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JUSTICE O’CONNOR’S TEST FOR CEREMONIAL DEISM

Michael Castagna

I. INTRODUCTION.....	Error! Bookmark not defined.
II. THE ORIGIN AND USE OF THE TERM AND CONCEPT “CEREMONIAL DEISM”	4
<i>A. Academic Coinage of the Term and High Court Application Thereof</i>	4
<i>B. Subsequent Use by the Lower Courts</i>	7
III. JUSTICE O’CONNOR’S TEST FOR CEREMONIAL DEISM: CONTEXT AND BRIEF OVERVIEW	10
IV. EXAMINING THE TEST FOR CEREMONIAL DEISM.....	13
<i>A. Assumptions Foundational to the Test</i>	13
<i>B. The Test’s Four Prongs</i>	15
1. “History and Ubiquity”	15
2. “Absence of Worship or Prayer”	21
3. “Absence of Reference to Particular Religion”	25
4. “Minimal Religious Content”	27
V. CONCLUSION	28

I. INTRODUCTION

This essay addresses an evolving legal concept, “ceremonial deism.” The Establishment Clause of the First Amendment bars government from “pass[ing] laws which aid one religion, aid all religions, or prefer one religion over another.”¹ The legal concept “ceremonial deism,” however, would shield the Pledge of Allegiance, legislative prayers, and other government references to religion from strict analysis under the Lemon test, endorsement test, and coercion test—i.e., from routine adjudication under the Establishment Clause. To illustrate, consider a challenge to the constitutionality of the Pledge. “The addition of the words ‘under God’ to the Pledge does, and was [legislatively] intended to, have the effect of endorsing religion.”² Granting this, the Pledge would seem destined to fail the Lemon and endorsement tests, in view of its impermissible religious purpose and effect.³ On the strength of “ceremonial deism,” however, a court may declare that “under God” is merely ceremonial, and that it does not offend the Establishment Clause. In support of this claim, the court will perform a sort of judicial taxidermy, whereby religious words are killed if only to keep them on hand, safely, in civic halls. Ceremonial deism invites such results by underplaying the sacred import of governmental references to religion, and by stressing their value as means to secular ends. These secular ends include recognition of the role that religion has played in our nation’s development;⁴ creation of

¹ *Everson v. Board of Education of Ewing*, 330 U.S. 1, 15 (1947).

² Stephen B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2091 (1996).

³ The endorsement test is often regarded as a refinement of the Lemon test, which examines a challenged statute by means of a three-prong analysis: 1) does the statute have a secular purpose; 2) is it the primary effect of that statute to advance or inhibit religion; 3) does the statute excessively entangle government with religion. (See *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971)). The endorsement test couples prongs one and two of the Lemon test and concentrates on whether a statute intended an endorsement and whether an endorsement is nonetheless perceived. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (O’Connor, J., concurring).

⁴ See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O’Connor, J., concurring) (“[A]lthough these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes. One such purpose is to commemorate the role of

a ceremonial atmosphere during civic events;⁵ and inspiration for overcoming a national crisis.⁶ Ceremonial deism, in other words, stands for the proposition that it is appropriate to retain government-sponsored religious speech for either of two reasons: to impart historic reflections about our nation's past (the "description" argument), or to establish an appropriate air of dignity during public assemblies (the "solemnization" argument).

Reliance on the argument for ceremonial deism creates special problems for a pluralistic society. With each passing year, government acknowledgments of religion stand to marginalize more individuals, whether adherents to minority religions or out-and-out unbelievers. Tests under the Establishment Clause, therefore, should give sufficient attention to the effects of official references to religion. Under the logic of ceremonial deism, however, a court need not wrestle with the marginalizing effect of an official acknowledgment; rather, the court may deny the threat of marginalization altogether by declaring the words at issue wholly void of religious force.

In 2005, Justice O'Connor delivered the high court's first sustained analysis of ceremonial deism. Her analysis culminated in a modification of the endorsement test—in the form of a four-prong test to determine valid instances of ceremonial deism. This essay addresses her test. Section II of this essay provides an overview of the origin and use of the term ceremonial deism. Section III introduces Justice O'Connor's test for ceremonial deism and the context in which she presented it. Section IV begins my critique of the test, pinpointing assumptions made by Justice O'Connor prefatory to her submission of the test's prongs, followed by an evaluation of the prongs themselves. Finally, Section V concludes this essay by

religion in our history.”).

⁵ *Lynch v. Donnelly*, 466 U.S. 668, 716 (1984) (Brennan, J., dissenting) (“[T]hese references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge....”).

⁶ *Id.*

arguing that Justice O'Connor's test fails to legitimate ceremonial deism.

II. THE ORIGIN AND USE OF THE TERM AND CONCEPT "CEREMONIAL DEISM"

A. *Academic Coinage of the Term and High Court Application Thereof*

The term "ceremonial deism" originated in a 1962 lecture by Eugene Rostow, dean of Yale Law School.⁷ The coinage might well have died in its academic crib—the lecture remains unpublished—if not for Harvard Professor Arthur Sutherland's reference to the term in a 1964 book review.⁸ According to Sutherland, Rostow coined the term in order to describe a "class of public activity, which ... could be accepted as so conventional and uncontroversial as to be constitutional"⁹—i.e., to describe governmental expressions of religion that need not be adjudged violations of the Establishment Clause.

The term ceremonial deism was explicitly used in three Supreme Court cases—in dissent in *Lynch v. Donnelly* (1984),¹⁰ in the majority opinion in *County of Allegheny v. ACLU* (1989),¹¹ and in concurrence in *County of Allegheny*.¹²

Justice Brennan used the term in *Lynch*, which upheld a city-maintained Christmas display among whose Yule tree and Santa-related decorations appeared a crèche.¹³ In his dissent, Justice Brennan explored principles under which the Court weighs government acknowledgments of religion.¹⁴ He confessed to uncertainty about this area of jurisprudence but nonetheless extracted a baseline: "I would suggest that such practices as the designation of 'In

⁷ Davison M. Douglas, *Ceremonial Deism*, in *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES* 259 (Paul Finkelman ed., 2006).

⁸ Calvin Massey, *The Political Marketplace of Religion*, 57 *Hastings L.J.* 1, 54 n. 211 (2005).

⁹ Epstein, *supra* note 2, at 2174 n. 29.

¹⁰ *Lynch*, 466 U.S. at 716 (Brennan, J., dissenting).

¹¹ *Allegheny*, 492 U.S. at 595 n. 46, and 603.

¹² *Id.* at 630 (O'Connor, J., concurring).

¹³ *Lynch*, 465 U.S. at 670.

