

## I PLEDGE ALLEGIANCE TO RELIGION?

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### I. INTRODUCTION

Courts have not been consistent in deciding whether students' Establishment Clause and Free Exercise rights are violated with the enactment of the 1954 statute (which amended the Flag Code to include "under God" in the Pledge of Allegiance),<sup>1</sup> state statutes, and district policies, which require teachers to lead students in reciting the Pledge every school day. While some courts argue under the *Lemon* test that the purpose of the Pledge of Allegiance was to promote patriotism in students, other courts argue that it endorses religion and disregards others' beliefs, with the most recent decisions favoring the Pledge as a patriotic ritual. However, courts are disregarding the daily recitation of the Pledge on students in an era where there are more and more students who are brought up in religions that do not believe in one God or do not believe in a God at all, and instead are relying heavily on Establishment Clause tests which mainly examine the purpose of the 1954 statute and whether it coerces students to recite the Pledge.<sup>2</sup> Nevertheless, courts should look at the possible effects the Pledge has on students' everyday lives along with examining the Pledge under the various tests as the Establishment and Free Exercise Clauses exists to "[protect] religious practices against even the incidental and unintended effects of government action."<sup>3</sup>

Section II of this article explains the historical beginnings of The Pledge of Allegiance starting with its creation by Francis Bellamy and ending with its addition into the United States

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<sup>1</sup> 4 U.S.C. § 4 Pledge of allegiance to the flag; manner of delivery;

<sup>2</sup> See an explanation of the interpretation of the *Lemon* test, Coercion Test, and Endorsement Test by courts below.

<sup>3</sup> Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1418 (1990).

Code in 1954. Section III will explain the precedent of The Pledge of Allegiance in relation to the Establishment Clause and Free Exercise in the United States Constitution. Section IV will discuss the possible effect of the Pledge of Allegiance on students despite recent decisions declaring reciting the Pledge Constitutional under the Establishment and Free Exercise Clauses. Section V will conclude the article.

## II. BACKGROUND ON THE PLEDGE OF ALLEGIANCE IN SCHOOLS.

In 1892, Francis Bellamy (Bellamy), a minister, wrote The Pledge of Allegiance,<sup>4</sup> which was published in *The Youth's Companion*, a children's magazine featuring short stories, anecdotes, current events, and puzzles.<sup>5</sup> Bellamy wrote The Pledge of Allegiance intending it to be spoken by any country,<sup>6</sup> but instead, it was adopted by the United States school systems as a patriotic ritual to be said by teachers and students in classrooms.<sup>7</sup> By June 22, 1942, the newly amended Pledge of Allegiance<sup>8</sup> was added by congress "as the official national pledge of the United States."<sup>9</sup> In addition, the Pledge was amended in 1942 in order to make sure that those pledging the flag were supporting the United States and not an opposing country though the new

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<sup>4</sup> The original Pledge of Allegiance read "I pledge allegiance to my Flag and the Republic for which it stands, one nation, indivisible, with liberty and justice for all." *The Pledge of Allegiance*, US HISTORY, (March 31, 2013), <http://www.ushistory.org/documents/pledge.htm>.

<sup>5</sup> DR. JOHN W. BAER, *THE PLEDGE OF ALLEGIANCE, A REVISED HISTORY AND ANALYSIS* (Free State Press, Inc. 1st ed. 2007), available at <http://www.oldtimeislands.org/pledge/pdgech2.htm>.

<sup>6</sup> US HISTORY, *supra* note 1.

<sup>7</sup> Francis Bellamy, *The Story of The Pledge of Allegiance to The Flag*, UNIVERSITY OF ROCHESTER LIBRARY BULLETIN, (March 31, 2013), <http://www.lib.rochester.edu/index.cfm?PAGE=3418>.

<sup>8</sup> "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." US HISTORY, *supra* note 1.

