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February 2005

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Recommended Citation

Sheldon Nahmod, *The Pledge as Sacred Political Ritual*, 13 Wm. & Mary Bill Rts. J. 797 (2005).

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THE PLEDGE AS SACRED POLITICAL RITUAL

Sheldon H. Nahmod*

INTRODUCTION

The public and the media, along with Congress, reacted with outrage and disbelief to the Ninth Circuit's 2002 decision in *Newdow v. United States Congress*.¹ In its initial version, *Newdow* broadly held that the inclusion in the Pledge of Allegiance of the phrase "one Nation under God"² violated the Establishment Clause.³ Members of Congress demonstrated their displeasure by reciting the Pledge of Allegiance on the steps of the Capitol. Many inveighed, yet again, against a liberal federal judiciary that not only bore an anti-religious bias, but also had reached out to decide an inflammatory constitutional issue better left to the

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¹ 292 F.3d 597 (9th Cir. 2002) (ruling that the phrase "under God" in the Pledge violates the Establishment Clause under the endorsement test, the *Lemon* test, and the coercion test), *as amended*, 328 F.3d 466 (9th Cir. 2003) (limiting analysis to the coercion test and ruling that, on this basis, the current Pledge of Allegiance violates the Establishment Clause in public schools and denying rehearing en banc), *cert. denied*, 540 U.S. 962 (2003), *and cert. granted in part sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 540 U.S. 945 (2003), *and rev'd*, 124 S. Ct. 2301 (2004) (finding that the plaintiff did not have prudential standing).

² The Pledge was first codified by Congress in 1942 and read as follows: "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." 36 U.S.C. § 172 (Supp. II 1942). Congress amended the Pledge, and added the words "under God" after the word "Nation" so that it now reads as follows: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4 (2000).

³ *Newdow*, 292 F.3d at 600. As noted more fully later, the Ninth Circuit amended its decision, limiting it to the public school setting, *Newdow*, 328 F.3d at 486–90, and thereafter the Supreme Court, per Justice Stevens, reversed and held in a five-three decision (Justice Scalia had recused himself) that the plaintiff did not have prudential standing. 124 S. Ct. 2301 (2004). The majority did not address the merits. *Id.* at 2301–12. However, Chief Justice Rehnquist and Justices O'Connor and Thomas concurred in the judgment. *Id.* at 2312–33 (Rehnquist, C.J., concurring). They determined that the plaintiff had prudential standing but argued on the merits that the phrase "under God" did not violate the Establishment Clause. *Id.* See discussion *infra* Part IV.A.

political process. The country had seen nothing like it since the Supreme Court's flag desecration decision in *Texas v. Johnson*⁴ twelve years earlier. Indeed, *Newdow* was considered by many to be an even more unpalatable decision than *Johnson* because, in addition to the flag, public school children and God were involved.

Newdow and the reaction to the decision call attention to the significant role in the American political community of the Pledge as a sacred⁵ political ritual, one that is an important component of American civil religion.⁶ The Pledge reinforces patriotic myths, it organizes individuals into a political community, and it communicates values that provide individuals with important aspects of their sense of reality. As an exegesis of the Pledge demonstrates,⁷ the inclusion of the phrase

⁴ 491 U.S. 397 (1989) (holding that under the First Amendment, the government cannot prohibit the politically motivated burning or other "desecration" of the American flag).

⁵ The distinction between the sacred and the non-sacred appeared several millenia ago in Western religion. Even though it did not originate with Judaism, the Pentateuch repeatedly emphasizes the distinction between "Koh'desh" (the sacred or holy) and "Chol" (the non-sacred or non-holy) in connection, for example, with the Israelites (the "holy people") and the land of Israel (the "holy land"). The concept of the sacred has been carried over into Christianity, but it was not until the twentieth century that it became important in the comparative study of religions. See RUDOLF OTTO, *THE IDEA OF THE HOLY: AN INQUIRY INTO THE NON-RATIONAL FACTOR IN THE IDEA OF THE DIVINE AND ITS RELATION TO THE RATIONAL* (John W. Harvey trans., Oxford University press 3d impression, 1925) (1917). Theologian Mircea Eliade, in an influential book, focuses on the concept of the sacred with its aspects of awe and separateness, and articulates a comprehensive theory regarding religion. MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* (Willard R. Trask trans., Harcourt, Brace & World, Inc. 1959). In particular, he demonstrates the ways that humanity divides time, space, and matter into two realms of the sacred and the non-sacred, or the holy and the non-holy. See *id.* at 14–16. A key insight in his description of the ways in which the sacred manifests itself in human life, or *hierophany*, is that the sacred literally makes itself seen. *Id.* at 11. He concludes his book by examining the presence of the sacred in modern life, maintaining that the modern individual is still surrounded by the sacred and by ritual, as reflected in political parties, the occult, and various philosophical movements. *Id.* at 201–13.

