

What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance

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Many Americans can recall reciting the Pledge of Allegiance as schoolchildren. This patriotic ritual is part of the common experience of those raised in the United States—perhaps not a significant personal experience for most people, but nonetheless one that is shared and remembered by all those who participated. Until last year, most Americans had probably never considered that the routine recitation of the Pledge in the public schools might violate the Constitution's prohibition on government establishments of religion, or, to use the common phrase, might breach the "separation of church and state."

Much of the country was shocked when a federal appeals court ruled in June 2002 that the inclusion of the words "under God" in the Pledge of Allegiance was unconstitutional. The U.S. Court of Appeals for the Ninth Circuit held that the federal statute codifying the Pledge, as well as a California school district's policy providing for recitation of the Pledge, violated the Establishment Clause of the First Amendment.¹ In February 2003, the Ninth Circuit amended its decision, finding the school district policy unconstitutional on narrower grounds, while declining to address the validity of the federal statute.² At the same time, the full Ninth Circuit denied a motion to rehear the case *en banc*.³

This Article suggests that the Ninth Circuit's decision reflects a valid interpretation of both the Constitution's meaning and of the Supreme Court's Establishment Clause doctrine. It also argues that the theory most likely to be invoked to overrule the decision—a theory that can be described as "historical acknowledgement"—should be rejected.

Part I will describe the Ninth Circuit panel's rationale, in both its June 2002 opinion and its February 2003 amended opinion, for declaring

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¹ *Newdow v. U.S. Cong. (Newdow I)*, 292 F.3d 597 (9th Cir. 2002), *amended by Newdow v. U.S. Cong. (Newdow II)*, No. 00-16423, 2003 WL 554742 (9th Cir. Feb. 28, 2003) (order stayed).

² *Newdow v. U.S. Cong. (Newdow II)*, No. 00-16423, 2003 WL 554742 (9th Cir. Feb. 28, 2003).

³ *Id.*

the Pledge's religious language unconstitutional. Part II will argue that *Newdow* is consistent with the bulk of relevant Supreme Court precedent. In Part III, I will anticipate the arguments that will likely be used to overrule the *Newdow* decision, focusing in particular on historical acknowledgement. Part IV will seek to refute the force of these arguments and to describe why the religious language in the Pledge causes real damage in violation of the Constitution. Part V will argue for a reconciliation of the Supreme Court's inconsistent Establishment Clause doctrine. Part VI will discuss the ruling in light of major theories of the religion clauses.

I. *NEWDOW V. U.S. CONGRESS*

A. *Newdow I*

In June 2002, a three-judge panel of the Ninth Circuit held unconstitutional the federal statute inserting "under God" into the Pledge of Allegiance, as well as a California school district's policy requiring teacher-led recitation of the Pledge.⁴

The Pledge of Allegiance was written in 1892 by a socialist Baptist minister.⁵ As codified by Congress in 1942, 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."⁶ Congress amended the law in 1954 by adding the phrase "under God" after the word "Nation."⁷ According to the amendment's congressional sponsors, its purpose was to distinguish America from atheistic communism, affirm the nation as a religious one, and infuse children with the belief that the United States is under God.⁸

California law mandates that the state's public schools start each school day with "appropriate patriotic exercises" and provides that the recitation of the Pledge of Allegiance satisfies this requirement.⁹ To implement this law, the Elk Grove Unified School District adopted a policy requiring that "[e]ach elementary school class [shall] recite the pledge of allegiance to the flag once each day."¹⁰ The daughter of the plaintiff, Mi-

⁴ *Id.*

⁵ See Bill W. Sanford, Jr., *Separation v. Patriotism: Expelling the Pledge from School*, 34 ST. MARY'S L.J. 461, 464–65 (2003).

⁶ Act of June 22, 1942, ch. 435, § 7, 56 Stat. 377, 380.

⁷ Act of June 14, 1954, ch. 297, 68 Stat. 249. As currently codified, the Pledge reads: "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." 4 U.S.C. § 4 (2000).

⁸ See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2118–21 (1996).

⁹ CAL. EDUC. CODE § 52720 (Deering 2001).

¹⁰ *Newdow I*, 292 F.3d at 600.

chael Newdow, attended an Elk Grove elementary school, where her teacher led her class in reciting the Pledge as codified in federal law.¹¹

Newdow filed suit in the Eastern District of California challenging the constitutionality of the federal statute, the California statute, and the school district policy.¹² He did not claim that his daughter was required to recite the Pledge.¹³ He did claim, however, that his daughter was injured when she was forced to “watch and listen as her state-employed teacher in her state-run school [led] her classmates in a ritual proclaiming that there is a God, and that our’s [sic] is ‘one nation under God.’”¹⁴ The school district filed a motion to dismiss for failure to state a claim, in which the United States joined.¹⁵ The district court granted the motion to dismiss, and Newdow appealed the dismissal to the Ninth Circuit Court of Appeals.¹⁶

On appeal, a two-judge majority of the three-judge Ninth Circuit panel¹⁷ ruled both the federal law and the school district policy unconstitutional under the First Amendment’s Establishment Clause.¹⁸ The majority noted that the Supreme Court had used three different tests to assess Establishment Clause challenges:¹⁹ (1) the three-part test from *Lemon v. Kurtzman*;²⁰ (2) the endorsement test first articulated in Justice O’Connor’s concurrence in *Lynch v. Donnelly*²¹ and later adopted by a majority in *County of Allegheny v. ACLU*;²² and (3) the coercion test upon which the Court relied in *Lee v. Weisman*.²³ Since the Supreme Court continues to use all three tests, the panel felt “free to apply any or all of the three tests,

¹¹ *Id.*

¹² *Id.* at 601.

¹³ *Id.* Such a requirement, of course, would directly violate the holding of *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (holding that forcing students to recite the Pledge of Allegiance violated the students’ free speech rights under the First Amendment).

¹⁴ *Newdow I*, 292 F.3d at 601 (quoting plaintiff).

¹⁵ *Id.*

¹⁶ *Id.* Because the State of California did not join the motion to dismiss, and because no arguments related to the state statute were advanced either before the district court or on appeal, the Ninth Circuit did not address the validity of the California law. *Id.* at 602.

¹⁷ Judge Goodwin wrote the opinion for the court, in which Judge Reinhardt joined. Judge Fernandez dissented from the court’s Establishment Clause holdings.

¹⁸ The court first found that Newdow had standing to challenge both the Elk Grove Unified School District policy, *id.* at 603, and the federal law, *id.* at 605. The dissenting judge concurred on the standing issues, though he expressed “serious misgivings” about Newdow’s standing to attack the federal statute. *Id.* at 612 n.1 (Fernandez, J., concurring in part and dissenting in part).

¹⁹ *Newdow I*, 292 F.3d at 605.

²⁰ 403 U.S. 602, 612–13 (1971) (“First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster ‘an excessive government entanglement with religion.’”).

²¹ 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring).

²² 492 U.S. 573 (1989).

²³ 505 U.S. 577 (1992).

and to invalidate any measure that fails any one of them.”²⁴ For the sake of completeness, the panel chose to analyze the claims under all three tests.²⁵

Turning first to the endorsement test, the majority found the federal law’s inclusion of “under God” in the Pledge, as well as the school district’s recitation policy, to be endorsements of religion.²⁶ The court rejected the notion that the phrase was merely a description of the historical importance of religion in the United States or an acknowledgement that many Americans believe in God.²⁷ Instead, the court found the Pledge’s statement that the United States is “under God” to be a profession of a specific religious belief—monotheism.²⁸ The majority stated that the Pledge takes a position with regard to a fundamental religious question, whether God exists, in contravention of the principle of government neutrality toward religion.²⁹ The panel cited *West Virginia Board of Education v. Barnette*,³⁰ in which the Supreme Court emphasized that the Pledge was not merely descriptive, but rather normative and ideological.³¹ “To recite the Pledge is . . . to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism.”³²

Applying the language of Justice O’Connor’s endorsement test, the panel found that the Pledge sends a message to non-believers “that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”³³ The panel agreed with Justice Kennedy’s dissent in *Allegheny*, that “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.”³⁴

The panel then found that the Act and the policy violated the coercion test.³⁵ The panel relied heavily on *Lee v. Weisman*,³⁶ in which the

²⁴ *Newdow I*, 292 F.3d at 607.

²⁵ *Id.*

²⁶ *Id.* at 607, 608.

²⁷ *Id.* at 607.

²⁸ *Id.*

²⁹ *Id.*

³⁰ 319 U.S. 624. For a summary of the holding of this opinion, see *supra* note 13.

³¹ *Newdow I*, 292 F.3d at 608. *Barnette*, unlike *Newdow*, involved a school policy that forced students to salute the flag and recite the Pledge, and it was decided before “under God” was added to the Pledge in 1954.

³² *Id.* at 607.

³³ *Id.* at 608 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)).

³⁴ *Id.* (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 672 (Kennedy, J., dissenting)). For Kennedy, this was a reason to reject the endorsement test. *Allegheny*, 492 U.S. at 672. He would have upheld the crèche in *Allegheny*, and he indicated he would uphold the Pledge of Allegiance. *Id.*

³⁵ *Newdow I*, 292 F.3d at 608.

³⁶ 505 U.S. 577 (1992).

Supreme Court struck down a graduation prayer as coercive even though students were not required to pray along. As in *Lee*, the recitation of the Pledge puts “students in the untenable position of choosing between participating in an exercise with religious content or protesting.”³⁷ The Supreme Court in *Lee*, employing a broad concept of coercion, held that “the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position.”³⁸ Like the prayer in *Lee*, the majority felt that the Pledge of Allegiance may appear to the non-believer to be “an attempt to enforce a ‘religious orthodoxy’ of monotheism.”³⁹ *Lee* is especially apropos because, like *Newdow*, it involved schoolchildren, whom the Supreme Court had found particularly susceptible to government coercion.⁴⁰ As for the federal act, the panel found that it too had a coercive effect—its context and history showed that Congress intended it to lead to the recitation by schoolchildren of “under God” as part of the Pledge.⁴¹ President Eisenhower announced upon signing the bill, “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.”⁴²

Turning finally to the *Lemon* test, the Ninth Circuit panel first found that the federal law violated the test’s “purpose” prong.⁴³ In defense of the Pledge statute, the United States had urged the court to recognize that the Pledge of Allegiance as a whole had secular purposes, including the solemnization of public occasions.⁴⁴ The court, however, concluded that the proper focus was on the 1954 Act alone (inserting “under God”), concluding that its “sole purpose was to advance religion”⁴⁵ The panel cited the House Report on the 1954 act, which included the statement: “The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.”⁴⁶

The school district’s recitation policy, on the other hand, did have a secular purpose: to foster patriotism.⁴⁷ The panel, however, found that despite the secular purpose, the policy had the impermissible effect of

³⁷ *Newdow I*, 292 F.3d at 608.

³⁸ *Id.* at 609 n.9 (quoting *Lee*, 505 U.S. at 593).

