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Under God, the Pledge of Allegiance, and Other Constitutional Trivia

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"UNDER GOD," THE PLEDGE OF ALLEGIANCE, AND OTHER CONSTITUTIONAL TRIVIA

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A panel of the United States Court of Appeals for the Ninth Circuit created a furor recently when it ruled that the inclusion of the words "under God" in the official Pledge of Allegiance violates the Establishment Clause of the First Amendment. Responses to this ruling by politicians, the press, and legal academics were overwhelmingly critical. The unifying theme of many of these responses is that the claim against the "under God" language in the Pledge is trivial and therefore not the proper basis for an Establishment Clause ruling. This Article uses the Pledge controversy as a vehicle for investigating the concept of constitutional trivia in the Establishment Clause context. There are two variations on the argument that the "under God" controversy is trivial. The first variation asserts that the religious component of the Pledge has so little religious significance that it does not rise to the level of an Establishment Clause violation. The second variation acknowledges the religious significance of the "under God" language, but asserts that trivial religious exercises should be considered permissible exceptions to the normal First Amendment rules. The problem is that neither variation on the triviality defense of the Pledge can be reconciled with a plausible reading of the factual background of the Pledge statute, or with the overwhelming thrust of the Supreme Court's Establishment Clause precedents. The triviality defense of the Pledge is therefore difficult to accept at face value. This defense should be viewed instead as a distorted reflection of the growing conflict over the most basic principle of Establishment Clause jurisprudence: Does the Constitution continue to mandate a secular government, or has the subtle sectarian dominance of government become an accepted constitutional fact?

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INTRODUCTION

A panel of the United States Court of Appeals for the Ninth Circuit ignited a political firestorm recently when it held in *Newdow v. United States Congress*[1] that the inclusion of the two words "under God" in the official Pledge of Allegiance violates the Establishment Clause of the First Amendment.[2] Politicians at every level of

1. 292 F.3d 597 (9th Cir. 2002).

2. *Id.* at 600. The official wording of the Pledge and the protocols for saluting the flag can be found at 4 U.S.C.A. § 4 (2003).

On February 28, 2003, the full Ninth Circuit Court of Appeals denied the defendants' motion for rehearing en banc of the three-judge panel's June 26, 2002, decision. Newdow v. United States Congress, No. 00-16423, slip op. at 2775 (9th Cir. Feb. 28, 2003), *petition for cert. filed*, 71 U.S.L.W. 3708 (U.S. Apr. 30, 2003) (No. 02-1574) [*Newdow III*]. At the same time, the original *Newdow* panel issued an amended decision. In his lawsuit, Mr. Newdow alleged that two government actions violate the Establishment Clause: (1) the federal statute adding the words "under God" to the official Pledge, and (2) the policy mandating the daily recitation of the official Pledge in classrooms throughout the public school district in which Mr. Newdow's daughter attends elementary school. *See Newdow*, 292 F.3d at 600. In its original opinion, the Ninth Circuit panel held unconstitutional both the federal statute and the local school district policy. *Id.* at 612. In its amended opinion, the panel held the school district policy unconstitutional, but declined to reach the question regarding the constitutionality of the federal statute. *Newdow III*, slip op. at 2812–13. In addition to narrowing its holding, the panel also omitted from its amended opinion some of the earlier opinion's discussion of the constitutionality of the federal statute adding the words "under God" to the official Pledge. *Compare id.* at 2810–13 (discussing the court's holding regarding the school

government rushed to the podium (or the television studio) to express their revulsion at Judge Alfred T. Goodwin's opinion for the 2–1 panel majority. The politicians' comments were invariably critical, and often ineloquently blunt. Within hours of the opinion's release, President Bush dismissed the decision as "ridiculous."[3] The Democratic Senate majority leader Tom Daschle called the decision "just nuts."[4] Senator Robert Byrd directed his comments to the individuals he viewed as the real culprits: "I hope the Senate will waste no time in throwing this decision back in the face of these stupid judges.... That's what they are, stupid."[5] The Senate then proceeded to vote 99–0 in favor of a resolution denouncing the court and instructing Senate lawyers to file a brief seeking reversal of the

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district policy), *with Newdow*, 292 F.3d at 609–12 (discussing the court's holding regarding the federal Pledge statute). The amended opinion does not, however, ignore the effects of the federal statute. Although the court omits from its amended opinion some of the original opinion's discussion of the unconstitutionality of the 1954 statute adding the words "under God" to the official Pledge, the court's pointed description of the unconstitutional religious effect of that statute remains in the amended opinion. *See Newdow III*, slip op. at 2808 ("A profession that we are a nation 'under God' is identical, for Establishment Clause purposes, to a profession that we are a nation ... 'under Zeus,' or a nation 'under no god,' because none of these professions can be neutral with respect to religion."). For this reason, the Ninth Circuit judges who dissented from the denial of rehearing en banc described the amended *Newdow* opinion as "differ[ing] little from *Newdow I* in its central holding." *Id.* at 2783 (O'Scannlain, J., dissenting from the denial of rehearing en banc). As one of the en banc dissenters noted, although the amended opinion avoided the "technical question of the 1954 Act," the amended opinion "necessarily *implies* that both an Act of Congress and a California law are unconstitutional." *Id.* at 2782 (O'Scannlain, J., dissenting from the denial of rehearing en banc).

This Article considers claims of triviality relating to the Pledge in all contexts, including both the narrow school context that is the focus of the amended *Newdow* opinion, as well as the broader context represented by the original incorporation of religious language in the federal Pledge statute. Because the analysis below will focus on both contexts, citations will generally be to the more detailed discussion in the original *Newdow* opinion. In situations where citation to multiple *Newdow* opinions might otherwise lead to confusion, the original *Newdow* opinion will be referred to as "*Newdow I*," the subsequent opinion relating to the plaintiff's standing, *Newdow v. United States Congress*, 313 F.3d 500 (9th Cir. 2002), will be referred to as "*Newdow II*," and the amended panel opinion and denial of rehearing en banc will be referred to as "*Newdow III*."

3. Charles Lane, *U.S. Court Votes to Bar Pledge of Allegiance; Use of "God" Called Unconstitutional*, WASH. POST, June 27, 2002, at A1.

4. *Id.*

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

decision.[6] The House of Representatives voted in favor of a similar resolution by a margin of 416–3.[7]

The politicians' quick and biting response to *Newdow* may have had as much to do with politics as piety. The *Washington Post* noted that many politicians undoubtedly recalled the political price Massachusetts Governor Michael Dukakis paid during the 1988 presidential campaign for vetoing a bill requiring students in all Massachusetts schools to recite the Pledge.[8] Even liberal newspapers and legal scholars, however, were quick to deride the substance of the Ninth Circuit panel's decision. The *New York Times* editorialized that "[t]his is a well-meaning ruling, but it lacks common sense. . . . In the pantheon of real First Amendment concerns, this one is off the radar screen."[9] In a similar vein, University of Chicago law professor Cass Sunstein told the *Chicago Daily Herald* that "[i]t is a very surprising decision and it's not compelled by any precedent."[10] Sunstein went on to note, "This is not a religious ritual, it's a patriotic ritual, so the decision is almost certainly to be overruled."[11] The doyen of American constitutional law academics concurred. When asked by the *Los Angeles Times* whether the Ninth Circuit panel decision would be upheld on appeal, Laurence Tribe responded, "I think the odds of that are about as great as an asteroid hitting Los

6. *See* 148 CONG. REC. S6105 (daily ed. June 27, 2002). Senator Jesse Helms was ill, but also would have voted in favor if he had been present. *See id.* (statement of Sen. Nickles).

7. 148 CONG. REC. H4135 (daily ed. June 28, 2002) (detailing the results of the vote on H.R. Res. 459, 107th Cong., 148 CONG REC. H4125 (daily ed. June 27, 2002) (enacted)). Two of the three Representatives casting negative votes on this Resolution came from the San Francisco Bay area (Representatives Mike Honda and Pete Stark) and the third was from Virginia (Representative Bobby Scott). *See* Robert Salladay & Zachary Coile, *Judge in Pledge Case Puts Brakes on Ruling*, SAN FRAN. CHRON., June 28, 2002, at A1. All three were reelected to office in 2002 from safe Democratic districts. Stark was reelected with a seventy-one percent majority, Honda was reelected with a sixty-five percent majority, and Scott was reelected after running unopposed. *Electing the New Congress: Races for the House*, N.Y. TIMES, Nov. 7, 2002, at B10.

On March 4, 2003, the Senate voted 94–0 in favor of a resolution denouncing the Ninth Circuit's decision not to rehear *Newdow* en banc. 149 CONG. REC. S3076 (daily ed. Mar. 4, 2003) (detailing the results of the vote on S. Res. 71, 108th Cong., 149 CONG. REC. S3076 (daily ed. Mar. 4, 2003) (enacted)). On March 20, 2003, the House voted 400–7 in favor of a similar resolution. 149 CONG. REC. H2137 (daily ed. Mar. 20, 2003) (detailing the results of the vote on H.R. Res. 132, 108th Cong., 149 CONG. REC. H1976 (daily ed. Mar. 19, 2003) (enacted)).

8. Lane, *supra* note 3.

9. Editorial, *"One Nation Under God,"* N.Y. TIMES, June 27, 2002, at A28.

10. Cass Cliatt, *Pledge Ruling Won't Affect Illinois; Expert Predicts Renewed Dedication to Pledge After Court's Ban*, CHI. DAILY HERALD, June 27, 2002, at 1, 2002 WL 23516020.

11. *Id.*

Angeles tomorrow."[12] In sum, the overwhelming immediate response to *Newdow* was that the Ninth Circuit panel granted relief on a trivial claim that is unworthy of serious consideration and is certain to be overturned on appeal. This immediate response to *Newdow* conforms to the predominant theme of pre-*Newdow* statements concerning the Pledge in articles by prominent Religion Clause academics.[13]

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12. Maura Dolan, *Pledge of Allegiance Violates Constitution, Court Declares*, L.A. TIMES, June 27, 2002, at A1. Other statements by Professor Tribe indicate that in addition to doubting that the *Newdow* decision will survive on appeal, he believes that the words "under God" in the Pledge are constitutionally unproblematic. *See* David Kravets, *Judge Says His Ruling on Pledge Had Supreme Court Precedents*, PHILADELPHIA INQUIRER, July 5, 2002, at A10 ("The insertion of God into the pledge may have been for religious reasons ... but five decades later, the phrase under God no longer evokes a religious experience.").

13. *See, e.g.*, Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 603 n.82 (1995) ("Although inconsistent with current Establishment Clause doctrine, in the opinion of modernists official references to God are a blend of patriotism and civil religion, de minimis in their harm to nontheists. Thus, it is prudent to overlook the inconsistency."); Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 521 (1992) (noting general consensus that the "under God" language of the Pledge and other manifestations of ceremonial deism are constitutional: "One way to reconcile these instances of 'de facto establishment' with the principle of non-establishment is to call them 'de minimis.' "); Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1339 (1995) (arguing that the Court has viewed government religious endorsements such as the phrase "under God" in the Pledge as exceptions to clearly applicable Establishment Clause doctrine: "The exceptions often are characterized as covering 'de minimis' instances of government endorsement or as historic governmental practices that have largely lost their religious significance or at least have proven not to lead the government into further involvement with religion"); Michael J. Perry, *Freedom of Religion in the United States: Fin de Siècle Sketches*, 75 IND. L.J. 295, 317 n.71 (2000) ("One may plausibly conclude that whatever religious dimension routine public recital of the Pledge retains is so slight, so marginal, as to be legally de minimis—that notwithstanding the phrase 'under God,' routine public recital of the Pledge is so much less a religious exercise than a quintessentially civic one."); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 207–08 n.59 (1992) ("But we need not melt down the national currency to get rid of 'In God We Trust.' Rote recitation of God's name is easily distinguished as a de minimis endorsement in comparison with prayer or the seasonal invocation of sacred symbols. The pledge of allegiance is a closer question.").

Steven B. Epstein is one notable exception to the general reluctance of legal academics to grant the "under God" language in the Pledge constitutional significance. His 1996 article is by far the most thorough analysis of the general problems that attend the phenomenon of ceremonial deism.

> Although the effect of including the words "under God" in the Pledge of Allegiance may be less pronounced than the effect of the prayers at issue in *Engel*, *Schempp*, and *Lee*, the daily recitation of the amended Pledge of allegiance nevertheless sends a message to students who do not believe in a monotheistic god "that they are outsiders, not full members of the political

The problem with these responses is that, at least as a matter of constitutional doctrine, they are all wrong. Professor Sunstein's blunt claim that the Ninth Circuit's decision is "not compelled by any precedent" is correct only in the very narrow technical sense that the United States Supreme Court has never held in a factually identical case that the Constitution prohibits the government from including the words "under God" in a pledge repeated daily as part of a legally mandated "patriotic exercise"[14] by students in a public school. But even if the Supreme Court has not issued such a precise ruling based on identical facts, the Court's precedents regarding government endorsement of religion and state-mandated religious activities in public schools provide abundant support for the conclusion reached by the Ninth Circuit panel.[15] Under any fair reading of the relevant precedents, the Ninth Circuit panel's interpretation correctly applied Establishment Clause doctrine.

So what is all the fuss about? Why were politicians, newspaper editorialists, and legal scholars so quick to dismiss the Ninth Circuit's analysis? The answer can be found in the opinion of Judge Ferdinand Fernandez, the lone dissenter in *Newdow*. Although Judge Fernandez made some effort to build an argument against the majority's conclusion, he did not seriously challenge the majority's interpretation of current doctrine regarding governmental endorsement of religion. Instead, Judge Fernandez argued that the majority was wrong to apply that doctrine in *Newdow* because the

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community" and instills in them a perception of "disapproval[] of their individual religious choices."

Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2152 (1996) (alteration in original). Other exceptions to the rule from the academic world include Jesse Choper and Arnold Loewy. *See* JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 142 (1995) (arguing that inclusion of "under God" in the Pledge in the school context is unconstitutional); 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, 1059–60 (1986) ("Unlike its inclusion in the Gettysburg Address, government's insertion of the phrase 'under God' in the Pledge of Allegiance is precisely the type of religious endorsement that should not be tolerated."). For another interesting critical analysis of the issue, see Alexandra D. Furth, Comment, *Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court's Secularization Analysis*, 146 U. PA. L. REV. 579, 579–80 (1998) (noting that the effort to render constitutional various government uses of religious symbols requires the government to secularize those symbols in a manner that injures religious practitioners, and arguing that this is both legally and analytically unsound).

14. *See* CAL. EDUC. CODE § 52720 (West 1989) (mandating daily "patriotic exercises" and stipulating that recitations of the Pledge "shall satisfy the requirements of this section").

15. *See infra* Part I.B.

plaintiff's constitutional claim was too trivial to implicate the First Amendment at all.[16] According to Judge Fernandez, the "tendency [of the inclusion of the words "under God" in the pledge] to establish religion in this country or to interfere with the free exercise (or non-exercise) of religion is de minimis."[17] Judge Fernandez went on to emphasize that he was not arguing that "there is such a thing as a de minimis constitutional violation," but rather that "the de minimis tendency of the Pledge to establish a religion or to interfere with its free exercise is no constitutional violation at all."[18]

The suggestion that the claim against the inclusion of "under God" in the Pledge amounts to a subconstitutional trifle seems to be the unifying theme of those criticizing the Ninth Circuit panel, and the motivation behind the almost unanimous belief that the wayward three-judge panel would be overruled either by an en banc panel of the Ninth Circuit or the Supreme Court itself.[19] A majority of judges on the full Ninth Circuit Court of Appeals has now declined to review en banc the *Newdow* panel decision.[20] Regardless of whether the panel decision survives scrutiny by the United States Supreme Court, the perception that this case involves only a trivial claim deserves further analysis. This Article will critique the concept of constitutional trivialities, especially as that concept applies in First Amendment Establishment Clause cases such as the *Newdow* challenge to the Pledge.