⁶ The term "civil religion" may have originated in JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT* bk. 4, ch. 8 (Henry J. Tozer trans., 1948) (1895), and was introduced into American political thought in 1967 by Robert Bellah, in his influential essay, Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967). According to Bellah, civil religion is a set of beliefs and attitudes that explains the meaning and purposes of a political society in terms of a transcendent spiritual reality. *Id.* at 5–9. These beliefs and attitudes are held by people generally and are expressed in public rituals, myths, and symbols. *Id.* at 8. American civil religion events such as the Revolution, the Civil War, the deaths of Presidents Lincoln and Kennedy, and the World Wars have Biblical analogues in the Exodus, the Chosen People, the Promised Land, and Sacrificial Death and Rebirth. *Id.* at 16–19. See AMERICAN CIVIL RELIGION (Russel E. Richey & Donald G. Jones eds., 1974) (containing essays on civil religion); discussion *infra* Part II.

⁷ See discussion *infra* Part II.A.

“under God” expressly renders God foundational to the American political community and thereby sacralizes the Pledge in violation of the Establishment Clause. Nevertheless, the Pledge functioned as a powerful political ritual long before “under God” was inserted, and would do so even if the phrase were eliminated from the Pledge on Establishment Clause grounds.

In Part I of this Article, which primarily relies on the work of David Kertzer,⁸ I first consider ritual in general — defined “as symbolic behavior that is socially standardized and repetitive”⁹ — and then political rituals in particular. In Part II, which is the core of this Article, I engage in an exegesis of the Pledge and analyze it as a sacred political ritual. Parts III and IV address the Ninth Circuit’s decision in *Newdow* and the Establishment Clause issues presented. Part III briefly sets out the constitutional background of the Pledge,¹⁰ which includes the Supreme Court’s decision in *West Virginia Board of Education v. Barnette*¹¹ and the Court’s school prayer decisions.¹² Part IV discusses *Newdow* and argues that the Ninth Circuit got it right on the Establishment Clause issue, even though the Supreme Court later reversed on prudential standing grounds.¹³

I. POLITICAL RITUALS

A. *Ritual in General*

Catherine Bell¹⁴ suggests that three general theoretical perspectives, singly or in combination, have characterized the study of ritual.¹⁵ The first perspective emphasizes religion and focuses on the origins of ritual and the connections

⁸ DAVID I. KERTZER, *RITUAL, POLITICS, AND POWER* (1988). See discussion *infra* Part I (addressing the characteristics of political rituals).

⁹ See KERTZER, *supra* note 8, at 9 (defining “ritual”).

¹⁰ Whenever the term “Pledge” is referred to, it includes the salute to the flag where the right hand is placed on the left breast while the language of the Pledge is recited.

¹¹ 319 U.S. 624 (1943).

¹² These decisions include those dealing with extracurricular activities such as graduations and football games. See discussion *infra* Part III.

¹³ *Newdow*, 124 S. Ct. 2301 (2004). See discussion *infra* Part IV.

¹⁴ I learned much from the excellent survey of the study of ritual in CATHERINE BELL, *RITUAL: PERSPECTIVES AND DIMENSIONS* (1997).

¹⁵ *Id.* at 2. As mentioned earlier, I use Kertzer’s definition of ritual “as symbolic behavior that is socially standardized and repetitive.” KERTZER, *supra* note 8, at 9. Kertzer notes that his definition does not “distinguish between religious and secular ritual,” a point that is important not only for his political ritual project but also for this Article. *Id.* Along similar lines, Bell identifies several characteristics of ritual-like activities: “formalism, traditionalism, disciplined invariance, rule-governance, sacral symbolism and performance.” BELL, *supra* note 14, at 138.

between the thing *said*, myth, and the thing *done*, ritual.¹⁶ The second, or functionalist perspective, focuses on how ritual *works*, that is, its role in social organization and the dynamics of human societies.¹⁷ In contrast, the third, or culturalist perspective, asks what ritual *means* and looks at ritual as a form of cultural connection “that transmits cognitive categories and dispositions that provide people with important aspects of their sense of reality.”¹⁸

¹⁶ See BELL, *supra* note 14, at 3–22. I address the mythic aspects of the Pledge later in my exegesis, particularly the references to “one Nation under God” and “with liberty and justice for all.” See discussion *infra* Part II. Mircea Eliade’s phenomenological study of religion, the dependence of ritual on myth, and the various psychoanalytic theories of ritual, ELIADE, *supra* note 5, and Joseph Campbell’s work on myth and ritual, BELL, *supra* note 14, at 16, are good examples of this perspective.

