of God, indeed, of a single God, and of that single God's superintendence over our one, indivisible, Nation" (Brief *Amicus Curiae* of Anti-Defamation League in Support of Respondent. 2004, p. 13). Even though graduation attendance in Lee was voluntary, public school attendance is mandatory. As a result, "The coercion, the inculcation, in such a setting with such a young and impressionable audience is unavoidable" (Brief *Amicus Curiae* of Anti-Defamation League in Support of Respondent, 2004, p. 15). Thus a child who chose not to participate would have to defend his/her dissent each day within the public school setting.

The brief of Eisgruber and Sager argued the EGUSD policy does not offer an alternative. It proposed EGUSD offer an alternative secular form of the Pledge. It expressed the opinion that the modern Establishment Clause concerns advertently or inadvertently place the government in the position of endorsing belief systems which do not reflect all members of the political community. It acknowledged that religious elements in civil ceremonies are "fundamentally generic and non-sectarian." As the participants in these ceremonies are individuals and not the government; however, there should be a secular alternative for persons to participate in these ceremonies without compromising their individual religious beliefs. It pointed out Article II permits presidents to affirm rather than swear to uphold the Constitution, and Article VI and the

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Fourteenth Amendment also provide for secular affirmations instead of religious oaths. Courtrooms also provide for witness to affirm they will tell the truth rather than swearing they will tell the truth. If EGUSD provided an officially secular alternative to the Pledge, it would give students the choice between a religious and secular form of participation, "That is the choice that Article II guarantees to presidents when they take office and to witnesses when they vow to tell the truth; school children surely deserve no less when asked to profess allegiance to their country" (Brief of Christopher L. Eisgruber and Lawrence G. Sager as *Amici Curiae* Supporting Respondent Michael A. Newdow, 2004, p. 13). Without a choice children who wish to show allegiance to their country are not provided the means to so without compromising their religious beliefs.

The brief filed by the Buddhist Temples discussed the conflict of a Buddhist wanting to affirm allegiance to his/her country without jeopardizing his/her beliefs. As a result the teacher-led recitation of the Pledge violates the Establishment Clause. It stated, "It is irrelevant that recitation of the Pledge in public elementary and secondary schools is voluntary because the nature of the exercise itself creates a constitutionally unacceptable dilemma for Buddhist children" (Brief *Amicus Curiae* of Buddhist Temples, Centers and Organizations Representing over 300,000 Buddhist Americans in Support of Respondents, 2004, p. 4). The brief explained the increase in the Buddhist population in the United States. It discussed the different Buddhist communities in the United States. It pointed out that non-theism was a central theme in the Buddhist philosophy. It explained the religious teaching of Buddhism not embracing the concept of God. The concept of God as a moral force directly clashes with the tenets of Buddhism. The Pledge violates the Establishment Clause because it, "[E]mbraces principles of liberty

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and justice…aligned with, watched over, blessed by, and/or answerable to, [a] monotheistic deity" (Brief *Amicus Curiae* of Buddhist Temples, Centers and Organizations Representing over 300,000 Buddhist Americans in Support of Respondents, 2004, p. 19). It stated the Act of 1954 made monotheism the religion officially sanctioned by our country. In doing so, the government is asking children to mix religion with government. The brief pointed out that in Lynch it is unacceptable for Buddhist children to choose between following the lead of their school teachers or serving their religion, "Buddhist students throughout the land are reminded that the official version of our country's patriotic oath proclaims and exalts a religion that is different from their own" (Brief *Amicus Curiae* of Buddhist Temples, Centers and Organizations Representing over 300,000 Buddhist Americans in Support of Respondents, 2004, p. 25). It reiterated the fact that the Pledge cannot be considered as ceremonial deism. For Buddhist children the reference to God does not suggest religion; it refers to the deity of a monotheist tradition. "If the Establishment Clause means anything, it is that loyalty to this country requires allegiance to the freedoms we cherish, and patriotism must never be conditioned on the expression of a particular religious belief" (Brief *Amicus Curiae* of Buddhist Temples, Centers and Organizations Representing over 300,000 Buddhist Americans in Support of Respondents, 2004, p. 29).

The brief filed by the Atheist Law Center argued against the Rutherford Institute's claim that the Ninth Circuit reached its decision from scattered *dicta*. It stated that the Pledge case brought out a principle that officials were willing to sacrifice for the social homogeneous life style. It claimed the distinguishing of prayer from the compulsory recitation of the Pledge is a diversionary tactic. In stating the prayer is different, only

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avoids the argument in the essence of the case. The brief argued in Barnette besides the fact of coercion, the state compulsion of recitation was the overriding issue not just the punishment for nonconformity. In arguing the existence of the Pledge for over fifty years, the brief pointed out that even if in Marsh legislative prayer had occurred for two hundred years, referring to the current form of the Pledge as "ceremonial deism" does not validate it in the public schools, and the Court in its previous holdings has stated the government may not favor religion over non-religion. It stated to argue the Pledge serves a secular purpose was true before the Act of 1954, but after 1954 that was no longer the case. The brief brought up the weak assertion by the petitioners who correlate the text of the Pledge to a reindeer-crèche display, and that this correlation would not be comprehended by schoolchildren.

The brief filed by Barbara McGraw explored the rights of conscience that has been the founding philosophical principle in the development of the United States' government. It made the premise that the originally conceived structure of our government was the open forum of its citizens to form the good of its society from the ground up not from the government down. "The phrase 'under God' connotes a top-down structure, and more importantly it is an endorsement that disrespects the nation's pluralism, and its imposition on school children functionally amounts to top-down coercion" (Brief *Amicus Curiae* of Barbara A. McGraw in Support of Affirmance, 2004, p. 2). In referring to a "higher authority" than Government, the brief advocates the "higher authority" is not God but individual conscience. It made the point that the difference between the United States and the Soviet Union was the Soviet Union was a top-down government and the United States was not. This distinction was overlooked

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with the Act of 1954. The nation was not founded "under" God but on man's individual relationship with the Divine. "[T]he founders' intentions were to guarantee freedom of conscience for individuals of a present and future pluralistic society" (Brief *Amicus Curiae* of Barbara A. McGraw in Support of Affirmance, 2004, p. 14). Regardless of Christianity being the primary belief when the nation was founded, the founders still framed a constitution that did not require a belief in a supreme being to serve in public office. It stated the Petitioners had forgotten that freedom of conscience was an inalienable right under the founders' convictions. "[T]he Founders' intention was to preserve the relationship of the Divine (however conceived by conscience) with *individuals* and not the state" (Brief *Amicus Curiae* of Barbara A. McGraw in Support of Affirmance, 2004, p. 23). The brief stated that a moral foundation which embraces pluralism is consistent with the American system that was established by the Founders. "[A] government policy endorsing 'God' in the Pledge in the coercive environment of the public school system results in the very thing that the Founders sought to avoid-the infringement by the government of those inalienable rights" (Brief *Amicus Curiae* of Barbara A. McGraw in Support of Affirmance, 2004, p. 27).

The brief filed by the American Atheists discussed the "Rights of Conscience" in reference to James Madison's Memorial and Remonstrance against Religious Assessment and his letters. It pointed out other participants in the drafting of the Bill of Rights also advocated for the "Rights of Conscience", most notable Senators Carroll, Harrington, and Livermore. "The drafters of the Bill of Rights saw fit to draw a practical distinction between holding a belief in god, and directing others to believe in god" (Brief Amicus Curiae of American Atheists in Support of Respondents, 2004, p. 9). The brief claimed

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the Act of 1954 was to "[d]enigrate and disparage those with atheistic views" (Brief Amicus Curiae of American Atheists in Support of Respondents, 2004, p. 10), to separate the Americans from the communists. It emphasized the intent of the congress in passing the Act of 1954 was plainly to recognize God as the leader of the nation, and to promote to school children that the United States is a nation who owes its existence to a deity. This Act was culminated by a radio broadcast of members of Congress reciting the new Pledge followed by a bugle playing "Onward Christian Soldiers" as the flag was raised. It reiterated the point that the Pledge adopted by Congress in 1942 was a solemn oath that had served the country through two world wars. It also reiterated the fact that the current form of the Pledge prevents atheists from pledging allegiance to their country. It recognized after the Ninth Circuit's decision, that although Congress passed an act to keep the Pledge in its current form, it did not lessen its unconstitutionality. The brief argued children are particularly sensitive to peer pressure and can also be quite cruel and insensitive to others. As a result for a child to recite or not recite the Pledge is really no choice at all. "If Jefferson...was loathe to share his personal religious views, it is unconscionable that we should require it of a child" (Brief Amicus Curiae of American Atheists in Support of Respondents, 2004, p. 19).

The brief filed by the United Fathers of America argued the question of Newdow's standing. It stated in the Petitioners' attack of Newdow's standing, they are avoiding the merits of the case. The brief claimed that Newdow had standing because there was no harm against the child as a result of the religious differences between the parents, and the Ninth Circuit recognized that fact. It also claimed the Ninth Circuit was correct in stating that Newdow suffered an injury because the recitation of the Pledge teaches that the

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child's father's beliefs are those of an outsider. It further asserted Newdow had standing because of his close relationship with his daughter who is a minor and cannot assert her own rights.

The brief stated for the Court to rule that Newdow lacked standing would mean every major issue involving the rights of children with non custodial parents would require the defense to enlist the support of the other custodial parent in supporting procedural defenses against the merits of the cases. "It would be an insult to this Court's intelligence to suggest that Ms. Banning would be before this Court represented by Kenneth Starr were it not for Newdow's success in the Ninth Circuit in the instant case and the publicity thereby generated in this landmark case" (Brief *Amicus Curiae* of United Fathers of America, and Alliance for Non-Custodial Parents Rights in Support of Respondent, 2004, p. 16). The brief claimed Ms. Banning was sought out by the religious right to aid in the opposition of Newdow's case. The brief stated if that strategy were allowed to succeed, it would set a horrible precedent. It reiterated Ms. Banning only became publicly adverse to the merits after the Ninth Circuit decision, which in turn, supported Newdow's standing. The brief made the analogy of denying Newdow standing to a custodial parent who approved of corporal punishment even to the point of bruising the child and a court blocking the non-custodial parent's right to seek any redress. It emphasized that the California Family Court had never made any order "[E]xtinguishing Newdow's parental rights or abrogating his religious freedoms in respect to his child. To say that the State courts 'decide' standing based upon such theoretical powers to decide underlying property and other interests of the litigants is meaningless" (Brief *Amicus Curiae* of United Fathers of America, and Alliance for Non-Custodial Parents Rights in Support of

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Respondent, 2004, p. 21). The brief pointed out EGUSD's own policies which do not allow the insult, degradation, or stereotyping of anyone based on his/her religion, and are in compliance with state and federal laws which discriminate on the basis of religion.

The brief filed by the Atheists for Human Rights claimed all persons who wish to recite the Pledge as a form of patriotism have standing to assert the same claim that was being presented by Newdow. It stated the Court was the only protection that minorities had against the majority and had an opportunity to protect all citizens from any religious belief inserted into the Pledge. It reiterated the fact that the Act of 1954 was directed to atheists. It stated the government should not send a message of endorsement of one religion over another. The brief pointed out the God referred to in the Pledge is a particular God as defined in dictionaries, and the Act of 1954 chose to use the word "God" instead of "god" to align citizens whose American beliefs were consistent with those of the Bible. "How did inserting 'under God' benefit the nation? It did not. It only reinforced and helped justify the long-standing cultural hostility toward atheistic citizens" (Brief *Amicus Curiae* of Atheists for Human Rights in Support of Respondent, 2004, p. 24). The brief concluded in reminding the court the majority of the nation's founders were deists and did not make references to God. It gave examples of writings previously mentioned where the Founding Fathers chose other words to refer to a Supreme Being or idea.

The brief filed by Rob Sherman (Plaintiff in Sherman v. Community Consolidated School District 21, 980 F. 2d 437 (1992)) argued the Pledge violated the Establishment Clause because in a school setting, children are not willing participants. It argued its point from the precedent established in Lee. In Lee the Court found subtle peer pressure

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could be just as real as any overt pressure. The brief pointed out Lee dealt with high school students, and the case before the Court dealt with students of a much younger age who are much more susceptible to the subtle peer pressure that was found unconstitutional. It stated in one viewing the Pledge as only being a patriotic exercise, "Such an attitude insults the theological scruples of potential student objectors, their parents and those who added the words, 'under God,' to the Pledge" (Brief *Amicus Curiae* of Rob Sherman Advocacy, 2004, p. 5).

The brief filed by the Associated Pantheist Groups explained to the Court the Pantheistic philosophy of religious reverence for Nature and the Universe. It referred to previous Court precedents in cases which have already been cited and stated,

> [I]t is not clear whether this Court intends different Establishment tests in different circumstances. This case offers the Court an opportunity to clarify the requirements of the Establishment Clause, whether by overruling particular tests, joining the several tests, and/or determining which tests apply in which cases. (Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of Associated Pantheist Groups in Support of Respondent, 2004, p. 12)

The brief presented statistics which showed roughly ten percent of the United States' population does not claim a belief in God, and the recitation of the Pledge involved a conflict with that ten percent's religious beliefs. It claimed the State could not require a patriotic exercise of a student body which contained a religious message. The brief argued the insertion of the words "under God" represents an endorsement of religion, and the State requiring the recitation of the Pledge equals the State officially recognizing God as a higher authority. It stated the Pledge does not exhibit neutrality and favors

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monotheism over other religions. The brief reiterated the difficulty of young school children not being able to opt out of reciting the Pledge as a result of peer pressure. It concluded in pointing out the United States is a pluralistic culture, and school children should not be compelled to endorse one belief over another.

The brief filed by the Church of Freethought explained the church's existence and philosophy of membership. It argued Newdow had standing because the Court has held that Government may not lend its power to one or another side in controversies of religious authority. The brief reiterated the fact that the Act of 1954 was done for religious reasons. It stated the Act of 1954 does not support an acknowledgement of history because historically the nation has not made the assertion that the Republic is one under God. It argued the Act of 1954 referred to Lincoln's Gettysburg Address in justification of the insertion of "under God"; however, the brief interpreted the phrase to mean "With the help of God" (Brief *Amicus Curiae* of The Church of Freethought in Support of Respondent, 2004, p. 14). The brief pointed out the references to "Providence" in the eighteenth century were not that objectionable which does not hold true in today's society. "Just as 'freedom of the press' no longer refers exclusively to newspapers, 'and establishment of religion' and 'the free exercise thereof' refers to more than the religious opinions and sects in existence in the late 18th century" (Brief *Amicus Curiae* of The Church of Freethought in Support of Respondent, 2004, p. 17). It claimed "freedom of religion" must mean no Government endorsement or recognition of other peoples' religions which the Court has upheld. The brief stated atheist religions have the same protection under the law as other religions. It reiterated the fact that atheistic children and their parents are made to feel as outsiders. The brief concluded in stating an

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affirmation of the Ninth Circuit's decision would "[N]ot unravel 'the fabric of our society'" (Brief *Amicus Curiae* of The Church of Freethought in Support of Respondent, 2004, p. 29). The brief also contained a lengthy appendix of an American Religious Identification Survey and its results in statistical and narrative forms.

The brief filed by the Seattle Atheists stressed the flexibility of the Constitution over time. It claimed ceremonial deism has become archaic in light of the religiously diverse population of the country. It stated, "Including the phrase 'under God' in such a daily recitation does not qualify as mere ceremonial deism because it contains significant religious content, it is unquestionably controversial, and it does not have an established history" (Brief of *Amicus Curiae* Seattle Atheists, Secular Coalition for America, Atheist Community of Austin, and Institute for Humanist Studies, in Support of Respondent, 2004, p. 11). The brief cited aforementioned cases where the Court upheld violations of the Establishment Clause with respect to schools. It reiterated President Eisenhower's words when he signed the Act of 1954. The brief pointed out the reference to God in the Pledge does not refer to the country's history but to the existence of God which is contrary to some religious beliefs. It concluded in stating,

> Thus the question is not "what *did* the Founding Fathers do" in a largely monotheistic society, but rather, "what *would* the Founding Fathers do" in the religiously diverse American society of today. The principles upon which they based the First Amendment do not allow for the inculcation of public school students with a teacher-led daily affirmation of the existence of a monotheistic God in an exercise of patriotic expression that excludes such a large number of American citizens for "We the People of the United States" on the basis of their religious belief or non-belief. (Brief

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> of *Amicus Curiae* Seattle Atheists, Secular Coalition for America, Atheist Community of Austin, and Institute for Humanist Studies, in Support of Respondent, 2004, p. 19)

Briefs for the Petitioners

The brief filed by EGUSD stated the facts before the Court. It pointed out after the Ninth Circuit decision in September of 2003, the California Superior Court awarded Sandra Banning and Newdow joint custody of their daughter, but Banning was still the final decision maker if the parents disagreed. The brief claimed Newdow lacked standing because he had not suffered "a distinct and palpable injury." It stated,

> It is axiomatic that state custody proceedings circumscribe the constitutional rights of parents. In the state court custody case, Respondent was given joint custody of his minor child; however, the state court expressly granted the final decision making authority over the educational and religious upbringing to the mother, Sandra Banning. In determining whether Respondent had standing to assert the claims in this case, the Ninth Circuit Court of Appeals incorrectly relied on case law in which the parents had full parental rights. (Petitioners' Brief on the Merits, Elk Grove Unified School District, Terence J. Cassidy, Counsel of Record, 2003, p. 8)

The brief informed the Court that Newdow had the burden to establish standing in showing he had suffered an injury, and the injury could not rest on a third party. "Respondent's rights flow from his status as a parent, or not at all. Thus in concluding the EGUSD Patriotic Observance policy is unconstitutional, the Ninth Circuit cannot confer standing up Respondent to assert the claims in this case" (Petitioners' Brief on the Merits, Elk Grove Unified School District, Terence J. Cassidy, Counsel of Record, 2003,

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p. 16). It argued that the Ninth Circuit ignored the fact that the mother had physical custody and the rights to direct the education of her child while she had physical custody during the school week.