Several general questions come to mind regarding the concept of constitutional trivialities, all of which have implications for the current Pledge controversy: How does one identify a constitutional triviality? Is a claim trivial because of its facts or because of the constitutional principle involved? Does the plaintiff or the government assess triviality? What would a consistent application of the concept of constitutional triviality do to existing Establishment Clause jurisprudence? What would the concept do to remaining Free Exercise Clause protections? For that matter, what would a consistent application of the concept of constitutional triviality do to the full range of First Amendment jurisprudence? Is a short

16. *See* Newdow v. United States Congress, 292 F.3d 597, 613 (9th Cir. 2002) (Fernandez, J., concurring in part and dissenting in part) (describing the danger from the phrase "under God" to First Amendment freedoms as "picayune").

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

18. *Id.* at 615 n.9 (Fernandez, J., concurring in part and dissenting in part).

19. *See supra* notes 10–12 and accompanying text.

20. *See* Newdow v. United States Congress, No. 00-16423 (9th Cir. Feb. 28, 2003), *petition for cert. filed*, 71 U.S.L.W. 3708 (U.S. Apr. 30, 2003) (No. 02-1574).

ecumenical prayer at a football game,[21] the phrase "Live Free or Die" on a state license plate,[22] or a jacket with the inscription "Fuck the Draft"[23] really worthy of lengthy consideration in full opinions by the United States Supreme Court? Or, conversely, is the very concept of constitutional triviality one of the most effective mechanisms for maintaining majoritarian control over public discourse? However one might describe the various manifestations of the phenomenon, the concept of constitutional trivia is not itself trivial.

This Article will consider several different aspects of the constitutional triviality claim regarding the Pledge. Part I begins with a description of the factual background of the Pledge, in particular the 1954 statute that added religious language to the existing text of the Pledge. Part I then considers the claim of triviality in light of constitutional doctrines arising out of the Court's three main Establishment Clause tests. Part I concludes with an analysis of the argument that Mr. Newdow's own injury is trivial and therefore nonjusticiable in federal court because Mr. Newdow lacks standing. Part II considers four different manifestations of the constitutional trivia argument regarding the substantive challenges to the Pledge. These arguments include, first, the argument that the "under God" language is not religious at all; second, the argument that, even if the language is religious, it is only a "de minimis" religious overture; third, the argument that granting Mr. Newdow relief will cast into doubt many other patriotic references to God; and fourth, the argument by civil libertarian opponents of Mr. Newdow's claim that as a strategic matter this claim should be abandoned in favor of a focus on more important Establishment Clause matters.

I. "UNDER GOD" AND THE NONTRIVIAL DOCTRINE OF GOVERNMENT RELIGIOUS ENDORSEMENTS

The gist of Mr. Newdow's legal case against the use of "under God" in the official Pledge of Allegiance is that the factual and political background of the statute adding the phrase "under God" to the Pledge indicates that the phrase was intended to represent a

21. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000).

22. *See* Wooley v. Maynard, 430 U.S. 705, 715–17 (1977) (holding that the First Amendment Free Speech Clause prohibits the State of New Hampshire from requiring private individuals to display on their automobile tags the state motto "Live Free or Die").

23. *See* Cohen v. California, 403 U.S. 15, 26 (1971) (overturning the conviction for "offensive conduct" of a man who wore a jacket bearing the words "Fuck the Draft" in a corridor of the Los Angeles courthouse, and holding that the First Amendment prohibits the government from criminalizing the public display of an expletive).

religious affirmation, which directly violates longstanding constitutional doctrine prohibiting the government from endorsing religious principles or issuing statements of religious affirmation—especially in the context of the public schools. In considering whether this claim is constitutionally trivial, three aspects of the case are important: the factual background of the inclusion of "under God" in the Pledge, the legal background of the constitutional doctrine prohibiting this particular form of governmental religious endorsement, and the nature of this particular plaintiff's injury. In light of the uncontroverted evidence concerning the addition of "under God" to the Pledge, several decades of Supreme Court jurisprudence on this subject, and Mr. Newdow's direct connection to the particular circumstances that generated his lawsuit, the unavoidable conclusion is that each of these three elements of *Newdow* are well within the parameters of a nontrivial substantive constitutional claim under the Establishment Clause.

A. The Factual Background of "Under God" and the Pledge

It is impossible to read the evidence supporting the constitutional challenge to the addition of the phrase "under God" to the official Pledge of Allegiance in a way that would render that claim trivial. On the contrary, virtually all the evidence relating to the 1954 statute adding the challenged language to the Pledge leads to the conclusion that the statute had an overwhelmingly religious intent and effect. First, the addition of the controversial religious phrase is a relatively recent modification of what was at that time a fifty-two year old patriotic composition that previously was devoid of religious references.[24] Additionally, the two new words added nothing to the nonreligious patriotic aspects of the Pledge.[25] Finally, the elected officials responsible for adding the two words to the existing Pledge specifically and repeatedly announced that strong religious sentiments motivated their action.[26] The legal implications of these facts depend on the applicable Establishment Clause law, which will be discussed in the next subsection, but it cannot plausibly be disputed that the religious purpose and effect of adding the words "under God" to the Pledge were foremost in the mind of every relevant political actor responsible for the decision, and that the same religious purpose and effect are evident from the words themselves.

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24. *See infra* notes 27–33 and accompanying text.
25. *See infra* notes 89–92 and accompanying text.
26. *See infra* notes 37–58 and accompanying text.

The evolution of the Pledge underscores (sometimes in ironic ways) the religious significance of the modification challenged in *Newdow*. The phrase "under God" did not appear in the original version of the Pledge of Allegiance. The original Pledge was written by Francis Bellamy, and published without attribution to Bellamy in 1892 by the magazine *The Youth's Companion*.[27] One of the many ironies of the Pledge of Allegiance controversy is that the author of the original Pledge was a Socialist who was forced to resign his position as a Baptist minister because of his leftist political and pro-racial integration activities.[28] Bellamy wrote the Pledge after leaving the ministry in 1891.[29] At the time he wrote the Pledge, Bellamy had joined the staff of *The Youth's Companion*, a magazine owned by a liberal Boston businessman named Daniel Ford.[30] The magazine was a sort of *Readers' Digest* of its time and was the first or second most widely circulated weekly magazine in the United States.[31] As part of a campaign to promote the use of the flag in public schools, the head of the magazine's Premium Department enlisted Bellamy to write the Pledge to commemorate the 400th anniversary of Christopher

27. For an interesting, although somewhat strange account of Bellamy's life, including his authorship of the Pledge, see generally MARGARETTE S. MILLER, TWENTY-THREE WORDS (1976). The book, which was written with the assistance of Bellamy's family, is an odd compendium of Bellamy's "unpublished and published manuscripts, sermons, diaries, [and] public and private letters." *Id.* at vi. Miller compiled these disparate materials into a sort of biography "written as Francis Bellamy might have written it." *Id.* For the story of Bellamy's composition of the Pledge, see *id.* at 119–25.

One of the many curious aspects of the history of the Pledge is the decades-long dispute over Bellamy's authorship of the Pledge. When Bellamy wrote the Pledge for *The Youth's Companion*, the magazine had a tradition of anonymity for its authors, so Bellamy's name was never published in conjunction with the Pledge. JOHN W. BAER, THE PLEDGE OF ALLEGIANCE, A CENTENNIAL HISTORY, 1892–1992, at 14 (1992). The first misattribution of the Pledge occurred when a high school student plagiarized the Pledge and submitted it to a school contest in Cherryvale, Kansas, in the school year 1895–1896. *Id.* at 64. The plagiarist was ironically named Frank Bellamy, although the guilty party was not related to the real author and may not have even been aware of their similar names. *Id.* The false Bellamy continued taking credit for the Pledge for many years, and even submitted a handwritten copy of it with his own signature to the Kansas State Historical Society, which then published the false Bellamy's version in its records. *Id.* The more prominent dispute over authorship of the Pledge occurred several decades later between supporters of Francis Bellamy and the descendants of James Upham, who had worked at *The Youth's Companion* and had urged Bellamy to compose the Pledge. *See id.* at 64–67. This dispute was finally resolved by a formal investigation into the matter by the Legislative Research Service of the Library of Congress, which issued a report in 1957 concluding definitively that Francis Bellamy was the true author of the Pledge. *See* 103 CONG. REC. A7451–52 (1957) (statement of Rep. Keating).

28. *See* BAER, *supra* note 27, at 43.

29. *Id.* at 47–49.

30. *Id.* at 43–44.

31. *Id.* at 14.

Columbus's discovery of America.[32] The version of the Pledge published at that time was: "I pledge allegiance to my flag and to the Republic for which it stands—one nation indivisible—with liberty and justice for all."[33]

Despite the left-wing sentiments of the Pledge's original author and supporters, the use of the Pledge was soon being embraced and advanced by conservative organizations such as the American Legion. During the first half of the twentieth century, several small changes were made. In 1923, the words "my flag" were changed to "the flag of the United States" because, in the words of American Legion literature on the subject, "some foreign-born people might have in mind the flag of the country of their birth instead of the United States flag."[34] The words "of America" were added a year later.[35] This was the form adopted by Congress in 1942 as the official Pledge of Allegiance.[36]

This version of the Pledge served the country throughout World War II and into the beginning of the Cold War era of the 1950s. As the Cold War era progressed, patriotism and religiosity often merged to form a common front against the perceived threat of atheistic Communism:

> Religiosity pervaded popular culture. Msgr. Fulton J. Sheen's weekly inspirational television program rivaled *I Love Lucy* in popularity. Religiously grounded self-help books like *The Power of Positive Thinking* and *Peace of Mind* (written respectively by a Presbyterian minister and a

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32. MILLER, *supra* note 27, at 119–25. The head of the Premium Department was James Upham, whose descendants later claimed that Upham authored the Pledge. *See id.* at 73. Although the attempt to attribute authorship of the Pledge to Upham ultimately failed, there is little doubt that Upham was responsible for developing the now-common tactic of using premiums as a means of increasing magazine circulation. *See* BAER, *supra* note 27, at 19. Premiums, which included American flags, were given to new and renewing subscribers, and to "subscribing clubs and institutions like schools and churches." *Id.* Upham later developed the *Youth's Companion* Premium Department into a precursor of the mail-order catalog. Subscribers could purchase from the magazine's Premium Department a range of goods, including "laying hens, microscopes, singing canaries, steam engines, 93-piece dinner sets, pedometers, watch fobs, clothes, tools, sewing machines, church bells, pianos, toys, stoves, bedsteads, furniture, silverware, moccasins, Jack knives, lockets, cameras, pictures, and books by Shakespeare, Dickens, Hardy, Gladstone, and Tennyson." *Id.*

33. MILLER, *supra* note 27, at 122.

34. The American Legion, *Our Flag: History of the Pledge of Allegiance*, *at* http://www.legion.org/our_flag/of_pledgehist_flag.htm (last visited Apr. 21, 2003) (on file with the North Carolina Law Review).

35. *Id.*

36. *See* Act of June 22, 1942, Pub. L. No. 77-623, § 7, 56 Stat. 377, 380 (codified as amended at 4 U.S.C.A. § 4 (2003)).

> rabbi) remained on the best-seller lists for years. Echoing this popularity, Congress added the phrase "under God" to the Pledge of Allegiance in 1954, and in 1956 adopted "In God We Trust" as the official motto of the United States.[37]

Actually, Congress did not come up with the idea of adding the phrase "under God" on its own. The two words were added at the instigation of a religious group—the Knights of Columbus. The Knights of Columbus had begun using the amended pledge in its own assemblies in 1951.[38] In 1952, the Supreme Council of the Knights of Columbus passed a resolution urging Congress to formally amend the Pledge.[39] Taking its cue from this group, Congress not only added the group's specifically religious phrase to the Pledge, but also constructed a legislative history that made the religious origins and intent of the phrase explicit.

The House Report on the addition to the official Pledge of the words "under God" repeatedly asserts the basic proposition that the insertion of the two words was intended to communicate the idea that the country's political structure derives its authority from God and indeed that the "nation was founded on a fundamental belief in God."[40]

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. 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.[41]

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37. William M. Wiecek, *America in the Post-War Years: Transition and Transformation*, 50 SYRACUSE L. REV. 1203, 1212 (2000).

38. CHRISTOPHER J. KAUFFMAN, FAITH AND FRATERNALISM: THE HISTORY OF THE KNIGHTS OF COLUMBUS 1882–1982, at 385 (1982).

39. *Id.*

40. H.R. REP. NO. 83-1693, at 1–2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340.

41. *Id.*

At every point in its analysis, the House Report subordinates the nation's political structure to the majority's religious ideal:

> From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.... Since our flag is symbolic of our Nation, its constitutional government and the morality of our people, the committee believes it most appropriate that the concept of God be included in the recitations of the pledge of allegiance to the flag.[42]

These are not trivial references to a concept denuded of its religious significance. The House Report refers to a specifically religious concept, which the Report places in direct contrast to contrary notions of "atheis[m] and materialis[m]."[43] The House referred to these concepts for the express purpose of excluding from the nation's defining tradition individuals who choose to follow some version of atheism or materialism rather than the majority's preferred religious ideal. Whatever the constitutional merits of Mr. Newdow's Establishment Clause claim, it simply cannot be argued that as a factual matter he misconstrued the intentions of Congress to target and disparage people with his beliefs on the subject of religion.

All the other evidence relating to the passage of the 1954 statute modifying the official Pledge confirms the House Report's single-mindedly religious approach. The Senate Report on the addition of "under God" to the Pledge is much less extensive than the House Report, but no less explicitly religious in its stated objective.[44] The substance of the Senate Report is contained in a letter to the Senate Judiciary Committee by Senator Homer Ferguson, who sponsored the 1954 "under God" legislation.[45] The Committee incorporated this letter into its Report, after describing the letter as having expressed "[t]he most cogent and compelling reasons for the passage of the resolution."[46] Ferguson's substantive arguments in favor of appending "under God" to the Pledge are largely the same as those expressed in the House Committee Report. The key theme is that the belief in God is the single most important factor in distinguishing the United States from Communist nations such as the Soviet

42. *Id.* at 2–3, *reprinted in* 1954 U.S.C.C.A.N. at 2340–41.
43. *Id.* at 2, *reprinted in* 1954 U.S.C.C.A.N. at 2340–41.
44. The Senate Report is reproduced at 100 CONG. REC. S6231–32 (1954).
45. *Id.*
46. *Id.*

Union:[47] "The spiritual bankruptcy of the Communists is one of our strongest weapons in the struggle for men's minds."[48] Senator Ferguson intentionally imputed deep religious significance to the words "under God." Judging by the favorable reference to Senator Ferguson's sentiments, the Senate Judiciary Committee and the full Senate did so as well. Ferguson even attests that the introduction of the resolution "was suggested to me by a sermon given recently by the Rev. George M. Docherty . . . who is pastor of the church at which Lincoln worshipped."[49] The gist of Reverend Docherty's sermon is that because of the secular phrasing of the pre-1954 Pledge, "it could be the pledge of any republic. In fact, I could hear little Moscovites repeat a similar pledge to their hammer-and-sickle flag in Moscow with equal solemnity."[50] The message conveyed by the Senate when it passed the "under God" legislation, like that of the House, was overtly and nontrivially sectarian: Americans believe in God, Communists do not. Ergo, atheists are not real Americans.

The final piece of evidence in assessing the specific degree of religiosity in the factual background to the 1954 amendment of the Pledge of Allegiance is President Eisenhower's intent in signing the legislation. A brief perusal of Eisenhower's official statement explaining his support for the legislation reveals that the President shared the deep religious sentiments expressed by those in the legislative branches:

> 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. . . . In this way we are reaffirming the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource, in peace or in war.[51]

As if the religious message conveyed by the President and every political official having input into the 1954 Pledge legislation needed reinforcing, the general atmosphere surrounding the President's signing ceremony drove the sectarian point home forcefully. Frederick Brown Harris was a Methodist minister who also served at

47. *Id.* ("[O]ne of the greatest differences between the free world and the Communists [is] a belief in God.").

