ONE NATION, UNDER GOD: RETHINKING THE PLEDGE

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The Pledge of Allegiance is recited daily by millions of schoolchildren nationwide. It has become a part of our national identity and accepted as a part of the typical American school day. And yet one phrase in it—"one nation, under God"—contradicts one of the deepest philosophies upon which this country has been built, that of separation of church and state outlined in the First Amendment to the Constitution. Its Establishment Clause, which precludes any law that endorses an establishment of religion, has resulted in an American culture that is held together not by any national religion, but rather by a secular religion of the law. Helle Porsdam, in *Legally Speaking,* observes that in the United States the law has "provided a common bond among all the various subcultures" and has developed into a "secular religion" (4). In an attempt to uphold this philosophy, Michael Newdow, a California atheist and, more importantly, a father, has brought suit against Congress, calling for the words "under God" to be deleted from the Pledge. His efforts date back to 2000 when Newdow brought suit against the Elk Grove School District, charging that reciting the Pledge in a public school setting was a violation of the First Amendment's Establishment Clause. In 2002, the Ninth Circuit Court ruled in his favor in *Newdow v. U.S. Congress et al.*, with Judge Goodwin declaring "it was wrong, very wrong . . . wrong as a matter of Supreme Court precedent properly understood . . . and wrong as a matter of common sense" (Newdow). However, the Supreme Court overturned the ruling on the grounds that Newdow did not have standing to bring the case on behalf of his daughter because she was living with her mother, not Newdow, at the time. Consequently, he filed suit again in 2004; this time, in an effort to have the Supreme Court rule on the merits of the case, Newdow decided to represent several unnamed parents and their children instead. Newdow's case, which is being argued in front of the court, is backed by legal precedent dating back to the landmark 1962 case *Engel v. Vitale*, where the Supreme Court ruled that all forms of state-mandated school prayer are unconstitutional. Other Supreme Court cases supporting Newdow, such as *Edwards v. Aguillard* (1987) and *Lemon v. Kurtzman* (1971), have also extended this principle, striking down many forms of government-sponsored religion in public schools. The Pledge of Allegiance falls into this category and these important precedents must be

carried forth into the decision of *Newdow et al. v. Congress et al.* Though many oppose removing the words "under God" from the Pledge, amending this deeply-embedded contradiction in American society is absolutely essential.

The first precedent mentioned in Goodwin's *Newdow* opinion stems from *Engel v. Vitale* (1962). *Engel* centered on morning prayers mandated by New York school officials, but ties in deeply with Newdow's case because of its similar appeal to the Establishment Clause of the First Amendment. The parents of several students sued the local Board of Education, claiming that opening the school day with the prayer— "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country"—violated their First Amendment freedom of religion. They felt that the prayer represented a governmental endorsement of monotheism and was therefore unconstitutional as an infringement upon their right to believe in other religions (or not to believe at all). Though the New York Court of Appeals ruled against the parents on the basis that the prayer was both relatively non-denominational and strictly voluntary, the Supreme Court overturned that ruling, finding in a 6-1 decision that "[n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause" (*Engel*). The Establishment Clause of the First Amendment prohibits any law that respects an establishment of religion, and when the Court found that the prayer by its very nature was a religious activity, the program was ruled a violation of the clause and hence unconstitutional.

Similarly, with the phrase "under God," it is important to realize that the mere fact that the prayer promotes a religion is sufficient to make the phrase a violation of First Amendment rights, regardless if that promotion is coercive. As Judge Goodwin stated in his original opinion in *Newdow*, "Once it is established that the state is sanctioning a formal religious exercise, then the fact that the students are not *required* to participate in the formal devotional exercises does not prevent those exercises from being unconstitutional" (*Newdow*). Even so, in a public school classroom many things technically non-coercive are in reality very much coercive. Since the United States remains a country dominated by Western religion doctrine, the vast majority of children have no reason to refuse to say the *Engel* prayer. Likewise, these same monotheistic children see nothing wrong with uttering the words "under God." Yet the child that refuses to say the prayer will stand out, marking himself or herself as a

target of possible ridicule. Accordingly, this indirect psychological peer pressure placed upon religious minorities to conform makes even "voluntary" religious exercises coercive.

