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The Meaning of 31 Words

The Pledge of Allegiance and Its Interpretations

In my essay, a case study of civil religion, I propose to examine both the history and evolution of the Pledge of Allegiance and the ultimate decision of the Supreme Court in terms of its constitutionality, as well as the remarkable dissents, using the famous notion of Robert N. Bellah. The Pledge case reveals the controversial legal as well as public attitudes towards the role of religion in American public life, especially the growing gulf between the predominantly separationist interpretation of the Establishment Clause by the Court since World War II, on the one hand, and the continuing strong role of religion in American public life, on the other.

I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

This is the official text millions of schoolchildren in thousands of schools throughout the United States are required to recite at the beginning of every school-day while standing at attention, looking at the American flag, and placing their right hand over their heart.¹ For the majority of Americans, the Pledge of Allegiance is arguably the

1. In the 1940s, members of the Jehovah's Witnesses denomination challenged the compulsory character of the Pledge of Allegiance at court, claiming that their children should not be required to recite the oath on freedom of conscience grounds. The Supreme Court first ruled against the Witnesses in 1940, then reversed its decision in 1943, forbidding public schools to require the recitation of the Pledge or punish children for refusing to do so (*West Virginia Board of Education v. Barnette*, 319 U. S. 624 [1943]). Nonetheless, the practice remained widespread, but most of these requirements have been turned into 'recommendations': in a 2002 textbook for elementary-school children, the above requirements are listed with the following comment: "Things you *can* do while saying the pledge" (Bill Martin, Jr. – Michael Sampson, *I Pledge Allegiance: The Pledge of Allegiance, with Commentary* [Cambridge, MA: Candlewick Press, 2002], p. 15, my emphasis).

best-known verbal expression of their patriotism, a succinct and lofty summary of the fundamental values of the US as represented by the national flag. As a result of being repeated thousands of times by millions of young people all over the country during their elementary school career, the words have practically acquired the status of a secular prayer, a near-sacred text resonant with the wisdom of the Founding Fathers, conveying a powerful statement about the United States with the overtones of self-evident truth.

My intention in this essay is to interpret the veneration of the flag in general and the Pledge of Allegiance in particular as an integral part of the American civil religion, a concept introduced by Robert N. Bellah in 1967. In his essay, which subsequently generated a great deal of scholarly controversy, Bellah asked the following pertinent question *apropos* the inauguration speech of J. F. Kennedy:

Considering the separation of church and state, how is a president justified in using the word *God* at all? The answer is that the separation of church and state has not denied the political realm a religious dimension. Although matters of personal religious belief, worship, and association are considered to be strictly private affairs, there are, at the same time, certain common elements of religious orientation that the great majority of Americans share. These have played a crucial role in the development of American institutions and still provide a religious dimension for the whole fabric of American life, including the political sphere. This public religious dimension is expressed in a set of beliefs, symbols, and rituals that I am calling the American civil religion.²

Bellah went on to identify several elements of this civil religion, beginning with the inauguration ceremony itself, which resembles a consecration of a high priest. Bellah examined all the inauguration speeches of the Presidents up to 1967 and found that all but one of them (Washington's very brief second inaugural address) mentioned or alluded to God, while none of them referred to Jesus Christ.³ This is used by Bellah as evidence that the 'God' invoked at public political ceremonies is not

2. Robert N. Bellah, "Civil Religion in America," in *American Civil Religion*, eds. Russell E. Richey – Donald G. Jones (New York: Harper & Row, 1974), 21–44, p. 24.

3. Bellah, p. 28. Bellah also observes that Presidents belonging to the generation of the Founding Fathers consistently avoid mentioning the word 'God' in their inaugural speeches, preferring such phrases as "Almighty Being," "Invisible Hand," "Providence," or "Infinite Power." It is only in the second inaugural speech of President James Monroe in 1821 that the phrase "Almighty God" is first uttered (Bellah, p. 42n3).

identical with the God of Christianity, neither is it simply an Enlightenment idea of an aloof Deity, since “he is actively interested and involved in history, with a special concern for America.”⁴ The rhetoric of the Founding Fathers and other contemporaries established an analogy between America and the Israel of the Old Testament, on which Washington, like a latter-day Moses, led his people out of captivity and into the promised land.⁵ From this analogy, the idea that the United States and its newly founded republican institutions enjoy divine favour and legitimacy naturally follows. The same divine legitimacy is invoked in the Declaration of Independence, which claims that the ‘inalienable rights’ of each man originate from their Creator.⁶

Bellah takes pains to emphasize that the civil religion is not merely a substitute for Christianity in the constitutional context of the separation of church and state: it is rather a system of beliefs and symbols that serves to justify the legitimacy of the new nation, express a national identity and destiny, and “mobilize support for the attainment of national goals.”⁷ It is also more than mere nationalism; in Bellah’s words, it is “a genuine apprehension of universal and transcendent religious reality as seen in or . . . as revealed through the experience of the American people.”⁸

The American civil religion soon developed its rudimentary theology: its most sacred event was of course the Revolution as an act of liberation and the making of a new covenant, namely the Declaration of Independence and the Constitution, which in turn acquired a quasi-holy status. The creators of these documents, the Founding Fathers, became the patriarchs or saints of the young nation, and Independence Day as well as Thanksgiving Day – proclaimed as a national holiday in Washington’s first presidential year at the request of both houses of Congress to express the nation’s gratitude for God’s special favours to the US⁹ – became its first ritual celebrations.

4. Bellah, p. 28.

5. Bellah, pp. 28–29.

6. Perhaps the first person to identify the divine legitimacy invoked in the Declaration was British author G. K. Chesterton, who wrote that “America is the only nation in the world that is founded on creed. That creed is set forth with dogmatic and even theological lucidity in the Declaration of Independence. . . . it clearly names the Creator as the ultimate authority from whom these equal rights are derived” (quoted in Sidney E. Mead, “The ‘Nation with the Soul of a Church,’” in *American Civil Religion*, ed. Russell E. Richey – Donald G. Jones [New York: Harper & Row, 1974], 45–63, p. 45).

7. Bellah, p. 35.

8. Bellah, p. 29.

9. Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982), pp. 51–52.

The Civil War added a new dimension to the civil religion, as it painfully constrained the nation to reflect upon its own fundamental principles. These reflections were summarized in a classic form by Lincoln's second inaugural address and Gettysburg address, which added to the Old Testament themes of exodus and new covenant the New Testament themes of sacrifice, death and rebirth, subsequently symbolized by Lincoln's personal martyrdom. The ritual calendar was completed by Memorial Day and the birthday of Washington and Lincoln, the two greatest figures in the national pantheon.¹⁰

In his first essay, Bellah does not carry on his analysis further than the Civil War, and does not discuss other rituals of national civil religion, most importantly the cult surrounding the national flag, probably because it is post-Civil War in origin. But he does make a passing reference to the public school system "as a particularly important context for the cultic celebration of the civil rituals,"¹¹ and his conceptual framework offers a suitable background for the examination of the Pledge of Allegiance, perhaps the most widespread daily ritual in the American civil religion.

The Origin of the Pledge

Despite the appearance of being sanctified by centuries of history, the Pledge is actually little more than one hundred years old: it was composed by a certain Francis Bellamy, staff editor of a popular family magazine in Boston called *The Youth's Companion*, in 1892.