48. *Id.*

49. *Id.*

50. *Id.*

51. Eisenhower's statement is reprinted at 100 CONG. REC. S8617–18 (1954).

the time as Chaplain of the United States Senate.[52] Harris attended Eisenhower's signing ceremony and described the scene in a religious column inserted into the Congressional Record by Senator Ferguson.[53] The added language's clear religious significance was not lost on Harris, nor was its message of political favoritism to those who adopted the official faith: "To put the words 'under God' on millions of lips is like running up the believer's flag as the witness of a great nation's faith."[54] The significance to nonbelievers was equally clear: "It is also displayed to the gaze of those who deny the sacred sanctities which it symbolizes."[55] Amidst a series of general paeans to "the faith in which the Republic was cradled" and attacks on "blasphemous denials of God," "cynical denier[s]," and "the baneful social pattern of atheistic materialism,"[56] Harris provided a description of the signing ceremony, highlighting the extent to which the entire enterprise was conducted in a manner roughly consistent with Harris's own somewhat overwrought sense of religious millenarianism:

> On that June day, within a few minutes after the signature of the President had written "under God" in the Pledge of Allegiance, the bill that legalized it leaped to life in a scene silhouetted against the white dome of the Capitol. There stood Senator Homer Ferguson, who had sponsored the resolution in the Senate, and with him a group of legislative colleagues from both houses of Congress. As the radio carried their voices to listening thousands, together these lawmakers repeated the pledge which is now the Nation's. Then, appropriately, as the flag was raised a bugle rang out with the familiar strains of "Onward, Christian Soldiers!"[57]

This is the image that encapsulates the government's intent in adding the words "under God" to the Pledge: the President, surrounded by many of the most important political actors of the time, standing together and reciting the newly sanctified Pledge, bolstered with repeated verbal diatribes against demonic atheists, and serenaded by the "familiar strains of 'Onward Christian Soldiers!' " The intent is unambiguous and undeniable: Every single political actor who had a hand in the decision to add the words "under God" to the Pledge specifically intended (to borrow Justice O'Connor's

52. *Id.* at S8617.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at S8618.
57. *Id.* at S8617.

phrasing) to send "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."[58]

In the end, it cannot be denied that the addition of the words "under God" to the official Pledge of Allegiance was intended and had the effect of adding a specifically religious sentiment to the previously secular covenant. The claim that the addition of "under God" conveys only a trivial religious meaning ignores the multiple specific, extensive, and quite pointedly religious arguments of every government official who spoke on the matter and was directly responsible for making the change. It is impossible to argue that those who supported the amended Pledge interpreted the term "God" as religious in only an abstract, generic, or trivial sense. Those adopting the legislation intended to convey the strongest possible meaning of "God": that is, as referring to a single supreme being, whose will is superior to the judgment of mere mortals, and whose dominance over political affairs is a mandatory assumption of American citizenship. As a factual matter, this is not a trivial endorsement of religious doctrine.[59] If it is to succeed, the triviality claim must rest on the law rather than the facts. As the next subsection illustrates, however, the Supreme Court has struck down government endorsements of religion in cases with far more trivial records of governmental religious intent than this one.

B. The Legal Background of Governmental Religious Endorsements

When Congress acted in 1954 to add "under God" to the Pledge, it at least recognized that this religious endorsement raised an Establishment Clause question. Congress offered this curt answer to that question:

> This is not an act establishing a religion or one interfering with the "free exercise" of religion. A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God. The phrase "under

58. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). For more on the application of Justice O'Connor's endorsement analysis to the Pledge, see *infra* notes 106–14 and accompanying text.

59. I will deal below with the argument that the Pledge has evolved away from its original religious meaning to serve a constitutionally permissible secular, patriotic function. *See infra* Part II.A.

> God" recognizes only the guidance of God in our national affairs.[60]

Virtually identical language appears in Senator Ferguson's letter, which represents the substantive core of the Senate Report.[61] To phrase the matter in the language of the Supreme Court's Establishment Clause jurisprudence, the opinion of Congress seems to have been that the Establishment Clause is satisfied if the government endorses religion in general, as long as the government avoids endorsing a particular church. In short, Congress misunderstood the law.

In the years since the Supreme Court began routinely issuing Establishment Clause rulings in 1947, it has repeatedly been offered the opportunity to adopt the so-called "nonpreferentialist" position on the Establishment Clause—that is, the position that the government may favor religion generally as long as it stops short of favoring a particular sect. A few members of the Court have actually embraced this position, but it has never come close to attracting the support of a majority of the Court.[62] For as long as the Court has been making pronouncements on the subject, it has interpreted the Establishment Clause to mean that the Clause is violated by governmental favoritism of religion generally, as well as by governmental favoritism of a particular church.[63] The Court's

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60. H. REP. NO. 83-1693, at 3 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2341–42.

61. "This is not an act establishing a religion. A distinction exists between the church as an institution and a belief in the sovereignty of God." 100 CONG. REC. S6231.

62. Then-Justice Rehnquist's dissenting opinion in *Wallace v. Jaffree* is the clearest exposition of the nonpreferentialist position. *See* Wallace v. Jaffree, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting). Justice White also embraced this position by noting his "appreciation" of Justice Rehnquist's nonpreferentialist interpretation of the history of the First Amendment and concluding that "[a]gainst that history, it would be quite understandable if we undertook to reassess our cases dealing with [the Religion] Clauses particularly those dealing with the Establishment Clause." *Id.* at 91 (White, J., dissenting).

63. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."). Arguably the Court's actual holdings in Establishment Clause cases are inconsistent with the nonfavoritism principle. This claim could even be made about *Everson* itself, in which by a narrow five-vote majority the Court upheld a New Jersey statute permitting local school districts to finance transportation to religious as well as public schools. *Id.* at 18. On a doctrinal level, however, the Court has been consistent ever since *Everson* in requiring that government programs neither favor a particular religion nor religion in general. As in *Everson*, when the Court upholds public programs granting funds to religious institutions, it usually argues that such programs merely avoid discrimination against, rather than favor religion. *See id.* Even in the Court's recent decision upholding public school vouchers to students attending religious schools, the Court insisted that the program did not involve

statements on this subject have been numerous and blunt: "[T]his Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another."[64] Not surprisingly, nonbelievers such as Mr. Newdow have been the beneficiaries of many of the Court's decisions discussing this matter, and the Court has specifically welcomed atheists and agnostics into the protective arms of the Establishment Clause:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither 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.[65]

So when the authors of the 1954 House Report concluded that the addition of the words "under God" did not violate the Constitution because they merely expressed the government's "belief in the sovereignty of God"[66] rather than establishing a particular institutional religion, they were relying on an inaccurate understanding of what the relevant law prohibits. The fallback position to the invalid assumptions reflected in the House Report is the triviality argument. The triviality argument applied to Establishment Clause jurisprudence would recognize that the Establishment Clause prohibits the establishment of religion over atheism or agnosticism, but assert that the particular form of establishment at issue in *Newdow*—that is, the addition of two small words to the Pledge—is too trivial to implicate the general Establishment prohibition. The question, therefore, is whether this particular government action is more trivial than that in other cases in which the Court has found an Establishment Clause violation in a government action embracing or expressing generalized religious sentiments. The answer to this question is very clearly "no." Those

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government favoritism toward religion: "There are no 'financial incentive[s]' that 'ske[w]' the program toward religious schools. Such incentives '[are] not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.' " Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2468 (2002) (alterations in original) (citations omitted) (quoting Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487–88 (1986), and Agostini v. Felton, 521 U.S. 203, 231 (1997)).

64. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 216 (1963).

65. Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (quoting *Everson*, 330 U.S. at 15)).

66. *Supra* note 60 and accompanying text.

who would dismiss Mr. Newdow's claim as legally trivial misread the case law as badly as the authors of the 1954 House Report.

Determining what the Establishment Clause means in cases such as *Newdow* is not as difficult as Judge Goodwin's Ninth Circuit panel decision makes it seem. Like many lower court judges, Judge Goodwin faces something of a mess when confronting a modern Establishment Clause issue. The problem is not that the Supreme Court has failed to articulate a standard for deciding Establishment Clause cases; the problem is that the Court has articulated too many standards for deciding Establishment Clause cases. The nine Justices on the Supreme Court have at one time or another announced six different Establishment Clause standards.[67] In attempting to make his way through this morass, Judge Goodwin identified three tests that at one point or another have garnered the support of a majority of the Supreme Court: the three-part *Lemon* test, the endorsement analysis, and the coercion analysis.[68] Judge Goodwin followed the pattern of other lower courts[69] in avoiding an irreconcilable clash of

67. The six different tests are: (1) the three-part *Lemon* test, *see infra* note 74; (2) the endorsement test, *see infra* notes 106–08 and accompanying text; (3) a narrow coercion analysis, which would prohibit only direct government coercion of specific religious practices, *see* Lee v. Weisman, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting); County of Allegheny v. ACLU, 492 U.S. 573, 660 (1989) (Kennedy, J., concurring in part and dissenting in part); (4) a broad coercion analysis, which would prevent the government from engaging even in subtle coercion or encouraging private coercion such as peer-group pressure in public schools, *see Lee*, 505 U.S. at 586–99; (5) a nonpreferentialist analysis, which would permit the government to favor religion in general as long as it did not favor a particular faith, *see Wallace*, 472 U.S. at 91–114 (Rehnquist, J., dissenting); and (6) a standardless, ad hoc approach to different Establishment Clause problems, *see* Bd. of Educ. v. Grumet, 512 U.S. 687, 721 (1994) (O'Connor, J., concurring). The situation is made even more confusing by the fact that some Justices embrace different analyses at different times, without ever abandoning their earlier approaches, or recognizing the incompatibility of the various tests. For example, Justice O'Connor was the original proponent of the endorsement analysis, which builds on *Lemon*, *see infra* note 106 and accompanying text, but has also supported a standardless, ad hoc approach, *see Grumet*, 512 U.S. at 721, and also has joined opinions favorably applying the principles of *Lemon*, *see, e.g.*, *Lee*, 505 U.S. at 602 (Blackmun, J., concurring) (explaining the three-part *Lemon* test).

68. Newdow v. United States Congress, 292 F.3d 597, 605 (9th Cir. 2002).

69. *See, e.g.*, DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 410–16 (2d Cir. 2001) (applying the *Lemon*, endorsement, and coercion tests); Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 468 (5th Cir. 2001) (en banc) (same); Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 278–80 (5th Cir. 1996) (same); *see also* ACLU of Ohio v. Capitol Square & Review Advisory Bd., 243 F.3d 289, 305–06 (6th Cir. 2001) (applying the *Lemon*, historical, and endorsement tests); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 966–69 (5th Cir. 1992) (concluding that five different tests have been used by the Supreme Court, and analyzing a graduation prayer under all five); Murray v. City of Austin, 947 F.2d 147, 153–58 (5th Cir. 1991) (applying the *Lemon*, historical, coercion, and endorsement tests).

outcomes, by assuring that the analysis under each of these tests leads to the same result. In this case that result is easy to achieve, because for all its theoretical inconsistency, the Supreme Court has consistently come down on the same side in cases analogous to *Newdow* by refusing to permit explicit state endorsement of religion—especially when (as in *Newdow*) that endorsement occurs in a public school classroom.[70]

The question here is not whether the law supports Judge Goodwin's *Newdow* majority opinion, because without question the relevant precedents universally support the central proposition of that opinion: As Judge Goodwin indicates, the Supreme Court repeatedly has prohibited the government from: (1) enacting legislation lacking a secular purpose or effect;[71] (2) endorsing religious ideas, including the generic idea that there is a God and His will controls or guides human destiny;[72] and (3) coercing participation in a religious exercise, even if that participation amounts to simply sitting silently during a brief nondenominational religious exercise.[73]

The focus of this Article is on responding to the triviality claim, rather than reaffirming the strength of the Establishment Clause doctrine. The significant question here, therefore, is whether the relevant Supreme Court precedents were produced in the context of circumstances involving far more substantial (i.e., nontrivial) violations of the nonestablishment mandate than the circumstances in *Newdow*. A perusal of the secular purpose/effect, endorsement, and coercion precedents indicates that the answer to this question is an unequivocal "no." The facts leading to the consistent outcomes of the Supreme Court precedents that are most relevant to *Newdow* do not represent significantly less trivial impositions of religion on unwilling individuals than the facts of *Newdow*. Thus, if the claim in *Newdow* is trivial, then so were the claims in many of the Supreme Court's most important Establishment Clause decisions of the past forty years. Conversely, if those cases were not trivial, then neither is *Newdow*.

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70. *See, e.g.*, *Lee*, 505 U.S. at 592 (noting the "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools"); Edwards v. Aguillard, 482 U.S. 578, 584 (1987) (noting the Court's vigilance in ensuring Establishment Clause compliance in elementary and secondary schools); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring) (noting the greater scrutiny required in cases involving impressionable schoolchildren where attendance is compelled by law).

71. *Newdow*, 292 F.3d at 605.

72. *See id.* at 606.

73. *See id.*

1. Triviality and the *Lemon* Analysis

Evidence supporting this conclusion can be found in cases applying each of the three tests Judge Goodwin cited in his *Newdow* opinion. The secular purpose and effect requirements comprise two-thirds of what is usually referred to as the three-part *Lemon* test, which has been the primary organizing principle of Establishment Clause decisions since the test was adopted by the Court in the 1971 decision *Lemon v. Kurtzman*.[74] The materials cited in the previous subsection[75] demonstrate that a messianic religiosity was the unmistakable motivation behind the addition of the words "under God" to the Pledge. This motivation directly violates the secular purpose requirement of *Lemon*. The question is whether despite the fact that the "under God" legislation was clearly enacted for religious purposes, the legislation was itself too trivial to trigger the application of the Establishment Clause.

On the contrary, many of the contexts in which the Court has applied the secular purpose requirement to invalidate government-

74. 403 U.S. 602 (1971). The formal statement of the three-part test is: "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.' " *Id.* at 612–13 (citations omitted) (quoting Walz v. Tax Comm'n of New York City, 397 U.S. 664, 674 (1970)). The Court has recently "folded the entanglement inquiry into the primary effect inquiry. This has made sense because both inquiries rely on the same evidence, and the degree of entanglement has implications for whether a statute advances or inhibits religion." Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2476 (2002) (O'Connor, J., concurring) (citations omitted). Several members of the Court have criticized or even mocked the *Lemon* test. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District."). Despite this criticism, the *Lemon* test has continued to dominate the Court's discussions of the Establishment Clause, and in the Court's two most recent Establishment Clause decisions the Court has gone out of its way to reemphasize the test's continued validity. *See Zelman*, 122 S. Ct. at 2465 ("The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion."); *id.* at 2476 (O'Connor, J., concurring) (arguing that the decision in that case did not "signal a major departure from this Court's prior Establishment Clause jurisprudence. A central tool in our analysis of cases in this area has been the *Lemon* test.... The test today is basically the same as that set forth in [*Schempp*, *Everson*, and McGowan v. Maryland, 366 U.S. 420 (1961)]."); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (" 'As in previous cases involving facial challenges on Establishment Clause grounds, we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon* ....' ") (citation omitted) (quoting Bowen v. Kendrick, 487 U.S. 589, 602 (1988)).

75. *See supra* notes 38–58 and accompanying text.

endorsed religious exercises have involved state religious action that opponents could plausibly describe as trivial. Indeed, in contrast to the extensive public overtures to religion by politicians during the period surrounding the adoption of the "under God" legislation, the Court has invalidated government actions in several other contexts in which the government actors carefully denied any religious motivation whatsoever.

In *Edwards v. Aguillard*,[76] for example, the Court struck down a Louisiana statute mandating the teaching of creationism in every public school that taught the theory of evolution.[77] The State justified the statute as an attempt to balance the presentation of scientific theories in public school classrooms in order to facilitate academic freedom.[78] The State carefully avoided any overt indications that it intended to advance the cause of religion, focusing instead on the "fairness [of] teaching all the evidence."[79] Despite any clear statement of religious motives by the State, the Court held that the statute was impermissible under the first prong of *Lemon*, noting that "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."[80] The Court cited various reasons for rejecting the Louisiana legislature's own stated motives for its legislation, ranging from the illogic of the academic freedom rationale,[81] to the subtle favoritism of religious doctrine built into the statute,[82] to the fact that opposition to evolution historically has been closely linked to fundamentalist religious groups.[83]

There can be little real doubt that the sponsors of the "equal time" legislation in the Louisiana legislature sought to advance and protect a particular body of religious doctrine regarding the origin of humankind by legally mandating the teaching of creationism.[84] The

76. 482 U.S. 578 (1987).