The brief argued that the Pledge did not violate the Establishment Clause; therefore, the EGUSD Patriotic Observance Policy did not violate the Establishment Clause. It referenced Wallace by stating, “In evaluating the purpose of a statute, if the public entity enacting the legislation expresses a plausible secular purpose in either the text or legislative history, then courts should generally defer to the stated intent” (Petitioners' Brief on the Merits, Elk Grove Unified School District, Terence J. Cassidy, Counsel of Record, 2003, p. 26). The brief claimed the Ninth Circuit failed to acknowledge prior pronouncements of the Court which had found the Pledge to be consistent with the Establishment Clause. It criticized the Ninth Circuit for not analyzing the fact of whether or not the Pledge was a religious act and just assumed that it was. It pointed out that the Court had not considered the Pledge to be a religious act such as prayer.

The brief claimed the descriptive words in the Pledge are about the “historical underpinnings” of the country. It referred to the Legislative Reference Survey of the Library of Congress and its determination of the Pledge. It stated the Ninth Circuit analyzed the coercive effect just of the words “under God” instead of the whole Pledge which was contrary to previous cases in the Court where the entire context of references had been addressed. “Listening to the recitation of the Pledge simply does not coerce an objecting child to support or participate in religion” (Petitioners' Brief on the Merits, Elk Grove Unified School District, Terence J. Cassidy, Counsel of Record, 2003, p. 34).

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The brief cited previously stated Court cases which found the Pledge did not violate the Establishment Clause. It made particular reference to Marsh that the Pledge had become part of the nation's history for over fifty years just as legislative prayer had been for two hundred years. It reminded the Court the decision in Sherman also relied upon the country's history. The brief concluded its argument by pointing out EGUSD's policy satisfied the Endorsement and three-pronged Lemon test. It argued because the Pledge is not a religious act, there was no entanglement with the government and religion.

The brief filed by the Solicitor General, Theodore B. Olson, provided further argument as to Newdow's standing. The brief stated the facts of the case. With regard to Newdow's standing, the brief pointed out the Ninth Circuit in Newdow II found that standing did exist because non-custodial parents have the right to expose their children to their own beliefs and values, and the Pledge had a coercive effect. The brief argued Newdow lacked standing because he had no legally protecting interest in preventing his child from being exposed to the Pledge. It reminded the Court that a minimum of standing requires the plaintiff had suffered an "injury in fact" from a legally protected interest, identified a causal connection between the injury and the conduct that is traceable to the plaintiff and not a third party, and showed that the injury will be redressed by a favorable decision. The plaintiff bears the burden of standing. Newdow did not challenge his own activities but that of his child. The brief argued Newdow did not have standing because the school district policy did not encroach upon any legal protected interest that he had with regard to the education of his child. Under California law Sandra Banning had the legal authority to make the final decisions regarding the

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child. Because the mother had control over the child's education, the brief argued Newdow could not demonstrate causation or redress ability as called for in Article III.

It stated Newdow had to show that EGUSD's Pledge policy caused the harm instead of the action of the mother's raising of the child.

> If Newdow believes the mother's educational decisions are causing harm to the child, the proper remedy is for him to seek a modification of the custody agreement form the family court. Newdow cannot use federal litigation to circumvent that state-law process or to modify indirectly a state-law custody judgment. (Brief for the United States as Respondent Supporting Petitioners, Theodore B. Olson, Solicitor General, Counsel of Record, 2003, p. 18)

The brief claimed the federal court could not "enter relief" without interfering in the decision making of the state court.

The brief argued the Pledge acknowledges the historical role of religion in the United States. It referred to the historical references of the Founding Fathers acknowledging a Creator. It included a lengthy appendix which contained the Constitutions of all fifty states which include references to God. The brief cited previously discussed cases where the Court found the Pledge did not violate the Establishment Clause. It stated,

> To insist that government must studiously ignore that one significant aspect of the Nation's history and character solely because of its religious basis-while freely acknowledging the political, philosophical, and sociological influences on American history-would transform the Establishment Clause from a principle of neutrality into a mandate that religion be shunned. (Brief for the United States as Respondent

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Supporting Petitioners, Theodore B. Olson, Solicitor General, Counsel of Record, 2003, p. 31)

The brief argued EGUSD adopted the Pledge policy for patriotic not religious reasons. It claimed an "objective observer" would not interpret the Pledge as an endorsement of religion. The brief state the Pledge policy is not coercive because the recitation of the Pledge is not a religious exercise, and the government has not coerced a religious exercise.

Brief for the Respondent

The brief filed by Newdow explored the previous arguments that had been addressed in the history of the lower court decisions. Newdow claimed the inclusion of "under God" violates the Establishment Clause. He stated the original Pledge served a patriotic secular purpose, and, after 1954, the Pledge has served a religious purpose. He pointed out the Court has been particularly careful in protecting constitutional freedoms in the public schools. Newdow made the argument that the prayer in Engel was no different than the reference to God in the Pledge. He stated, "The student and government involvement in religion here is far greater than that in many of the practices already ruled unconstitutional" (Respondent's Brief on the Merits, Michael Newdow, in pro per, 2003, p. 6). Newdow claimed when Government adopted the current form of the Pledge, it answered the question that God did exist. This violated the neutrality of minority views being treated the same as majority views which had been deemed essential by the Court. In recounting the religious ceremony of monotheism when the current form of the Pledge was enacted Newdow stated,

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> This "text, legislative history, and implementation of the statute" demonstrates an unquestionable violation of the Endorsement test. "Under God" was intruded into the Pledge to affirmatively proclaim that Americans as a people, actively believe in God. Congress, therefore, not only made a law "respecting an establishment of religion," it made a law establishing religion – namely, Monotheism – in a country with millions of Atheistic citizens. (Respondent's Brief on the Merits, Michael Newdow, in pro per, 2003, p. 12)

Thus when Congress passed the Act of 1954, it took a step backward in the country's religious freedom.

Newdow made the point that voluntary recitation of the Pledge is coercive. He stated,

> [N]o one can seriously deny that small children led by their teachers every day in reciting that ours is "one Nation under God" are inculcated with the belief that God exists. Is this not precisely how churches indoctrinate the children of their congregations? (Respondent's Brief on the Merits, Michael Newdow, in pro per, 2003, p. 14)

Newdow argued the petitioner's citing of Marsh was different than the Pledge. He pointed out that the legislative history of prayer had occurred for two hundred years. The "sectarian religious dogma" in the Pledge was not inserted until sixty-two years after the Pledge's creation. Marsh also involved adults who could enter and leave when they wished. "Here, there are children in the public schools, 'left with no alternative but to submit.' Lee, 505 U.S. at 597'" (Respondent's Brief on the Merits, Michael Newdow, in pro per, 2003, p. 30).

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Newdow argued ceremonial deism is dependent on one's religious beliefs. He stated the Founding Fathers were Deists who believed God did not interfere with the affairs of man. He claimed if a religious belief has become "ceremonial" then it is essentially "an admission" of an establishment of religion. Newdow brought out the insertion of "under Jesus" instead of "under God" would not be any different.

> With a Supreme Court Chief Justice having publicly stated that the United States is "a Christian land governed by Christian principles," "under Jesus" can surely be "woven into the fabric of our society"...If America's Muslims and Jews demand an end to fifty years of "under Jesus," the objection that such a reversion would "confe[r] a favored status on [those sects] in our public life" would be just as logical. Plus, with purely Christian prayers delivered at presidential inaugurations, isn't it all just "ceremonial Christianity," anyway? (Respondent's Brief on the Merits, Michael Newdow, in pro per, 2003, p. 34)

Newdow argued the four times that the Pledge had been mentioned in dissenting opinions by the Court, they showed that the Court's Establishment Clause jurisprudence should invalidate the Act of 1954. "Thus, justices of this Court have acknowledged that the neutrality, endorsement, outsider and coercion tests all demand removal of 'under God' from the Pledge" (Respondent's Brief on the Merits, Michael Newdow, in pro per, 2003, p. 38).

Newdow argued the Ninth Circuit ruled correctly in that he had suffered an injury which could be redressed by a favorable decision with regard to his standing. He stated the Family Court allowed him to maintain an action against the government. He argued parents have standing to sue when they feel their children are being harmed unless there

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is a compelling State interest which overrides that interest. Newdow pointed out he has the right to compete with the mother's indoctrination of their child without Government interference no matter who has custody. He stated under the California Education Code, he has the right to participate in decisions relating to the education of his child or the total school program. Newdow stated he had volunteered in his daughter's classes since 1999 and has witnessed the indoctrination of the religious dogma with he himself also being led by her teachers in the Pledge. Newdow claimed he also had standing as a taxpayer to raise Establishment Clause claims against exercises of congressional power under the taxing and spending power of Article I, 8 of the Constitution. In his conclusion, Newdow stated, "Thus, rather than being 'one Nation indivisible,' America is now divided on the basis of religion by its very own 'symbol.' That this division is most prominent in the public schools is simply impermissible" (Respondent's Brief on the Merits, Michael Newdow, in pro per, 2003, p. 50).

Oral Argument

When the Court announced that it would grant *certiorari* in the Newdow case, this researcher petitioned the Court to hear the oral argument. The Marshall of the Court replied to state that a seat had been reserved for this researcher to be present. The oral argument was heard before the United States Supreme Court on March 24, 2004. Justice Scalia was not present for the oral argument. The original transcripts of the argument were recorded verbatim. In the transcripts the Justices who were asking the questions were not listed. The transcript only records their inquires as "Question". Because this researcher was present for the oral argument, he was able to record which Justice was asking the question. The two questions before the Court were: 1. Whether respondent has

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standing to challenge as unconstitutional a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance. 2. Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment. Terence J. Cassidy, Counsel for the Elk Grove Unified School District and Theodore B. Olson, Solicitor General, argued for the plaintiffs. Michael A. Newdow argued for the respondent.

Mr. Cassidy opened the argument by stating the Pledge policy did not violate the Establishment Clause because it was a policy concerning a patriotic exercise, and Newdow lacked standing because state law defined the rights of parents in custody disputes. Justice O'Connor pointed that the Court normally defers to the appellate courts and wondered why the argument should not move on to the merits. Mr. Cassidy argued the Ninth Circuit had made "an incorrect analysis" (Record p. 4). Justice Kennedy asked if there was a question of Article III standing or "[Would] it be open to us under our precedents to say that we think there's Article III standing, but this really involved rights of third parties, and as a prudential matter, we do not think it's appropriate to exercise jurisdiction" (Record p. 5). Justice Kennedy pointed out the Government's brief did not argue prudential standing, just Article III standing. Mr. Cassidy stated the plaintiffs believed the Court should defer to the mother's rights and interests with respect to the education of her child. Justice Kennedy presented Newdow's argument that Newdow had rights as a father, and the State was "tilting the balance unconstitutionally" (Record

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p. 6). Mr. Cassidy stated Newdow did not have a legally protected right and therefore did not have standing under Article III.

Justice Souter stated even though under the State the mother has the rights of the child, Newdow had an interest in making sure that his daughter was not subjected to what Newdow considered an unconstitutional religious influence. Justice Souter asked Mr. Cassidy for his answer in that particular claim for personal standing. Mr. Cassidy stated the school district can only function with one parental decision maker and suggested the Court take the same approach with regard to standing. Justice Souter stated he was asking the question not about next friend standing for the child but as a father. Justice Kennedy pointed out California said that Newdow has "the right to have an equal shot at trying to influence and raise" (Record p. 8) his child. Mr. Cassidy stated the court directs which parent gets the responsibility for making decisions. Justice Stevens argued that the judge did not tell Newdow to stop the litigation or that the litigation was not in the best interest of his child. Mr. Cassidy argued because Newdow bypassed the state court, that decision was never reached. Justice Stevens argued the mother never asked for relief, nor did she ask him to discontinue the lawsuit. Mr. Cassidy responded under the California education code, school districts only have to have one decision maker.

Mr. Cassidy then turned over the remainder of his time to the Solicitor General. Mr. Olson stated to the Court that Newdow had no right to bring the case in his daughter's name and no legally protected right to challenge his daughter's educational interests in Federal Court. Justice Kennedy stated the State was inconsistent in providing an unfair playing field. Mr. Olson argued Newdow was claiming a right to challenge the public schools in the education of his child, and the domestic court considered the interests of

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the child. Justice Kennedy then asked Mr. Olson if he thought there was prudential standing. Mr. Olson stated the plaintiffs were also arguing prudential standing. At which time Justice Kennedy asked Mr. Olson to state his best authority. Mr. Olson referred to two cases. The first was Rooker-Feldman which recognized the issue of standing would have "the effect of disturbing and upsetting the effect of the trial court" (Record p. 13). The second case was Arkenbrandt where the Court decided that Federal courts did not have jurisdiction with respect to domestic divorce, alimony, and custody.

Justice Souter asked the question about standing which clarified the final decision of the case.

> [I]n determining whether we should recognize his next friend standing, we should take into consideration the state custody arrangements and the state judgments about what is in the best interests of the child. When we go to the second question, should we recognize his individual standing, if we do recognize his individual standing, but we don't recognize his standing as next friend, we will undercut the interests which are being protected by refusing to recognize his standing as next friend. We've got to go, in effect, we've got to come to the same conclusion in each case or we will undercut our conclusion on – on next friend standing if it's adverse. (Record p. 14)

Mr. Olson concurred with Justice Souter's statement and stated that he thought that was consistent with what had occurred with the Court in regard to family court jurisdiction. Chief Justice Rehnquist stated the merits had nothing to do with the domestic issues. Mr. Olson disagreed and pointed out the mother expressed concern about the child being the center of the case. He further pointed to Newdow's briefs which were directed more to the rights of his daughter than his rights as an individual.

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Mr. Olson reiterated what had been presented in the briefs in that fourteen different Justices articulated there was a difference between a purely religious exercise and the ceremonial reference in public occasions with respect to the Pledge. Justice Ginsberg added the references made by Mr. Olson were done without the benefit of a brief or oral argument.

Justice Kennedy asked if the student had the right to opt out of saying the Pledge. Mr. Olson responded in the affirmative. Justice Stevens then asked, "Why is that if this is not a prayer or not an exercise?" (Record p. 18). Mr. Olson stated in Barnette the individual right of conscience had occurred before the Pledge had been amended. Justice Stevens asked if Mr. Olson thought the Pledge had the same meaning today as it did when it was amended in 1954. Mr. Olson responded that the amended Pledge is an acknowledgment of the religious beliefs of the Framers and that same significance of 1954 was still the same today. He also stated that the Court has said that the Pledge, "[W]ould cause a reasonable observer to understand that that is this is not a religious invocation" (Record p. 20).

Justice Ginsberg asked if Mr. Olson's argument was stronger now than it was fifty years ago. Mr. Olson agreed with support to his argument that the Congress in 2002 stated the meaning of the Pledge has historical context. He further argued the State of California requires patriotic exercises to be a responsibility of the school districts, and the Pledge has been put into the category of a patriotic exercise. Justice Ginsberg asked why people were not given a choice; that it does not have to be recited one way or the other. Mr. Olson responded that the Pledge did not have to be stated.

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Mr. Olson made the final point that Newdow had made the reference of "under Jesus" having the same effect as "under God". Mr. Olson stated the Framers repeatedly referred to God, Lord, or Creator. He referred to Jefferson's autobiography which stated that in the Virginia Bill the reference to Jesus Christ was not made because religious freedom was not intended to include a particular sect. Mr. Olson concluded his time in stating,

> The Establishment Clause does not prohibit civic and ceremonial acknowledgments of the indisputable historical fact of the religious heritage that caused the framers of our Constitution and the signers of the Declaration of Independence to say that they had the right to revolt and start a new country. (Record p. 23).

Michael A. Newdow presented his argument to the Court. His opening argument stated,

> Every school morning in the Elk Grove Unified School District's public schools, government agents, teachers, funded with tax dollars, have their students stand up, including my daughter, face the flag of the United States of America, place their hands over their hearts, and affirm that ours is a nation under some particular religious entity. (Record p. 24)

Justice Kennedy immediately went to the question of standing. He stated that Newdow was asking the Court to declare the Pledge unconstitutional and that his daughter was going to take the blame.

> And it seems to me that your insisting on standing here contradicts that common sense core of the standing rule, which is – and I'm just talking about her standing, I'm not talking about yours – that the common sense core of the standing rule is, when a

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citizen wants the courts to exercise this awful power, that they take the consequences, and you're putting that on her. (Record p. 25).

Newdow stated the Court should not look at the harms of people because of prejudices in our society. He also stated he did not think any "adverse consequences" would occur with respect to his daughter. Newdow further pointed out he was not bringing this suit on her behalf but his own. Justice Kennedy acknowledged, "That's – that's a different point altogether, but if she has no standing, then it seems to me the next question is whether or not the rights that you assert, and I understand what they are, do seem to undercut her position" (Record p. 26). Newdow stated the question before the Court was if he had a right to standing. He stated he had the right to know that when his daughter went to school, she was not going to be told every morning that her father was wrong in his religious beliefs. "That is an actual, concrete, discrete, particularized, individualized harm to me, which gives me standing" (Record p. 27).

Justice O'Connor started her questioning on the merits by stating Newdow's daughter did have the right not to participate. Newdow stated that was true, but under Lee she was coerced to participate. Justice O'Connor stated Lee dealt with prayer. Newdow responded he was not sure if the Pledge was a prayer, but President Bush stated when people state the Pledge, [T]hey are asked to participate in an important American tradition of humbly seeking the wisdom and blessing" (Record p. 27). Justice O'Connor replied a reasonable person could look at the Pledge as not being a prayer. Newdow responded President Bush said that it did constitute prayer. Justice O'Connor replied, "Well, but he – we certainly don't take him as the final authority on this" (Record p. 28).