Bellamy's text was not the first pledge of allegiance practiced in public schools. The practice of taking an oath of loyalty to the flag of the United States probably originated during the Civil War and the Reconstruction as one way of reinforcing the dubious political faithfulness of teachers in Southern states. The practice was first popularized in public schools by George T. Balch, a Civil War veteran and member of the Grand Army of the Republic, a patriotic organization formed after the War. Balch, who was working as an auditor for the New York City Board of Education, published a book entitled *Methods for Teaching Patriotism in the Public Schools* in 1890, in which he propagated the use of the flag as a fundamental symbol of patriotic loyalty.¹² The Balch salute was practiced the following way:

10. Bellah, pp. 30–33.

11. Bellah, p. 33.

12. Cecilia Elizabeth O'Leary, *To Die For. The Paradox of American Patriotism* (Princeton, NJ: Princeton University Press, 1999), pp. 151–152.

students touched first their foreheads, then their hearts, reciting, "We give our Heads – and our Hearts – to God and our Country." Then with a right arm outstretched and palms down in the direction of the flag, they completed the salute: "One Country! One Language! One Flag!"¹³

Balch's efforts were part of a larger movement, unfolding in the 1880s, to instill a sense of American patriotism into the new masses of immigrants that were flooding the country in increasing numbers in the late 19th century. The zealous patriots recognized that education of immigrant children promises the best results for a campaign of nationalist indoctrination. Balch followed up his first publication with other books, including *A Patriotic Primer for the Little Citizen*, which educated children about patriotic values through questions and answers. One such answer defined the aim of the public school as "To train us in such habits of behavior as will best fit us to become GOOD MEMBERS OF CIVIL SOCIETY and PATRIOTIC AMERICANS."¹⁴ Practices recommended by Balch combined "religious fervor and military discipline":¹⁵ adoration of symbolic objects by observing strictly choreographed rituals which were expected to impress the youthful mind. His program was an instant success: by 1893, more than 6,000 children in 21 schools of New York City saluted the flag daily, and on Washington's birthday the same year, 20,000 Native American children saluted the flag in the federal government's Indian Schools.¹⁶

The flag salute movement received a huge impetus from *The Youth's Companion*, a popular weekly family magazine published in Boston, which had more than 400,000 subscribers in 1887, making it one of the most widely read weeklies in the country. The *Companion*, under the chief editorship of owner Daniel Ford, successfully marketed itself as an entertaining magazine with high moral standards that published articles both for children and adults, ranging from short news bits to long stories and essays, some of them written by Mark Twain, Bret Harte, O. Henry, Emily Dickinson, William James, Theodore Roosevelt, and others.¹⁷

The magazine had considerable readership among public school teachers, and in about 1888, it espoused the campaign, initiated by the Grand Army of the Re-

13. John W. Baer, *Questions and Answers* [about the Pledge of Allegiance], October 7, 2003, A.1 <<http://pledgeqanda.com>>.

14. Quoted in O'Leary, p. 152.

15. O'Leary, p. 153.

16. O'Leary, pp. 154–155.

17. John W. Baer, *The Pledge of Allegiance: A Centennial History, 1892–1992* (Annapolis, Md: Free State Press, 1992), Ch. 2. Online version: <<http://history.vineyard.net/pledge.htm>>.

public,¹⁸ to raise the US flag over every schoolhouse in America as part of the great task of assimilating immigrant children. Previously, the flag had not been routinely displayed anywhere except on ships and in military installations. The idea came from the head of the magazine's premium department (the equivalent of a modern manager of advertising), James Upham, who most probably saw in it a unique opportunity to promote a good patriotic cause while increasing sales and profits.¹⁹

The magazine soon embarked on an unceasing propaganda campaign for the flag: besides a torrent of articles, it sponsored a national essay contest on the topic, publishing the winning entries, and also launched an advertising campaign for selling US flags "of every size, shape and price, including a pocket size flag with a carrying case," selling about 25,000 to public schools alone in one single year, 1891.²⁰ The *Companion* also lobbied for adoption of flag laws nationwide, and as a result, most states passed such laws by 1905 except in the South, where enthusiasm for the federal flag was lacking for obvious reasons.²¹ The enthusiastic response from teachers, students and families nationwide increased the number of subscribers to 560,000 by 1892, providing a healthy profit from the sale of patriotism.²²

For 1892, Congress authorized the organization of a World's Columbian Fair in Chicago to commemorate the four hundredth anniversary of the voyage of Columbus. Upham very skilfully allied his own campaign with the national event, and in 1891 came up with the idea of a National Public School Celebration centering around the raising of the US flag and reciting a flag salute, which was officially incorporated into the program of the Fair and embraced by several nationwide organizations, such as the National Education Association.²³

The management of the campaign of the Public School Celebration was entrusted to one of the *Companion's* editors, Francis Bellamy. Bellamy was a novice

18. The GAR declared their aim at the 23rd National Encampment in 1889 the following way: "Let the children learn to look upon the American flag 'By angels' hands to valor given,' with as much reverence as did the Israelites look upon the ark of the covenant" (O'Leary, p. 151).

19. Baer, *The Pledge*, ch.2.

20. Baer, *The Pledge*, ch.2.

21. Baer, *The Pledge*, ch.2.

22. O'Leary, p. 157. The circulation figure provided by O'Leary – who cites Louise Harris: *Flag over the Schoolhouse* (1971) as source – is contradicted by Baer, who claims that circulation did not reach the half-million mark until 1898 but cites no source (Baer, *The Pledge*, Ch. 2). But essentially, the two figures reflect the same tendency: the magazine's circulation was continuously growing, lifted by the tide of patriotic enthusiasm.

23. Baer, *The Pledge*, ch.2.

at the magazine, having worked for more than a decade as a Baptist minister in Boston, but he was forced to resign his position in 1891 when the conservative businessmen who supported the congregation threatened to withdraw their support due to Bellamy's preaching of the doctrines of Christian Socialism from the pulpit. The owner of the *Companion*, Daniel Ford, who attended Bellamy's church and sympathized with the 'Social Gospel' he argued for, invited him to work for the magazine.²⁴

Bellamy's ideas were considerably shaped by his cousin, Edward Bellamy, who published his famous Socialist utopian novel, *Looking Back*, in 1888. Both people were ardent nationalists who deeply believed in the great potential of the United States as well as the ideas enshrined in the Constitution, but criticized the spirit of industrial capitalism and the resulting urban poverty as contrary to the spirit of universal human brotherhood. When Francis graduated from the University of Rochester in 1876, he delivered a speech in which he praised the slogan of the French Revolution – liberty, equality, fraternity – as the best expression of the universal aspirations of man. He saw no contradiction between them and the essential values of Christianity.²⁵

The nationwide propaganda campaign supervised by Upham and Bellamy was highly successful: they managed to gain the support of General John Palmer, commander of the Grand Army of the Republic, former President and current candidate Grover Cleveland as well as future president Theodore Roosevelt. Influential politician Henry Cabot Lodge secured a meeting for Bellamy with current President Benjamin Harrison, who gave his official endorsement to the Celebration.²⁶ As a result of the intense lobbying, the two houses of Congress passed a joint resolution on June 29, 1892, authorizing the president to proclaim Columbus Day a national public-school holiday. In a Presidential Proclamation dated July 21, 1892, Harrison ordered the public celebration of Columbus Day on October 21st, 1892:

Columbus stood in his age as the pioneer of progress and enlightenment. The system of universal education is in our age the most prominent and salutary feature of the spirit of enlightenment, and it is peculiarly appropriate that the schools be made by the people the center of the day's demonstration. Let the National Flag float over every school house in the

24. Baer, *The Pledge*, ch.4.

25. Baer, *The Pledge*, ch.4.

26. O'Leary, p. 165.

country, and the exercises of such as shall impress upon our youth the patriotic duties of American citizenship.²⁷

Upham and Bellamy co-operated in drafting the program for the local celebrations: it started by reading out the Presidential Proclamation, followed by the raising of the flag by Civil War veterans and saluted by schoolchildren. The program continued with the “acknowledgement of God” in the form of prayer or a reading from the Scripture, and a special address entitled “The Meaning of Four Centuries,” written by Bellamy, in which he exalted the American public school as one of the outstanding institutions of the nation, disseminating the fundamental values of the Founding Fathers: “America, therefore, gathers her sons around the schoolhouse today as the institution closest to the people, most characteristic of the people, and fullest of hope for the people.”²⁸ The celebration was supposed to end with individual speeches and patriotic songs.

