

# UNDER GOD?

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## INTRO

Today, when students recite the pledge in school, they are being indoctrinated to the religious implications of the phrase “under God.” While it is unlikely that these students have ever considered what these words mean, the words are drummed into the, every day. If they were asked to contemplate the phrase “under God,” they would likely recognize all the religious underpinnings of the words.

This article will argue that the current Pledge of Allegiance violates the Establishment Clause for several reasons. First, merely the addition of “under God” to the Pledge of Allegiance emphasized religion in violation of the Establishment Clause. Second, the Pledge of Allegiance was written with “God” and not “god,” and therefore was a direct reference to Christian and Judo religions in violation of the Establishment Clause.

## HISTORY OF THE PLEDGE OF ALLEGIANCE

Francis Bellamy wrote the original Pledge of Allegiance as “patriotic oath”<sup>1</sup> to America in 1892.<sup>2</sup> Later that year, it was first recited in a public school in honor of

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<sup>1</sup> John W. Baer, *"The Pledge of Allegiance: A short history,"* available at <http://www.vineyard.net/>

the 400<sup>th</sup> anniversary of Columbus discovering America.<sup>3</sup> In 1898, New York was the first state to require students to recite the Pledge.<sup>4</sup>

In 1942, Congress passed the United States Flag Code.<sup>5</sup> The statute set forth procedures for handling the flag and codified the Pledge of Allegiance.<sup>6</sup> Additionally, the Flag Code replaced the Bellamy salute with the current salute, calling for citizens to recite the pledge while standing with their right hand over their heart.<sup>7</sup> In 1942 the pledge 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.”<sup>8</sup>

In 1954, amongst the chaos of McCarthyism and the Cold War, a new Pledge of Allegiance was swiftly passed.<sup>9</sup> An inspirational speech by Reverend George Docherty motivated this change.<sup>10</sup> The Reverend, who did not know of the pledge,

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<sup>2</sup> Charles J. Russo, *The Supreme Court and Pledge of Allegiance: Does God Still Have A Place in American Schools?*, 2004 B.Y.U. Educ. & L.J. 301, 303-304 (2004)

<sup>3</sup> *Id.* at 303-04

<sup>4</sup> *Id.* at 303

<sup>5</sup> Pub. L. No. 623-435, § 7, 56 Stat. 380 (1942) (codified at 36 U.S.C. § 172).

<sup>6</sup> *See Id.*

<sup>7</sup> *See Id.* The Bellamy salute was removed because it resembled Hitler’s salute and started with the right hand out stretched palm down and ended with the palm facing upwards.

<sup>8</sup> *Id.*

<sup>9</sup> Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2118 (1996)

<sup>10</sup> Mark Strasser, *Establishing the Pledge: On Coercion, Endorsement, and the Marsh Wild Card*, 40 Ind. L. Rev. 529, 552 (2007)

since he grew up in Scotland, learned of it from his son.<sup>11</sup> After hearing the pledge, he wrote a sermon that was heard by the then President Dwight Eisenhower.<sup>12</sup> In his sermon, Docherty proclaimed that without God in the pledge, it could apply to the Soviet Union.<sup>13</sup> “I could hear little Muscovites recite a similar pledge to their hammer-and-sickle flag with equal solemnity.”<sup>14</sup> Less than four months later, President Eisenhower made it official and the new Pledge read “one Nation, under God, indivisible...”<sup>15</sup>

#### CONSTITUTIONAL CHALLENGES

After the addition of “under God” in 1954, the Pledge of Allegiance faced and overcame numerous constitutional challenges. These challenges focus primarily on whether the certain statutes, requiring the pledge to be said in schools, violated the Establishment Clause. All of this litigation established different tests for determining whether an Establishment Clause violation was present. Further, legal scholars have recognized an exception to the Establishment Clause based on Ceremonial Deism.