It should be emphasized that none of these perspectives invariably stands apart from the others. For example, Joseph Campbell’s approach describes four functions of myth and ritual, some of which are similar to the second and third perspectives set out in the text. *Id.* Thus, while ritual for Campbell has a “mystical function that induces a sense of awe” and a cosmological function of promoting “a coherent image of the cosmos,” *id.*, Campbell’s approach also has a sociological function of integrating individuals within the community and a psychological function of guiding an individual’s psychological development, *id.* Interestingly, Bell declares that much of the theory underlying these perspectives has been discredited but concedes that it is still influential. *Id.* at 22.

¹⁷ See BELL, *supra* note 14, at 23–60. I address the Pledge from a functionalist perspective later, particularly in connection with its setting in a public education context involving children. See discussion *infra* Part II.

This functionalist approach is sociological in nature, as reflected in the seminal work of Emile Durkheim who studied religion as a social phenomenon. EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* (Joseph Ward Swain trans., The Free Press 1965) (1915). For Durkheim, rituals, defined as rules of conduct in the presence of sacred objects, help promote the feeling of connection to something larger. BELL, *supra* note 14, at 24. Later anthropologists engaged in neo-functional systems analysis and emphasized that human behavior is determined by more than social conditioning. *Id.* at 29–33. These anthropologists described the interaction of multiple cultural systems and developed what Bell terms ecological, ethological, biogenetic, and psychological theories of ritual. *Id.* at 32. And, in what Bell calls an important move, structuralism shifted attention from the role of ritual in religion to a more general category of social action. See *id.* at 33–46. Claude Lévi-Strauss, for example, treated all social phenomena, including ritual, as symbolic systems of communication that are derived from and shaped “by structures of thought rooted in the human brain.” *Id.* at 42–43. In general, according to Bell, under this second perspective ritual is non-rational and non-utilitarian. See generally *id.*

¹⁸ BELL, *supra* note 14, at 2. While the functionalist perspective links symbols to social organizations, the culturalist perspective emphasizes social and cultural change as well as the arbitrary and language-like nature of a cultural system of symbols. *Id.* at 61. Under this perspective, according to Bell’s description, ritual is a means by which the cultural system and the social system interact with one another. *Id.* at 2.

Prominent among culturalists is Clifford Geertz who, in his “extensive treatment of ritual,” asserted that religious symbols and religious rituals “constitute a system of values that

Bell maintains that no one perspective is superior to the others and that each of the three perspectives can still be found in ritual studies today.¹⁹ She then elaborates on her own preference, one that is similar to the culturalist perspective: ritual is, and should be studied as, a form of cultural practice.²⁰ This entails the following: (1) ritual should be studied in its real context; (2) the central quality of ritual is the body moving in a specially constructed space, simultaneously imposing and receiving the values ordering the environment; and (3) ritualization is a form of acting that tends to promote the authority of forces deemed to derive from beyond the immediate situation.²¹ Bell argues that this approach has the advantage of focusing on what people do and how they do it, rather than on any overarching theory of ritual.²²

Political rituals,²³ addressed next, are a special category of ritual that has been carefully examined by David Kertzer.²⁴

B. Political Rituals

Bell observes that anthropologists who study political rituals have determined that such rituals generally “construct, display and promote the power of political

acts both as ‘a model of’ the way things actually are and as ‘a model for’ how they should be.” *Id.* at 66 (quoting CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURE* 112 (1973)). For Geertz and others, ritual functions to display social passions. Moreover, ritual is not invariably conduct: words alone can be performative utterances that constitute deeds, or speech acts. Bell explains that various theories of ritual performance became prominent in the 1970s, followed by an emphasis on human action as praxis. *Id.* at 72–73. Such “practice theory” studies how human activities, including rituals, are creative strategies through which people reproduce and reshape their social and cultural environments. *Id.* at 73.

Interestingly, Bell identifies what she calls a new paradigm of ritual as “primarily a medium of expression, a special type of language suited to what it is there to express, namely, internal spiritual-emotional resources tied to our true identities but frequently unknown and undeveloped.” *Id.* at 241. She argues that the social forces underlying this ongoing shift toward self-centered ritual include the media, tourism, and multi-culturalism. *Id.* at 242–51.

¹⁹ She points out that there are other perspectives outside of the three, including feminist analyses and liturgical studies conducted from within religious traditions. BELL, *supra* note 14, at 89.

²⁰ *Id.* at 82.

²¹ *Id.* at 81–82.

²² For Bell, ritual is practice that makes and harbors cultural patterns, and doesn’t just express these patterns; it is “a vehicle for the *construction* of relationships of authority and submission.” *Id.* at 82.

²³ Bell identifies what she calls six fairly standard ritual genres, of which political rituals are one such genre. She explains her typologies as compromises between completeness and simplicity. These genres are: (1) “life-cycle” rites of passage; (2) “calendrical and commemorative rites”; (3) “rites of exchange and communication”; (4) “rites of affliction”; (5) “rites of feasting, fasting and festivals”; and (6) “political rituals.” *Id.* at 94.