Upham also asked Bellamy to compose a fitting salute to the flag in August 1892. The text he eventually came up with was the following: *I pledge allegiance to my Flag and the Republic for which it stands, one nation indivisible, with liberty and justice for all*. In his own recollection, the first part of the sentence occurred to him first as an echo of the Civil War, in which people fought valiantly for the Union, represented by the US flag. The word ‘allegiance’ was probably suggested by the ‘oaths of allegiance’ former Confederate soldiers and officials were required to swear in order to get their political rights back. The “one nation indivisible” phrase is also a clear reference to the bloody struggle whose veterans and memories were still very much alive at the time. The final part was meant as a summary of the fundamental values of the nation: Bellamy claimed to have been tempted to insert some form of the great slogan of the French Revolution but realized that the officials of the Celebration would not accept such a radical declaration, therefore he settled for the phrase “with liberty and justice for all,” in which ‘liberty’ and ‘justice’ had a respectable pedigree, appearing in the Preamble to the US Constitution. The allusion for the more controversial third ideal, ‘equality’, was, according to Bellamy, hidden in the concluding “for all.”²⁹

The Pledge was published in the September 8th issue of the *Companion* as part of the Official Program of the Celebration. The program and its individual parts, including the Pledge, appeared anonymously, in line with the magazine’s policy of

27. Baer, *The Pledge*, ch.4.

28. Baer, *The Pledge*, ch.4.

29. Baer, *The Pledge*, “A Short History”; O’Leary, p. 161.

not signing articles written by staff members. This fact subsequently gave rise to a dispute over authorship in the 1939, when the United States Flag Association set up a three-member scholarly committee to arbitrate over competing claims of authorship between Bellamy and Upham's family. The committee unanimously decided in favour of Bellamy.³⁰

On October 21, 1892, the official opening day of the Columbian Exhibition, millions of schoolchildren took part in "the first nationally orchestrated day devoted to raising and saluting the flag."³¹ After four years of intense campaigning, more than 100,000 public schools had raised the US flag over their buildings, and Columbus Day signalled the beginning of a nationwide campaign to turn general education into a program for Americanization.

The Evolution of the Pledge

As I have endeavoured to sketch up above, the Pledge of Allegiance was a product of a larger movement unfolding in the late 19th century that can be seen as a deliberate and self-conscious effort to extend the meaning and the influence of the civil religion. The traumatic experience of the Civil War has provoked a national soul-searching (at least outside the South), and resulted in a significant transformation of the civil religion as formulated by the Founding Fathers. The primary fear of the generation that fought the War of Independence was a tyrannical government (either foreign or domestic), therefore they drafted a Constitution whose central concern was to carefully limit the powers of the federal government and prevent the dominance of any branch. This issue remained in the focus of political struggles in the first half of the 19th century, as both Jefferson's Republican Party and Jackson's Democrats championed the cause of the smallest possible federal government, and the maximum autonomy of member states.

The Civil War, however, had proven that the states-right doctrine could easily provide justification for the break-up of the Union, and the fierceness of Southern opposition to the United States dismayed Northern patriots. The primary threat against the prosperity of the nation was seen no longer in an all-too-powerful federal government, but in potential divisions within the nation. The Pledge of Allegiance was created as part of a response to what many saw as an urgent need for new, unify-

30. "The Story of the Pledge of Allegiance," September 1, 2003 <<http://www.flagday.org/Pages/StoryofPledge.html>>.

31. O'Leary, p. 168.

ing patriotic symbols and rituals. The inclusion of the flag among the sacred symbols of the nation was a very important step to provide the masses with an accessible and instantly recognizable emblem of civil religion. In the speech Bellamy wrote for the local celebrations, he very skillfully utilized the occasion of Columbus Day, the 400th anniversary of the discovery of ‘the promised land,’ to celebrate the public school as the very fulfillment of the promise made by the Founding Fathers in the Declaration of Independence (while his rhetoric, with the repetition of phrases ending with ‘the people,’ deliberately echoed the wording of the Gettysburg Address). The Pledge provided the words for the celebration of the national flag as an emblem of the very same promise, and this liturgy has proven very successful in the following decades, quickly becoming an integral part of the civil religion as practiced in public schools all over the country.

It is important to note, however, that Bellamy’s version of the Pledge was not identical with the version used today: most importantly, it did not contain any reference to God. Despite being a Protestant clergyman by training, Bellamy was a firm believer in the constitutional separation of church and state, and did not wish to insert any explicitly religious reference in an essentially secular oath intended for public schools.³²

Bellamy’s original text was subsequently modified three times, each time inserting more words into the sentence. Twice, in 1923 and 1924, the First National Flag Conference held in Washington, D.C., under the leadership of the American Legion and the Daughters of the American Revolution, proposed emendations in order to ‘clarify’ the reference to the flag. Members of these patriotic organizations were concerned that the phrase “my flag” may be misinterpreted by immigrant children as the flag of their original home country, and, in order to eliminate any potential ambiguity, they replaced these two words with the phrase “the flag of the United States” in 1923, enlarging it to “the flag of the United States of America” in 1924.³³ It should be noted that this modification occurred at the time when widespread nativist fears about the uncontrolled flow of immigrants into the country resulted in restrictive legislation effectively putting an end to the unlimited immigration from Europe.

The third, latest and undoubtedly most significant modification took place in 1954, during the early Cold War, amid the frenzied anti-Communist hysteria fuelled primarily by Senator Joseph McCarthy. By that time, the Pledge had become ‘canonical,’ since it had been incorporated into the the United States Flag Code (Title

32. Baer, *Questions*, A.1.

33. “The Story.”

36) by Congress in 1942, shortly after the US entered World War II, at a time when patriotic fervor reached unprecedented heights. As a result, any modification to the text had to be approved by Congress as well.³⁴

The 1954 modification was preceded by a public campaign, initiated by several patriotic and religious organizations, including the Sons of the American Revolution, the Knights of Columbus, and the American Legion; and it was promoted nationwide by the Hearst Newspapers. The idea itself allegedly originated from Louis A. Bowman, a member of the Illinois Society of the Sons of the American Revolution, who proposed to repeat the Pledge with the added two words, “under God,” after “one nation,” on Lincoln’s Birthday, February 12, 1948, at a meeting of the Illinois Society. Bowman explained that the idea is derived from Lincoln’s Gettysburg Address, where he refers to “this nation, under God.” During the campaign, the major argument in favor of the modification was that it makes a pithy point about the fundamental values of the United States that distinguishes it from the atheist, Communist Soviet Union.³⁵

In 1952 the Reverend Dr. George M. Docherty, pastor of the New York Avenue Presbyterian Church in Washington, DC, preached in favor of adding “under God” to the Pledge. His point was that a Soviet atheist could easily recite the Pledge without compunction by substituting the ‘Union of the Soviet Socialist Republics’ for the ‘United States.’³⁶

Eventually, both houses of Congress passed a bill incorporating this addition, and the bill was signed by President Dwight Eisenhower on Flag Day, June 14, 1954. On that occasion, the President said: “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 and war.”³⁷

By first ‘canonizing’ the text and then inserting an explicit reference to ‘God’ into the Pledge, Congress completed a process that may be interpreted as the full incorporation of the Pledge into the sacred tradition of the civil religion. The addition has considerably changed the meaning of the whole Pledge, since the values enunciated

34. “The Story.”

35. It is hardly a coincidence that two years later, in 1956, Congress substituted the original and entirely secular motto of the US, “E Pluribus Unum,” selected by the Founding Fathers, for “In God We Trust,” which is the only motto appearing on US paper currency (Baer, *Questions*, A.1).

36. Baer, *Questions*, A.1.

37. “The Story.”

therein – the republican form of government symbolized by the flag, the unity of the nation, and the commitment to freedom and justice – have gained a sacred overtone, an implicit legitimacy with a divine origin. In that way, however, the rhetoric of the Pledge has become fully harmonious with that of the Declaration of Independence and the Gettysburg Address, two ‘holy’ documents of the American civil religion which both attributed divine support to the values on which the United States is predicated.

The Challenge to the Pledge

Recently, the privileged position of the Pledge as one of the primary prayers of civil religion has become an object of controversy, primarily in the context of the on-going legal argument over how the separation of church and state is to be understood and enforced in public schools. This has been a highly charged public issue for decades, one of the ‘culture wars’ sharply dividing public opinion in the US.³⁸

The constitutional problem underlying the conflict is the interpretation of the so-called ‘establishment clause’ of the First Amendment: “Congress shall make no law respecting an establishment of religion.” Legal interpretations of this brief statement, according to Ted Jelen, can be grouped around two general positions: accommodationism and separationism. The former is the narrow interpretation, namely, that the clause forbids the federal government³⁹ to provide preferential

38. According to James Davison Hunter, a cultural conflict is “political and social hostility rooted in different systems of moral understanding. The end to which these hostilities tend is the domination of one cultural and moral ethos over all others” (James Davison Hunter, *Culture Wars: The Struggle to Define America* [New York: BasicBooks, 1991], p. 42). He claims that the major fault lines of cultural conflicts in the late 20th century run between adherents of “cultural orthodoxy” and “cultural progressivism,” the former defined as a belief system or world view characterized by “a commitment . . . to an external, definable, and transcendent authority,” while the latter interprets moral authority more flexibly, rationally and subjectively, tending to “resymbolize historic faiths according to the prevailing assumptions of contemporary life” (Hunter, pp. 44–45). While religious individuals can be found on both sides, people with strong religious convictions tend to gravitate towards moral orthodoxy, while people of more secular outlook more typically support the ideas of progressivism.