<sup>9</sup> Robert C. Cloud, Ed.D., *The Pledge of Allegiance: Patriotic Exercise or Religious Activity*, 271 ED. LAW REP. 25, 26 (2011).

amendment still did not include a mention of God.<sup>10</sup> However, by 1954, “under God,” was added to the Pledge of Allegiance.<sup>11</sup>

During the early 1950s, the United States was in a cold war with the former Soviet Union,<sup>12</sup> which coincided with a religious upsurge throughout the nation.<sup>13</sup> In response to America’s quest to be tough on communism, many people and groups, such as Louis A. Bowman, an attorney from Illinois, and the Knights of Columbus, a Catholic fraternity started using “under God” in their version of the Pledge of Allegiance.<sup>14</sup> This was done to “acknowledge the dependence of [the American] people and . . . Government upon the moral directions of the creator while simultaneously deny[ing] the atheistic and materialistic concepts of communism.”<sup>15</sup> In 1954, Congress amended the Flag Code to include the words “under God” in the Pledge of Allegiance.<sup>16</sup> Congress maintained that “under God” was added “to reinforce the idea that our nation is founded upon the concept of a limited government, in stark contrast to the unlimited power exercised by communist forms of government.”<sup>17</sup>

### III. PRECEDENT

Although there were cases concerning the daily recitation of the Pledge before 1954, the addition of “under God” lead to complications between the Pledge and the Establishment and Free Exercise Clauses.

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<sup>10</sup> *Newdow v. Rio Linda Union School Dist*, 597 F.3d 1007, 1031 (2010).

<sup>11</sup> US HISTORY, *supra* note 1.

<sup>12</sup> *Cold War*, HISTORY (March 31, 2013), <http://www.history.com/topics/cold-war>.

<sup>13</sup> *1950s: Religion: Overview*, ENCYCLOPEDIA (March 31, 2013), <http://www.encyclopedia.com/doc/1G2-3468302049.html>.

<sup>14</sup> BAER, *supra* note 2, available at <http://www.oldtimeislands.org/pledge/pdgech8.htm>.

<sup>15</sup> Emily D. Newhouse, *I Pledge Allegiance to the Flag of the United States of America: One Nation Under No God*, 35 TEX. TECH L. REV 383, 387 (2004).

<sup>16</sup> 4 U.S.C.A. §4 “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.”

<sup>17</sup> *Newdow v. Rio Linda Union School Dist*, 597 F.3d at 1032.

a. *West Virginia State Board of Education v. Barnette*

In *Barnette*, the appellees brought suit against the resolution put in place by the West Virginia State Board of Education, which required students and teachers to salute the American flag “as a regular part of the program of activities in public school,” and that any refusal to salute the flag would be considered an “Act of insubordination.”<sup>18</sup> An “Act of insubordination” was punished by expulsion, making the child “unlawfully absent” where the parents could be convicted for delinquency “subject to fine not exceeding \$50 and jail term not exceeding thirty days.”<sup>19</sup> The injunction appellees brought a request for an exception to the resolution for Jehovah’s Witnesses whose religious beliefs forbid worshiping or saluting a flag.<sup>20</sup> The Board of Education moved to dismiss, arguing that “laws and regulations are an unconstitutional denial of religious freedom, and freedom of speech, and are invalid under the ‘due process’ and ‘equal protection’ clauses of the Fourteenth Amendment to the Federal Constitution.”<sup>21</sup> The District Court held in favor of *Barnette* and its class.<sup>22</sup>

On appeal, the Supreme Court overruled the decision in *Gobitis*,<sup>23</sup> and held that the resolution imposed by the West Virginia State Board of Education to compel students to salute the flag violated the First Amendment of the Constitution.<sup>24</sup> The court found that “freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds,” and instead may only be restricted if there is a “grave and immediate danger to interest which the

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<sup>18</sup> *W. Virginia State Board of Educ. v. Barnette*, 319 U.S. 624, 626, 629 (1943).

<sup>19</sup> *Id.* at 729.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 630.

<sup>22</sup> *Id.*

<sup>23</sup> In *Minersville School Dist. v. Gobitis*, the court ruled that compelling students to recite the Pledge of Allegiance did not violate their due process rights. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 599-600 (1940).