77. *Id.* at 581–82.

78. *Id.* at 582.

79. *Id.* at 586.

80. *Id.* at 586–87.

81. *Id.* at 587 ("The Act does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life.").

82. *Id.* at 588.

83. *Id.* at 590 ("There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution.").

84. This is the factual conclusion of the seven members of the *Edwards* majority. *See id.* at 594 ("[T]he primary purpose of the Creationism Act is to endorse a particular religious doctrine."); *id.* at 608 (Powell, J., concurring) ("In sum, I find that the language and the legislative history of the Balanced Treatment Act unquestionably demonstrate

important point for present purposes, however, is that the direct evidence of impermissible religious motives for the 1954 legislation adding "under God" to the official Pledge is far less trivial than the virtually nonexistent direct evidence on the record of the *Edwards* creationism statute. The national politicians in 1954 were much less circumspect than the Louisiana legislators three decades later. The politicians in 1954 wore their religious motives on their sleeves, and even included those motives prominently in the official statements of legislative purpose and the ceremonies celebrating the legislation's passage. Onward Christian soldiers, indeed.

A similar comparison can be made with other cases in which the Court has applied the secular purpose requirement. In *Santa Fe Independent School District v. Doe*,[85] the Court once again confronted a government body attempting to cloak its motives in advancing a religious cause. The case involved a local school board policy authorizing student elections to determine whether prayer should be delivered before public high school football games.[86] The school board argued that even though the elections resulted in a short religious exercise, the board itself was neutral with regard to the private religious message.[87] The Court did not find this explanation any more convincing than the Louisiana legislature's similarly "secular" justification for teaching the story of Genesis in science classes:

> The District . . . asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.[88]

The "solemnizing" rationale used by the school board in *Santa Fe* is a common argument in the Court's recent school prayer decisions.

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that its purpose is to advance a particular religious belief."). Only Justice Scalia and Chief Justice Rehnquist disagreed. *See id.* at 610 (Scalia, J., dissenting) (arguing that in the absence of clear-cut legislative assertions to the contrary, the Court must accept at face value the legislature's asserted secular purpose for enacting the statute).

85. 530 U.S. 290 (2000).

86. *See id.* at 297–98.

87. *Id.* at 302.

88. *Id.* at 315.

The solemnizing argument is usually used to rebut the claim that there is no secular purpose for the inclusion of religious symbols or references in otherwise secular governmental-sponsored or controlled contexts. This rationale can easily be modified to fit the needs of those attempting to justify adding "under God" to the Pledge. In fact, the federal government used this exact argument in *Newdow* when it claimed "that the Pledge has the secular purpose of 'solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.' "[89] Unfortunately, the solemnization argument is no more likely to survive constitutional scrutiny in the Pledge context than in the school prayer context. In *Santa Fe*, for example, the school board's policy asserted that the purpose of the message was to "solemnize the event."[90] The Court noted that a "religious message is the most obvious method of solemnizing an event,"[91] and therefore concluded, "the expressed purposes of the policy encourage the selection of a religious message"[92] in violation of the Establishment Clause.

Analyzing the solemnization argument through the filter of a constitutional triviality claim does not improve the chances that the argument will succeed in the Pledge context. The 1954 Pledge legislation adding religious language to the Pledge actually is less defensible than school prayer scenarios such as that in *Santa Fe*, because government-controlled events employing the Pledge (such as the opening of the school day in a public school) have already been "solemnized" by the unaltered Pledge. Thus, the claim that the words "under God" do not have the secular purpose of solemnizing a government event is not trivial; the event is already solemn. To the extent that teachers in a public school classroom really do employ the Pledge to calm students and focus their attention on serious matters of patriotism and civic virtue, the two words "under God" add nothing to the atmosphere already created by the pre-1954 Pledge.

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89. Newdow v. United States Congress, 292 F.3d 597, 610 (9th Cir. 2002) (quoting Lynch v. Donnelly, 465 U.S. 668, 693 (1984)). The substance of the government's argument is very similar to Justice O'Connor's comment on the subject early in her tenure on the Court: "In my view, the words 'under God' in the Pledge ... serve as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.' " Wallace v. Jaffree, 472 U.S. 38, 41 n.5 (1985) (O'Connor, J., concurring) (alteration in original) (quoting *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring)).

90. *Santa Fe*, 530 U.S. at 306.

91. *Id.*

92. *Id.* at 307.

In this respect, the Pledge dispute is like the dispute over the Alabama moment-of-silence legislation struck down by the Court in *Wallace v. Jaffree*.[93] As Judge Goodwin noted in his *Newdow* opinion, the Supreme Court struck down the Alabama legislation "not because the final version 'as a whole' lacked a primary secular purpose, but because the state legislature had amended the statute specifically and solely to add the words 'or voluntary prayer.' "[94] Judge Goodwin was referring to the peculiar facts of *Wallace*. At the time *Wallace* was decided, Alabama had not one, but three statutes authorizing a one-minute moment of silence in the state's public schools. The first statute, enacted in 1978, authorized a moment of silence "for meditation;"[95] the second statute, enacted in 1981, authorized a period of silence "for meditation or voluntary prayer;"[96] the third statute, enacted in 1982, "authorized teachers to lead 'willing students' in a prescribed prayer to 'Almighty God . . . the Creator and Supreme Judge of the world.' "[97]

The Plaintiffs in *Wallace* did not challenge the first statute, and the Court had summarily affirmed the lower court's ruling that the third statute violated the Establishment Clause.[98] Thus, the only issue in *Wallace* was the constitutionality of the second statute. The Court struck down that statute on the ground that it failed the secular purpose requirement of *Lemon*. The two primary grounds for this holding were some ill-advised comments about " 'return[ing] voluntary prayer' to the public schools"[99] by the legislation's sponsor in the state legislature, and the "relationship between this statute and the two other measures that were considered in this case."[100] After considering the relationship between the 1978 and 1981 statutes, the Court concluded that the "wholly religious character of the later enactment is plainly evident from its text."[101] The basis for this conclusion was that "the only significant textual difference [between the 1978 and 1981 statutes] is the addition of the words 'or voluntary prayer.' "[102] Since students could meditate (or even pray) equally well during the silent meditation period mandated under the original

93. 472 U.S. 38, 61 (1985).
94. *Newdow*, 292 F.3d at 610 (citing *Wallace*, 472 U.S. at 59–60).
95. *Wallace*, 472 U.S. at 40 (quoting ALA. CODE § 16-1-20 (Supp. 1984)).
96. *Id.* (quoting ALA. CODE § 16-1-20.1 (Supp. 1984)).
97. *Id.* (quoting ALA. CODE § 16-1-20.2 (Supp. 1984)).
98. *See* Wallace v. Jaffree, 466 U.S. 924, 924 (1984).
99. *Wallace*, 472 U.S. at 57.
100. *Id.* at 58.
101. *Id.*
102. *Id.* at 59 (quoting ALA. CODE § 16-1-20.1 (Supp. 1984)).

statute as they could under the more explicit mandate of the 1981 modification, the Court noted:

> Appellants have not identified any secular purpose that was not fully served by [the 1978 statute] before the enactment of [the 1981 statute]. Thus, only two conclusions are consistent with the text of [the 1981 statute]: (1) the statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act.[103]

There is no plausible argument that the *Wallace* analysis does not apply to the Pledge case. The relevant facts are directly analogous. In both cases legislators made no effort to hide their religious intentions; if anything, the evidence on that score is far stronger in *Newdow* than in *Wallace*. The problematic statements in the Pledge case came from both the official House and Senate Reports, as well as the President who signed the legislation, whereas the problematic statement in *Wallace* was made by only one senator a year after the legislation passed. As Chief Justice Burger—one of the *Wallace* dissenters—pointed out, "there is not a shred of evidence that the legislature as a whole shared the sponsor's motive or that a majority in either house was even aware of the sponsor's view of the bill when it was passed."[104] The same obviously could not be said of the 1954 amendment to the Pledge. As for the fact that the *Wallace* majority drew an incriminating conclusion from the fact that the legislature had inserted five words with religious significance into an otherwise secular statute, *Wallace* dissenter Chief Justice Burger drew the obvious inference:

> Congress amended the statutory Pledge of Allegiance 31 years ago to add the words "under God." Do the several opinions in support of the judgment today render the Pledge unconstitutional? That would be the consequence of their method of focusing on the difference between [the 1981 statute] and its predecessor statute rather than examining [the 1981 statute] as a whole. Any such holding would of course make a mockery of our decisionmaking in Establishment Clause cases.[105]

In emotional disputes over religion and the government, "mockery" is usually in the eye of the beholder. But whatever the

103. *Id.*
104. *Id.* at 86–87 (Burger, C.J., dissenting).
105. *Id.* at 88 (Burger, C.J., dissenting).

merits of the *Wallace* majority's logic, at the very least it should be clear that the claim against the 1954 Pledge statute is no more trivial than the claim that garnered the votes of six members of the Court in the Alabama case.

2. Triviality and the Endorsement and Coercion Analyses

Comparison of the Pledge case to the Court's decisions relying on the endorsement and coercion analyses produces the same conclusion. Although the Court has based its Establishment Clause decisions on the endorsement and coercion analyses far less frequently than it has relied on the *Lemon* test, for purposes of analyzing the triviality argument the results are uniformly indistinguishable from *Newdow*.

As Judge Goodwin's *Newdow* opinion indicates, the endorsement analysis is most frequently utilized by the Supreme Court in cases dealing with symbolic representations of religion in holiday displays. Justice O'Connor introduced the endorsement analysis in her concurring opinion in *Lynch v. Donnelly*,[106] and the majority employed the analysis in *County of Allegheny v. ACLU*.[107] The endorsement analysis is a gloss on the *Lemon* test, filtering the questions of secular intent and effect through the prism of governmental endorsement. The prohibition of governmental actions having the purpose or effect of endorsing religion is intended to prevent government from

> making adherence to a religion relevant in any way to a person's standing in the political community.... 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.[108]

Both *Lynch* and *Allegheny* involved constitutional challenges to religious holiday displays that were in some fashion associated with the government. The displays included a variety of religious images intermixed with secular holiday messages.[109] Of the three main

106. 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

107. *See* 492 U.S. 573, 595–602 (1989).

108. *Lynch*, 465 U.S. at 687–88 (O'Connor, J., concurring).

109. *Lynch* involved a city-owned display in a private park. The display included "among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads 'SEASONS GREETINGS,' and [a] crèche." *Id.* at 671. The first *Allegheny* display was located inside the county courthouse and included a small evergreen tree, poinsettias, a

displays at issue in the two cases, Justice O'Connor's application of the endorsement analysis produced a verdict that one display did and two displays did not amount to an unconstitutional endorsement of religion by the state.[110]

The important point with regard to the triviality argument, however, is not the outcome of the Supreme Court's application of the endorsement analysis, but rather the fact that no Justice applying the endorsement analysis asserted that the challenge to holiday displays was trivial. The question, therefore, is whether Mr. Newdow's claim against the addition of "under God" to the Pledge is more trivial than the concededly nontrivial claims against state-authorized holiday displays. Again, as with the comparison of *Newdow* to Supreme Court precedents based on *Lemon*, *Newdow* seems less trivial in several respects than the Court's previous endorsement cases. First, as indicated in the previous subsection,[111] the governmental actors responsible for adding "under God" to the Pledge did so with specifically religious motives, which were expressed in the official statements of legislative intent. In the holiday display cases, the government actors specifically renounced any intention to embrace religion.[112] Second, in the holiday display cases the religious message was intermixed with other, secular images and messages,[113] which had the effect (at least in two cases) of mitigating the religious meaning of the displays to the satisfaction of

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wooden fence, and a manger scene. *See Allegheny*, 492 U.S. at 580. The manger scene included "figures of the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men, all placed in or before a wooden representation of a manger, which has at its crest an angel bearing a banner that proclaims 'Gloria in Excelsis Deo!' " *Id.* The second *Allegheny* display was located on a sidewalk outside the city-county building. *Id.* at 581. It included a forty-five-foot Christmas tree, an eighteen-foot Menorah, and a sign bearing the mayor's name and the phrase "Salute to Liberty." *Id.* at 582–87.

110. *See Allegheny*, 492 U.S. at 637 (O'Connor, J., concurring) (agreeing with the majority that the Christmas tree and menorah were constitutional and the crèche display was not); *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring) (agreeing with the majority that the display was constitutional).

111. *See supra* notes 37–58 and accompanying text.

112. In *Lynch* the city argued its purposes were "exclusively secular," and the Supreme Court agreed that regardless of whether the city's secular purposes were "exclusive," the city had satisfied the requirements of *Lemon*. *See Lynch*, 465 U.S. at 681 n.6. In *Allegheny* there was no specific evidence regarding the government's intent in erecting two religious displays. The District Court ruled that there was no unconstitutional intent, *see Allegheny*, 492 U.S. at 588, and the Supreme Court did not express a view, ruling instead on the basis of the secular effect test, *id.* at 597.

113. *See, e.g.*, *Lynch*, 465 U.S. at 671 (noting the variety of secular symbols surrounding the religious elements of the display).

the majority of the Court,[114] whereas the phrase "under God" became in 1954 a focal point of the entire Pledge. Third, even the most overtly religious holiday display was disassociated with official governmental functions and could be avoided by anyone choosing to look the other way or avoid walking by the display altogether, whereas the words "under God" in effect became part of an official statement of religious principles by the government itself, an unavoidable slap in the face to anyone not sharing the government's chosen faith. Finally, with regard to the particular facts of Mr. Newdow's case, the religious endorsement occurred in a public school before a captive audience of susceptible children, rather than in an open space exposed mostly to adults. In short, in several significant respects the endorsement claim against the Pledge is much more serious than the endorsement claims a majority of the Court has already deemed nontrivial.

The same is true of the coercion analysis. In general, coercion is not a necessary ingredient of an Establishment Clause claim, since "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct government compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[115] Nevertheless, Justice Kennedy's opinion for the Court's majority in *Lee v. Weisman*[116] (the graduation prayer case) focuses on the coercion inherent in forcing public school students to sit silently during a religious invocation sponsored by the state.[117] Justice Kennedy emphasized the singular nature and importance of a high school graduation ceremony, concluding that the Constitution does not permit the state to "exact religious conformity from a student as the price of attending her own high school graduation."[118] The Court analogized graduation ceremonies to classroom exercises, citing its earlier classroom prayer decision, and concluded that the ban on religious exercises in one context mandated a ban in the

114. *See Allegheny*, 492 U.S. at 616 (noting that placement of Jewish and Christian symbols together, along with a sign celebrating tolerance, "simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society"); *Lynch*, 465 U.S. at 680 (noting that the district court plainly erred by considering only the religious elements of the display).

115. Engel v. Vitale, 370 U.S. 421, 430 (1962).

116. 505 U.S. 577 (1992).

117. *See id.* at 593.

118. *Id.* at 596.

other.[119] More importantly for purposes of applying the triviality analysis to the dispute over the inclusion of "under God" in the Pledge, the *Lee* majority specifically considered and rejected the government's triviality argument in the graduation prayer context. Much of the government's argument—and the Court's rationale for rejecting it—is directly applicable to *Newdow*:

> [The prayer] is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority. And for the same reason, we think that the intrusion is greater than the two minutes or so of time consumed for prayers like these.... That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront.[120]

In *Lee*, the Court staunchly refused to accept the government's argument that the religious exercise was constitutionally trivial because it was brief and objecting students could silently and unobtrusively avoid participating actively in the prayer.[121] Despite the Court's rejection of this argument in *Lee*, an identical claim is at the heart of the common assertion that students confronting the "under God" portion of the Pledge face only a trivial dilemma: "a student, like others participating in a routine public recital of the Pledge, can seamlessly and without fanfare or even notice—and, therefore, without obloquy—omit the 'under God' from her own recital of the Pledge."[122] In this respect, *Newdow* and *Lee* are indistinguishable. If the ability to sit silently and unobtrusively in a graduation ceremony fails to render that claim trivial, then the same is true of a claim arising from a classroom of students saying the Pledge.