Furthermore, though the Engel prayer is non-denominational by Western standards, it still stands as a promotion of a certain family of religions that recognize a monotheistic "Almighty God." Though "under God" does presume a non-denominational deity, justifying a religious mandate based on the fact that it caters to many monotheistic religions ignores the large number of polytheists, atheists, and agnostics in the United States to whom every such religious ruling is a violation of their right to believe in a different manner, or not to believe at all. Not every religion is monotheistic, and, more importantly, not every person believes in religion. Nowhere in the First Amendment's right to free exercise of religion does it state that American citizens *must* exercise religious beliefs—atheism is a perfectly valid way to exercise one's First Amendment right to religious belief. To nonbelievers, therefore, even non-denominational government endorsement of every religion is an unconstitutional violation of that fundamental right. The First Amendment was never intended to simply protect popular religions, but rather to protect every form of religious expression, even the lack thereof. Consequently, the government's program of prayer, though promoting a non-denominational set of religions, violated the Establishment Clause and the rights it grants to all Americans, including nonbelievers. This historic decision in *Engel* set a precedent for future Supreme Court rulings by demonstrating that even non-denominational expressions of religion are unconstitutional. Such a precedent is important to consider in Newdow since the mere fact that "under God" does not cater to a specific religion does not mean it is constitutional.

In addition to this important ruling, the Court also needs to consider the "Lemon Test," first outlined in the landmark 1971 case *Lemon v. Kurtzman.* The Lemon Test is three-pronged and outlines the necessary conditions for a government action to be deemed in accordance with the First Amendment: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion'" (Lemon). The current Pledge of Allegiance clearly fails the Lemon test on the first two prongs. Not only is there no conceivable secular legislative purpose to the words "under God," but even if there

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were, its effect would be secondary to the main effect of the words, which advance religion. Given the religious connotations of "under God," the words cannot pass the test and, therefore, represent the advancement of a religious doctrine.

While it seems evident that these important Supreme Court decisions ought to play a significant role in Newdow's case, there are those who have criticized and will continue to criticize such rulings as undemocratic. For example, the Moral Majority, led by the popular televangelist Jerry Falwell, asserts a mandate of the people as justification for their promotion of a Christian agenda: "The United States is a Christian nation, built under God, and will continue to be one because the people want it to be. No atheist liberal justice can stand in our way" (Falwell 219). More specifically, seeing the United States as a Christian nation, Falwell believes it should, therefore, embody the Christian values, if not the beliefs, of the majority. In many places that have enacted statutes in violation of the Establishment Clause, the school board members have been democratically elected by large conservative majorities who wish to decide the curriculum for their children. Robert Bork, a former Supreme Court nominee and author of "In Defense of Legal Reasoning," concurs: "Why should the Court, a committee of nine lawyers, be the sole agent for overriding democratic outcomes?" (7). Falwell and Bork argue that to have "nine old men" appointed by the President overturn the democratic vote of a majority morality is inherently un-American. Even federal judges have remarked on this fact: in a 1997 Ninth Circuit decision upholding the constitutionality of a ballot initiative banning affirmative action, the court wrote, "A system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy" (Coalition). In this case of Newdow and "under God," Falwell would clearly claim that the Supreme Court is unjustified in overruling the democratic decision to include the words "under God," a decision that has already been made by the American people.

However, it is important to realize that not only should we not permit Christian standards to define American culture, but that the true meaning of our law is to protect the rights of minority groups against the tyranny of the majority. As Porsdam points out, the only "cultural glue" that binds our nation together is the law: "When things come to a head, it is to jurists, rather than to politicians or even members of the clergy, that Americans turn in search for their answers" (1). Furthermore, "[a]s one minority group after another has fought to be included in the

American dream, to gain those rights and freedoms outlined in the Constitution, they have looked to the law as a means by which change can be accomplished" (Porsdam 4). Our secular system of law must protect the rights of all people, even non-monotheists, atheists, and agnostics, all of whom make up the religious minority in this country. Gerry Spence, in his essay "Justice: The Divine Mist," asserts that "it is the office of the law to restrain the powerful" (1). It is indeed justifiable for the Supreme Court to overrule democratic decisions if it means protecting the rights of the minority from a tyranny of the majority. In Judge Goodwin's opinion for *Newdow*, he stated: "It is the highest calling of federal judges to invoke the Constitution to repudiate unlawful majoritarian actions and, when necessary, to strike down statutes that would infringe on fundamental rights, whether such statutes are adopted by legislatures or by popular vote" (*Newdow*). There is no reason for the Supreme Court to be hesitant about overturning a popular law like mandating the recitation of the Pledge when the law is fundamentally unconstitutional and unjust.