<sup>24</sup> *Barnette*, 319 U.S. at 642.

state may lawfully protect.”<sup>25</sup> Accordingly, the court determines that a government may not pressure its citizens to pledge their allegiance in order to promote national unity because authority regarding national unity “is to be controlled by public opinion, not public opinion by authority.”<sup>26</sup>

*b. Newdow v. United States Congress*

In *Newdow v. United States Congress*, plaintiff Michael Newdow (“Newdow”), an atheist, appealed the constitutionality of “under God” in the pledge of allegiance, and argued that mandating his child to recite the Pledge of Allegiance during each school day violated the Establishment Clause of the First Amendment.<sup>27</sup> At the time of the case, California had a state law and district rule that required teachers to begin the school day by reciting the Pledge of Allegiance, which Newdow alleges that because of these mandates (including the 1954 federal Act), “his daughter is injured when she is compelled to ‘watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our’s [sic] is ‘one nation under God.’”<sup>28</sup> The District Court dismissed the case because they decided to rule “only on the constitutionality of the Pledge, and defer any ruling on sovereign immunity.”<sup>29</sup>

When deciding the case, the court looked at the Endorsement, Coercion, and *Lemon* tests to determine whether there was any violation of the Establishment Clause.<sup>30</sup> However, although

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<sup>25</sup> *Id.* at 639.

<sup>26</sup> *Id.* at 641.

<sup>27</sup> *Newdow v. U.S. Congress*, 292 F.3d 597, 600 (9th Cir. 2002).

<sup>28</sup> *Id.* at 600-01.

<sup>29</sup> *Id.* at 601.

<sup>30</sup> *Id.* at 605.; “To survive the ‘*Lemon* test,’ the government conduct in question (1) must have a secular purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion.” *Id.* at 605 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

the court said it could apply three tests to invalidate the statute, it mainly looked at the *Lemon* test.<sup>31</sup> When examining the *Lemon* test against the facts in *Newdow v. United States Congress*, the court only applied the purpose prong of the *Lemon* test to the 1954 amendment adding “under God” to the Pledge because the court found that “the legislative history of the 1954 Act reveals that the Act’s *sole* purpose was to advance religion, in order to differentiate the United States from nations under communist rule.”<sup>32</sup> The court found that “the Establishment clause guards not only against the establishment of ‘religion as an institution,’ but also against the endorsement of religious ideology by the government,” and therefore the Act fails the first prong under the *Lemon* test.<sup>33</sup> Additionally, the court also found that although the district policy passes the purpose prong of the *Lemon* test, it does not survive the test as a whole because “the policy is 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.”<sup>34</sup> The Court of Appeals in the Ninth Circuit held by adding “under God” to the Pledge of Allegiance, and mandating that teachers lead students to recite the Pledge violated the Establishment Clause.<sup>35</sup>

*c. Elk Grove Unified School Dist. v. Newdow*

This time in *Elk Grove*, *Newdow* argued that the Pledge “constitutes religious indoctrination of his child,” because it contains “under God,” which is in violation of the Establishment Clause and Free Exercise Clause.<sup>36</sup> In this case, the Supreme Court ignored the Establishment Clause and Free Exercise Clause arguments from *Newdow v. United States Congress* and instead declared that *Newdow* did not have standing due to the inability under

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<sup>31</sup> *Id.* at 605.

<sup>32</sup> *Id.* at 610.

<sup>33</sup> *Id.* at 611.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 612.

<sup>36</sup> *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 1 (2004)

California law “to sue as next friend.”<sup>37</sup> However, the court did agree with the holding in *Barnette*, which said that students may “abstain from the recitation” of the Pledge if they objected based on their religion.<sup>38</sup> Additionally, the concurring justices noted that the Pledge of Allegiance is a representation of loyalty to the United States and its flag. Furthermore, that “under God” does not endorse religion, but instead that “our Nation was founded on a fundamental belief in God” and reciting the Pledge is an act of patriotism rather than one of religion.<sup>39</sup>

*d. Newdow v. Rio Linda Union School Dist.*

In *Rio Linda*, Newdow and other parents and their children once again filed a claim challenging the California Education Code § 52720 (“CEC”) and the school district’s policy<sup>40</sup>, which required teachers to lead student in reciting the Pledge of Allegiance.<sup>41</sup> In this case, the court examined the CEC and the school district’s policy against the *Lemon* test.<sup>42</sup> The court finds that the CEC and the district’s policy pass under the first prong of the *Lemon* test because they are purely patriotic and do not mandate the use of the Pledge, only cite it as an option.<sup>43</sup> Additionally, the court also found the CEC and the school district policy also passes the second and third prongs of the *Lemon* test because neither mandate the recitation of the Pledge, so there is no “excessive [governmental] entanglement.”<sup>44</sup> Moreover, under the *Lemon* test, the court

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<sup>37</sup> *Id.* at 17.