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119. *See id.* at 590 ("[O]ur precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students.").

120. *Id.* at 594.

121. *See id.* at 593–94.

122. Perry, *supra* note 13, at 318 n.71.

This conclusion has been reinforced by the Court's actions since *Lee*. Although the *Lee* Court emphasized the formality and singularity of the graduation exercise as crucial to its decision regarding prayer at public school graduation ceremonies, a few years later in *Santa Fe Independent School District v. Doe*[123] a six-member majority of the Court applied *Lee* to much less formal extracurricular activities such as public school football games.[124] The school board defendant in *Santa Fe* defended its system of permitting students to vote to have an invocation before the games by arguing that the coercion evident in a graduation ceremony was not present in an informal and purely voluntary gathering such as a high school football game.[125] The Court acknowledged that "[a]ttendance at a high school football game, unlike showing up for class, is certainly not required in order to receive a diploma."[126] The Court also acknowledged that "the informal pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony."[127] But the Court rejected the district's argument anyway:

> To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is "formalistic in the extreme" .... We stressed in *Lee* the obvious observation that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of

123. 530 U.S. 290 (2001).
124. *See id.* at 301–10.
125. *See id.* at 310.
126. *Id.* at 311.
127. *Id.*

> resisting conformance to state-sponsored religious practice."[128]

The Court's application of the coercion analysis to the high school football game context is quoted at length because it is directly relevant to the triviality claim leveled at the *Newdow* challenge to the inclusion of "under God" in an official Pledge that is repeated daily during official class periods in public high school classrooms. It is impossible to seriously argue that the social pressure on a student in a classroom reciting the religious component of the Pledge is more trivial than the pressure imposed in graduation ceremonies and football games. Indeed, the pressure may be even greater in the Pledge case because dissenting students will be doubly ostracized: A student who refuses to recite the Pledge will be tainted as both unreligious and unpatriotic. Responding to this by arguing that an objecting student "can seamlessly and without fanfare or even notice—and, therefore, without obloquy—omit the 'under God' from her own recital of the Pledge"[129] reduces the protection of religious liberty to the level of a "don't ask, don't tell" standard; in other words, you have a right to be an atheist so long as you don't tell anyone.

In short, the argument that the *Newdow* claim is more trivial than other Establishment Clause claims recognized by the Supreme Court cannot withstand serious scrutiny. The law is clear, and it is on Mr. Newdow's side, as even some advocates of the triviality approach acknowledge. Discussing the Pledge and other manifestations of ceremonial deism,[130] one commentator has argued that we should stop

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128. *Id.* at 311–12 (alteration in original) (quoting Lee v. Weisman, 505 U.S. 577, 596 (1992)).

129. Perry, *supra* note 13, at 318 n.71.

130. The term "ceremonial deism" is used here in Steven Epstein's sense. *See* Epstein, *supra* note 13, at 2094. Epstein identifies as the defining characteristics of ceremonial deism practices involving:

> (1) actual, symbolic, or ritualistic;
> (2) prayer, invocation, benediction, supplication, appeal, reverent reference to, or embrace of, a general or particular deity;
> (3) created, delivered, sponsored, or encouraged by government officials;
> (4) during governmental functions or ceremonies, in the form of patriotic expressions, or associated with holiday observances;
> (5) which, in and of themselves, are unlikely to indoctrinate or proselytize their audience;
> (6) which are not specifically designed to accommodate the free religious exercise of a particular group of citizens; and
> (7) which, as of this date, are deeply rooted in the nation's history and traditions.

Id. at 2095.

trying to reconcile the doctrine with the practices: "Since a refusal to invalidate these obvious governmental manifestations of religion cannot be satisfactorily reconciled with the express prohibition of the Establishment Clause by any course of reasoning or doctrinal development, these holdings generally are viewed as exceptions to the establishment clause requirements."[131] The suggestion that the courts recognize a series of overtly religious "exceptions" to the Establishment Clause will be considered in more detail in the next Section. For the moment it is worth emphasizing that the predicate for this suggestion is the express recognition that, in the absence of some special dispensation, these religious actions clearly violate the Establishment Clause as it is currently interpreted. To phrase the suggestion in a less flattering manner, the triviality analysis is merely a mechanism for legitimating violations of the Establishment Clause.

C. *The Plaintiff's Injury*

Aside from the factual background to the case and the legal doctrine applicable to the plaintiff's claim, there is one final factor in *Newdow* that is potentially subject to a triviality analysis: the nature of the plaintiff's exposure to the alleged injury in this case. The claim in *Newdow* was brought by the father of an eight-year-old student at a public elementary school in California.[132] Like all students in California public schools, Mr. Newdow's daughter was exposed to the mandatory daily recitation of the Pledge of Allegiance.[133] The California Education Code requires "patriotic exercises" at "the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday," and notes that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section."[134] The school Mr. Newdow's daughter attended complied with this statute by having the students recite the

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Note that this definition is somewhat different than that of Dean Walter Rostow, who coined the phrase "ceremonial deism." Rostow defined ceremonial deism as a "class of public activity, which . . . c[ould] be accepted as so conventional and uncontroversial as to be constitutional." *See* Arthur E. Sutherland, Book Review, 40 IND. L.J. 83, 86 (1964) (reviewing WILBER G. KATZ, RELIGION AND AMERICAN CONSTITUTIONS (1963)). Along with Professor Epstein, and in contrast to Dean Rostow, I do not assume that simply fitting some practice (such as the religious component of the Pledge) into the category of "ceremonial deism" necessarily implies the constitutionality of that practice.

131. McCoy, *supra* note 13, at 1339.

132. Newdow v. United States Congress, 292 F.3d 597, 600 (9th Cir. 2002).

133. *Id.*

134. CAL. EDUC. CODE § 52720 (West 1989).

official Pledge of Allegiance, as modified by the 1954 statute that added the words "under God."[135] There was no allegation in the case that the school required unwilling students to participate, which would have violated the Supreme Court's 1943 mandate against compelling participation in saying the Pledge.[136] Thus, the only allegation in the case was that a public school was unlawfully exposing its students to a state-approved daily recitation of the religious sentiment that the United States is one nation "under God."

Two aspects of the facts in *Newdow* could arguably lead to the conclusion that the plaintiff's particular connection to the claim is trivial. First, the father, rather than the daughter, brought the lawsuit.[137] Second, the case involves the simple exposure to two words—not the mandatory recitation of those words.[138] Upon closer examination, however, neither of these two aspects can be deemed trivial; as with the various other aspects of the case, these factors are indistinguishable from those in many other religious freedom cases previously reviewed by the Supreme Court.

The fact that the father, rather than the student, brought the case has been noted in several news accounts as possibly undermining the father's standing to pursue his claim.[139] According to press accounts, both the daughter and her mother are practicing Christians who agree with the religious references in the Pledge.[140] The mother (who was never married to Mr. Newdow) has custody of the child, and has sought to intervene in the case to ensure that the daughter "would not be branded for the rest of her life as the girl who was the atheist in the pledge case or the girl who didn't like the Pledge of Allegiance."[141] In its original opinion the Ninth Circuit panel determined that Mr. Newdow had a valid constitutional injury for purposes of Article III standing in federal court.[142] In another opinion issued six months later, the panel also rejected the mother's claim that the state court

135. *See* 4 U.S.C.A. § 4 (2003).

136. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

137. *Supra* note 132 and accompanying text.

138. *Supra* note 136 and accompanying text.

139. *See, e.g.*, Bob Egelko, *Girl in Pledge Case Not an Atheist, Mom to Tell Court*, SAN FRAN. CHRON., July 13, 2002, at A15 (suggesting that because Mr. Newdow lacked custody of his daughter, he may lack standing to assert his claims); Adam Liptak, *Subsidiary Issue Enters Pledge Case*, N.Y. TIMES, Oct. 23, 2002, at A15 (same).

140. Egelko, *supra* note 139.

141. *Id.* (quoting Paul E. Sullivan, attorney for the mother).

142. Newdow v. United States Congress, 292 F.3d 597, 602–05 (9th Cir. 2002).

order granting her sole custody gave her the authority to challenge the noncustodial father's standing to pursue the action.[143]

The Ninth Circuit's grant of standing to Mr. Newdow is easily justifiable under the Supreme Court's Establishment Clause standing decisions. The fact that a religious freedom case is brought by a parent rather than a minor child is not a sufficient reason to dismiss the litigation as frivolous. Lawsuits challenging prayer in public schools—probably the Establishment Clause cases most closely analogous to *Newdow*—are routinely litigated by the parents of schoolchildren rather than the children themselves. This is the way the original school prayer case was litigated in *Engel v. Vitale*,[144] and has continued to characterize this area of litigation as recently as the 2000 decision prohibiting prayer at public school football games.[145]

The injury attributable to Mr. Newdow is neither mitigated nor made more trivial by the fact that the plaintiff parent is the noncustodial parent, or by the fact that the child herself may disagree with her father's position in the case. Issues involving government religious endorsement in public schools involve both the individual student's rights and the parent's rights. The parent's rights are not limited to the rights of the custodial parent.[146] Ironically, the fact that

143. *See* Newdow v. United States Congress, 313 F.3d 500, 501–02 (9th Cir. 2002).

144. *See* Engel v. Vitale, 370 U.S. 421, 423 (1962) (case litigated by ten parents of public school children in New York).

145. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000) (case litigated by mothers of Catholic and Mormon children on behalf of themselves and their children).

146. The precise contours of a noncustodial parent's substantive due process parental rights have not been defined by the Supreme Court. Clearly, these rights exist in some magnitude, however, because the Court has recognized for many years that noncustodial parents' rights constitute a liberty interest sufficient to trigger procedural due process protections. *See* Santosky v. Kramer, 455 U.S. 745, 749, 753–54 (1982) (holding that procedural due process evidentiary requirements apply to a state proceeding seeking to terminate noncustodial parents' parental rights to their biological children); Armstrong v. Manzo, 380 U.S. 545, 550 (1965) (holding that procedural due process requires a state court to give a noncustodial parent notice and an opportunity to be heard before the court grants a motion by the custodial parent's new spouse to adopt the noncustodial parent's biological child).

State law is more definitive regarding a noncustodial parent's right to participate in his or her child's religious upbringing. In the religion context, issues of noncustodial parental rights usually arise where the custodial parent seeks to have courts restrict the noncustodial parent from exposing the child to the noncustodial parent's religious beliefs and practices. The leading California decision on the subject reflects the rule in the overwhelming majority of jurisdictions that have considered the issue:

> [W]hile the custodial parent undoubtedly has the right to make ultimate decisions concerning the child's religious upbringing, a court will not enjoin the noncustodial parent from discussing religion with the child or involving the child in his or her religious activities in the absence of a showing that the child will be thereby harmed.

the custodial parent and the child apparently agree with the state's allegedly unconstitutional religious endorsement underscores the distinctive parental rights claim of Mr. Newdow, the noncustodial parent.[147] In general, a parent has an interest independent of that of the child in challenging the state's unconstitutional behavior when that behavior interferes with the parent's relationship with his or her child—a relationship whose constitutional dimensions stretch back to the 1925 decision in *Pierce v. Society of Sisters*.[148] The narrow holding of *Pierce* is that the state may not interfere with "the liberty of parents and guardians to direct the upbringing and education of children under their control."[149] This is the concept to which the Ninth Circuit referred in granting Mr. Newdow standing to challenge the "under God" portion of the Pledge.[150] The argument against granting Mr. Newdow standing to litigate the claim revolves around the fact that he does not have legal "control" over his daughter.[151]

In re Marriage of Murga, 163 Cal. Rptr. 79, 82 (Cal. Ct. App. 1980); *see also In re* Marriage of Weiss, 49 Cal. Rptr. 2d 339, 343 (Cal. Ct. App. 1996) ("*Murga* adopted a rule of nonintervention with respect to a noncustodial parent's right to express his or her religious beliefs."); *In re* Marriage of Birdsall, 243 Cal. Rptr. 287, 289 (Cal. Ct. App. 1988) ("In [*Murga*] the court adopted a rule of nonintervention in a noncustodial parent's right to express his or her religious beliefs.").

In its second *Newdow* opinion, the Ninth Circuit panel cited *Murga* for the proposition that "California state courts have recognized that noncustodial parents maintain the right to expose and educate their children to their individual religious views, even if those views contradict those of the custodial parent or offend her." *Newdow II*, 313 F.3d at 504. Thus, although Mr. Newdow's rights as a noncustodial parent would not extend so far as to dictate his daughter's religious upbringing, under the law of California and most other jurisdictions he has a legally recognized interest in contributing to his daughter's religious understanding and education. It should not be difficult to extrapolate from this legal interest the proposition that Mr. Newdow has standing to challenge the state's illegal imposition of religion on his daughter in a public school.

147. As the Ninth Circuit panel held,

> [The mother] has no power, even as sole legal custodian, to insist that her child be subjected to unconstitutional state action. . . . [The mother] may not consent to unconstitutional government action in derogation of Newdow's rights or waive Newdow's right to enforce his constitutional interests. Neither [the mother's] personal opinion regarding the Constitution nor her state court award of legal custody is determinative of Newdow's legal rights to protect *his own* interests.

Newdow II, 313 F.3d at 505.

148. 268 U.S. 510, 534–36 (1925) (holding unconstitutional an Oregon statute requiring parents to send their children to public schools).

149. *Id.* at 534–35.

150. *See* Newdow v. United States Congress, 292 F.3d 597, 602 (9th Cir. 2002) ("Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter.").

151. In its second opinion on Mr. Newdow's standing, the Ninth Circuit panel relied primarily on the express provisions of the state-court custody order to deny the mother's authority to challenge Mr. Newdow's standing. *See Newdow II*, 313 F.3d at 502. The state-court custody order was issued on September 25, 2002, after the Ninth Circuit panel's

This approach ignores the broader theme of the parental rights cases, however. The broader theme of *Pierce* and other parental rights cases is that the parent-child relationship "may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State."[152] This broader theme does not depend on the parent having legal control over the child; the key is not protecting the parent's ability to control the child's upbringing, but rather protecting the parent's emotional relationship with the child. This theme easily encompasses Mr. Newdow's case; after all, an unconstitutional governmental endorsement of religion by the state cannot possibly serve as a "purpose within the competency of the state."

The nontriviality of Mr. Newdow's injury can be illustrated by the following scenario: Suppose a public school engages in an egregious violation of *Engel v. Vitale*—for example, by repeatedly and aggressively subjecting its students to Christian prayer, coupled with individualized proselytizing, and following these actions by holding regular baptisms in the school swimming pool. Suppose further that in the course of proselytizing the students at the school, the authorities routinely refer to other religions such as Judaism and Islam as sinful, and their adherents as destined for Hell. Suppose finally that one of the students at the school is the progeny of a devoutly fundamentalist Christian mother (who has legal custody of the child) and a Jewish father (who is not married to the mother and does not have legal custody of the child). The injury to the Jewish father in this scenario is direct, serious, and by definition nontrivial.

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first *Newdow* decision. *See id.* This custody order permitted Mr. Newdow to have input into matters such as his daughter's medical care and educational needs, and granted him access to his daughter's medical and school records. *See id.* On the other hand, the order granted the mother physical custody and gave her final decision-making authority regarding her daughter over matters concerning which she and Mr. Newdow disagreed. *See id.* The order specifically prohibited Mr. Newdow from "pleading his daughter as an unnamed party or representing her as a 'next friend' in [the Pledge lawsuit]." *Id.* In its second *Newdow* decision, the Ninth Circuit panel noted that Mr. Newdow "no longer claims to represent his child, but asserts that he retains standing in his own right as a parent to challenge alleged unconstitutional state action affecting his child." *Id.* Having already determined in its first opinion that Mr. Newdow had established an injury sufficient to satisfy Article III standing requirements, the Ninth Circuit panel held that the new state-court custody order did not undercut Mr. Newdow's right to pursue his constitutional claim, because the state-court order allowed Mr. Newdow to retain some parental rights. *Id.* at 503–04 ("We hold that a noncustodial parent, who retains some parental rights, may have standing to maintain a federal lawsuit to the extent that his assertion of retained parental rights under state law is not legally incompatible with the custodial parent's assertion of rights.").

152. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

The State is engaged in conduct that violates the Constitution and thereby drives a wedge between a daughter and her father that will not easily be overcome.[153] The father's lack of legal custody of the child does not diminish the extent to which the State is injuring the father-daughter relationship, thereby impairing the father's religious freedoms. Arguing that the father has no legally cognizable injury is not plausible.

The other aspect of Mr. Newdow's particular claim that arguably renders the case trivial relates to the particular type of injury. Sixty years ago, the Supreme Court famously held that public school children could not be forced to recite the Pledge of Allegiance.[154] As noted above, there is no indication that the California school attended by Mr. Newdow's daughter violated this prohibition. Therefore, the argument goes, even if the inclusion of the words "under God" could be construed as an invalid endorsement of religion by the government, this case is not a proper vehicle for challenging that endorsement since in this case no one was forced to participate unwillingly in the illegal state action.

The problem with this argument is that it flies in the face of virtually every public school endorsement case the Supreme Court has ever decided. Neither of the earliest public school religion cases—*Engel v. Vitale*[155] (the school prayer case) or *Abington School District v. Schempp*[156] (the public school Bible-reading case)—involved mandatory participation in the contested religious exercises. In *Engel* the New York Court of Appeals had upheld the state-endorsed Regents' prayer "so long as the schools did not compel any pupil to join in the prayer over his or his parents' objection."[157] In *Schempp*, "[t]he students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises."[158] Nevertheless, both religious exercises were struck down as violations of the Establishment Clause.[159]

153. *See Newdow II*, 313 F.3d at 505 (concluding that the state-endorsed Pledge "provides the message to Newdow's young daughter not only that non-believers, or believers in non-Judeo-Christian religions, are outsiders, but more specifically that her *father's* beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom").

154. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

155. 370 U.S. 421 (1962).

156. 374 U.S. 203 (1963).

157. *Engel*, 370 U.S. at 423.

158. *Schempp*, 374 U.S. at 207.

159. *Id.* at 223–24; *Engel*, 370 U.S. at 424.

The more recent cases are to the same effect. Neither *Lee v. Weisman*[160] (the graduation prayer case) nor *Santa Fe Independent School District v. Doe*[161] (the public school football game prayer case) involved mandatory participation in the religious exercises at issue. In the graduation prayer case, for example, no student was required to attend the graduation ceremony as a prerequisite for obtaining a diploma,[162] and no student who chose to attend the ceremony was required to do anything more than sit quietly while the prayer was being uttered.[163] Nevertheless, the Court found on behalf of the father of a graduating student that the religious exercise violated the Establishment Clause.[164] The even more minimal imposition on religious dissenters in the football game prayer case did not change the outcome: The Court held that "voluntary" student-led prayer violated the Establishment Clause in that context as well as in the more formal context of a graduation ceremony.[165] In both cases it was the combination of government with religion that created the violation by shifting to the objector the onus of avoiding the religious exercise. According to the Court, "This turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."[166]

The fact that the state-endorsed religious exercises in all these cases did not have an immediate and measurable effect on the religious practices of the objectors did not render the objectors' Establishment Clause claims trivial. As the Court recognized in its earliest cases, the Establishment Clause operates differently from the Free Exercise Clause. It is true that challenges to violations of the Free Exercise Clause require proof that a person's religious beliefs or actions have been coerced. In contrast to the Free Exercise Clause, however, the Establishment Clause is a structural limitation on the government's ability to endorse, advance, or otherwise foster religion, and a violation of this structural limitation is inherently injurious—regardless of the negligible effect on the religious practices of strong-

160. 505 U.S. 577 (1992).
161. 530 U.S. 290 (2000).
162. *Lee*, 505 U.S. at 583.
163. *Id.* at 593.
164. *Id.* at 598–99.
165. *Santa Fe*, 530 U.S. at 292 ("The second part of the District's argument—that there is no coercion here because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary—is unpersuasive.").
166. *Lee*, 505 U.S. at 596.

willed dissenters. The *Schempp* majority opinion summed up the difference between Free Exercise and Establishment Clause violations:

> Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.[167]

Thus, Mr. Newdow's claim against the use of an overt religious endorsement in the Pledge can hardly be deemed trivial; the claim falls well within a long tradition of similar challenges to violations of structural limitations on governmental religious exercises.

II. "UNDER GOD" AND THE VARIETIES OF CONSTITUTIONAL TRIVIA

In light of the overwhelming weight of the facts and law, opponents of the Ninth Circuit panel's decision in *Newdow* have a major problem. The Establishment Clause doctrine undeniably supports Judge Goodwin's majority opinion, and it is not immediately evident how Mr. Newdow's challenge to the inclusion of "under God" in the Pledge is any more trivial than the facts or law supporting many other successful Establishment Clause challenges that the Court has adjudicated during the last four decades.

In *Newdow*, dissenting Judge Fernandez implicitly acknowledges the strong support for the majority's position by refraining from seriously disputing the majority's application of the relevant *Lemon*, endorsement, and coercion precedents. But if the relevant precedents support the majority, why do Judge Fernandez and other critics continue to insist that Mr. Newdow's claim is trivial? The theory, as at least one commentator has explicitly suggested,[168] is that even if the inclusion of an overtly religious component in the Pledge cannot be reconciled with existing Establishment Clause doctrine, a specific exception should be carved out of that doctrine to permit "de minimis" or trivial religious establishments. This is a somewhat different version of the triviality argument than the one considered in the previous Part. The previous Part considered and rejected the claim that the facts, law, and personal standing of the plaintiff in *Newdow* are more trivial than other Establishment Clause claims

167. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963).

168. *See supra* note 131 and accompanying text.

adjudicated by the Supreme Court. This Part considers the argument that even if the inclusion of "under God" in the Pledge is technically an establishment of religion analogous to those the Court has previously recognized, it is only a trivial establishment and should therefore be permitted as an exception to the normal operation of the First Amendment.

There are four variations on this version of the triviality argument. Some of these variations appear in Judge Fernandez's dissenting opinion, and some of them have been proffered by critics outside the court who disagree with the *Newdow* majority opinion. The four variations are: (1) adding "under God" to the Pledge is a trivial violation of the Establishment Clause because in context the word "God" is not truly religious; (2) adding the words "under God" to the Pledge impacts religious liberty so slightly that it poses only a trivial threat of establishing a religion; (3) banning the religious component of the Pledge will lead to bans on other examples of ceremonial deism; and (4) overturning the religious portion of the Pledge will generate a furor that will harm efforts to litigate other, more important Establishment Clause violations. Considering each of these variations in turn will demonstrate that attempts to salvage the religious portion of the Pledge by carving out a triviality exception to the application of Establishment Clause doctrine should fare no better than the effort to reconcile the Pledge with Establishment Clause doctrine directly.

A. Triviality and the Nonreligious God

The first, and perhaps most common argument—that Mr. Newdow's legal claim is too trivial to justify applying standard Establishment Clause doctrine—rests on the assertion that Mr. Newdow has misunderstood the meaning of the term "God." According to this argument, "God" in the context of the Pledge is not a sufficiently religious concept to implicate the protections of the Establishment Clause. This seems to be what Professor Sunstein meant when he commented that "[t]his is not a religious ritual, it's a patriotic ritual, so the decision is almost certainly to be overruled."[169] In a similar vein, Professor Tribe was paraphrased in one newspaper account as having commented that "[t]he insertion of God into the pledge may have been for religious reasons . . . but five decades later, the phrase under God no longer evokes a religious experience."[170]

169. *See* Cliatt, *supra* note 10.
170. Kravets, *supra* note 12.

Members of Congress expressed similar sentiments in response to the Ninth Circuit panel's ruling. Senator Bennett of Utah opposed the ruling, for example, on the ground that "[t]he word 'God' is sufficiently universal and nonspecific as to allow those who use it to ascribe any quality, any gender, any doctrine, any position that those people might wish to ascribe to it."[171]

Although Senator Bennett may be correct that the word "God" is comprehensive enough to satisfy theists (or at least monotheists), it defies logic to assert that the word "God" is "sufficiently universal and nonspecific" to encompass the concepts of agnosticism or atheism. The term "God" cannot be stretched to mean "the absence of God." And of course, Senator Bennett did not really intend that the word should be so distorted. In the very next sentence he explained his true meaning: "It is inconceivable to me that the Ninth Circuit should suggest that the generic term 'God' is somehow endorsement of a *specific* religion."[172] In other words, Senator Bennett did not intend to suggest the absurd proposition that the term "God" was broad enough to encompass the beliefs of atheists or agnostics; he simply meant to say that the term "God" stopped short of establishing Catholicism or Protestantism, and therefore was compatible with the Constitution. Thus, like his predecessors in 1954,[173] Senator Bennett apparently does not understand (or worse, does not care) that the Supreme Court has consistently and repeatedly "rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another."[174] The establishment of religion in general—that is, the generic belief in God—violates the First Amendment to the same extent as the establishment of a particular sect.[175] Many of the attempts to argue that the term "God" is nonreligious are simply reiterations of this common misunderstanding of basic First Amendment doctrine.

Professors Sunstein and Tribe are too knowledgeable about Establishment Clause doctrine to suggest that the government is permitted to endorse religion generically as long as it stops short of endorsing a particular sect, but they seem to commit a different error. They seem to be suggesting that the insertion of "under God" in the Pledge is permissible because it is a nonreligious mechanism used by

171. 148 CONG. REC. S6106 (daily ed. June 26, 2002) (statement of Sen. Bennett).
172. *Id.* (emphasis added).
173. *See supra* notes 60–65 and accompanying text.
174. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 216 (1963).
175. *See supra* notes 63–65 and accompanying text.

Congress to advance the broader secular meaning of the Pledge. Thus, Professor Tribe emphasizes that the words do not "evoke[] a religious experience,"[176] and in Professor Sunstein's words, the Pledge is "not a religious ritual, it's a patriotic ritual."[177] This approach is little more than a rephrasing of the time-worn argument that a religious sentiment may be used to solemnize affairs at which the Pledge is recited. There are three problems with this approach to avoiding the religious significance of the concept of "God." First, it is implausible that the addition of the words "under God" in 1954 added any solemnity to a Pledge that had seen the country through two world wars without those words; the words "under God" added something else in addition to solemnity—that is, a religious gloss on an already solemn affirmation. Second, the solemnization rationale is inconsistent with the evidence in the record as to the clear-cut religious purpose motivating the 1954 statute.[178] And third, the Court has consistently rejected the solemnization argument proffered by school boards trying to justify public school prayer.[179]

A somewhat different version of this error has been attributed to Justice Brennan in his early discussion of ceremonial deism in *Abington School District v. Schempp*.[180] In this opinion Justice Brennan seems to assert that religious references such as the "under God" language in the Pledge are a constitutionally permissible "recognition" of the country's religious heritage.[181] Justice Brennan's discussion of this issue is important because proponents of the 1954 addition to the Pledge frequently cite it in support of their claim that the "under God" language is constitutional. Indeed, a reference to this discussion, along with a portion of Justice Brennan's opinion, is incorporated into the text of the House of Representatives' Resolution protesting the *Newdow* decision.[182] Likewise, the *Washington Post* editorial cited the Brennan opinion in criticizing the *Newdow* decision.[183] According to the *Post*, Justice Brennan and other Justices have "presumed" that the addition of "under God" to the Pledge is constitutional, and "no court of appeals should blithely

176. Kravets, *supra* note 12.

177. Cliatt, *supra* note 10.

178. *See supra* notes 37–58 and accompanying text.

179. *See supra* notes 88–92 and accompanying text.

180. 374 U.S. 203 (1963).

181. *See id.* at 304 (Brennan, J., concurring) ("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.' ").

182. *See* H.R. Res. 459, 107th Cong., 148 CONG REC. H4125 (2002) (enacted).

183. Editorial, *One Nation Under Blank*, WASH. POST, June 27, 2002, at A30.

generate a political firestorm . . . just to find out whether they meant what they said."[184] Like much else that has been said and written about the facts and law surrounding the religious language in the Pledge, Justice Brennan's discussion has been misconstrued and misinterpreted.

The overall context of Justice Brennan's comments about the Pledge is seldom mentioned. The comments appear in a long opinion explaining his reasons for joining the majority's decision to strike down a public school Bible reading exercise.[185] In one long portion of the opinion, Justice Brennan attempted to clarify the line between the permissible exercise of religious freedom and the impermissible establishment of religion.[186] During this part of the discussion, he listed a number of circumstances in which the Establishment Clause permits the government to accommodate religion.[187] One item on this list was entitled "Activities Which, Though Religious in Origin, Have Ceased to Have Religious Meaning."[188] "[N]early every criminal law on the books can be traced to some religious principle or inspiration," Justice Brennan noted, "[b]ut that does not make the present enforcement of the criminal law in any sense an establishment of religion, simply because it accords with widely held religious principles."[189] At the end of this discussion, he includes the following passage, which is the part of the opinion frequently quoted by those supporting the constitutionality of the "under God" portion of the Pledge:

> 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." Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.[190]

184. *Id.*
185. *See Schempp*, 374 U.S. at 230–304 (Brennan, J., concurring).
186. *See id.* at 295–304 (Brennan, J., concurring).
187. *See id.* (Brennan, J., concurring).
188. *Id.* at 303 (Brennan, J., concurring).
189. *Id.* (Brennan, J., concurring).
190. *Id.* at 303–04 (Brennan, J., concurring).

A quick reading of this three-sentence passage seems to provide the perfect piece of evidence that "under God" is constitutionally permissible. After all, here is perhaps the Court's strongest and most articulate modern proponent of separationist values arguing in favor of the religious language in the Pledge. But upon closer inspection, it is not at all clear that Justice Brennan's opinion helps the Pledge proponents.

First, consider the tentative phrasing of his comments. He never definitively concludes that the Pledge and other "various patriotic exercises" are constitutional.[191] He says only that they "might" or "may" be constitutional.[192] This is an intentionally indefinite reference to an issue that, after all, had not yet come before the Court at the time Justice Brennan wrote his opinion. The political context of this discussion is important. *Schempp* was one of the Court's earliest public school religious exercise cases. It was issued only a year after *Engel v. Vitale*,[193] the controversial school prayer decision. There was an obvious need at the time to explain the parameters of the two decisions. In this context, the provisional phrasing of Justice Brennan's comments in *Schempp* served a dual purpose. On the one hand, the possibility that he and a majority of the Court would approve many common religious exercises would reassure skeptical members of the public that the Court's new school-prayer and school-Bible-reading decisions would not lead to the extirpation of all evidence of religiosity from public life. On the other hand, by withholding a definitive decision, Justice Brennan preserved his ability to hold certain specific instances of governmental "recognition" of religion unconstitutional in the future if it turned out upon more complete consideration that a particular example crossed the line into unconstitutional establishment.

References to the Pledge were not the only examples of government religious activity about which Justice Brennan offered tentative conclusions in *Schempp*. In deciding how much weight to ascribe to one set of tentative conclusions, it is important to note that he later revised his opinion of another matter that he provisionally approved in *Schempp*. Another of Justice Brennan's list of religious "accommodations" in *Schempp* related to "Establishment and Exercises in Legislative Bodies."[194] In this section of his opinion,

191. *Id.* at 303 (Brennan, J., concurring).
192. *Id.* (Brennan, J., concurring).
193. 370 U.S. 421 (1962).
194. *Schempp*, 374 U.S. at 299 (Brennan, J., concurring).

Justice Brennan offered qualified support for the constitutionality of legislative prayer:

> The saying of invocational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvements of the kind prohibited by the Establishment Clause. Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect.[195]

When the Court finally granted formal review of the substantive Establishment Clause claim against legislative prayer, however, Justice Brennan abandoned his earlier position that such prayers "might" be constitutional:

> [D]isagreement with the Court requires that I confront the fact that some 20 years ago ... I came very close to endorsing essentially the result reached by the Court today. Nevertheless, after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today.[196]

There are strong intimations in that later opinion that Justice Brennan was leaning toward a similar revision of his earlier sentiments on the inclusion of a religious passage in the official Pledge.[197]

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195. *Id.* at 299–300 (Brennan, J., concurring).