³⁹ *Id.* at 609.

⁴⁰ *Id.*

⁴¹ *Id.* at 605, 609.

⁴² *Id.* at 609.

⁴³ *Id.* Since the law failed the “purpose” prong, the panel declined to apply the test’s other prongs. *Id.* at 611.

⁴⁴ *Id.* at 609–10.

⁴⁵ *Id.* at 610.

⁴⁶ *Id.* (quoting H.R. REP. NO. 83-1693, at 1–2 (1954)).

⁴⁷ *Id.* at 611.

promoting religion, and thus it failed *Lemon*'s second prong.⁴⁸ Given the impressionability of schoolchildren and the confined school environment, the majority found the policy "highly likely to convey an impermissible message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God."⁴⁹

Judge Fernandez dissented from the panel's Establishment Clause holdings. He declined to apply any of the specific Supreme Court tests cited by the majority or to lay out in depth any particular theory of the religion clauses, dismissing such tests and concepts as "legal world abstractions and ruminations."⁵⁰ Instead, his dissent relied primarily on the assertion that any harm caused by the Pledge's religious language is so "miniscule," "de minimis," or "picayune at most,"⁵¹ that there was no constitutional violation.⁵² In support of this proposition, Judge Fernandez pointed to relevant dicta in five Supreme Court cases.⁵³ He also expressed concern that the majority's analysis would lead to the invalidation of "God Bless America," "America the Beautiful," the fourth stanzas of both "The Star

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 613 (Fernandez, J., concurring in part and dissenting in part). The judge did give some clues as to his views on the religion clauses. He stated that the Constitution was not intended to drive religion out of "public thought." *Id.* (Fernandez, J., concurring in part and dissenting in part). He declared that of all the "tests and concepts which have floated to the surface from time to time," he preferred the notion of neutrality, meaning that government may neither discriminate in favor of nor against a religion or religions. *Id.* (Fernandez, J., concurring in part and dissenting in part). He did not explain how the words "under God" in the Pledge of Allegiance were non-discriminatory, or whether he would bar discrimination against non-believers. He also implied that to run afoul of the religion clauses, the government must establish a "theocracy" or "suppress" religious belief. *Id.* at 613, 614 n.4 (Fernandez, J., concurring in part and dissenting in part). Not surprisingly, he did not cite any Supreme Court cases for these views on the religion clauses, though he did cite two of his own opinions (a dissent and a concurrence). *Id.* at 613 (Fernandez, J., concurring in part and dissenting in part).

⁵¹ *Id.* at 613 (Fernandez, J., concurring in part and dissenting in part).

⁵² *Id.* at 615 (Fernandez, J., concurring in part and dissenting in part).

⁵³ *Id.* at 613 (Fernandez, J., concurring in part and dissenting in part). These various majority, concurring, and dissenting opinions were joined over the years by Justices Burger, Rehnquist, Harlan, Brennan, White, Goldberg, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia, and Kennedy. *Id.* at 614 (Fernandez, J., concurring in part and dissenting in part). The following opinions cited by Fernandez suggested approval of the words "under God" in the Pledge of Allegiance, at least to some extent: *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984); *County of Allegheny v. ACLU*, 492 U.S. 573, 672-73 (1989) (Kennedy, J., concurring in part and dissenting in part); *Wallace v. Jaffree*, 472 U.S. 38, 78 n.5 (1985) (O'Connor, J., concurring); and *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting). Fernandez could also have included: *Lee v. Weisman*, 505 U.S. 577, 639 (1992) (Scalia, J., dissenting); *Wallace*, 472 U.S. at 88 (Burger, C.J., dissenting); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 304 (1963) (Brennan, J., concurring); and *Engel v. Vitale*, 370 U.S. 421, 450 (1962) (Stewart, J., dissenting). Furthermore, one of the opinions cited, Justice Blackmun's majority opinion in *Allegheny*, puts to the side the question of the constitutionality of "nonsectarian references to religion" such as the Pledge; it did not express a view either way. *Allegheny*, 492 U.S. at 602-03.

Spangled Banner” and “My Country ‘Tis of Thee,” and references to God on currency.⁵⁴

The Ninth Circuit’s decision in *Newdow* quickly provoked significant criticism. United States Senators and Representatives took to the floors of their respective chambers to decry the ruling.⁵⁵ The Senate unanimously approved a resolution denouncing the decision.⁵⁶ The House approved a similar resolution by a vote of 416 to 3.⁵⁷ On the same day that the Ninth Circuit issued its opinion, President Bush called it “ridiculous,” House Majority Whip Tom DeLay deemed it “sad” and “absurd,” and Senate Majority Leader Tom Daschle said it was “nuts.”⁵⁸ Senator John Edwards called the opinion “wrong,”⁵⁹ and Senator Robert Byrd called the judges in the *Newdow* majority “stupid.”⁶⁰ Major newspapers also criticized the decision.⁶¹

In an unusual move, the day after its decision, the panel stayed the enforcement of its decision pending appeal.⁶² The U.S. Department of Justice petitioned the Ninth Circuit to rehear the case *en banc*, as did the Elk Grove school district.⁶³ Meanwhile, on December 4, 2002, the panel rejected a motion by the student’s mother to strip Newdow of standing on the ground that the mother had sole legal custody.⁶⁴

B. Newdow II

On February 28, 2003, the Ninth Circuit panel amended its decision, and the full circuit declined to rehear the case *en banc*.⁶⁵ The amended decision (*Newdow II*) is significantly narrower than the panel’s June 2002 opinion.

First, the panel declined to reach the issue of whether the federal Pledge of Allegiance statute is unconstitutional. The panel noted that the

⁵⁴ *Newdow I*, 292 F.3d at 614–15 (Fernandez, J., concurring in part and dissenting in part).

⁵⁵ See 148 CONG. REC. S6105–S6112 (daily ed. June 27, 2002); 148 CONG. REC. H4125–H4136 (daily ed. June 28, 2002).

⁵⁶ S. Res. 292, 107th Cong., 148 CONG. REC. S6105 (2002).

⁵⁷ H.R. Res. 459, 107th Cong., 148 CONG. REC. H4135 (2002).

⁵⁸ Charles Lane, *U.S. Court Votes to Bar Pledge of Allegiance: Use of “God” Called Unconstitutional*, WASH. POST, June 27, 2002, at A1.

⁵⁹ *Id.*

⁶⁰ Carl Hulse, *Lawmakers Vow to Fight Judges’ Ruling on the Pledge*, N.Y. TIMES, June 27, 2002, at A6.

⁶¹ See, e.g., Editorial, *One Nation Under Blank*, WASH. POST, June 27, 2002, at A30.

⁶² David Von Drehle, *Judge Blocks Pledge Decision During Appeals: Republicans Seek Political Gain, But Ruling Spurs Bipartisan Ire*, WASH. POST, June 28, 2002, at A6.

⁶³ Henry Weinstein, *Court Affirms Pledge Ruling: Appeals Panel Rebuffs Attempts to Nullify Its Decision Outlawing the Phrase “Under God,”* L.A. TIMES, Dec. 5, 2002, at B1, 2002 WL 103223481.

⁶⁴ *Newdow v. U.S. Cong.*, 313 F.3d 500 (9th Cir. 2002).

⁶⁵ *Newdow v. U.S. Cong. (Newdow II)*, No. 00-16423, 2003 WL 554742 (9th Cir. Feb. 28, 2003).

district court had not reached the issue, finding only that the school district policy was constitutional.⁶⁶ Given its finding that *Newdow* was entitled to injunctive relief against recitation of the Pledge, and given the rules for granting declaratory relief, the Ninth Circuit panel doubted that the district court would have granted the declaratory relief sought by *Newdow* regarding the 1954 Act.⁶⁷ On remand, however, *Newdow* could still ask the district court to declare the federal statute unconstitutional, in addition to issuing the injunction against the school district policy.⁶⁸

Second, the Ninth Circuit's amended opinion rested only on the coercion test in finding that the school district's recitation policy violated the Establishment Clause.⁶⁹ While the panel still felt free to apply any of the Supreme Court's three tests, it emphasized that it was unnecessary to apply the *Lemon* or endorsement tests, once the panel found that the policy was impermissibly coercive.⁷⁰ Thus, the panel abandoned its original strategy of completeness in order to focus on the ground it presumably felt was the strongest.⁷¹

The amended opinion, however, did not simply discard its previous analysis under the endorsement and *Lemon* tests, nor did it completely ignore the 1954 Act. Rather, it folded much of this analysis into its coercion holding. For example, the amended decision still argues that the statement that the nation is "under God" expresses a belief in monotheism, and that the Pledge has a normative and ideological character, as the Supreme Court recognized in *Barnette*.⁷² These arguments were part of *Newdow I*'s endorsement holding.⁷³ The opinion also cites the legislative history of the 1954 Act to bolster its finding of coercion,⁷⁴ whereas *Newdow I* had considered this history in applying *Lemon*'s purpose prong to the federal statute.⁷⁵

The amended opinion also addressed the criticism that the original opinion ignored Supreme Court dicta regarding the constitutionality of the Pledge. The panel focused on the two times that a Supreme Court majority opinion specifically addressed the Pledge of Allegiance in dicta—in *Lynch v. Donnelly* and in *County of Allegheny v. ACLU*.⁷⁶ According to

⁶⁶ *Id.* at *22.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at *18.

⁷⁰ *Id.*

⁷¹ This decision could have the effect of prolonging the litigation: if the Supreme Court were to reverse the coercion holding, the Ninth Circuit would still be free to take up again the endorsement or *Lemon* tests, or both, which could result in further appeals to the Supreme Court.

⁷² *Id.* at *19.

⁷³ See *supra* notes 28–32 and accompanying text.

⁷⁴ *Newdow II*, 2003 WL 554742, at *20 (concluding that Congress and the President intended the religious words to be recited by schoolchildren).

⁷⁵ See *supra* notes 45–46 and accompanying text.

