

CLOSING THE ENDORSEMENT TEST ESCAPE-HATCH IN THE PLEDGE OF ALLEGIANCE DEBATE

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Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.¹

Justice William Brennan, Edwards v. Aguillard

Pondering the Pledge's possible effects [on his four-year-old daughter, Newdow] recited it to her in its pre-1954 form. After hearing ". . . one Nation, indivisible, with liberty and justice for all," [the] child — without a second's pause — immediately shouted "under God"! [Newdow] at the time didn't even know she had ever even heard the Pledge before. Yet, apparently from her days in pre-school, she immediately recognized that her father had "left out" those two words.²

Michael Newdow, Atheist Father

INTRODUCTION

In March 2004, atheist father Michael Newdow argued before the United States Supreme Court³ that the daily recitation of the Pledge of Allegiance,⁴ including the phrase "one Nation, under God,"

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¹ Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

² Original Complaint at ¶ 130, Newdow v. Cong. of the United States, 2000 U.S. Dist. LEXIS 22366 (E.D.Cal. July 21, 2000) (No. CIV S-00-0495 MLS PAN PS) [hereinafter *Newdow I*].

³ Newdow, a non-practicing attorney, represented himself in the case. Linda Greenhouse, *Atheist Presents Case for Taking God from Pledge*, N.Y. TIMES, Mar. 25, 2004, at A1.

⁴ The Pledge of Allegiance reads: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation *under God*, indivisible, with liberty and justice for all." 4 U.S.C. § 4 (Supp. 2004) (emphasis added). The Pledge is recited while standing at attention with the right hand over

in his daughter's public elementary school classroom violates the Establishment Clause of the United States Constitution.⁵ The crux of Newdow's claim was that the reference to God in the Pledge interferes with his parental right to raise his daughter as an atheist because it coerces her to believe that God exists.⁶ The Court of Appeals for the Ninth Circuit agreed with Newdow,⁷ igniting a storm of controversy,⁸ and setting the stage for a much-anticipated ruling by the Supreme Court. In *Elk Grove Unified School District v. Newdow* (*Newdow III*),⁹ however, the Court failed to reach the merits of the case, and reversed the Ninth Circuit because Newdow lacked standing.¹⁰

the speaker's heart. *Id.*

⁵ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

⁶ See *infra* Part I.A.1.

⁷ *Newdow v. United States Cong.*, 328 F.3d 466 (9th Cir. 2002) [hereinafter *Newdow II*], *rev'd sub nom. on other grounds*, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2312 (2004) [hereinafter *Newdow III*].

⁸ The Ninth Circuit's decision was met with almost universal disapproval. See, e.g., Martin Kasindorf, *Court Ruling on the Pledge Ignites Furor*, USA TODAY, June 27, 2002, at 1A. Eighty-seven percent of Americans surveyed in a *Newsweek* poll conducted shortly after the *Newdow II* decision felt that "under God" should remain in the Pledge. See *Vast Majority in U.S. Support 'Under God'*, CNN.com (June 30, 2002), at <http://www.cnn.com/2002/US/06/29/poll.pledge> (last visited Jan. 16, 2005). President George W. Bush called the ruling "ridiculous," while Democratic Senator Tom Daschle called it "nuts." Evelyn Nieves, *Judges Ban Pledge of Allegiance from Schools, Citing 'Under God'*, N.Y. TIMES, June 27, 2002, at A1. Republican New York Governor George Pataki added that it was "junk justice." *Id.* Other superlatives used to describe the decision were "appalling" and "absurd," and the ruling was said to have created a "constitutional crisis." *Id.* Major media outlets were also quick to express their disagreement with the decision, however were more tempered in their criticism than lawmakers were. See, e.g., Lance Morrow, Editorial, *God Knows What the Court was Thinking*, TIME MAG., July 8, 2002, at 96 (criticizing the initial insertion of "under God" into the Pledge, yet still calling the Ninth Circuit's decision "stupid" because of its timing); Editorial, *'One Nation Under God'*, N.Y. TIMES, June 27, 2002, at A28 (stating that although "[w]e wish the words [under God] had not been added back in 1954," the *Newdow II* ruling "lacks common sense").

⁹ 124 S. Ct. 2301 (2004).

¹⁰ *Id.* at 2312. Newdow originally brought his Pledge suit on behalf of his daughter as her "next friend." However, the child's mother, to whom Newdow never married, had sole legal custody over the girl and obtained an order from a California state court enjoining Newdow from suing on their daughter's behalf. *Id.* at 2307. Nevertheless, the Ninth Circuit subsequently held that Newdow had Article III standing in his own right as a parent to challenge the school district's pledge policy. *Id.* (citing *Newdow v. United States Cong.*, 313 F.3d 500, 502-03 (9th Cir. 2002)). The Supreme Court disagreed, reversing the court of appeals and ruling that Newdow lacked "prudential standing" because it would be "improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family

While *Newdow III* delayed an ultimate resolution of the Pledge issue, the arguments made in the decision's three concurring opinions, by the school district in opposition to *Newdow*, and by much of the legal and political community at the time of the case, revealed that a satisfactory resolution of the Pledge debate for *Newdow* may never come via the Establishment Clause. Justices, commentators, and politicians alike obfuscated *Newdow*'s central argument that his daughter was being coerced into religious belief because she was asked daily to pledge allegiance to a "nation, under God," by asserting unrelated counterarguments that the Pledge does not endorse religion.¹¹ *Newdow*'s coercion argument examines the Pledge from the *subjective* viewpoint of his impressionable young child in the particularly coercive atmosphere of the public school classroom.¹² In response, proponents of the Pledge argue from an *objective* viewpoint: in the eyes of a *reasonable observer* aware of the "history and ubiquity" of the Pledge of Allegiance, the words "under God" are merely an acknowledgement of the role religion played in the founding of the nation, and not an attempt to endorse religion.¹³ From this perspective, "under God" is no different than other purportedly acceptable religious references in the public lives of Americans, such as the national motto, "In God We Trust."¹⁴

The battle between these two contrasting viewpoints is a result of the Court's inability to settle on one analytical test as the measure of an Establishment Clause violation.¹⁵ In support of his claim, *Newdow* naturally relied upon *Lee v. Weisman*,¹⁶ where the Court employed a "coercion test" to hold that the Establishment Clause bars a public middle school from leading its students in a non-denominational prayer during a graduation ceremony because of the religiously coercive effect it may have on the young students in the audience.¹⁷

In response, supporters of the Pledge ignored the claim that

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." *Id.* at 2312.

¹¹ See *infra* Part I.B.1.

¹² See *infra* Part I.A.1.

¹³ See *infra* Part I.B.1.

¹⁴ *Id.*

¹⁵ See *infra* Part II.

¹⁶ 505 U.S. 577 (1992).

¹⁷ *Id.* at 599. See *infra* Part II.A for a further discussion of *Lee v. Weisman* and its coercion test.

“under God” is coercive to a child, and instead, utilized the other major analytical tool of the Establishment Clause—the endorsement test.¹⁸ For example, Justice O’Connor, the leading proponent of this test, contended in her *Newdow III* concurring opinion that no reasonable observer aware of the “history and ubiquity” of the Pledge could possibly view the words “under God” as an endorsement of religion or as a prayer, and thus, concluded that the Pledge cannot fail the coercion test.¹⁹ By taking this approach, the Justice escaped the need to apply *Lee*’s coercion test to the facts of *Newdow III*, and the need to address the real question at the core of *Newdow*’s coercion argument: whether a *five-year-old* in the context of a classroom recitation would view the words “under God” as a coercive influence.

There is a good reason for this avoidance. Any principled application of *Lee*’s coercion test to *Newdow*’s claim necessarily leads to the conclusion that the use of “under God” in public schools is unconstitutional.²⁰ The problem for *Newdow* is that, as demonstrated by Justice O’Connor, an escape-hatch is built into the road leading to this conclusion—an application of the Court’s endorsement test precedents inevitably leads to the contrary result that the Pledge is constitutional under the Establishment Clause.²¹

Courts and commentators have assumed that this result is impossible because any government use of religion strong enough to *coerce*, a fortiori, must also be strong enough to merely *endorse*.²² This assumption holds true, however, only if the government use of religion is substantial enough to coerce the *reasonable observer*. In contrast, *Lee* examined the coercive effect a prayer has on a school-aged child *through the eyes of a school-aged child*, finding coercion because of the impressionable nature of young students in the school environment. Thus, government religious speech strong enough to coerce a five-year-old child may not necessarily rise to the level of an endorsement of religion in the eyes of a reasonable observer with knowledge of the “history and ubiquity” of the religious reference. A five-year-old child is not such a reasonable observer.²³

¹⁸ See *infra* Part II.B for a discussion of the Establishment Clause’s endorsement test.

¹⁹ *Newdow III*, 124 S. Ct. at 2321-27.

²⁰ See *infra* Part III.A.

²¹ See *infra* Part III.B.

²² See *infra* Part III.C.

²³ See *id.*

The conundrum created by this distinction leaves Newdow's coercion claim trapped in an Establishment Clause black hole from which the next Newdow²⁴ will need to escape if he or she is to have a chance of successfully challenging the use of "under God" in the public classroom. This Comment suggests that the Free Exercise and Due Process Clauses present a possible alternative to the Establishment Clause for asserting a coercion-based claim against the Pledge. Arguably, the recitation of the Pledge, with "under God," in the public classroom violates the Free Exercise Clause²⁵ by coercing impressionable children into religious belief, and thus in turn, also violates the fundamental right of atheist parents to direct the (non)religious upbringing of their children.²⁶ Such a claim would insulate the coercion argument from the endorsement test's reasonable person counterarguments, which are irrelevant to the question of whether a five-year-old hearing "under God" everyday is coerced into believing that God exists.²⁷

Part I illustrates the contrast between Newdow's arguments against "under God," which view the Pledge from the perspective of a young, impressionable elementary-school student, and his opponents' arguments, which view the Pledge through the eyes of a reasonable observer. Part II demonstrates how this contrast results from the Court's Establishment Clause jurisprudence and its use of two main analytical tests—the coercion test and the endorsement test. Part III argues that under current Court precedents, both sides of the *Newdow* Pledge debate are correct: "under God" coerces while it does not endorse. This part goes on to explain how this anomaly gives proponents of the Pledge an escape-hatch by which they can avoid the inevitable result that the Pledge is unconstitutional under *Lee*. Part IV proposes that to avoid this problem, the next Newdow should argue that the daily repetition of the Pledge, with "under God," in the public classroom coerces a child's religious beliefs in violation of the Free Exercise Clause and the child's parents'

²⁴ The next Newdow may be Newdow himself. Newdow re-filed his claim against the use of "under God" in the Pledge on January 5, 2005 in the District Court for the Eastern District of California, however this time with co-plaintiffs who are custodial parents, in hopes of remedying his standing problems. Associated Press, *Atheist Files Second Suit on 'Under God' in Pledge*, N.Y. TIMES, Jan. 6, 2005, at A19.

²⁵ The Free Exercise Clause reads: "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend I.

²⁶ See *infra* Part IV.

²⁷ See *infra* Part IV.D.

fundamental right to direct their child's religious upbringing. Such an approach would properly focus the Pledge debate solely upon the issue of whether "under God" applies "subtle coercive pressure" on impressionable public school children with whom the Court has observed "there are heightened concerns with protecting freedom of conscience."²⁸

I. THE PLEDGE DEBATE: A CONTRAST IN PERSPECTIVES

A. *Coercion Claims by Atheist Parents Against the Pledge of Allegiance*

1. The *Newdow* Trilogy

In *Newdow v. United States Congress (Newdow II)*,²⁹ the Ninth Circuit held that a public school district's policy of leading willing students in a daily recitation of the Pledge of Allegiance, including the words "under God," violates the Establishment Clause.³⁰ *Newdow* objected to the Pledge because his elementary school-aged daughter was "compelled to watch and listen as her state-employed teacher in her state-run school [led] her classmates in a ritual proclaiming that there is a God."³¹ *Newdow's* surprise victory brought the Pledge issue to the front pages of newspapers across the nation, sparking a public debate over the propriety of God in the Pledge.³² The two sides of this debate asserted two very different arguments against each other. For *Newdow*, it is clear that his central concern was protecting his elementary school-aged daughter's still-developing beliefs. Just as Christian parents typically raise their children to be Christian, and Jewish parents typically raise their children to be Jewish, *Newdow* repeatedly expressed a desire to raise his child as an atheist without the government influencing her otherwise.³³ Before the Supreme

²⁸ *Lee*, 505 U.S. at 592.

²⁹ 328 F.3d 466 (9th Cir. 2002).

³⁰ *Id.* at 490.

³¹ *Id.* at 483.

³² *See, e.g., Nieves, supra* note 8.

³³ *See, e.g.,* Original Complaint at ¶¶ 78-79, 112, 130-33, *Newdow I* (No. CIV S-00-0495 MLS PAN PS); Brief of the Plaintiff/Appellant Appealing District Court's Order Granting Defendants' Motion to Dismiss at 3-4, 56-57, *Newdow II* (No. 00-16423) ("[I]n exercising the basic right of educating their children in the public schools—[atheists] shouldn't be forced to have those citizens 'of tender years' subjected to the daily indoctrination of a religious notion which is the explicit repudiation of all they hold true."); Respondent's Brief on the Merits at 1, 15-16, *Newdow III* (No. 02-1624) ("For those who do not share the majority's religious belief that there exists a God—

Court, Newdow did not attack the Pledge on its face or the act of Congress in 1954 that added the words “under God,”³⁴ but instead only claimed that the Pledge’s *use in public schools* was unconstitutional.³⁵ Newdow’s primary concern was alleged coercive

and who wish to instill non-Monothestic values in their children—[the recitation of the Pledge in public schools] intrudes into their rights of parenthood.”).