196. Marsh v. Chambers, 463 U.S. 783, 795–96 (1983) (Brennan, J., dissenting).

197. This can be inferred from a portion of Justice Brennan's *Marsh* opinion in which he discusses four purposes served by the "principles of 'separation' and 'neutrality' implicit in the Establishment Clause." *Id.* at 803 (Brennan, J., dissenting). One purpose, he argues,

> is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government. The Establishment Clause "stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."

Id. at 804 (Brennan, J., dissenting) (quoting Engel v. Vitale, 370 U.S. 421, 432 (1962)). Justice Brennan then adds a footnote supporting this proposition in which he asks the reader to

> Consider ... this condensed version of words first written in 1954 by one observer of the American scene:
>
> > "The manifestations of religion in Washington have become pretty thick. We have had opening prayers, Bible breakfasts, [and so on]; now we have added ... a change in the Pledge of Allegiance. The Pledge, which has served well enough in times more pious than ours, has now had its rhythm upset but its anti-Communist spirituality improved by the insertion of the phrase "under God." ... A bill has been introduced directing the post office to cancel mail with the slogan "Pray for Peace." (The devout, in place of

The second reason the cryptic references to the Pledge in Justice Brennan's *Schempp* opinion provide little support for the claim that "under God" is nonreligious is that this conclusion contradicts the overall approach to the Establishment Clause he articulates throughout *Schempp*. Those who would cite Brennan's *Schempp* concurring opinion in support of the current Pledge would do well to read the portion of that opinion immediately preceding his suggestion that some ceremonial uses of religion may comply with the Constitution. In the preceding portion of his opinion, Justice Brennan sets forth his standard for identifying Establishment Clause violations, by noting that there are three matters specifically forbidden by the Establishment Clause: "involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means

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> daily devotions, can just read what is stuck and stamped all over the letters in their mail.).
>
> . . . .
>
> To note all this in a deflationary tone is not to say that religion and politics don't mix. Politicians should develop deeper religious convictions, and religious folk should develop wiser political convictions; both need to relate political duties to religious faith—but not in an unqualified and public way that confuses the absolute and emotional loyalties of religion with the relative and shifting loyalties of politics.
>
> . . . .
>
> All religious affirmations are in danger of standing in contradiction to the life that is lived under them, but none more so than these general, inoffensive, and externalized ones which are put together for public purposes."

Id. at 804–05 n.16 (Brennan, J., dissenting) (alterations in original) (quoting WILLIAM L. MILLER, PIETY ALONG THE POTOMAC 41–46 (1964)).

Justice Brennan's favorable quote of these unflattering comments about the insertion of "under God" in the Pledge to illustrate the "trivialization and degradation of religion by too close an attachment to the organs of government" provides support for the view that by the time of *Marsh* he had developed doubts about his approving comments regarding the Pledge in *Schempp*.

In fairness, it should be noted that Justice Brennan continued to phrase his comments in conditional terms. In *Marsh*, he noted that "I frankly do not know what should be the proper disposition of features of our public life such as 'God save the United States and this Honorable Court,' 'In God We Trust,' 'One Nation Under God,' and the like," *Marsh*, 463 U.S. at 818 (Brennan, J., dissenting), and one year later he reiterated that "I remain uncertain about these questions." Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting). But even if Justice Brennan never explicitly embraced the notion that Congress violated the Constitution when it added the phrase "under God" to the Pledge, the deep ambiguity of all his comments on this matter should prevent proponents of the religious language in the Pledge from using him as a primary supporter of their position.

would suffice."[198] The third item on this list is the one implicated by the facts of *Schempp* itself—state-mandated devotional exercises in a public school. Justice Brennan summarized his position in a way that has direct implications for the religious component of the Pledge:

> Such devotional exercises may well serve legitimate nonreligious purposes. To the extent, however, that such purposes are really without religious significance, it has never been demonstrated that secular means would not suffice. Indeed, I would suggest that patriotic or other nonreligious materials might provide adequate substitutes—inadequate only to the extent that the purposes now served are indeed directly or indirectly religious. Under such circumstances, the States may not employ religious means to reach a secular goal unless secular means are wholly unavailing.[199]

These conclusions logically would apply to the 1954 religious addendum to the Pledge. The Pledge as a whole does indeed serve the secular purpose of celebrating the dignity of a united nation and honoring one of the nation's symbolic representations. But it cannot be "demonstrated that secular means [i.e., the Pledge sans the 'under God' addendum] would not suffice." As with the devotional found lacking in *Schempp*, the nonreligious Pledge would be inadequate "only to the extent that the purposes now served [i.e., by the religious language inserted into the Pledge] are indeed directly or indirectly religious." Thus, the government cannot use the religious Pledge unless the previously employed secular Pledge would be "wholly unavailing." Read in context, in its entirety, and in light of his later writings, Justice Brennan's *Schempp* opinion simply cannot be used to support the claim that the religious language in the Pledge is a trivial and essentially secular "recognition" of religion that should be exempt from normal Establishment Clause rules.

In the end, the biggest problem with the various attempts to argue that the phrase "under God" in the context of the Pledge is a nonreligious concept is that these attempts are all utterly implausible except as mechanisms to avoid the clear application of the Establishment Clause. The notion that "under God" is not religious is inconsistent with any non-tendentious effort to define the key term—"God"—and with any reasonable reading of the stated intentions of the relevant political actors in both 1954 and 2002, when politicians throughout Washington rushed to expend legislative time

198. *Schempp*, 374 U.S. at 295 (Brennan, J., concurring).
199. *Id.* at 293–94 (Brennan, J., concurring).

and governmental dollars to defend the linkage of God and country.[200] These politicians used "God" in its religious context and said so publicly.[201] They were not defending (to use Senator Bennett's phrasing) a "universal and nonspecific" term to which could be ascribed "any quality, any gender, any doctrine, any position;"[202] they were (to quote the Senate Chaplain) "running up the believer's flag as the witness of a great nation's faith."[203]

None of the relevant players in the battles over the Pledge—both in 1954 and today—have even pretended otherwise. Consider again the quotations from the legislative history of the 1954 statute.[204] Consider also another of President Bush's comments on the modern litigation over the Pledge: "America is a nation that values our relationship with the Almighty.... We need commonsense judges who understand that our rights were derived from God."[205] Senate majority leader Tom Daschle independently confirmed Mr. Bush's assertion of a specifically religious devotion: "We have been drawn together in the face of tremendous tragedy in the last nine months and in part that healing process has come by our belief in a supreme being."[206] None of these are generic references denuded of any religious significance. In light of the arguments considered in this Part it is sadly necessary to articulate yet again the obvious fact recognized by Justice Powell years ago in response to another disingenuous attempt to avoid the application of the Establishment Clause: " '[C]oncepts concerning God or a supreme being of some sort are manifestly religious.' "[207]

Even at the lowest level of constitutional analysis, constitutional arguments should be able to pass what Richard Epstein calls the "smirk test": "[I]f the lawyer for the state can offer a bad reason with a straight face, then he or she wins. But if you smirk before you finish, then you lose."[208] The government lawyers in *Newdow* should

200. *See supra* notes 6–7, 38–58 and accompanying text.

201. *See supra* notes 54–57 and accompanying text.

202. 148 CONG. REC. S6106 (daily ed. June 26, 2002) (statement of Sen. Bennett).

203. 100 CONG. REC. S8617 (1954).

204. *See supra* notes 37–58 and accompanying text.

205. Rick DelVecchio, *Legal Affairs: The Pledge of Allegiance*, SAN FRAN. CHRON., June 30, 2002, at A3, 2002 WL 4024238.

206. Hulse, *supra* note 5.

207. Edwards v. Aguillard, 482 U.S. 578, 599 (1987) (Powell, J., concurring) (quoting Malnak v. Yogi, 440 F. Supp. 1284, 1322 (D.N.J. 1977), *aff'd per curiam*, 592 F.2d 197 (3d Cir. 1979)).

208. Richard A. Epstein, *The Harms and Benefits of* Nollan *and* Dolan, 15 N. ILL. U. L. REV. 477, 491 (1995).

start practicing now if they plan to argue that "under God" is a nonreligious concept.

B. Triviality and De Minimis Establishments of Religion

The second variation on the theme that the "under God" language in the Pledge is a trivial and therefore noncognizable Establishment Clause violation focuses on the small magnitude of the threat the Pledge poses for religious liberty generally. This is one of Judge Fernandez's main arguments in his *Newdow* dissent: "[W]hen all is said and done, the danger that 'under God' in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody's beliefs is so minuscule as to be de minimis. The danger that phrase presents to our First Amendment freedoms is picayune at most."[209]

Judge Fernandez's dismissive attitude toward the harm of such "de minimis" establishments is coupled with the suggestion that the only people upset by such government actions are hypersensitive religious spoilsports such as Mr. Newdow:

> [S]uch phrases as "In God We Trust" or "under God" have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity.[210]

In contrast to the first variation of the triviality exception argument, this version concedes that "under God" is a specifically religious phrase.[211] But this version of the triviality exception argument is no less blind than the first variation to the facts of the "under God" controversy, and is no less a bizarre deviation from the accepted thrust of Establishment Clause doctrine.

As for the facts, the notion that the entire controversy over the "under God" language of the Pledge is a trivial and pathological fixation of an isolated crank ignores the equally fervent views of those who would move heaven and earth to keep those two words in the

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209. Newdow v. United States Congress, 292 F.3d 597, 613 (9th Cir. 2002) (Fernandez, J., concurring in part and dissenting in part).

210. *Id.* at 614 (Fernandez, J., concurring in part and dissenting in part).

211. Judge Fernandez explicitly acknowledges this point:

> Those expressions have not caused any real harm of that sort over the years since 1791, and are not likely to do so in the future. As I see it, that is not because they are drained of meaning. Rather, as I already indicated, it is because their tendency to establish religion (or affect its exercise) is exiguous.

Id. (Fernandez, J., concurring in part and dissenting in part).

Pledge. The notion that this matter is important only to a "fevered eye" of someone like Mr. Newdow is subverted by the frenzied vehemence with which opponents of Mr. Newdow insist that the inclusion of the two words "under God" in the Pledge is a matter of major national importance. Even a casual observer can attest to the furor generated by the *Newdow* decision, which included not only routine denunciations of the court and its decision from virtually the entire political community,[212] but also multiple hostile responses, including death threats, directed at the plaintiff and his daughter.[213] These reactions were almost all specifically oriented toward perpetuating the government's direct endorsement of a religious belief in God. More ominously, these threats and vehement criticisms contained implicit—and sometimes explicit—attacks on the religious views of someone who chooses in a very public way not to conform to the government's chosen form of religious belief. However one chooses to characterize the dispute, it can hardly be maintained that the religious and political significance of the argument over the use of "under God" in the Pledge is trivial or "de minimis."

Judge Fernandez's substantive constitutional argument that the "under God" phrase poses only a de minimis threat to constitutional values is related to the widespread perception that Mr. Newdow's

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212. *See supra* notes 3–7 and accompanying text.

213. *See* Scott Gold & Eric Bailey, *Plaintiff Surprised by Furor*, L.A. TIMES, June 27, 2002, at A1. Mr. Newdow eventually had to get a second phone line into his house to deal with the flood of calls responding to his victory. *Id.* The substance of the hostile calls were predictable, including references to Mr. Newdow as an "atheist bastard" and suggestions that if he does not like the country, he should "take [himself] and [his] family and get the hell out," a suggestion conveyed by a woman on behalf of "America." *Id.*

Of course, death threats and actual violence have typically accompanied the majority's response to those who oppose the Pledge for religious reasons. A two-year wave of violence against Jehovah's Witnesses followed the Supreme Court's initial ruling in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), that the Constitution did not provide religious objectors the right to refuse to salute the flag. *Id.* at 598–600. The Supreme Court would later overrule this decision in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Mobs attacked Jehovah's Witness meetings, Witness halls were burned, and a Nebraska Witness was beaten, kidnapped, and castrated. PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 23 (1990). In an article written contemporaneously with these events, two Justice Department officials recounted various violent attacks on Witnesses during this period, including one in Richwood, West Virginia, in which the "chief of police and deputy sheriff had forced a group of Jehovah's Witnesses to drink large doses of castor oil and had paraded the victims through the streets ... tied together with police department rope." Victor W. Rotnem & F. G. Folsom, Jr., *Recent Restrictions upon Religious Liberty*, 36 AM. POL. SCI. REV. 1053, 1061 n.23 (1942). These officials concluded: "In the two years following the [*Gobitis*] decision the files of the Department of Justice reflect an uninterrupted record of violence and persecution of the Witnesses. Almost without exception, the flag and the flag salute can be found as the percussion cap that sets off these acts." *Id.* at 1062.

case is at most a trivial matter litigated by someone who has too much time on his hands. But Judge Fernandez's understanding of what the Establishment Clause prohibits is badly flawed. A majority of the Court has never suggested that the Establishment Clause prohibits only establishments that "bring about a theocracy or suppress somebody's beliefs."[214] Indeed, if that were the standard, most of the Establishment Clause cases decided by the Court during the last half century would have had very different results. Recall the range of activities the Supreme Court has held unconstitutional: posting the Ten Commandments on a public school classroom wall;[215] permitting a student at a public school to say a brief nonsectarian prayer before a football game;[216] permitting public school students to read a brief passage from the Bible at the beginning of the day at a public school;[217] requiring the teaching of creationism to "balance" the teaching of evolution;[218] and placing a religious holiday display in the lobby of a public building.[219] None of these activities were so comprehensive an imposition of religion by the state that they threatened to "bring about a theocracy" or even "suppress somebody's beliefs," yet a majority of the Supreme Court held all these activities unconstitutional.

The fact is that Mr. Newdow's claim against the addition of "under God" to the Pledge is no more trivial constitutionally than many other claims already recognized by the Court. Conversely, if Judge Fernandez is correct that this government action is constitutional because it stops short of installing a theocracy, then a substantial part of First Amendment law will need to be rewritten. Judge Fernandez's exception will thus have swallowed the rule.[220]

C. *Triviality and the Slippery Slope*

The third version of the proposed triviality exception to the Establishment Clause is the slippery slope argument. The argument

214. *See Newdow*, 292 F.3d at 613 (Fernandez, J., concurring in part and dissenting in part).

215. Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam).

216. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000).

217. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963).

218. Edwards v. Aguillard, 482 U.S. 578, 594 (1987).

219. County of Allegheny v. ACLU, 492 U.S. 573, 579 (1989).

220. This seems to have been Judge Fernandez's intent. He emphasized that "I do not say, that there is such a thing as a de minimis constitutional violation. What I do say is that the de minimis tendency of the Pledge to establish a religion or to interfere with its free exercise is no constitutional violation at all." Newdow v. United States Congress, 292 F.3d 597, 615 n.9 (9th Cir. 2002) (Fernandez, J., concurring in part and dissenting in part).

is that if the Constitution prohibits something as minor as the addition of the two words "under God" to the Pledge, then other patriotic references to God are also potentially subject to constitutional challenge. Once again, Judge Fernandez incorporates this theme into his *Newdow* dissent:

> [U]pon Newdow's theory of our Constitution, accepted by my colleagues today, we will soon find ourselves prohibited from using our album of patriotic songs in many public settings. "God Bless America" and "America the Beautiful" will be gone for sure, and while use of the first three stanzas of "The Star Spangled Banner" will still be permissible, we will be precluded from straying into the fourth. And currency beware![221]

Members of Congress were equally frightened by the prospect of further constitutional battles over references to God in songs and on coins.[222]

There are several answers to these concerns. Like many other aspects of the response to *Newdow*, the concerns may simply be an overreaction. The Pledge is different in several respects from other types of ceremonial deism, and the courts logically could strike down the 1954 modification of the Pledge without implicating the coinage or the singing of patriotic songs. The formal recitation of a patriotic affirmation is different in kind from other manifestations of religion in coins or songs because it involves the government seeking a direct affirmation of religious belief by all those saying the Pledge. In Justice Black's concurring opinion in *Barnette*, he likened the mandatory Pledge to an oath: "Such a statutory exaction is a form of test oath, and the test oath has always been abhorrent in the United

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221. *Id.* at 614–15 (Fernandez, J., concurring in part and dissenting in part).