⁷⁶ *Newdow II*, 2003 WL 554742, at *20. For a list of dicta regarding the Pledge, in-

the panel's majority, in neither case did the Court suggest it was permissible for schools to lead recitations of the Pledge.⁷⁷

At the same time that the Ninth Circuit ordered *Newdow I* amended, it announced—without opinion—that the petition for rehearing *en banc* had failed to gain the support of a majority of the full circuit court.⁷⁸ Nine judges dissented from the denial of *en banc* review; there were two dissenting opinions. Judge McKeown's one-paragraph opinion simply stated that the case was sufficiently important to be reheard *en banc*.⁷⁹ Judge O'Scannlain, writing for six judges, issued a scathing attack on the *Newdow II* decision, which he considered a barely modified version of *Newdow I*.⁸⁰ Reviewing the Supreme Court's school prayer cases, O'Scannlain concluded that the Supreme Court had barred only religious acts (such as prayer) in public schools, but that it had not barred mere references to religion, a category that includes the Pledge of Allegiance.⁸¹ The panel's decision "contradicts our 200-year history and tradition of patriotic references to God" and conflicts with the Founders' understanding.⁸² O'Scannlain feared that *Newdow II* would forbid recitation of the Constitution, Declaration of Independence, Gettysburg Address, and National Motto, in addition to singing the National Anthem, since they also contain religious references; he also feared it would forbid observation of the national holidays of Thanksgiving and Christmas.⁸³

The Elk Grove School District quickly announced that it would appeal *Newdow II* to the Supreme Court.⁸⁴ On March 4, 2003, the Ninth Circuit stayed its decision for ninety days; if the school district files an appeal with the Supreme Court within the ninety days, the stay will be extended until the Court acts on the case.⁸⁵

II. NEWDOW AND PRECEDENT

A. The Three Tests

The Supreme Court's religion clause cases are not the clearest area of its jurisprudence, and most of the recent cases reveal deep divisions within the Court itself. Nevertheless, the three tests employed by the

cluding concurrences and dissents, see *supra* note 53. Though the panel did not say so, one can assume it deliberately selected only majority opinions.

⁷⁷ *Newdow II*, 2003 WL 554742, at *20.

⁷⁸ *Id.* at *1. The vote was 15 to 9 for denial. Lyle Denniston, *US Appeals Court Eases Pledge Ruling*, BOSTON GLOBE, Mar. 1, 2003, at A3.

⁷⁹ *Newdow II*, 2003 WL 554742, at *13–*14 (McKeown, J., dissenting).

⁸⁰ *Id.* at *3–*13 (O'Scannlain, J., dissenting).

⁸¹ *Id.* at *4–*10 (O'Scannlain, J., dissenting).

⁸² *Id.* at *10 (O'Scannlain, J., dissenting).

⁸³ *Id.* at *4, *10–*11 (O'Scannlain, J., dissenting).

⁸⁴ *District to Take Fight on Pledge to Top Court*, BOSTON GLOBE, Mar. 4, 2003, at A2.

⁸⁵ Henry Weinstein, *Ban on Reference to God Delayed*, L.A. TIMES, Mar. 5, 2003, at B1.

Ninth Circuit majority in *Newdow I* represent the major Establishment Clause tests developed by the Supreme Court.

In its 1971 decision in *Lemon v. Kurtzman*, the Court propounded a three-part test for Establishment Clause challenges. “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.’”⁸⁶ In *Lemon*, the Court ruled that a state’s reimbursement of private schools for certain costs, as well as its payments of a salary supplement to private school teachers, involved excessive entanglement of church and state.⁸⁷ The Court subsequently used the *Lemon* test to strike down other government programs of assistance to private schools.⁸⁸ From 1971 to 1992, the Court applied the principles from *Lemon* in all but one of its thirty-one Establishment Clause decisions, including all public school cases.⁸⁹ In more recent years, however, the test has been increasingly disfavored. The Court has essentially eliminated entanglement as a separate prong;⁹⁰ it is now merely one factor to be considered in applying the effect prong.⁹¹

The endorsement test was first formulated by Justice O’Connor in her concurrence in *Lynch v. Donnelly*.⁹² Effectively combining the first two prongs of *Lemon*, it asks whether the government action has the purpose or effect of endorsing (or disapproving of) religion.⁹³ O’Connor explained, “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”⁹⁴ In *Lynch*, O’Connor would have used the endorsement test to uphold a publicly sponsored crèche display that was surrounded by secular holiday symbols.⁹⁵ A majority of the Court subsequently adopted the endorsement test in prohibiting an unadorned crèche display on public property, while upholding a public menorah displayed in a secularized context.⁹⁶

⁸⁶ 403 U.S. 602, 612–13 (1977) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)) (citation omitted).

⁸⁷ *Id.* at 614.

⁸⁸ See *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Comm. for Pub. Educ.*, 413 U.S. 472 (1973).

⁸⁹ *Lee v. Weisman*, 505 U.S. 572, 603 n.4 (1992) (Blackmun, J., concurring).

⁹⁰ See *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2476 (2002); *Mitchell v. Helms*, 530 U.S. 793, 807–08 (2000).

⁹¹ *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997). *Newdow* did not refer to this development.

⁹² *Lynch v. Donnelly*, 465 U.S. 668, 687–90 (1984) (O’Connor, J., concurring).

⁹³ *Id.* (O’Connor, J., concurring).

⁹⁴ *Id.* at 688 (O’Connor, J., concurring).

⁹⁵ *Id.* at 692–94 (O’Connor, J., concurring).

⁹⁶ *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

Finally, in *Lee v. Weisman*, the Court applied a coercion test to strike down prayers at a public school graduation.⁹⁷ Invoking a broad definition of coercion, it found the prayers coercive, and thus unconstitutional, even though students were not required to participate in the prayers.⁹⁸ At other times, however, the Court has clarified that while coercion is sufficient, it is not necessary for an Establishment Clause violation, since a requirement of religious coercion would seem to render the Free Exercise Clause redundant.⁹⁹

B. Religion Inside and Outside Schools

Newdow II accurately pointed to another theme running through the Supreme Court's religion clause jurisprudence: whatever test is used, the government must be especially careful to treat religion neutrally in public school settings. The Court has struck down the display of the Ten Commandments in public schools,¹⁰⁰ as well as laws that prohibit the teaching of evolution¹⁰¹ or promote the teaching of creationism in public schools.¹⁰² It has also invalidated school prayer initiated by school officials.¹⁰³

At the same time, the Court held that a school could not exclude a religious group that wanted to use school facilities for worship and prayer as part of an extracurricular after-school program that was open to other groups.¹⁰⁴ The religious group "[sought] nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. [A]llowing the Club to speak on school grounds would ensure neutrality, not threaten it."¹⁰⁵

In contradiction to this general theme of neutral treatment of religion in schools, however, some members of the Court have suggested in dicta that the recitation of the Pledge of Allegiance in schools is constitutional,

⁹⁷ 505 U.S. 577 (1992).

⁹⁸ *Id.* at 593.

⁹⁹ See *Allegheny*, 492 U.S. at 597–98 n.47; *Engel v. Vitale*, 370 U.S. 421 (1962). Justice Kennedy, who wrote for the Court in *Lee*, would generally require a finding of coercion. *Allegheny*, 492 U.S. at 659–62 (Kennedy, J., concurring in part and dissenting in part). In *Lee*, Justice Scalia criticized the majority's reliance on a broad notion of psychological coercion. *Lee*, 505 U.S. at 632 (Scalia, J., dissenting). He argued that the Establishment Clause only forbade "coercion . . . by force of law and threat of penalty." *Id.* at 640 (Scalia, J., dissenting).

¹⁰⁰ *Stone v. Graham*, 449 U.S. 39 (1980).

¹⁰¹ *Epperson v. Arkansas*, 393 U.S. 97 (1968).

¹⁰² *Edwards v. Aguillard*, 482 U.S. 578 (1987).

¹⁰³ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (involving student-led prayer at football games facilitated by the school district); *Lee v. Weisman*, 505 U.S. 577 (1992) (involving invocation by a rabbi at a middle school graduation); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (involving Bible readings and prayer at the beginning of every school day); *Engel v. Vitale*, 370 U.S. 421 (1962) (involving state-composed prayer).

¹⁰⁴ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

¹⁰⁵ *Id.* at 114.

even though the Pledge contains the words “under God.”¹⁰⁶ I will return to this point later.

Outside the public school setting, the Court has been less rigorous in enforcing notions of neutrality. In three cases from the 1980s, the Supreme Court upheld public sponsorship of religious practices or symbols. In 1983, it ruled that it was constitutional for a state-paid chaplain to offer a prayer at the beginning of each legislative day of a state legislature.¹⁰⁷ The next year, the Court allowed a city to erect a public Christmas display, including a crèche, during the holiday season.¹⁰⁸ The Court seemed to countenance some straying from strict neutrality, even by its own terms. It assumed, *arguendo*, that the Christmas display advanced religion “in a sense,” but concluded that any benefit to religion was “indirect, remote and incidental.”¹⁰⁹ In both *Marsh* and *Lynch*, the Court relied heavily on history, finding that legislative prayer was “deeply embedded in the history and tradition of this country,”¹¹⁰ and that government-sponsored crèches simply depict “the historical origins of this traditional event long recognized as a National Holiday.”¹¹¹ The Court observed that there “is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.”¹¹²

Five years after *Lynch*, the Court held unconstitutional a crèche in a county courthouse that was not part of a larger Christmas display.¹¹³ Without any context to detract from its religious message, the nativity scene constituted an endorsement of Christianity.¹¹⁴ At the same time, however, the Court upheld a public menorah, using reasoning similar to that in *Lynch*.¹¹⁵

The *Newdow I* panel seemed to apply the three major tests in a relatively straightforward manner, and *Newdow II* correctly pointed out similarities with *Lee v. Weisman*.¹¹⁶ Even a critic of the decision could concede that *Newdow I* was “rationally impeccable.”¹¹⁷ Given the outraged response to the decision, its rationale is surprisingly difficult to refute on its own terms. The Ninth Circuit’s judgment is quite consistent with Supreme

¹⁰⁶ See *supra* note 53 and accompanying text. But see *supra* notes 76–77 and accompanying text.

¹⁰⁷ *Marsh v. Chambers*, 463 U.S. 783 (1983).

¹⁰⁸ *Lynch v. Donnelly*, 465 U.S. 668 (1984).

¹⁰⁹ *Id.* at 683.

¹¹⁰ *Marsh*, 463 U.S. at 786.

¹¹¹ *Lynch*, 465 U.S. at 680.

¹¹² *Id.* at 674.

¹¹³ *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

¹¹⁴ *Id.* at 598.

¹¹⁵ *Id.* at 620.

¹¹⁶ For an argument that *Newdow* incorrectly applied the three tests, see Sanford, *supra* note 5 (arguing that the words “under God” in the Pledge of Allegiance do not endorse religion, are not coercive, and do not have the effect of promoting religion, and that the 1954 Act inserting “under God” had a secular purpose).

¹¹⁷ William E. Wiggin, *A Civil Liberties Paradox*, DEL. LAW., Fall 2002, at 36, 36.

Court holdings, particularly in school prayer cases, striking down religious activity in schools as endorsements, and even religious coercion.¹¹⁸ The decision is also consistent with the trend toward strict neutrality toward religion in other areas of the Court's religion clause jurisprudence, particularly in the areas of free exercise¹¹⁹ and government aid to religious organizations.¹²⁰

III. THE CASE AGAINST *NEWDOW*

What explains the widespread opposition to the Ninth Circuit's invalidation of a school district policy mandating recitation of the Pledge of Allegiance? This Part examines the arguments most often advanced in support of the constitutionality of the Pledge.