The first test came in 1962 in *School District v. Schempp*, when a state statute required that Bible verses, the Lord’s Prayer and the Pledge of Allegiance be recited

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<sup>11</sup> Matt Schudel, *Rev. George Docherty; Urged ‘Under God’ in Pledge*. WASH. POST, Nov. 30, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/29/AR2008112900912.html>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Russo, *supra* note 2, at 304

every morning.<sup>16</sup> The Court held that a Bible reading that was both optional and nondenominational violated the Establishment Clause.<sup>17</sup> However, the Court further concluded that requiring the pledge alone would likely not violate the Establishment Clause.<sup>18</sup> In coming to this conclusion, the court first analyzed whether a secular purpose for the law existed, and then whether the participation would affect or inhibit religion.<sup>19</sup>

In *Lemon v. Kurtzman*, the court introduced a three-prong test for examining whether a statute that concerns religion is a violation of the Establishment Clause.<sup>20</sup> The three prong test assesses whether (1) there is a secular purpose for the law; (2) which does not have as its primary function to inhibit or advance religion and (3) the statute must not create excessive entanglement between church and state.<sup>21</sup>

Justice O'Connor, in *Lynch v. Donnelly*, introduced the next Establishment Clause test, the "Endorsement Test," in 1984.<sup>22</sup> This test focused on the second prong on the Lemon test and asked whether the statute actually endorses religion.<sup>23</sup>

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<sup>16</sup> *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 205-06 (1963)

<sup>17</sup> *Id.* at 206.

<sup>18</sup> *Id.*

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

<sup>20</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

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

<sup>22</sup> *Lynch v. Donnelly*, 465 U.S. 668, 682 (1984).

<sup>23</sup> *Id.*

O'Connor explained the proper standard as "whether the government intends to convey a message of endorsement or disapproval of religion."<sup>24</sup>

In 1992, Justice Kennedy introduced the "coercion test," the most recent Establishment Clause test.<sup>25</sup> In *Lee v. Weisman*, a Rabi was invited to speak at a high school graduation and a family opposed his speaking.<sup>26</sup> The school argued that attendance was optional and thus there was no Establishment Clause violation.<sup>27</sup> In the decision Kennedy stated:

To say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. . . . Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.<sup>28</sup>

Thus since a student is basically coerced to attend his graduation, forcing him to listen to religious propaganda would not be appropriate.<sup>29</sup>

A separate theory, Ceremonial Deism, arose in 1962, as to why the Pledge of Allegiance would never create a violation of the Establishment Clause. From the time it was coined by Yale Law School Dean Eugene Rostow, Ceremonial Deism has

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<sup>24</sup> *Id.* at 691.

<sup>25</sup> See *Lee v. Weisman*, 505 U.S. 577 (1992).

<sup>26</sup> *Id.* at 577.

<sup>27</sup> *Id.* at 578.

<sup>28</sup> *Id.* at 595.

<sup>29</sup> *Id.* at 596.

gained acknowledgement and acceptance in the field and from the courts.<sup>30</sup>

Ceremonial Deism was explained as “a class of public activity which . . . c[ould] be accepted as so conventional and uncontroversial as to be constitutional.”<sup>31</sup> Following this reasoning the Pledge of Allegiance never violates the Establishment Clause.

A landmark case, affirming Ceremonial Deism, occurred in *Sherman v. Community Consolidated School District*. In this case the Seventh Circuit abandoned the Establishment Clause tests identified above and concluded that there could be no Establishment Clause violation because there was no element of religion in the Pledge of Allegiance.<sup>32</sup> The Court explained that prayers are distinguishable from ceremonial references.<sup>33</sup> Ceremonial Deism is a government invocation of God that the courts have found constitutional on the grounds that the practice is longstanding and its religious impact is minimal and nonsectarian.<sup>34</sup> The Court found that the Pledge of Allegiance was a ceremonial reference to God and thus, did not violate the Establishment Clause.<sup>35</sup>

Explanations as to why Ceremonial Deism in civic procedure does not violate the Establishment Clause are forthcoming. According to Justice Brennan, “God Save the United States and this honorable Court, ‘In God We Trust,’ [and] ‘One Nation

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<sup>30</sup> Ryan Pahnke, *Originalism, Ceremonial Deism and the Pledge of Allegiance*, 5 Nev. L.J. 742, 758 (2005).