¹⁴ *Id.* at 715-716.

God We Trust’ as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow’s apt phrase, as a form of ‘ceremonial deism,’ protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.”¹⁵ These practices and references, he wrote, “are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases.”¹⁶

Justice Blackmun referred to ceremonial deism in *County of Allegheny*, which announced two decisions—one upholding a public holiday display that featured a Christmas tree, menorah, and sign promoting “liberty,”¹⁷ located outside the City-County Building; the other decision holding against a crèche located on the staircase of the County Courthouse.¹⁸ In the majority opinion, Justice Blackmun quoted with approval Justice O’Connor’s *Lynch* concurrence, wherein she referred to legislative prayer as an official acknowledgment of religion that “serve[s], in the only wa[y] reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.”¹⁹ Justice O’Connor did not use the term ceremonial deism in *Lynch*, but Justice Blackmun viewed her analysis as illustrative of this doctrine. “The function and history of this form of ceremonial deism,” he continued, “suggest that ‘those practices [the Pledge and motto] are not understood as conveying government approval of particular religious

¹⁵ *Id.* at 716.

¹⁶ *Id.* at 717.

¹⁷ *Allegheny*, 492 U.S. at 582 (the sign read: “During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom”).

¹⁸ *Id.* at 578.

¹⁹ *Id.* at 595, n. 46 (quoting *Lynch*, 465 U.S. 669, 693) (O’Connor, J., concurring).

beliefs.”²⁰ Later in his opinion, Justice Blackmun used the term ceremonial deism in a manner indicative of the weight he accorded this concept; referring to Justice O’Connor’s *Lynch* concurrence and Justice Brennan’s dissent in that case, he wrote:

Our previous opinions have considered in dicta the motto and the Pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring); *id.* at 716-717 (Brennan, J., dissenting). We need not return to the subject of ‘ceremonial deism’ [Justice Blackmun cites to his earlier ceremonial deism reference in *County of Allegheny*, *supra* note 12], because there is an obvious distinction between crèche displays and references to God in the motto and the Pledge. However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government’s allegiance to a particular sect or creed.²¹

In her *Allegheny* concurrence, Justice O’Connor referred to legislative prayers and the court crier’s “God save the United States and this honorable Court” as instances of ceremonial deism.²² Quoting her *Lynch* concurrence, she repeated that such official acts “serve the secular purposes of ‘solemnizing public occasions’ and ‘expressing confidence in the future.’”²³ She continued: “These examples of ceremonial deism do not survive Establishment Clause scrutiny simply by virtue of their historical longevity alone. Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause....”²⁴

In addition to these explicit references to ceremonial deism, the concept of ceremonial deism implicitly informs the majority opinion in *Marsh v. Chambers*, which upheld the Nebraska Legislature tradition of commencing its daily sessions with a chaplain-led prayer—the only

²⁰ *Id.* (quoting *Lynch*, 465 U.S. 668, 693) (O’Connor, J., concurring).

²¹ *Id.* at 603-604.

²² *Id.* at 630.

²³ *Id.* (quoting *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring)).

²⁴ *Id.*

instance where such a prayer has withstood judicial scrutiny.²⁵ Although the practice failed the Eighth Circuit’s application of the Lemon test,²⁶ the Supreme Court upheld the practice on account of its “unique history.”²⁷ Legislative prayer, according to the Court, “is deeply embedded in the history and tradition of this country,”²⁸ is “part of the fabric of our society.”²⁹ In fact, the Framers’ position on the practice’s constitutionality is evident from their actions: “[T]hree days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights.”³⁰ From that moment till the present, “the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.”³¹ “To invoke Divine guidance on a public body ... is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”³²

B. Subsequent Use by the Lower Courts

The term ceremonial deism was subsequently used by U.S. Courts of Appeals. In *Sherman v. Community Consolidated School District*, the Court of Appeals for the Seventh Circuit Court upheld a school policy requiring daily Pledge recitations.³³ Judge Frank Easterbrook, writing for the majority, based the court’s decision on the perception that “under God” amounted to a mere ceremonial reference, a phrase empty of its “original religious

²⁵ *Marsh v. Chambers*, 463 U.S. 783 (1983).

²⁶ *Chambers v. Marsh*, 675 F.2d 228 (8th Cir. Neb. 1982) (the practice failed the purpose and effect prongs because the chaplaincy promoted one religion, inasmuch as the Legislature had reappointed a Presbyterian minister to the chaplaincy for sixteen years running, and had published his prayers; and failed the entanglement prong because state money was used in order to pay for the chaplain and said prayers).

²⁷ *Marsh*, 463 U.S. at 791.

²⁸ *Id.* at 787.

²⁹ *Id.* at 792.

³⁰ *Id.* at 788.

³¹ *Id.* at 787.

³² *Id.* at 792.

³³ *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. Ill. 1992).

significance.”³⁴ In doing so, the court favorably referenced Justice Brennan’s dissent in *Lynch*—namely, “the reference[] to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow’s apt phrase, as a form of ‘ceremonial deism,’ protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.”³⁵ Further, the court quoted from *Allegheny*:

Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that the government may not communicate an endorsement of religious belief. . . . We need not return to the subject of ‘ceremonial deism,’ . . . because there is an obvious distinction between crèche displays and references to God in the motto and the pledge.³⁶

Directly following this quote, Justice Easterbrook noted, “Plaintiffs observe that the Court sometimes changes tune when it confronts a subject directly. True enough, but an inferior court had best respect what the majority says rather than read between the lines. If the Court proclaims that a practice is consistent with the Establishment Clause, we take its assurance seriously.”

The Court of Appeals for the Tenth Circuit Court used the term in *Gaylor v. United States*, where plaintiffs challenged the constitutionality of the national motto, “In God We Trust.”³⁷ The motto, they argued, violated the Establishment Clause. The court, however, said the motto’s “primary effect is not to advance religion; instead, it is a form of ‘ceremonial deism’ which through historical usage and ubiquity cannot be reasonably understood to convey government approval of religious belief.”³⁸ The court supported this reference to ceremonial deism with citations to Justice O’Connor concurrences in *Lynch* and *Allegheny*, along with a citation to Justice Brennan’s dissent in *Lynch*.³⁹

³⁴ *Id.* at 447.

³⁵ *Id.* (quoting *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting)).

³⁶ *Id.* at 447-448 (quoting *Allegheny*, 492 U.S. at 602-603 (Blackmun, J., majority opinion)).

³⁷ *Gaylor v. United States*, 74 F.3d 214 (10th Cir. Colo. 1996).