<sup>38</sup> *Id.* at 7.

<sup>39</sup> *Id.* at 30 (Rehnquist, J. concurring).

<sup>40</sup> “Each school shall conduct patriotic exercises daily. At elementary schools, such exercises shall be conducted at the beginning of each school day. The Pledge of Allegiance to the flag will fulfill this requirement.” *Newdow v. Rio Linda Union School Dist.*, 587 F.3d 1007, 1018 (9th Cir. 2010).

<sup>41</sup> *Id.* at 1013.

<sup>42</sup> *Id.* at 1017.

<sup>43</sup> *Id.* at 1018.

<sup>44</sup> *Id.*

found that the addition of “under God” was “a reference to the historical and religious traditions of our country” and congress’s purpose in enacting the 1954 Act was not to mandate a religious doctrine but instead to “(1) underscore the political philosophy of the Founding Fathers that God granted certain inalienable rights to the people which the government cannot take away; and (2) to add the note of importance which a Pledge to our Nation ought to have and which in our culture ceremonial references to God arouse.”<sup>45</sup> Further, the court found that a governmental action could still be constitutional even if it has a “religious component.”<sup>46</sup>

In addition, the Court of Appeals also examined the Pledge against the two other Establishment Clause tests (the Endorsement Test, and the Coercion Test).

Under the Endorsement Test,<sup>47</sup> the court found the Pledge is again a patriotic exercise, not a religious one, and “under God” acknowledges the Founding Father’s “political philosophy that a power greater than the government gives the people their inalienable rights.”<sup>48</sup> The court also acknowledged that a child who is not aware of the history of the Pledge might think it is a religious phrase, but a “reasonable observer” that was aware of the history would not.<sup>49</sup>

Lastly, the court also applied the Pledge to the Coercion Test,<sup>50</sup> and found that it “does not coerce students to support or participate in religion or in a religious exercise.”<sup>51</sup> The court reasoned that the students are being coerced, but not for a religious exercise, and instead of a

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<sup>45</sup> *Id.* at 1023, 1028.

<sup>46</sup> *Id.* at 1034.

<sup>47</sup> “Under the Endorsement Test, we look to see whether the challenged governmental action has the purpose or effect of endorsing, favoring, or promoting religion, particularly if it has the effect of endorsing one religion over another.” *Id.* at 1037 (citing *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 578-79 (1989)).

<sup>48</sup> *Id.* at 1037.

<sup>49</sup> *Id.*

<sup>50</sup> “[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.” *Id.* at 1039 (citing *Lee* at 587).

<sup>51</sup> *Id.*

patriotic exercise.<sup>52</sup> Additionally, the court distinguished that in *Lee v. Weisman*<sup>53</sup> the coercion was for a religious exercise and here the exercise is patriotic, which does not violate the Establishment Clause.<sup>54</sup> Therefore, the Ninth Circuit held in this case that the Pledge of Allegiance does not violate the Establishment Clause under all three tests because principal purpose of the Pledge was to “inspire patriotism” and was and is still a “predominantly patriotic exercise.”<sup>55</sup>

#### IV. ANALYSIS

As demonstrated, recent court decisions have ignored the effect the Pledge of Allegiance has on students, and instead rely on whether the intended purpose of the addition of “under God” and mandated daily recitations of the Pledge are political rather than religious. However, courts should consider the effect the Pledge has on students and the possible conflict the Pledge has on parent’s upbringing on their young children, despite the decision in *Barnette* where the court found schools cannot compel students to recite the Pledge.<sup>56</sup> Nevertheless, some argue that there is still pressure on students to conform to peer pressure and recite the Pledge due to stigma of being disloyal to the United States.<sup>57</sup> In April 2013, in Maryland, a tenth-grade student was “repeatedly harassed and intimidated” and eventually punished by teachers and the school’s assistant principal for not participating in the Pledge due to her beliefs between the United States

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<sup>52</sup> *Id.*

<sup>53</sup> “The Establishment Clause was inspired by the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. Prayer exercises in elementary and secondary schools carry a particular risk of indirect coercion.” *Lee v. Weisman*, 505 U.S. 577, 578 (1992).