²⁴ See KERTZER, *supra* note 8.

institutions . . . or the political interests of [particular] constituencies.”²⁵ Political rituals construct power by showing “people as a coherent and ordered community based on shared values and goals” and by “demonstrat[ing] the legitimacy of th[o]se values and goals.”²⁶ David Kertzer, whose work on political rituals is quite comprehensive, makes a similar point somewhat differently — political rituals create political reality by building political organizations, creating political legitimacy, “creating political solidarity in the absence of political consensus,” and molding people’s understandings of the political universe.²⁷ For Kertzer and others, therefore, political rituals do far more than support the political status quo; they can also create political power.

According to Kertzer,²⁸ symbols are the means “by which we give meaning to the world around us”;²⁹ they “instigate social action and define [an] individual’s sense of self.”³⁰ “Ritual[s] help[] give meaning to [the] world . . . by linking the past to the present and the present to the future,” thereby providing continuity both individually and to the world.³¹ “They also furnish the means by which people make sense of the political process.”³² In Kertzer’s view, “modern politics depends on people’s tendency to reify political institutions.”³³ “Each society has its own mythology detailing its origins and sanctifying its norms,”³⁴ and “ritual practices are

²⁵ BELL, *supra* note 14, at 128.

²⁶ *Id.* at 129. Specific examples of political rituals in the United States include the State of the Union Address, Presidential funerals (most recently, that of Ronald Reagan), elections, Fourth of July celebrations, the singing of the National Anthem at sporting and other events, and, of course, the Pledge of Allegiance.

²⁷ KERTZER, *supra* note 8, at 14 (summarizing chapters 2–5 of his book).

²⁸ Kertzer probably fits into the culturalist category.

²⁹ *Id.* at 3–5.

³⁰ *Id.* at 6.

³¹ *Id.* at 9–10.

³² *Id.* at 6.

³³ *Id.*

³⁴ *Id.* at 12. According to important thinkers like Friedrich Nietzsche and Mircea Eliade, myths are necessary for individuals and the societies in which they live because they supply meaning for them as well as provide an emotional connection for individuals as members of a political community. See ALLAN MEGILL, *PROPHETS OF EXTREMITY: NIETZSCHE, HEIDEGGER, FOUCAULT, DERRIDA* 75 (1985) (quoting FRIEDRICH WILHELM NIETZSCHE, *THE BIRTH OF TRAGEDY* 135 (Douglas Smith trans., Oxford Univ. Press ed., 2000) (1887) (declaring that myths are a central and indispensable element of culture)); ELIADE, *supra* note 5, at 205 (1957) (“A whole volume could well be written on the myths of modern man, on the mythologies camouflaged in the plays that he enjoys, in the books that he reads.”).

Long before these thinkers, Plato recognized the function of myth when he argued that only those myths that served the purposes of the political community should be permitted in the republic by the philosopher-kings. *THE REPUBLIC OF PLATO* bk. III (Francis MacDonald Cornford trans., Oxford University Press 1942).

a major means of propagating these political myths.”³⁵ Political rituals work because they have both a “cognitive effect on people’s definition of political reality” and an emotional impact resulting from the satisfaction that people get from participating in them.³⁶

Kertzer inquires into several areas that are relevant to the Pledge of Allegiance: political legitimacy, political solidarity, and the molding of “people’s understanding of the political universe.”³⁷ A political system that is viewed as illegitimate is unstable, so political rituals help to make people conform by making them believe that the society in which they live is legitimate and reflects how the world should be constructed.³⁸ In addition, every society has its legitimating myths; in democratic countries, according to Kertzer, that myth is often equality.³⁹

Building on Durkheim, Kertzer points out that political rituals “not only express innate strivings for social solidarity, but also do much to build and renew them.”⁴⁰ For example, the rituals of American civil religion⁴¹ produce solidarity in situations of conflict. Moreover, uniformity of belief is not required for participation in political rituals because of the inherent ambiguity of many such rituals.⁴² For Kertzer, this turns out to be very important for building social solidarity: political rituals build solidarity of beliefs through people acting together without necessarily sharing the same beliefs.⁴³

Finally, and of special importance in connection with the Pledge, for Kertzer, political rituals not only build solidarity but are an important means of influencing people’s political ideas and values.⁴⁴ To show how this happens, he delves into cognitive psychology⁴⁵ and focuses on the view that information that comes

³⁵ KERTZER, *supra* note 8, at 13.

³⁶ *Id.* at 14.

³⁷ *Id.*

³⁸ For example, an important ritual of legitimation in democracies is the election. *Id.* at 50–51.

³⁹ *Id.* at 51.

⁴⁰ *Id.* at 62.