³⁸ *Id.* at 216.

³⁹ *Id.*

The Court of Appeals for the Fourth Circuit used the term ceremonial deism in a majority opinion.⁴⁰ The judge-petitioner in that case, *North Carolina Civil Liberties Union Legal Foundation v. Constangy*, argued that his habit of opening court with prayer was no more an official endorsement than the national motto or “God save the United State’s and this Honorable Court.”⁴¹ Citing Justice O’Connor’s concurrence in *Allegheny*, the court countered: “[T]hese brief references to God have been repeated so often that their religious meaning has diminished [sic] so that they are merely examples of ‘ceremonial deism.’”⁴²

The Court of Appeals for the Sixth Circuit used the term ceremonial deism in its majority opinion in *ACLU v. Capitol Square Review & Advisory Bd.*⁴³ Addressing a challenge to Ohio’s state motto, “In God, all things are possible,” the court maintained that the motto “fits comfortably within this country’s long and deeply entrenched tradition of civic piety, or ‘ceremonial deism,’ as Yale Law School’s Eugene Rostow called it.”⁴⁴ The court then quoted *Marsh*: “Like state-financed prayers by a legislative chaplain, ‘it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.’”⁴⁵

As these examples demonstrate, lower courts have embraced the Supreme Court’s use of the term ceremonial deism. Until 2004, however, the Court had yielded no sustained analysis of the concept; accordingly, lower courts lacked conceptual boundaries. One danger, inherent in the Court’s use of ceremonial deism, was that courts would perpetrate a secular gutting of religion, upholding official acknowledgements of religion by decreeing them serviceable but no longer spiritual. The harm was that some nonbelievers and religious adherents would yet feel the

⁴⁰ *North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F. 2d 1145 (4th Cir. N.C. 1991).

⁴¹ *Id.* at 1151.

⁴² *Id.* (citing *Allegheny*, 492 U.S. at 620 (O’Connor, J., concurring)).

⁴³ *ACLU v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001).

⁴⁴ *Id.* at 300.

⁴⁵ *Id.*

sting of words hostile to their creed or guiding principles, while other religious adherents would learn, courtesy of magistrates, that they had been laboring under the misapprehension that choice religious words retained religious significance. In what follows, I examine whether Justice O'Connor put some or all of these concerns to rest in 2005.

III. JUSTICE O'CONNOR'S TEST FOR CEREMONIAL DEISM: CONTEXT AND BRIEF OVERVIEW

In *Elk Grove Unified School District v. Newdow*, Justice O'Connor fashioned a test to identify constitutionally protected forms of ceremonial deism.⁴⁶ At issue in the case was a California public school code that required teachers to open class with daily recitation of the Pledge of Allegiance. Respondent Michael Newdow, an atheist, argued that inclusion of the words "under God" violated the Establishment Clause of the First Amendment. He brought suit on behalf of his daughter, a student in the school district, challenging the district's recitation policy *and* the Pledge itself. Newdow lost at District Court, but the Ninth Circuit Court of Appeals reversed, holding both the school policy and the Pledge unconstitutional.⁴⁷ Subsequent to this holding, the child's biological mother, Sandra Banning, filed a motion for leave to intervene, arguing that she retained sole legal custody of their daughter, that neither she nor her daughter shared Newdow's aversion to the school policy, and that Newdow's pursuit of the action would harm their daughter.⁴⁸ The Ninth Circuit reconvened in order to address Newdow's standing in light of the altered custodial rights.⁴⁹ The court denied Banning's motion and held that Newdow had standing, which he now exercised on behalf of his own interests and not on

⁴⁶ *Elk Grove*, 542 U.S. at 33 (2004) (O'Connor, J., concurring).

⁴⁷ *Newdow v. United States Cong.*, 292 F.3d 597 (9th Cir. 2002). The Ninth Circuit later amended its decision, limiting the holding to the school district's policy (*Newdow v. United States Cong.*, 328 F.3d 466 (9th Cir. 2002)).

⁴⁸ *Elk Grove*, 542 U.S. at 9. The custody order was granted prior to Newdow's appeal before the Ninth Circuit (*Newdow v. United States Cong.*, 313 F.3d 500, 502 (9th Cir. 2002)).

⁴⁹ Following the custody order, a superior court judge "entered an *in personam* order enjoining Newdow from pleading his daughter as an unnamed part or representing here as a 'next friend' in his lawsuit." *Id.* at 502.

behalf of his daughter's as well.⁵⁰ "Neither Ms. Banning's personal opinion regarding the Constitution nor her state court award of legal custody is determinative of Newdow's legal rights to protect *his* own interests."⁵¹

The Supreme Court heard Elk Grove Unified School District's appeal in 2004. A procedural matter, however, brought the issue to an anticlimactic end: a majority of the Court held that Newdow, a noncustodial parent, lacked standing.⁵² Nonetheless, three justices—Rehnquist,⁵³ O'Connor,⁵⁴ and Thomas⁵⁵—were prepared to go to the merits, and, further, to hold the Pledge constitutional.

Justice O'Connor begins her concurrence by stating that the endorsement test should control in Establishment Clause cases.⁵⁶ Introduced by Justice O'Connor in *Lynch*,⁵⁷ the endorsement test stands for the proposition that government action "must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'"⁵⁸ Two principles inform application of the endorsement test. The first principle is that courts must examine official acknowledgments of religion from the viewpoint of a "reasonable observer."⁵⁹ The second principle is that the "reasonable observer" must be "deemed aware of the history of the

⁵⁰ Owing to the superior court order (*supra* note 41), Newdow no longer sought redress on behalf of the alleged injury to his daughter. See *Newdow*, 313 F.3d at 502.

⁵¹ *Id.* at 505.

⁵² *Elk Grove*, 542 U.S. at 18 (holding that "it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing").

⁵³ *Id.* at 18.

⁵⁴ *Id.* at 33.

⁵⁵ *Id.* at 45.

⁵⁶ *Id.* at 34.

⁵⁷ *Lynch*, 465 U.S. at 687-694 (1984) (O'Connor, J., concurring).

⁵⁸ *Allegheny*, 492 U.S. at 627 (O'Connor, J., concurring) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)).