If the Supreme Court overturns the *Newdow* decision on substantive grounds, it is likely to employ a theory that might be condensed under the name "historical acknowledgement."¹²¹ This line of argument does not amount to a theory of the religion clauses as a whole, but is captured by such phrases as "acknowledgement," "history," "tradition," and a related concept of "de minimis injury." Elements of this argument appear in the Supreme Court dicta supporting the constitutionality of the inclusion of "under God" in the Pledge,¹²² and (more importantly) in the Court's holdings upholding government sponsorship of religious practices and symbols.¹²³

The basic argument has the following components: (1) the federal and state governments have historically incorporated religious symbols and practices into the public sphere before, during, and after the framing of the Constitution and the Bill of Rights; (2) from this it follows that the Framers did not intend to forbid such practices (sometimes called "ceremonial deism"), and they are therefore permissible today; (3) as long as

¹¹⁸ The Ninth Circuit may have been on shaky ground, however, in holding that the federal statute is coercive. Absent recitation policies in local school districts, an unnoticed provision of the U.S. Code endorsing theism could hardly be seen as coercing anyone to do anything. That there are such school policies does not seem to render the federal statutory language itself coercive.

¹¹⁹ See *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause does not exempt religious activities from burdens imposed by neutral laws of general applicability).

¹²⁰ See *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002) (holding a school voucher program with neutral criteria constitutional, even though most participants used vouchers to attend religious schools); *Mitchell v. Helms*, 530 U.S. 793, 801 (2000) (upholding lending of educational materials to public and private schools according to neutral criteria). It is important to note, however, that unlike most scholars, the Supreme Court has not sought to propound a unified meaning for both religion clauses. See *infra* Part VI (discussing scholarly theories).

¹²¹ It may instead rely on jurisdictional or standing grounds.

¹²² See *supra* note 53 and accompanying text.

¹²³ See *supra* notes 107–115 and accompanying text (discussing *Marsh v. Chambers* (upholding legislative prayer), *Lynch v. Donnelly* (upholding a crèche as part of a larger holiday display that included more secular symbols), and *County of Allegheny v. ACLU* (upholding a menorah surrounded by more secular holiday symbols)).

the tendency of current practices to establish religion is “no more than” these historical practices, they are permissible as mere “acknowledgements” of religion’s traditional and historical role in the nation’s public life; and (4) these practices have been going on since before 1791 without any negative effects, so there is no reason to forbid them now.

The argument begins with the observation that the colonies and the Founders frequently engaged in religious behavior in the public sphere. Many of the colonies had established churches,¹²⁴ excluded non-Protestants from office, and outlawed blasphemy.¹²⁵ Although Virginia took an early lead in protecting religious rights and was one of the first colonies to disestablish its church, it continued to open each legislative session with prayer.¹²⁶ Of course, the Declaration of Independence was explicitly religious.¹²⁷ The Court in *Lynch* gave great weight to the actions of the First Congress, which wrote the Bill of Rights and which included seventeen delegates to the Constitutional Convention.¹²⁸ The Court pointed out that “[i]n the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid chaplains for the House and Senate.”¹²⁹ The day after the First Amendment was proposed, Congress urged President Washington to proclaim “a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favours of Almighty God,” and Washington did so.¹³⁰ The First Congress also reenacted the Northwest Ordinance, which included grants for parochial schools in the Northwest territories. The Ordinance stated, “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”¹³¹

Some students of the Constitution have gone further, using these examples, as well as the history of the debates surrounding the adoption of the Bill of Rights, to argue that the Framers never intended government neutrality between religion and non-religion, but only sought to prevent the establishment of a national church or the preference of one sect over another.¹³² This view would allow not only symbolic acknowledgements of religion, but conceded endorsements such as school prayer.¹³³ This

¹²⁴ See 1 ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 37 (1950).

¹²⁵ See THOMAS CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 73, 221 (1986).

¹²⁶ See *Marsh v. Chambers*, 463 U.S. 783, 787 n.5 (1983).

¹²⁷ THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

¹²⁸ *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

¹²⁹ *Id.* at 674.

¹³⁰ *Id.* at 675 n.2 (quoting STOKES & PFEFFER, *supra* note 124, at 87 (rev. ed. 1964)).

¹³¹ *Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting) (quoting Northwest Ordinance, ch. 8, 1 Stat. 50 (1787)).

¹³² See *infra* note 248 and accompanying text.

¹³³ See *Wallace*, 472 U.S. at 100 (Rehnquist, J., dissenting); Edwin Meese III, The Su-

view has never been adopted by a majority of the Court. The Court has, however, cited these historical breaches in church-state separation when approving of such government “acknowledgements” of religion as the crèche in *Lynch*.¹³⁴ While the line between real endorsements and mere acknowledgements may seem illusory,¹³⁵ the Court has made clear that the historical acknowledgement doctrine justifies only limited types of government involvement with religion.

In condoning government sponsorship of religion, defenders of historical acknowledgement have relied not only on evidence from the founding era, but on subsequent historical practices. Such arguments are particularly relevant to *Newdow*, since the Pledge of Allegiance was not written until 1892,¹³⁶ and “under God” not added until 1954. The Pledge was unknown to the Framers. Explaining his support for school prayer, Justice Stewart cited longstanding historical practices such as: since John Marshall’s time, the Supreme Court has opened each day’s session with the plea “God save the United States and this Honorable Court”; both houses of Congress begin each day with prayer; every President has invoked God in his inaugural address; “The Star-Spangled Banner” contains religious language; a 1952 law urges the President to declare a National Day of Prayer every year; coins read “In God We Trust”; and in 1954 Congress added “under God” to the Pledge of Allegiance.¹³⁷ The *Lynch* majority declared: “There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.”¹³⁸ The Court went on to cite the national motto “In God We Trust” and the Pledge of Allegiance,¹³⁹ and it noted that all three branches, as well as public schools, have acknowledged the celebration of Christmas for 200 years.¹⁴⁰ In his partial dissent in *Allegheny*, Justice Kennedy argued that the Establishment Clause does not prohibit “[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage.”¹⁴¹ In upholding prayer in the Nebraska legislature, the Supreme Court observed,

preme Court of the United States: Bulwark of a Limited Constitution, Address Before the American Bar Association (July 9, 1985), in 27 S. TEX. L. REV. 455 (1986).

¹³⁴ See *supra* notes 128–130 and accompanying text.

¹³⁵ See William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson’s Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 782 (criticizing *Lynch*).

¹³⁶ See Sanford, *supra* note 5, at 464–65.

¹³⁷ *Engel v. Vitale*, 370 U.S. 421, 446–49 (1962) (Stewart, J., dissenting).

¹³⁸ *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

¹³⁹ *Id.* at 676.

¹⁴⁰ *Id.* at 686.

¹⁴¹ *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part); see also *Lee v. Weisman*, 505 U.S. 577, 631–32 (1992) (Scalia, J., dissenting) (approving of Kennedy’s history-based approach in *Allegheny*).

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.¹⁴²

Justice Brennan's (tentative) version of this theory is that ceremonial deism has been so longstanding, commonplace, and associated with civil government that it has lost its religious meaning:

The truth is that we have simply interwoven the motto ["In God We Trust"] so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits. This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded "under God."¹⁴³

While I remain uncertain about these questions, I would suggest that such practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood . . . as a form a [sic] "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.¹⁴⁴

The Court has been willing to uphold even new species of government "acknowledgement" of religion, as long as the challenged practice's tendency to establish religion is no greater than that of the historically accepted practices. Hence, the Court found that the nativity scene challenged in *Lynch* was "no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's mass.'"¹⁴⁵ In upholding legislative prayer, the Court concluded that, not only had it been practiced since the founding, but it "presents no more potential for establishment than" other

¹⁴² *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

¹⁴³ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring).

¹⁴⁴ *Lynch*, 465 U.S. at 716-17 (Brennan, J., dissenting).

¹⁴⁵ *Id.* at 683.

practices upheld by the Court.¹⁴⁶ The result is that the Supreme Court's major Establishment Clause tests have been supplemented (or eroded) by this "any more than" test.¹⁴⁷

The final step in this argument is clear from some of the excerpts above: as long as a challenged government practice has been exercised historically, or is no more dangerous than those exercised historically, it is not an unconstitutional establishment, endorsement, or promotion of religion. Rather, it is merely an "acknowledgement,"¹⁴⁸ "reminder,"¹⁴⁹ taking "note"¹⁵⁰ or "account,"¹⁵¹ or "recogni[tion]"¹⁵² of the "spiritual traditions of our Nation,"¹⁵³ "the role of religion in American life,"¹⁵⁴ "our religious heritage"¹⁵⁵ or "the religious beliefs and practices of the American people as an aspect of our national history and culture."¹⁵⁶

Many expressions of support for the historical acknowledgement theory of the Establishment Clause are sprinkled with an unmistakably favorable view of religion (theism in particular), coupled with either hostility or blindness toward the place of nonbelievers (or even more broadly, nontheists) in American society. The Court has declared, "We are a religious people whose institutions presuppose a Supreme Being."¹⁵⁷ It speaks respectfully of the nation's spirituality and religious history.¹⁵⁸ The dissent in *Newdow* laments that the majority's decision threatens to remove "a vestige of the awe we all must feel at the immenseness of the universe,"¹⁵⁹ assuming that all Americans think about God when they contemplate the universe. At the same time, the Supreme Court has feared that a "fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'"¹⁶⁰ The dissent in *Newdow* is similarly dismissive of nonbelievers who challenge their second-class status, stating that the Pledge is only objectionable "in the fevered eye" of those who would

¹⁴⁶ *Marsh*, 463 U.S. at 791.

¹⁴⁷ See Van Alstyne, *supra* note 135, at 783.

¹⁴⁸ *E.g.*, *Lynch*, 465 U.S. at 674; *id.* at 714 (Brennan, J., dissenting).

¹⁴⁹ *Id.* at 685.

¹⁵⁰ *Id.* at 680.

¹⁵¹ *Id.* at 714 (Brennan, J., dissenting).

¹⁵² *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 304 (1963) (Brennan, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 450 (1962) (Stewart, J., dissenting).

¹⁵³ *Engel*, 370 U.S. at 450 (Stewart, J., dissenting).

¹⁵⁴ *Lynch*, 465 U.S. at 674.

¹⁵⁵ *Id.* at 686.

¹⁵⁶ *Id.* at 716 (Brennan, J., dissenting).

¹⁵⁷ *Zorach v. Clauson*, 343 U.S. 306 (1952). This line has been repeated several times by the Supreme Court since Justice Douglas's opinion in *Zorach*. See, e.g., *Engel*, 370 U.S. at 450 (Stewart, J., dissenting); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *Lynch*, 465 U.S. at 675.

¹⁵⁸ See *supra* notes 124–156 and accompanying text.

¹⁵⁹ *Newdow v. U.S. Cong. (Newdow I)*, 292 F.3d 597, 615 (9th Cir. 2002) (Fernandez, J., concurring in part and dissenting in part).