<sup>31</sup> *Marsh v. Chambers*, 463 U.S. 783, 818 (Brennan, J., dissenting).

<sup>32</sup> See generally *Sherman v. Cmty. Consol. Sch. Dist.*, 980 F.2d 437, 448 (7th Cir. 1992).

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

<sup>34</sup> Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. Rev. 1545, 1549 (2010).

<sup>35</sup> Pahnke, *supra* note 30, at 758.

Under God'. . . . are consistent with the Establishment Clause not because their import is de minimis, but because they have lost any true religious significance.”<sup>36</sup>

Another theory is that the references to God are not a statement of religious belief, but He is mentioned because of his importance to the country’s past and present.<sup>37</sup> The Tenth Circuit affirmed this theory when it held that the “In God We Trust . . . . symbolizes the historical role of religion in our society.”<sup>38</sup> A third theory is that these references to religion are purely ceremonial.<sup>39</sup> In certain situations, the use of religion is “uniquely suited to serve wholly secular purposes as solemnizing public occasions or inspiring commitment to meet some national challenge.”<sup>40</sup>

In *Elk Grove*, Justice O’Connor attempted to regulate the use and meaning of Ceremonial Deism by identifying four elements which establish it: (1) “the history and ubiquity of the practice, (2) the absence of worship or prayer, (3) the absence of reference to a particular religion, and (4) minimal religious content.”<sup>41</sup>

## DISCUSSION

The circumstances surrounding how “under God” was added to the Pledge of Allegiance affirms the phrase’s religious significance. The political turmoil, the

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<sup>36</sup> *Marsh*, 463 U.S. at 818.

<sup>37</sup> Corbin, *supra* note 34, at 1553-54.

<sup>38</sup> *Gaylor v. United States*, 74 F.3d 214, 216 (10<sup>th</sup> Cir. 1996).

<sup>39</sup> Corbin, *supra* note 34, at 1554

<sup>40</sup> *Lynch*, 465 U.S. at 717 (Brennan dissenting).

<sup>41</sup> William Trunk, *The Scourge of Contextualism: Ceremonial Deism and the Establishment Clause*, 49 B.C. L. Rev. 571, 583 (2008).

influence of the religious backers and the current societal times explain why the addition of “under God” passed so swiftly and without much controversy.

Possibly, the most indicative of the phrase’s religious significance are the people who campaigned for the change. The most well know sponsor for this change were the Knights of Columbus.<sup>42</sup> Even prior to effecting the change, the strongly Roman Catholic fraternity began reciting the pledge with “under God.”<sup>43</sup>

A few years latter, Reverend Docherty became involved in this fight. At a mass attended by President Eisenhower, Docherty spoke passionately about this issue in his sermon.<sup>44</sup> Apparently at this time the President was not opposed to receiving political advice in church.

In addition to campaigning for political reform during his own services, Docherty lacked complete standing to discuss the matter, because he was an immigrant. As most Americans learn in school, immigrants founded America. However, perhaps a recent immigrant was not the most credible source to educate the President on what America stood for. Growing up in Scotland, Docherty had never recited the pledge in school, nor learned American history or values in our classrooms.<sup>45</sup> He did not even know about the pledge until his son came home from

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<sup>42</sup> Russo, *supra* note 2, at 304.

<sup>43</sup> *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1050 (9th Cir. 2010); Steven G. Gey, *Under God," the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. Rev. 1865, 1876 (2003).

<sup>44</sup> See Schudel, *supra* note 11.

<sup>45</sup> *Id.*



school reciting it.<sup>46</sup> It is difficult to believe that he knew America well enough to understand ever thing that America was. Nevertheless, in his sermon, Docherty stated that the Pledge of Allegiance lacked a “definitive factor in the American way of life [which] was God Himself.”<sup>47</sup> It seems more likely that he was voicing some religious propaganda rather than trying to truly honor American culture.