³⁴ “Under God” has not always been a part of the Pledge of Allegiance. The Pledge first was written without the words “under God” in 1892 by a Baptist minister named Francis Bellamy, who worked as an editor at a popular family magazine called *The Youth’s Companion*. Arthur Schlesinger Jr., *When Patriotism Wasn’t Religious*, N.Y. TIMES, July 7, 2002, 4, at 9. The Pledge quickly became a popular part of the efforts of the public schools to introduce patriotism into the classroom in order to promote national unity after the Civil War and to “Americanize” immigrant children who were coming to the nation in increasing numbers at the turn of the Twentieth Century. MERLE CURTI, *THE ROOTS OF AMERICAN LOYALTY 185-86, 188-89* (1946). By 1940, a majority of the states passed laws requiring the recitation of the Pledge in their public schools. Charles J. Russo, *The Supreme Court and the Pledge of Allegiance: Does God Still Have a Place in American Schools?*, 2004 BYU EDUC. & L.J. 301, 303 (2004) (citing DAVID W. MANWARING, *RENDER UNTO CEASAR: THE FLAG SALUTE CONTROVERSY* 2, 4-5 (U. of Chi. Press 1962)). Congress codified the Pledge without the words “under God” on June 22, 1942 “[a]s part of an overall effort to ‘codify and emphasize existing rules and customs pertaining to the display and use’” of the U.S. flag. *Newdow III*, 124 S. Ct. at 2316 (Rehnquist, C.J., concurring) (citing Act of June 22, 1942, Pub. L. No. 77-623, ch. 435, 56 Stat. 377, 377-80). On June 14, 1954 Congress added the words “under God” to the Pledge between the word “Nation” and the word “indivisible.” Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249 [hereinafter 1954 Act].

³⁵ See *Newdow III*, 124 S. Ct. at 2305; *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 384, 384 (2003) (granting certiorari on the narrow question: “Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words ‘under God,’ violates the *Establishment Clause* of the *First Amendment*.”); Respondent’s Brief on the Merits at 3-7, *Newdow III* (No. 02-1624).

Specifically, Newdow sought to invalidate Elk Grove school district policy AR 6115, which reads: “Patriotic Observances, Elementary Schools: Each elementary school class recite [sic] the pledge of allegiance to the flag once each day.” Petitioners’ Brief on the Merits at 3, *Newdow III*, (No. 02-1624). The school district’s policy was promulgated in order to satisfy a California statutory requirement that public schools conduct certain “patriotic exercises” at the beginning of each school day, which Newdow also challenged. See CAL. EDUC. CODE § 52720 (West 1989) (“In every public elementary school each day . . . at the beginning of the first regularly scheduled class . . . there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.”).

Newdow did however, challenge the 1954 Act adding “under God” to the Pledge of Allegiance on its face before the Eastern District of California, see Original Complaint at ¶¶ 28-29, *Newdow I* (No. CIV S-00-0495 MLS PAN PS), and before the Ninth Circuit. See *Newdow II*, 328 F.3d at 482. The Ninth Circuit originally found the 1954 Act to be facially invalid, but later amended its opinion to only strike down the Elk Grove Unified School District’s policy of using the Pledge in public classrooms.

effect of “under God” in this narrow and specific context. He argued that “every school morning . . . government agents indoctrinate their public school students—including [my] daughter—with sectarian dogma.”³⁶ While acknowledging that his daughter’s school did not force her to say the Pledge,³⁷ Newdow claimed that she was “compelled to watch and listen” to its recitation, and that this has an “adverse effect . . . on the ability of atheists in general, and [Newdow] in particular, to raise their children free from religious governmental interference.”³⁸ To further illustrate his point, Newdow stated in his complaint that he tested the effect the daily recitation of the Pledge had on his then four-year-old daughter by reciting the Pledge to her without the words “under God.”³⁹ “After hearing the words ‘ . . . one Nation, indivisible, with liberty and justice for all,’” Newdow claims that his daughter, “without a second’s pause—immediately shouted ‘under God’! . . . recogniz[ing] that her father had ‘left out’ those two words.”⁴⁰

Newdow’s argument relies upon two important subjective factors, particular to his daughter, in explaining why merely watching the Pledge and listening to the phrase “under God” is coercive. First, he pointed to the young “impressionable” age of the five-year-old⁴¹

See *Newdow v. United States Cong.*, 292 F.3d 597, 612 (9th Cir. 2002), *amended by* 328 F.3d 466 (9th Cir. 2002).

³⁶ Respondent’s Brief on the Merits at 4, *Newdow III* (No. 02-1624).

³⁷ In *West Virginia State Board of Education v. Barnette*, the Court held that a public school district may not legally compel students to recite the Pledge of Allegiance because it violates the students’ First Amendment right not to speak. 319 U.S. 624, 642 (1943). The public school may, however, *ask* students to recite the Pledge everyday as long as dissenting students are permitted to opt out. See, e.g., WASH. REV. CODE § 28A.230.140 (1997) (“[A]ppropriate flag exercises [shall] be held in each classroom at the beginning of the school day, and in every school at the opening of all school assemblies, at which exercises those pupils *so desiring* shall recite [the Pledge of Allegiance]. Students not reciting the pledge shall maintain a respectful silence.” (emphasis added)).

³⁸ Original Complaint at ¶¶ 96, 99, 130-32, *Newdow I* (No. CIV S-00-0495 MLS PAN PS).

³⁹ *Id.* at ¶ 130. Newdow’s daughter had yet to begin public school since she was only four-years-old, however she had been exposed to the Pledge on a daily basis in pre-school. *Id.*

⁴⁰ *Id.*

⁴¹ Respondent’s Brief on the Merits at 1, 7, 15, *Newdow III* (No. 02-1624). At the time Newdow filed his original complaint in March 2000 his daughter was five-years-old. Original Complaint at ¶ 76, *Newdow I* (No. CIV S-00-0495 MLS PAN PS). By the time the case came before the United States Supreme Court in 2004, it can be assumed she was about nine-years-old, however, the briefs and Court opinion only refer to her as an elementary school student. See *Newdow III*, 124 S. Ct. at 2305.

girl, explaining that it would take an “amazing child” to know that “under God” in the Pledge is anything other than her school stating that God exists.⁴² Second, Newdow argued that this coercive power is particularly hard to resist for his daughter in the environment of the public classroom.⁴³ In school, Newdow explained, young children face unique pressures to conform to their peers, and pressure to please their instructors due to the “didactic nature of the teacher-student relationship.”⁴⁴ During oral argument, Newdow illustrated his point by asking the Supreme Court⁴⁵ to “[i]magine you’re the one atheist with 30 Christians [in the classroom] and [the teacher] say[s] to this child, let’s all stand up, face the flag, [and] say we are one nation under God.”⁴⁶ Newdow then argued that even though his daughter is not legally required to join her teacher in reciting the Pledge, it is a “huge imposition to put on a small child” to ask her to resist the Pledge and its reference to God.⁴⁷ While Newdow did make other constitutional arguments against the use of “under God” in the classroom,⁴⁸ his repeated allegations that the Pledge interfered with his ability to inculcate his daughter with atheist beliefs shows that at center, Newdow was concerned that his child would be coerced into accepting the existence of God.⁴⁹

⁴² Transcript of Oral Argument at 27, *Newdow III* (No. 02-1624).

⁴³ Respondent’s Brief on the Merits at 1, 3-7, 15-16, *Newdow III* (No. 02-1624).

⁴⁴ *Id.* at 15.

⁴⁵ Newdow represented himself before the Supreme Court. See *Greenhouse*, *supra* note 3.

⁴⁶ Transcript of Oral Argument at 36, *Newdow III* (No. 02-1624).

⁴⁷ *Id.*

⁴⁸ In addition to his claim that the school district’s pledge policy violated the coercion test, Newdow also argued that the Pledge policy violated the Establishment Clause under the *Lemon* test, endorsement test, and neutrality requirement. Respondent’s Brief on the Merits at 8-15, *Newdow III* (No. 02-1624).

⁴⁹ See, e.g., Original Complaint at ¶¶ 78-79, 122, 130-32, *Newdow I* (No. CIV S-00-0495 MLS PAN PS). Newdow opened his Supreme Court brief declaring that “[f]or those who do not share the majority’s religious belief that there exists a God—and who wish to instill non-Monotheistic values in their children—[the recitation of the Pledge with “under God” in public schools] intrudes into their rights of parenthood.” Respondent’s Brief on the Merits at 1, *Newdow III* (No. 02-1624). Additionally, during his oral argument before the Court, Newdow repeatedly expressed his concern that the coercion of his daughter’s beliefs regarding God would interfere with his ability to teach her atheism. See Transcript of Oral Argument at 25-26, *Newdow III* (No. 02-1624) (“I am saying I as her father have a right to know that when she goes into the public schools she’s not going to be told every morning to be asked to stand up, put her hand over her heart, and say your father is wrong, which is what she’s told every morning.”).

2. Other Coercion Claims Against the Pledge

Newdow is not the only atheist parent to claim that “under God” is coercive to young children in public schools. Ten years before the *Newdow II* decision, the Seventh Circuit, in *Sherman v. Community Consolidated School District 21*,⁵⁰ denied a similar claim brought by an atheist parent who argued that an Illinois law requiring his son’s elementary school to lead students in the Pledge everyday was unconstitutional, because it applied coercive pressure on his son to participate.⁵¹ The parent argued that his son was coerced, first, because the school’s principal “asks my son to stand with one hand over his heart and participate with the other pupils in reciting the pledge,” and second, because his son was, “hassled by other children on the playground because of his refusal to recite the Pledge.”⁵² The parent’s complaints echo the two context-specific factors raised by Newdow’s coercion claim: the pressures felt by a young child from peers and teachers in the public classroom.⁵³

One year after *Newdow II*, in *Myers v. Loudoun County School Board*,⁵⁴ the District Court for the Eastern District of Virginia dismissed another coercion claim against the Pledge. This time the plaintiff father was not an atheist, but rather an Anabaptist Mennonite who argued that the daily recitation of the Pledge as a whole, not just the words “under God,” “prevent[ed] h[im] and his children from freely exercising their . . . religion, which specifically forbids ‘worship’ of a secular state because such worship is ‘idoltrous.’”⁵⁵ Myers claimed that his children were coerced into straying from their religious beliefs because everyday they were required to sit and listen to the Pledge while everyone else in their classes stood around them.⁵⁶ While the suit in *Myers* differs from *Newdow*⁵⁷ and *Sherman* in that the plaintiff was not an atheist and did not attack the words “under God” in particular, the case still

⁵⁰ 980 F.2d 437 (7th Cir. 1992).

⁵¹ *Id.* at 439-41.

⁵² *Id.* at 443.

⁵³ *See supra* Part I.A.1.

⁵⁴ 251 F. Supp. 2d 1262 (E.D. Va. 2003).

⁵⁵ *Id.* at 1264.

⁵⁶ *Id.* at 1270-71.

⁵⁷ *Id.* at 1276. Although the court admitted that the Ninth Circuit’s holding in *Newdow II* was “not squarely before it in this action,” the court made sure nonetheless to “specifically reject [it] . . . find[ing] the rationale of that decision entirely unpersuasive.” *Id.* at 1266 n.8.

demonstrates that even religious parents have had concerns that the Pledge may coerce religious beliefs that contradict their own teachings to their children.

B. The Counterargument: "Under God" Does Not Endorse Religion

1. The *Newdow* Trilogy

In response to *Newdow's* claim, judges, legal commentators, and public officials did not argue that an elementary school-age child would *not* be religiously coerced by hearing the Pledge everyday. Instead, they primarily advanced arguments that, in the eyes of the reasonable observer, the words "under God" do not endorse religion, but merely acknowledge the role of religion in America's founding, similar to many other references to God and religion in the nation's history and documents. While the *Newdow III* Court did not decide the merits of the Pledge issue, Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas did address them in separate concurring opinions.⁵⁸ Two of these opinions,⁵⁹ along with the questions and comments posed by the Justices at oral argument⁶⁰ indicate that at least a portion of the Court was in favor accepting this counterargument as an answer to *Newdow's* claim.

In her concurring opinion, Justice O'Connor argued that *Newdow's* claim should have been denied because "[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today."⁶¹ Therefore, Justice O'Connor continued, such "ceremonial deisms," like "under God," are constitutional because the reasonable observer, with knowledge of the "history and ubiquity" of such deisms will not understand the reference to be a government endorsement of religion.⁶² Only a "novel or uncommon reference[] to religion," Justice O'Connor explained, "can more easily be perceived as

⁵⁸ See *Newdow III*, 124 S. Ct. at 2312-33.

⁵⁹ The concurring opinions of Chief Justice Rehnquist and Justice O'Connor. See *id.* at 2312-27.

⁶⁰ See *infra* Part II.C for excerpts of the debate that took place between Michael *Newdow* and the Justices of the Supreme Court at oral argument.

⁶¹ *Newdow III*, 124 S. Ct. at 2322 (O'Connor, J., concurring).

⁶² *Id.* at 2323 (O'Connor, J., concurring).

government endorsements because the reasonable observer cannot be presumed to be fully familiar with their origins.”⁶³ No reasonable observer, the Justice concluded, sees the Pledge, with the phrase “under God” as a prayer—instead, the “phrase is merely descriptive; it purports to only identify the United States as a Nation subject to divine authority.”⁶⁴ This argument, typical of the response to Newdow’s coercion argument, completely overlooks that Newdow never called for the outright removal of “under God” from the Pledge.⁶⁵ Further, what a reasonable observer “fully familiar” with the “history and ubiquity” of the Pledge would perceive fails to consider what an impressionable five-year-old, who is not familiar with the history and ubiquity of the Pledge, would perceive.

Chief Justice Rehnquist likewise avoided the merits of the coercion question by first offering a parade of examples of the use of the word “God” in the nation’s history—e.g., in inaugural speeches by former presidents and in the nation’s motto, “In God We Trust”—all of which have little to do with the experience of young children in public classrooms.⁶⁶ Next, the Chief Justice purported to address whether the Pledge is coercive by stating:

I do not believe that the phrase “under God” in the Pledge converts its recital into a “religious exercise” of the sort described in *Lee v. Weisman*. Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase “under God” is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact [that] “[f]rom 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.”⁶⁷

Whether Chief Justice Rehnquist is describing how he subjectively perceives the words “under God” in the Pledge, or how a reasonable person should perceive them, he—like Justice O’Connor—misses the critical feature of Newdow’s challenge to the Pledge in the first place: how a *five-year-old child sitting in a public classroom* would perceive the phrase “under God.”