¹⁶⁰ *Zorach*, 343 U.S. at 313.

seek to drive all religion out of public life.¹⁶¹ The dissent adds that excising religious imagery from official songs, coins, and pledges would “cool the febrile nerves of a few at the cost of removing the healthy glow conferred upon many citizens when the forbidden verses, or phrases, are uttered, read, or seen.”¹⁶² The message to nonbelievers: if you complain, you are overly fastidious, fevered, and febrile.

A final aspect of the historical acknowledgement approach is the assertion that “no baleful effects have been generated” by government references to God throughout history.¹⁶³ The implication of the Supreme Court’s Establishment Clause cases is that, while government practices that endorse religion send a message to nonadherents that they are outside the political community,¹⁶⁴ those practices that merely “acknowledge” religion do not. The Court has described the difference as one between “real threat and mere shadow.”¹⁶⁵

The *Newdow II* majority did not cite the Supreme Court’s historical acknowledgement holdings (*Marsh*, *Lynch*, and *Allegheny*),¹⁶⁶ but it clearly had them in mind when it stated: “The recitation that ours is a nation ‘under God’ is not a mere acknowledgement that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase . . . is normative.”¹⁶⁷ The majority, however, did not seek to explain whether the Pledge is different from the practices found constitutional in the historical acknowledgement cases, or why the majority declined to follow those cases. The *Newdow* dissent itself largely ignored the “historical acknowledgement” argument, choosing to rely primarily on the related idea of de minimis injury. It cited Supreme Court dicta supporting the Pledge for the proposition that the Court has never considered the Pledge a sufficient threat to the Establishment Clause to be unconstitutional.¹⁶⁸

IV. THE PROBLEM WITH HISTORICAL ACKNOWLEDGEMENT

Of course, unlike legislative prayer, the Pledge of Allegiance did not exist at the time of the framing of the Constitution, so critics of the *Newdow* decision are limited to the contention that the Pledge is *like* other practices that have existed since 1789. This is the argument implicit in

¹⁶¹ *Newdow I*, 292 F.3d at 614 (Fernandez, J., concurring in part and dissenting in part).

¹⁶² *Id.* at 615 (Fernandez, J., concurring in part and dissenting in part).

¹⁶³ *Id.* at 614 n.4 (Fernandez, J., concurring in part and dissenting in part).

¹⁶⁴ See *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring).

¹⁶⁵ *Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)).

¹⁶⁶ The panel did, however, address the dicta in *Lynch* and *Allegheny* relating to the Pledge. See *supra* notes 76–77 and accompanying text.

¹⁶⁷ *Newdow I*, 292 F.3d at 607.

¹⁶⁸ *Id.* at 613 (Fernandez, J., concurring in part and dissenting in part).

Supreme Court opinions supporting the constitutionality of the Pledge.¹⁶⁹ Indeed, it is hard to argue that the religious language in the Pledge is any more an establishment of religion than many practices of the founding generation. However, this argument necessarily presupposes the validity of looking to the specific practices of the Framers as a proper method of constitutional interpretation. At least in the case of the Pledge, it is not.

Originalism—the idea that the original understanding of those who framed and ratified the Constitution should guide our understanding of its meaning today¹⁷⁰—gained wide prominence in the 1980s, when Attorney General Meese proclaimed it the official constitutional philosophy of the Reagan Administration.¹⁷¹ That administration nominated two of originalism's greatest proponents to the Supreme Court, one successfully (Antonin Scalia) and one unsuccessfully (Robert Bork). As laid out by these thinkers, originalism has several attractive features. Perhaps most significantly, it appeals to a common sense of what judges' roles ought to be in a properly functioning constitutional democracy.¹⁷² Judges are not to overturn the will of legislative majorities absent a violation of a constitutional rights, as those rights were understood by the Framers.¹⁷³ To determine the Framers' intent, judges may look to the text, structure, and history of the Constitution, but are prohibited from inventing extra-constitutional rights.¹⁷⁴ Originalism seeks to promote the rule of law by imparting to the Constitution a fixed, continuous, and predictable meaning.¹⁷⁵ It seeks to promote democracy by limiting the circumstances under which unelected judges may invalidate the acts of legislative majorities.¹⁷⁶

Many legal scholars have sought to expose the flaws of originalism,¹⁷⁷ and its shortcomings are particularly apparent in the context of the religion clauses. First, it is impractical to look for one specific original meaning of the religion clauses. For one thing, it assumes unanimity among all the

¹⁶⁹ See cases cited *supra* note 53.

¹⁷⁰ See RAOUL BERGER, *FEDERALISM: THE FRAMERS' DESIGN* 15–17 (1987); ROBERT BORK, *THE TEMPTING OF AMERICA: THE USURPATION OF LAW BY POLITICS* 143–46 (1999); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38–47 (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) [hereinafter Scalia, *Originalism*].

¹⁷¹ DEREK DAVIS, *ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH/STATE RELATIONS* 30 (1991).

¹⁷² See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 3 (1980).

¹⁷³ See BORK, *supra* note 170, at 143–46.

¹⁷⁴ See *id.* at 165–66.

¹⁷⁵ See *id.* at 1–5, 143–46, 154–55; Scalia, *Originalism*, *supra* note 170, at 849, 854, 862–63.

¹⁷⁶ See BORK, *supra* note 170, at 139–41, 264, 351–52.

¹⁷⁷ See generally RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

Members of Congress who voted for the Bill of Rights and all the state legislators who voted to ratify it. The Framers' views on church and state differed, and often conflicted.¹⁷⁸ Bork has defined original intent as the intent of the public rather than that of the ratifiers—how the public would have understood the meaning of the Constitution's provisions.¹⁷⁹ But it seems even more futile to search for views of the Constitution shared by all members of the public, especially given the heated debates surrounding certain constitutional provisions, including the religion clauses. That early governments promoted religious practices does not mean there was unanimous support for such practices, much less unanimous support for the view that such practices were consistent with the First Amendment. For example, while Presidents Washington and Adams proclaimed official days of thanksgiving and prayer, Jefferson refused to do so.¹⁸⁰ Madison issued such a proclamation while President, but later regretted it.¹⁸¹

In addition, originalism has been attacked for its indeterminacy. Not only might unanimity have been lacking, but the historical accounts are incomplete and often inconclusive.¹⁸² It is hard to tell who counts as Framers.¹⁸³ Those who seek the "true meaning" from the historical record invariably end up picking out strands of thought from Jefferson and Madison, or alluding to the practice in this or that colony. As one scholar explains, the original meaning of the religion clauses is particularly hard to decipher:

No respected church-state scholar of today is so bold as to declare, with unqualified conviction, the exact meaning of the religion clauses at the time of their passage. The clauses, standing alone, are too succinct to adequately inform anyone of the plethora of factors that contributed to their wording. The specialist, therefore, must dig deeper by analyzing a wide range of factors, including the history of European church-state patterns, colonial practices, church-state relations in the states after the American Revolution commenced but before the Constitutional Convention convened, the political and religious beliefs (and their intersection) of the delegates to the Constitutional Convention, the question of the virtual absence of the subject of religion in the Constitution and the subsequent outcry in some circles for an amendment protecting religious liberty, the debates of the First

¹⁷⁸ JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGIOUS CLAUSES* 3 (1995).

¹⁷⁹ See BORK, *supra* note 170, at 165.

¹⁸⁰ See 1 PFEFFER & STOKES, *supra* note 124, at 87–88.

¹⁸¹ See 1 *id.* at 88–89.

¹⁸² See CHOPER, *supra* note 178, at 3; Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 860 (1986).

¹⁸³ CHOPER, *supra* note 178, at 2.

Congress which adopted the Bill of Rights, the prevailing church-state patterns of the various states at the time of the First Congress, the debates that took place at the state ratifying conventions, and the understanding of the clauses by the American people at the time of ratification.¹⁸⁴

The many scholarly works devoted to the history of the clauses have failed to produce anything approaching consensus. Debates over the history of the clauses are legion. Some scholars claim that the history of the clauses' adoption shows the Framers were primarily concerned with separation and neutrality,¹⁸⁵ while others believe the same history shows the Framers wanted to accommodate and incorporate religion into public life (with certain limits).¹⁸⁶ Conclusions about the history of the religion clauses seem inevitably to support their authors' normative views about how the clauses should be applied today. Accordingly, many scholars have sensibly conceded that the history is inconclusive.¹⁸⁷

The historical evidence indicates, for example, that the First Congress supported legislative prayer, and that the first president thought it right to proclaim a national day of Thanksgiving. However, that early leaders felt inclined to engage in these acts does not necessarily mean they would have thought them constitutional, if they had seriously considered the issue. One observer has argued that, since most early government favoritism toward religion was uncontroversial in an overwhelmingly Protestant country, it was unexamined. The one practice that was controversial—the use of taxes to support particular churches—was discussed and rejected.¹⁸⁸ As Justice Brennan noted, “Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober

¹⁸⁴ DAVIS, *supra* note 171, at xvi.

¹⁸⁵ The separationist view has been largely influenced by the Supreme Court's influential account of the history of the religion clauses in *Everson v. Board of Education*, 330 U.S. 1 (1947). See Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 233 (1994); see also Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (finding that the Framers generally did not intend exemptions for religion from generally applicable laws).

¹⁸⁶ See *Wallace v. Jaffree*, 472 U.S. 38, 99–106 (1985) (Rehnquist, J., dissenting); see also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (finding that the Framers intended to exempt religion from burdensome generally applicable laws); John Whitehead & John Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 TEX. TECH L. REV. 1 (1978).

¹⁸⁷ See, e.g., Brennan, *supra* note 177, at 435; Douglas Laycock, “Nonpreferential” *Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 877 (1986); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1053 n.35 (1986).

¹⁸⁸ Laycock, *supra* note 187, at 917–18.

constitutional judgment on every piece of legislation they enact. . . .”¹⁸⁹ James Madison, for example, later regretted his vote as a Congressperson for congressional chaplains,¹⁹⁰ as well as his decision as President to proclaim a day of Thanksgiving.¹⁹¹ To treat any action by the First Congress as necessarily consistent with the Bill of Rights is like believing that any action by a party to a contract is consistent with that contract.¹⁹²

Moreover, it is far from clear that the Framers intended to freeze their contemporary practices and attitudes into place as eternal constitutional rules. It is just as likely that they intended to lay down general principles to guide the republic, leaving it up to future generations to interpret the more open-ended provisions of the Constitution (of course, some provisions of the Constitution are quite specific and not open to interpretation, such as the presidential age requirement).¹⁹³ It is telling that the Framers wrote the Constitution in general terms, rather than compiling a prolix legal code listing acceptable and unacceptable practices.¹⁹⁴ After all, those who wrote and amended the Constitution did not seek to entrench the status quo, but to overthrow it.¹⁹⁵

But if not originalism, then what? To the originalist, the only alternative is for courts to “make up” rights that have no basis in the Constitution, such as the right to privacy, and particularly the right to have an abortion. This formulation of judicial practice is a straw man. It is a relatively uncontroversial proposition that courts should not invent rights out of whole cloth and should confine themselves to interpreting the Constitution. What is unclear is precisely what rights the Constitution protects. Originalism represents one way of determining the Constitution’s meaning, but it is flawed in the ways discussed above.