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The inquiry into other references to God in our nation's heritage began with Justice Rehnquist asking Newdow about the argument of "under God" being a descriptor. Newdow responded one needed to look at all the words, and in doing so, God was a religious reference. Justice Rehnquist asked what would be the difference if school children were required to sing "God Bless America". Newdow responded by stating if a child were required to stand up, face the flag, put his/her hand over his/her heart, and say "God Bless America" it would clearly violate the Establishment Clause as well. Justice Ginsberg continued in asking if children stated God bless Mommy and God bless Daddy would they think they were saying a prayer. Newdow responded in the affirmative and added if Mommy and Daddy were under God, they would also be assuming that there was a God. Justice Ginsberg stated the children did not have to say "under God". Newdow responded,"[G]overnment is not allowed to take a position on that. Government is saying there's a God... The issue is whether or not government can put that idea in her mind and interfere with my right" (Record p. 30).

Justice Ginsberg questioned the custody of the child in that the mother had the final decision and did not agree with Newdow. Newdow pointed out the issue is that Government is weighing in on the issue. He stated the mother had no right to tell EGUSD how to run their exercises, and there was nothing in the custody order that affected what he was asking the Court.

> If, in fact, this Court grants the relief that I suggest and that we take out the words, under God, or at least tell the Elk Grove Unified School District they can no longer do that, then nothing in the custody order will be affected in any way. (Record p. 31)

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Justice O'Connor continued with the line of questioning in references to God in our daily lives. She asked Newdow if he found "God save this honorable Court" invalid. Newdow responded when that occurs, nobody is asked to stand up, place his/her hand over his/her heart and affirm the belief. Justice O'Connor asked about "In God We Trust" on currency. Newdow responded by stating if his daughter were asked to stand up every morning in a public school, and Justice O'Conner interrupted in stating it was all right for her to read the coins, but it is the problem of her being asked to state the Pledge which she does not have to say. Newdow brought up the point of coercion in Lee. Justice O'Connor countered by stating no child was required to say the Pledge. Newdow stated no child was required to be at the graduation in Lee, but it still resulted in a coercive effect. Justice O'Connor stated Lee involved prayer. Newdow then went to the original intent of why Congress inserted the words in the first place.

Justice Kennedy reiterated Newdow's daughter was not required to state the Pledge. Newdow continued with his argument of coercion in that his daughter was not required, but a six or seven-year-old girl was standing there. Justice Kennedy brought up the fact that Lee was prayer, and Barnette was not. Newdow explained the Establishment Clause does not require prayer with the example of putting the Ten Commandments on the wall as a violation. The issue of the Establishment Clause is if it is religious. He pointed to the plaintiff's brief which made eighteen references to religious education, religious training, and religious interest. "All of this has to do with religion, and to suggest that this is merely historical or patriotic seems to me to be somewhat disingenuous" (Record p.34).

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Justice Souter inquired about the Seeger case where the words of a supreme being were used to refer to religious beliefs and if Newdow thought that God in the Pledge was "so generic" that it could be inclusive. Newdow responded in the negative by pointing out Seeger dealt with private speech, and his right to say that in Seeger's view a supreme being was the same as God. Newdow argued the issue in the case before the Court was Government.

> [E]verybody on the way here is government. It's Congress that stuck the two words, under God, into the pledge, clearly for a religious purpose. It's the State of California that says, go ahead, use the Pledge of Allegiance, which is now religious. It is the city of Elk Grove that says, now we're going to demand. (Record p. 35)

Justice Souter questioned one getting too broad in his interpretation of religion, and this broad view in a civic context did not violate the Establishment Clause because the broad perspective was meant to include everybody. The few who chose not to say the Pledge could not. Newdow responded in stating he could include under God to mean no God. He does not believe in the existence of God, and for Government to define a broad term of God that it "wants to impose" on him is something that Government may not do.

Justice Ginsberg reiterated that the child does not have to say the words "under God" or the child cannot say the Pledge at all. Newdow stated he felt that was a "huge imposition" to put on a small child who may be the only atheist in a classroom of thirty Christians who are asked to stand up, face the flag, and state the Pledge. Justice Ginsberg pointed out that Newdow was arguing for the child. Newdow refuted by stating that Government is stating there is a God, and the father is not. That is an injury to Newdow. Chief Justice Rehnquist stated there was no indication that the child was an atheist.

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Newdow replied his “[R]ight to inculcate [his] religious beliefs includes the right to know that government will not in the public schools influence her one way in – or the other” (Record p.38).

Justice Souter stated he thought the republic as described as being under God does have some affirmation. He asked what Newdow thought of the affirmation in actual practice, “[I]n the midst of this civic exercise as a religious affirmation is – is so tepid, so diluted then so far, let’s say, from a compulsory prayer that in fact it – it should be, in effect, beneath the constitutional radar” (Record p. 39). Newdow stated the whole concept goes against the ideals of the Establishment Clause. Justice Souter stated the way society lives and thinks in civic life and schools, the religious affirmation argument is lost because the religious content, distinct from the civic content, is close to disappearing. Newdow stated every time he thinks of pledging allegiance, it is like he is getting slapped in the face. “[I] want my religious belief system to be given the same weight as everybody else’s. And the Government comes in here and says, no, Newdow, your religious belief system is wrong and the mother’s is right” (Record p. 42).

Justice Souter understood Newdow had the right to be offended, and he respected that fact. Justice Souter still questioned whether Government had the power to “work” that offense. Justice Souter claimed if one had a broad understanding of God, then the Pledge was not a prayer in a ceremonial context. Even though people would still be offended, they could still not say the words “under God”. Justice Souter stated, “So it’s not perfect, it’s not perfect, but it serves a purpose of unification at the price of offending a small number of people like you. So tell me from ground one why – why the country cannot do that?” (Record p.43) Newdow answered in stating that the Pledge had served the country

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for sixty-two years in perfect unification before the Act of 1954. It had unified the country through the depression and two world wars before it started to separate people.

Justice Stevens asked Newdow the same question he had asked Mr. Olson. His question to Newdow was if Newdow thought the Pledge had the same meaning today as it did in 1954. Newdow stated ninety-nine senators stopped what they were doing to say they wanted God in the Pledge. He also felt it was significant to the American public. Justice Stevens followed up in asking Newdow if that was why he did not take the same position with "In God We Trust" on the dollar bill. Newdow stated that situation is completely different because with the Pledge we are asking children to stand up, be coerced in the setting, hold their hands over their hearts, and pledge their own affirmation to some religious entity. He pointed out that Government is not supposed to be anywhere close to this issue, and the Act of 1954 was clearly created for religious purposes including the playing of "Onward Christian Soldiers" as the flag was raised. It was intended to get religion into the government.

Newdow elaborated on his argument in stating, "[T]he Free Exercise Clause has never meant that a majority may use the machinery of the state to practice its beliefs, and that's precisely what we have in this situation" (Record p.48). Newdow reminded the Court that all of the Justices have demanded neutrality, "[H]ere we have the quintessential religious question, does there exist a God? And government has come in, yes, there exists a God. That is not neutrality by any means" (Record p.49).

Justice Kennedy stated the merit of the argument is the difference between a prayer and the Pledge, and he asked Newdow if his point had been that no difference exists. Newdow replied there was a difference when the Pledge did not contain religious dogma.

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When asked to clarify the difference in Lee, Newdow stated the Pledge was a religious exercise as was the intent of Congress. Justice Kennedy asked if both prayer and the Pledge were religious exercises. Newdow clarified in stating that prayer was a subset of a religious exercise. Justice Kennedy stated what if the case turned on what he thought was a religious exercise which did exist in Lee. Newdow stated he thought the Pledge clearly was a religious exercise, and he could not see, "[A]nything that's not religious under God" (Record p.50). He reemphasized the plaintiff making reference to the fact that the issue of the mother was religious upbringing. Justice Kennedy then asked to make the assumption Lee was 100 percent prayer. He asked in Newdow's view if what he was referring to in the Pledge was five percent prayer. Newdow stated that was a confusing issue; however, in Lee the graduation ceremony was about an hour and a half, and the prayer was about two minutes. So, if one were to look at the ratio, the words "under God" in the Pledge are greater than the prayer in Lee. Newdow further argued that the staircase in Allegheny could be a single transportation mode just like the Pledge is a patriotic mode. "But the question is, why did you stick the crèche in the middle of this grand staircase? The question is here, why did you stick these two purely religious words, under God, in the middle of the Pledge of Allegiance?" (Record p. 51).

Newdow concluded his argument by asking the Court to imagine one of the Justices was a child in a class of theists, and the Justice had a different idea that might be considered, but everyone else in the class was imposing his/her theist view. Newdow stated his scenario failed every test on which the Court had ruled. He asked the Court to uphold this principle and, "[H]ave every American want to stand up, face the flag, place

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their hand over their heart and pledge to one nation, indivisible, not divided by religion, with liberty and justice for all" (Record p.52).

The Court gave Mr. Cassidy five minutes for rebuttal. Mr. Cassidy stated in Lynch, the Court reached the conclusion that an acknowledgment of the role of religion in our society is not an endorsement nor exercise of religion. He reminded the Court that Newdow's daughter is not required to stand up and state the Pledge. Mr. Cassidy claimed the mother exercised her right under the state custody order, and Newdow did not have a causal relationship in not having a legally protected right to assert what he was claiming in his suit.

Mr. Cassidy informed the Court, EGUSD had policies in place that were in accommodation with Barnette, and students could opt out of the Pledge in several ways. He reminded the Court the school district's policy had a secular purpose, and there was nothing in the record to show any religious purpose in the adoption of the Pledge policy. He stated the Pledge was part of the educational curriculum in teaching students about citizenship and national unity.

Justice Stevens asked Mr. Cassidy to comment on the argument Douglas Laycock had presented in his brief. The argument being, "[I]f the religious portion of the Pledge is not intended as a serious affirmation of faith, then every day government asks millions of school children to take the name of the Lord in vain" (Record p.54). Mr. Cassidy disagreed with the argument because the term, one nation under God, reflected the political philosophy of the country, one of a limited government. Mr. Cassidy claimed the political philosophy was more "enhanced" by the Act of 1954.

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Mr. Cassidy concluded by pointing out the school district policy provided that children look at all of the aspects of our country's history. The students are being taught about nationalism and civic unity at an early age. They are learning more than the Pledge. Mr. Cassidy was cut off and thanked by Chief Justice Rehnquist concluding the oral arguments.

Summary

In this chapter the researcher presented a brief history of the political aspects pertaining to the Establishment Clause from its beginnings to its application in Cantwell. Historical decisions from the U. S. Supreme Court which had an effect on the arguments and decisions which were presented in the progression of Newdow were addressed. The history of Newdow's complaint was traced and analyzed from the California Eastern District Federal Court through the oral argument heard before the U. S. Supreme Court. Starting with Cantwell in 1940, Supreme Court decisions have affected not only the Pledge of Allegiance, but also how one views and interprets his/her rights with regard to the Establishment Clause and its connection to the Equal Protection Clause of the Fourteenth Amendment. Both parties in the Newdow case extracted different interpretations and *dicta* from Court precedents to support their arguments.

In the1992 Sherman decision, the Seventh Circuit ruled that the Pledge was not a violation of the Establishment Clause. In the 2003 Newdow decision, the Ninth Circuit ruled that the Pledge was a violation of the Establishment Clause. A conflict had occurred between two different circuit courts of appeals.

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The U.S. Supreme Court granted *certiorari* to the Newdow case. The issue of the case was whether a public policy that required public school teachers to lead their classes in saying the Pledge of Allegiance which contained the words "under God" violated the Establishment Clause. The other question pertaining to Newdow's standing ended up playing a major part in the ultimate decision of the Court. The plaintiffs argued the Pledge was not a religious exercise but a reference to the country's historical heritage. The respondent argued the Pledge was a religious exercise and violated the Establishment Clause.

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CHAPTER 3

METHODOLOGY

A Qualitative Legal Research Design

The purpose of this study was to identify, assess, and analyze the impact of the U.S. Supreme Court's decision in Elk Grove Unified School District v. Newdow, 542 U.S. ___ (2004) as to whether the words "under God" in the Pledge of Allegiance constituted a violation of the Establishment Clause as written in the First Amendment. The intent of this study was to examine the religious or non-religious implications in reciting the Pledge of Allegiance. This study was further intended to provide educators and administrators with a clearer understanding of religious references, verbal or physical, as they pertain to a government sponsored public school setting.

To implement a qualitative research design, the researcher needed to siphon the specific precedents, facts, and points of law to reach a conclusion of the information that had been gathered. The facts of the conclusion dictated what information issues needed to be addressed (Wren & Wren, 1986). In this study, the researcher used the sources from Court decisions, oral argument, congressional records, submitted briefs, periodicals, and books. The Court decisions were analyzed in chronological order to allow the researcher and reader to see the progression of jurisprudence as it pertained to the Establishment Clause. The arguments involved in the Newdow decision were also explored in chronological order, again, to allow the researcher and reader a

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comprehensive view of the litigation and its variations as the case progressed through the court system. Thus, the researcher gathered the facts, analyzed the facts, identified the legal issues raised by the facts, and arranged the legal issues in a logical order (Wren & Wren, 1986).

The gathering of the facts required the researcher to explore different sources of information. These sources were tangible pieces of evidence that were pertinent such as written laws, documents, or a record of conversation that were central to the issue. The wealth of factual information in books, periodicals, and reports that have been written on legal issues allowed the researcher a comprehensive perspective in what facts were aligned with each side of the issue (Wren & Wren, 1986).

After the facts had been gathered, the researcher analyzed the information to determine what issues needed to be explored. The factual analysis led the researcher to the basis of the case. The researcher identified which facts were pertinent to the defendant and which facts were pertinent to the plaintiff. The researcher organized the facts to derive the legal issues involved for both sides of a case.

In identifying the legal issues involved in a case, the researcher asked what areas of the law came into question as a result of an act or claim. Once the legal issues had surfaced, the researcher needed to gather more information about particular issues that had not surfaced previously. The researcher also had to reassess the facts that he thought were pertinent in the beginning but were not as important as the research progressed.

Once the researcher finished the evaluation of the facts and identification of the legal issues, he put the issues into a logical order. A logical order, "[W]ill increase the efficiency and effectiveness of [the] research" (Wren and Wren, p. 37, 1986). In a broad

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legal issue such as the one presented in this paper, the researcher had issues that overlapped. In this case, the researcher sought what issues could be categorized into sub-groups within the broad question at hand.

Delving into the research of a case, the researcher had to identify the sources of the legal issue. The researcher had to "distinguish primary sources (also referred to as authorities) from secondary sources or authorities" (Wren and Wren, p. 41, 1986). The primary sources were separated into what Wren and Wren classified as mandatory authorities and persuasive authorities. The distinction between the two authorities was determined by which court had made a ruling and the jurisdiction of that particular court. In an instance where there might be concurring and dissenting opinions, those opinions were considered persuasive to future legal issues, but they were not mandatory authorities (Wren & Wren, 1986).

Wren & Wren suggested three approaches to finding the law; descriptive word or fact, know authority, or known fact (Wren & Wren, p. 45, 1986). The researcher used the "known topic" approach in the writing of this dissertation. The researcher explored the "known authority", the Establishment Clause, by first looking at how it had been dealt with as it pertained to the issues raised in the case. The researcher looked at the "known case" and found similar cases on the same topic.

After the researcher had identified his case, an evaluation of the case was necessary. The evaluation was a two-step process consisting of an internal evaluation and an external evaluation. The internal evaluation consisted of ascertaining which facts were similar to the research problem, and what legal impact the facts would have with regard to the research problem.

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The need for an internal evaluation of judicial decisions is tied to the doctrine of *state decisis*. This court-created doctrine says, essentially, that when a court has applied a rule of law to a set of facts, that legal rule will apply when ever the same set of facts is again presented to the court. (Wren & Wren, p. 80, 1986)

Thus, the researcher had examined cases of a similar nature in their decisions with regard to the Establishment Clause as they pertained to Newdow. The researcher did an internal evaluation of the Act of 1954. "The issue here [was] whether the legislature nonetheless had a conscious intent to have the statute apply to those facts (Wren & Wren, p. 84, 1986). The researcher had to examine the history of the Act of 1954 to evaluate the legislative intent.

The external evaluation consisted of determining the validity of the decision in the case. The external evaluation examined how subsequent court cases had applied to the researched case. It also explored the broader implications of the decision that was reached in the case.

The research accumulated for this study was the analysis of all of the Newdow motions, petitions, briefs, lower court decisions, *amicus curie* briefs, oral argument, and relevant cases to the facts surrounding the litigation. The materials were arranged in a brief format to sort out the points that were relevant to the issues. The brief format was used to assist the reader in understanding the arguments that were presented, and when the arguments were presented.

The researcher attended the oral argument that was held before the U. S. Supreme Court. This experience allowed the researcher to draw from the transcripts a personal perception of the Justices in the questioning of the litigants. The questions raised by the

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individual Justices provided insight for the researcher to the relevance of the legal issues that had been explored in the oral argument.

The Court decided not to rule on the original complaint presented. The constitutionality of the Act of 1954 was not directly addressed. The dissenting opinions from Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas intended to clarify previous precedents that had been given by the Court. The claim that the words "under God" in the Pledge are a violation of the Establishment Clause has yet to be decided by the United States Supreme Court.

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CHAPTER 4

FINDINGS OF THE STUDY

This chapter answers the research questions posed in Chapter 1. The U. S. Supreme Court's decision in Elk Grove Unified School District v Newdow is presented as well as Establishment Clause issues discussed in concurring opinions. The chapter also addresses the implications of the concurring opinions as they relate to public education.