⁵⁹ *Elk Grove*, 542 U.S. at 34 (O'Connor, J., concurring).

conduct in question, and must understand its place in our Nation’s cultural landscape.”⁶⁰

Justice O’Connor explains her understanding of and rationale for ceremonial deism before supplementing the endorsement test with a new, four-factor analysis. “The constitutional value of ceremonial deism,” she writes, “turns on a shared understanding of its legitimate nonreligious purposes.”⁶¹ Justice O’Connor submits two reasons why the Court should permit government “to refer to or commemorate religion in public life.”⁶² The first reason is that religious references can serve the secular purpose of commemorating national history.⁶³ The second reason is that religious references can uniquely serve the secular purpose of solemnizing public events.⁶⁴ Justice O’Connor states that such references and acknowledgments are permissible in “a discrete category of cases”—a “category of ‘ceremonial deism’” including the national motto, court invocations (“God save the United States and this Honorable Court”), and patriotic songs.⁶⁵

Justice O’Connor next unveils a four-prong test to determine whether the Pledge offends the Establishment Clause or, rather, represents a permissible form of ceremonial deism.⁶⁶ The test’s first prong examines the “history and ubiquity” of a practice. The longer a practice has been observed throughout the Nation’s history, the more deserving that practice is of constitutional protection. Similarly, the more a practice has circulated among citizens (i.e., the more ubiquitous it is), the more deserving that practice is of constitutional protection.

The second prong is “absence of worship or prayer.”⁶⁷ A practice forfeits constitutional protection to the extent that it seeks to place individuals in a “penitent state of mind, or ... create

⁶⁰ *Id.* at 35.

⁶¹ *Id.* at 37.

⁶² *Id.* at 35.

⁶³ *Id.*

⁶⁴ *Id.* at 36.

⁶⁵ *Id.* at 37.

⁶⁶ *Id.*

⁶⁷ *Id.* at 39.

a spiritual communion or invoke divine aid.”⁶⁸ “Only in the most extraordinary circumstances could actual worship and prayer be defended as ceremonial deism.”⁶⁹

The third prong is “absence of reference to particular religion.”⁷⁰ “[N]o religious acknowledgement could claim to be an instance of ceremonial deism if it explicitly favored one particular religious belief system over another.”⁷¹

The fourth prong is “minimal religious content”—i.e., requisite “brevity of a reference to religion or to God in a ceremonial exercise,” relative to the balance of the speech content.⁷²

IV. EXAMINING THE TEST FOR CEREMONIAL DEISM

A. Assumptions Foundational to the Test

Justice O’Connor predicates her test for ceremonial deism on three assumptions. These assumptions appear in her overview of ceremonial deism, which precedes her enunciation of the four-prong test. First, Justice O’Connor states that the endorsement test should govern analysis of the Pledge, and that this test relies on the “viewpoint of the reasonable observer.”⁷³ “Given the dizzying religious heterogeneity of our Nation,” she writes, “adopting a subjective approach would reduce the test to an absurdity.”⁷⁴ On its face, however, the endorsement test exists to protect individuals at the margins of society: “Endorsement, I have explained, ‘sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’”⁷⁵ The difficulty with this standard is that the reasonable observer, shorn of any dissident religious or counter-religious feelings, will find little to object to, and will therefore

⁶⁸ *Id.* at 40.

⁶⁹ *Id.* (citing *Marsh*, 463 U.S. 783).

⁷⁰ *Id.* at 42.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 34.

⁷⁴ *Id.* at 34-35.

⁷⁵ *Id.* at 34.

leave some members of society without a voice in forums of justice.

Second, Justice O'Connor assumes that official references to religion attend to secular, not sacred, ends. "I believe that although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes."⁷⁶ These secular purposes fall into two categories, one serving historical purposes, the other serving inspirational purposes. The former role of ceremonial deism allows government "to commemorate the role of religion in our history."⁷⁷ On this assumption, government references to religion are merely "descriptive,"⁷⁸ not normative or prescriptive. The inspirational role, meanwhile, assumes that official references to religion "serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."⁷⁹ Ironically, the argument from historical use admits religion (we are permitted to reflect upon religion's role in shaping our land), but the argument from inspirational use excludes it (religious words are said to inspire predominantly secular emotions). Justice O'Connor does not account for this inconsistency. "Such references," she states, "can serve to solemnize an occasion instead of to invoke divine provenance."⁸⁰ It is easy to understand the solemnizing effect—i.e., that religious words add moment to an event—but it is less easy to understand how these words effect a secular rather than religious air. If anything, their capacity to achieve the one result suggests a capacity to achieve the other—namely, for religious words to convey religious meaning.

⁷⁶ *Id.* at 35.

⁷⁷ *Id.*

⁷⁸ *See id.* at 40 ("Even if taken literally, the phrase ['under God'] is merely descriptive; it purports only to identify the United States as a Nation subject to divine authority").

⁷⁹ *Id.* at 36 (quoting *Lynch*, 465 U.S. 669, 692-693) (O'Connor, J., concurring).

⁸⁰ *Id.* at 36.

Finally, Justice O'Connor draws upon her first and second assumptions to make a third assumption: "The reasonable observer discussed above, fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over nonreligion."⁸¹ Thus derived, the third assumption rests upon these bases with something less than analytic firmness. The following critique of Justice O'Connor's will revisit these assumptions. It is important, though, to bear them in mind, in view of the fact that they are foundational to any apology for ceremonial deism.

B. The Test's Four Prongs

Justice O'Connor, having provided an overview of the endorsement test, along with the above assertions about ceremonial deism, observes: "This case requires us to determine whether the appearance of the phrase 'under God' in the Pledge of Allegiance constitutes an instance of such ceremonial deism. Although it is a close question, I conclude that it does, based on my evaluation of the following four factors."⁸² I proceed now with an examination of these factors.

1. "History and Ubiquity"

The first of the test's four prongs, "history and ubiquity," rests in part on the above assumption that religious words are capable of stimulating secular thoughts without serving religious purposes. "The constitutional value of ceremonial deism turns on a shared understanding of its legitimate nonreligious purposes," Justice O'Connor writes. "That sort of understanding can exist only when a given practice has been in place for a significant portion of the Nation's history, and when it is observed by enough persons that it can fairly be called

⁸¹ *Id.*

⁸² *Id.* at 37.

ubiquitous.”⁸³ To this is added the argument that “the history of a given practice is all the more relevant when the practice has been employed pervasively without engendering significant controversy.”⁸⁴ In other words, we are asked to respect a practice on account of its endurance and familiarity, and on account of the tacit approval accorded that practice. These attributes, however, should not be permitted to immunize an official acknowledgement of religion. The same attributes, after all, attached to unconstitutional laws permitting slavery, segregation, anti-miscegenation, and gender discrimination. Clearly, a legislative act can be flawed from its inception. As Justice Brennan observed: “Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact, and this must be assumed to be as true of the Members of the First Congress as any other.”⁸⁵

Underlying the ubiquity component of Justice O’Connor’s first prong is the notion that religious language loses strength by dint of routine repetition.⁸⁶ “Any religious freight the words may have been meant to carry originally has long since been lost.”⁸⁷ We are asked to believe that broad, sustained practice enervates content. This view anchors not only the “history and ubiquity” factor but also the whole of Justice O’Connor’s argument. Commentators, however, generally contest the idea.⁸⁸ For one thing, the view does not explain how religious words lose strength as religious words, whereas secular words such as “liberty and justice” retain strength in their secular capacity. In addition, the view “suggests that, when ‘initially used,’ phrases like ‘in

⁸³ *Id.*

⁸⁴ *Id.* at 38.