39. Advocates of this interpretation also emphasize that the First Amendment, in the original intention of the Founding Fathers, did not forbid state governments to support religion, which was as much a practical political concession to existing establishment laws of several states at the time when the Bill of Rights still awaited ratification, as a theoretical distinction

treatment to any particular church or religion over the others, but it does not prevent the government from offering support to religion in general; this idea is often referred to as 'benevolent neutrality.' "Government is required to be neutral between religions, but is not required to be neutral between religion and irreligion."⁴⁰ This interpretation was generally accepted during the first 150 years of US history both by the government and the majority of the public.

Separationism is the broad interpretation of the establishment clause: it construes the clause as a general ban on any form of government assistance to religion or churches, on all levels of government alike. This position also has a long history, going at least as far back as Thomas Jefferson's famous phrase that the First Amendment was intended to erect "a wall of separation between church and State,"⁴¹ but it has not been accepted widely or embraced by the Supreme Court before the mid-20th century. The separationist position is more skeptical and suspicious about the influence of religion in public life, but not necessarily hostile to religion itself: some conservative churches argue that authentic religion does not need and should not receive government assistance since that violates the free exercise clause of the First Amendment. Nevertheless, the typical argument of separationists is that religion is a source of conflict in democratic politics, therefore it should be kept as distant from it as possible.

between the constitutional limitations binding the federal government and the state governments, respectively (Kenneth D. Wald, *Religion and Politics in the United States* [New York: St. Martin's Press, 1987], pp. 111–112; see also Cord, pp. 3–47). This interpretation of the First Amendment, however, was superseded by Supreme Court rulings from the 1940s on, which extended the ban on the support of religion to all levels of government on the basis of the Fourteenth Amendment: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." "By restricting states in the same way as the federal government, the new interpretation treated religion as part and parcel of a national list of rights that all governmental institutions must respect" (Wald, p. 117).

40. Ted G. Jelen, "In Defense of Religious Minimalism," in *A Wall of Separation? Debating the Public Role of Religion* by Mary C. Segers and Ted G. Jelen (Lanham, MD: Rowman & Littlefield, 1998), 3–51, p. 4.

41. Jefferson's widely quoted phrase comes from a letter he wrote as president to the Danbury Connecticut Baptist Association on Jan 1, 1802 (quoted in Cord, pp. 114–115). He is generally considered the most radical early advocate of the separation of church and state; Cord, however, cites a 1808 letter in which even Jefferson restricted the idea of separation to the federal government. "Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States, as far as it can be in any human authority" (quoted in Cord, p. 40). Of course, this statement predates the Civil War and the Fourteenth Amendment.

The separationist interpretation of the establishment clause was adopted and spelled out in detail by the Supreme Court in its opinion in the 1947 case *Everson v. Board of Education*,⁴² and the Court went on to extend this interpretation to all cases involving taxpayers' money used for religious purposes, or situations in which any governmental organization could be considered to express a preference for religion. Legal battles over the interpretation of the establishment clause typically focused on public schools, the most common arena of clashing principles.

Because children are thought to be especially open to influence, Americans have been most sensitive to government's treatment of religion insofar as it affects the youngest members of society. That concern has been magnified because children are required by law to attend school and most of them do so in educational institutions paid for by tax revenues. In such politically delicate circumstances, any apparent favoritism toward a religious faith can appear to constitute government endorsement of religion.⁴³

In that spirit, the Court has declared unconstitutional such practices as providing religious instruction in public school premises (1948); reciting mandatory prayers or Bible verses at the beginning of each school day (1962, 1963); state contribution to the salaries of parochial school teachers or the maintenance of church school buildings (1971, 1973); reimbursing parents for the costs of private school tuition (1973); posting the Ten Commandments on classroom walls (1980); or orga-

42. The majority opinion of Justice Hugo Black summarized the Court's new interpretation of the Establishment Clause as follows: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious groups and vice versa" (quoted in Darien A. McWhirter, *The Separation of Church and State* [Phoenix, AR: Oryx Press, 1994], p.36). Cord subjects Justice Black's majority opinion to a detailed analysis (pp. 109–145) and makes a convincing argument that such a broad interpretation is without precedent in the history of the Supreme Court, and cannot be justified by historical reference to the words and deeds of the Founding Fathers either. In essence, the Supreme Court significantly extended the interpretation of the Constitution to address a current issue, namely, the discrepancy between policies of the federal government and state governments concerning church-state relations.

43. Wald, p. 117.

nizing voluntary prayer sessions or any other religious activities on school premises (1982, 1983). At the same time, in seemingly paradoxical fashion, the Court accepted such forms of state aid as compensation for the costs of bus transportation of children to and from school, including children attending religious private schools (1947); and loaning the textbooks received free of charge by public school students to private school students as well (1968).⁴⁴

In the 1971 case *Lemon v. Kurtzman*, Chief Justice Warren Burger established a three-pronged test for the acceptance of any government action as compatible with the establishment clause:

- The policy must have a primarily secular purpose.
- The policy must have a primarily secular effect.
- The policy must not result in ‘excessive entanglement’ between government and religion.⁴⁵

Applying this test to public school cases, the Court has considered all state practices acceptable whose primary aim is to offer some sort of help to all students, regardless of the type of school they attend (such as compensation for bus transportation costs or loaning books). But as soon as state legislation or policy is directed primarily toward helping religious private schools, their students, or students of any particular religious persuasion, and consequently discriminates against other students, it is considered unconstitutional.

The Lemon test – although it was applied rather inconsistently later on – was subsequently supplemented with two other tests. The so-called endorsement test was defined by Justice O’Connor in her concurring opinion in the 1984 case *Lynch v. Donnelly* as an unconstitutional government endorsement or disapproval of religion which “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.”⁴⁶ The coercion test was adopted as a precedent in the 1992 case *Lee v. Weisman*, when the Court found non-sectarian forms of prayer at public school graduation ceremonies such as invocations and benedictions unconstitutional, because such religious acts at a ceremony organ-

44. Wald, pp. 118–119, 134.

45. Jelen, pp. 5–6; *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in *A Wall of Separation? Debating the Public Role of Religion*, Mary C. Segers and Ted G. Jelen (Lanham, MD: Rowman & Littlefield, 1998), 168–170.

46. *Lynch v. Donnelly*, 465 US 668 (1984), November 13, 2003 <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=465&invol=668>>.

ized and supervised by the school put “subtle coercive pressure” on nonreligious students to participate or at least comply with it, which is an impermissible case of establishing a state preference for religion.⁴⁷ Both decisions further widened the interpretation of the Establishment Clause but made Supreme Court precedents even more complicated and more difficult to apply with any consistency.

These Supreme Court decisions were far from popular among the American public; the largest outcry was provoked by the ban on public school prayer: “Public opinion polls have consistently revealed that a clear majority of Americans – possibly as much as two-thirds of the population – favors some sort of organized prayers in the public schools.”⁴⁸ Backed by public support, state legislatures as well as local school boards have attempted to find a way around the Court ban, ranging from legislation substituting the morning prayer with a period of “silent meditation” at the beginning of school days (this was also declared unconstitutional by the Court in 1985), and attempts to pass a Constitutional amendment explicitly legalizing prayer in public institutions (such a bill failed to receive two-thirds support in the Senate in 1984), to simply disregarding the legal ban and continuing the religious practices with the transparent claim that it is left to the discretion of the individual teacher. In areas of strongly and conservatively religious population such as the South, noncompliance is still widespread since the probability that a local parent mounts a legal challenge against public school prayers or Bible readings is very low.⁴⁹

Given the tendency of the Supreme Court to interpret the establishment clause in a strongly separationist way since 1947, it may be considered surprising that the ‘under God’ phrase inserted into the Pledge was not singled out as violating the separation in any legal challenge until 2002. That year, the 9th Circuit Court of Appeals caused nationwide uproar by reversing the decision of a lower federal court in the case *Newdow v. U.S. Congress* and ruling that the recitation of the Pledge of Allegiance in a California public school is an unconstitutional “endorsement of religion” because of the phrase ‘under God.’ In its ruling, the Circuit Court basically accepted

47. *Lee v. Weisman*, 505 US 577 (1992), November 13, 2003 <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=465&invol=668>>.