222. Several different Representatives expressed this fear in the floor debate over *Newdow*. One example is Representative Holden's comments:

> Mr. Speaker, above the Chair's head, "In God We Trust." Will that be the next thing to be attacked? Our currency, "In God We Trust." Will that be the next to be attacked? We need to stand united and send a clear message that we are not going to adhere to this ridiculous decision.

148 CONG. REC. H4123 (daily ed. June 27, 2002) (statement of Rep. Holden).

Another example is Representative Cox's comments:

> So perhaps we ought not to dismiss out of hand what Judge Fernandez is telling us: All right, if we do what the Ninth Circuit wishes us to in the *Newdow* case today, then we had better be prepared to get rid of God Bless America, we had better be prepared to get rid of that motto In God We Trust, right over the Speaker pro tempore's head, and we had better be prepared to get it off of our currency, because the same principle must apply.

148 CONG. REC. H4049 (daily ed. June 26, 2002) (statement of Rep. Cox).

States."[223] Uttering such an oath links the speaker to the substance of the credo in a far more direct way than spending a coin links the spender to the sentiment printed on the metal.

When the official Pledge is incorporated into a public school classroom containing young students, the inherently coercive atmosphere accentuates the problem. This provides another possible distinction between the Pledge challenged in *Newdow* and other manifestations of religion such as the coinage. Indeed, the majority opinion in *Newdow* itself recognized this distinction when it noted that the Pledge holding was not inconsistent with another Ninth Circuit panel decision rejecting a constitutional challenge to the "In God We Trust" inscription on coins and currency.[224]

The obvious similarities between the Court's school prayer decisions and the public school context of the *Newdow* challenge to the Pledge make it easy to distinguish *Newdow* from generalized religious references on coins and in songs. On the other hand, the *Newdow* critics may have a point with regard to songs or other official manifestations of religious endorsement when those manifestations occur in a context that, like the Pledge, requires unwilling individuals (especially young ones) to either embrace the official religious endorsement or bring unwanted attention to themselves by dissenting publicly.

The question is why the *Newdow* critics find this notion surprising, radical, or outside the bounds of rational consideration. The recognition that a consistent application of the Supreme Court's Establishment Clause doctrine would forbid many familiar forms of overt government endorsement of religion is not novel. To cite just the most prominent examples, three of the most esteemed scholars of the Establishment Clause arrived separately at precisely this conclusion long before Judge Goodwin wrote his *Newdow* decision.[225]

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223. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 644 (1943) (Black, J., concurring).

224. *See Newdow*, 292 F.3d at 609 n.10 ("The most important distinction is that school children are not coerced into reciting or otherwise actively led to participating in an endorsement of the markings on the money in circulation.").

225. *See* Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 947 (1986) (discussing the secular purpose doctrine, and noting that "[a]s a matter of policy, this doctrine casts great doubt on many deeply ingrained practices in our country," including the "In God We Trust" inscription on coins and presidential Thanksgiving proclamations to God); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 8 (1986) (discussing the requirement of governmental neutrality toward religion and noting that under this requirement, "[t]he government should not put 'In God We Trust' on coins; it should not open court sessions

Of course, on certain rare occasions when the Supreme Court addresses these issues—as in, for example, the Court's decision upholding legislative prayer—the Court simply "ignores its own articulated test when it wishes to uphold a deeply engrained national practice that clashes with this doctrine."[226] And at the end of the day, this may be the way *Newdow* is ultimately resolved. But the panel that produced the *Newdow* furor neither manipulated the existing doctrine nor created a slippery slope where one did not already exist. Establishment Clause doctrine is clear-cut and unquestionably applies to the Pledge and maybe some other examples of official ceremonial endorsement of religion. Critics of the Ninth Circuit panel opinion in *Newdow*, therefore, should express neither surprise nor consternation at the result simply because the court employed the normal legal tools of logic and doctrinal fidelity.

D. Triviality as Civil Libertarian Realpolitik

The final argument in favor of protecting the religious language in the Pledge under a triviality exception to the Establishment Clause emanates from different sources than the other three arguments. The first three arguments in favor of crafting an exception to the Establishment Clause are often expressed by judges and commentators who appear uncomfortable with the broader separationist tenor of the Supreme Court's modern Establishment Clause precedents. The fourth argument for an exception, on the other hand, is heard from those who generally agree with the goal of separating church and state. These are, ironically, the civil libertarian critics of *Newdow*. The civil libertarian *Newdow* critics propose to carve out an exception for the Pledge not as a first step toward diluting the general protections of the Establishment Clause, but rather as a tactical maneuver to preserve and protect existing precedents that (they feel) might be undermined by a logical, but extremely unpopular application of those precedents to the Pledge.

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with 'God save the United States and this honorable Court'; and it should not name a city or a naval vessel for the Body of Christ or the Queen of the Angels"); Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 746 n.30 (1986) (arguing that religious inscription on coins and currency, religious references in public ceremonies, and religious language in the Pledge discriminate in favor of the Judeo-Christian notion of God and are therefore unconstitutional).

226. Choper, *supra* note 225, at 947; *see* Marsh v. Chambers, 463 U.S. 783, 792 (1983) (upholding the Nebraska state legislature's practice of beginning each legislative session with a prayer).

This position did not arise specifically in response to *Newdow*. At the end of Leonard Levy's history of the Establishment Clause, which is overwhelmingly sympathetic to the cause of separation of church and state, Levy dismisses as "silly suits" challenges to the religious language in the Pledge:

> One of the principal arguments of separationists against certain practices that breach the wall of separation, particularly in the field of education, is that those practices are divisive and stimulate conflict among people of differing faiths. Some silly suits, such as those seeking to have declared unconstitutional the words "under God" in the pledge of allegiance or in the money motto "In God We Trust," have the same deleterious effects. Separationists who cannot appreciate the principle of *de minimis* ought to appreciate a different motto—"Let sleeping dogmas lie."[227]

In its editorial responding to *Newdow*, the *New York Times* also advanced this theme of civil libertarian realpolitik, arguing that "the ruling trivializes the critical constitutional issue of separation of church and state."[228] So much for Madison's reminder that "it is proper to take alarm at the first experiment on our liberties."[229]

It would be interesting to hear where the editorial writers of the *New York Times* believe the "genuine defense of the First Amendment" really begins. If not with *Newdow*, then what about *Barnette*? Or if not with the Pledge, then what about silent prayer?[230]

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227. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 177 (1986).

228. According to the *New York Times*:

> The practical impact of the ruling is inviting a political backlash for a matter that does not rise to a constitutional violation. We wish the words had not been added back in 1954. But just the way removing a well-lodged foreign body from an organism may sometimes be more damaging than letting it stay put, removing those words would cause more harm than leaving them in. By late afternoon yesterday, virtually every politician in Washington was rallying loudly behind the pledge in its current form.
>
> Most important, the ruling trivializes the critical constitutional issue of separation of church and state. There are important battles to be fought virtually every year over issues of prayer in school and use of government funds to support religious activities. Yesterday's decision is almost certain to be overturned on appeal. But the sort of rigid overreaction that characterized it will not make genuine defense of the First Amendment any easier.

"One Nation Under God," supra note 9.

229. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1, 65 (1947) (Rutledge, J., dissenting).

230. *See* Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (striking down an Alabama moment of silence statute).

Or what about a short ecumenical prayer at school-related functions?[231] Or even a short ecumenical prayer at the beginning of the school day?[232] Levy, for one, seems to suggest at one point that a little public school prayer in itself may not be such a disaster, after all.[233] But once it is conceded that a little generic prayer never hurt anyone, is it logically possible to resist the next suggestion that a little Jesus never hurt anyone?

Realpolitik-inclined civil libertarians are effectively advocating the empty religious liberty tendered by Justice Frankfurter in his *Barnette* dissent. He argued that the government had the constitutional authority to legally coerce Jehovah's Witness children to salute the flag in direct violation of their beliefs, because the children still had the freedom to disavow the state's mandated creed once they left the room.[234] According to Justice Frankfurter, the state's interest in fostering unity of patriotic purpose simply outweighed the religious minority's interest in avoiding the implicit governmental challenge to their own religious teachings.[235] By the same token, Mr. Newdow still has a few evening hours to convince his daughter that the religious views expressed by the government, her school, her teachers, and all of her classmates may not be the right ones for her. A daunting prospect, maybe, but no one ever said that passing on a legacy of religious dissent would be easy. Just ask the Jehovah's Witnesses who lived the reality of resisting a trivial little patriotic mandate after *Gobitis*.[236]

The problem with a consistent application of civil libertarian realpolitik is that it ends up at the same destination already reached by the proponents of the second triviality exception—that is, the proposition that the Establishment Clause is not violated unless it "tend[s] to bring about a theocracy or suppress somebody's

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231. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000) (finding prayer at public school football games unconstitutional); Lee v. Weisman, 505 U.S. 577, 580 (1992) (finding graduation prayer unconstitutional).

232. *See* Engel v. Vitale, 370 U.S. 421, 422 (1962).

233. Referring to several Supreme Court rulings on this subject, Levy concludes:

> A moment of silence in the public school for meditation or prayer, posting the Ten Commandments on a school bulletin board, or even saying a bland interdenominational prayer would not really make much difference, if they were not omens that the cause of religion would be still further promoted by government.

LEVY, *supra* note 227, at 176.

234. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 663–64 (1943) (Frankfurter, J., dissenting).

235. *See id.*

236. *See supra* note 213.

beliefs."[237] For those who agree with Justice Scalia that the Republic would be best served by citizens "voluntarily joining in prayer together, to the God whom they all worship and seek,"[238] this may make perfect sense. But for those who profess concern for "the critical constitutional issue of separation of church and state,"[239] conceding that a little religious establishment is permissible amounts to nothing less than an implicit surrender of the constitutional principle itself.

CONCLUSION

The legal context of *Newdow* can be summed up easily: The facts surrounding the inclusion of "under God" in the Pledge clearly indicate an impermissible religious intent and effect, the law unambiguously supports the claim that the 1954 change to the Pledge is unconstitutional, and Mr. Newdow has an obvious personal interest as a parent of a child in a public school in bringing the constitutional claim to court. In light of the clear legal support for Michael Newdow's challenge, what accounts for the widespread and persistent argument that his claim is trivial? There are probably two different explanations for the charge of triviality issuing from two different categories of *Newdow* critics.

Critics falling into the first category would like to dismiss the claim as trivial because they do not particularly care for the separationist tenor of Establishment Clause doctrine on which it relies. These critics belong to the school of Establishment Clause analysis asserting that the separation of church and state amounts to discrimination against religion because it has the effect of excluding religion from the public square.[240] *Newdow* dissenter Judge

237. Newdow v. United States Congress, 292 F.3d 597, 613 (9th Cir. 2002) (Fernandez, J., concurring in part and dissenting in part). This position also was adopted, incidentally, by Justice Frankfurter in *Barnette*:

> That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority.

Barnette, 319 U.S. at 662 (Frankfurter, J., dissenting).

238. Lee v. Weisman, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting).

239. *"One Nation Under God," supra* note 9.

240. *See* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 37 (1984) ("[W]e have in recent decades systematically

Fernandez clearly falls into this category. The predicate for his dissenting opinion is his assertion that the Religion Clauses "were not designed to drive religious expression out of public thought; they were written to avoid discrimination."[241] In Judge Fernandez's view, the Religion Clauses are nothing more than "an early kind of equal protection provision [intended to] assure that government will neither discriminate for nor discriminate against a religion or religions."[242] According to Judge Fernandez, the *West Virginia v. Barnette* variety of free speech protection against being forced to recite the Pledge is all the protection religious dissenters can expect from the Constitution.[243] The fact that the Supreme Court rejected precisely this argument in the Establishment Clause cases involving public school classroom, graduation, and extracurricular prayer[244] is not addressed by Judge Fernandez (although he does cite Justice Scalia's dissent in the graduation prayer case),[245] leaving one to suspect that Judge Fernandez's characterization of Mr. Newdow's claim as de minimis[246] is really a cloak for a much broader disagreement with the entire concept of secular government and the separation of church and state.

The first category of *Newdow* critics are at least consistent, although perhaps not entirely forthcoming about their reasons for opposing the claim against the modified Pledge. It is harder to explain the theory motivating the second category of *Newdow* critics. These critics—the civil libertarian critics—generally agree with the concept of separation of church and state but would refrain from enforcing that preference when it comes to this particular manifestation of ceremonial deism. What explains this seeming inconsistency? Two explanations are possible, and neither explanation is terribly flattering to the critics.

The first possible explanation is simple insensitivity. It is possible to detect a tone of elitist impatience in some of the commentary about the *Newdow* case (see, for example, the *New York*

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excluded from policy consideration the operatives [sic] values of the American people, values that are overwhelmingly grounded in religious belief.").

241. *Newdow*, 292 F.3d at 613 (Fernandez, J., concurring in part and dissenting in part).

242. *Id.* (Fernandez, J., concurring in part and dissenting in part).

243. *Id.* at 614 (Fernandez, J., concurring in part and dissenting in part).

244. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310–13 (2000); Lee v. Weisman, 505 U.S. 577, 595–97 (1992); Engel v. Vitale, 370 U.S. 421, 430–31 (1962).

245. *See Newdow*, 292 F.3d at 613 & n.2 (Fernandez, J., concurring in part and dissenting in part) (citing *Lee*, 505 U.S. at 632–35 (Scalia, J., dissenting)).

246. *See id.* at 613, 615 (Fernandez, J., concurring in part and dissenting in part).

Times editorial discussed in the previous Section).[247] We know what is important, these commentators imply, and Mr. Newdow's claim just does not strike us as all that important. Mr. Newdow's remedy, these commentators hint, is just to ignore the minor governmental intrusion into his religious life. The problem with this approach is that it would undermine the claims of a long line of successful free speech and Establishment Clause litigants, ranging from the Jehovah's Witness children in *Barnette* to Deborah Weisman in the graduation prayer case. If viewed objectively, the injuries in these cases were not much more earth-shaking than Mr. Newdow's. Yet it is hard to imagine the civil libertarian critics of *Newdow* renouncing their support for the Court's *Barnette* and school prayer decisions.

Insensitivity aside, there is also an air of conflict fatigue about the civil libertarian responses to Mr. Newdow's claim. We cannot litigate everything, they say, so just let us focus on the big issues. The first problem with this approach is that it is hard to see how the facts of *Engel*, *Schempp*, *Lee*, and *Santa Fe* present definitively "bigger" violations than the one challenged by Mr. Newdow, yet presumably the civil libertarian critics still support these decisions and will aggressively seek to enforce them in lower courts. Then there is the matter of litigation strategy. If civil libertarians routinely accede to "minor" violations of a clear-cut constitutional principle, when does the accretion of acceptable "minor" violations end up creating the basis for a rejection of the principle itself? If civil libertarians routinely concede the acceptability of "trivial" constitutional violations, they may find one day that they do not have any ammunition left when it comes time to litigate the major violations.[248]

In sum, the basic principle being litigated in *Newdow* is the principle that the Establishment Clause of the First Amendment created a secular government—not a government "under God." This principle is fundamental and the Supreme Court has reaffirmed it

247. *See supra* notes 228–33 and accompanying text.

248. This is perhaps the main point of Steven Epstein's analysis of ceremonial deism:

> The implications of ceremonial deism are far-reaching because courts frequently employ this amorphous concept as a springboard from which to hold that other challenged practices do not violate the Establishment Clause. After all, the argument typically goes, if practices such as the Pledge of Allegiance to a nation "under God," legislative prayer, the invocation to God prior to court proceedings, and the Christmas holiday are permissible notwithstanding the Establishment Clause, then surely the practice at hand (be it a nativity scene, commencement invocation, or some other governmental practice)—which does not advance religion "any more than" these accepted practices—must also pass muster under the Establishment Clause.

Epstein, *supra* note 13, at 2086.

repeatedly. A routine, daily, state-mandated renunciation of this principle is not trivial, and those who deny this basic truth should understand that they risk trivializing the Constitution itself.