⁸⁵ *Marsh*, 463 U.S. at 814 (Brennan, J., dissenting).

⁸⁶ *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting)).

⁸⁷ *Elk Grove*, 542 U.S. at 41. *See also Allegheny*, 492 U.S. at 631 (O’Connor, J., concurring) (“[T]hey [longstanding practices] serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time”).

⁸⁸ B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 Duke L.J. 705, 722 (2010).

God we trust’ and ‘under God’ ‘violated the Establishment Clause because they had not yet been rendered meaningless by repetitive use.’”⁸⁹ Indeed, this critique can be extended to an individual’s first encounters with official acknowledgements of religion—to, for instance, a child’s or adult immigrant’s initial exposure to the Pledge. That is, the logic of Justice O’Connor’s argument from longstanding national exposure is no less applicable to individual exposure: for every American, there is a period during which “under God” must necessarily retain its divine import, and during which the Establishment Clause is accordingly implicated.

A court guided by the principle of ubiquity arrogates to itself an unpredictable power—namely, the power to decide which words and therefore ideas retain vitality. Armed with this power, the Court can either uphold an official acknowledgment by declaring it dead, or forbid an acknowledgment by declaring it in the pink of health. In respect of the Pledge, the former approach—to say that “under God” lacks vigor *qua* religious language—discounts the effect that words register on believers and nonbelievers alike. On the one hand, Justice O’Connor overlooks the injury sustained by atheists such as Michael Newdow. On the other hand, Justice O’Connor overlooks the relevance of “under God” to adherents of religion—as witnessed during the protests of citizens and politicians following the Ninth Circuit’s ruling against California’s Pledge statute.⁹⁰ In *Van Orden v. Perry*, Justice Thomas decried the ubiquity argument for this very reason. “[R]epetition does not deprive religious words or symbols of their traditional meaning. Words like ‘God’ are not vulgarities for which the shock value diminishes with each successive utterance.”⁹¹ Professor Douglas Laycock also dismissed the notion that these religious references are destitute of religious significance. In the amicus brief he prepared for

⁸⁹ *Myers v. Loudoun County Pub Schs.*, 418 F. 3d 395, 405 (4th Cir. Va. 2005) (quoting *Sherman v. Community Consolidated Sch. Dist. 21*, 980 F. 2d 437, 448 (7th Cir. 1992) (Manion J., concurring)).

⁹⁰ Richard J. Ellis, *To the Flag: The Unlikely History of the Pledge of Allegiance* ix-x (2005). See also Trunk, *supra* note 25, at 572.

⁹¹ *Van Orden v. Perry*, 545 U.S. 677, 696 (2005) (Thomas, J., concurring).

Newdow on behalf of thirty-two Jewish and Christian clergy, Laycock offered this colorful disjunctive: “Either government is asking school children to make a sincere statement of belief in the one true God Whom the Nation is under, or it is asking children to take the name of the Lord in vain. Neither request is consistent with government’s duty of neutrality toward and among religions.”⁹²

Another concern attaches to the first of Justice O’Connor’s four prongs. Assume, *arguendo*, that ubiquity *does* numb individuals to religious connotation. The detachment that settles over individuals on account of routine will just as effortlessly disperse upon moments of national crisis. At such times—in the wake of 9/11 hostilities, for instance—official references to God and religion may lose their rumored weakness. The “reasonable observer,” on hand during a national crisis, would doubtless perceive a great deal of religious freight in stout utterances of “under God” and other sacred phrasings; the reasonable observer would find it difficult to believe that the government had not conveyed a message “that religion or religious belief is favored or preferred.”⁹³ At best, then, the words are dormant offenses to the Establishment Clause, susceptible to reawakening upon, for instance, a religiously motivated attack on our soil. This phenomenon raises a valid challenge to the “ubiquity” prong, and it does so using elements central to Justice O’Connor’s support of that factor. Duration and diffusion, according to Justice O’Connor, govern the meaning of words. If, however, time and place exhaust a word’s religious meaning, it should not be wondered that time and place can revivify that meaning.

The “history and ubiquity” prong hinges on the untenable claim that a reasonable

⁹² Brief for Rev. Dr. Betty Jane Bailey et al. as Amici Curiae Supporting Respondents, *Newdow*, 542 U.S. 1 (2004) (No. 1624).

⁹³ *Allegheny*, 492 U.S. at 627 (O’Connor, J., concurring) (quoting *Wallace*, 472 U.S. 38, 70 (O’Connor, J., concurring)).

observer, fully aware of the Pledge’s history and origins, would not regard “under God” as a government endorsement.⁹⁴ To the contrary, the legislative history of the 1954 amendment to the Pledge⁹⁵ reveals that “the sole purpose was to advance religion....”⁹⁶ Sen. Homer Ferguson, sponsor of the 1954 measure to add the words “under God,” said, “I have felt that the Pledge ... should recognize the Creator who we really believe is in control of the destinies of this great Republic.”⁹⁷ Both Sen. Ferguson and Rep. Louis Rabaut, sponsor of the measure in the House, regarded the addition of “under God” as a means of differentiating Americans from our Cold War enemy, the “atheistic” Communists.⁹⁸ A statement by Rep. Rabaut, adopted by the House Report, explained that the amended Pledge would alert Americans “to the true meaning of our country and its form of government.”⁹⁹ “More importantly,” he continued, “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.”¹⁰⁰ The congressman was not merely speaking of “under God” in terms of the historical appreciation it would arouse; rather, he was talking about the present (“our way of life”). Justice O’Connor has embraced the former application of the words—namely, “to commemorate the role of religion in our history”¹⁰¹; the latter application, however, invokes an improper governmental use of religious words. The newly

⁹⁴ *Elk Grove*, 542 U.S. at 37 and 43 (O’Connor, J., concurring).

⁹⁵ See Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249 (1954) (codified as amended at 4 U.S.C. 4 (2000 & Supp. III 2003)) (the language of the Pledge, as provided by the Act, 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 a all”).