48. Wald, p. 128. Spokesmen of some fundamentalist religious groups have gone as far as blaming all sorts of moral decline and social problem since 1962 on the ban against prayer in public schools: “removing prayer and the acknowledgment of God from our class rooms has been the primary cause of the devastatingly serious decline in the lives of students, their families, the schools, and our nation” (quoted from *America: To Pray or Not To Pray?* published by the Concerned Women for America in 1988; see Hunter, p. 203n19, p. 368).

49. Wald, pp. 128–130.

the argument of plaintiff Michael Newdow, an atheist who filed the suit as a constitutional test case against the United States, Congress, California, two school districts and its officials on behalf of his eight-year-old daughter, studying in an Elk Grove, California, public school. He claimed that “his daughter is injured when she is compelled to ‘watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our’s [sic] is ‘one nation under God.’”⁵⁰

In its opinion, the majority of the three-member panel (consisting of Circuit Judges Alfred T. Goodwin and Stephen Reinhardt) applied the ‘Lemon test,’ described above, as well as the endorsement test and coercion test. Applying these tests to the case at hand, the majority of the panel found that the phrase ‘under God’ is a “profession of a religious belief, namely, a belief in monotheism,”⁵¹ and the recitation of the Pledge in the form codified in 1954 amounts to swearing allegiance to – among other, secular, values – monotheism. In rather sweeping language, the opinion declared that

[a] profession that we are a nation “under God” is identical, for Establishment Clause purposes, to a profession that we are a nation “under Jesus,” a nation “under Vishnu,” a nation “under Zeus,” or a nation “under no god,” because none of these professions can be neutral with respect to religion. The school district’s practice of teacher-led recitation of the Pledge aims to inculcate in students a respect for the ideals set forth in the Pledge, including the religious values it incorporates.⁵²

Since the California Education Code prescribes “appropriate patriotic exercises” at the beginning of each school day and explicitly declares that recitation of the Pledge of Allegiance satisfied this requirement,⁵³ the school district’s appropriate policy of prescribing voluntary and teacher-led recitation of the Pledge at the beginning of each school day “has a coercive effect” because it forces schoolchildren into an uncomfortable position of having to choose between compliance or open dissent, a form of pressure declared illegal in *Lee v. Weisman*.

50. *Newdow v. US Congress et al.* No. 00-16423 D.C. No. CV-00-00495-MLS/PAN. Order and Amended Opinion and Amended Concurrence/Dissent. The United States Court of Appeals for the Ninth Circuit. Filed June 26, 2002. Amended February 28, 2003, November 13, 2003 <<http://caselaw.lp.findlaw.com/data2/circs/9th/0016423p.pdf>>, p. 2801.

51. *Newdow v. US Congress*, p. 2807.

52. *Newdow v. US Congress*, p. 2808.

53. *Newdow v. US Congress*, p. 2800, note 1.

The majority opinion was aware of the momentous implications of declaring the mere utterance containing a reference to God unconstitutional, therefore they strove to draw a line of distinction between the Pledge and other well-known public documents and rituals mentioning or alluding to God:

The Pledge differs from the Declaration [of Independence] and the [national] anthem in that its reference to God, in textual and historical context, is not merely a reflection of the author's profession of faith. It is, by design, an affirmation by the person reciting it. "I pledge" is a performative statement. . . . To pledge allegiance to something is to alter one's moral relationship to it, and not merely to repeat the words of an historical document or anthem.⁵⁴

For failing to meet the criteria established by the above-mentioned Supreme Court precedents, the majority opinion concluded that "the school district's policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words 'under God,' violates the Establishment Clause."⁵⁵ It refused to consider, however, the constitutionality of the 1954 Act of Congress that inserted the phrase into the official text of the Pledge.

The majority decision of the panel did not even meet the approval of their own fellow judge: the third member of the panel, Circuit Judge Ferdinand F. Fernandez, in a rather emotionally worded dissenting opinion, rejected the idea of applying specific Supreme Court tests to the Pledge and instead emphasized what he considered the original intention of the First Amendment, which is not "to drive religious expression out of public thought . . . [but] to avoid discrimination."⁵⁶ He went on to conclude that the Pledge represents a negligible amount of threat of suppressing somebody's beliefs or enforcing a 'theocracy.' Furthermore, he referred to several Supreme Court opinions in which the Supreme Court considered the Pledge in passing and did not raise objections against it. For example, in the 1989 case *County of Allegheny v. ACLU*, the Supreme Court remarked that "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief."⁵⁷ Such examples of referring to God in various public rituals, for instance at the beginning of legislative or court sessions, has been described by the phrase

54. *Newdow v. US Congress*, p. 2811.

55. *Newdow v. US Congress*, pp. 2812–13.

56. *Newdow v. US Congress*, p. 2814.

57. Quoted in *Newdow v. US Congress*, p. 2815.

‘ceremonial deism,’ and considered part of the American historical and cultural heritage ever since the establishment of the independent nation. As Judge Fernandez passionately declared,

such 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. 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.⁵⁸

A more detailed and rationally argued dissent was put forward when the whole Circuit Court was asked to reconsider the case *en banc*, that is, before a randomly selected 11-member panel. In February 2003, the majority rejected the appeal, but six judges dissented, and Circuit Judge O’Scannlain submitted a dissenting opinion, in which he strongly condemned the panel’s decision. His fundamental argument was that the panel had misinterpreted existing Supreme Court precedents since those precedents focused exclusively on public religious exercises, typically public school prayer, while repeatedly emphasizing that other “manifestations in our public life of belief in God . . . [at] patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise [school prayer].”⁵⁹ In the same spirit, the Supreme Court, in the 1963 case *Abington School Dist. v. Schempp*, struck down a Pennsylvania state law requiring schoolchildren to read from the Bible and recite the Lord’s Prayer each morning while saying nothing of the Pledge that was also part of the same morning routine.⁶⁰ O’Scannlain specifically quotes from Justice Brennan’s concurring opinion which, while agreeing that prayers and Bible readings are religious exercises, ventured the – albeit somewhat hesitant – opinion that

[t]he reference to divinity in the revised pledge of allegiance . . . 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.⁶¹

58. *Newdow v. US Congress*, p. 2816.

59. *Engel v. Vitale* (1962), quoted in *Newdow v. US Congress*, p. 2785.

60. *Newdow v. US Congress*, p. 2786.

61. Quoted in *Newdow v. US Congress*, p. 2787.

In the 1985 case *Wallace v. Jaffree*, in which the Supreme Court declared the Alabama state law authorizing a one-minute period of silence in public schools “for meditation or voluntary prayer” unconstitutional, Justice O’Connor in her concurring opinion remarked that “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.’”⁶² Even in the *Lee* case that was used as precedent by the panel, the Supreme Court cautioned against “[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life [which] could itself become inconsistent with the Constitution.”⁶³

O’Scannlain’s conclusion is that since the Supreme Court’s coercion test applies exclusively to formal religious exercises at school, its application to the Pledge hinges on whether the Pledge may be considered a religious act, a question asked by 7th Circuit Court in their decision of the 1992 case *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Township* and firmly answered in the negative. O’Scannlain fully agrees with this answer: “Most assuredly, to pledge allegiance to flag and country is a *patriotic act*. . . . The fact the Pledge is infused with an undoubtedly religious reference does not change the nature of the act itself.”⁶⁴ He justifies his opinion by pointing out the difference between the formalities of the Pledge and the common formalities of prayer, as well as citing “our 200-year history and tradition of patriotic references to God,”⁶⁵ which would be under direct threat once the panel’s decision became a precedent:

Of course, the Constitution itself explicitly mentions God, as does the Declaration of Independence, the document which marked us as a separate people. The Gettysburg Address, inconveniently for the majority, contains the *same precise phrase*—“under God”—found to constitute an Establishment Clause violation in the Pledge. [footnote omitted] After *Newdow II*, are we to suppose that, were a school to permit—not require—the recitation of the Constitution, the Declaration of Independence, or the Gettysburg Address in public schools, that too would violate the Constitution? . . . Indeed, the recitation of the Declaration of Independence would seem to be the better candidate for the chopping block than the Pledge, since the Pledge does not require anyone to acknowledge the *personal* relationship

62. Quoted in *Newdow v. US Congress*, p. 2788.

63. Quoted in *Newdow v. US Congress*, p. 2789.

64. *Newdow v. US Congress*, pp. 2791–2, emphasis retained.