In making these arguments, Justice O’Connor and Chief Justice

⁶³ *Id.* (O’Connor, J., concurring).

⁶⁴ *Id.* at 2325 (O’Connor, J., concurring).

⁶⁵ See *supra* note 35 and accompanying text.

⁶⁶ See *Newdow III*, 124 S. Ct. at 2316-20 (Rehnquist, C.J., concurring).

⁶⁷ *Id.* at 2319-20 (Rehnquist, C.J., concurring).

Rehnquist adopted the reasoning proffered by the school district challenged by *Newdow*. In the school district's brief, it claimed that "[w]hile the beginning of the Pledge is an affirmation by the person reciting it, . . . the speaker is not . . . indicating a belief, to the second half of the Pledge which reads 'one nation under God.'"⁶⁸ The second half of the Pledge is merely "descriptive of the historical ideals upon which the country was founded," the school district claimed, and thus, one does not indicate a belief in this part of the statement.⁶⁹ "Under God," and these other descriptive statements (like "indivisible") are there merely "to give the persons reciting the Pledge an idea about the historical underpinnings of the [nation]."⁷⁰ Again, this argument takes an objective, reasonable person approach to avoid confronting the particular coercion issue head on, and is detached from the reality of whether a child in elementary school, watching his or her teacher and friends say the Pledge, would be able to make this distinction when hearing the words "under God."

The theme articulated by the school district was echoed time and again in other contexts by legal commentators⁷¹ and politicians.⁷² Congressional reaction to the Ninth Circuit's *Newdow II* decision was particularly caustic. Republicans and Democrats alike denounced *Newdow II* as "ridiculous," "nuts," and "stupid."⁷³ Both the Senate and

⁶⁸ Petitioners' Brief on the Merits at 31-32, *Newdow III* (No. 02-1624).

⁶⁹ *Id.*

⁷⁰ *Id.* at 32.

⁷¹ See, e.g., Toobin: *Pledge Ruling Likely 'Dead on Arrival'*, CNN.com (June 27, 2002), at <http://www.cnn.com/2002/LAW/06/27/toobin.pledge.otsc/index.html> (last visited Jan. 17, 2005). CNN legal analyst Jeffrey Toobin, speaking of the Ninth Circuit's decision stated:

You've got to put this decision in context. Our money says "In God we trust." Every single day that the United States Supreme Court is in session the marshal begins by saying, "God save this honorable court." God is not a forbidden word in the American government, and I think that this is an indication. If any of those nine justices, having heard "God save this honorable court" every single day, if something was wrong with it, someone might have said something.

Id.

⁷² For example, former California Governor Gray Davis remarked after the Ninth Circuit refused to rehear *Newdow II* en banc: "At the start of every court session, the Supreme Court invokes God's blessing. So does the Senate and the House of Representatives. Surely, the Supreme Court will permit schoolchildren to invoke God's name while reciting the Pledge of Allegiance." Adam Liptak, *Full Appeals Court Lets Stand the Ban On 'God' in Pledge*, N.Y. TIMES, March 1, 2003, at A1.

⁷³ President George W. Bush called the ruling "ridiculous," while then-Democratic Senator Tom Daschle called it "nuts." See Nieves, *supra* note 8. Republican New York Governor George Pataki added that it was "junk justice." *Id.*

House of Representatives stopped their regular work to pass resolutions condemning *Newdow II*.⁷⁴ Additionally, on November 13, 2002, Congress passed a bill to reaffirm its support for the current language of the Pledge with “under God,”⁷⁵ and to add its own “findings” to 4 U.S.C. § 4, where the Pledge is codified, explaining why the *Newdow II* decision was “erroneous.”⁷⁶ In those findings, Congress offers a list of the different ways in which “God” has been used in American historical documents and political life, including, the Mayflower Compact, the Declaration of Independence, the First Congress’s resolution proclaiming a “National Day of Thanksgiving,” and the Gettysburg Address.⁷⁷ Of course, schools do not ask young impressionable schoolchildren to profess a belief in the contents of any of these documents to start off each school day; nevertheless, it seems that Congress sought to make the point expressed by the Court in *Lynch v. Donnelly*⁷⁸ that “[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.”⁷⁹ *Lynch*, however, like the other cases cited by Congress in its bill, follows a line of Court reasoning that examines religious references from an objective point of view, failing to directly address *Newdow*’s coercion claim.⁸⁰

Other superlatives used to describe the decision were “appalling,” and “absurd,” and the ruling was said to have created a “constitutional crisis.” *Id.* One Senator was so disgusted that he called the judge who authored the decision—a thirty-three year veteran of the federal courts—“stupid.” See *Senators Call Pledge Decision ‘Stupid,’* CNN.com (June 27, 2002), at <http://www.cnn.com/2002/ALLPOLITICS/06/26/senate.resolution.pledge/index.html> (last visited Jan. 17, 2005). Additionally, on the day of the *Newdow II* decision, over one hundred members of the U.S. House of Representatives gathered on the steps of the Capitol to recite the Pledge of Allegiance in unison to protest the Ninth Circuit’s ruling. *Id.*

⁷⁴ S. Res. 292, 107th Cong., 148 CONG. REC. S6105 (2002) (enacted); H.R. Res. 459, 107th Cong., 148 CONG. REC. H4135 (2002) (enacted). See also *Lawmakers Blast Pledge Ruling*, CNN.com (June 27, 2002), at <http://www.cnn.com/2002/LAW/06/26/pledge.allegiance/index.html> (last visited Feb. 13, 2005) (noting that the Senate resolution passed 99-0).

⁷⁵ Act of Nov. 13, 2002, Pub. L. No. 107-293, § 2, 116 Stat. 2057, 2060 (codified as amended at 4 U.S.C. § 4).

⁷⁶ *Id.* § 1, 116 Stat. at 2058-60.

⁷⁷ *Id.*

⁷⁸ 465 U.S. 668 (1984).

⁷⁹ See § 1, 116 Stat. at 2057 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 654 (1984)).

⁸⁰ See *infra* Part II.B for a discussion of the endorsement test.

2. *Sherman v. Community Consolidated School District 21*

Chief Justice Rehnquist and Justice O'Connor's response to Newdow's coercion claim mirrored the Seventh Circuit's rebuttal to an identical claim presented in *Sherman*. Rather than apply the coercion test or the *Lemon* test,⁸¹ Judge Easterbrook opted for a "more direct" approach.⁸² First, the judge listed the multiple ways in which the nation's leaders—from the founders to contemporary presidents—have referenced God.⁸³ Judge Easterbrook then equated the Pledge with the Declaration of Independence, which also contains references to a higher being,⁸⁴ and distinguished such "patriotic or ceremonial occasions" from prayers, which are "unquestioned religious exercises."⁸⁵ The judge made this evaluation through the eyes of the reasonable observer; as support for his Pledge-prayer distinction, he quoted an opinion by Justice O'Connor stating that "government acknowledgements of religion," due to their "history and ubiquity, . . . are not understood as conveying approval of particular religious beliefs."⁸⁶ Relying on this reasoning and other Supreme Court dicta, the Seventh Circuit rejected *Sherman*'s coercion claim against "under God."⁸⁷

In sum, the debate over the use of "under God" in the Pledge of Allegiance, which culminated with *Newdow III*, can be characterized by two contrasting arguments. Newdow's coercion argument sees the Pledge and the words "under God" through the eyes of a five-year-old. Opponents counter with an argument that sees the Pledge from an objective viewpoint, stressing the benign role of such religious references in describing the nation's history.

⁸¹ To survive the *Lemon* test, a government action must have (1) a secular purpose, (2) a principal or primary effect that neither advances nor inhibits religion, and (3) must not create an excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

⁸² *Sherman*, 980 F.2d at 445.

⁸³ *Id.* at 445-46.

⁸⁴ The Declaration of Independence uses the words "God," and "Creator." THE DECLARATION OF INDEPENDENCE paras. 1-2 (U.S. 1776).

⁸⁵ *Id.* at 446-47.

⁸⁶ *Id.* at 447 (quoting *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring)).

⁸⁷ *Id.* at 448.

II. THE RELATIONSHIP BETWEEN THE ESTABLISHMENT
CLAUSE'S COERCION AND ENDORSEMENT TESTS,
AND ITS EFFECT ON THE PLEDGE DEBATE

The reason why Pledge proponents are able to escape directly confronting whether the daily recitation of "under God" is coercive to an elementary school student lies in the "erratic and unprincipled" state of Establishment Clause jurisprudence.⁸⁸ Since the early 1970s, the Court has developed and applied three Establishment Clause tests: the *Lemon* test, the endorsement test, and the coercion test.⁸⁹ Depending on the type of Establishment Clause case before the Court, it might choose to apply one test over another,⁹⁰ or to apply all three tests.⁹¹ Very generally, the Establishment Clause is violated under the endorsement test (which essentially incorporated the *Lemon* test⁹²) when a reasonable observer would view government action as sending a message that it favors one religion over another, or religion over irreligion.⁹³ The coercion test sets the bar for an

⁸⁸ LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 154, 220-21 (2d ed. 1994). See also Kevin E. Broyles & James Matthew Henderson, Sr., *How Much God in the Schools?: Religious Freedom and the First Self-Evident Truth: Equality as a Guiding Principle in Interpreting the Religion Clauses*, 4 WM. & MARY BILL RTS. J. 351, 353 (1995) ("[T]he Court's religious freedom cases are often logically incomprehensible, its First Amendment jurisprudence irreconcilable from one case to the next.").

⁸⁹ DANIEL O. CONKLE, *CONSTITUTIONAL LAW: THE RELIGION CLAUSES* 113 (2003).

⁹⁰ See, e.g., *Newdow III*, 124 S. Ct. at 2321 (O'Connor, J., concurring) ("As I have said before, the *Establishment Clause* cannot easily be reduced to a single test. There are different categories of *Establishment Clause* cases, which may call for different approaches.") (quoting Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring)).

⁹¹ See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301-17 (2000) (applying the *Lemon*, endorsement and coercion tests to invalidate a school-sponsored prayer prior to high school football games).

⁹² The endorsement test was developed by Justice O'Connor as a "clarification" of the Court's Establishment Clause jurisprudence and the *Lemon* test. *Lynch*, 465 U.S. at 687-94 (O'Connor, J., concurring). While at times the Court omits the *Lemon* test language when applying the endorsement test to detect Establishment Clause violations, see, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (O'Connor, J., concurring), commentators have said that the endorsement test is "fully consistent" with the *Lemon* test, see Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865, 874 (1993) [hereinafter, Conkle, *Lemon*], and indeed, is often applied by the Court as a measure of whether government action violates *Lemon's* "effect prong." See, e.g., *Santa Fe*, 530 U.S. at 301-10; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993); *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 249-53 (1990) (plurality opinion).

⁹³ See e.g., *Lynch*, 465 U.S. at 692 (1984) (O'Connor, J., concurring). To violate the endorsement test a government action must "have the effect of communicating a

Establishment Clause violation higher, and only strikes down state action that is taken to indoctrinate and coerce religious participation and beliefs.⁹⁴

A. *Coercion and the Establishment Clause*

Lee v. Weisman is an obvious source of support for an atheist parent's claim that "under God" exerts coercive pressure on his child attending public school. In that case, the Court struck down a school district's practice of allowing the recitation of a nonsectarian invocation by a religious figure at its middle school graduation ceremony.⁹⁵ The coercion test is the newest of the Court's Establishment Clause tests, but for years prior to *Lee*, the coercion rationale lingered in the background of the Court's line of "school prayer" cases, where it has consistently invalidated other uses of religion in the public classroom.

1. Establishment Clause Coercion Pre-*Lee v. Weisman*: The School Prayer Cases

The Supreme Court has a long history of rejecting school-sponsored religious instruction and prayer in public schools.⁹⁶ Many of these cases were decided before the formulation of specific Establishment Clause tests, but for the most part their reasoning relies upon the first prong of the three-part *Lemon* test, which "forbids the government, including the public schools, from acting with the purpose of advancing or endorsing either one religion over others or religion over irreligion."⁹⁷ While not forming the basis of the Court's decisions, the issue of coercion has been often discussed as a supporting rationale for striking down classroom religion. Three

message of government endorsement or disapproval of religion," to a "reasonable observer" who is "deemed aware of the history and context of the community and the forum in which the religious [speech takes place]." *Pinette*, 515 U.S. at 780. For example, in *County of Allegheny v. ACLU*, 492 U.S. 573, 627-28 (1989), Justice O'Connor concurred in the Court's decision striking down the display of a crèche in a county government building, finding the display objectionable not because it threatened to coerce Christian belief into anyone, but merely because the display "convey[ed] a message 'that religion or a particular religious belief is favored or preferred.'" See also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND PRACTICE 1151 (2d ed. 2002).

⁹⁴ See *Lee*, 505 U.S. at 591-92.

⁹⁵ *Id.* at 581-86.

⁹⁶ See CONKLE, *supra* note 89, at 147.

⁹⁷ *Id.*

examples are particularly instructive.

In *McCullum v. Board of Education*,⁹⁸ the Court addressed religion in the public schools for the first time and struck down a program that allowed private religious instructors to use public school facilities to teach students religious dogma during school hours.⁹⁹ The Court ultimately found the program in violation of the Establishment Clause because providing “tax-supported public school buildings . . . for the dissemination of religious doctrines,” purposely aids religion.¹⁰⁰ Justice Black’s majority opinion also acknowledged the religiously coercive threat the program posed, stressing that “[t]he preservation of the community from . . . coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual’s church and home, indoctrination in the faith of his choice.”¹⁰¹ Likewise, Justice Frankfurter’s concurring opinion added that the voluntary nature of the program was constitutionally irrelevant because

[t]hat a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school’s domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.¹⁰²

Similarly, in *Engel v. Vitale*¹⁰³ the Court used the Establishment Clause to invalidate a public school district’s requirement that a nondenominational prayer be recited daily in its classrooms.¹⁰⁴ Again, Justice Black stressed that religious coercion was a factor, but not essential to the Court’s decision:

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental 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. This is not to say, of

⁹⁸ 333 U.S. 203.

⁹⁹ *Id.* at 205.