Research Questions and Analysis

1. How did the U. S. Supreme Court resolve the conflict between the lower courts?

The oral arguments were heard before the Court on March 24, 2004. The questions before the Court were: 1. Whether respondent has standing to challenge as unconstitutional a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance. 2. Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment. In Sherman v. Community Consolidated School District 21, 980 F. 2d 437 (1992), the Seventh Circuit Court of Appeals found that the Pledge policy was a patriotic exercise and did not violate the Establishment Clause. In Newdow v. U.S. Congress et al., 328 F. 3d 466 (2003), the Ninth Circuit found that the Pledge policy examined under the three prong test in Lemon,

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Ninth Circuit found that the Pledge policy examined under the three prong test in Lemon, the Endorsement test in Lynch, and the Coercion test in Lee did violate the Establishment Clause.

The decision of the Court was handed down on June 14, 2004. In a unanimous decision on the first question presented before the Court, the Court found that Newdow did not have standing and reversed the opinion of the Ninth Circuit. Justice Stevens wrote the majority opinion for the Court joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Chief Justice Rehnquist wrote a concurring opinion joined by Justices O'Connor and Thomas as to part one. Justices O'Connor and Thomas each filed separate concurring opinions. Justice Scalia took no part in the decision or consideration of the case.

Justice Stevens opened his opinion with the history of the Pledge up to its current practice (p. 2305). The second section of his opinion (p.2306) dealt with the process of Newdow as it progressed through the lower courts. He pointed out that the Ninth Circuit found that Newdow had standing in Newdow I. Justice Stevens explained that after Newdow I, Sandra Banning filed her motion for leave to intervene and to dismiss the complaint based on the fact that she had sole legal custody of the student. The Superior Court of California enjoined Newdow from naming his daughter in his action. The Ninth Circuit in Newdow II found that Newdow still had the right to seek redress for his parental injury. Justice Stevens pointed out that in the denial of an *en banc* review in Newdow III, the Ninth Circuit omitted the "initial opinion's discussion" of Newdow's standing to challenge the Act of 1954. The Court then granted *certiorari* for the school district's petition.

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The third section of Justice Stevens's opinion for the majority (p. 2308) dealt with the issue of standing. Justice Stevens stated that the Court's jurisprudence regarding standing contained two strands, constitutional and prudential. The first strand was Article III constitutional standing in which the plaintiff must show that the complaint has caused him/her an "injury in fact" which a favorable judgment will redress. The second strand of prudential limits examined the limits of unelected, unrepresentative judiciary powers. In addressing the prudential strand, Justice Stevens stated, "One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations" (Newdow, 2004, p. 2309). Justice Stevens pointed out that the Court had always considered the laws of domestic family relations as those which belonged to the individual states. Only on rare occasions where the Court had to answer a federal question in domestic relations would the Court accept a family case; otherwise, domestic relational issues were left to the state courts.

Justice Stevens pointed out that in August of 2002 when Banning filed her motion for leave to intervene or dismiss after the Ninth Circuit's initial decision, the California Superior Court had already given her sole legal custody in February of 2002. That order authorized Banning to "exercise legal control" if the two parents could not reach a mutual agreement. The California Superior Court order was in effect at the time that the Ninth Circuit ruled on Newdow's standing. In September of 2003, the California Superior Court ruled that both Banning and Newdow had joint legal custody, but Banning still had the right to make final decisions concerning the child if the two did not agree. The majority for the Court found that Newdow's rights "could not be viewed in isolation." Justice Stevens wrote that the rights of the mother and those of the child in particular

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were also of consideration. The child had been placed in the middle of a custody debate, "[T]he propriety of a national ritual, and the meaning of our constitution" (Newdow, 2004, p. 2310).

Justice Stevens stated that in questions of state law, the Court refers to the "interpretation" of the Court of Appeals in which the State is located. With Newdow, the Ninth Circuit had utilized two state appellate cases which had found that even though the custodial parent had the right to make the final choice, it did not keep the non-custodial parent from discussing or involving the child in his/her religious beliefs so long as there is no harm to the child. The Court found that neither the actions of Banning nor those of EGUSD had obstructed Newdow from instructing his daughter in his religious views. It found that the legal precedent of the cases used by the Ninth Circuit did not support the magnitude of Newdow's sought relief. Justice Stevens wrote,

> He wishes to forestall his daughter's exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and Banning disagree. The California cases simply do not stand for the proposition that Newdow has a right to dictate to others what they may and may not say to his child respecting religion. (Newdow, 2004, p.2311)

The Court found that the cases used by the Ninth Circuit did not address the restraint of a third party outside of the parent-child relationship. As a result, the Court found the California Court's ruling deprived Newdow of his right to status as next friend to his daughter.

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The Court found that is was "improper" for federal courts to "entertain" a claim involving domestic disputed rights, "[W]hen prosecution of the lawsuit may have and adverse effect on the person who is the source of the plaintiff's standing" (Newdow, 2004, p. 2312). In addressing the issue of prudential standing, Justice Stevens stated, "When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law" (Newdow, 2004, p. 2312). The Court found that because Newdow did not have standing to sue as next friend under California, he did not have prudential standing to bring his suit to federal court.

The Court resolved the conflict between the Seventh and Ninth Circuit Appellate Courts by vacating the Ninth Circuit's ruling based on the question of Newdow's standing. The majority opinion of the Court did not address the question of the Pledge policy being a violation of the Establishment Clause. In vacating the ruling of the Ninth Circuit in Newdow, the Court established the viability of the precedent set in the Seventh Circuit decision of Sherman which found that the Pledge policy was constitutional. The merits of the Pledge policy as they pertained to the Establishment Clause were explored in the concurring opinions of Chief Justice Rehnquist and Justices O'Connor and Thomas.

In writing the majority opinion, Justice Stevens and the majority members of the Court chose to apply the philosophy of examination and restraint as prescribed by Cardozo. It chose not to entertain Newdow's constitutional claim. In its methods of philosophy in the judicial process, the Court chose to exert along the line of logical progression. The Court used restraint in not deciding in the instant and allowing time to

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carve out a path before reaching its decision with regard to the constitutional issue. The Court balanced the social interest served by symmetry against the social interest served by equity and fairness in not ruling on the merits. The Court balanced its roll in the social democratic process against the individual equity issues in Newdow's claim that had been precedented in previous Establishment Clause cases.

By vacating the Ninth Circuit's decision with the use of the prudential standing theory, the Court validated its logical judiciary role in deferring to the states' jurisdictional rights within the governmental process. The Establishment Clause and its application is a broad field in which rules may be settled one way or another. Following the line of the customs of the community, the Court applied the method of tradition in letting the Pledge policy stand and not ruling on its constitutional merits. The Court let custom assert itself in guiding which path to choose in reaching its decision (Cardozo, 1991).

In ruling on the prudential standing theory, the Court utilized the method of sociology. The Court provided a continuance in the guiding and directing of choice. In this function, the Court utilized insight in the adaptation to changing social needs. By using restraint, the Court allowed the law to continue to remake itself, which will in turn allow the emergence of social needs and values. The Justices used discretion that was informed by tradition, disciplined by the system, and subordinated by the necessity of social order (Cardozo, 1991).

The majority of the Court chose a traditional role within the checks and balances of our governmental system. The Court did not act as a legislative body. It did not rule on what might have been a change in the perceived will of the majority of the country. "A

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choice of competing values is reflected in legislative and executive action, and it is this choice that the Court must consider in light of its own value judgment" (Bickel, 1998. p. 49). By ruling on the prudential standing theory, the Court was able to uphold its neutral role as the judiciary branch. "[T]he values the Court vindicates must have a content greater than any single concern of the moment" (Bickel, 1998, p. 50). Accordingly, the majority members of the Court did not have a majority to vindicate Newdow's claim in that eight Justices wrote the decision and five of the eight Justices did not write anything in opposition of Newdow's claim.

2. What were the major arguments that influenced the United States Supreme Court's decision?

At the oral argument both Terrance Cassidy representing EGUSD and Theodore Olson, Solicitor General, argued for dismissal of Newdow's claim based on the fact that Newdow lacked standing. Terrance Cassidy had cited both the Rooker-Feldman doctrine[10] and Ankenbrandt v. Richards, 504 U.S. 689 (1992)[11] in his brief. Theodore Olson had referred to the Rooker-Feldman doctrine in his brief. Even though Justice O'Connor stated that the Court usually defers standing issues to the appellate court, Mr.

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[10] The Rooker-Feldman doctrine is a combination of two cases Rooker v. Fidelity Trust Co. 263 U.S. 413 (1923) and D.C. Court of Appeals v. Feldman 460 U.S. 462 (1983). The doctrine only allows the U.S. Supreme Court to hear challenges for state-court judgments. The doctrine prohibits lower federal courts to review state-court decisions. The plaintiffs cited the Rooker-Feldman doctrine to point out that the Ninth Circuit could not override the state-court's custody order giving Banning the legal right to make educational decisions regarding her child.

[11] Ankenbrandt v. Richards, 504 U.S. 689 (1992) dealt with a mother who brought suit on behalf of her daughters to seek damages for alleged torts against their father and his female companion. The Fifth Circuit affirmed the district court's decision to dismiss the case because it involved "domestic relations". The Court reversed the Fifth Circuit's decision because the suit did not request the district court to issue a divorce, alimony, or child custody decree.

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Cassidy reminded the Court that there was a custody dispute when the case was before the Ninth Circuit. Mr. Cassidy argued that the Court had an obligation to "reassess" the rights granted to Newdow if the Ninth Circuit had ruled in error.

As stated earlier, the question of standing argued by the plaintiffs before the Court was two fold. The plaintiffs argued that Newdow did not have Article III standing because he did not have a legally protected interest to bring his claim. Justice Souter posed the argument that Newdow may have an interest in seeing that his child is not subjected to what he considered unconstitutional religious influence. Mr. Cassidy responded that the school district would have to defer to state law and rely on the sole decision maker that being Banning, and since the state law recognized Banning as the sole decision maker with regard to the daughter's education, Newdow did not have a legally protected interest in bringing his suit. Justice Stevens pointed out that the state judge did not direct Newdow to stop his litigation, nor did Banning pursue a halt of the litigation in state court. Mr. Cassidy argued that Newdow bypassed the state court. Mr. Olson reiterated the fact that under the state court jurisdiction, the mother had the right to make the decisions concerning the child's education, and that even though Newdow may have an individual right to influence his daughter, he did not have the legally protected right to challenge the school district.

The prudential standing theory was not at the forefront of the plaintiffs' argument. In addressing Mr. Cassidy's opening argument, Justice Kennedy introduced the question of prudential standing,

> Is this just a question of Article III standing or would it be open to us under our precedents to say that we think there's Article III standing, but this really involves

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> rights of third parties, and as a prudential matter, we do not think it's appropriate to exercise jurisdiction. (Record, p. 5)

Justice Kennedy pointed out that both of the plaintiffs' briefs addressed Article III standing but did not argue prudential standing. Justice Kennedy pursued the prudential standing theory in asking Mr. Cassidy what precedent he would cite other than the Rooker-Feldman doctrine. Mr. Cassidy admitted that he did not know if the case fit in any exact issue of other prudential cases, but that the prudential standing theory did merit consideration. Mr. Cassidy stated that the Court should not interfere with the mother's rights and interests in raising her child. Justice Kennedy raised the theory of prudential standing when questioning Mr. Olson. Justice Kennedy asked Mr. Olson to state his best authority. Mr. Olson replied to Justice Kennedy by citing the Rooker-Feldman precedent that if the Court recognized Newdow's standing it would disturb the domestic court's decision concerning the interests of the child. Mr. Olson further cited Arkenbrandt where the Court found that federal courts did not have jurisdiction with respect to domestic relations which were pertinent to Newdow in the matters involving his child.

Justice Souter summarized Mr. Olson's argument for Newdow's lack of standing. Justice Souter stated that the Court had to determine the state's custody arrangements and interests for the child, before it could determine Newdow's standing, thus affecting Newdow's right to carry the litigation.

When Newdow presented his oral argument, the first question, which was asked by Justice Kennedy, concerned the prudential standing theory. Justice Kennedy pointed out that Newdow was putting the constitutional issue upon his daughter which Justice Kennedy felt was a contradiction of the standing rule. Justice Kennedy also explained

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that the daughter would take the public scrutiny and blame, "[A]nd we take the case, I think, on the assumption that even at her tender years she probably doesn't agree with that and that her mother certainly doesn't" (Record, p. 25). Justice Kennedy also stated that if Newdow had individual rights than those rights undercut his daughter's position. Newdow claimed he had the right to know that his daughter would not go to public school every morning and be told that her father was wrong in his beliefs.

In examining the oral argument, the Court pursed the theory of prudential standing with closer attention than that which had been supplied in the submitted briefs. As discussed in Chapter 2, some of the briefs touched on Article III standing, but did not make the prudential standing theory that was brought out in the plaintiff's brief in reference to Rooker-Feldman or Ankenbrandt. Through the exploration of the prudential standing theory, the Court provided a clearer picture of the prudential standing rule that was not fully accepted by all of the Justices as discussed in the concurring opinions. As brought out by both Justice Souter and Justice Kennedy, the Court had to determine Newdow's prudential standing in order to pursue his Article III standing to rule on the constitutionality of his Establishment Clause claim. The Court found that the prudential standing of Newdow created an obstacle that did not allow it to further pursue the issue of "under God" as an Establishment Clause violation.

3. What was the jurisprudence of the concurring Justices?

The concurring opinions of Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas did not agree with the majority opinion in regard to the prudential standing issue. The three concurring Justices disputed the Court's ruling of standing. Justice O'Connor and Justice Thomas in their separate concurring opinions each wrote a brief statement

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which supported the arguments presented by Chief Justice Rehnquist in his discussion of the Court's ruling on the prudential standing issue. Justice O'Connor stated that she would follow the Court's policy in deferring to the Federal Court of Appeals in matters that involved the interpretation of state law. Justice Thomas simply stated that he agreed with Chief Justice Rehnquist in that Newdow had standing. As a result of their disagreement with regard to the standing ruling of the Court, the three Justices in their concurring opinions chose to discuss the constitutional merits of the second question pertaining to the Establishment Clause that had been presented before the Court.

Chief Justice Rehnquist presented the opinion with regard to standing for the three Justices. In his concurring opinion, Chief Justice Rehnquist stated, "The Court today erects a novel prudential standing principle in order to avoid reaching the merits of a constitutional claim" (Newdow, 2004, p. 2312). The Chief Justice stated that the Court had created new prudential standing jurisprudence in the writing of its new principle,

> [I]t is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. (Newdow, 2004, p. 2313)

The Chief Justice felt that the domestic relations exception used by the Court did not constitute a prudential standing limitation of federal jurisdiction. The Chief Justice wrote,

> This case does not involve diversity jurisdiction, and respondent does not ask this Court to issue a divorce, alimony, or child custody decree. Instead it involves a substantial federal question about the constitutionality of the School District's

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conducting the pledge ceremony, which is the source of our jurisdiction. Therefore, the domestic relations exception to diversity jurisdiction forms no basis for denying standing to respondent. (Newdow, 2004, p. 2314)

The Chief Justice pointed out that Newdow shared joint custody of his daughter with Banning, Newdow retained the right to expose his daughter to religious views, and the domestic issue had nothing to do with Newdow's constitutional claim.

Chief Justice Rehnquist argued that instead of the Court's established practice of deferring state law to the regional appellate courts, the Court chose to criticize the Ninth Circuit's interpretation of state law. The Ninth Circuit had already examined the question of Newdow's standing in Newdow I and again after Banning had submitted her motion to dismiss. In all instances the appellate court found that Newdow had standing and retained rights under California law. The Chief Justice wrote, "In contrast to the Court, I would defer to the Court of Appeals' interpretation of California law because it is our settled policy to do so" (Newdow, 2004, p. 2315). Chief Justice Rehnquist stated that the Court relied on Banning's view of the merits of the case, but under the Ninth Circuit's construction of California law, Banning's "veto power" did not override Newdow's right to make his claim. The Chief Justice pointed out that it was not the daughter that provided Newdow's standing but rather the father-daughter relationship which provided standing and was pursuant to Newdow's interests. The Chief Justice referred to the Court's narrow ruling of the prudential standing, "[L]ike the proverbial excursion ticket – good for this day only – our doctrine of prudential standing should be governed by general principles, rather than ad hoc improvisations" (Newdow, 2004, p. 2316).

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After addressing the standing issue, the three concurring opinions discussed the merits of whether or not the school district Pledge policy was a violation of the Establishment Clause. Each Justice presented a different aspect of his/her reasons in finding the Pledge policy constitutional. Chief Justice Rehnquist examined the historical and legislative aspects with reference to the use of the words, "under God". The Chief Justice observed that "under God" has a variety of meanings to the millions of people who recite it. He stated, "How much consideration anyone gives to the phrase probably varies, since the Pledge itself is a patriotic observance focused primarily on the flag and the Nation, and only secondarily on the description of the Nation" (Newdow, 2004, p. 2317). The Chief Justice took the position that the phrase was an historical summation of the Nation's leaders that has manifested itself into many of the country's public observances.

In supporting his historical argument, the Chief Justice discussed specific Presidential references that were relevant. The Chief Justice started with a description of George Washington's first inauguration. He quoted from a written account which described Washington placing his hand on the Bible as he stated the oath ending with "I solemnly swear...So help me God".[12] A further reference to the first president was given in Washington referring to "Almighty God" in his first Thanksgiving proclamation. The Chief Justice quoted the Gettysburg Address of President Lincoln which used the words "under God", and Lincoln's second inaugural address which had references to God. Chief Justice Rehnquist referred to Woodrow Wilson's request for a declaration of war before Congress, in which, President Wilson stated that God would help our country.