65. *Newdow v. US Congress*, pp. 2792–3.

with God to which the Declaration speaks. [footnote omitted] So too with our National Anthem and our National Motto.

Our national celebration of Thanksgiving dates back to President Washington, which Congress stated was “to be observed by acknowledgment with grateful hearts, the many and signal favours of Almighty God.” *Lynch*, 465 U.S. at 675 n.2. Congress made Thanksgiving a permanent holiday in 1941, [footnote omitted] and Christmas has been a national holiday since 1894. [footnote omitted] Are pere Newdow’s constitutional rights violated when his daughter is told not to attend school on Thanksgiving? On Christmas day? Must school outings to federal courts be prohibited, lest the children be unduly influenced by the dreaded intonation “God save these United States and this honorable Court”? [footnote omitted] A theory of the Establishment Clause that would have the effect of driving out of our public life the multiple references to the Divine that run through our laws, our rituals, and our ceremonies is no theory at all.⁶⁶

I have quoted extensively from the dissenting opinion because I think it reveals the wider issue underlying the constitutional wrangling over the interpretation of the Pledge: in my understanding, the issue is nothing else but the future of the American civil religion. From an outsider’s point of view, it may seem strange why two words inserted into the Pledge of Allegiance less than 50 years ago would stir up such passionate emotions: on the one hand, they indeed seem quite innocuous, unlikely to be found offensive by anyone willing to recite the rest of the Pledge; on the other hand, they were not part of the original text to start with, the Pledge would lose none of its solemnity and patriotic value if they were erased from it, and that way no one could question the constitutionality of the recitation of the Pledge. But such rational considerations have little place in the argument of either side. Critics charge, seemingly in harmony with the separationist interpretation of the First Amendment preferred by the Supreme Court since the 1940s, that such an explicit reference to God in a patriotic oath prescribed for schoolchildren amount to a preference for theism and thus constitute a case of government-sanctioned discrimination against agnostics, atheists, or polytheists, which sounds like an exaggerated claim. Defenders of the Pledge, however, are not even willing to consider dropping the contentious words from the text. Their staunch defense of the Pledge in its current form is unyielding because it is framed as the defense of something far more significant: the sanctity of the American civil religion. Those documents, rituals and symbols that constitute the

66. *Newdow v. US Congress*, pp. 2793–4, emphases retained.

sacred tradition of patriotism derive a significant part of their holiness by establishing an explicit link between God and the American nation. The canonization of the Pledge and its full incorporation into that sacred tradition was completed by inserting the explicit reference to God in 1954. Legal challenges citing the establishment clause represent a mortal threat to the Pledge and similar patriotic rituals, since these attacks are striking at the heart of the sacred tradition: their implied divine origin. To employ a crude analogy: questioning the appropriateness of references to God in the texts and rituals of civil religion in the eyes of its defenders is equal to doubting the divine origin of Jesus for Christians.

Although other secularized modern democracies have survived reasonably well without invoking such metaphysical support from above, the tradition of the American civil religion rests, explicitly or implicitly, on a deeply embedded belief in American exceptionalism, the idea that the United States, its values, institutions and way of life enjoys some sort of special divine favour. This majority attitude has been increasingly uneasy with the growing trend of secularization that has affected American society in steadily widening waves all through the 20th century, a tendency manifested in constitutional law by the increasingly separationist interpretation of the First Amendment by the Supreme Court. The 'benevolent neutrality' of the federal and the state governments towards various denominations has given way to a preference for legally enforced neutrality between religion and irreligion, which, according to critics, is in fact a discrimination against religion. Judge O'Scannlain does not fail to level this charge against the panel's decision:

The absolute prohibition on any mention of God in our schools creates a bias *against* religion. The panel majority cannot credibly advance the notion that *Newdow II* is neutral with respect to belief versus non-belief; it affirmatively favors the latter to the former. One wonders, then, does atheism become the default religion protected by the Establishment Clause?⁶⁷

His impassioned rhetoric, however, belies that a significant part of his argument in defense of the Pledge is disingenuous: while he goes out of his way to make a distinction between the Pledge as a patriotic act, as opposed to religious acts, his underlying conviction is that the two are one and the same. The Pledge is a patriotic *and* religious act, the two aspects are inseparably intertwined. Criticising the religious aspect is inevitably seen as an attack on the patriotic values connected to it. For the true believers of civil religion, this one nation has indeed become indivisible under – and from – God.

67. *Newdow v. US Congress*, p. 2798.

A Temporary Settlement

The Elk Grove School District, supported by the Attorney General of California, appealed to the Supreme Court of the United States to review the decision of the 9th Circuit Court. On October 14, 2003, the Supreme Court accepted the case for consideration. The decision was eagerly awaited by supporters and critics of the Pledge of Allegiance alike. As it happened many times in the nation's past, it has fallen on the high court to give a final and incontrovertible interpretation to the Constitution and the Pledge. From the point of view of civil religion, the process is highly similar to a church council that is entrusted with the responsibility of resolving a doctrinal dispute and draw the line between true dogma and heresy. Is the Pledge a religious act or a patriotic act? Are the words 'under God' to be understood as a reference to the historical origins of the nation or as a recognition of divine blessing and favour constantly present? Can the unity of the American civil religion be preserved without the presence of God?

Powerful forces swang into motion to offer support to one or the other side and put pressure on the eight justices (Justice Antonin Scalia recused himself from the case at Newdow's request since he had made public remarks earlier in which he had criticized the Circuit Court's decision⁶⁸) considering the case. Several religious groups and associations, the majority of Congress members, the attorneys general of all 50 states, the National School Boards Association and the National Education Association have signed briefs supporting the pledge in its currently accepted form, while George Bush expressed his support in a form letter sent to those who wrote to the White House complaining about the Circuit Court's decision.⁶⁹ At the same time, 32 Christian and Jewish clergy members took Newdow's side in the case, arguing that the pledge with the phrase 'under God' is a kind of civic blasphemy. The group's brief asserted that "every day, government asks millions of schoolchildren to take the name of the Lord in vain."⁷⁰ The American Civil Liberties Union also sided with Newdow, and so did, surprisingly, well-known conservative journalist William Saphire, who declared that "Those of us who believe in God don't need to inject our faith into a patriotic affirmation and coerce all schoolchildren into going along."⁷¹

68. Linda Greenhouse, "One Crucial Issue in Pledge Case: What Does 'Under God' Mean?" *The New York Times* (March 22, 2004).

69. Greenhouse, "One Crucial Issue."

70. Greenhouse, "One Crucial Issue."

71. William Saphire, "Of God and the Flag," *The New York Times* (March 24, 2004).

The issues involved were so weighty and so divisive that several observers predicted the Court was going to find some sort of evasive legal argument to avoid a categorical answer to the constitutionality of the ‘under God’ phrase. A convenient way to duck the problem was offered by Newdow’s questionable legal standing, that is, his right to bring this particular case to court. Newdow never married the mother of his daughter and they live separately, with the mother, Sandra L. Banning, having legal custody over the girl. Furthermore, she filed a brief supporting the pledge and her daughter’s recitation of it.⁷² All this significantly undermined Newdow’s argument that his parental responsibility for the upbringing and education of his daughter compelled him to bring the case to court, even though the Circuit Court in its decision recognized his right “to direct the religious education of his daughter.”⁷³

Oral arguments before a full session of the Supreme Court were heard on March 24, 2004, with Newdow arguing his own case against the well-known and very experienced constitutional lawyer, Solicitor General Theodore B. Olson. Newdow performed surprisingly well before the high court, his sharp and witty answers to the Court’s questions drawing occasional bursts of applause from the audience and consternations from some Justices.⁷⁴

Eventually, the Supreme Court issued its decision on the deeply symbolic day of June 14, 2004, the 50th anniversary of President Eisenhower signing the Congress bill into law that inserted the ‘under God’ phrase into the Pledge of Allegiance. It was highly unlikely that the Court meant to commemorate such an anniversary by striking the ‘under God’ phrase down, so the very timing of the release of the decision all but guaranteed the maintenance of the status quo. The majority of the Court, however, balked at unequivocally declaring the present form of the Pledge constitutional, and opted instead for the predictable emergency exit by ruling that Newdow lacked standing to bring the case before a federal court. Justice Stevens, who wrote the majority opinion supported by four other Justices, argued that the Supreme Court strictly avoids involvement in domestic legal conflicts, recognizing the priority of the laws and courts of individual states in such matters. Newdow’s claim that his right “to inculcate in his daughter—free from governmental interference—the atheistic beliefs he finds persuasive”⁷⁵ was injured by the daily recital of the Pledge in his

72. Linda Greenhouse, “Atheist Presents Case for Taking God From Pledge,” *The New York Times* (March 25, 2005).

73. *Newdow v. US Congress*, p. 2804.