¹⁰⁰ *Id.* at 212. Professor Conkle describes this holding as implementing what would later become the *Lemon* and endorsement test’s first prong. See CONKLE, *supra* note 89, at 150.

¹⁰¹ *McCullum*, 333 U.S. at 217.

¹⁰² *Id.* at 227 (Frankfurter, J., concurring).

¹⁰³ 370 U.S. 421 (1962).

¹⁰⁴ *Id.* at 422.

course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that.¹⁰⁵

It was enough for the Court that the school district's prayer was merely "composed by government officials as part of a governmental program to further religious beliefs"¹⁰⁶ in order to find it unconstitutional; however, its concern with coercion was obvious.

Finally, in *Wallace v. Jaffree*,¹⁰⁷ the Supreme Court overturned an Alabama law allowing public schools to set aside one minute each day "for meditation or voluntary prayer."¹⁰⁸ The plaintiff claimed that his two daughters (one in kindergarten, the other in second grade) were being coerced into praying during the minute of silence due to the "ostracism [they faced] from their peer group class members if they did not participate."¹⁰⁹ The Court held that the moment of silence violated the *Lemon* test's first prong since it was "entirely motivated by a purpose to advance religion."¹¹⁰ Justice Stevens's majority opinion, however, did acknowledge the parent's fears of religious coercion, pointing out that, "[t]he individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority."¹¹¹

2. *Lee v. Weisman*: Coercion Takes Center Stage

After years of being relegated to dicta in the Court's Establishment Clause holdings, coercion finally took center stage in 1992, when in *Lee v. Weisman*¹¹² the Court relied upon the rationale to invalidate a public school district's practice of inviting a religious figure to deliver a nonsectarian invocation to students at its middle school graduation ceremony.¹¹³ Justice Kennedy, invoking *Engel*,

¹⁰⁵ *Id.* at 430-31.

¹⁰⁶ *Id.* at 425.

¹⁰⁷ 472 U.S. 38 (1985).

¹⁰⁸ *Id.* at 41-42.

¹⁰⁹ *Id.* at 42.

¹¹⁰ *Id.* at 56.

¹¹¹ *Id.* at 52.

¹¹² 505 U.S. 577 (1992).

¹¹³ *Id.* at 581-86.

among other cases, explained that there are “heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools,” and that “[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.”¹¹⁴ The Court’s opinion abandoned an objective reasonable person point of view and indicated that the “risk of indirect coercion” is to be measured from the point of view of the young student in the public school context: “What to *most believers* may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, *in a school context* may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.”¹¹⁵ Even though some people may not feel injured by standing for the prayer merely out of respect for others’ beliefs, Justice Kennedy explained that “for the dissenter of *high school age*, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real.”¹¹⁶ The prayer was coercive in this context, Justice Kennedy stressed, because the plaintiff was forced to make an impermissible choice between either participating in the offensive religious activity or protesting against it. While “mature adults” may be able to withstand the coercive force of such a dilemma, Justice Kennedy stated, “the State may not, consistent with the Establishment Clause, place *primary and secondary school children* in this position.”¹¹⁷

The *Lee* Court’s reliance on this coercion rationale did not repudiate the *Lemon* test (which is more protective of religious liberty) or formally adopt a coercion test for all Establishment Clause

¹¹⁴ *Id.* at 592.

¹¹⁵ *Id.* at 592 (emphasis added).

¹¹⁶ *Id.* at 593 (emphasis added). Justice Kennedy continued, explaining that “a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.” *Id.* Even though Justice Kennedy uses the “reasonable” language, similar to Justice O’Connor’s endorsement standard, it is clear that the Justice is still speaking of a schoolchild, of young age and in the pressurized environment of the public school, not Justice O’Connor’s objective reasonable person aware of the “history and ubiquity” of the Pledge.

¹¹⁷ *Id.* at 593 (emphasis added). Justice Kennedy cited “research in psychology” to confirm the “common assumption that adolescents are often susceptible to pressure from their peers towards conformity, [especially] in matters of social convention.” *Id.* at 593-94; *see also* *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (noting the difference between adults who are mentally equipped to withstand “religious indoctrination” and children more likely to be affected by “peer pressure”).

cases.¹¹⁸ Instead, the Court carefully explained that “*at a minimum*, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.”¹¹⁹ Thus, the Court preserved the principle, expressed in the preceding school prayer cases, that a finding of coercion is sufficient, but not necessary, for a violation of the Establishment Clause.¹²⁰ Unlike *McCullum*, *Engel*, *Wallace*, and the other school prayer cases, however, coercion was the main rationale for the decision in *Lee*. This most likely occurred as the result of a compromise formed between Justice Kennedy and Justices Blackmun, Stevens, O’Connor and Souter in order to create a majority in favor of invalidating the prayer.¹²¹ The school district and the (first) Bush Administration as *amicus curiae* urged the *Lee* Court to formally abandon the *Lemon* test and to find the graduation prayer constitutional under the theory that no one in the audience was coerced into religious conformity by the prayer.¹²² Initially, the Court appeared as if it would take this advice. Justice Kennedy and the Rehnquist-Scalia wing of the Court support the adoption of a coercion-based standard as the sole measure of an Establishment Clause violation, because it would give the government breathing room to accommodate the virtues of religious belief in public life.¹²³ The Chief Justice originally assigned Justice Kennedy to write a 5-4 majority opinion *upholding* the prayer in *Lee*; however, a change of heart several months later caused Justice Kennedy to defect and join the four Justices in favor of invalidating the prayer.¹²⁴ That change of heart, though, did not include abandoning his affinity for the coercion test. While the other four members of the *Lee* majority

¹¹⁸ See LEVY, *supra* note 88, at 200-01.

¹¹⁹ *Lee*, 505 U.S. at 587 (emphasis added).

¹²⁰ CONKLE, *supra* note 89, at 124; see generally Conkle, *Lemon*, *supra* note 92, at 865.

¹²¹ Justices Blackmun, Stevens, O’Connor and Souter joined in Justice Kennedy’s majority opinion. Justices Blackmun and Souter authored concurring opinions in which Justices O’Connor and Stevens both joined. *Lee*, 505 U.S. 599-631.

¹²² Douglas Laycock, “Noncoercive” Support for Religion: Another False Claim About the Establishment Clause, 26 VAL. U. L. REV. 37, 39, 53-54 (1991) [hereinafter Laycock, *Noncoercive*].

¹²³ LEVY, *supra* note 88, at 159.

¹²⁴ Linda Greenhouse, *The Blackmun Papers: Documents Reveal the Evolution of a Justice*, N.Y. TIMES, March 3, 2004, at A1. The personal letters and memoranda of Justice Blackmun from his time on the Court were released five years after his death in 2004 by the Library of Congress. Justice Kennedy’s *Lee v. Weisman* defection was “[o]ne of the surprises in the papers” and revealed “that after several months” of pondering his initial opinion upholding the prayers, Justice Kennedy thought it “looked quite wrong.” *Id.*

preferred to strike down the prayer using the endorsement test, Justice Kennedy preserved his personal opposition to that standard by writing a majority opinion declaring the prayers unconstitutional for being *coercive*, and “[a]s the swing man in the case, [he] apparently had his way with the other members of the majority who would have been on the losing side had they not capitulated to his views.”¹²⁵ So while the other members of the *Lee* majority signed on to Justice Kennedy’s coercion rationale, they were sure to make clear in two concurring opinions that a breach of *Lemon*’s lower endorsement threshold is still sufficient to violate the Establishment Clause.¹²⁶ Thus, *Lee* does not represent a break with the “coercion is sufficient, but not necessary” rationale of the school prayer cases that came before it, but nevertheless, its use of coercion as its deciding rationale has affected Establishment Clause jurisprudence. Now, a “coercion test” is often seen as a third analytical option for the Court and litigants to use alongside the *Lemon* and endorsement tests.¹²⁷

In sum, *Lee* provides an attractive precedent for an atheist parent concerned over the possible coercion of his child’s religious beliefs arising from the daily repetition of the words “under God,” and explains why such a parent would make the Establishment Clause the main thrust of his or her attack. Indeed, this was the main approach taken by both Newdow and Sherman in their suits against the Pledge.

B. *Endorsement and the Establishment Clause*

Rather than respond directly to a coercion claim based upon *Lee v. Weisman*, school districts and other supporters of “under God” in the Pledge have proffered an alternative framework in the endorsement test. The endorsement test was born with Justice O’Connor’s “clarification” of the *Lemon* test in her concurring opinion in *Lynch v. Donnelly*.¹²⁸ To survive the *Lemon* test, a government action must have (1) a secular purpose, (2) a principal or primary effect that neither advances nor inhibits religion, and (3)

¹²⁵ LEVY, *supra* note 88, at 202.

¹²⁶ Justice Blackmun wrote a concurring opinion with Justices Stevens and O’Connor joining. *See Lee*, 505 U.S. at 599-609. Justice Souter also wrote a concurring opinion, also with Justices Stevens and O’Connor joining. *See id.* at 609-31.

¹²⁷ CONKLE, *supra* note 89, at 124. *See, e.g., Santa Fe*, 530 U.S. at 310-13 (applying the coercion test alongside the endorsement test and *Lemon* test).

¹²⁸ 465 U.S. at 687-94 (O’Connor, J., concurring).

must not create an excessive entanglement with religion.¹²⁹ The endorsement test essentially dropped *Lemon's* third prong and evaluates prongs one and two from the perspective of a reasonable person.¹³⁰ More specifically, prong one asks “whether the government intends to convey a message of endorsement or disapproval of religion,” and prong two asks whether government action “ha[s] the effect of communicating a message of government endorsement or disapproval of religion,”¹³¹ to a “reasonable observer . . . deemed aware of the history and context of the community and the forum in which the religious [speech takes place].”¹³² Such a message of endorsement violates the Establishment Clause, Justice O’Connor explained, because it makes religion relevant “to a person’s standing in the political community,” by declaring to “nonadherents that they are outsiders,” and to “adherents that they are insiders”¹³³—regardless of whether anyone’s beliefs or actions are coerced by the religious speech. In *Lynch*, a government-owned crèche displayed on public grounds in the context of a secular Christmas holiday display was held not to violate *Lemon's* second prong.¹³⁴ Justice O’Connor, concurring, explained that although the religious content of the crèche was not removed by its secular surroundings, the context of the display negated a message of endorsement of that content.¹³⁵ Thus, a reasonable observer would not understand the crèche to be an endorsement of religion, but rather, part of a display celebrating a public holiday.¹³⁶ Conversely, in *County of Allegheny v. ACLU*,¹³⁷ the Court held that a similar government-owned nativity scene *standing alone* on the main steps of a county courthouse conveyed an impermissible message of endorsement to a reasonable observer, because “unlike in *Lynch*, nothing in the context of the display detracts from the crèche’s

¹²⁹ *Lemon*, 403 U.S. at 612-13.

¹³⁰ *See Lynch*, 465 U.S. at 690-92 (O’Connor, J., concurring).

¹³¹ *Id.* at 692 (O’Connor, J., concurring).

¹³² *Pinette*, 515 U.S. at 780 (O’Connor, J., concurring). Justice O’Connor explained that the reasonable observer of the endorsement test “is similar to the ‘reasonable person’ in tort law,” who is “a personification of a community ideal of a reasonable behavior, determined by the [collective] social judgment.” *Id.* at 779-80 (O’Connor, J., concurring) (internal quotations omitted).

¹³³ *Lynch*, 465 U.S. at 687 (O’Connor, J., concurring).

¹³⁴ *Id.* at 671, 681-83.

¹³⁵ *Id.* at 692 (O’Connor, J., concurring).

¹³⁶ *Id.* (O’Connor, J., concurring).

¹³⁷ 492 U.S. 573 (1989).

religious message.”¹³⁸

Thus, under the endorsement test, a court evaluating government religious speech must do so from the perspective of the reasonable observer “deemed aware of the history of the conduct in question, and . . . understand[ing of] its place in our Nation’s cultural landscape.”¹³⁹

C. Coercion versus Endorsement in the Pledge Debate: An Illustration

The contrast between the perspectives of the coercion test and endorsement test arguments in the Pledge of Allegiance debate was nowhere better demonstrated than in Newdow’s oral argument before the United States Supreme Court in *Newdow III*. Newdow tried numerous times to stress that the use of “under God” in the Pledge is only unconstitutional in the public school context because of the influence it wields over impressionable students like his daughter. The Court’s consistent reply to Newdow was that the words “under God” do not make the Pledge a prayer in the eyes of a reasonable observer, and declined to address how a five-year-old might perceive the Pledge. The discourse went as follows:

MR. NEWDOW: . . . I am saying I as her father have a right to know that when she goes into the public schools she’s not going to be told every morning to be asked to stand up, put her hand over her heart, and say your father is wrong, which is what she’s told every morning. . . .

QUESTION:¹⁴⁰ Well, she does have a right not to participate.

MR. NEWDOW: She has a—yes, except under *Lee v. Weisman* she’s clearly coerced to participate. If there was coercion in *Lee v. Weisman* —

QUESTION: That was a prayer.

MR. NEWDOW: Well, I’m not sure that this isn’t a prayer, and I’m—I am sure that the Establishment Clause does not require prayer. . . .

QUESTION: Yeah, but I suppose reasonable people could look at the pledge as not constituting a prayer. . . . [The Pledge]

¹³⁸ *Id.* at 598-602.

¹³⁹ *Newdow III*, 124 S. Ct. at 2323 (O’Connor, J., concurring) (citing *Pinette*, 515 U.S. at 781 (O’Connor, J., concurring)).

¹⁴⁰ Unfortunately, the oral argument transcripts provided by the United States Supreme Court on its website, <http://www.supremecourtus.gov>, do not specify the name of the Justice asking each question.

certainly doesn't sound like anything like a prayer.

MR. NEWDOW: Not at all.

QUESTION: Then why isn't [the] categorization of the remainder [of the Pledge] as descriptive, one nation under God, with liberty and justice for all [valid]? . . .