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[12] The Chief Justice used his quote from M. Riccards, A Republic, If You Can Keep It: The Foundation of the American Presidency, 1700-1800, (1987)

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President Franklin Delano Roosevelt asked for God's blessing and protection in his first inaugural address. President Eisenhower also asked for God's blessing when the allied forces landed on D-Day.[13]

The second portion of Chief Justice Rehnquist's argument used instances where God is mentioned in traditions and currency. The motto "In God We Trust" as placed on the two-cent coin was enacted by congress in 1864. It appeared on more coins until 1938, when all coins had it engraved. In 1956 congress enacted that "In God We Trust" become the National motto. By 1960 the motto was inscribed on all federal currency. The U.S. Supreme Court opens it sessions with "God save this honorable Court". The Chief Justice argued that references to God are part of the national culture and reflect the recognition of religion in our nation's history.

Chief Justice Rehnquist pointed out the majority opinion expressed the view that the Pledge evolved as a public acknowledgement of what the flag symbolizes. He does not believe the recital of the Pledge constitutes a religious exercise as the prayer did in Lee. The Chief Justice stated that the words "under God" are a reflection of the concept that our Nation was founded on a belief in God. He wrote, "Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church" (Newdow, 2004, p. 2320).

Chief Justice Rehnquist argued that even though Newdow was sincere in his beliefs as an atheist, Newdow did not have the power to veto the decision of the public schools

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[13] The rest of the Presidential quotations used in the opinion were taken from H. Commager, Documents of American History, 8th ed., (1968) with the exception of President Eisenhower's which was cited from http//www.eisenhower.archives.gov/dl/dday/SoldiersSailorsAirmen

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in carrying out their policies as prescribed by Congress. He further argued that Newdow's claim could only be substantiated if the words "under God" in the Pledge led to an establishment of religion, which in his view, they did not. He disagreed with the Ninth Circuit in finding that the words "under God" were a descriptive phrase in a patriotic ceremony that could not, "[P]ossibly lead to the establishment of a religion, or anything like it" (Newdow, 2004, p. 2320).

The Chief Justice pointed out that three levels of government, national, state, and local, produced the Elk Grove Pledge ceremony. The students may abstain from reciting the Pledge if they chose. Chief Justice Rehnquist stated,

> To give a parent of such a child a sort of "heckler's veto" over a patriotic ceremony willingly participated in by other students, simply because the Pledge of Allegiance contains the descriptive phrase 'under God', is an unwarranted extension of the Establishment Clause, an extension which would have the unfortunate effect of prohibiting a commendable patriotic observance. (Newdow, 2004, p. 2320)

Chief Justice Rehnquist traced the historical references to God as a part of the national historical culture. He argued that the words "under God" were a descriptive phrase within a patriotic ceremony. In his view, the descriptive phrase "under God" was not a prayer and did not establish a religion. He further opinioned that the Pledge has been legislatively accepted on the federal, state, and local levels. Finally, the point was made that the recitation of the Pledge in public schools was voluntary and thus did not violate the Constitution.

The opinion of the Chief Justice had similarities to the opinion that was delivered by the Seventh Circuit in Sherman (1992). The Seventh Circuit found that the Pledge was a

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patriotic expression. The Seventh Circuit opinion also cited the examples of Thanksgiving proclamations as well as Lincoln's Gettysburg Address to support that it had historical references in its conclusion that the Pledge did not violate the Establishment Clause.

The force of the precedent in law can either be found in the events that made it what it is, or in some principle which allows the judge to say what it ought to be. The existing form of some laws stem from history (Cardozo, 1991). "They are not to be understood except as historical growths. In the development of such principles, history is likely to predominate over logic or pure reason" (Cardozo, 1991, p. 52). Such was the method of philosophy of historical developments in Chief Justice Rehnquist's concurring opinion supporting the Pledge policy.

The rule of principle of the Court is rarely rigid. "The Court has ways of persuading before it attempts to coerce, and that, over time, sustained opinion running counter to the Court's constitutional law can achieve its nullification directly or by desuetude" (Bickel, 1998, p. 28). The Court has ruled sparingly in its definition of the wall of separation. Chief Justice Rehnquist has continued to use the role of the country's historical roots in his justification of upholding constitutional validity in his interpretation of the Establishment Clause within a Court that has moved away from historical justification.

In discussing the merits of the case, Justice Thomas focused the major portion of his concurring opinion on the issue of coercion. The Ninth Circuit had found that the ceremonial aspect of the Pledge in the public school setting had a coercive effect and used Lee in particular to reach its conclusion. Justice Thomas discussed his disagreement with the Ninth Circuit's ruling and with the overall Court opinion in Lee.

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Justice Thomas stated that he thought the Court took "an expansive" definition of coercion in Lee that could not be defended. Justice Thomas wrote, "Adherence to Lee would require us to strike down the Pledge policy, which in most respects, poses more serious difficulties than the prayer at issue in Lee" (Newdow, 2004, p. 2328). Justice Thomas compared two aspects of coercion in Lee with the Pledge policy. He stated that the peer pressure of attendance was far less subtle because unlike a graduation as in Lee, students are required by law to attend school. Justice Thomas admitted that the second aspect of coercion was more complicated. Under Barnette, students can opt out of the Pledge, but as the Court found in Lee research has found that adolescents are quite susceptible to peer pressure "towards conformity". Justice Thomas pointed out that dissenting high school students are not coerced to pray. "At most they are 'coerced' into possibly appearing to assent to the prayer. The 'coercion' here, however, results in unwilling children actually pledging their allegiance" (Newdow, 2004, p. 2329).

In addressing Chief Justice Rehnquist's opinion that the Pledge is not a religious exercise, Justice Thomas once again turned to Barnette. The Court found in Barnette that pledging allegiance was declaring a belief. With the current form of the Pledge, Justice Thomas stated, "It is difficult to see how this does not entail an affirmation that God exists" (Newdow, 2004, p. 2329). Given the Court's definition, the Pledge whether it is a prayer or not, "[M]ust present the same or similar constitutional problems" (Newdow, 2004, p. 2329). In clarifying his point Justice Thomas footnoted, "Surely the 'coercion' to the pledge (where failure to do so is immediately obvious to one's peers) is far greater that the 'coercion' resulting from a student-initiated and student-led prayer at a high school football game" (Newdow, 2004, p. 2329). Justice Thomas opined that there is

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surely a distinction between the Pledge being a prayer as opposed to an affirmation, but the Court had previously ruled that Government cannot require a person to declare a belief in God.

Justice Thomas stated that according to the precedent of the Court in Lee, the Pledge policy is unconstitutional; however, he disagreed with the decision in Lee. Justice Thomas felt that peer pressure does not constitute coercion. Students are not coerced to state the Pledge, but they are coerced to attend school. Justice Thomas made the point that "[W]hat is at issue is a state action, the question becomes whether the Pledge policy implicates a religious liberty right protected by the Fourteenth Amendment" (Newdow, 2004, p. 2330).

Justice Thomas stated that the Establishment Clause has a history of being a federalism provision which prevents congress "from interfering with state establishments." The Free Exercise Clause protects an individual's right as applied against the states through the Fourteenth Amendment. Justice Thomas stated that, "Because the Pledge policy also does not infringe any free-exercise rights, I conclude that it is constitutional" (Newdow, 2004, p. 2330). Justice Thomas stated that the Establishment Clause protects states from federal interference, but does not protect an individual right.

Justice Thomas discussed whether or not the Pledge policy pertained to an establishment of religion. Justice Thomas argued from the perspective of the dissenting opinion in Lee that an establishment of religion was by force of law and a threat of penalty. He used the Virginia colony as an example of it citizens being required to attend services and being tithed to support the Anglican ministers and the costs of buildings for

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the established religion of the Church of England. Justice Thomas stated, "A religious organization that carries some measure of the authority of the State begins to look like a traditional 'religious establishment' at least when that authority can be used coercively" (Newdow, 2004, p. 2332). Justice Thomas did not see how Government practices had anything to do with creating or maintaining a coercive state establishment of religion that could "[I]mplicate the possible liberty interest of being free from coercive state establishments" (Newdow, 2004, p. 2332). Justice Thomas concluded his opinion in stating, "Through the Pledge policy, the State has not created or maintained any religious establishment, and neither has it granted Government authority to an existing religion. The Pledge policy does not expose anyone to the legal coercion associated with an established religion" (Newdow, 2004, p. 2333).

Justice Thomas has not followed the path of the Court in his interpretation of the Establishment Clause. Although the judge may mark his limits in accordance with reason and justice, he may not substitute his ideas for those whom he serves (Cardozo, 1991). In expressing the view that the Establishment Clause is a federal jurisdiction, Justice Thomas has addressed the issue of federalism and state rights. "Judicial review means not only that the Court may strike down a legislative action as unconstitutional but also that it may validate it as within constitutionally granted powers and as not violating constitutional limitations" (Bickel, 1998, p. 29). Justice Thomas justified his objection to the Court's ruling in Lee by recognizing the individual rights of states to govern as they please as a constitutionally granted power irrespective of the Establishment Clause.

Justice O'Connor's concurring opinion expanded upon the Endorsement test of the Establishment Clause. Justice O'Connor explained that the Endorsement test identifies

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whether or not government makes a person's religious beliefs relevant to his/her standing in the community by conveying that a particular religion is favored. There are two points which must be examined to determine that endorsement has occurred. The first point is that from the perspective of a reasonable observer, does Government support a religion that would be relevant to a person's standing in the community. The second point is that the examination of endorsement, again from the perspective of a reasonable observer, incorporates a "[C]ommunity ideal of social judgment, as well as rational judgment" (Newdow, 2004, p. 2322).

In articulating on the first point of Government supporting a religion as Newdow argued, Justice O'Connor wrote,

> Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a 'hecklers veto' sufficed to show that its message was one of endorsement. (Newdow, 2004, p. 2323)

Supporting the second point of endorsement viewed from a communal social judgment, Justice O'Connor stated, "[T]he test does not evaluate a practice in isolation from its origins and context" (Newdow, 2004). This point was clarified by Justice O'Connor reminding that the Court had permitted Government to commemorate religion in public life as in the instances of Lynch with a nativity scene as part of a larger seasonal display, Allegheny with a menorah as part of a seasonal display, and Marsh with state legislative prayer. Justice O'Connor viewed that some references to religion are part of the country's origins and historical national traditions. Justice O'Connor stated,

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It is unsurprising that a nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottos, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today. (Newdow, 2004, p. 2322)

Justice O'Connor opined that for centuries the country's citizens had made references to God and invocations of divine assistance to solemnize the occasions not to "invoke divine provenance". The reasonable observer would not view the references as Government endorsing a specific religion, nor would he/she view the references as endorsement of religion over non-religion. In referring to the ceremonial deism of the national motto, the Star-Spangled Banner, and the opening of the Supreme Court, Justice O'Connor stated that this "discrete" category of cases acknowledge to the divine without offending the Constitution or the values the were served by the Establishment Clause. She stated, "These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead their history, character, and context prevent them from being constitutional violations at all" (Newdow, 2004, p. 2323).

Justice O'Connor admitted that it was a close question, but she found that the words "under God" in the Pledge fall into the category of ceremonial deism. She based her conclusion on four factors. Her first consideration was the history and ubiquity of ceremonial deism. Justice O'Connor opinioned that ceremonial deism constitutes a shared understanding of "legitimate non-religious purposes". The practice of ceremonial deism has been established in the nation's history and has been observed by citizens since the beginning of the country's establishment. Ceremonial deism has been observed by the general population at the same time for the last two centuries, thus, making it

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ubiquitous. In contrast to ceremonial deism, other uncommon references to religion could be perceived as Government endorsement. Justice O'Connor stated, "As a result, in examining whether a given practice constitutes an instance of ceremonial deism, its 'history and ubiquity' will be of great importance" (Newdow, 2004, p. 2323).

In support of her classification of the Pledge being categorized as a ceremonial deism, Justice O'Connor referred to the history of the Pledge and the words "under God" being in existence for the last fifty years. She pointed out that the Pledge and the Star-Spangled Banner were "[O]ur most routine ceremonial act[s] of patriotism" (Newdow, 2004, p. 2323). Justice O'Connor referred to Lynch as an example of the Court ruling on a practice of a seasonal display that had occurred for forty years. Even though the current form of the Pledge had been in existence for fifty years, Justice O'Connor found it "telling" that there were only three claims of Establishment Clause violations that had appeared before the Federal court system.

The second factor in Justice O'Connor's decision of the Pledge's constitutionality was the absence of worship or prayer. As precedent in Engel, Government may not place its stamp of approval upon one particular kind of prayer or religious service. The Court's upholding of legislative prayer in Marsh was a result of it having been a practice in Nebraska for 200 years. In framing worship or prayer, Justice O'Connor wrote,

> Any statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate secular purpose of solemnizing an event and recognizing a shared religious history. (Newdow, 2004, p. 2324)

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She added that any statement could be "imbued" by a person as having the qualities of a prayer, but one has to consider the relevant viewpoint of the reasonable observer.

Justice O'Connor stated that she did not know of any religion which incorporated the Pledge into its canon; nor did she know of any religion that considered the Pledge as an expression of faith. She further added that even if the phrase "under God" were taken literally, it "[I]s merely descriptive; it purports only to identify the United States as a Nation subject to divine authority. That cannot be seen as a serious invocation of God or as an expression of individual submission to divine authority" (Newdow, 2004, p. 2325). Justice O'Connor stated that even if some of the legislatures had intended to implement an "overt religious message" when the Act of 1954 occurred, "[T]heir intentions cannot, on their own, decide our inquiry" (Newdow, 2004, p. 2325). Justice O'Connor stated that the legislators had a secular purpose in mind that linked the country to its religious origins. The social and cultural history after the Act of 1954 has shown that the Pledge's original secular character has not changed. "Whatever the sectarian ends its authors may have had in mind, our continued repetition of the reference to 'one Nation under God' in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context" (Newdow, 2004, p. 2325). Justice O'Connor also added that the originally religious intent had been since long lost.

The third factor in Justice O'Connor's decision in the constitutionality of the Pledge was that of the Pledge's absence to a particular religion. The Pledge as a ceremonial deism does not favor one particular belief over another. The alteration of the Pledge occurred at a time in the Nation's history, "[W]hen our national religious diversity was neither as robust nor as well recognized as it is now" (Newdow, 2004, p. 2326). As a

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result the Pledge, "[R]epresents a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system" (Newdow, 2004, p. 2326).

The fourth factor of Justice O'Connor's decision in classifying the Pledge as a ceremonial deism is that it contains minimal religious content. Justice O'Connor opinioned that in most of the Court's Establishment Clause cases, the offensive religious content was far more pervasive than the "highly circumscribed reference" to God that is in the Pledge. Justice O'Connor stated that the brevity of a reference to God or a religion in a ceremonial exercise was important for three reasons. First, the reference is being used to solemnize an event and not as an endorsement of any religion. Second, the brevity of the reference if found offensive, allows the participant to "opt out" and still participate in the ceremony. Third, the brevity of reference in a ceremony limits Government's ability to show a preference of one religion over another. In support of this argument, Justice O'Connor pointed out that the Pledge contains a total of thirty-one words. Only two of the words in the Pledge were being challenged. The brevity of the two words constitutes a minimal reference to religion. Because the Pledge existed without "under God" for fifty years, Justice O'Connor stated that the presence of the phrase was "not absolutely essential". Given this consideration, students who want to participate in showing allegiance to their country may still participate without saying "under God" and still consider themselves as "meaningful participants".

In summarizing her opinion, Justice O'Connor stated,

> I have framed my inquiry as a specific application of the endorsement test by examining whether the ceremony or representation would convey a message to a

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> reasonable observer, familiar with its, history, origins, and context, that those who do not adhere to its literal message are political outsiders. (Newdow, 2004, p. 2326)

She stated that if she were to consider the same factor in the application of the Coercion test, she would arrive at the same conclusion. Justice O'Connor wrote,

> Any coercion test that persuades an onlooker to participate in an act of ceremonial deism is inconsequential as an Establishment Clause matter, because such acts are simply not religious in character. As a result, symbolic references to religion that qualify as instances of ceremonial deism will pass the coercion test as well as the endorsement test. (Newdow, 2004, p. 2327)

Justice O'Connor opined that the Constitution would betray its own principles if it allowed citizens to avoid ideas in which they disagreed. She stated that Newdow's complaint was "well-intentioned", but cannot be the "yardstick" of the Court's Establishment Clause inquiry. Ceremonial references to God and religion are a part of the country's religious history. Justice O'Connor concluded, "It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to server our ties to the traditions developed to honor it" (Newdow, 2004, p. 2327).

Cardozo contends that a method of philosophy exists in the role of a judge. Justice O'Conor appeared to utilize this method in her concurrence. A judge exerts a principal along a logical line of progression. In this line of logical progression a rule or principle may emerge which becomes a point of departure from which new directions will be evaluated (Cardozo, 1991). Justice O'Connor has taken a line of logical progression in her explanation of ceremonial deism, and how its falls under the constitutional radar. She also has appeared to use the following of a principle along the lines of justice, morals and

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social welfare, and the *mores* of the day in her method of sociology. Justice O'Connor has defined the role of ceremonial deism as a way of not violating the constitution. In her opinion from the perspective of a reasonable observer, she has looked at what she believes "[S]ome other man of normal intellect and conscience might reasonably look upon as right" (Cardozo, 1991, p. 89). By doing so, Justice O'Connor has used the method of tradition in the viewing of the Pledge along the lines of the custom of the community. In a broad field where rules may be settled one way or the other, "[C]ustom tends to assert itself as the controlling force in guiding the choice of paths" Cardozo, 1991, p. 65).