⁹⁶ *Newdow*, 292 F.3d at 610.

⁹⁷ *Engle v. Vitale*, 370 U.S. 421, 440, n. 5 (1962) (quoting 100 Cong. Rec. 6348).

⁹⁸ Ellis, *supra* note 52 at 131-133.

⁹⁹ *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1032 (9th Cir. Cal. 2010) (quoting H.R. Rep. No. 83-1693, 1954 U.S.C.C.A.N 2339, 2347 (May 28, 1954)). The House Report also noted: “At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. [O]ur American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp.” *Id.* at 2340.

¹⁰⁰ *Newdow*, 597 F.3d at 1032.

¹⁰¹ *Elk Grove*, 542 U.S. at 35 (O’Connor, J. concurring).

minted Pledge, according to the congressman, not only says that we are a religious people, but is intended to impress this upon children. More tellingly yet, Rep. Rabaut declared that the “unbridgeable gap between America and Communist Russia is a belief in Almighty God.... [U]nless we are willing to affirm our belief in the existence of God ... we ... open the floodgates to tyranny and oppression.”¹⁰² Clearly, the addition of “under God” represented religious intent on the part of legislators. “The claim that the addition of ‘under God’ conveys only a trivial religious meaning ignores the multiple specific, extensive, and quite pointedly religious arguments of every government official who spoke on the matter and was directly responsible for making the change.”¹⁰³ Under *McGowan v. Maryland*, this shift in legislative intent is not only relevant but controlling. *McGowan*, which stressed the importance of legislative intent, upheld Sunday closing laws on grounds that language in the most current statutes reflected an “air of ... relaxation rather than one of religion.”¹⁰⁴ *McGowan*, in other words, held that whereas Sunday closings originated out of nakedly religious purposes—purposes no longer deemed constitutional under Establishment Clause jurisprudence—laws supporting the closings had been updated to reflect secular rather than sacred purposes. Thus updated, the Sunday closing laws overcame challenge under the Establishment Clause. *McGowan*, therefore, prompts scrutiny of evolving legislative intent. Applied to the Pledge, the principle of *McGowan* reveals an unacceptable reversal: legislative backing for the 1954 Act substituted religious intent for secular intent. This conclusion is hardly shocking, given the legislative sweat and histrionics exerted on behalf of

¹⁰² See Ellis, *supra* note 70, at 134.

¹⁰³ Steven. G. Gey, “Under God,” *The Pledge of Allegiance, And Other Constitutional Trivia*, 81 N.C.L. Rev. 1865, 1877 (2003) (arguing that “at every point in its analysis, the House Report [on the addition of “under God” to the Pledge] subordinates the nation’s political structure to the majority’s religious ideal”; that “all the other evidence relating to the passage of the 1954 statute ... confirms the Report’s single-mindedly religious approach”; and that the Senate Report is “no less explicitly religious in its stated objective”).

¹⁰⁴ *McGowan v. Maryland*, 366 U.S. 420, 448 (1961).

two words: “under God.”¹⁰⁵ The shift, though, reveals the unconstitutionality of the Pledge. If *McGowan* upheld Sunday closing laws on account of a religious-to-secular shift in legislative intent, the 1954 Act must be rejected on account of its secular-to-religious shift, whereby a secular oath became religious.

Justice O’Connor’s reliance on the “reasonable observer” creates another problem. On its face, the Endorsement Test exists to protect “outsiders.”¹⁰⁶ Assuming, *arguendo*, that the Pledge was amended for wholly secular reasons, the proper focus should nonetheless fall upon school children—that is, the reasonable school child and not a reasonable observer of ripe age. It is children, after all, who are made to recite or, minimally, listen to the Pledge; who, on account of their age and mandatory confinement, are uniquely impressionable, uniquely vulnerable. Moreover, the Lemon test and endorsement test look to the effect of a government action, not merely its purpose; it is necessary to determine, here, whether the effect of Pledge recitation is to communicate to *children* a message that government endorses religion. Unfortunately, Justice O’Connor’s ceremonial deism test restricts analysis to the viewpoint of an adult (the “reasonable observer”), preventing accurate assessment of injury.

2. “Absence of Worship or Prayer”

The “absence of worship or prayer” factor omits significant questions and analyses. First, Justice O’Connor provides an insufficient definition of prayer and worship. “Any statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate

¹⁰⁵ During a thirteen-month period, congressmen submitted eighteen joint resolutions calling for the addition of “under God” to the Pledge. *See* Ellis, *supra* note 70, at 133.

¹⁰⁶ *Elk Grove*, 542 U.S. at 34 (O’Connor, J., concurring) (“Endorsement, I have explained, ‘sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community’”).

secular purposes of solemnizing an event and recognizing a shared religious history.”¹⁰⁷ No mention is made of praise, notwithstanding the universally acknowledged role of praise in the context of prayer.¹⁰⁸ Arguably, though, the Pledge more than gestures toward praise, in consequence of which it may be correct to think of the Pledge in terms of prayer. Second, Justice O’Connor focuses on intent alone, rather than on intent *and* effect (“any statement that has as its *purpose* placing the speaker or listener in a penitent state of mind....”¹⁰⁹). But the endorsement test concerns itself with whether a reasonable observer would perceive a government endorsement of religion, irrespective of government’s purpose.¹¹⁰ Third, the “absence of worship or prayer” factor does not allow for psychological equivalencies between prayer and oaths. Justice O’Connor appears to forestall this criticism. “Of course, any statement can be imbued by a speaker or listener with the qualities of prayer. But ... [a reasonable] observer could not conclude that reciting the Pledge, including the phrase ‘under God,’ constitutes an instance of worship.”¹¹¹ Again, though, the proper viewpoint for this analysis should be that of a reasonable school child, not that of an adult.¹¹² It may remain an open question whether adults regard the Pledge as touching on prayer. Children, on the other hand, are more likely to construe the oath as a spiritual petition. Research, in fact, points to this very phenomenon. “Social science research has ... found that insofar as young schoolchildren ascribe

¹⁰⁷ *Elk Grove*, 542 U.S. at 40 (O’Connor, J., concurring).

¹⁰⁸ Prayer is “the relating of the self or soul to God in trust, penitence, praise, petition, and purpose, either individually or corporately.” John Bowker ed., *The Oxford Dictionary of World Religions* 762 (1997).

¹⁰⁹ *Elk Grove*, 542 U.S. at 40 (O’Connor, J., concurring) (emphasis added).

