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Supreme Court Watch

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SUPREME COURT WATCH



By Reginald C. Oh

During the U.S. Supreme Court's 2003–04 Term, one of the more controversial cases on its docket dealt with the constitutionality of Pledge of Allegiance recitations in public schools. Specifically, the issue in *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004), was whether the inclusion of the phrase “under God” in the Pledge of Allegiance created a First Amendment Establishment Clause violation. When the Court decided the case on June 14, 2004, however, it strategically sidestepped the controversy entirely by dismissing the case for lack of standing, deferring, to another day, a decision on the constitutionality of the Pledge of Allegiance. This article will examine briefly the Court's standing analysis, and then focus on the several concurring opinions in which several members of the Court explained how they would have ruled on the merits of the case.

The case began when respondent Michael Newdow, an avowed atheist, filed a lawsuit in the federal district court challenging the Elk Grove Unified School District's practice of having school teachers lead their classes in daily recitations of the Pledge of Allegiance. The Pledge of Allegiance states, “I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.” The current version of the Pledge was adopted by Congress in a 1954 Act.

At the time the lawsuit was filed, Newdow's daughter was a kindergarten student in the school district, and his contention was that the school district's policy of requiring his daughter and other school children to recite the Pledge is a form of religious indoctrination in violation of the First Amendment. In his complaint, the father challenged both the 1954 Congressional Act, and the school district's policy of teacher-led Pledge recitations. The federal district court rejected the father's contentions and dismissed the complaint. The Ninth Circuit Court of Appeals reversed, holding that both the 1954 Act and the school district's policy violated the Establishment Clause. Subsequently, the Ninth

Circuit amended its first opinion, declined to determine the constitutionality of the 1954 Act, and held only the school district's policy of requiring recital of the Pledge to be an Establishment Clause violation. The Supreme Court granted writ of certiorari, and, by an 8–0 vote, reversed the Ninth Circuit decision.

Five Justices voted to reverse the Ninth Circuit decision, concluding that the respondent lacked standing to bring the suit. Justices Rehnquist, O'Connor, and Thomas concurred in the judgment reversing the Ninth Circuit decision. All three Justices disagreed, however, with the majority on the standing issue. They held that the respondent did have standing to bring the case, but voted to reverse the decision on the merits of the case, concluding that the “under God” phrase does not violate the Establishment Clause. Justice Scalia recused himself and did not take part in the consideration of the case.

Justice Stevens wrote the majority decision, holding that Newdow did not have standing as a noncustodial parent of his daughter to challenge the school district's policy. Although the Court acknowledged that the father did have standing under Article III's “case or controversy” requirement, it concluded that the father lacked prudential standing to bring the lawsuit. Under the doctrine of prudential standing, the Court has established “self-imposed limits on the exercise of federal jurisdiction.” 124 S. Ct. at 2308. Specifically, the Court held that the father did not have standing to bring suit on behalf of his daughter, because he did not have the legal right under California law to make decisions on her behalf. That legal right belonged to the father's ex-wife. Thus, the Court concluded that, since the father's standing was derived entirely from his relationship with his daughter, the fact that he did not have the requisite legal custody over his daughter negated his ability to bring the lawsuit on her behalf.

The Court's refusal to decide on the merits of the case created a rather anti-climatic conclusion to the political and legal controversy generated by the “Pledge” case. Perhaps the five Justices who decided the case on standing are hoping that the case will be dismissed and will not come before the Court in the foreseeable future, thereby shielding the Court from unwanted political controversy. The concurring opinions written by Justices Rehnquist, O'Connor, and Thomas, therefore, provide the more interesting aspects of the decision, as they showed the varying approaches the Justices will likely take when and if this issue comes before the Court in the future.

Justice Rehnquist contends that requiring students to recite the Pledge does not violate the Establishment Clause because “[r]eciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one. . . .” 124 S. Ct. at 2320. As a patriotic exercise, the Pledge for Rehnquist is a “declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents.” *Id.* at 2319.



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Essentially, Rehnquist contends that the inclusion of the phrase “under God” does not transform the Pledge as a political oath into a religious invocation or prayer, and therefore, recital of the Pledge “cannot possibly lead to the establishment of religion, or anything like it.” *Id.* at 2320.

Rehnquist’s analysis is flawed because it relies on simplistic categorical reasoning to negate the religious/spiritual aspects of the Pledge. He seems to suggest that because the Pledge is about patriotism, it cannot be about religion, and the Establishment Clause cannot therefore be implicated. However, the patriotic nature of the Pledge, in conjunction with its reference to God, arguably does strongly implicate Establishment Clause concerns. Typically, the Establishment Clause is thought of as creating a separation between church/religion and state. The Framers were concerned about the coercive potential in the intermingling of religion and government.

The Pledge, however, instead of instilling a belief in the separation of church and state, actually does the opposite and inculcates in children the belief that patriotism and belief in God are inextricably intertwined. For children required to recite the Pledge countless number of times throughout their school going years, the Pledge may work to fuse in their minds allegiance to the nation with allegiance to God. In other words, the Pledge may teach children that pledging allegiance to the United States is tantamount to pledging allegiance and loyalty to God. In this way, it could be argued that the Pledge raises establishment concerns precisely because it invokes God as an integral part of an act of patriotism.