The Constitution means more than what the Framers practiced, and it applies to realities they could not imagine. The document, in particular the Bill of Rights and Civil War amendments, is a blueprint of freedom and equality.¹⁹⁶ The Framers intended it as such, and to interpret it accordingly is not to “ignore” the Constitution. “[T]he Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers.”¹⁹⁷ Rather, it is a document of “majest-

¹⁸⁹ *Marsh v. Chambers*, 463 U.S. 783, 814 (1983) (Brennan, J., dissenting).

¹⁹⁰ *Id.* at 815 (Brennan, J., dissenting).

¹⁹¹ *See supra* note 181 and accompanying text.

¹⁹² *See id.* at 816 (Brennan, J., dissenting). The Bill of Rights was in a sense a contract between the new national government and the people: many of the states conditioned their ratification of the Constitution upon a subsequent adoption of a Bill of Rights. *Id.*

¹⁹³ *See* DWORKIN, *supra* note 177, at 76, 272; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

¹⁹⁴ *See* *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

¹⁹⁵ *See* Brennan, *supra* note 177, at 438.

¹⁹⁶ *See* DWORKIN, *supra* note 177, at 73.

¹⁹⁷ *Marsh v. Chambers*, 463 U.S. 783, 816 (Brennan, J., dissenting); *see also* DWORKIN, *supra* note 177, at 74 (stating that the Constitution is not an “antique list of the particular demands that a relatively few people long ago happened to think important”).

tic generalities” whose “broad purposes” must be applied to the issues of each age.¹⁹⁸ The Framers might in some respects have misunderstood the force of their own principles.¹⁹⁹ The Supreme Court has frequently rejected practices in which the Framers of the Bill of Rights and the Fourteenth Amendment engaged, including gender discrimination, racial segregation, denials of jury trials, cruel and unusual punishment, and unreasonable searches and seizures.²⁰⁰ The Constitution is a “lodestar” for our future aspirations rather than the ossification of past practice.²⁰¹

The Constitution contains several general provisions that establish a democracy which respects individual freedom and equality. The Establishment Clause is one of these provisions. Whatever the merits of the right to privacy, there is in the Establishment Clause a clear textual basis for a right of atheists and nontheists to be free from government endorsement and coercion. That right is reinforced by the Free Exercise Clause and the Equal Protection Clause. Together, these provisions ensure the rights of religious groups to exercise their beliefs and to be treated equally.

It does not necessarily follow, of course, that the inclusion of “under God” in the Pledge of Allegiance fails to recognize each citizen’s freedom and equal moral status. Brennan himself thought the Pledge probably constitutional. But is the Pledge a mere “acknowledgement” or “recognition” of historical facts and traditions, or is it something more?

As the Ninth Circuit recognized in *Newdow*, the legislative history of the 1954 amendment to the Pledge indicates that the Pledge was decidedly not intended to be neutral with respect to religion. It takes sides on a controversial question: whether God exists and whether the nation is dependent on God. The federal law sends a message to nontheists that they are disfavored and outside the political community, while assuring theists that they are preferred. The recitation of the Pledge in schools amplifies this effect.²⁰² Nor can it be argued that it has become neutral since 1954. Every recitation of the words is an expression of the belief (conscious or not) in the divine foundations of the United States.

Leading schoolchildren in reciting the Pledge clearly differs from having them recite the historical words of American leaders that included religious language, such as the Declaration of Independence and the Gettysburg Address. In the case of the Pledge, the recited words are obviously meant to express the children’s *own* beliefs (Congress itself proclaimed this intention). That is exactly why schoolchildren have the right not to

¹⁹⁸ *Marsh*, 463 U.S. at 816–17 (Brennan, J., dissenting); see also Brennan, *supra* note 177, at 438.

¹⁹⁹ See DWORKIN, *supra* note 177, at 270.

²⁰⁰ *Marsh*, 463 U.S. at 816 (Brennan, J., dissenting).

²⁰¹ See Brennan, *supra* note 177, at 433.

²⁰² By comparison, discrimination is also a fact of American history that we should acknowledge, but one cannot imagine that having children recite “one nation under white male rule” would be permitted as a mere historical reference.

speak the words. The attempt to equate this practice with the study of history is particularly spurious.

To say that the impact of the religious language in the Pledge is de minimis ignores its potential impact. “Under God” may be only two words, but they reflect a pervasive pattern of government behavior that suppresses the development of atheistic and nontheistic beliefs. The words limit, rather than promote, religious pluralism. Private actors may and do mount efforts to combat godlessness, but government (i.e., federal and state governments) cannot take sides in this crucial debate. In fact, the government sponsors an overwhelming barrage of religious messages launched at its citizens, including presidential speeches, legislative prayer, Ten Commandments monuments on municipal property throughout the country, “In God We Trust” (the national motto) on coins, the public celebration of selected religious holidays, and of course the Pledge of Allegiance. From their cognitive birth Americans receive the message: “You can be almost anything, but not an atheist.” We are prejudiced, biased from the outset.

This anti-atheist sentiment is so pervasive that many fail to recognize its manifestations. When the government participates in promoting a theist message, the Supreme Court accepts that it is merely “acknowledging” the importance of religion. Theism has been so dominant for so long in the United States that it has become the state; it has become secular. In this way government has made God easy to accept and hard to reject. To reject God means overcoming these monumental social barriers sponsored by the government. Of course, the religious do not understand this message of disrespect for nontheism as a harm. On the contrary, it is a sort of a “religious man’s burden.” To be sure, governmental theism is not what we ordinarily think of as a harm. Most people would surely choose to be religious even without the government’s endorsement. But it is nevertheless a *constitutional* harm, because the Constitution prohibits the State from telling people what to think of God.

Originalism’s focus on the practices of the Framers is even less appropriate when society has changed fundamentally in ways unforeseeable to the Framers. The “historical acknowledgement” approach is only one account of American history. Another version acknowledges that America has increasingly realized that it must be tolerant of difference and treat its citizens equally in pursuit of the “majestic generalities” embedded in the Constitution. This history also recognizes that America has become extremely diverse and pluralistic.²⁰³ In 1789 the nation was overwhelmingly Protestant,²⁰⁴ and government aid to Protestantism was ram-

²⁰³ See *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (O’Connor, J., concurring); Frederick M. Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1107 (2002); Laycock, *supra* note 187, at 918.

²⁰⁴ See Laycock, *supra* note 187, at 918.

pant and uncontroversial.²⁰⁵ It is not surprising that the Framers did not think much about the rights of non-Protestants or non-believers. It simply did not occur to them that the principle that forbade church taxes had implications for other kinds of government support for religion.²⁰⁶ Today, the United States population is 56% Protestant, 25% Catholic, 2% Jewish, and 6% other religions. Another 11% express no religious preference,²⁰⁷ and 4 to 5% do not believe in God.²⁰⁸ Establishment Clause doctrine must be faithful to the principles and purposes of the Constitution while properly accommodating the religious diversity of contemporary America. To do so, it need look no further than the Supreme Court's principal Establishment Clause holdings.

V. RECONCILING THE DOCTRINE

The religion clauses are classic examples of old and relatively open-ended texts whose language and history provide uncertain answers, prompting judges to rely heavily on precedent.²⁰⁹ As discussed in Part II, the case law has produced three different but overlapping tests that together pose the following questions: (1) Does the government's practice legally or psychologically coerce citizens into professing a particular religious belief?; and (2) Even if there is no such coercion, does the government's practice have the purpose or effect of endorsing or promoting (or disapproving of) religion? These are precisely the questions, of course, that the Ninth Circuit addressed in *Newdow I* and *II*. These tests, when rigorously enforced, have been instrumental in helping unpopular religious minorities, including non-believers, resist majoritarian impulses to force them into second-class status, most significantly by barring religious endorsement and coercion from public schools.²¹⁰ Should it grant *certiorari*, the Supreme Court should decide *Newdow* in a manner consistent with those principles²¹¹ and uphold the Ninth Circuit decision.

As we have seen, however, the Supreme Court's Establishment Clause doctrine cannot be so easily contained. The Court has occasionally devi-

²⁰⁵ *Id.* at 913.

²⁰⁶ *Id.* at 918–19.

²⁰⁷ See Epstein, *supra* note 8, at 2148 n.396 (1996) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACTS OF THE UNITED STATES 1994, at 70 (1994)).

²⁰⁸ See *id.* at 2158 n.442 (citing a report which indicated that 5% of Americans do not believe in God); William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME L. REV. 11, 15 (2002) (citing poll results indicating that 96% of Americans believe in God).

²⁰⁹ See William P. Marshall, *Unprecedented Analysis and Original Intent*, 27 WM. & MARY L. REV. 925, 925 (1986).

²¹⁰ See Epstein, *supra* note 8, at 2158 (finding that endorsement, not originalism, is the proper test).

²¹¹ See RONALD DWORKIN, *LAW'S EMPIRE* 134 (advocating "consistency in principle" by judicial decision-makers).

ated from its principal tests, either by ignoring them (as in *Marsh*) or by applying them half-heartedly (as in *Lynch*). Several Justices who have supported the main lines of Establishment Clause doctrine have opined in dicta that practices such as the Pledge of Allegiance are constitutional under the Court's doctrines. In *Lynch*, a majority of the Court suggested such a view in dicta, although the *Newdow II* court interpreted *Lynch* not to condone explicitly the recitation of the Pledge in the public schools.

Exceptions such as these undermine the principles of the Court's Establishment Clause doctrines.²¹² Whereas the primary holdings protect freedom and equality, the exceptions endanger them. Each approval of government-sponsored religious orthodoxy—such as legislative chaplains and Christian nativity scenes—can be used to justify the next endorsement, extending the web of discrimination against disfavored religious beliefs.²¹³

If the Supreme Court decides to rule on the Pledge, it will have at least three options. First, it could decide that the Pledge fits into the category of permissible historical acknowledgements upheld in *Marsh*, *Lynch*, and *Allegheny*. I have suggested that this is the wrong approach. Second, the Court could overrule those three cases, thereby eliminating the exceptions to the Court's Establishment Clause doctrine, and uphold the Ninth Circuit's decision. This is the most just solution, and it would clarify and synchronize the Court's Establishment Clause doctrine. But such a ruling seems highly unlikely. Finally, the Court could retain its overall doctrine, including the exceptions, but hold that the Pledge of Allegiance is not an exception—because it is recited in schools, because the religious language was added only in 1954, or on some other grounds. The Ninth Circuit, which of course cannot overturn Supreme Court precedent, chose the final course. *Newdow II* relies primarily on the case's school setting to place the Pledge recitation policy on the side of impermissible coercion (like the invocation in *Lee*), rather than on the side of permissible acknowledgements of religion (such as legislative prayer). If the Supreme Court chooses not to eliminate the exceptions to its Establishment Clause doctrine, it should at least refrain from expanding them and doing further damage to the equal status of nontheists. The Court would cause such damage if it chose to sanction the public sponsorship of religious expression by schoolchildren as part of the patriotic exercise of reciting the Pledge of Allegiance.