MR. NEWDOW: . . . It says under God. That's as purely religious as you can get and I think it would be an amazing child to suddenly come up with this knowledge of the history of our society and—what our nation was founded on.¹⁴¹

Later in the argument, a Justice of the Court used the familiar tactic of comparing “under God” to other public uses of religion that bear no relation to daily repetition in a public elementary school classroom:

QUESTION: Of course, we have — we have so many references to God in our daily lives in this country. We opened this session of the Court today — . . . with a reference and I suppose you would find that invalid as well.

MR. NEWDOW: . . . No one — when this Court opens, God save this honorable Court, nobody's asked to stand up, place their hand on their heart and affirm this belief. . . .

QUESTION: And you have no problem with, in God we trust, on the coins and that sort of thing?

MR. NEWDOW: If my child was asked to stand up and say, in God we trust, every morning the public schools led by her teachers —

QUESTION: It's alright for her to have the coins and use them and read them, but it's — it's the — the problem of being asked to say the pledge?

MR. NEWDOW: Well, first of all, under *Lee v. Weisman*, she is coerced in —

. . .

QUESTION: That was a prayer.¹⁴²

But was it a prayer to the five-year-old? This question is never addressed—and with good reason. As demonstrated in Part III.A, under *Lee v. Weisman* the daily recitation of the Pledge with the words “under God” in public school classrooms violates a child's Constitutional right to freedom of religious conscience.

¹⁴¹ Transcript of Oral Argument at 25-27, *Newdow III* (No. 02-1624).

¹⁴² *Id.* at 30-31.

III. ENDORSEMENT: PROVIDING AN ESCAPE-HATCH FROM
APPLYING *LEE V. WEISMAN*'S COERCION TEST TO "UNDER GOD"
IN THE PLEDGE OF ALLEGIANCE

When the reasoning of *Lee v. Weisman* is applied to the daily recitation of the Pledge with "under God" in the public classroom, the conclusion that the practice violates the constitution is unavoidable. Therefore, to avoid this result, one must escape from applying the coercion test in the first place. Two different arguments were taking place in the Pledge debate because the endorsement test provides this escape by offering supporters of "under God" a way to uphold the Pledge while avoiding an honest application of *Lee*.

A. *Lee v. Weisman Applied to "under God" in the Pledge*

Angered by the majority decision in *Lee*, Justice Scalia wrote a prescient dissent, decrying what he felt would be the absurd result dictated by the Court's reasoning: the unconstitutionality of the Pledge of Allegiance.¹⁴³ Justice Scalia pointed out that the religious invocation struck down in *Lee* was immediately preceded during the graduation ceremony by the Pledge, for which the students also stood.¹⁴⁴ He then warned that since the Pledge

include[s] the phrase "under God," recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction. If students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge. Must the Pledge therefore be barred from the public schools (both from graduation ceremonies and from the classroom)?¹⁴⁵

According to the Ninth Circuit, which faithfully applied *Lee* in *Newdow II*, the answer to Justice Scalia's hypothetical is yes. The Ninth Circuit first rejected in the Seventh Circuit's reasoning in *Sherman*¹⁴⁶ upholding "under God," because Judge Easterbrook failed to apply *Lee*'s coercion test in that case.¹⁴⁷ The Ninth Circuit

¹⁴³ *Lee*, 505 U.S. at 638-39 (Scalia, J., dissenting).

¹⁴⁴ *Id.* at 583 (Scalia, J., dissenting).

¹⁴⁵ *Id.* at 638-39 (Scalia, J., dissenting).

¹⁴⁶ 980 F.2d 437 (7th Cir. 1992). See *supra* Part I.A.2 and I.B.2 for a brief discussion of *Sherman*.

¹⁴⁷ *Newdow II*, 328 F.3d at 489-90.

maintained that reciting the Pledge requires the speaker to declare a belief in monotheism, thus rejecting the argument that the Pledge is merely a historical recognition that the founders believed in God.¹⁴⁸ Further, this profession of belief cannot be religiously-neutral, the court of appeals averred, because “[a] profession that we are 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.’”¹⁴⁹ The Ninth Circuit then noted *Lee*’s heightened concerns with coercive pressures in the public classroom, and stated that similarly here, the school district’s policy of daily recitation of the Pledge, even though voluntary, “places students in the untenable position of choosing between participating in an exercise with religious content or protesting.”¹⁵⁰

Another compelling case that *Lee* mandates the removal of “under God” from the public classroom was made, ironically, by Justice Thomas (a staunch accomodationalist) in his concurring opinion in *Newdow III*.¹⁵¹ After first making it clear that he believes *Lee* was “wrongly decided,” Justice Thomas nevertheless argued that as a matter of precedent, “under God” in the classroom is invalid post *Lee*.¹⁵² Significantly, Justice Thomas confronted the actual context-specific facts of *Newdow*’s case when conducting his analysis, and examined the Pledge from the viewpoint of an elementary school-aged child. He first pointed out that *Lee*’s graduation prayer was a one-time event before older teenagers with their parents nearby, as opposed to *Newdow*, where the Pledge is recited daily to “very young students, removed from the protection of their parents.”¹⁵³

Second, while the students in *Lee* could choose whether to attend their graduation ceremony where the prayer took place (although they may be coerced to go by peer pressure), Justice Thomas stressed that students are legally required to attend school, where the Pledge is delivered.¹⁵⁴

¹⁴⁸ *Id.* at 487 (“To recite the Pledge is not to describe the United States; instead it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and – since 1954 – monotheism.”).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 488.

¹⁵¹ 124 S. Ct. 2301, 2327 (2004) (Thomas, J., concurring).

¹⁵² *Id.* at 2330 (Thomas, J., concurring).

¹⁵³ *Id.* at 2328 (Thomas, J., concurring).

¹⁵⁴ *Id.* (Thomas, J., concurring).

Third, the Justice explained that the dissenting students in *Lee* would, at worst, have been coerced into standing for the graduation invocation, and thus would only appear to be participating in the prayer. In contrast, Newdow's young child would actually be coerced into saying the Pledge and reciting the words "under God."¹⁵⁵ Additionally, Justice Thomas pointed out that the coercive strength of the peer pressure to participate in the classroom Pledge is especially great because "failure to do so [would be] immediately obvious to one's peers."¹⁵⁶

Fourth, Justice Thomas argued that "[i]t is difficult to see how" stating that the United States is "'one Nation under God,' . . . does not entail an affirmation that God exists."¹⁵⁷ Refuting Chief Justice Rehnquist's assertion that "under God" is merely descriptive and does not constitute an affirmation of religious belief (and thus is not coercive),¹⁵⁸ Justice Thomas pointed out that the Court already explicitly stated in *West Virginia State Board of Education v. Barnette*¹⁵⁹ that reciting the Pledge "require[d] affirmation of a belief and an attitude of mind"¹⁶⁰ In agreement with Justice Thomas is Professor Douglas Laycock, who has maintained that the argument that "'under God' is not a religious statement" is simply "phony."¹⁶¹ He points out that the existence of God is the foundation of theistic faiths, and that the members of Congress who added "under God" to the Pledge were not coy about their intentions.¹⁶²

Indeed, Congress decided to add "under God" to the Pledge during the height of the Cold War and in response to fear from the threat posed by "godless communism."¹⁶³ The event that hastened

¹⁵⁵ *Id.* at 2329 (Thomas, J., concurring).

¹⁵⁶ *Id.* at 2329 n.3 (Thomas, J., concurring).

¹⁵⁷ *Newdow III*, 124 S. Ct. at 2329 (Thomas, J., concurring).

¹⁵⁸ The argument that the Pledge is devoid of religious content has been employed often to rebut the Ninth Circuit's decision. *See, e.g.*, Petitioners' Brief on the Merits at 30, *Newdow III* (No. 02-1624); *Newdow II*, 328 F.3d at 472 (O'Scannlain, J., dissenting) ("[T]he Pledge of Allegiance is simply not a 'religious act.'").

¹⁵⁹ 319 U.S. 624 (1943).

¹⁶⁰ *Newdow III*, 124 S. Ct. at 2329 (Thomas, J., concurring) (quoting *Barnette*, 319 U.S. at 631).

¹⁶¹ Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 162 (2004).

¹⁶² *Id.* at 224. On June 14, 1954 Congress added the words "under God" to the Pledge between the word "Nation" and the word "indivisible." 68 Stat. at 249.

¹⁶³ *See* RELIGION AND THE COLD WAR (Dianne Kirby ed., 2002). *See also* 100 CONG. REC. H1700 (1954) ("The unbridgeable gap between America and Communist Russia is a belief in Almighty God.") (statement of Rep. Rabaut). Adding "under

the addition to the Pledge was a sermon given by the Reverend George Docherty in Washington, D.C.'s New York Avenue Presbyterian Church in February 1954.¹⁶⁴ With President Eisenhower in attendance, Reverend Docherty argued from the pulpit that without a reference to God, one could “hear little Muscovites repeat a similar pledge to their hammer-and-sickle flag in Moscow with equal solemnity”¹⁶⁵ Reverend Docherty’s sermon was so effective that seventeen bills were subsequently submitted in Congress proposing to add “under God” to the Pledge.¹⁶⁶ One Senator who helped pass the act exclaimed, “What better training for our youngsters could there be than to have them, each time they pledge allegiance to Old Glory, reassert their belief, like that of their fathers and their fathers before them, in the all-present, all-knowing, all-seeing, all-powerful Creator.”¹⁶⁷ Additionally, when President Dwight D. Eisenhower signed the act adding “under God”, he declared that

[f]rom this day forward the millions of our school children will daily proclaim . . . the dedication of our Nation and our people to the Almighty. [N]othing could be more inspiring than to contemplate this rededication of our youth on each school morning, to our country’s true meaning Over the globe, . . . millions [have been] deadened in mind and soul by a materialistic philosophy of life In this way, we are reaffirming the transcendence of religious faith in America’s heritage and future¹⁶⁸

In light of this historical background, it is plain that “under God” was added to the Pledge for the very reason that it has religious content.

God” to the Pledge was first suggested by the Knights of Columbus, a Catholic organization, which in 1951 added “under God” to its own recitation of the Pledge at Knights meetings. CHRISTOPHER KAUFFMAN, *FAITH AND FRATERNALISM: THE HISTORY OF THE KNIGHTS OF COLUMBUS 1882-1982*, at 385 (1982).

¹⁶⁴ Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2118 (1996).

¹⁶⁵ *Id.* at 2118-19 (citations omitted).

¹⁶⁶ *Id.* at 2119 (citations omitted).

¹⁶⁷ 100 CONG. REC. H5915 (1954). Additionally, Representative Louis Rabaut, the House sponsor of the Act, stated that “the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins.” *See* 2 U.S.C.C.A.N. at 2341. Senator Homer Ferguson, the Senate sponsor of the bill, stressed that with the new Pledge and “under God” it was important to “remind the . . . young people of America, who take the pledge of allegiance to the flag more often than do adults, that it is not only a pledge of words but also of belief.” 100 CONG. REC. H6348 (1954).

¹⁶⁸ 100 CONG. REC. H8617 (1954).

Claims to the contrary seem disingenuous at best.

As mentioned by Justice Thomas, the Supreme Court has previously addressed the nature of the language of the Pledge of Allegiance. In holding that public schools cannot force students to recite the Pledge, the *Barnette* Court explained that its words are normative and ideological, and rejected a school district's similar claim that the second half of the Pledge is merely descriptive.¹⁶⁹ If "the phrase 'liberty and justice for all,' . . . must be accepted as descriptive of the present order rather than an ideal," the Court said, it "might to some seem an overstatement."¹⁷⁰ *Barnette* was decided before the 1954 addition of "under God" to the Pledge, but today those two words are contained in the same "second half" of the Pledge as "liberty and justice for all,"—the same second half that the current Chief Justice and others now claim to be descriptive, despite *Barnette's* clear holding otherwise.

In addition to being contrary to the intentions of Congress and the Court's reasoning in *Barnette*, the argument that pledging to a "nation, under God" does not affirm a belief in God is contrary to the logical, generally accepted meaning of the text. At the very least, to state that the United States is "one Nation under God" implicitly accepts that there is a god to be under in the first place. This common sense notion was even acknowledged by President George W. Bush who once explained that, "[w]hen we pledge allegiance to One Nation under God, our citizens participate in an important American tradition of humbly seeking the wisdom and blessing of Divine Providence."¹⁷¹

Even accepting for the sake of argument that, in the eyes of a reasonable observer, reciting "one Nation, under God" does not require a profession of belief that God exists, it is unrealistic to believe that a five-year-old child would perceive it this way.¹⁷² Indeed, studies in child psychology have shown that many children confuse the Pledge of Allegiance with a prayer because "God" is one of the few terms they immediately recognize.¹⁷³

¹⁶⁹ See *Barnette*, 319 U.S. at 633-34.

¹⁷⁰ *Id.* at 634 n.14.

¹⁷¹ See Amicus Curiae Brief of Americans United for Separation of Church and State, et al. in Support of Affirmance at 27, *Newdow III* (No. 02-1624), citing a letter by President George W. Bush to an "American Buddhist leader."

¹⁷² *Id.* at 11-13.

¹⁷³ *Id.* at 13 (citing ROBERT D. HESS & JUDITH V. TORNEY, *THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN* 105 (1967); Carol Seefeldt, "I Pledge . . .",

Finally, in his *Newdow III* concurrence, Justice Thomas countered Chief Justice Rehnquist's claim that since the Pledge is not a "prayer" it cannot fail the coercion test. While conceding that the Pledge is not a prayer, Justice Thomas reminded the Court that it has rejected past attempts to make distinctions between prayer and other forms of speech containing religious messages,¹⁷⁴ and has stated that under the Free Exercise Clause "the government cannot require a person to 'declare his belief in God.'"¹⁷⁵

In addition to Justice Thomas' criticisms, the "Pledge is not a Prayer" argument ignores that the Court has never stated that only a prayer can violate the coercion test or the Establishment Clause. The explicit concern of *Lee*'s coercion test is protecting freedom of "*belief and conscience*."¹⁷⁶ While this concern has most often arisen in the context of state mandated prayers in public schools,¹⁷⁷ this has not always been the case. For example, in *Stone v. Graham*¹⁷⁸ the Court held that the Establishment Clause prevents a public school from posting the Ten Commandments in a classroom because its effect would be "to *induce* the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."¹⁷⁹ Even though a prayer was not involved, the Court still recognized the coercive propensity of public school-sponsored religion. That freedom of conscience is somehow threatened by a prayer, but not other forms of school-sponsored religion, is simply an illogical distinction that ignores Court precedent.