Justice O’Connor, in her separate concurrence, relies on the doctrine of religious endorsement to contend that the Pledge does not violate the Establishment Clause. Under the Establishment Clause endorsement test, government sponsored speech violates the Establishment Clause if it “makes 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.” *Id.* at 2321. A government endorsed message violates the Establishment Clause if a reasonable observer would conclude that the government through its speech is sending a message to nonadherents that they are outsiders in the political community.

For O’Connor, the question of whether the Pledge endorses religion comes down to the question of whether the Pledge should be considered an act of “ceremonial deism.” Acts of ceremonial deism are facially religious references that are employed primarily for secular purposes, and the Court has held that such acts do not present any real establishment of religion problems. *Id.* at 2323. Thus, for Justice O’Connor, the national motto “In God We Trust” is an act of ceremonial deism, because the motto commemorates the role of religion in our national history, and does not invoke in a meaningful way “divine provenance.” *Id.* at 2322.

Based on her analysis of the Pledge’s history, its absence of worship or prayer, its absence to any particular religion, and its minimal religious content, Justice O’Connor concludes that it is an act of ceremonial deism and therefore does not convey a message that religion or a particular religious belief

is favored or disfavored. First, she emphasizes that in a fifty-year span, the Pledge has become a routine ceremonial act of patriotism, in which “countless schoolchildren recite it daily.” *Id.* at 2323. Moreover, for O’Connor, the fact that in the fifty-year history of the Pledge, it has only been legally challenged three times supports her conclusion that the Pledge has become a routine, secular, and ceremonial act of patriotism that cannot be viewed as endorsing a particular religious belief. *Id.* at 2324.

Second, she contends that a reasonable observer would not view the Pledge as prayer or worship, nor would a reasonable observer see the Pledge as a “serious invocation of God or as an expression of individual submission to divine authority.” *Id.* at 2325. Third, the reference to God in a general way suggests that a reasonable observer would not conclude that the Pledge in any way is favoring or disfavoring particular religious beliefs or sects. Finally, she concludes that the Pledge has only a minimal reference to God, and the brevity of the reference strongly suggests that it is a ceremonial exercise that does not convey a message of religious endorsement.

O’Connor’s endorsement analysis is flawed because it elevates formalism over realism. The critical flaw here is in her use of the “reasonable observer” as the basis to determine whether the Pledge conveys a religious message. Although she does not explicitly mention the age of her hypothetical reasonable observer, it seems fairly clear that the observer is an adult and not a child. Specifically, given that this case is concerned with whether or not the Pledge endorses religion among schoolchildren, arguably, O’Connor’s analysis of the Pledge should have used the hypothetical reasonable schoolchild as the basis on which to determine the effect of the message on its intended audience.

When a reasonable adult may view the Pledge as merely a ceremonial reference to God, the critical question is how a school child will understand the message put forth by the Pledge. Given the impressionability of schoolchildren, especially elementary schoolchildren, it would be much harder for O’Connor to contend that a reasonable child observer would view the Pledge’s reference to God as minimal or as merely commemorating the role of religion in our national history.

Moreover, the recitation of the Pledge in the school context is very different from other acts of ceremonial deism, in which there are no elements of required participation. No one has to pledge allegiance to a Christmas crèche, for example, nor is one required to read and affirm the motto, “In God We Trust,” stamped on coins. In this case, however, children are required to recite the Pledge and pledge allegiance to “one nation under God.” Justice O’Connor tries to diminish the coercive nature of the recitation of the Pledge by noting that children may opt out and refuse to utter the part of the Pledge that contains the “under God” phrase. But, in suggesting that children have the option of “opting out” of reciting the Pledge, the forced recitation of the Pledge is creating exactly the situation O’Connor suggests is an Establishment Clause violation—it is treating those children who do not want to profess allegiance to a nation under God as “outsiders in the political

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community” on the basis of their religious beliefs.

Justice Thomas criticizes O'Connor and Rehnquist's opinions for failing to recognize the coercive and religious nature of the Pledge as it relates to schoolchildren. He contends that adherence to a prior Court decision holding that a school prayer at a graduation ceremony violated the Establishment Clause would require the Court to hold that recitation of the Pledge in schools similarly violates the Establishment Clause. Moreover, Thomas contends that the coercive elements with the Pledge case are actually stronger than in *Lee v. Weisman*, 505 U.S. 577 (1992), because “a prayer at a 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.” *Id.* at 2328.

Moreover, Thomas contends that the Pledge clearly re-

quires students to declare a belief in “one nation under God,” and that declaration is tantamount to making children profess a belief that “God exists,” a religious act that the Court has declared unconstitutional in other cases. However, while Thomas believes that the Pledge is unconstitutional under current Establishment Clause doctrine, he would ultimately uphold the constitutionality of the Pledge because he believes current Establishment Clause doctrine should be overturned, and that the Court should conclude that the Establishment Clause was meant only to restrain the federal government in establishing religion, and therefore, it should not apply to states.

Although the Court never reached a holding on the substantive issue in the case, given that *Newdow* was dismissed for lack of standing, nevertheless, the concurrences in *Newdow* gives us a glimpse into how the Court may decide this issue in the future.



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