VI. ANALYSIS: THEORIES OF THE RELIGION CLAUSES

The *Newdow* decision is consistent not only with the Supreme Court's principal Establishment Clause tests, but also with most scholarly

²¹² See Epstein, *supra* note 8, at 2135.

²¹³ See Van Alstyne, *supra* note 135, at 771, 783.

theories of the religion clauses. While there are almost as many such theories as there are students of the clauses,²¹⁴ I will try to identify a representative sample, some of which overlap. Some theories call for strict enforcement of the Establishment Clause, while others espouse a narrower reading.

A. Formal Neutrality

In his seminal 1961 article, Philip Kurland argued that religion clause cases should be decided according to a theory of neutrality. According to Kurland's "neutral principle,"²¹⁵ the religion clauses of the First Amendment should be read together "to mean that religion may not be used as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations."²¹⁶ Kurland found that many of the Supreme Court's rulings were consistent with neutrality, while many others were not.

Kurland endorsed decisions that refused to exempt religion from neutral, generally applicable laws, such as *Reynolds v. United States*,²¹⁷ *Hamilton v. Regents of the University of California*,²¹⁸ *Minersville School District v. Gobitis*,²¹⁹ *Cox v. New Hampshire*,²²⁰ *Chaplinsky v. New Hampshire*,²²¹ and *Prince v. Massachusetts*.²²² He disapproved of decisions that recognized religious exemptions,²²³ although he concluded that decisions upholding Sunday closing laws were consistent with his neutral principle, assuming the objectives of such laws were now primarily secular.²²⁴

²¹⁴ It is interesting to note that while the Supreme Court has not formulated a unified theory of the two religion clauses, most academic commentators who have addressed the subject have attempted to do so.

²¹⁵ Phillip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 2 (1961).

²¹⁶ *Id.* at 5.

²¹⁷ 98 U.S. 145 (1878) (holding that a federal law banning polygamy could be constitutionally applied to Mormons); see Kurland, *supra* note 215, at 6–8.

²¹⁸ 293 U.S. 245, 252 (1934) (refusing to grant a religious exemption from military training required at a public university); see Kurland, *supra* note 215, at 23–26.

²¹⁹ 310 U.S. 586 (1940) (rejecting a free exercise challenge to a law requiring participation in flag-salute ceremonies in public schools, assuming it could be applied to students generally); see Kurland, *supra* note 215, at 26–33. This assumption was overturned three years later. See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

²²⁰ 312 U.S. 569 (1941) (rejecting a religious exemption from a licensing requirement for parades); see Kurland, *supra* note 215, at 40–41.

²²¹ 315 U.S. 568 (1942) (rejecting a religious exemption from a law prohibiting offensive comments in public places); see Kurland, *supra* note 215, at 41–42.

²²² 321 U.S. 158 (1944) (holding that child labor laws could be applied to Jehovah's Witnesses); see Kurland, *supra* note 215, at 52–53.

²²³ Kurland, *supra* note 215, at 22 (criticizing *Arver v. United States*, 245 U.S. 366 (1918), which upheld a draft law exempting ministers and students in divinity or theological schools); *id.* at 53–55 (criticizing *Follett v. Town of McCormick*, 321 U.S. 573 (1944), which held that a municipal tax on book agents could not be applied to Jehovah's Witnesses).

²²⁴ *Id.* at 86–94.

Kurland endorsed decisions striking down laws that specifically burdened religion,²²⁵ while criticizing decisions that purported to uphold neutral laws when those laws were in fact classified on the basis of religion.²²⁶ He also supported decisions upholding challenges by religious organizations to speech restrictions when those decisions were based on free speech grounds, rather than on free exercise grounds.²²⁷ At the same time, he disapproved of decisions that struck down restrictions on religious proselytizing on free exercise grounds, not simply on free speech grounds, since those decisions implied that religious speech was more deserving of protection than other speech.²²⁸ He thought the neutral principle forbade public school time-release programs pursuant to which students were released during school time to pursue religious instruction, even if the students left school grounds.²²⁹

Kurland's definition of "neutrality" represents a particular concept of neutrality. After all, many judges and commentators, including those with whom Kurland has disagreed, have claimed to support "neutrality."²³⁰ Kurland's is a strict, formal neutrality—a neutrality of treatment, not of impact.²³¹

The Pledge is clearly not formally neutral with respect to religion. If it were strictly neutral, it might omit God altogether, allowing individuals to determine privately their conception of religion's association with country and flag. Alternatively, it would read something like "one nation, either under God or not, depending on what you believe, indivisible . . ." The government, in leading schoolchildren in reciting the Pledge, is using religion, in Kurland's words, for "the conferring of rights or privileges" and for the imposition of "obligations."²³² The theists in the classroom enjoy the privilege of having their beliefs recognized by the school. The non-theists are obliged either to participate in, pretend to participate in, or protest a message offensive to them.

²²⁵ *Id.* at 37–40 (approving of *Cantwell v. Connecticut*, 310 U.S. 296 (1940), which struck down a state law requiring a license to solicit donations for religious causes, where the state was required to determine whether the cause was religious).

²²⁶ *Id.* at 8–11 (criticizing *Davis v. Beason*, 133 U.S. 333 (1890), which upheld an Idaho law requiring voters to swear they are not members of any group that advocates polygamy—a law that clearly targeted Mormons); *id.* at 67–70 (criticizing *Everson v. Board of Education*, 330 U.S. 1 (1947), which upheld state transportation assistance for all children in private non-profit schools but ignored a local school board resolution restricting school transportation to public and Catholic school students).

²²⁷ *Id.* at 50–51 (approving of *Martin v. City of Struthers*, 319 U.S. 141 (1943)).

²²⁸ *Id.* at 43–44 (criticizing *Largent v. Texas*, 318 U.S. 418 (1943)); *id.* at 44, 47–50 (criticizing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)).

²²⁹ *Id.* at 73–77 (praising *McCullum v. Board of Education*, 333 U.S. 203 (1948), and criticizing *Zorach v. Clauson*, 343 U.S. 306 (1952)).

²³⁰ See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 998–99 (1990).

²³¹ *Id.*

²³² See *supra* text accompanying note 216.

B. Substantive Neutrality

In contrast to formal neutrality, Douglas Laycock has advocated reading the religion clauses to promote “substantive neutrality.”²³³ A law or rule is substantively neutral if it neither encourages nor discourages religious practice.²³⁴ Substantive neutrality differs from Kurland’s formal neutrality mainly in its attentiveness to the ways in which formally neutral laws burden the exercise of religion. For example, in Laycock’s view, an exemption from Prohibition for sacramental wine was necessary to avoid discouraging religion, while there was little danger that such an exemption would encourage individuals to be more religious.²³⁵ With respect to the Establishment Clause, however, formal and substantive neutrality are likely to produce similar results.

The daily recitation of the phrase “under God” encourages theistic religion, and it increases the amount of religious expression in the classroom. Whether Newdow’s daughter is an enthusiastic or a reluctant participant, or is too young to understand, the daily recitation of the Pledge makes it more likely that she will express the specific (and controversial) religious belief that the United States is a nation under God, as millions of young voices have before her. In fact, Congress and the President explicitly intended the religious language in the Pledge to have this effect.²³⁶

C. Secularism

Kathleen Sullivan has argued that the religion clauses impose a duty on government to establish a secular civil order.²³⁷ The obligation to create a secular culture of liberal democracy means that no faith can be translated into public policy,²³⁸ although religious voices can certainly participate in the democratic system.²³⁹ Thus, the Establishment Clause prohibits government “stamps of approval” on religion, including practices the Supreme Court has claimed are only “acknowledgements” of religion, such as legislative prayer and government-sponsored crèches.²⁴⁰

There is nothing secular about the phrase “under God.” Its inclusion in the Pledge of Allegiance is therefore inconsistent with secularist theories of the religion clauses. Of course, public libraries house books that mention (or even praise) God, and a public museum might contain relig-

²³³ Laycock, *supra* note 230, at 1001.

²³⁴ *Id.*

²³⁵ *Id.* at 1003.

²³⁶ See *supra* text accompanying notes 42, 46.

²³⁷ Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992).

²³⁸ *Id.* at 198.

²³⁹ *Id.* at 201.

²⁴⁰ *Id.* at 205–07.

ious paintings. These would be consistent with the secularist approach, since they further the secular goals of promoting knowledge *about* religions and appreciation of art.²⁴¹ In contrast, the purpose of including “under God” in the Pledge of Allegiance is not to teach students about religion, but rather to express (unchallenged) a particular religious viewpoint. To argue that the Pledge is merely teaching children that the nation exists under divine guidance is to presuppose that the nation *is* under divine guidance, a controversial religious proposition about which government can have no opinion.

D. Separationism

Strict separationists go further than those who support neutrality. They believe that the religion clauses ban any government aid to religious organizations, even when it is based on neutral criteria.²⁴² This idea of separationism, premised on Thomas Jefferson’s metaphor of a “wall of separation between church and state,”²⁴³ is evident in Supreme Court opinions striking down government assistance programs, as well as dissents from opinions upholding such programs.²⁴⁴ This conception of the religion clauses, which enjoyed its heyday in the *Lemon v. Kurtzman* line of cases,²⁴⁵ focuses more on social structures than on individual rights.²⁴⁶ Under this view, neutrality is a necessary, but not sufficient, condition of constitutionality.²⁴⁷

The statute and policy challenged in *Newdow* violate the principle that religion should be completely separate from public life for essentially the same reasons that they violate the neutrality and secularism theories. The federal government sought to harness religion in its battle against communism when it enacted the 1954 statute, and school districts cross the line of separation when they mandate recitation of the Pledge in their classrooms. The post-1954 Pledge stands for the principle that, far from being separate, god and country are inextricably intertwined.

²⁴¹ See *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989).

²⁴² See Laycock, *supra* note 230, at 1001; Lupu, *supra* note 185, at 231.

²⁴³ See *Reynolds v. United States*, 98 U.S. 145, 164 (1878). *But cf.* *Wallace v. Jaffree*, 472 U.S. 38, 92 (1984) (Rehnquist, J., dissenting) (“[U]nfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years.”).

²⁴⁴ See, e.g., *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1943) (insisting on “a wall between Church and State which must be kept high and impregnable”); *Zorach v. Clauson*, 343 U.S. 306, 316–20 (1952) (Black, J., dissenting).

²⁴⁵ See Lupu, *supra* note 185, at 242.

²⁴⁶ See *id.* at 235.

²⁴⁷ See *Mitchell v. Helms*, 530 U.S. 793, 838–39 (2000) (O’Connor, J., concurring). For an argument that separation and neutrality can co-exist in Establishment Clause doctrine, see Gedicks, *supra* note 203.