⁴¹ As noted earlier, *supra* note 6, American politics and the American political system have been viewed by some scholars as modeled on religion, with many of the characteristics of the American political system deemed semi-religious in nature and thus reflective of American civil religion. For example, Bennett considers the components of American civil religion to include both the existence of a divinity that is non-sectarian and instrumental, and a “generalized dogma or political ethos” that is transcendent. W. Lance Bennett, *Political Sanctification: The Civil Religion and American Politics*, 14 SOC. SCI. INFO. 79, 87 (Nov.–Dec. 1975). Overall, there is a consensus on general principles among adherents to American civil religion. *Id.* at 82.

⁴² KERTZER, *supra* note 8, at 76.

⁴³ *Id.*

⁴⁴ *Id.* at 76–79.

⁴⁵ *See id.* at 79 (relying on various psychological studies).

“through our senses is ‘processed’ through ‘pre-existing systems of schematized and abstracted knowledge’” structures that are termed “schemas.”⁴⁶ In addition to schematic thinking, Kertzer points out that psychologists have observed “that people pay much more attention to vivid, concrete information than to more colorless, abstract information,” that we are more likely to notice something “distinct within its environment,” and that we are “influenced by the order in which we learn[] different features.”⁴⁷

Kertzer puts all of this together and states that, as a psychological matter, political rituals are “persuasive” because they “discourage critical thinking.”⁴⁸ He asserts that “[a]s a form of formalized communication, [ritual] presents us with a well-defined course of action . . . [and] highlights a limited series of vivid images . . . [and] symbols employed [to] suggest a particular interpretation of what is being viewed.”⁴⁹ In this way, political reality is defined by both ritual and beliefs that “are subsequently reaffirmed through regular collective expression.”⁵⁰ Political rituals “encourage certain interpretations of the world” primarily through “the powerful emotions they trigger.”⁵¹ Kertzer acknowledges, though, that the ultimate force of political rituals comes from a *combination* of emotion and cognitive content, with the most effective rituals involving a person’s personality as a whole.⁵²

II. THE PLEDGE AS SACRED POLITICAL RITUAL

A. An Exegesis of the Pledge, with Commentary

To analyze the Pledge of Allegiance as a sacred political ritual, I begin Part II with an exegesis of the Pledge, followed by consideration of its setting and context. I then consider the expressive functions of the Pledge in creating and supporting political norms.

⁴⁶ *Id.* at 79 (quoting RICHARD NISBETT & LEE ROSS, HUMAN INTERFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 7 (1980)).

⁴⁷ *Id.* at 82–83.

⁴⁸ *Id.* at 85.

⁴⁹ *Id.*

⁵⁰ *Id.* at 95. As Kertzer points out, this view assumes that people are not essentially rational. *Id.* at 96–97.

⁵¹ *Id.* at 99.

⁵² *Id.* Along similar lines, Kertzer maintains that political rituals can be seen as “a form of rhetoric, [or] the propagation of a message through a complex symbolic performance.” *Id.* at 101.

It is worth pointing out that, despite his emphasis on the construction of political reality through political rituals and symbols, Kertzer sensibly repudiates the extreme view that people are “zombies imprisoned in a symbolically created universe they are powerless to change.” *Id.* at 174. After all, he observes, people’s behavior and their symbols do change and “these changes are [often] linked to external events.” *Id.* at 175. Kertzer devotes chapter 9 of his book to a discussion of how political change comes about. *See id.* at 174–84.

"I": This personal pronoun is in the singular, not the plural. It is the individual who speaks here and takes personal responsibility in front of others, peers and teacher, in the classroom. The individual engages in a performative act; the rational faculty is involved, as is the affective (hand on the heart). "I am, therefore I pledge." "I pledge, therefore I am."

"pledge allegiance": I promise loyalty and fidelity and affirm that this is the truth (that it corresponds to fact). I do this in a public ceremony that others see and in which they participate as well. Symbolically I bind myself (to the flag and the Republic) at the same time that others similarly bind themselves. I communicate this message to others and they communicate this message to me. All of us "I's" witness together, thereby constituting a political community. Solidarity is promoted, even if we have different political views.

Significantly, after the first three words of the Pledge are recited, the speaker recedes into the background while the American flag, America's form of government, and its idealized characteristics become the focus and take center stage.

"to the flag of the United States of America": I pledge allegiance to a piece of decorated cloth that represents or symbolizes the United States, and to no other country or its flag. The American flag not only concretely embodies the political community as it currently exists and as it will exist in the future, but it also represents the history of the United States, from its founding to the present. This real and imagined history includes those episodes in which the flag has played an important role, such as the Revolutionary War, the British bombardment of Fort Mchenry during the War of 1812, the Civil War and the First and Second World Wars (the latter, by Iwo Jima especially). By pledging allegiance to the American flag, I am connected to the past, present, and future of the United States.