Making the sermon more effective was the political climate of the 1950’s. The Cold War was raging and the effects were felt around America. The Soviets were portrayed as godless villains, and anything that stood against those ideas was in favor. Moreover, the McCarthy era was in full swing and freedom of speech was not frequently exercised.

Propaganda flooded America, and a strict dichotomy was created, as fighting this evil became priority number one. The Soviets were at one end and anything that stood against them was deemed good and American. In this fight against the heathens, religion and God was deemed ultra American. Any opposition to God was an opposition to America, thereby classifying you as a communist. Had there been an outcry in America or by Congress when the bill to add “under God” to the pledge was proposed, it is possible that McCarthy trials would have ensued.

My second argument is the basic argument between the meanings of words. When the Pledge of Allegiance was changed in 1954, the new pledge read “under

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

<sup>47</sup> Strasser, *supra* note 11, at 552.

God.” Congress chose to use “God” instead of “god,” thereby enacting a highly religious statute.

“God” is connoted as the one Supreme Being, the creator and ruler of the universe, while “god” is recognized as a reference to any deity. God with a capital “G” is a proper name that identifies one specific being, generally the Christian Supreme Being. When Congress wrote “God” they were referring to the Christian God. President Eisenhower’s speech when the Pledge of Allegiance was signed into law further supports this theory. He said, “From this day forward, the millions of our schoolchildren will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our nation and our people to the Almighty.”<sup>48</sup> “The Almighty” is another word for the Christian God.

Taking the meaning of God into account, the Pledge of Allegiance with “under God” (religious pledge) does not meet any judicial Establishment Clause tests, nor does it qualify for Ceremonial Deism.

A standard statute allowing the religious Pledge of Allegiance to be recited in public schools would fail each of the tests. Under the Schempp and “endorsement test,” a statute fails if it affects or endorses religion. References to the Christian God, obviously affect and endorse religion by supporting Christianity above all other religions. Additionally, this reference would be unsuccessful against the Lemon test’s third prong. The third prong requires there be no excessive entanglement

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<sup>48</sup> Larry Witham, *"If it says 'God,' so be it,"* WASH. TIMES, Jun. 28, 2002, available at <http://www.washtimes.com>.

between church and state and the religious pledge creates the entanglement. Even without acknowledging the religiosity of the pledge, this test should always fail. As evident by the countless lawsuits that arise from statutes allowing the pledge to be recited in public schools, there is a huge entanglement between religion and state. Each time a new lawsuit arises, the state must become involved to protect the pledge's reference to Good.

The Lynch coercion test fails because a student is required to attend school when the pledge is said daily. Every day student are coerced into hearing the pledge and over time coerced into accepting it. Possibly worse than a student contrary to the pledge being forced to listen to it, is when a student becomes desensitized to the idea and beliefs that exist in the pledge. Students should learn the mean of the pledge and its significant rather than being desensitized to the pledge's historical and religious significance.

Ceremonial Deism has been described as constitutional for a variety of reasons. Courts argue that something qualifies for Ceremonial Deism when it is conventional and uncontroversial, secular and with little religious impact, or overwhelmingly ceremonial. The religious pledge does not qualify as Ceremonial Deism under these descriptions. First, as long as people are bringing constitutional challenges, the religious pledge will never be uncontroversial. Next, as long as the challenges create Establishment Clause issues, the pledge will never be secular. Finally, if the pledge were purely ceremonial, then there would have never been a

need to change it. It should have remained in its original form to be kept for ceremonial value.

The most compelling argument for Ceremonial Deism is that the reference to religion is only a historical reference to the importance religion when America was created. This explanation does not try to hide the religious implications of the pledge. Instead, it acknowledges the role of religion and creates a situation where a reference to a Christian God is not might not be prayer.

#### CONCLUSION

In conclusion “under God” should never have been added to the Pledge of Allegiance. In doing so, the pledge became a prayer as well as a tribute to America, creating an excessive entanglement between church and state. For the pledge to honor America in a secular and appropriate way, “under God” should be removed and the original pledge should be reinstated.