The democratic process allows the majority to displace decision-makers and to reject their policies. "With that idea, judicial review must achieve some measure of consonance" (Bickel, 1998, p. 27). Justice O'Connor has applied the measure of consonance in her continuation of endorsement in what a reasonable observer may view as a violation of the Establishment Clause. In clarifying ceremonial deisms, Justice O'Connor has found some religious expressions to remain without a change in the policies of the decision-makers. "The Court is seen as a continuum" (Bickel, 1998, p. 31). Justice O'Connor has continued to maintain this continuum in her concurrence through following the idea of endorsement from the eyes of the reasonable observer. The Constitution is "[a] complex charter of government, looking to unforeseeable exigencies" (Bickel, 1998, p. 35). It is open to choice and judgment. The Court in exercising its power of judicial becomes the arbitrator of what is rational and permissible but should not have concern with policy choices (Bickel, 1998). Justice O'Connor has established guidelines in her clarification of endorsement which allow for what is rational and

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permissible, from her viewpoint, and those guidelines do not alter the existing policies of the majority nor those of the decision-makers.

4. Has the Court's decision left unresolved issues?

The Court's decision has left at least three unresolved issues. The first issue is that the majority of the Court ignored the merits of the Establishment Clause issue and vacated the Ninth Circuit's opinion based on the technical issue of Newdow's prudential standing. The Court had recently ruled on Lee at the time of the Seventh Circuit's opinion in Sherman. Judge Easterbrook, who wrote the majority opinion for the Seventh Circuit, referred to the five to four decision in Lee as one that "disparaged" Lemon. The issue of coercion and endorsement that the Court established in Santa Fe were issues that did not exist in 1992. As a result those issues had not been argued in Sherman to provide assistance with the Seventh Circuit decision. The Ninth Circuit found that those precedents shed a different view on the issue of the Pledge policy and found the Elk Grove Pledge policy a violation of the Establishment Clause. The issue concerning the merits of Newdow's claim has yet to be determined by a majority of the U. S. Supreme Court.

The second issue that has emerged is the view of Justice Thomas towards the Court's precedent of coercion as established in Lee. In his concurring opinion, Justice Thomas stated that the Pledge presents a far greater coercion than prayer at a football game as in Santa Fe. Even though Justice Thomas went on to state that he disagreed with the decision in Lee, the issue of coercion in school led recitation of the Pledge has yet to be addressed by the entire Court. The Court did not give a majority clarification of the precedents that were set in Lee and Santa Fe. Those same precedents were ones that

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guided the Ninth Circuit to its decision of the Pledge policy violating the Establishment Clause.

In Barnette the Court stated that the recitation of the Pledge was an affirmation. Clearly, if the Pledge is an affirmation, then the words "under God" denote a belief that God does exist, whether it is viewed as a descriptive phrase or not. Does a six or seven year old student have the independence of thought and character to defy the circumstances and questioning of his/her peers within the surroundings of his/her classroom and teacher in not following the ritualistic exercise of daily recitation of the Pledge? Even if, as Justice O'Connor suggested, he/she does not state the words "under God", and the student has the strength of character to stick to his/her beliefs within the confines of a classroom setting, the coercive pressure of the young student's involvement in the compliant classroom setting creates an uncomfortable position of being an "outsider" within the confines of a nurtured educational classroom environment.

The third issue is that of endorsement. In order for the Pledge to pass under the "constitutional radar", it must be viewed as ceremonial deism or a patriotic act, as held by Chief Justice Rehnquist and Justice O'Connor. In her concurrence, Justice O'Connor stated that as a result of her classification of the Pledge as being a ceremonial deism, it would pass the Coercion test of the Court as well. If the Pledge is viewed as an affirmation, then one must determine if "under God" can be viewed as a prayer. If the view is held that the Pledge is a ceremonial patriotic act, then there is no endorsement of religion. If the view exists that the Pledge is an affirmation and "under God" is a declaration of belief, then the government is endorsing religion. Furthermore, as

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Newdow argued, does Government have the right to endorse a belief in monotheism at the expense of other beliefs which are held by its citizenry?

5. Have new issues emerged as a result of the Court's decision?

One new issue that has emerged is the clarification of the prudential standing theory that was defined by the majority of the Court. The majority as stated by Justice O'Connor did not defer to the appellate court in deciding the standing issue and as a result did not decide the constitutional issue. In choosing to pursue the standing issue, the Court did establish a precedent that clarified, in the Court's view, an incorrect decision that was handed down by the Ninth Circuit.

Obviously as a result of the Court vacating the decision of the Ninth Circuit on the issue of standing, the merits of the constitutional issue presented before the Court were not decided. Thus, the issue of the Pledge policy being a violation of the Establishment Clause still exits. Because the merits of the case were not decided by the majority of the Court, the door was left open for another challenge of a school board's policy in allowing the Pledge to serve as a state civic curriculum requirement. Three Justices made it clear that they found the Pledge did not violate the Establishment Clause. The other five Justices did not address the Establishment Clause claim that was made by Newdow. The door has been left open for one who has a firmer custody ground on which to stand (no pun intended) to challenge the constitutionality of the Pledge. If the issue came before the Ninth Circuit again, the appellate court may stand by its previous decision because of the lack of a concrete decision by the Supreme Court, or it may follow the concurring opinions of Chief Justice Rehnquist and Justice O'Connor and find the Pledge a patriotic

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exercise and "under God" a ceremonial deism, thus flying under the "constitutional radar" of the Coercion and Endorsement tests in its classification of a ceremonial deism.

On January 3, 2005, Michael Newdow filed a complaint in the Eastern California Federal District Court claiming the Pledge policy was in violation of the First, Fifth, and Fourteenth Amendments of the Constitution. The complaint was on the behalf of four unnamed students and their families. The complaint named three different school districts and their superintendents. It also named the State of California, the United States of America, and the Congress of the United States. All of the parents in the plaintiff's complaint have prudential standing as clarified in the Court's decision of Newdow. The complaint filed by Newdow raised the issues that were explored in Chapter 2 in addition to the issues in the concurring opinions of Justice Thomas and Justice O'Connor discussed in this chapter.

On March 2, 2005, the U. S. Supreme Court heard oral arguments for two different complaints involving the Ten Commandments. The first complaint addressed the issue of the display of a monument of the Ten Commandments on the Texas capital as constituting a violation of the Establishment Clause. The second complaint addressed the displays of the Ten Commandments in two county courthouses in the state of Kentucky as being a violation of the First Amendment. In both cases the respondents' and the plaintiffs' briefs discussed the concurrence of Justice O'Connor in Newdow to support their arguments.

If Justice Thomas's opinion concerning the coercive aspect of the Pledge is taken into account, then the lower courts may view the idea of a Government sponsored policy of a teacher led recitation as having a coercive effect on students within the public schools

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who do not share a monotheistic belief. As the diversity of the ethnic heritage in our country continues to grow, children in public schools are holding more and more non-monotheistic religious beliefs. The lower courts will have to weigh the religious question of previous Court decisions starting with the statement of the Pledge being an affirmation in Barnette.

6. What are the implications of the decision for school leaders and school administration?

When there are custodial rights of parents concerned in the decision making process, many schools and school districts are caught in the middle. The Court found that Newdow did not have prudential standing because he did not have the final authority over his daughter's education. The clarification of the Court in its examination of the family custody order may assist school districts in clarifying what complaints may not have to be litigated in Federal district court as a result of the decision made by the Court. In custodial conflicts of students within individual schools, the decision helps to clarify for school administrators which parent has the weight and power in the educational decision making of the student.

Upon examination of the concurring opinions, school leaders have a clearer description of what religious content may be deemed constitutional in the public school setting. If there is religious content in an historical document, school leaders may defend the use of the material as a part of the nation's history. It has already been established that students learn and sometimes memorize the historical documents that have become significant to our nation's heritage over time.

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By 2040 over half of the students in K-12 public education are projected to be minorities (Kaiser, 2003). As a result, the increase of student awareness towards different cultures has been increasing into the public education curriculum. The onslaught of the attack on September 11, 2001, has brought religion to the forefront of our country. Now the role of religion, not only in history but in current affairs, plays a significant factor in the political arena and needs to be addressed in our public schools.

In addressing the teaching of religions in our public schools, courts have devised three legal standards that could be applied to protect academic freedom and not violate the Establishment Clause. Kaiser (2003) coins these standards as: 1) a good faith standard as decided in Mozert[14]; 2) a clearly unreasonable standard as decided in Davis[15]; and 3) an objective observer standard as decided in Santa Fe. Kaiser (2003) contends that under a good faith standard, schools would be able to fulfill their constitutional duties in providing information to students regarding religion in a factual unbiased manner. This would protect schools and districts from a teacher who taught in a biased manner or utilized inappropriate curriculum materials. Under the unreasonable standard a court would presume that the district had established a curriculum of religious content that was in compliance with the Establishment Clause and the Free Exercise Clause. Kaiser (2003) feels that this would be a stronger standard because it would focus on the

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[14] Mozert v. Hawkins County Board of Education, 827 F.2d 1058 (6th Cir. 1987). The Sixth Circuit found that a school district could not change its curriculum to accommodate a particular religion. The district could change its curriculum based on educational needs. Thus, change for educational needs were permissible, those for religious purposes were not. Accordingly, a change for educational needs is one of good faith; a change for religious purpose is one of bad faith.

[15] Davis v. Monroe County Board of Education, 526 U.S. 629 (1999). The Court found that it could assert judicial authority over a school if the school had been unreasonable in its efforts to prevent sexual harassment under Title IX.

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effect of the curriculum. The courts could reverse the school board policy if it had been clearly unreasonable in violating a constitutional harm. The strictest standard of the three in evaluating constitutional violations with regard to curriculum in the school setting would be the objective observer standard. Under this standard an objective observer who was acquainted with the history and circumstances involving the curriculum and how it was being executed could determine if the school or district was creating a constitutional harm. Kaiser (2003) admits that the objective observer standard would require greater judicial participation in deciding school curriculum than the other two standards; however, it would allow for stronger protection against constitutional violations.

7. Does the decision offer guidance for addressing future disputes regarding the interpretation and application of the Establishment Clause?

The Court's decision still offers inconsistent guidance with future disputes regarding the Establishment Clause. Since 1947 with Everson, the Court has yet to find a consistent precedent in its decisions concerning Establishment Clause cases. As explored in the decisions discussed in Chapter 2, the Court relies on different tests that it has established over the years which either adapt to the decision at hand or do not. The Court has adopted four perspectives in its precedents of interpreting Establishment Clause decisions. The first is the historical perspective that was used in Marsh. The Court was able to justify the legislative prayer in Nebraska because of a direct correlation to legislative prayer that occurred at the time of the country's founding. Although some Justices have tried to link other opinions to an historical basis of precedent and Founding Fathers' intent, the decision in Marsh was able to defy political changes in sentiment, most notably the "wall of separation" established in Everson and the three prong Lemon

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test, in its justification of the historical setting of the framers. For one to invoke the Marsh test, one would have to prove that the conduct of the framers established the constitutionality of the claim (Schonfeld, 2003).

The second perspective used by the Court is the Lemon test established in Lemon. This perspective was overlooked in Marsh in lieu of the historical intent. The Lemon test provided three prongs of evaluation, "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'" (Lemon, 1971). With the exception of Marsh, the Court used the Lemon test for thirteen years in deciding Establishment Clause claims (Schonfeld, 2003).

The third perspective used by the Court was expanded from the secular purpose prong of the Lemon test by Justice O'Connor in her development of the Endorsement test in Lynch. The Endorsement test widened the parameters that were examined in Lemon and allowed the Court to uphold laws that may advance or inhibit religion (Schonfeld, 2003). As a result, the Court was able to validate a nativity scene as a celebration of a national holiday which was not understood to be an endorsement of religion. Thus in Allegheny because of the context of the setting of a nativity scene, the Court was able to apply the Endorsement test to find that the scene in front of a courthouse was an endorsement of religion where the scene in a park was not an endorsement.

The fourth perspective developed by the Court was the Coercion test. This precedent was developed by Justice Kennedy in Lee. As explained earlier, the Coercion test examined whether government forces one "[T]o support or participate in religion or its

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exercise" (Lee, 1992). Schonfeld (2003) pointed out that the analysis of the Coercion test examines how the government action is implemented. The Court clarified its distinction of difference between prayer in Marsh and that in Lee. In Marsh adults were free to enter and leave during the prayer. In Lee it was an event where a student must attend a graduation ceremony. Thus the analysis of the Coercion test of whether or not Government is conducting a religious exercise depends on the individual circumstances in which the exercise is applied (Schonfeld, 2003).

The concurring opinion of Justice O'Connor's provided further elaboration of the Endorsement test. Justice O'Connor was clear to point out that in her opinion the constitutionality of the Pledge was a close call, yet one more clarification of the "reasonable observer" needed to be made, that being what is viewed as ceremonial deism. If the intent of the Act of 1954 was religious, if the political uproar against the Ninth Circuit's decision was based upon national rooted beliefs in theism, then why have the opinions of the Court not recognized the obviously religious intent of the phrase "under God" as having religious meaning? By classifying the phrase as ceremonial deism or letting it fly under the constitutional radar, the Court has minimized the intent of the phrase, and compromised the theistic beliefs that are so fervently eager to retain the phrase in the Pledge.

The inability of the Justices to agree on Establishment Clause issues has created more ambiguity for the lower courts. The decisions from the Court concerning school Establishment Clause issues since Everson have created confusion. Griffin (2001) pointed out that the confusion of the Court can be seen in its rulings. The Court permitted Government funding of buses to private schools, but not field trips from private

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schools. The Court permitted Government funding of books to private schools but not maps, globes, and projectors. The Court permitted the funding of standardized tests in private schools but not tests written by private school officials. The Court permitted Government funding of religious universities but not religious elementary and secondary schools. The Court allowed release time for religious instruction but not on public school grounds. The Court found that public school teachers could not retain their secular views if they taught in religious schools after their secular workday. The Court prohibited the funding of secular subjects in religious schools, but found it constitutional to have religious worship on public school grounds (Griffin, 2001, Levy, 1986). The Justices of the Court, in Santa Fe, could not even agree as to whether an invocation before a football game was religious or secular (Griffin, 2001). Griffin states, "[T]he law of the schools is a law of their (Justices) own prepossessions, precisely because the Court has ignored the distinction between the secular and the sectarian" (Griffin, 2001, p. 244). As a result, the Justices of the Court have "[O]pted for confusion and inconsistency in Establishment Clause jurisprudence in service of their own prepossessions about religion" (Griffin, 2001, p. 241).

In the Court's failure to provide a concrete test of what constitutes a violation of the Establishment Clause, Justice O'Connor has played a major pivotal role in crafting consensus on Establishment Clause case law. Since 1983 in Mueller v. Allen, Justice O'Connor has been the swing vote in five to four majority decisions concerning Establishment Clause issues handed down by the Court. Mueller v. Allen dealt with the ability of parents whose children attended parochial school to be entitled to the same tax deductions as those whose children attended public school. Justice O'Connor supported

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the majority opinion in holding that the tax law did not violate the Establishment Clause. In Lynch, 1984, Justice O'Connor filed a concurring opinion for the majority in determining that a nativity scene in a seasonal display on public grounds did not violate the Establishment Clause. In Allegheny, 1989, Justice O'Connor concurred in part, concurred in judgment, and filed a concurring opinion for the majority in determining that a crèche displayed inside a courthouse was a violation of the First Amendment. In Lee, 1992, Justice O'Connor joined in a concurring opinion for the majority in determining that prayer at a graduation ceremony violated the Establishment Clause. In Agostini V. Felton, 1997, Justice O'Connor delivered the majority opinion in overturning a previous Court decision, Aguilar v. Felton, 1985, by finding that public school teachers could teach in parochial schools without violating the Establishment Clause. In Santa Fe, 2000, Justice O'Connor joined the majority opinion in determining that a student led prayer at a football game was a violation of the Establishment Clause. In Zellman v. Simmons-Harris, 2002, Justice O'Connor joined the majority opinion and wrote a concurring opinion in determining that the Ohio school voucher program was neutral to religion and did not violate the Establishment Clause. Justice O'Connor's concurring opinion in Newdow bears careful examination with regard to future majority decisions by the Court in determining Establishment Clause violations. This has already been seen in the Ten Commandment cases which were heard before the Court on March 2, 2005.

The religious diversity in our country is far greater now than it was at the time of the writing of our Constitution. The public education system that exists today in our country has changed dramatically since the writing of the First Amendment. Chemerinsky (2001) disagreed with Justice Scalia in Lee when the Justice stated that the Establishment Clause

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should protect the majority. The Establishment Clause was intended for Government to prevent the majority from making the minority feel that its religious beliefs were unwelcome. The definition of prayer is particular to a person's own beliefs and religion. "There is no unity of world's religions on questions of faith and belief" (Griffin, 2001, p.261). The "default" majority religion of Christianity or monotheism in public institutions is not permitted under the Establishment Clause (Griffin, 2001). Griffin states, "Religious practices are particular. The ideal of a common prayer or a common theology is illusory, and the government may not establish a civil religion" (Griffin, 2001, p. 265). The question that still looms is whether or not the Court is using patriotism to justify "ceremonial deism" in the Court establishing a civil religion of monotheism. If this is the trend of the Court, are citizens felt to be "singled out" as unpatriotic because their religious beliefs do not condone the use of patriotic "ceremonial deisms"?

Summary

In this chapter the research questions were examined as they pertained to the U. S. Supreme Court's decision in Newdow. Justice Stevens wrote the majority opinion for the Court. The Court ruled that Newdow did not have prudential standing with regard to his daughter to challenge the unconstitutionality of a public school policy which required teachers to lead willing students in the recitation of the Pledge of Allegiance. As a result of the Court's decision pertaining to Newdow's standing, the merits of whether or not the policy requiring teachers to lead willing students in the Pledge which contains the words "under God" constitutes a violation of the Establishment Clause was not decided by a

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majority of the Court. The majority opinion based Newdow's lack of standing on the family custody orders that had been in effect from the California Superior Court. The State court order gave the mother sole legal custody in matters dealing with the educational decisions of the daughter. The Court found that it would not intervene in domestic relations accept on rare occasions to answer a federal question. The Court found that the Ninth Circuit had incorrectly ruled with regard to Newdow's standing.