The American flag is thus a sacred political symbol,⁵³ one whose integrity is protected by federal and state statutes. While it is true that these statutes cannot, consistent with the First Amendment, prevent the physical mutilation of the flag for

⁵³ See Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L.J. 511 (1991), where I considered the implications of the various opinions in *Texas v. Johnson*, 491 U.S. 397 (1989), which held, five-four, that criminalizing the politically motivated burning of the American flag violates the First Amendment. *Id.* at 513. I argued that, for the dissenters, the American flag is a sacred object that must be venerated because of the role it has played in American history and because it embodies the American experience. *Id.* at 530. The flag also "represents America's imagined past and present." *Id.* As I pointed out in connection with Chief Justice Rehnquist's dissent, veneration of the American flag "draws citizens within the American experience, invites vicarious participation in the birth of the republic and the various wars in which American blood was spilled in defense of that republic, and thus promotes their attachment to it." *Id.* at 530-31. Nevertheless, despite the importance of the flag for political community and American civil religion, I ultimately concluded that sacralizing the flag by criminalizing its politically motivated burning is, on balance, unwise in light of our First Amendment "tradition of tolerance for controversial and unsettling ideas." *Id.* at 548.

political purposes, they nevertheless express the reverent attitude that one is supposed to display before this piece of decorated cloth.⁵⁴

“and to the Republic for which it stands”: I pledge allegiance not only to the flag, which represents the United States and its history, but also to its political system. I acknowledge that the flag symbolizes a particular political system and type of government. This political system is both an idea (a Republic, neither a true democracy on the one hand nor an authoritarian regime on the other) and a concrete government in the real world. The Republic, like the flag, has a past, present, and future, and I am thereby connected to them as well.

The remainder of the Pledge is more abstract than what precedes it because it asserts the idealized characteristics of the Republic. This abstraction encourages people with markedly different political views to join in the Pledge and reinforces the various myths that follow.

“one Nation under God” (the language discussed in *Newdow*): This people and its political community (a Republic) recognize God as the Supreme Being. The Nation and its citizens live by God’s laws and under God’s protection. God, the foundation of the nation, intervenes in history and is concerned with the United States. The absence of a comma between “one Nation” and “under God” further emphasizes that God is foundational.

This myth serves both to reassure and to connect the individual to the political community that is thus rendered eternal and transcendent. In addition, it sacralizes the United States as a nation, and further suggests that the same God who created the world and revealed himself in the Jewish and Christian traditions plays an important role in United States history. Moreover, this reference to God who is eternal means that members of the American political community are connected through God to the omnipotent and the omnipresent. The phrase thus turns what was already a powerful political ritual into an explicitly sacred political ritual.

While inconsistent with a strict church/state separation approach of the sort advocated by John Locke⁵⁵ and Thomas Jefferson,⁵⁶ “under God” is consistent with civic republicanism of the kind espoused by George Washington.⁵⁷ He and others,

⁵⁴ *Id.* at 516 n.30.

⁵⁵ See John Locke, *A Letter Concerning Toleration* (1695), reprinted in 35 GREAT BOOKS OF THE WESTERN WORLD: LOCKE, BERKELEY, HUME 1, 4 (Robert Maynard Hutchins ed., 1952) (arguing the Enlightenment position of strict separation of church and state, “civil government relates only to men’s civil interests, is confined to the care of the things of this world, and hath nothing to do with the world to come”).

⁵⁶ Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), reprinted in 8 THE WRITINGS OF THOMAS JEFFERSON 113 (H.A. Washington ed., 1984) (interpreting the Establishment and Free Exercises Clauses as “building a wall of separation between church and State”).

⁵⁷ See GEORGE WASHINGTON, WASHINGTON’S FAREWELL ADDRESS TO THE PEOPLE OF THE UNITED STATES (1796), S. DOC. NO. 106-21, at 20 (2000) (declaring that religion and

such as John Adams, maintained that the future of the United States depended on the morality of its people, and that, in turn, this morality depended on religion.⁵⁸ In this way religion is useful to the political community. Accordingly, they (unlike Jefferson and perhaps Madison) would have had little or no problem with incorporating God in the Pledge. From this perspective, the inclusion of God in the Pledge is an entirely proper manifestation of American civil religion.

Observe how “one Nation under God” relates back to the first words of the Pledge: the individual who is pledging allegiance personally acknowledges God’s involvement in the founding of the United States and God’s continuing interest in, and protection of, the country and its citizens.

“*indivisible*”: This is the myth that the citizens of the United States are politically united and cannot be divided; they constitute one entity. The fact that students recite the Pledge in unison and simultaneously engage in the same conduct (like their parents before them) buttresses the myth of indivisibility. Moreover, there is an intriguing parallel between an indivisible nation and a monotheistic God.