Moreover, although the Pledge does not formally speak to God, its *substance* is similar to that of the coercive invocation struck down in *Lee*. While the invocation was certainly a prayer in form because it

CHILDHOOD EDUC. 308 (May/June 1982) (stating that "[c]hildren reveal [various] misconceptions about the Pledge. 'Well, I think it's like a prayer to God,' explains one girl." (second alteration in original)).

¹⁷⁴ *Newdow III*, 124 S. Ct. at 2329 (Thomas, J., concurring) (citing *Widmar v. Vincent*, 454 U.S. 263, 270 n.6 (1981) (stating that an alleged distinction between worship and religious speech lacks "intelligible content")).

¹⁷⁵ *Id.* at 2329 (Thomas, J., concurring) (citing *Torcaso v. Watkins*, 367 U.S. 488, 489 (1961)).

¹⁷⁶ *Lee*, 505 U.S. at 592 ("A state-created orthodoxy puts at grave risk that freedom of *belief and conscience* which are the sole assurance that religious faith is real, not imposed.") (emphasis added).

¹⁷⁷ See e.g., *Engel*, 370 U.S. 421. See also *supra* Part II.A.1 for a brief discussion of *Engel* and its holding.

¹⁷⁸ 449 U.S. 39 (1980).

¹⁷⁹ *Id.* at 42 (emphasis added).

was addressed to God, the substance of the prayer also contained many secular messages; it thanked God for “America, where diversity is celebrated and the rights of minorities are protected . . . ,” and “for [America’s] court system where all may seek justice.”¹⁸⁰ Additionally, the *Lee* prayer thanked God for giving the students the “[c]apacity for learning,” and for the achievement and “important milestone” of graduation.¹⁸¹ Likewise, the substance of the Pledge of Allegiance contains a similar mix of secular and religious statements. The Pledge heralds the secular virtues of our nation, such as “liberty, and justice for all,” while describing a relationship in which those qualities are subservient to God with the statement, “one nation under God.” Thus, the substance of both the invalid prayer in *Lee* and the Pledge illustrate a structure where secular qualities exist by virtue of God.¹⁸² The only difference is that a prayer is addressed to God in order to give thanks for these secular qualities. For the purposes of coercing the religious beliefs of a five-year-old, the characterization of the former as a coercive “prayer” and the latter as a noncoercive “secular statement of patriotism” is mere semantics. As Justice Thomas stated, the Court has rejected past attempts to make distinctions between worship and other religious speech.¹⁸³ If the Pledge is perceived as no different than a prayer in the eyes of a five-year-old, then it makes little difference that to a reasonable observer the words “under God” are patriotic, not religious, and descriptive, not normative. The child’s freedom of conscience—the main concern of *Lee*—is still threatened.

In sum, as long as *Lee v. Weisman* and its coercion test remain good law, Newdow’s claim that the daily repetition of the Pledge, with “under God,” in the public classroom is unconstitutional should be upheld. Although Justice Thomas has personally repudiated *Lee*, he and the Ninth Circuit should be commended for their honest application of its precedent—one that others have skillfully avoided using the endorsement test.

¹⁸⁰ *Lee*, 505 U.S. at 582.

¹⁸¹ *Id.*

¹⁸² Cf. Brief Amici Curiae of Christian Legal Society, et al. in Support of Petitioners at 3-4, *Newdow III* (No. 02-1624) (arguing that “under God” in the Pledge is a recognition that the United States is a “limited government grounded in the concept that individuals are endowed by God with certain inalienable rights,” and that “government is not the highest authority in human affairs”).

¹⁸³ See *Widmar*, 454 U.S. at 270 n.6.

B. *Escaping Lee via the Endorsement Test*

One looking to avoid a straightforward application of *Lee* and the inevitable result detailed by Justice Thomas has an escape-hatch: an application of the Court's endorsement test cases leads to the contrary result that the Pledge is constitutional under the Establishment Clause. Supporters of the Pledge have successfully used this tactic. In *Newdow III*, the school district failed to even cite *Lee* in the portion of its brief that purported to address whether the Pledge is coercive.¹⁸⁴ Instead, the school district cited *Lynch* and *Allegheny*, and analogized the placement of "under God" in the context of the other secular messages in the Pledge to *Lynch*'s placement of a crèche in the context of a secular Christmas display, concluding that because "the Pledge does not convey a message of religious belief or endorsement," it "cannot fail the coercion test."¹⁸⁵ *Lynch* and *Allegheny*, of course, examined the government's use of religion from the perspective of a reasonable observer, so while the school district's argument is correct as a matter of endorsement test precedent, it escapes addressing whether the Pledge coerces Newdow's daughter into religious belief in the *Lee* sense—from the perspective of "primary and secondary school children."¹⁸⁶

Justice O'Connor, in her *Newdow* concurring opinion similarly devoted six pages to declaring that no reasonable person, aware of the "history and ubiquity" of the Pledge would take the words "under God" to be an endorsement of religion, but instead would see "under God" as a mere "ceremonial deism" with nonreligious purposes.¹⁸⁷ The Pledge, she explained, has contained the words "under God" for fifty-years and is "our most routine ceremonial act of patriotism."¹⁸⁸ In contrast, Justice O'Connor illustrated, "novel or uncommon references to religion can more easily be perceived as government endorsements because the reasonable observer cannot be presumed to be fully familiar with their origins."¹⁸⁹ Just as the school district did, Justice O'Connor pointed to *Lynch*, and the ubiquity of including religious crèches in secular Christmas displays to support her point.

Justice O'Connor does purport to apply the coercion test at the

¹⁸⁴ Petitioners' Brief on the Merits at 30-34, *Newdow III* (No. 02-1624).

¹⁸⁵ *Id.* at 34 (emphasis added).

¹⁸⁶ *Lee*, 505 U.S. at 593.

¹⁸⁷ *Newdow III*, 124 S. Ct. at 2321-27 (O'Connor, J., concurring).

¹⁸⁸ *Id.* at 2323 (O'Connor, J., concurring).

¹⁸⁹ *Id.* (O'Connor, J., concurring) (emphasis added).

end of her opinion, however, she never leaves the objective perspective of her endorsement test argument when doing so. She stated that “[a]ny coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential . . . because such acts are simply not religious in character.”¹⁹⁰ Having already established that “under God,” in the eyes of the reasonable observer is a “ceremonial deism” devoid of any religious content, the Justice conveniently transplants this objective perspective into her coercion argument in order to escape the real question demanded by *Lee*’s coercion test: whether *a child of elementary school age* would believe “under God” was devoid of any religious content.

This tactic of using the endorsement test to avoid addressing the coercion issue is illustrative of an observation made a decade ago by Professor Leonard Levy, who has been critical of the Court’s Establishment Clause decisions. He contended that the multiple Establishment Clause tests do not serve any purpose but to allow the Justices to arrive at decisions that comport with their own policy preferences under the guise of an objective well-reasoned opinion.¹⁹¹ These opinions have been unconvincing, wrote Professor Levy, “because [the Justices] do not habitually take into serious consideration the best arguments advanced by dissenters, by those separately concurring, or by losing parties.”¹⁹² Indeed, because of the endorsement test, Justice O’Connor and others can escape the need to consider *Newdow*’s coercion test arguments at all.

C. *How the Pledge Can Coerce Without Endorsing*

Courts and commentators have assumed that the result suggested here—that “under God” violates the Establishment Clause under the coercion test, but does *not* violate the Establishment Clause as an endorsement of religion—is impossible. In his concurring opinion in *Lee*, Justice Blackmun expressed his agreement with Justice Kennedy’s coercion analysis in the majority opinion, but wrote to clarify that the Establishment Clause goes further than merely “restrain[ing the government] from compelling religious practices: It must not engage in them either. The Court repeatedly has recognized that a violation of the Establishment Clause is not

¹⁹⁰ *Id.* at 2327 (O’Connor, J., concurring).

¹⁹¹ LEVY, *supra* note 88, at 154, 156.

¹⁹² *Id.* at 223.

predicated on coercion.”¹⁹³ Nevertheless, Justice Blackmun signed on to the majority opinion because, “[g]overnment pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.”¹⁹⁴ Under this greater-includes-the-lesser logic, government use of religion that is strong enough to *coerce* religious beliefs or practices, must, a fortiori, also merely *endorse* religion.¹⁹⁵ Or, in other words, coercion is a rung higher than endorsement on the ladder of Establishment Clause violations.

As a result, using the endorsement test to deny *Newdow*’s claim would at first seem to require the result that “under God” is also not coercive, dispensing with the need to even conduct a comparison between the Pledge and *Lee*. If “under God” is not a strong enough use of religion to endorse, how can it possibly coerce? Indeed, this is the reasoning used by the school district against *Newdow* in lieu of actually applying *Lee*. It first concluded that the Pledge “does not convey a message of religious belief or endorsement,” and asserted that as a result, the Pledge “cannot fail the coercion test.”¹⁹⁶

The error with this reasoning, however, is that it falsely assumes that the type of coercion at issue in *Lee* and *Newdow* was coercion of the *reasonable observer* aware of the “history and ubiquity” of the religious speech. Logically, government religious speech strong enough to coerce the reasonable observer would also be an endorsement of religion in the eyes of that reasonable observer.

¹⁹³ *Lee*, 505 U.S. at 604 (Blackmun, J., concurring) (citation omitted). *See also id.* at 619 (Souter, J., concurring) (“[Our precedents] cannot, however, support the position that a showing of coercion is necessary to a successful Establishment Clause claim.”); *Allegheny*, 492 U.S. at 627-28 (O’Connor, J., concurring in part and concurring in the judgment). Concurring in *Allegheny*, Justice O’Connor wrote:

An Establishment Clause standard that prohibits only “coercive” practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis.

Id. (internal citations omitted).

¹⁹⁴ *Lee*, 505 U.S. at 604 (Blackmun, J., concurring).

¹⁹⁵ *Id.*; *see also* LEVY, *supra* note 88, at 202-03; CONKLE, *supra* note 89, at 124 (“Whenever there is coercion favoring religion, however subtle and indirect, there also is advancement or endorsement in violation of the Court’s other Establishment Clause tests.”).

¹⁹⁶ Petitioners’ Brief on the Merits at 34, *Newdow III* (No. 02-1624).

When on the same playing field, the greater-includes-the-lesser logic holds true. What the school district and others missed, however, is that the five-year-old child is not the reasonable observer. The *Lee* Court recognized this fact, and to be sure, it is essential to its reasoning that an impressionable schoolchild (unlike the reasonable observer) may be coerced by a school-sponsored religion.¹⁹⁷ While to an adult reasonable observer “under God” in the Pledge may be a “ceremonial deism,” devoid of religious content, to Newdow’s daughter, “under God” *is*, in the words of Justice O’Connor, a “*novel or uncommon* reference[] to religio[n]” because such a young child “cannot be presumed to be fully familiar with [the Pledge’s] origins.”¹⁹⁸ In reality, coercion of an elementary school age child and endorsement in the eyes of a reasonable observer are rungs on different Establishment Clause ladders altogether. Therefore, while Justice O’Connor may be right as a matter of endorsement test precedent that “under God” does not violate the Establishment Clause, Justice Thomas is just as correct that, as a matter of coercion test precedent (mainly, *Lee*), “under God” *does* violate the Establishment Clause. The conundrum created by this distinction had Newdow trapped in an Establishment Clause black hole from which the next Newdow will need to escape if he hopes to have any chance of persuading the Court to apply *Lee* to the Pledge. The answer to this problem may lie outside of the Establishment Clause altogether.

IV. AN ALTERNATIVE: CLOSING THE ENDORSEMENT TEST ESCAPE-HATCH WITH THE FREE EXERCISE AND DUE PROCESS CLAUSES

In order to prevent Pledge proponents from using the Establishment Clause’s endorsement test to avoid a straightforward application of *Lee v. Weisman*, the next Newdow should utilize the *other* religion clause. Essentially, the crux of Newdow’s argument against the Pledge was that “under God” interferes with his family’s

¹⁹⁷ For example, in arriving at its holding the *Lee* Court distinguished *Marsh*, 463 U.S. at 795, where the Court held that prayer services held prior to sessions of a state legislature are constitutional. Justice Kennedy pointed out that there are “[i]nherent differences between the public school system and a session of a state legislature.” *Lee*, 505 U.S. at 596. In the former, a state-dominated atmosphere exists that leaves a student “with no alternative but to submit” to a government-sponsored religious exercise. *Id.* at 597. In the latter, “adults are free to enter and leave” at will, and are not subject to the same coercive atmosphere. *Id.*

¹⁹⁸ See *Newdow III*, 124 S. Ct. at 2323 (O’Connor, J., concurring).

free exercise of atheism.¹⁹⁹ While *Lee* led Newdow to the Establishment Clause instead, there are Justices and scholars who argue that the coercion test has no place as an Establishment Clause test because the Free Exercise Clause already outlaws religious coercion.²⁰⁰ Indeed, one of the main purposes of the clause is to preserve religious voluntarism, or in other words, the right of individuals to make private choices about religion free from government interference.²⁰¹ At its core, the Free Exercise Clause bars government from regulating religious *beliefs*—precisely what has upset Newdow and other atheist parents about the Pledge.²⁰² If “under God” does coerce a child to implicitly affirm a belief in God in violation of the Free Exercise Clause, in turn, that infraction would also violate the child’s parents’ complimentary Fourteenth Amendment right to direct the religious upbringing of their child.²⁰³ The next attack against “under God” should lie here, and at the least, this rationale will be insulated from the endorsement test escape-hatch, and may force the Court to reconcile its decision in *Lee* and the Pledge.²⁰⁴

A. *The Free Exercise Clause: The Proper Home of Lee v. Weisman’s Coercion Test?*

Lee v. Weisman’s use of coercion as the lynchpin of an Establishment Clause analysis is controversial because preventing the coercion of religious acts and beliefs is already the centerpiece protection offered by the Free Exercise Clause. Justices of the Court have pointed out that “[t]o require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause

¹⁹⁹ In fact, Newdow asserted a free exercise claim in his original complaint to the District Court for the Eastern District of California, *see* Original Complaint at ¶¶ 78-79, *Newdow I* (No. CIV S-00-0495 MLS PAN PS) (“Plaintiff, under the Free Exercise Clause, has an unrestricted right to inculcate in his daughter — free from governmental interference — the atheistic beliefs he finds persuasive. The government’s use of the words ‘under God’ in the Nation’s Pledge of Allegiance infringes upon this right.”), and in his brief on the merits to the Ninth Circuit, *see* Brief of the Plaintiff/Appellant Appealing District Court’s Order Granting Defendant’s Motion to Dismiss at 56-57, *Newdow II* (No. 00-16423). These claims, however, were ignored by both courts. *See* *Newdow v. United States Cong.*, 328 F.3d 466 (9th Cir. 2002); *Newdow v. Cong. of the United States*, No. CIV S-00-0495 MLS PAN PS, 2000 U.S. Dist. LEXIS 22367 at *1-3 (E.D. Cal. May 25, 2000).