The merits of the Establishment Clause violation were examined in the concurring opinions of Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas. Chief Justice Rehnquist wrote in his concurring opinion that the Court had created new prudential standing jurisprudence. The Chief Justice found that the wording of the Pledge was a patriotic observance which primarily focused on the flag and secondarily on the description of the country. Justice Thomas found that under the Court's ruling in Lee, the Pledge policy had a stronger coercive effect than a prayer at a graduation ceremony. Justice Thomas did not agree with the Court's opinion in Lee. He stated that the Establishment Clause was a federal provision that prevented interference with state establishments. Justice O'Connor agreed with Chief Justice Rehnquist in her concurring opinion that the Court should leave standing issues up to the lower courts. She expanded her clarification of endorsement. Justice O'Connor found that the words "under God" fell into the category of ceremonial deism and, thus, the Pledge was constitutional. She based her conclusion on four factors. First, the practices of ceremonial deisms were part of the nation's history. Second, the Pledge has an absence of worship or prayer. Third, the Pledge has an absence to a particular religion. Fourth, the Pledge contains minimal religious content.

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The decision of the Court not to rule on the constitutionality of the Pledge policy has provided relief for school boards across the nation. School boards do not have to change their requirements with regard to the Pledge and willing recitation by students. School boards have a stronger ground in determining what custody disputes may arise in federal courts as a result of the Court's ruling against Newdow's prudential standing. School boards will still have to examine the coercive effects of their policies with respect to Establishment Clause violations, but can rest a little while on the issue of the Pledge.

The merits of Newdow's claim have yet to be resolved by the Court. As a result of the Court's not addressing the merits and exploration of its previous decisions and precedents, the Pledge policy has been challenged again. In the Court vacating the Ninth Circuit's decision, the vacillation of Establishment Clause issues still continues and seems to be decided on a case by case basis in the application of one test over another.

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CHAPTER 5

SUMMARY, PERSPECTIVES, REFLECTIONS, RECOMMENDATIONS, AND EPILOGUE

This chapter will provide a summary of the Court's decision in Newdow which was analyzed in Chapter 4. It will present the decision in Newdow from the historical perspective of the role of a judge and the role of the Court with regard to the decision making process. The individual reflections of the writer's observances through his research will be discussed. Recommendations for further study that the researcher felt might be pertinent will be proposed. An epilogue of current standing in the courts with regard to Newdow will be addressed. Finally, the conclusion of this dissertation will be presented.

Summary of Analysis in Newdow Jurisprudence

The majority of the eight member Court in the Newdow decision avoided the merits of Newdow's claim. The issue of whether or not a public school policy which requires willing students to be led by a teacher in reciting the Pledge of Allegiance containing the words "under God" is a violation of the Establishment Clause was only addressed in three concurring opinions. Instead of deciding the constitutional merits of conflict that had arisen between the Seventh Circuit in Sherman and the Ninth Circuit in Newdow, the Court found that Newdow did not have standing under the prudential theory to pursue his

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claim thus overturning the Ninth Circuit's findings that the Pledge did violate the Establishment Clause.

The majority opinion written by Justice Stevens found that because Newdow did not have the authority to make the final determination in the education of his daughter under California law, the Ninth Circuit had ruled incorrectly with regard to Newdow's standing. The question of standing had been addressed in the Ninth Circuit, and the appellate court had found that Newdow had standing to pursue his claim. Three decisions by the Ninth Circuit each determined that he did have standing. The Supreme Court based its decision on the fact that the mother, who had sole custody of the daughter at the time, did not object to her daughter reciting the Pledge, and under California law it was her right to make the decision with regard to her daughter's education. The majority of the Court found that only on rare occasions in federal cases would it intervene into domestic relations.

The concurring opinion of Chief Justice Rehnquist expressed the view that the Court should have ruled on the merits and that the majority's ruling on standing was "[L]ike the proverbial excursion ticket – good for this day only" (Newdow, 2004, p. 2316). Both Justices O'Connor and Thomas agreed with the Chief Justice with regard to the majority's decision on standing and stated that with regard to questions of standing the practice of the Court was to differ to the appellate courts of the jurisdiction that rendered the decision. Chief Justice Rehnquist discussed the merits of the Establishment Clause claim and found that the Pledge policy was constitutional. He stated that our country was founded on a belief in God and that the Pledge was a patriotic exercise reflecting the historical heritage of our country.

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The concurrence of Justice Thomas explored the Court's Establishment Clause Coercion test that had been adopted in Lee. Though Justice Thomas opined that he did not agree with the Court's findings in Lee, he stated that the compulsory attendance laws provided a much stronger issue of coercion with regard to the Pledge policies than did a prayer at a high school graduation; however, Justice Thomas also found that the Pledge policy was constitutional. He reasoned that the policy did not infringe on any free-exercise rights made applicable to the states pursuant to the Fourteenth amendment. He also concluded that the Pledge policy did not establish a state religion nor did it establish one religion over another, so it did not violate the Establishment Clause of the First Amendment.

In her concurrence Justice O'Connor focused on whether the question of the Pledge policy was an endorsement of religion. In doing so, Justice O'Connor classified the phrase "under God" as a ceremonial deism and found it constitutional. She supported her conclusion on four factors. First, the practice of ceremonial deism has occurred since the founding of the country and has been observed for that last two hundred years. Second, ceremonial deism does not include worship or prayer. Third, ceremonial deism does not favor, "[A]ny individual religious sect or belief system" (Newdow, 2004, p. 2326). Fourth, ceremonial deism contains minimal religious content. As a result, the brevity of ceremonial content does not place government in a position of showing a preference for one religion over another. To find an endorsement of religion she contended, one had to look at the origins of the phrase and its context. Admitting that it was a difficult question, Justice O'Connor stated that through the eyes of a reasonable observer, the

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Pledge policy was not a governmental endorsement of religion and therefore did not violate the Establishment Clause.

In her concluding remarks Justice O'Connor stated that she would render the same conclusions if she applied the Coercion test. "Any coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character" (Newdow, 2004, p. 2327). By defining "under God" as ceremonial deism and finding that ceremonial deism is constitutional, Justice O'Connor has modified her view of coercion as expressed in her concurrence in Lee, 1992. In Lee, which involved a prayer, the Court found that, "A reasonable observer of high school age could believe that standing or remaining silent signified her own participation in, or approval of, the group exercise, rather than her respect for it" (Lee, 1992, p. 578). Newdow was raising the issue of coercion of a student in an elementary school setting, which involved the voluntary recitation of the Pledge. In Lee, the Court found that students older than elementary school age, "[A]re often susceptible to peer pressure, especially in matters of social convention, the State may no more use social pressure to enforce orthodoxy than it may use direct means" (Lee, 1992, p. 578). As Newdow claimed, clearly the Pledge policy falls under the peer pressure of social convention in a more intimate classroom setting.

Justice Thomas concurred that the Pledge policy because of mandatory attendance laws presents a stronger coercive effect of participation than a junior high school graduation in Lee or a pre-game football prayer ceremony in Santa Fe. As the Court stated, "[S]ubtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation" (Lee,

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1992, p. 588). With States' mandatory school attendance laws, and the "appearance of participation", the only alternative to avoid the aspect of coercion would be for a student to leave the room while the Pledge is being recited. Under Barnette, the student could opt out of the recitation, but under Lee the coercion of silent participation leaves the solution of removing oneself from the classroom setting. To put this pressure on a student of any age creates on ostracism on the part of the student. As the Court stated, "[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools" (Lee, 1992, p. 592). The Court pointed out, "To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy that it may use more direct means" (Lee, 1992, p. 594).

In finding that ceremonial deism is not a violation of the Establishment Clause, Justice O'Connor is creating a jurisprudence of an establishment of a civil religion that is contrary to the opinion of the Court with which she concurred in Lee. "The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted" (Lee, 1992, p. 590). In finding ceremonial deisms *de minimus*, Justice O'Connor appears to have retreated from her concurrence in Lee, "Government may neither promote nor affiliate itself with any religious doctrine or organization" (Lee, 1992, p. 599). In allowing ceremonial deism to fly under the constitutional radar, Justice O'Connor may not be endorsing a particular religious sect or religious organization, but she is endorsing a religious belief that a Judea-Christian God exists, and Government may not endorse a religious belief. Finding ceremonial deism constitutional is contrary to

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Justice O'Connor's concurrence with Justice Blackmun and Justice Stevens, "A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some" (Lee, 1992, p. 606-607). A further contradiction to Justice O'Connor's jurisprudence of ceremonial deism being constitutional is found in her concurrence with Justice Stevens and Justice Souter, "When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike the near core of the Establishment Clause. However 'ceremonial' their messages may be, they are flatly unconstitutional" (Lee, 1992, p. 631).

The core of the argument in Newdow lies in the interpretation of the words "under God". EGUSD argued that the precedents of the Court in Lee and Santa Fe dealt with prayer. The school district and the Solicitor General argued that "under God" was a ceremonial descriptive phrase within a patriotic exercise. In the oral argument, Newdow stated that the President of the United States said that the Pledge constituted a prayer. The Court stated in Barnette that the Pledge was an affirmation, and as a result of it being an affirmation, students were not required to affirm an ideology that was contrary to their religious beliefs. The Act of 1954 deliberately inserted the words "under God" into the Pledge to affirm that our country believed in monotheism as opposed to atheism. To state that a country was founded on the religious basis of one God or to state that a country acknowledges the existence of one God does not alter the fact that a patriotic exercise is stating that there is one God who Government believes exists. Newdow is simply asking the Court to invoke the same jurisprudence it found in Lee and Santa Fe with prayer to the governmental affirmation of a God that is stated in the Pledge. Whether the Pledge is considered a prayer or not, Government is still affirming that a God exists and conveying

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that message of religious belief in requiring that the Pledge be recited in a classroom setting. Under the coercive aspect of Lee, even if a student does not recite the Pledge, he/she is silently participating in an affirmation that God exists which is governmentally sponsored.

Political Historical Perspective

Newdow, 2004 allows one to look at the jurisprudence of the Court's decision in this case from two different perspectives. The first perspective is the role of the individual Justice in his/her decision-making process (Cardozo, 1991). The second perspective is the role of the Court in its collective decision-making process as the third branch in our governmental system's balance of powers (Bickel, 1998). Both perspectives provide further insight into the Court's precedents with regard to Establishment Clause cases.

The judiciary rules on the constitutionality of laws and statutes. The individual Justices base their own decisions on their interpretations of the relationship of those laws and statutes to the Constitution. It is through this process of individual decision-making that precedents of the Court as a collective body and the third branch of our government are established in the Court's majority opinions. As Cardozo, explains, the two perspectives become intertwined.

> The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is

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beaten something which has a constancy and uniformity and average value greater than its component elements. (Cardozo, 1991, p. 177)

The members of the Court in Newdow have presented some similar individual points of view in their opinions with regard to Establishment Clause cases.

Douglas Laycock is an attorney, who additionally has written numerous articles on Establishment Clause issues that have been presented before the Court. He, himself, has argued Establishment Clause cases before the Supreme Court. In tracing the individual jurisprudence of the current Justices on the Court, Laycock has classified the individual decision-making process of the Justices' opinions in Establishment Clause cases. Seven Justices on the Court appear to view Establishment Clause cases consistently. Three of the Justices, Rehnquist, Scalia, and Thomas vote to permit religious funding and protect religious speech. Four of the Justices, Breyer, Ginsburg, Souter, and Stevens vote to prohibit religious funding and to prohibit religious speech in government sponsored forums. Justices Kennedy and O'Connor find the speech and funding cases differently (Laycock, 2004). "What reconciles the speech and funding cases is the principle of minimizing government influence and maximizing individual choice" (Laycock, 2004, p. 157).

The Court has remained stable with regard to religious speech. "The distinction between government and private speech, and the characterization of religious speech has an expression of viewpoints have been remarkably stable and persistent, but these two rules actually have the full support of only two Justices, Kennedy and O'Connor" (Laycock, 2004, p. 222). The remainder of the Court has created a four to three block in which Justices Kennedy and O'Connor have six votes to prohibit governmental

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sponsorship of religious speech and five votes to invalidate governmental discrimination against private religious speech (Laycock, 2004).

After Cantwell, the individual rights that were federally protected in the Bill of Rights were then applied to the states through the Fourteenth Amendment, and the precedent of the Court required the states to refrain from adopting laws or engaging in procedures that established a religion (Hamburger, 2002, Levy, 1986). The perspective of some of the Justices on the Court seems to want to return to the literal meaning and intent of the framers and founders without looking at the precedents that have been established by the Court in its applications of individual rights as applied to the First Amendment since the Cantwell decision. "If judges have woefully misinterpreted the *mores* of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors" (Cardozo, 1991, p. 152). Chief Justice Rehnquist would have the Court examine its Establishment Clause jurisprudence from the viewpoint of what the framers did two hundred years ago. Justice Thomas would have the Court view the Pledge policy as constitutional through the Fourteenth Amendment because, in his view, the Establishment Clause is a federal protection that does not apply to the states with regard to their individual Pledge policies.

The cultural and religious diversity of our country has changed in the last two hundred years. When a constitutional issue dealing with establishment of religion is concerned, the individual beliefs of all of the members of society should be taken into consideration. The concurring Justices refer to the references of a supreme being made by the founding fathers. The Justices claim that the conceptual framework for our country is based on a supreme being. What they do not refer to in their arguments is that the

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founding fathers believed in a supreme being which necessarily may not have been a Judea-Christian God. "A jurisprudence that is not constantly brought into relation to objective or external standards incurs the risk of degenerating into...a jurisprudence of more sentiment and feeling" (Cardozo, 1991, p. 106). The duty of a judge is to objectify in law the convictions and philosophies of the citizenry of his/her time. It is not to objectify his/her own convictions and philosophies. This objectivity cannot be done well if the judge's sympathies and beliefs are devoted to a time which has passed (Cardozo, 1991). The concurrences of Chief Justice Rehnquist and Justice Thomas would have us ignore the Establishment Clause precedents since Cantwell and revert backwards in a society that has moved forward in religious diversity.

With the merits argued by Newdow, the majority of the individual decision-making members of the Court chose to take a traditional judicial role in not sacrificing the general to the particular and kept a consistency and uniformity of precedent in not deciding in the instance (Cardozo, 1991). The majority of which Justice Kennedy was one, decided to wait for further development of the precedents that had been established in Lee. "[T]he field where the judge is not limited by established rules, is shadowy and evanescent, and tends to become one of words and little more" (Cardozo, 1991, p. 110). Even though the Court has been consistent in its Establishment Clause rulings with regard to the public school setting, to disavow a portion of the Pledge or declare it unconstitutional would require the members to take their precedents one step further in the removal of religious references made by Government, which is a path it did not choose. One precedent may push a path to its extreme and another precedent may push its

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path to a different extreme (Cardozo, 1991). "In Newdow, it may have been politically impossible to affirm and legally impossible to reverse" (Laycock, 2004, p. 224).

The two extremes create a conflict which might open a path to be taken for the mean between the two extremes (Cardozo, 1991). In defining and finding ceremonial deism constitutional, Justice O'Connor created a path between the established precedents of the Court and the political ramifications of finding the Pledge policy a constitutional violation. The duty of a judge is to declare law in accordance with reason and justice. It is also seen as a phase of his/her duty to declare the law in accordance with custom (Cardozo, 1991). The concurring opinions of Chief Justice Rehnquist and Justice O'Connor pursued the goal of unifying the Pledge policy with the customs that have developed in our nation's history. When the Court has to decide a precedent that is weighed between logic and reason or one that has been conceived from historical growth, the Court will likely choose the historical over the logical (Cardozo, 1991). The majority of the individual members of the Court chose not to expand the Court's definition of whether or not the Pledge policy was a constitutional violation. Instead, because the Court vacated the Ninth Circuit's decision, the individual concurring Justices had the luxury to expand Establishment Clause jurisprudence in justifying the historical without affecting the majority opinion of the Court. "[T]he judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience" (Cardozo, 1991, pp. 133-134). Newdow presented the members of the Court with the task of writing an opinion that either defended or defined the *de minimus* exception. "The opinion would

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be difficult to write because the implicit exception is at best a matter of judgment rather than principle" (Laycock, 2004, p. 223).

In examining Newdow from the role of the Court as the third branch of our governmental system, the Court in itself is not a legislative body (Bickel, 1998). "[T]he judges of the highest tribunal are supposed to enforce constitutional limitations, not make national policy or determine what policy is desirable for the nation" (Levy, 1986, p. 181). With Newdow, the Court utilized restraint in its determination of policy. "The root difficulty is that judicial review is a counter-majoritarian force in our system" (Bickel, 1998, p. 16). This may be why the majority of the Court decided to vacate the Ninth Circuit's decision.

When a constitutional issue dealing with establishment of religion is concerned, the individual beliefs of all of the members of society should be taken into consideration. "What is rational, and rests on an unquestioned shared choice of values, is constitutional" (Bickel, 1998, p. 43). Solutions of expediency are for the legislatures and the executive branch in reaching pragmatic compromises (Bickel, 1998). "Courts must act on true principles, capable if unremitting application. When they cannot find such a principle, they are bound to declare the legislative choice valid. No other choice is open to them" (Bickel, 1998, p. 58). In vacating the Ninth Circuit's decision, the majority of the Court weighed its role within our country's democratic process. "Besides being a counter-majoritarian check on the legislature and the executive, judicial review may, in a larger sense, have a tendency over time to seriously weaken the democratic process" (Bickel, 1998, p. 21). By not ruling on the merits of the constitutionality issue argued by Newdow, the Court chose not go against the political outcry at its point in time.