¹¹⁰ *Id.* at 36; see also James M. Lewis and Michael L. Vild, Note, *A Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard*, 65 Notre Dame L. Rev. 671, 689 (1990) (“This is the rationale for having an effects prong in addition to a purpose prong: actions done with permissible intent may still have impermissible effects upon those unaware of the intent”).

¹¹¹ *Elk Grove*, 542 U.S. at 40.

¹¹² Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. Rev. 1545 (2010). Although she does not focus on children, Corbin argues that “the supposedly objective reasonable person too often equates to a reasonable Christian. Corbin draws on a feminist critique of the “reasonable person” standard in sexual discrimination cases, arguing that the reasonable person is often a male who cannot begin to appreciate the unique vulnerability of a female victim of sexual discrimination, and who therefore reinforces the inequalities fundamental to the problem of sexual discrimination.

any meaning to the Pledge, they perceive ‘under God’ as expressing religious belief: ‘The questionnaire responses showed that a number of second-grade children believed the Pledge of Allegiance was a prayer to God.’”¹¹³

If it *can* be shown that elements of prayer are absent from the Pledge, comparable attributes may offset such absence. For instance, the Ten Commandments do not necessitate prayer, but the *Stone* Court held against state-mandated postings of the Commandments on classroom walls.¹¹⁴ “If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.”¹¹⁵ Applied to the Pledge, *Stone* raises valid questions about the effect of “under God,” not least because the Pledge involves recitation by children. The risk inherent in the act—of intoning “under God” in ritualistic fashion—is arguably greater than that implicated by posting the Decalogue. The “absence of worship or prayer” prong, therefore, is too narrow.

Justice O’Connor unnecessarily downplays the religious import of “under God.” “Even if taken literally,” she writes, “the phrase is merely descriptive; it purports only to identify the United States as a Nation subject to divine authority.”¹¹⁶ Having thus designated the phrase, she is able to conclude that the reasonable observer would not detect an element of worship in the Pledge. However, in order to reach this conclusion, she omits to grapple with the logical relation and meaning of words within the text. It must first be observed that “allegiance” is a potent

¹¹³ Brief for Americans United for Separation of Church and State, et al. as Amici Curiae in Support of Affirmance, *Elk Grove*, 542 U.S. 1 (2004) (quoting Robert D. Hess & Judith V. Torney, *The Development of Political Attitudes in Children* 105 (1967)).

¹¹⁴ *Stone v. Graham*, 449 U.S. 39 (1981).

¹¹⁵ *Id.* at 42.

¹¹⁶ *Id.* at 40.

word. “Allegiance” is defined as “the fidelity owed by a subject or citizen to a sovereign or government.”¹¹⁷ Additionally, “allegiance” is defined as “devotion or loyalty to a person, group, or cause.”¹¹⁸ “Allegiance” in the Pledge is sworn to the “republic,” which is “under God”; definitions of “under” include “subject to the authority, control, guidance, or instruction of.”¹¹⁹ If, then, “allegiance” is being sworn to the “republic,” which is “under God,” it follows that “allegiance” (devotion or loyalty) is being surrendered onto God (to whose authority and control the republic is subject). The hierarchical development of this claim follows cleanly in the text, its logic and momentum established by the relation of “republic” to “flag”: “I pledge allegiance to the flag of the United States of America, and to the republic for which it stands....” This interrelation of words suggests a not insignificant religious dimension, the effect of which is to greatly surpass “merely descriptive” phrasing. Even prior to the addition of “under God,” the Court in *Barnette* observed: “[T]he ... pledge requires affirmation of a belief and an attitude of mind.”¹²⁰ The addition of “under God,” therefore, raises valid questions about the prayer or worship aspects of the Pledge, particularly owing to the performance aspects of this national institution.¹²¹ At the very least, “under God” cannot be deemed “merely descriptive.” “To recite that the nation is ‘under God,’ writes Douglas Laycock, “is inherently a religious affirmation.”¹²² “When 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

¹¹⁷ *Merriam-Webster’s Collegiate Dictionary*, 10th ed.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (holding against compulsory flag salute and compulsory recitation of Pledge).

¹²¹ The performance aspect of the Pledge raises additional questions. Pledge recitals require an effort of mind *and* body—a combined attentiveness somewhat unique to our age. The effect of this—of reciting words and placing a hand on one’s heart—bears examination. Possibly the act places individuals in an attitude of prayer.

¹²² Douglas Laycock, *Theological Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 188 Harv. L. Rev. 155, 224 (2004).

Providence.”¹²³

3. “Absence of Reference to Particular Religion”

The “absence of reference to particular religion” prong ignores the plain language of the Pledge. The plain language evokes a particular understanding of deity and therefore favors one form of religion over other forms of religion. First, “under God” invokes the deity of monotheistic religion. Hindus, Buddhists, Wiccans, Native Americans, even Secular Humanists¹²⁴ are effectively marginalized by the religious component of the Pledge—either because they believe in multiple gods or in no god at all. Second, “under God” implies an interventionist deity with interest in and jurisdiction over the United States. Among those alienated, in this instance, are none other than deists.¹²⁵

To date, the Court’s ceremonial deism analysis has been highly colored by the Judeo-Christian beliefs of the majority of American society.... Specifically, the selective application of ceremonial deism only to those religious symbols consistent with the Judeo-Christian tradition ... serves both to overlook and exclude nonadherents from the definition of what it means to be an “American.” This in turn threatens to rend the “fabric of society” because it reiterates the force of religion in maintaining standing in the political community.¹²⁶

The theological connotations of “under God,” therefore, confer a benefit upon adherents to monotheistic religions. The majority in *McCreary County* stressed that the Establishment

¹²³ *Id.* at 225.

¹²⁴ The Court has deemed secular humanists to be religious adherents, notwithstanding their absence of belief in deity. See *Torcaso v. Watkins*, 367 U.S. 488, 495 n. 11 (1961).

¹²⁵ It is no small irony that the doctrine of ceremonial deism risks alienating deists themselves. Deists have greatly multiplied in recent years, according to the American Religious Identification Survey. Commissioned by the Program on Public Values, Trinity College, the 2008 survey coined the word “Nones” to identify individuals who claim “no religion.” The survey estimates that 34 million adults comprise the None demographic, and “most Nones [59%] are neither atheists nor theists but rather agnostics and deists...” Dr. Barry A. Kosmin, et al., *American Nones: The Profile of the No Religion Population* (A Report Based on the American Religious Identification Survey of 2008), <http://www.americanreligionsurvey-ar.is.org>.

¹²⁶ Charles Gregory Warren, Comment, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court’s Establishment Clause Jurisprudence*, 54 Mercer L. Rev. 1669, 1703-1704 (2003).

