



ELK GROVE UNIFIED SCHOOL DISTRICT V. NEWDOW
SUPREME COURT OF THE UNITED STATES
542 U.S. 1
June 14, 2004

We will likely hear more from Mr. Newdow in the future. This case concerns his challenge to the Pledge of Allegiance “under God” phrase. The Court does not decide the religious issue because it found Mr Newdow did not have standing to bring the suit; however, this case is provided for the importance of its “dicta.”

OPINION: Justice Stevens...Each day elementary school teachers in the Elk Grove Unified School District lead their classes in a group recitation of the Pledge of Allegiance...Michael A. Newdow is an **atheist** whose daughter participates in that daily exercise. Because the Pledge contains the words "under God," he views the School District's policy as a religious indoctrination of his child that violates the 1st Amendment. A divided panel of the Court of Appeals...agreed...We granted certiorari...and...conclude that **Newdow lacks standing** and therefore reverse the Court of Appeals' decision...

The Pledge of Allegiance was initially conceived more than a century ago. As part of the nationwide interest in commemorating the 400th anniversary of Christopher Columbus' discovery of America, a widely circulated national magazine for youth proposed in 1892 that pupils recite the following affirmation: "I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all." In the 1920's, the National Flag Conferences replaced the phrase "my Flag" with "the flag of the United States of America."

In 1942, in the midst of World War II, Congress adopted, and the President signed, a Joint Resolution codifying a detailed set of "rules and customs pertaining to the display and use of the flag of the United States of America." Section 7 of this codification provided in full:

"That the pledge of allegiance to the flag, 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all', be rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words 'to the flag' and holding this position until the end, when the hand drops to the side. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute."

This resolution...confirmed the importance of the flag as a symbol of our Nation's indivisibility and commitment to the concept of liberty.

Congress revisited the Pledge of Allegiance 12 years later when it amended the text to add the words "**under God**." The House Report that accompanied the legislation observed that, "from the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." The resulting text is the Pledge as we know it today...

Under California law, "every public elementary school" must begin each day with "appropriate patriotic exercises." The statute provides that "the giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" this requirement. The Elk Grove Unified School District has implemented the state law by requiring that "each elementary school class recite the pledge of allegiance to the flag once each day." **Consistent with our case law, the School District permits students who object on religious grounds to abstain from the recitation.** *West Virginia Bd. of Ed. v. Barnette (1943)*¹.

In March 2000, Newdow filed suit...At the time of filing, Newdow's daughter was enrolled in kindergarten in the Elk Grove Unified School District and participated in the daily recitation of the Pledge...The complaint explains that Newdow is an **atheist** who was ordained more than 20 years ago in a ministry that "espouses the religious philosophy that the true and eternal bonds of righteousness and virtue stem from reason rather than mythology." The complaint seeks a declaration that the 1954 Act's addition of the words "under God" violated the Establishment and Free Exercise Clauses of the United States Constitution, as well as an injunction against the School District's policy requiring daily recitation of the Pledge...

In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing...There is a vast difference between Newdow's right to communicate with his child--which both California law and the 1st Amendment recognize--and his claimed right to shield his daughter from influences to which she is exposed in school despite the terms of the custody order. We conclude that...Newdow lacks

¹Case 1A-S-9 on this website.

prudential standing to bring this suit in federal court. The judgment of the Court of Appeals is reversed.

Newdow did not have custody of his daughter.

CONCURRENCE: Chief Justice Rehnquist/O'Connor/Thomas...On the merits, I conclude that the Elk Grove Unified School District policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," does not violate the Establishment Clause of the 1st Amendment.

...Congress amended the Pledge to include the phrase "under God" in 1954. The amendment's sponsor...said its purpose was to contrast this country's belief in God with the Soviet Union's embrace of atheism...Following the decision of the Court of Appeals in this case, Congress passed legislation that made extensive findings about the historic role of religion in the political development of the Nation and reaffirmed the text of the Pledge. To the millions of people who regularly recite the Pledge, and who have no access to, or concern with, such legislation or legislative history, "under God" might mean several different things: that God has guided the destiny of the United States, for example, or that the United States exists under God's authority. How much consideration anyone gives to the phrase probably varies, since the Pledge itself is a patriotic observance focused primarily on the flag and the Nation, and only secondarily on the description of the Nation.