<sup>54</sup> *Newdow v. Rio Linda Union School Dist.*, 587 F.3d. at 1040.

<sup>55</sup> *Id.* at 1014.

<sup>56</sup> *Barnette*, 319 U.S. 624, 642 (1943).

<sup>57</sup> Tovia Smith, *Parents Fight Over Pledging Allegiance In Schools*, NPR (April 28, 2013), <http://www.npr.org/2011/09/19/140600621/parents-fight-over-pledging-allegiance-in-schools>.

policies and Puerto Rico.<sup>58</sup> Although the student was not abstaining from the Pledge for religious reasons, the Pledge as a required daily patriotic exercise can be detrimental to students due to peer pressure despite having a legislatively mandated option to recite the Pledge daily. Justice Kennedy argues that the Establishment Clause does not prohibit “government policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage.”<sup>59</sup> Further, Justice Brennan argues that references to God in our nation’s history and in the Pledge of Allegiance have lost religious significance due to repetition.<sup>60</sup> Nonetheless, this does not rid of the possibility peer pressure to conform to the students reciting the Pledge. If the Pledge’s purpose is truly patriotic, and serves the nation to instill patriotic values in its children then “under God” does not need to be a part of this teacher-led classroom ritual.

Additionally, if an atheist or other non-theist parent teaches their children to reject the existence of God, it is sending children contradictory messages. While that may be acceptable older students, it is likely that younger students in elementary school will be arguably injured by the conflicting messages. For example, John E. Thompson argues, “[u]nder 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.”<sup>61</sup> Because the Pledge is being recited in classrooms, students, whether they recite the

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<sup>58</sup> Jenny Inglee, *Student Punished for Not Reciting the Pledge of Allegiance in Maryland*, TAKE PART (May 13, 2013), <http://www.takepart.com/article/2013/04/11/pledge-allegiance-schools-student-berated-not-participating-maryland>.

<sup>59</sup> John E. Thompson, *What’s the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, 38 HARV. C.R.-C.L. L. REV. 563, 577 (2003). (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part).

<sup>60</sup> *Id.* (citing *Lynch v. Donnelly*, 465 U.S. 668, 716-17 (1984) (Brennan, J., dissenting)).

<sup>61</sup> Thompson, *supra* cite 56, at 586.

Pledge or not, are being taught that the nation is a religious nation, and therefore if you do not believe in the existence in God, it is possible that you are not patriotic.

Furthermore, if the Pledge of Allegiance's purpose as a patriotic ritual is to teach students about being patriotic to the United States when there is still a question of whether it violates the Establishment and Free Exercise Clauses, then it should be acceptable for all schools to move away from the tradition of the Pledge and instead implement other patriotic exercises. For example at Malcom X Elementary School in Berkeley, California, teachers are not required to lead the students in reciting the Pledge, and instead perform other patriotic exercises, such as learning and dissecting the Pledge.<sup>62</sup>

## V. CONCLUSION

Finally, although Pledge of Allegiance was instilled in schools to promote patriotism, the addition of "under God" creates a detrimental effect on students through peer pressure which courts have no addressed. Instead courts discuss the issue of God in the Pledge under tests that examine religion in government subsidies under the Establishment and Free Exercise Clauses. Courts have mixed holdings on the issue, and because of this they should look at the effect or possible effect the Pledge has on students' everyday lives.

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<sup>62</sup> Jill Tucker, *Many schools skip Pledge of Allegiance*, SAN FRANCISCO CHRONICLE (May 13, 2013), <http://www.sfchronicle.com/education/article/Many-schools-skip-Pledge-of-Allegiance-4379740.php>.