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Because the process of judicial review runs counter to the theory of democracy, it cannot ultimately be effective (Bickel, 1998). The Court rules on the constitutionality of law without the approval of its citizenry within the electoral process. With regard to the sensitivity of religious diversity in our country, the Court has not offered definitive guidance in its Establishment Clause precedents. The vacillation of the Court in connection with Establishment Clause cases has occurred as a result of the Court examining each case individually and deriving a majority opinion from previous precedents. The use of tests lead to the appearance of objectivity in opinions, but as Levy points out, "[N]o evidence shows that a test influences a member of the Court to reach a decision that he would not have reached without that test" (Levy, 1986, p.129). The tests established by the Court assist the lower courts and other policy-making bodies in their interpretation of the Court's jurisprudence.

One may view that the variety of rulings often seem contradictory, and the Court continues to carve out a path that will not lend itself to one extreme or another in the true erection of a wall that separates church and state. "When values conflict – as they often will – the Court must proclaim one as overriding, or find an accommodation among them (Bickel, 1998, p. 58). Perhaps the continued vacillation of definite precedent from the Court regarding the Establishment Clause is an ongoing accommodation or a compromise of values that in the Court's view has an even-handed application (Bickel, 1998). "Any person who reaches the highest court is sophisticated enough to appreciate the strategic and political values of achieving desired results by indirection. Overruling is a device of last resort, employed only when other alternatives are unavailable or unavailing" (Levy, 1986, p. 171).

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In carving out its path for Establishment Clause interpretation, the Court has expanded in its opinions concerning the idea of ceremonial deism being able to fly under the constitutional radar. In not deciding the merits of Newdow's claim, the Court has stayed away from the essence of the issue that was presented. However, with the introduction in the discussion of the merits in the Justices concurring opinions of Newdow's claim, the Court seems to be suggesting guidance for a compromising path with regard to Establishment Clause interpretation.

In the aftermath of September 11, 2001, America embraced her flag and the country it represents. The idea of terrorist attacks across the globe which are rooted from a religious belief that is different from the majority of our country's citizenry has created a stronger political pull to the right and the moral majority's perspective of God and country. The public and legislative outcry against the Ninth Circuit decision in the Newdow case less than a year after the attacks supports this point. "[J]udicial review is a deviant institution in the American democracy" (Bickel, 1998, p. 18). Congress represents the nation's will and the majority; the Court does not. "[W]hen the Court invalidates the action of a state legislature, it is acting against the majority will within the given jurisdiction, what is more, it also promises to foreclose majority action on the matter in issue throughout the country" (Bickel, 1998, p. 33). If the Court followed its previous precedents pertaining to coercion and non-participatory observance as decided in Lee and Santa Fe, "[I]t thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it" (Bickel, 1998, p. 17).

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Reflections

The Establishment Clause states, "Congress shall make no law respecting an establishment of religion". Taken literally that means any establishment of a state or national religion is a violation of the Constitution. A government by the people and for the people does not mean a government of religious endorsement by some people to include a religious endorsement for all people. City, county, state, and federal government need to get out of the business of promoting a civil religion of monotheism.

The civil religion of monotheism has slowly infiltrated our society to the point where the majority of society has become numb to it existence. "[S]ince the purpose may be to discriminate, we must face the question, as a matter of principle, whether that purpose is allowable, for it is in itself not irrational" (Bickel, 1998, p. 225). A Christmas tree in the lobby of a public school is not only a seasonal display but also an endorsement of the religious beliefs of the evergreen symbolizing eternal life. A nativity scene mixed in with other religious displays and seasonal displays is still an endorsement of a religious belief, whether it is shared with other displays or not. The placement of a Christmas tree on the White House lawn and its tree lighting ceremony is an endorsement of the religious spirit of Christianity. What the President of the United States chooses to display within the walls of his/her White House residence is a private matter, but when it is displayed in a public manner, its states to the country that the Office of the President endorses and promotes Christianity and monotheism.

As seen in the Establishment Clause cases which have disputed the governmental endorsement of religion, the Court has chosen to evaluate its decisions without eroding the civil religion that has permeated our society. In some cases, the Court has gone out of

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its way to justify and promote a civil religion of monotheism, Lynch, 1984. With the concurrence of Justice O'Connor in Newdow, the Court appears to be continuing in its path of governmental religious endorsement. The justification of ceremonial deism as being ubiquitous and *de minimus* does not alter nor minimize the omnipresent fact that the Court is allowing all forms of Government to establish, endorse, and publicly celebrate monotheism, whether it be displays on governmental property, inscriptions on currency, or declarations of patriotism.

The two perspectives consisting of a judge as an individual decision-maker and the role of the Court in our governmental system could have been utilized by the majority of the Court in following its previous precedents and deciding the merits of Newdow's claim. "One of the most fundamental social interests is that law shall be uniform and impartial" (Cardozo, 1991, p. 112). In pursuit of such interest, the Justices of the Court need to shut their minds from what others may think. "They try things out on evidence, by the process of proof and refutation, and shut their minds to the kinds of surmise by which the general public may reach politically sufficient conclusions" (Bickel, 1998, p. 220). A judge needs "[t]o disengage himself, so far as possible, of every influence that is personal or that comes from the particular situation which is presented to him, and base his judicial decision on elements of an objective nature" (Cardozo, 1991, pp. 120-121).

Fifty years ago in Brown v. Board of Education, 1954 and Brown II v. Board of Education, 1955, the Court abolished a tradition and policy in our public school system which was based on discrimination. The Court found that segregation in our public schools was unconstitutional. "The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and – the short of it is – its labors

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under the obligation to succeed" (Bickel, 1998, p. 239). The Court defied politics and public opinion in its desegregation decision.

If the Court chose to do so, it could stop its meandering of precedents in Establishment Clause cases and find that a governmental endorsement of a civil religion is unconstitutional just as it found that segregation was unconstitutional. "How and whence do nine lawyers, holding lifetime appointments, devise or derive principles which they are prepared to impose without recourse upon a democratic society?" (Bickel, 1998, p. 235). The Court has reached unanimous decisions previously in its application of the Fourteenth Amendment to the Establishment Clause, Cantwell, 1940, and Epperson, 1968.

> The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, or marking a new point of departure from which others who come after him will set out upon their journey. (Cardozo, 1991, p. 113)

In finding a civil religion unconstitutional, the Court would clarify that our government does not favor one belief over another and is truly neutral towards any religious belief of its citizens.

The Court was able to use the constitutional principles of equal protection overlapping due process in its decision to remove segregation in Brown (Bickel, 1998). The Court could apply those same principles of equal protection with regard to non-monotheistic children under the same umbrella. The Free Exercise Clause of the First Amendment allows one to freely believe as he/she chooses without governmental

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interference. The Fourteenth Amendment guarantees governmental equal protection of one's individual beliefs. The Court could find that the Pledge policy is an enforcement of law that deprives non-monotheistic children equal protection of their religious beliefs because they are required to attend public school. Under the requirement of compulsory attendance, those children are required to be exposed to a monotheistic belief in which they do not share. The Court has power of precedence to find complete Government neutrality towards religion, especially as it is applied to the prescribed requirement of students silently participating in the recitation of a statement declaring an affirmation that God exists in a government mandated attendance classroom setting. In doing so the Court would be taking a firm stand for the guarantee of equal protection for religious freedom of all citizens not just those of monotheistic beliefs.

"[G]overnment should not try to enforce morality by law, we mean that in our system it cannot enforce it, if it is merely an idiosyncratic morality or a falsely professed morality, not the generally accepted one" (Bickel, 1998, p. 251). Congress and the political right are still trying to enforce the altruistic belief that what our country does is right because God is on her side. The civil religion of monotheism is being used by the government as a justification to defend and support its global politics, whether it be the justification of troops in a war against a country of different religious beliefs or pressure for economic reforms in third world countries of different faiths. The fundamental foundation of the principles of our government and the Constitution itself are stronger than that.

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Contrary to what the political right might profess, the individual rights of all citizens to believe as they chose and voice those beliefs as they choose without governmental interference constitute the foundation of our country.

> Finally there remains a percentage, not large indeed, and yet not so small as to be negligible, where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power. (Cardozo, 1991, p. 165)

The respect for individual beliefs, which is the basis of our constitution, is evidenced in its application of increasing religious diversity across the nation. The Court has the capability to advance that religious diversity in its development of the law by incorporating equal protection of religious beliefs in not allowing governmental interference.

An applied principle usually lasts for one or two generations. For the principle to endure beyond that time, it has to go through a process of renewal. As a result, the judgment of the Court reflects the application of the applied principle accordingly (Bickel, 1998). Since Everson in 1947, the Court has renewed its application of the Establishment Clause principle that was applied. This applied principle can be seen in intervals of renewal through the Court's evolution of tests to interpret Establishment Clause applications from one generation to the next. After Everson the Court's rulings evolved to the Lemon test, (Lemon 1971), then the Endorsement test, (Lynch, 1984), and finally the Coercion test, (Lee, 1992 and Santa Fe, 2000). With the merits of Newdow's claim, the Court has the opportunity to continue the application of its previously applied

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principle in recognizing its previous jurisprudence and embracing the religious diversity of the citizens that has grown within its jurisdiction into the next generation. "[T]he moment of ultimate judgment need not come either suddenly or haphazardly. Its timing and circumstances can be controlled. On the way to it, both the Court and the country travel the paths of the many lesser doctrines, passive and constitutional" (Bickel, 1998, p. 240). A "reasonable observer" may no longer be one who has a belief in monotheism. "[T]he Court may decide concrete cases and may not pronounce general principles at large; but it may decide a constitutional issue only on the basis of general principle" (Bickel, 1998, p. 247). The Court has the opportunity to seize its progression of applied principle and create a further process of renewal which promotes a constitutional recognition of all religious beliefs and that Government does not show a preference for one over another.

Recommendations for Further Study

In Lee the Court based its opinion of coercion in part on studies pertaining to adolescent peer pressure, (Lee, 1992, p. 594). The *Amicus Curie* Brief submitted by the Americans United for Separation of Church and State, American Civil Liberties Union, and Americans for Religious Liberty in support of the respondent (p. 13-14), quoted further studies of children's attitudes when reciting the Pledge. In the oral arguments, Newdow stated that the President of the United States considered the Pledge a prayer (Record, p. 28). An in depth study pertaining to the religious perceptions of school children's interpretations of the words "under God" is strongly recommended. Under Lee and Santa Fe, Government may not endorse one religious belief over another at the

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expense of the participation of the non-believer. A study of attitudes and perceptions when reciting the Pledge would clarify the ambiguity of both sides of the argument which were presented in Newdow.

Justice O'Connor's opinion would classify certain phrases that have been woven into our country's governmental system as ceremonial deism. In Justice O'Connor's opinion these ceremonial deisms because of their general reference to "God" and those references being of minimal content should be allowed to pass under the "constitutional radar" as non-violations of the Establishment Clause. Further study is recommended with regard to Laycock's brief in support of the respondent (Motion for Leave to File Brief and Brief of Rev. Dr. Betty Jane Bailey, Rev. Dr. J. Martin Bailey, Rabbi Leonard I. Beerman, Rev. Terry N. Cantrell, Rev. Dr. Harvey Cox, et al) pertaining to the question of whether Government is asking school children and/or its citizenry to make a "sincere" statement as to the belief in one true God or whether it is asking its citizenry to take the name of the Lord in vain. "Neither request is consistent with government's duty of neutrality toward and among religions" (Laycock, 2004, p. 225).

Phillip Hamburger (2002) has traced the evolution of the historical and political implications of the Establishment Clause in his book, Separation of Church and State. As stated throughout this dissertation, the cultural, historical, and religious diversity in our country has been increasing dramatically. Further research is needed with regard to the evolution of precedent in the Court's decisions between the Equal Protection Clause contained in the Fourteenth Amendment and the Free Exercise Clause in the First Amendment as they apply to governmental endorsement of religion in it representation of neutrality towards all of its citizens.

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This researcher was able to attend the oral argument of Newdow, 2004. This researcher found the differences of assuredness in the reactions of the appellants and respondent to be the most interesting aspect of the oral argument. The ability of the Justices to ask questions during both sides of the presentations before the Court proved interesting in the different abilities of the appellants and respondents to react to the questions in justifying their argument. A reading of the transcript does not accurately reflect this researcher's perceptions of the appellants not being as well prepared for the questions as opposed to the assured well preparedness that was demonstrated by Newdow.

A further aspect that this researcher found interesting was the individual questions of the Justices. The Justices seemed to ask questions in order to get certain points of law presented out in the open, most particularly Justice Ginsberg's questions with regard to the singing of "God Bless America" and Justice Kennedy's exploration of prudential standing. This researcher had the perception that some of the members of the Court had already reached their own individual decisions with regard to Newdow's claim and wanted to have the concerns of those decisions expressed in open court so that they could be addressed in the written opinions. Further research is needed in the analysis of oral argument as it pertains to the decision-making process of the Court.

Epilogue

In vacating the Ninth Circuit's decision, the majority of the Court has postponed and avoided the merits of Newdow's argument. The question still remains as to whether a public school district policy that requires teachers to lead willing students in reciting the

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Pledge of Allegiance, which includes the words "under God," is a violation of the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment. Previous precedents of the Court in Lee and Santa Fe, which were argued by Newdow, support the argument that the Pledge policy is a violation. Further clarification of the Endorsement test by Justice O'Connor in her concurring opinion classifies the phrase "under God" as a ceremonial deism and as *de minimus*; therefore, it flies under the constitutional radar of the Establishment Clause. Further carving of Establishment Clause jurisprudence will be obtained in the opinions delivered by the Court for the Ten Commandment cases. Those precedents will then be applied in the new complaint that has been filed by Newdow on the behalf of three other families. The membership of the Court, most probably, will be changing within the next five years. New justices will provide new insight and hopefully further clarification to the meaning of the words "Congress shall make no law respecting an establishment of religion."

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Brief of *Amicus Curiae* Center for Individual Freedom in Support of Petitioners

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the Petitioners

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Brief of Texas, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming as *Amici Curiae* in Support of Petitioners

Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of the American Jewish Congress in Support of Petitioners

Motion for Leave to File Brief of *Amici Curiae* and Brief of *Amici Curiae*, United States Congress Member Ron Paul, California State Assembly Member Ray Haynes, Gilbert Armijo, National Layers Association, Traditional Values Coalition, Traditional Values Coalition Education and Legal Institute, Campaign for California Families, Pastors Information Resource Council, The Pro-Family Law Center, West Covina Unified School District, The Louisiana Family Forum,

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Cathy Fitzgerald, Daniel S. Hahn, Lawrence Spicher, Mark Cooper, Natisha Cooper, Lana Loza, Janice Walker, Evelyn Bradley, Marjorie Silveira, in Support of Petitioners' Petition for Writ of *Certiorari*

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Amicus Curiae Brief of the Freedom from Religion Foundation, Inc. in Support of the Rev. Dr. Michael A. Newdow, Respondent

Amicus Curiae Brief of Religious Scholars and Theologians in Support of Respondent

Brief of *Amici Curiae* the American Humanist Association, The Association of Humanistic Rabbis, The Humanist Society, The HUUmanists, The Society for Humanistic Judaism in Support of Respondent

Brief *Amicus Curiae* of American Atheists in Support of Respondents

Brief *Amicus Curiae* of Anti-Defamation League in Support of Respondent

Brief *Amicus Curiae* of Atheists for Human Rights in Support of Respondent

Brief *Amicus Curiae* of Atheist Law Center in Support of Respondent

Brief *Amicus Curiae* of Barbara A. McGraw in Support of Affirmance

Brief *Amicus Curiae* of Buddhist Temples, Centers and Organizations Representing over 300,000 Buddhist Americans in Support of Respondents

Brief *Amicus Curiae* of Historians and Law Scholars in Support of Respondent

Brief *Amicus Curiae* of Rob Sherman Advocacy

Brief *Amicus Curiae* of The Church of Freethought in Support of Respondent

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Brief *Amicus Curiae* of United Fathers of America, and Alliance for Non-Custodial Parents Rights in Support of Respondent

Brief of *Amicus Curiae* Seattle Atheists, Secular Coalition for America, Atheist Community of Austin, and Institute for Humanist Studies, in Support of Respondent

Brief of Christopher L. Eisgruber and Lawrence G. Sager as *Amici Curiae* Supporting Respondent Michael A. Newdow

Brief of the Council for Secular Humanism as *Amicus Curiae* in Support of Respondent Michael A. Newdow

Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of Associated Pantheist Groups in Support of Respondent

Motion for Leave to File Brief and Brief of Rev. Dr. Betty Jane Bailey, Rev. Dr. J. Martin Bailey, Rabbi Leonard I. Beerman, Rev. Terry N. Cantrell, Rev. Dr. Harvey Cox, Rev. Dr. Robin Crawford, Rabbi Dan Fink, Pastor Richard Lee Finn, Rev. Dr. Ronald B. Flowers, Rev. Robert Forsberg, Rev. Dr. C. Welton Gaddy, Rev. Dr. David M. Graybeal, Pastor Robert Wayne Hayward, Rev. Joan Huff, Rabbi Steven B. Jacobs, Pastor Kevin James, Rev. Neal Matson, Pastor Marvin Moore, Rev. Dr., Bruce A Pehrson, Rev. Dr. Albert M. Pennybacker, Rev. Alice de V. Perry, Rev. Brenda Bartella Peterson, Rev. Dr. Bruce Prescott, Rev. Katherine Hancock, Ragsdale, Rev. Dr. George R. Regas, Rev. Dr. Duke Robinson, Rev. Dr. George Rupp, Rev. Dr. Paul D. Simmons, Rev. Jerald M.Stinson, Rev. Deborah Streeter, Pastor Samuel Thomas, Jr., Rev. Charles White, and the Unitarian Universalist Association as *Amici Curiae* Supporting

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Respondent Michael A. Newdow

Briefs for the Petitioners

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Petitioners' Brief on the Merits, Elk Grove Unified School District, Terence J. Cassidy, Counsel of Record

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