The phrase "under God" in the Pledge seems, as a historical matter, to sum up the attitude of the Nation's leaders...Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound. [Justice Rehnquist refers to Washington's inaugural prayer, Thanksgiving proclamations of numerous presidents, Lincoln's Gettysburg Address...] The motto "**In God We Trust**" first appeared on the country's coins during the Civil War... In 1956, Congress declared that the motto of the United States would be "In God We Trust." Our Court Marshal's opening proclamation concludes with the words "**God save the United States and this honorable Court.**" The language goes back at least as far as 1827.

All of these events strongly suggest that our national culture allows public recognition of our Nation's religious history and character...

Notwithstanding the voluntary nature of the School District policy, the Court of Appeals, by a divided vote, held that the policy violates the Establishment Clause of the 1st Amendment because it "impermissibly coerces a religious act." To reach this result, the court relied primarily on our decision in *Lee v. Weisman*². That case arose out of a graduation ceremony for a public high school in Providence, Rhode Island. The ceremony was begun with an invocation, and ended with a benediction, given by a local rabbi. The Court held that even though attendance at the ceremony was

²Case 1A-R-089 on this website.

voluntary, students who objected to the prayers would nonetheless feel coerced to attend and to stand during each prayer. But the Court throughout its opinion referred to the prayer as "an explicit religious exercise" and "a formal religious exercise."

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*. 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]: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.

There is no doubt that respondent is sincere in his atheism and rejection of a belief in God. But the mere fact that he disagrees with this part of the Pledge does not give him a veto power over the decision of the public schools that willing participants should pledge allegiance to the flag in the manner prescribed by Congress. There may be others who disagree, not with the phrase "under God," but with the phrase "with liberty and justice for all." But surely that would not give such objectors the right to veto the holding of such a ceremony by those willing to participate. Only if it can be said that the phrase "under God" somehow tends to the establishment of a religion in violation of the 1st Amendment can respondent's claim succeed, where one based on objections to "with liberty and justice for all" fails. Our cases have broadly interpreted this phrase, but none have gone anywhere near as far as the decision of the Court of Appeals in this case. **The recital, in a patriotic ceremony pledging allegiance to the flag and to the Nation, of the descriptive phrase "under God" cannot possibly lead to the establishment of a religion, or anything like it...**

The Constitution only requires that schoolchildren be entitled to abstain from the ceremony if they chose to do so. To give the parent of such a child a sort of "heckler's veto" over a patriotic ceremony willingly participated in by other students, simply because the Pledge of Allegiance contains the descriptive phrase "under God," is an unwarranted extension of the Establishment Clause, an extension which would have the unfortunate effect of prohibiting a commendable patriotic observance.

CONCURRENCE: Justice O'Connor...[Not provided].

CONCURRENCE: Justice Thomas...I...take this opportunity to **begin the process of rethinking the Establishment Clause.** I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation. Moreover, as I will explain, the Pledge policy is not implicated by any sensible incorporation of the Establishment Clause, which would probably cover little more than the Free Exercise Clause...

Adherence to *Lee* would require us to strike down the Pledge policy, which, in most respects,

poses more serious difficulties than the prayer at issue in *Lee*. A prayer at graduation is a one-time event, the graduating students are almost (if not already) adults, and their parents are usually present. By contrast, very young students, removed from the protection of their parents, are exposed to the Pledge each and every day.

Moreover, this case is more troubling than *Lee* with respect to both kinds of "coercion." First, although students may feel "peer pressure" to attend their graduations, the pressure here is far less subtle: Students are actually compelled (that is, by law, and not merely "in a fair and real sense") to attend school.

Analysis of the second form of "coercion" identified in *Lee* is somewhat more complicated. It is true that since this Court decided *West Virginia Bd. of Ed. v. Barnette*, States cannot compel (in the traditional sense) students to pledge their allegiance. Formally, then, dissenters can refuse to pledge, and this refusal would be clear to onlookers. That is, students have a theoretical means of opting out of the exercise. But as *Lee* indicated: "Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity..." On *Lee*'s reasoning, *Barnette*'s protection is illusory, for government officials can allow children to recite the Pledge and let peer pressure take its natural and predictable course. Further, even if we assume that sitting in respectful silence could be *mistaken* for assent to or participation in a graduation prayer, dissenting students graduating from high school are not "coerced" to pray. At most, they are "coerced" into possibly appearing to assent to the prayer. The "coercion" here, however, results in unwilling children actually pledging their allegiance.