74. Greenhouse, “Atheist Presents Case.”

75. *Elk Grove Unified School District and David W. Gordon, Superintendent, Petitioners v. Michael A. Newdow et al.* No. 02-1624 decision of the Supreme Court of the United States.

daughter's school was contradicted by mother Sandra Banning's claim that she was a Christian who did not object to her daughter's reciting the Pledge or listening to others reciting it.⁷⁶ Furthermore, as Banning had sole legal custody over the child, she had asked for and received a California Superior Court order which enjoined Newdow from involving her daughter as a party in the case.⁷⁷ While recognizing Newdow's right to influence the religious education of her daughter, the Court established that he had no right "to dictate to others what they may and may not say to his child respecting religion,"⁷⁸ not being the legal custodian of his daughter. As Stevens summed it up:

In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. . . . There is a vast difference between Newdow's right to communicate with his child—which both California law and the First Amendment recognize—and his claimed right to shield his daughter from influences to which she is exposed in school despite the terms of the custody order. We conclude that, having been deprived under California law of the right to sue as next friend, Newdow lacks prudential standing to bring this suit in federal court.⁷⁹

The validity of this legal reasoning aside, it seems obvious that the rejection of Newdow's legal standing may serve as a neat ploy to avoid consideration of the merit of the case, that is, the constitutionality of the Pledge. In his dissenting opinion, Chief Justice William Rehnquist did not flinch from the challenge, and made his opinion straightforward: the Pledge in its current form is constitutional. Before offering his justification, he blasted the majority opinion for what Rehnquist considered a highly contradictory position: while apparently founding their position on the Court's deference for state law, the majority opinion effectively rejected the interpretation of California law by that state's Court of Appeals which accepted Newdow's standing.

In his consideration of the case itself, the Chief Justice essentially provided no new argument compared to the dissenting opinion of Circuit Court Judge O'Scann-

June 14, 2004, August 21, 2004 <<http://www.supremecourtus.gov/opinions/03pdf/02-1624.pdf>>, Opinion of the Court, p. 11.

76. *Elk Grove Unified School District v. Newdow*, Opinion of the Court, p. 6.

77. *Elk Grove Unified School District v. Newdow*, Opinion of the Court, p. 6.

78. *Elk Grove Unified School District v. Newdow*, Opinion of the Court, p. 13.

79. *Elk Grove Unified School District v. Newdow*, Opinion of the Court, p. 14.

lain. He rehearsed the well-known instances of historical references to God by former Presidents in their public utterances, from Washington through Lincoln, Wilson and Franklin D. Roosevelt to Eisenhower (the latter in his capacity as Commander of the Allied forces before D-day) and cited some of the generally accepted uses of God's name (the national anthem, the motto 'In God We Trust,' the Court Marshall's proclamation before Supreme Court sessions). He concluded that

[a]ll of these events strongly suggest that our national culture allows public recognition of our Nation's religious history and character. In the words of the House Report that accompanied the insertion of the phrase "under God" in the Pledge: "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."⁸⁰

To an observer, it appears as somewhat one-sided argumentation to justify the public use of God's name by the words of the report which was written specifically to persuade the House to pass the bill ordering the inclusion of the phrase 'under God' in the Pledge, but the Chief Justice was apparently captivated by this quote, using it twice in his relatively short opinion. For the second time, he cited it to demonstrate that the 'under God' phrase could not be considered a formal religious exercise of the kind that had been declared unconstitutional in public schools by the Court in 1992,⁸¹ but rather a recognition of the religious heritage of the US (he carefully avoided discussing why such a recognition were necessary in a 'patriotic exercise,' or why it should be preserved in the Pledge when the patriotic exercise had functioned equally well without it for more than half a century). His summary was unequivocal:

Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church. . . . The recital, in a patriotic

80. *Elk Grove Unified School District v. Newdow*, Rehnquist, C. J., concurring in judgment, p. 13.

81. It might be worth noting at this point that the Chief Justice joined Justice Scalia's dissent from the majority opinion of the Court in the *Lee v. Weisman* case, which established this precedent. Scalia in his dissenting opinion protested against "a boundless, and boundlessly manipulable, test of psychological coercion," and argued both that non-sectarian public prayers have a long historical tradition in the US and that the First Amendment's provisions cannot be so construed as to authorize the Court to ban "the expression of gratitude to God that a majority of the community wishes to make" (Darien McWhirter, *The Separation of Church and State* [Phoenix, AR: Oryx, 1994], pp. 31–33).

ceremony pledging allegiance to the flag and to the Nation, of the descriptive phrase “under God” cannot possibly lead to the establishment of a religion, or anything like it.⁸²

By way of conclusion, he also remarked that the text of the Pledge of Allegiance had been codified by Congress, while its daily use had been approved by both the state of California and the local school board – three levels of popular government agreed on its appropriateness, and such democratic choices should be restricted on constitutional grounds only when a grave violation of constitutional principles can be established. While the Constitution guarantees the right of individual children to abstain from the ceremony if they chose to do so, it cannot give a “heckler’s veto”⁸³ to any parent to prevent a patriotic ceremony because he finds one single phrase offensive in it. The Chief Justice’s phrase is telling: it reveals, consciously or unconsciously, his personal opinion on plaintiff Michael Newdow and his claim.

Justice Sandra Day O’Connor wrote a separate opinion, in which she fully agreed with the Chief Justice’s dissent but felt that she should offer a separate argumentation in support of it. She had written about Establishment Clause cases several times in the past, creating the endorsement test, cited above, in 1984, which never fully gained the status of a Supreme Court precedent, nonetheless it was cited in several subsequent cases, including the 9th Circuit Court’s decision. O’Connor returned to her favourite approach in this opinion as well, arguing that the endorsement test should be applied to a case with two related principles in mind: those of the “reasonable observer” and the “community ideal of social judgment.”⁸⁴ The first means essentially the same as the Chief Justice’s refusal to accept a “heckler’s veto”: in O’Connor’s more sophisticated wording, any government action might be considered religious endorsement from a radically subjective point of view, “given the dizzying religious heterogeneity of our nation.”⁸⁵ The second principle urges the examination of a certain practice while considering its historical origins and social context. With this, O’Connor again reiterated the Chief Justice’s historical argument, suggesting that

82. *Elk Grove Unified School District v. Newdow*, Rehnquist, C. J., concurring in judgment, pp. 14–16.

83. *Elk Grove Unified School District v. Newdow*, C. J. Rehnquist, concurring in judgment, p. 16.

84. *Elk Grove Unified School District v. Newdow*, J. O’Connor, concurring in judgment, p. 3.

85. *Elk Grove Unified School District v. Newdow*, J. O’Connor, concurring in judgment, p. 2.

although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes. One such purpose is to commemorate the role of religion in our history.⁸⁶

Another such secular purpose is “to solemnize public occasions,”⁸⁷ to quote a favourite phrase of O’Connor, in which case such references must not be interpreted as government endorsement of religion. The latter case is what O’Connor called ‘ceremonial deism,’ and she lumped all the famous instances cited by the Chief Justice into this category. In the rest of her opinion, she endeavoured to demonstrate that the ‘under God’ phrase also belongs under the heading of ceremonial deism.