“*with liberty and justice for all*”: These words, which are undefined and vague, declare the myth that the United States provides freedom and fairness to everyone, regardless of who they are and where they come from. There is no express reference to equality, but it is connoted by “for all.”

*B. The Setting and Context of the Pledge*⁵⁹

1. Where and Who

The Pledge ordinarily occurs in the classroom at the beginning of the school day and involves standing up and pledging to the flag while reciting the words of the Pledge. The school classroom, a special purpose space that is educational in nature, is used not only to convey the information and skills necessary for success in the workplace but also to inculcate democratic values and to create a sense of connection to the larger political community.⁶⁰ The classroom is under the control of an

morality are essential to the success of popular government and “that morality can[not] be maintained without religion”). For an illuminating discussion of various theological and political perspectives on the proper relation between government and religion, including the Enlightenment view of Locke and Jefferson and the civic republican view of Washington and others, see John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371 (1996).

⁵⁸ See WASHINGTON, *supra* note 57.

⁵⁹ Recall that I use Kertzer’s definition of ritual “as symbolic behavior that is socially standardized and repetitive.” KERTZER, *supra* note 8, at 9. Setting and context are therefore important. See e.g., BELL, *supra* note 14, at 1–2 (mentioning Bell’s approach to the study of ritual).

⁶⁰ See Witte, *supra* note 57, at 424 (describing the primary purpose of public schools as advancing “constitutional and democratic values”).

authority figure, the teacher who, representing the state,⁶¹ leads the students in the Pledge, thereby strengthening the message of the Pledge. The students are all together when they recite the Pledge in unison under the teacher's leadership, thereby promoting social and political solidarity. These considerations combine to enhance whatever educational and political message the Pledge is thought to communicate, even if that message is received differently by students of different ages and at different levels of intellectual development.⁶² Further reinforcing social and political solidarity as well as the Pledge's message is that most, if not all, of the parents of the students themselves participated in the Pledge when they were in school.

2. When

The Pledge routinely takes place at the same time every day, ordinarily at the very beginning of the school day. This placement at the beginning of the day has several effects. Because the Pledge precedes instruction, it can be interpreted as setting a patriotic tone for the school day. In addition, this placement gives it a kind of priority over the rest of the curriculum. And the fact that the Pledge remains the same each day, while the instruction changes, both solemnizes the educational enterprise in a prayer-like manner and transcends the daily instruction. That the Pledge is recited in the classroom each and every day further emphasizes its message.

3. The Physical Movements

It is not only the recitation of the words while respectfully standing at attention that gives the Pledge its affective power. Consider that there is movement of the right hand to the heart and the holding of the hand over the heart, the seat of emotions, while reciting. This constitutes more than words that are a performative

⁶¹ In private religious schools, the teacher typically represents the church or other religious institution.

⁶² See Eugene A. Weinstein, *Development of the Concept of Flag and the Sense of National Identity*, 28 CHILD DEV. 167 (1957). The study concluded that the acquisition of the concept of the flag and national identity is gradual and is related to chronological age and the ability to perform logical operations. *Id.* at 173–74. For example, children at the first stage of development, from five to six years old, only know that the thing called a flag has certain colors and lines but have no real idea of what the flag represents or that there are other countries. *Id.* at 171. In contrast, children at the eighth stage of development, ten years old, know that “the flag stands for loyalty to a set of goals” as well as to “those groups holding those goals.” *Id.* at 172. They also know of other countries and other flags. *Id.* at 173. Finally, children at the ninth and tenth stages studied, from eleven to twelve years old, “clearly understand[] the full implication of convention and [are] able to incorporate this understanding in responses showing a sophisticated conception of the relationship of convention to flag, people, and government.” *Id.*

act; this is itself an act (symbolic conduct) that communicates to others (a kind of witnessing) the speaker's belief in what he or she is saying. Furthermore, that the students are not only saying the same thing but also acting in the same manner promotes conformity of both belief and action.

C. The Expressive Functions of the Pledge

The power of the Pledge as a sacred political ritual is not diminished by the First Amendment right of children to refuse to participate, per *Barnette*,⁶³ because students overwhelmingly *do* participate. It takes a great deal of courage for a student (or anyone, for that matter) to separate from peers and thereby call attention to herself. In effect, the student must publicly declare herself in disagreement with some aspect of the Pledge.⁶⁴

But there is another reason the sacralizing power of the Pledge is not diminished. Apart from whatever informal sanctions might be imposed on a student who refuses to salute and pledge to the flag, the legislatively mandated Pledge communicates an important message. One does not have to commit fully to what legal scholars currently call expressivist theory⁶⁵ to agree that laws send messages in addition to creating sanctions for misbehavior.⁶⁶ These messages, which involve certain attitudes, beliefs, and values that are communicated by a legislature and are understood as such by the audience, can function to manage social norms and

⁶³ *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁶⁴ See KERTZER, *supra* note 8, at 167. Kertzer observes that the Nazis used a person's refusal to salute "Heil Hitler" as a means of identifying opponents, who were then ostracized or worse. *Id.*

⁶⁵ See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2045 (1996). In part, expressivist theories of law have developed in reaction to the law and economics movement that emphasizes the effect of government sanctions, while supposedly paying little or no attention to the messages that legal rules send or to the effect of those messages on social norms and behavior.