E. *Non-preferentialism*

Some scholars have espoused the “non-preferentialist” theory that the Framers of the Constitution meant to forbid government action that prefers one sect over another, but not action that prefers religion in general over non-religion.²⁴⁸ This theory has been much criticized.²⁴⁹ Even Michael McConnell, who has called for greater accommodation for religion in public life, has called the non-preferentialist theory “discredited.”²⁵⁰ The Supreme Court has noted on several occasions that the religion clauses protect nonbelievers.²⁵¹

In any case, the Pledge of Allegiance as currently codified and recited fails even this narrow reading of the Establishment Clause. Even accepting the premise that non-believers do not belong to a “religion” (non-preferentialism can make sense only if there is such a thing as non-religion), not all religions recognize an idea of God. In striking down a state requirement that office holders avow a belief in God, the Supreme Court acknowledged that some religions practiced in the United States, such as Buddhism, do not have a concept of a deity.²⁵² Similarly, reference to God in the Pledge of Allegiance excludes not only atheists and agnostics, but also followers of non-theistic faiths.

F. *Pluralism/Accommodation*

Michael McConnell has argued that the primary purpose of the religion clauses is to protect the nation’s pluralistic religious heritage.²⁵³

²⁴⁸ See *Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting) (supporting the constitutionality of school prayer); ROBERT CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982).

²⁴⁹ See Laycock, *supra* note 187.

²⁵⁰ Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 145 (1992).

²⁵¹ See, e.g., *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 694 (1994) (government may “favor[] neither one religion over others nor religious adherents collectively over nonadherents”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989) (government is forbidden from endorsing “religion generally” or from placing its imprimatur on “religion as such”); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985) (government must “maintain a course of neutrality among religions, and between religion and nonreligion”); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (neither the federal nor state governments “can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs” (footnote omitted)); *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 15 (1947) (“Neither [the federal nor state governments] can pass laws which aid one religion, aid all religions, or prefer one religion over another”).

²⁵² See *Torcaso*, 367 U.S. at 495 n.11 (also listing Taoism, Ethical Culture, Secular Humanism, “and others”).

²⁵³ McConnell, *supra* note 250, at 117, 168. McConnell seems to echo the non-preferentialist view when he says the religion clauses are meant to protect the rights of “religious

Government should accommodate religion whenever possible, exempting sincere religious practice from the excessive burdens of “neutral” laws.²⁵⁴ Whenever government supports secular institutions, such as public schools, it should support equivalent religious institutions, such as parochial schools.²⁵⁵ Government can promote religion, for example, by erecting a monument to the Mormons, as long as it does not prefer Mormonism; it must be open to erecting monuments to any religion.²⁵⁶ Symbols in the public sphere should reflect symbols in the private sphere. Instead of taking down crèches, the government should erect more religious symbols to reflect the diversity of religiosity in America.²⁵⁷

Even this approach, applied honestly, would foreclose the inclusion of “under God” in the Pledge. That phrase does not accommodate America’s religious plurality, for it excludes many religious views: all non-theistic ones. To accommodate them, the Pledge would require so many additions that it would be too long to recite, and its religious language would overwhelm its primary purpose of patriotism. In order not to prefer any of the country’s many faiths, the Pledge could of course simply omit the phrase “under God.” While McConnell laments that a secular public sphere fails to recognize the importance of religion in the United States, any other solution would seem unworkable in the case of the Pledge.²⁵⁸ Just as McConnell argues that removing a nativity scene from public space is not neutral because it endorses secular ideologies, he might argue that removing “under God” from the Pledge is not neutral, because either way, someone is aggrieved.²⁵⁹ But removing “under God” is not the same as inserting “under no God.” Removing “under God” seems to be the best, if not the only, way to truly accommodate religious pluralism. Often the only way not to express a preference is to remain silent.

G. Coercion

McConnell has also expressed the view that the Establishment Clause was meant only to prohibit religious coercion by the government.²⁶⁰ This view has been adopted by some members of the Supreme Court, most notably Justice Kennedy.²⁶¹ The view has been criticized for rendering the

believers.” *Id.*

²⁵⁴ *Id.* at 117, 125, 137–40.

²⁵⁵ *Id.* at 184.

²⁵⁶ *Id.* at 156.

²⁵⁷ *Id.* at 193.

²⁵⁸ Indeed, it is questionable whether McConnell’s approach is truly workable in any context. Is there enough public space to celebrate all the country’s religions, and could the government really do so without preference? Would it ever erect a monument to Satanism or even to atheism?

²⁵⁹ See McConnell, *supra* note 250, at 192.

²⁶⁰ See Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

²⁶¹ See *supra* note 99.

Free Exercise Clause redundant.²⁶² It also fails to bar government endorsements of religion that seem inappropriate but are not coercive.²⁶³ In any case, the recitation of the Pledge is coercive, for the reasons laid out by the majority in *Newdow II*. Even Justice Kennedy, the Court's strongest backer of the coercion test, found that an invocation at a school graduation—in which students were not required to participate—was coercive.²⁶⁴ Should the Supreme Court decide *Newdow*, Justice Kennedy will have difficulty differentiating the Pledge on coercion grounds. The Pledge of Allegiance, however, would be constitutional under Justice Scalia's stricter version of the coercion test.²⁶⁵

H. Anti-secularism

Some have argued that the roots of American law are explicitly religious,²⁶⁶ that the Framers were religious men who never intended the total separation of church and state,²⁶⁷ and that the current secular legal order has unconstitutionally established secular humanism,²⁶⁸ a nontheistic religion that worships humankind as the source of meaning.²⁶⁹ In this view, secular humanism will lead to totalitarianism, and the legal system should once again recognize God as the basis of our civil law and jurisprudence.²⁷⁰

The tenor of these arguments is certainly consistent with daily recitation of religious language in the public schools. Their criticisms of secularism, including the alleged establishment of secular humanism, are easier to understand, however, than their proposed solutions. Whitehead and Conlan claim to oppose the establishment of religion,²⁷¹ but the proposition of a legal system based on the law of God that does not establish religion is disingenuous. Moreover, it is unclear how omitting the phrase “under God” in the Pledge would establish atheism or secular humanism. Of course, the amended Pledge would no longer include religion, but

²⁶² See *supra* note 99.

²⁶³ See Douglas Laycock, “Noncoercive” Support for Religion: Another False Claim About the Establishment Clause, 26 VAL. U. L. REV. 37, 41 (1991).

²⁶⁴ *Weisman*, 505 U.S. at 599.

²⁶⁵ See *supra* note 99.

²⁶⁶ Whitehead & Conlan, *supra* note 186, at 61.

²⁶⁷ *Id.* at 2, 25.

²⁶⁸ *Id.* at 21; see also *Newdow v. U.S. Cong. (Newdow II)*, No. 00-16423, 2003 WL 554742, at *13 (9th Cir. Feb. 28, 2003) (O’Scannlain, J., dissenting from decision not to rehear *en banc*) (complaining that *Newdow II* officially favors atheism and is biased against religion).

²⁶⁹ *Id.* at 30.

²⁷⁰ *Id.* at 65; see also DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, AND RELIGION 337 (1997) (“The Founders understood that Biblical values formed the basis of the republic and that the republic would be destroyed if the people’s knowledge of those values should ever be lost.”).

²⁷¹ Whitehead & Conlan, *supra* note 186, at 17 (arguing that if secular humanism is a religion, the state cannot sponsor it).

neither would it explicitly advocate any of the tenets of secular humanism. Each citizen, as she recites the Pledge, can decide for herself what views of the transcendent (if any) she associates with her homage to the flag.

Some argue that even if government does not explicitly denigrate religion, the *cumulative effect* of ignoring God, especially in the schools, is to deny theism and establish secular humanism. This hardly improves the anti-secularist argument. One could just as easily argue that the government's constant refusal to teach children to deny God has the cumulative effect of endorsing theism. The government cannot avoid taking positions on religious issues unless it either ignores religion or teaches it in a purely academic manner, such as comparative religion classes. Ceremonies such as school prayer and the recitation of the Pledge fall into neither category. The cumulative effect of the government ignoring God is the same as the one-time effect: we do not know whether the state has a belief as to whether there is a god. And that is as it should be.

CONCLUSION

There is no way to tell how many children have turned to religion as a result of exposure to the Pledge of Allegiance, or how many nontheist students have been forced to listen, if not participate, in this religious ritual that excludes them. The Supreme Court has been especially sensitive to the effects of government-sponsored religion on children, though its reasoning has not been consistent. In some cases, it has viewed children as passive, impressionable, and easily subject to indoctrination.²⁷² In others, it has viewed them as having well-developed religious views that must be protected from the burdens of state action.²⁷³ The truth is probably that children have active spiritual lives,²⁷⁴ and that their religious beliefs become more sophisticated as they age. Children continually seek meaning and validation. "Adolescents are active participants in their religious development, a development that arises from their cumulative interaction with the whole spectrum of environmental influences"²⁷⁵ The government should not be one of those influences.

A constitutional injustice cannot be allowed to persist because the Framers (or Americans at some earlier time, or even most Americans now) would not have thought it unjust. The debate between originalism and a moral, adaptable Constitution is an old one by now. The lines have been drawn, and this Note may be unlikely to persuade a committed origi-

²⁷² *Lee v. Weisman*, 505 U.S. 577, 592–94 (1992).

²⁷³ Note, *Children as Believers: Minors' Free Exercise Rights and the Psychology of Religious Development*, 115 HARV. L. REV. 2205, 2219–20 (2002).

²⁷⁴ *Id.* at 2221.

²⁷⁵ ROGER J. R. LEVESQUE, NOT BY FAITH ALONE: RELIGION, LAW, AND ADOLESCENCE 48 (2002).

nalist. But those who would uphold endorsements of religion, such as in the Pledge of Allegiance, as mere “historical acknowledgements” of religion should recognize the effect of their interpretation upon the non-theists among us.²⁷⁶ The impact cannot be lightly dismissed as de minimis. Decisions about religion are often crucial to self-identity, for believers and non-believers alike. The religious language in the Pledge of Allegiance was important to those who supported its insertion in 1954, and it is important to those who continue to support its inclusion. But it is just as important to those Americans who feel alienated by its message of exclusion. For them, it *is* a big deal.

²⁷⁶ Of course, a committed originalist would argue that the responsibility for any harm lies with legislators and those who failed to include certain provisions in the Constitution. I suggested above that this argument relies on a faulty view of the intent of the Framers. In addition, originalists themselves have defended non-originalist decisions like *Brown v. Board of Education*. See BORK, *supra* note 170, at 147, 155–58. But why eradicate *de jure* second-class status for racial minorities, but not for all religious minorities? Why continue with an inconsistent Establishment Clause doctrine, instead of trying to reconcile it? The burden should be on those who want to establish an explicitly religious public sphere to explain why the Supreme Court’s tests, such as endorsement, should be jettisoned. As explained above, attempts to avoid the full implications of those tests in *Marsh*, *Lynch*, and *Allegheny* were unconvincing.