The Chief Justice would distinguish *Lee* by asserting "that the phrase 'under God' in the Pledge does not convert its recital into a 'religious exercise' of the sort described in *Lee*." In *Barnette*, the Court addressed a state law that compelled students to salute and pledge allegiance to the flag. The Court described this as "compulsion of students to declare a belief." The Pledge "required affirmation of a belief and an attitude of mind." In its current form, reciting the Pledge entails pledging allegiance to "the Flag of the United States of America, and to the Republic for which it stands, one Nation under God." Under *Barnette*, pledging allegiance is "to declare a belief" that now includes that this is "one Nation under God." It is difficult to see how this does not entail an affirmation that God exists. Whether or not we classify affirming the existence of God as a "formal religious exercise" akin to prayer, it must present the same or similar constitutional problems.

To be sure, such an affirmation is not a prayer, and I admit that this might be a significant distinction. But the Court has squarely held that the government cannot require a person to "declare his belief in God." *Torcaso v. Watkins*³ ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion'")...

I conclude that, as a matter of our precedent, the Pledge policy is unconstitutional. I believe,

³Case 1A-R-032 on this website.

however, that *Lee* was wrongly decided. *Lee* depended on a notion of "coercion" that, as I discuss below, has no basis in law or reason. The kind of coercion implicated by the Religion Clauses is that accomplished "**by force of law and threat of penalty.**" Peer pressure, unpleasant as it may be, is not coercion. But rejection of *Lee*-style "coercion" does not suffice to settle this case. Although children are not coerced to pledge their allegiance, they are legally coerced to attend school. *Abington*⁴; *Engel*⁵. Because what is at issue is a state action, the question becomes whether the Pledge policy implicates a religious liberty right protected by the 14th Amendment.

I accept that the *Free Exercise Clause*, which clearly protects an individual right, applies against the States through the 14th Amendment. But the Establishment Clause is another matter. **The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments.** Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause. In any case, I do not believe that the Pledge policy infringes any religious liberty right that would arise from incorporation of the Clause. Because the Pledge policy also does not infringe any free-exercise rights, I conclude that it is constitutional.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." As a textual matter, this Clause probably prohibits Congress from establishing a national religion. Perhaps more importantly, the Clause made clear that Congress could not interfere with state establishments, notwithstanding any argument that could be made based on Congress' power under the Necessary and Proper Clause. Nothing in the text of the Clause suggests that it reaches any further. The Establishment Clause does not purport to protect individual rights. By contrast, the Free Exercise Clause plainly protects individuals against congressional interference with the right to exercise their religion, and the remaining Clauses within the 1st Amendment expressly disable Congress from "abridging particular freedoms." **This textual analysis is consistent with the prevailing view that the Constitution left religion to the States.** History also supports this understanding: At the founding, at least six States had established religions...

I would welcome the opportunity to consider more fully the difficult questions whether and how the Establishment Clause applies against the States. One observation suffices for now: As strange as it sounds, an incorporated Establishment Clause prohibits exactly what the Establishment Clause protected--state practices that pertain to "an establishment of religion." At the very least, the burden of persuasion rests with anyone who claims that the term took on a different meaning upon incorporation. We must therefore determine whether the Pledge policy pertains to an "establishment of religion."

The traditional "establishments of religion" to which the *Establishment Clause* is addressed necessarily involve actual legal coercion...*by force of law and threat of penalty*...Even if

⁴Case 1A-R-034 on this website.

⁵Case 1A-R-033 on this website.

"establishment" had a broader definition, one that included support for religion generally through taxation, the element of legal coercion (by the State) would still be present...Through the Pledge policy, the State has not created or maintained any religious establishment, and neither has it granted government authority to an existing religion. The Pledge policy does not expose anyone to the legal coercion associated with an established religion. Further, no other free-exercise rights are at issue. It follows that religious liberty rights are not in question and that the Pledge policy fully comports with the Constitution.