²⁰⁰ *See infra* Part IV.A.

²⁰¹ *See infra* Part IV.B.

²⁰² *See infra* Part IV.C.

²⁰³ *See infra* Part IV.D.

²⁰⁴ *See infra* Part IV.E.

violation would make the Free Exercise Clause a redundancy,²⁰⁵ or conversely, would reduce the Establishment Clause to an “ornament” with no meaning independent of the Free Exercise Clause.²⁰⁶ This redundancy argument has substantial support among Justices,²⁰⁷ legal scholars,²⁰⁸ and Court precedent.²⁰⁹ Professor Laycock forcefully argues that an exclusive Establishment Clause coercion standard would “abandon the goal of government neutrality toward and among religions.”²¹⁰ Regardless of whether coercion should have any proper role in Establishment Clause analysis, this debate illustrates that religious coercion is undisputedly a free exercise concern.²¹¹

²⁰⁵ *Allegheny*, 492 U.S. at 628 (O’Connor, J., concurring in part and concurring in the judgment) (citing Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 922 (1986) (“If coercion is also an element of the establishment clause, establishment adds nothing to free exercise.”)).

²⁰⁶ *Lee*, 505 U.S. at 621 (Souter, J., concurring).

²⁰⁷ Justice Souter agrees with Justice O’Connor, and has argued that because “laws that coerce non-adherents to ‘support or participate in any religion or its exercise,’ . . . by definition violate their right to religious free exercise,” using the coercion test “render[s] the Establishment Clause a virtual nullity.” *Lee*, 505 U.S. at 621 (Souter, J., concurring) (quoting *Allegheny*, 492 U.S. at 659-60 (Kennedy, J., concurring in part and dissenting in part)); see also *Lee*, 505 U.S. at 619 (Souter, J., concurring) (“[Our precedents] cannot, however, support the position that a showing of coercion is necessary to a successful Establishment Clause claim.”); *id.* at 604 (Blackmun, J., concurring) (“Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient.”).

²⁰⁸ LEVY, *supra* note 88, at 159, 201; see also Suszanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT. REV. 123, 135 (1992) (arguing that “[i]f all government coercion concerning religious beliefs violates the Free Exercise Clause, a coercion-based Establishment Clause does not prohibit anything that is not independently prohibited by the Free Exercise Clause”); see generally Laycock, *Noncoercive*, *supra* note 122, at 37; but see Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986) (arguing for a coercion-based Establishment Clause test); Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 843 n.171 (1993) (arguing that the Free Exercise Clause prevents government from coercing people out of practicing their religion, while the Establishment Clause prevents government from coercing people into practicing religion).

²⁰⁹ *Lynch*, 465 U.S. at 688; *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (“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.”); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (“The Establishment Clause, unlike the Free Exercise Clause does not depend upon any showing of direct governmental 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.”).

²¹⁰ Laycock, *Noncoercive*, *supra* note 122, at 69.

²¹¹ See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (stating that under the Free Exercise Clause, “government may not compel affirmation of

Additionally it shows that *Lee's* coercion-centered analysis, which led Newdow to centrally rely upon the Establishment Clause instead,²¹² was perhaps a majority-building anomaly instead of the declaration of a new stand-alone test. This suggests that *Lee's* coercion test may be a better fit as a free exercise rationale, and that the Free Exercise Clause may be the more logical place to assert a claim based upon a parent's concern over his child's freedom from religious belief. At least one federal court has applied *Lee's* coercion test in evaluating a free exercise claim.²¹³ The Free Exercise Clause's underlying rationale of protecting private religious choices, and its largely untapped bar against the regulation of religious beliefs, provides support for such an approach.

B. The Free Exercise Clause & Religious Voluntarism: Protecting Private Religious Choices

The "first and foremost" value of the Free Exercise Clause is religious voluntarism.²¹⁴ Voluntarism is "the principle of personal choice,"²¹⁵ and in the religion context, it represents the ideal that an individual should have "the freedom to make religious choices for oneself, free from governmental compulsion or improper influence."²¹⁶

religious belief") (citing *Torcaso*, 378 U.S. at 488); Laycock, *Noncoercive*, *supra* note 122, at 41; *see also* CHEMERINSKY, *supra* note 93, at 1149 n.1 ("Although these theories [including the coercion test] have been presented and discussed most by the Justices and commentators in the context of the Establishment Clause, they also can be used in Free Exercise Clause analysis.").

²¹² Although Newdow did raise free exercise claims in his original complaint, they were not addressed. *See supra* note 199.

²¹³ *See Meyers v. Loudoun County Sch. Bd.*, 251 F. Supp. 2d 1262, 1271-72 (E.D. Va. 2003).

²¹⁴ CONKLE, *supra* note 89, at 72; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 818-19 (1988) ("The free exercise clause was at the very least designed to guarantee freedom of conscience by preventing any degree of compulsion in matters of belief."); Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 517 (1968) ("Religious voluntarism, of course, is an important aspect of the freedom of conscience guaranteed by the free exercise clause."). There is considerable agreement among scholars that religious voluntarism is one of the major underlying rationales for both religion clauses, and its importance is also reflected in Article VI, Section Three of the Constitution, which states that "no religious test shall ever be required as a qualification to any office or public trust under the United States." William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 772 (1984).

²¹⁵ Van Alstyne, *supra* note 214, at 778.

²¹⁶ CONKLE, *supra* note 89, at 38; *see also* *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985)

The importance of voluntarism in the American conception of religious liberty can be traced back to the beginnings of colonization, when settlers left Europe to escape laws that forced them to worship in churches of the state's choosing, rather than their own.²¹⁷ As Justice Black explained in his oft-cited description of the history of the religion clauses in *Everson v. Board of Education*,²¹⁸ the colonies inherited Europe's practice of state-sponsored religion partially in the form of taxes designed to pay ministers and build churches.²¹⁹ This angered many colonists who felt that "individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."²²⁰ Tensions over religious taxes came to a head in Virginia in 1784, where a bill was introduced to institute a tax to pay the salaries of teachers of Christianity.²²¹ Leading the successful opposition to the bill, James Madison listed fifteen reasons in his *Memorial and Remonstrance Against Religious Assessments* for why the tax should be defeated.²²² Reason number one was religious voluntarism.²²³ Madison wrote that it was an "undeniable truth" that allegiance to a religion can only be directed "by reason and conviction, not by force or violence," and thus, "[t]he [r]eligion then of every man must be left to the conviction and conscience of every man," not civil government.²²⁴ Soon after the defeat of the tax, the Virginia legislature passed the Virginia Act for Establishing Religious Freedom.²²⁵ Thomas Jefferson authored the Act, and, similar to

(O'Connor, J., concurring) (stating that the protection of religious liberty is the "common purpose" of the religion clauses); *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring) (same); *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947) (same). Additionally, Professor William Van Alstyne has described religious voluntarism as deriving "largely from the moderate spirit of religious toleration associated with the Quaker tradition of Pennsylvania." Van Alstyne, *supra* note 214, at 773.

²¹⁷ See *Everson*, 330 U.S. at 8.

²¹⁸ *Id.* at 13.

²¹⁹ *Id.* at 10-11.

²²⁰ *Id.* at 11.

²²¹ See JOHN T. NOONAN, JR. & EDWIN MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM 171 (2001).

²²² See James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), reprinted in NOONAN, *id.* at 173-78.

²²³ See *id.* at 173.

²²⁴ See *id.*

²²⁵ Virginia Act for Establishing Religious Freedom, VA. CODE ANN. § 57-1 (Michie 1995) (enacted Jan. 16, 1786).

Madison, he stressed religious voluntarism by declaring that “[a]lmighty God hath created the mind free,” and “all attempts to influence it . . . are a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do”²²⁶

Although framers like Jefferson and Madison often made statements supporting complete neutrality with respect to all religious matters,²²⁷ this “substantive idea of religious liberty was firmly rooted . . . not in secular philosophy, but rather in theology,” reflecting the dominance of Christianity in early American political and social life.²²⁸ Thus, this early conception of religious liberty (i.e., voluntarism) was one of, what Professor Daniel Conkle calls, “denominational equality”: government encouragement of Christianity *as a whole* was permissible as long as it did not interfere with individuals’ freedom of conscience *within* sects of Christianity.²²⁹ This Christian understanding of religious voluntarism dominated Supreme Court precedents²³⁰ up until the 1960s, when the Court abandoned its legal favoritism of Christianity and adopted an approach of “religious neutrality”²³¹—not only between different

²²⁶ See *id.* The bill further denounces:
the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, have established and maintained false religions over the greatest part of the world, and through all time.

Id.

²²⁷ In his *Remonstrance*, Madison argues that matters of religion should be “wholly exempt” from the cognizance of government. NOONAN, *supra* note 221, at 173. Jefferson, in a letter to the Danbury Baptist Association, famously wrote: “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State.” See *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

²²⁸ Daniel O. Conkle, *The Path of American Religious Liberty: From Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 3-5 (2000) [hereinafter, Conkle, *Path*].

²²⁹ *Id.* at 6-8.

²³⁰ See, e.g., *United States v. MacIntosh*, 283 U.S. 605, 625 (1931) (stating that “we are a Christian people according to one another the equal right of religious freedom”) *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (stating that “this is a Christian nation”).

²³¹ Conkle further acknowledges and discusses the distinctions between “formal”

religions,²³² but also between religion and non-religion.²³³ The Court explicitly detailed this shift to neutrality in *Wallace v. Jaffree*.²³⁴ In that case, the Court used the Establishment Clause to overturn an Alabama law which allowed for a minute of silence each day in public schools “for meditation or voluntary prayer.”²³⁵ Before applying the *Lemon* test to strike down the law, Justice Stevens explained that it was once thought that religious voluntarism merely prevented government from preferring “one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith.”²³⁶ Justice Stevens explained, however, that “the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith *or none at all*.”²³⁷

C. *The Free Exercise Clause’s Absolute Bar on the Regulation of Beliefs*

Reflecting its core value of religious voluntarism,²³⁸ the Free Exercise Clause protects freedom of conscience by absolutely barring

and “substantive” religious neutrality, coined by Professor Laycock. See Conkle, *Path*, *supra* note 228, at 9 (citing Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990)). However, this distinction is not critical for purposes of the discussion here.

²³² See, e.g., *Everson*, 330 U.S. at 15 (“The ‘establishment of religion’ clause . . . means at least [that the Federal Government cannot] pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

²³³ See Conkle, *Path*, *supra* note 228, at 8-10; see also *Wallace*, 472 U.S. at 40; *Walz v. Tax Comm’n of N. Y.*, 397 U.S. 664, 695 (1970) (Harlan, J., concurring) (“Neutrality and voluntarism stand as barriers against the most egregious and hence divisive kinds of state involvement in religious matters.”); *Schempp*, 374 U.S. at 216 (“[T]his Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another.”); *id.* at 305 (Goldberg, J., concurring) (“The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion.”); *Torcaso*, 367 U.S. at 495 (“[N]either a State nor the Federal Government can constitutionally . . . pass laws or impose requirements which aid all religions as against non-believers.”); *Everson*, 330 U.S. at 18 (“[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers.”).

²³⁴ 472 U.S. 38 (1985).

²³⁵ *Id.* at 40.

²³⁶ See *id.* at 52 (footnotes omitted).

²³⁷ *Id.* at 53 (footnotes omitted) (emphasis added). Justice Stevens was particularly cognizant of the threat of persecution against the disbeliever, recognizing that “the political interest in forestalling intolerance extends beyond intolerance among Christian sects – or even intolerance among ‘religions’—to encompass intolerance of the disbeliever and the uncertain.” *Id.* (footnotes omitted).

²³⁸ See *supra* Part IV.B.

any government attempts to compel, outlaw, or regulate religious belief or disbelief.²³⁹ This includes a direct attempt to compel affirmation of religious belief. In *Torcaso v. Watkins*,²⁴⁰ the Court overturned a Maryland law that required individuals to declare a belief in the existence of God as a prerequisite to holding public office.²⁴¹ Torcaso was offered a commission from the Governor of Maryland to serve as a Notary Public but was forced to decline because he refused to take the religious oath.²⁴² Torcaso sued for his commission on the grounds that the requirement violated his free exercise rights.²⁴³ The Court agreed, and in striking down the religious test, pointed out that many colonists had left Europe for America to escape such religious tests so they could practice their religion freely.²⁴⁴ According to the Court, the Free Exercise Clause was passed in order to prevent such regulation of beliefs, and thus government cannot “constitutionally pass laws or impose requirements which aid all religions as against non-believers, and [cannot] aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.”²⁴⁵

As central as the freedom of belief is to the Free Exercise Clause, it rarely forms the basis for litigation.²⁴⁶ Instead, most free exercise challenges involve laws that burden religiously motivated *conduct*.²⁴⁷

²³⁹ *Employment Div.*, 494 U.S. at 877 (“The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.”) (citing *Sherbert* and *Torcaso* among other cases); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (“The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such.”); *Torcaso*, 367 U.S. at 495; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Reynolds*, 98 U.S. at 164.

²⁴⁰ 367 U.S. 488 (1961).

²⁴¹ *Id.* at 496.

²⁴² *Id.* at 489.