However, critics such as Falwell reject this philosophy, claiming that such action against the promotion of religion oppresses religion, also unconstitutional under the First Amendment. He states that, "Modern U.S. Supreme Courts have raped the Constitution and raped the Christian faith and raped the churches by misinterpreting . . . the First Amendment to the Constitution and shutting down religion instead of protecting it" (Falwell 241). Similarly, the school board argued in *Engel v. Vitale* that prohibiting voluntary prayer in public schools was tantamount to blocking freedom of religion by not allowing students to pray. While it is true that in each case the government is preventing the expression of religion, in each case it is the government itself that is expressing it, and in a public school setting. Certainly the government has no right to prevent people from praying on their own or to undermine their personal monotheism invoked in the phrase "under God." What Falwell and others sharing his beliefs fail to notice, however, is that it is not the expression of religion that the government is taking a stance against—something indeed protected by the First Amendment—but rather, it is the government taking a stance against its own advocacy and promotion of a particular religion in public schools where school-endorsed voluntary prayer or the recitation of the words "under God" is, in reality, psychologically coercive. First Amendment violations do not occur when the government protects the rights of atheists, agnostics, and polytheists; rather, they occur when the government caves into the demands of the religious and

endorses religious doctrine in public school settings. If the words are removed from the Pledge, it seems intuitively ridiculous to claim that such protection of the rights of the nonreligious is somehow infringing upon the rights of the religious.

Finally, while many will argue that the words "under God" are valuable for their secular historical background, claiming that the words do not promote religion, but rather represent a greater theme of patriotism, it is important to look beyond those two words when reciting the Pledge. Though it is undeniable that the words do symbolize patriotism in some sense, it does not change the fact that the words are religiously motivated: singling out the words "under God" to be used to promote patriotism is unnecessary as there are many ways to atheistically express patriotism. Is it not the act of putting one's hand on one's heart, rising together, and speaking words such as "one nation" and "indivisible" in the Pledge that truly inspires patriotism, rather uttering "under God" in between? In a country proud of its tradition of separation of church and state, patriotism can very well be stirred without reference to gods. True patriotism needs not be conveyed by speaking the words "under God." As in *Edwards v. Aguillard,* when the Supreme Court ruled that ignoring equally valid secular methods to achieve some goal in favor of a religious one was tantamount to endorsing religion, it is clear the government is religiously, not patriotically, motivated in mandating the recitation of those words when such a religious reference is entirely unnecessary.

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Thus, as the Supreme Court hears the second *Newdow* case, the decision it must make is clear. From a technical perspective, Newdow's case is backed by much legal precedent. The state-mandated Pledge of Allegiance as currently recited by schoolchildren is indeed a violation of not only the Establishment Clause, but also the Lemon Test, for the simple reason that it makes explicit reference to God by describing the United States as being "one nation, under God." When placed in a psychologically coercive setting such as a public school, it seems intuitive that the inherently religious words do not belong in such a proclamation of devotion to this country built on the separation of church and state. We have tacitly accepted governmental references to God in much of America—our currency declares that "in God we trust," we have chaplains to open and close each session of Congress, we place our hand on a Bible while swearing to tell the truth in courts, and our President closes his speeches with "God bless America." Yet it is important to remember that we only find these acceptable because we do not believe they truly violate any

religious freedoms. At some point we must draw the line, and the place at which we begin is in the public schools so that when we teach our children of this nation's ideals, our words will be backed by our actions through the eradication of such hypocrisy. The true violation of First Amendment rights occurs when the right not to believe or believe in a different manner is eliminated, when such beliefs are endorsed and mandated by the government in a coercive public school setting. While Falwell and others will continue to argue that eliminating the phrase will be oppressing religion or diminishing the patriotic value of the Pledge, it is imperative that the Supreme Court consider its legal precedents while reviewing the Newdow case, and reassert the separation of church and state by ruling in favor of Newdow in *Newdow v. Congress* and striking out the words "under God" from the Pledge of Allegiance. Until that is done and until there is a change, pledging allegiance to America will remain an ironic contradiction to the American philosophy.

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