She supported her interpretation by stressing the relatively long history and ubiquity of the Pledge, which nonetheless seems to have generated practically no controversy in a country ready to bring rather bizarre Establishment Clause cases to court. This argument in my view is not too convincing since many of the Supreme Court decisions of the past were based on similar or more outlandish challenges that were ultimately accepted by the majority of the Court. The second argument is basically identical with that of the Chief Justice, namely, that the Pledge with the ‘under God’ phrase cannot be construed as a religious prayer, which is inadmissible as an instance of ceremonial deism. O’Connor, unlike the Chief Justice, felt that this claim is explicitly contradicted by the religious intentions of the sponsors of the 1954 bill, therefore she hastened to add:

Whatever the sectarian ends its authors may have had in mind, our continued repetition of the reference to “one Nation under God” in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context. Any religious freight the words may have been meant to carry originally has long since been lost.⁸⁸

Furthermore, the reference in the Pledge is non-sectarian, it does not prefer any particular religious faith or denomination over the other, even though – as O’Connor was forced to admit – it obviously prefers those which believe in one single Supreme Being over those, like Buddhism, which do not. She tried to avoid this trap by a rather awkward reference to historical context again, claiming that half a century

86. *Elk Grove Unified School District v. Newdow*, J. O’Connor, concurring in judgment, p. 3.

87. *Elk Grove Unified School District v. Newdow*, J. O’Connor, concurring in judgment, p. 4.

88. *Elk Grove Unified School District v. Newdow*, J. O’Connor, concurring in judgment, pp. 9–10.

ago, in a less diverse nation, the reference could be considered generic enough to be acceptable to all.

Her final argument is that the religious content of the Pledge is minimal (2 words out of 31), which again proves that the phrase is an instant of ceremonial deism rather than a signal of government endorsement of religion. An evidence of this religious minimalism is, according to O'Connor, that "the presence of those words is not absolutely essential to the Pledge, as demonstrated by the fact that it existed without them for over 50 years,"⁸⁹ which begs the question: why should then these two words be protected so resolutely and with such convoluted argumentation?

The rather disappointing performance of Justice O'Connor is contrasted by the robust dissent put forward by Justice Clarence Thomas. While he agreed with the Chief Justice and Justice O'Connor that the Pledge of Allegiance is constitutional, he was the only Justice on the bench willing to tackle the central problem, the eye of the storm raised by Michael Newdow's case: how could it happen that the Circuit Court of Appeals reached a diametrically opposite conclusion based on what Thomas considered a "persuasive reading of out precedent, especially *Lee v. Weisman*?"⁹⁰ In a bold answer rather unusual from a Supreme Court Justice, Thomas repeated his earlier opinion that "our Establishment Clause jurisprudence is in hopeless disarray."⁹¹ Over the past thirty years, the Supreme Court had created several tests, but applied none of them consistently, making distinctions between seemingly similar cases and creating exceptions to their own precedent, which confused lower court and produced 'silly' results.⁹² Therefore Thomas in his

89. *Elk Grove Unified School District v. Newdow*, J. O'Connor, concurring in judgment, p. 11.

90. *Elk Grove Unified School District v. Newdow*, J. Thomas, concurring in judgment, p. 1.

91. *Elk Grove Unified School District v. Newdow*, J. Thomas, concurring in judgment, p. 1n1.

92. Thomas's opinion is shared by legal scholar Donald L. Drakeman, who observed ten years earlier that the conclusions reached by the Supreme Court in Establishment Clause cases had been "characteristically confusing" (Drakeman, *Church-State Constitutional Issues: Making Sense of the Establishment Clause* [Greenwood Press, 1991], p. 41). He was also sharply ironic about exactly the same case cited by Thomas in his footnote, the *County of Allegheny v. American Civil Liberties Union* (1989), where the majority opinion declared a Christmas crèche display unconstitutional but a huge menorah permissible, arguing that in the latter case there were enough non-religious symbols to distract from the message of the religious theme. As Drakeman remarked, "the Court did not specify the ratio of elves to angels required to withstand an establishment clause challenge" (Drakeman, p. 38) against a Christmas display, mocking the increasingly absurd distinctions employed by the Court.

opinion called for an overhaul of the Supreme Court's interpretation of the Establishment Clause and he grabbed the opportunity to chart the course for such a sweeping review.

He observed – implicitly opposing the opinion of both Rehnquist and O'Connor – that on the basis of the *Lee v. Weisman* decision, the SC should declare the Pledge unconstitutional, since the “subtle coercive pressure”⁹³ deemed dangerous in the case of a school graduation invocation and benediction, a single event, is far more prominently present in a daily school ritual. He rather dismissively brushed aside the elaborate argument of the Chief Justice that the Pledge is not a religious exercise by pointing out that in the 1940 decision ruling the compulsory recital of the Pledge unconstitutional, the Supreme Court described it as an “affirmation of a belief,” which now includes the phrase that the US is ‘one Nation under God.’

It is difficult to see how this does not entail an affirmation that God exists. Whether or not we classify affirming the existence of God as a “formal religious exercise” akin to prayer, it must present the same or similar constitutional problems.⁹⁴

With a sudden turn of argument, however, Thomas did not conclude that the Pledge is unconstitutional: the point of his reasoning was that the most relevant precedent, the *Lee v. Weisman* case was wrongly decided. He squarely rejected that ‘peer pressure’ can be equated with ‘coercion’ as defined by the decision. Furthermore, he questioned the whole constitutional foundation of extending the scope of the Establishment Clause through the Fourteenth Amendment by arguing that while the Free Exercise Clause was certainly meant to protect individual rights, the Establishment Clause is directly applicable only to the federal government, possibly but questionably to state governments (whose scope of action it was evidently meant to protect), and definitely not to individuals. Along this reasoning, the only meaningful question that could be asked about the Pledge is whether it pertains to an ‘establishment of religion,’ the original subject of the Establishment Clause.

Thomas's answer is a firm ‘No,’ emphasizing that true establishment by necessity involves legal coercion with a threat of penalty, or at least legal compulsion (e.g. taxation for religious purposes). An alternative view of establishment may also lay stress upon the danger of lending governmental authority to one particular church or religion. Voluntary activities in a public school, be it a school prayer or recital of the

93. *Elk Grove Unified School District v. Newdow*, J. Thomas, concurring in judgment, p. 2.

94. *Elk Grove Unified School District v. Newdow*, J. Thomas, concurring in judgment, p. 4.

Pledge, have nothing to do with such coercive government action. Since free-exercise rights are not threatened, he concluded – along a completely different line of logic – that the Pledge is fully constitutional.

As the brief summary above has shown, members of the Supreme Court are also divided in their views of both the Pledge and the interpretation of the Establishment Clause. An observer cannot quite get rid of the suspicion that much of the elaborate argumentation distinguishing the Pledge from a ‘proper religious exercise’ is but a legal facade to hide the proponents’ core conviction: namely, that there is nothing essentially wrong with American schoolchildren reciting daily that the US is ‘one nation under God’; and the concept of ‘ceremonial deism’ is a constitutional excuse to accommodate common and widely approved phenomena of ‘civil religion’ over and against the otherwise strict separationist interpretation of the Establishment Clause by the Supreme Court. It is noteworthy that none of the eight Justices considered the substance of *Newdow’s* case valid: or if they did, they chose to conceal their opinion behind the technical argument about the lack of the plaintiff’s standing. Justice Thomas alone had the intellectual and political courage to admit plainly that the Circuit Court of Appeal’s decision was correct, under the existing precedents established by the Supreme Court the Pledge should be declared unconstitutional, and all other hair-splitting distinctions between ‘religious’ and ‘patriotic’ exercises hastily brought in by Chief Justice Rehnquist and Justice O’Connor are attempts to paper over this truth. But Thomas employs this revelation as an argument for his urgent call to reverse at least 40 years of Supreme Court interpretation of the First Amendment, to return to an accommodationist position that would give a much wider scope for states and state institutions (including public schools) to ‘endorse’ religion in a variety of ways. This argument, however sound it may seem in the light of constitutional history and a strictly literal interpretation of the First Amendment, carries a huge threat under the current political climate of the United States: it might open the floodgates for a radical conservative agenda that would be eager to promote Christianity through the machinery of the state, thus turning civil religion into something like an established Christian church.

Such a radical conservative turn in the interpretation of the Constitution is unlikely. Still, Thomas’s constitutional logic is a fine illustration why so many people, especially on the liberal side of the political spectrum, are bracing themselves for the nominations of President George W. Bush to the new Supreme Court positions. If the majority of the Court could be won over to a more conservative interpretation of the First Amendment, much more than a mere phrase in the Pledge of Allegiance may be at stake.