²⁴³ *Id.*

²⁴⁴ *Id.* at 490.

²⁴⁵ *Id.* at 495.

²⁴⁶ See CONKLE, *supra* note 89, at 75; GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1445 (14th ed. 2001); see also *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 523 (1993) (“The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.”).

²⁴⁷ See CONKLE, *supra* note 89, at 75; GUNTHER, *supra* note 246, at 1445. Although laws that attempt to regulate religious *belief* are in all cases invalid, laws that regulate religious *conduct* can be justified by certain government interests. In *Employment Div.*, 494 U.S. at 878, the Court announced that neutral laws of general applicability that happen to regulate religious conduct are valid under the Free Exercise Clause as long as government can show there is a rational basis for the law. 494 U.S. 872, 878

Some commentators maintain that the lack of litigation over attempts to control religious beliefs is due to the fact that our government is not inclined to make such attempts.²⁴⁸ While today this may be generally true, in 1954 Congress expressly stated that the daily inculcation of children with a religious message was *its goal* when passing the law that added “under God” to the Pledge.²⁴⁹ In light of this express Congressional purpose, is hard to see how the addition of “under God” is not a blatant “governmental regulation of religious beliefs as such.”²⁵⁰ Congress cleverly used the Pledge and its daily recitation in the public classroom as a vehicle for the delivery of an affirmation of the existence of God to the minds of millions of schoolchildren. Applying *Torcaso* and *Lee* to this attempt at mind-control results in the unconstitutionality of “under God,” under the Free Exercise Clause.

Torcaso held that the Free Exercise Clause prevents government from legally compelling an individual to affirm a belief in God.²⁵¹ Similarly, *Barnette* held that the Free Speech Clause prevents government from legally compelling an individual to recite the (pre-“under God”) Pledge of Allegiance.²⁵² Reciting the Pledge of Allegiance with the words “under God” requires the speaker to affirm a belief in God.²⁵³ Thus, as a matter of free exercise, *Torcaso* would now appear to also bar government from *legally compelling* an individual to recite the Pledge with “under God.” Of course, post-*Barnette*, public schools may no longer legally compel students to say the Pledge, but instead must make participation voluntary. This

(1990). A law that burdens religious conduct is only held to the higher standard of strict scrutiny if it regulates religious conduct for the reason that it is religious. *Id.* at 877.

²⁴⁸ Professor Erwin Chemerinsky wrote that “[g]overnments . . . do not adopt laws prohibiting or requiring thoughts; statutes invariably regulate conduct.” CHEMERINSKY, *supra* note 93, at 1200. Professor Daniel Conkle similarly states, “[a]s a practical matter, it is virtually impossible – in the absence of incredibly coercive and intrusive means – to control the inner thoughts that people hold, and thankfully, our contemporary government is not inclined to make the effort.” CONKLE, *supra* note 89, at 75.

²⁴⁹ See *supra* notes 163-168 and accompanying text for a discussion of Congress’s addition of “under God” to the Pledge of Allegiance.

²⁵⁰ See *Sherbert*, 374 U.S. at 402.

²⁵¹ *Torcaso*, 378 U.S. 488.

²⁵² *Barnette*, 319 U.S. at 642.

²⁵³ See *supra* notes 158-173 and accompanying text for a discussion of why the words “under God” in the Pledge do have religious content and cause the speaker to affirm the existence of God.

would solve both the Free Exercise problem under *Torcaso*, and the Free Speech problem under *Barnette*, were it not for *Lee*, which declared that subtle coercive pressure “can be as real as any overt compulsion.”²⁵⁴ As demonstrated by Part III.A, above, there is more of a threat of subtle coercive pressure involved with the Pledge of Allegiance than there was in *Lee*. Therefore, substitute *Torcaso* and *Barnette*’s legal compulsion with *Lee*’s coercion, and the daily repetition of the Pledge with “under God” in public schools violates both the Free Exercise Clause and the Free Speech Clause. That the Pledge would violate both the Free Exercise and Free Speech Clauses simultaneously makes sense given that “[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment,”²⁵⁵ and that some scholars suggest that the Free Exercise Clause is really no more than a protection of religious speech.²⁵⁶ Thus, if being coerced into reciting the Pledge of Allegiance violates Free Speech, reciting the religious part of the Pledge, “under God” should also violate the Free Exercise Clause. It is a conclusion that was recognized by the Seventh Circuit in *Sherman v. Community Consolidated School District 21*.²⁵⁷ Judge Easterbrook wrote that:

[i]f as *Barnette* holds no state may require anyone to recite the Pledge, and if as [*Lee*] hold[s] the recitation by a teacher or rabbi of unwelcome words is coercion, then the Pledge of Allegiance becomes unconstitutional under all circumstances, just as no school may read from a holy scripture at the start of class. As an analogy this is sound. As an understanding of the first amendment it is defective²⁵⁸

“Defective,” because Judge Easterbrook went on to use the endorsement test to escape applying *Lee*’s coercion test in the first place, and concluded, similarly to Justice O’Connor’s concurring *Newdow III* opinion, that “under God” is religiously meaningless ceremonial deism.²⁵⁹

Under the Free Exercise Clause, however, there is no

²⁵⁴ *Lee*, 505 U.S. at 593.

²⁵⁵ *Id.* at 591.

²⁵⁶ Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 71 (2001).

²⁵⁷ 980 F.2d 437 (7th Cir. 1992).

²⁵⁸ *Id.* at 444.

²⁵⁹ See *id.* at 445-48; see also *supra* Part II.B.2 and accompanying text for a discussion of the Seventh Circuit’s decision in *Sherman*.

endorsement test escape from coercion. Additionally, a Free Exercise Clause claim presents a better alternative than a Free Speech claim against the Pledge because of Newdow's other concern: the ability of a parent to direct the religious (or non-religious) education of his child without government interference.

D. The Fundamental Right of Parents to Direct the Religious Upbringing of Their Children

It is common sense that parents shape their children's religious beliefs and practices to match their own, and indeed many faiths require parents to do so.²⁶⁰ Accordingly, the Court has held that parents have a fundamental, Fourteenth Amendment due process²⁶¹ right to direct the religious upbringing of their children free from government interference.²⁶² Thus, in the past, when a free exercise claim has been brought on behalf of a child, courts have often also treated the claim as one where the parents' rights are at stake as well.²⁶³

This right has its roots in the landmark case of *Pierce v. Society of Sisters*.²⁶⁴ In *Pierce*, an Oregon law compelled all children between the ages of eight and sixteen to attend public school.²⁶⁵ A private religious school brought suit, arguing that because the law denied parents the opportunity to choose a religious education for their child, the law denied parents their due process right to direct their child's education.²⁶⁶ The Court agreed, and held that "the

²⁶⁰ See Note, *Children as Believers: Minors' Free Exercise Rights and the Psychology of Religious Development*, 115 HARV. L. REV. 2205, 2205 (2002) [hereinafter *Children*].

²⁶¹ U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty or property, without due process of law.").

²⁶² See *Yoder v. Wisconsin*, 406 U.S. 205, 233 (1972) (holding that a compulsory school law "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children under their control," and thus, the Free Exercise Clause requires an exemption for the children of Amish parents). *But see id.* at 241-46 (Douglas, J., dissenting in part) (criticizing the *Yoder* Court for allowing parents to dictate their children's beliefs when the Bill of Rights is supposed to afford children the same protections as adults).

²⁶³ See *Children*, *supra* note 260, at 2212. The author of this note points out the anomaly that when courts review free exercise challenges brought by parents on behalf of their children they "generally do not bother to disaggregate the children's and parent's rights," and suggests a "parents' rights" theory as one possible explanation. *Id.* at 2209-10.

²⁶⁴ 268 U.S. 510 (1925).

²⁶⁵ *Id.* at 531.

²⁶⁶ *Id.* at 532-34.

fundamental theory of liberty . . . excludes any general power of the state to standardize its children,” by mandating that they receive a public education.²⁶⁷ The Court stated that “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”²⁶⁸

Nearly fifty years later in *Wisconsin v. Yoder*,²⁶⁹ the Supreme Court explained that a child’s preparation for “additional obligations” includes the specific right of parents to direct the formation of their children’s religious beliefs.²⁷⁰ In *Yoder*, Amish parents challenged their conviction under a state law mandating school attendance for all children until the age of sixteen.²⁷¹ The parents argued that their religious beliefs barred their fourteen and fifteen-year-old children from attending organized schooling, and thus, compliance with the law would violate both their free exercise rights and their right to direct the education of their children under the Due Process Clause.²⁷² The Supreme Court agreed, overturned the convictions, and stated that “*Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children.”²⁷³ The Court further held that when this right is “combined with a free exercise claim . . . more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement under the First Amendment.”²⁷⁴

Thus, the Court has recognized that the free exercise rights of a child, which includes freedom from government influence over conscience, goes hand-in-hand with the right of that child’s parents to direct what beliefs with regard to religion will be instilled in the child—mirroring exactly Newdow’s primary objection over “under God” in the Pledge of Allegiance.

E. Insulating the Coercion Issue from Endorsement

This alternative free exercise-due process approach offers the

²⁶⁷ *Id.* at 534-35.

²⁶⁸ *Id.* at 535.

²⁶⁹ 406 U.S. 205 (1972).

²⁷⁰ *Id.* at 233.

²⁷¹ *Id.* at 207.

²⁷² *Id.* at 208-09.

²⁷³ *Id.* at 233.

²⁷⁴ *Id.* (quoting *Pierce*, 268 U.S. at 535).

attractive benefit of insulating a *Lee* coercion claim against the Pledge from the Establishment Clause's endorsement test escape-hatch. As long as the dichotomy between the endorsement test's adult reasonable observer perspective, and the coercion test's school-aged child perspective exists, proponents of the Pledge will always be able to circumvent applying the *Lee* coercion test by resorting to the endorsement test. Either by declaring that "under God" is not an endorsement to the reasonable person and therefore *cannot* fail the coercion test,²⁷⁵ or by transplanting the endorsement test's reasonable person point-of-view into the coercion test analysis,²⁷⁶ supporters of "under God" can use the inconsistent state of Establishment Clause jurisprudence to their advantage.

In contrast, the Free Exercise Clause's prohibition on the regulation of beliefs is often stated,²⁷⁷ but rarely utilized in litigation.²⁷⁸ As a result, a future litigant would have almost a blank slate to work with, free from the tortured tests of the Establishment Clause, which could be used to advantage by focusing the claim, and the Court's attention, on the basic principles of the Free Exercise Clause's bar on regulation of beliefs: voluntarism and noncoercion.²⁷⁹ This could help force a discussion towards whether "under God" actually jeopardizes a child's freedom of belief and conscience in the *Lee* sense, and away from irrelevant discussions about how the Pledge compares to non-classroom public references to God. Additionally, a focus on voluntarism and noncoercion could open the door for serious Court consideration of psychological studies demonstrating that the inculcation of religious references does have an effect on a child's developing belief system.²⁸⁰ While such studies were presented to the Court in *Newdow III*, they were completely ignored in favor of the Establishment Clause's concepts of endorsement and ceremonial deism.²⁸¹

²⁷⁵ See *supra* note 196.

²⁷⁶ See *supra* note 190 and accompanying text.

²⁷⁷ See *supra* note 239 and accompanying text.

²⁷⁸ See *supra* note 246 and accompanying text.

²⁷⁹ See *supra* Part IV.B for a discussion of the Free Exercise Clause's underlying principle of religious voluntarism.

²⁸⁰ See *supra* note 173 and accompanying text. Cf. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954) (relying upon psychological studies to demonstrate that public school segregation denied African-Americans equal protection by "generat[ing] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

²⁸¹ *Id.*

Once this foundation is laid, the litigant would then be in a position to point to the Court's main free exercise case relying on the freedom of belief principle—*Torcaso v. Watkins*²⁸²—for support. When utilized in combination with *Lee*'s coercion principle, a case can be made that the Pledge, with “under God,” coerces impressionable schoolchildren into believing and affirming the existence of God, in violation of the Free Exercise Clause. In turn, this governmental interference with a child's thoughts obstructs a parent from being the sole, directing influence in that child's religious belief system, in violation of the Fourteenth Amendment.

Admittedly, this approach has many unknowns,²⁸³ and Justices bent on upholding the Pledge are unlikely to be deterred no matter what arguments or evidence are presented to them. But at the least, forcing the Court to somehow explain away the rationale of *Lee* while upholding “under God” may expose the hypocrisy of claiming that a one-time prayer containing secular and religious messages can coerce a middle-school student, but yet a daily Pledge containing similar secular and religious messages cannot coerce a five-year-old. A free exercise-plus-due process claim has the potential to focus attention where it properly belongs—on schoolchildren and their parents, not on the Pledge. Far too much attention during the *Newdow* controversy was paid to Pledge itself and other uses of God in public life that have no bearing on the question of whether “under God” causes a child and her parents injury when employed in the classroom. This shift in perspective would take place by taking from proponents of “under God” use of the Establishment Clause's endorsement test, which makes it possible to avoid choosing between overturning *Lee v. Weisman*, or honestly applying its coercion test to the use of the Pledge of Allegiance in public schools.

CONCLUSION

Lee v. Weisman must have looked enticing to Michael Newdow. Despite its promise, it led him to an Establishment Clause jurisprudence in disarray, a Court unwilling to choose one analytical

²⁸² 367 U.S. 488 (1961).

²⁸³ This comment does not purport to address all of the possible pitfalls that may exist in asserting such a free exercise claim, but rather to suggest that this may be a more attractive avenue to explore.

test, and opponents who have used this to their advantage to avoid the unavoidable result—acknowledged by Justices Scalia and Thomas, and Judge Easterbrook—that “under God” in the public classroom is unconstitutional under *Lee v. Weisman*. Newdow certainly is not the only atheist parent to come home dismayed that his child now reflexively believes that the United States is a “nation under God” because of the daily recitation of the Pledge of Allegiance. When the next Newdow brings his claim before the federal courts, he will have the opportunity to learn from Newdow’s experience and try a new approach towards getting the Court to seriously confront whether the Pledge adversely influences a child’s religious freedom of conscience. That new approach could lie in the Free Exercise and Due Process Clauses.