Clause requires government to observe neutrality in respect of religion. The majority countered the dissent's claim that "the deity the Framers had in mind was the God of monotheism, with the consequence that government may espouse a tenet of traditional monotheism."¹²⁷ On the contrary, argued the majority, the Framers operated within a much more religiously circumscribed mentality; their pressing concern involved contests among Christian bodies, not other religious bodies—not even other monotheistic religions.¹²⁸ "Justice Story probably reflected the thinking of the framing generation when he wrote in his Commentaries that the purpose of the [Establishment] Clause was 'not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects.'"¹²⁹ From this, the Court noted, it is evident that interpretation of the Constitution will necessarily result in "applications unanticipated by the Framers,"¹³⁰ and that the spirit of the Framers must be honored in such a way as to strive for neutrality in matters of religion pertinent to our time.¹³¹

By definition, the "absence of reference to particular religion" factor does not address whether an official act amounts to an unconstitutional preference in favor of religion over *nonreligion*. Neither does Justice O'Connor's application of her test demonstrate any sympathy for this issue.¹³² Under the Establishment Clause, however, "the touchstone for our analysis is

¹²⁷ *McCreary County v. ACLU*, 545 U.S. 844, 879 (2005).

¹²⁸ *Id.*

¹²⁹ *Id.* (quoting R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 13 (1988) (emphasis deleted by the Court)).

¹³⁰ *Id.* at 881.

¹³¹ The Court addressed the relevance of the Framers' own actions in respect of official acknowledgments of religion: "The dissent cites material suggesting that separationists like Jefferson and Madison were not absolutely consistent in abstaining from official religious acknowledgment. But, a record of inconsistent historical practice is too weak a lever to upset decades of precedent adhering to the neutrality principle. And it is worth noting that Jefferson thought his actions were consistent with nonendorsement of religion and Madison regretted any backsliding he may have done." *Id.* at 879, n. 25.

¹³² Justice O'Connor does not wrestle with this question; rather, she handles it in conclusory fashion—"general acknowledgments of religion need not be viewed by reasonable observers as denigrating the nonreligious"—before turning to questions of sectarian endorsement (*Elk Grove*, 542 U.S. at 42).

the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’”¹³³ “The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic—the nonbeliever—is entitled to go his own way.”¹³⁴ In 2008, more than 1.6 million adults identified themselves as atheists—almost double the amount in 2001.¹³⁵ The Pledge imposes special difficulties on atheists, not least the suggestion that belief in and submission to God is a mark of good citizenship. Michael Newdow shared his own burden during oral argument before the Court: “I am an atheist. I don’t believe in God. And every school morning my child is asked to stand up, face that flag, put her hand over her heart, and say that her father is wrong.”¹³⁶ Hence, this prong of the ceremonial deism test offers unclear guidance, to the extent that it does not wrestle with a broader standard of protection available under the Establishment Clause.

4. “Minimal Religious Content”

The “minimal religious content” factor underestimates the potency of religious language, particularly of references to the divine. Justice O’Connor dismisses the effect of “under God” in the Pledge by means of a questionably relevant contrast: two words in the context of a thirty-one-word recitation.¹³⁷ References to God, however, bear great conceptual weight.¹³⁸ In the Pledge itself, “under God” encompasses “flag,” “republic,” “nation”—the whole secular reality.¹³⁹ In addition, the unequal balance between secular and sacred language in a text may be offset by

(O’Connor, J. concurring)).

¹³³ *McCreary County*, 545 U.S. at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

¹³⁴ *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring).

¹³⁵ U.S. Dept. of Commerce, *supra* note 78. The Department’s Statistical Abstract put the number of agnostics at 1,985,000, and those claiming “no religion” at 30,427,000.

¹³⁶ *Elk Grove*, 542 U.S. 1, respondent’s oral argument, 2004 U.S. Trans. Lexis 27 (U.S. Trans. 2004).

¹³⁷ *Elk Grove*, 542 U.S. at 43 (O’Connor, J. concurring).

¹³⁸ Certainly this appears true of children, as evidenced by the above-mentioned study (*supra* note 63).

¹³⁹ See my earlier analysis, where I discuss the “logical relation and meaning of words within the text.”

other factors. Here, where legislators added “under God” to a popular, secular text, and did so to great fanfare, those added words assumed a heft unrecognized by Justice O’Connor’s simple arithmetic. What is important is not the quantitative relation between the sacred and secular words but rather their qualitative relation.

V. CONCLUSION

Justice O’Connor’s attempt to systematize analysis of ceremonial deism, while commendable, fails to legitimate this legal concept. Her method trades on assumptions that her four prongs not only fail to offset, but ultimately rely upon. Central to her test is the notion that official references to God no longer haul “religious freight.”¹⁴⁰ This, however, is an assumption whose inherent troubles Justice O’Connor never dispels. The assumption assigns arbitrary power to judges, who are not equipped to dabble in the field of “semantic shift.” Also key to Justice O’Connor’s test is her reliance upon the “reasonable observer,” a fictive adult with what appears to be an unflappable religious sensibility. As I have shown, however, this standard deserts members of society whom Justice O’Connor’s endorsement test purports to champion: “nonadherents” and “outsiders.”¹⁴¹ In the context of ceremonial deism, the reasonable observer standard offers inadequate protection to dissidents and children. This is especially troubling in respect of the latter class of individuals, whom the Court has otherwise shielded from creeping indoctrination and coercion. In *Lee v. Weisman*, the Court observed: “[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.... Our decisions in *Engel v. Vitale* and *School Dist. of Abington* recognize, among other things, that prayer exercises

¹⁴⁰ *Elk Grove*, 542 at 41.

¹⁴¹ *Id.* at 34.

in public schools carry a particular risk of indirect coercion.”¹⁴² In view of this concern, the *Lee* Court held against graduations prayers led by a member of clergy, “under circumstances where ... young graduates who object are induced to conform.”¹⁴³ Applied to the Pledge, it is doubly likely that school children will face coercive pressure, not least because of policies requiring daily recitation of the oath. Under *Lee*, it should not matter that students are permitted to opt out of the Pledge: their tender age, coupled with the unique environment, can induce conformity. But Justice O’Connor’s reasonable observer standard ignores the child’s perception. So, too, does her test ignore the question of physical context (e.g., a classroom environment). An additional prong would correct this oversight, provided the reasonable observer standard were concomitantly enlarged. In addition to a context prong, and in view of *Lee*, the test would also benefit from a coercion prong.

¹⁴² *Lee v. Weisman*, 505 U.S. 577, 593 (1992) (citations omitted).

¹⁴³ *Id.* at 599.