Expressivist theory can be insightful, but the core observation that legal rules send messages even apart from their sanctions is nothing new. For example, in the infamous Supreme Court decision, *Plessy v. Ferguson*, 163 U.S. 537 (1896), which upheld a state statute prohibiting whites and blacks from traveling together on the same railroad car, the majority argued that this kind of segregation did not "stamp[] the colored race with a badge of inferiority." *Id.* at 551. If that were the case, it was only because "the colored race chooses to put that construction upon it." *Id.* To which Justice Harlan, in his justly famous dissent, soundly responded that "[e]very one knows" that the purpose of the legislation was to exclude blacks from railroad cars used by whites and thus to send a message of inferiority. *Id.* at 557.

⁶⁶ See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 953 (1996).

influence behavior by signaling the underlying attitudes of the community and society (as reflected by a legislative majority) toward various kinds of behavior. The assumption underlying this particular expressivist approach is that as people get information about what others — presumably the majority — approve and disapprove, they modify their behavior in order to “gain approval and avoid disapproval.”⁶⁷ In the case of the legislatively mandated Pledge, the audience consists of all members of the political community as well as students.

One critical implication of this approach is that even purely symbolic government action is important and can be controversial because it can change behavior by signaling majoritarian attitudes. This helps explain why there have been so many political and legal struggles not only about governmental displays of religious symbols such as creches, Christmas trees, and menorahs, but also about governmental attempts to protect the American flag and to promote the Pledge with “under God.”

It should therefore come as no surprise that there was such a striking and strident reaction to the Ninth Circuit’s initially broad decision in *Newdow*. People understood this decision as taking a stand against the desirability of the Pledge and thus against its overt sacralizing message.⁶⁸ Responding to *Newdow*, many symbolically expressed their own belief in the message of the Pledge. This was perhaps most obvious when members of Congress in Washington reacted to *Newdow* by standing on the steps of the Capitol and reciting the Pledge.⁶⁹ This ritual-reinforcing response was intended to send its own message — the “one Nation under God” message of the Pledge — to the national political community.

With this understanding of the Pledge as a sacred political ritual, I turn next to the constitutional background of the Pledge and then to the decision in *Newdow* and the Establishment Clause issues presented.

⁶⁷ See McAdams, *supra* note 65, at 340.

⁶⁸ Strictly speaking, when the Supreme Court strikes down legislation as violative of the Constitution, it is not taking a position on the wisdom of that legislation, a matter for the legislative process in a democracy. But very often the public considers judicial review for constitutionality as indeed taking a position on the wisdom of the reviewed legislation. This attitude is, at least in part, a consequence of the public’s view of the Constitution as a sacred founding document that expresses constitutional norms that bind the entire political community. It is easy to move from this to the view that if legislation is struck down by the Supreme Court on constitutional grounds, then it is unwise as well. In contrast, if legislation is upheld by the Court against constitutional challenge, then it may be considered wise. As a result, the Court’s constitutional decisions can be, and often are, received expressively even though they are not the outcome of majoritarian decision making. The Court’s abortion decisions are perhaps the most obvious example, although the flag-burning decision is another example of a case in which the Court is often perceived as taking sides on the legislative merits of a controversial issue.

⁶⁹ *Senators Call Pledge Decision “Stupid”* (June 27, 2002), at <http://archives.cnn.com/2002/ALLPOLITICS/06/26/senate.resolution.pledge/>.

III. THE PLEDGE (WITHOUT GOD), *WEST VIRGINIA BOARD OF EDUCATION V. BARNETTE* AND THE COURT'S SCHOOL PRAYER DECISIONS

A. *The Pledge and Compelled Speech*

*West Virginia Board of Education v. Barnette*⁷⁰ contains some of the most famous language in the Supreme Court's First Amendment jurisprudence, namely, Justice Jackson's observation that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."⁷¹ Most everyone also knows that, in overruling the two-year-old *Gobitis*⁷² decision, the Court, in the midst of the Second World War, held in *Barnette* that it violates the First Amendment for the state to compel public school students to recite the Pledge and salute the flag.⁷³ Still, certain aspects of this decision deserve mention.

Barnette dealt with a compulsory Pledge and flag salute⁷⁴ that was challenged by Jehovah's Witnesses on freedom of speech and religion grounds. Jehovah's Witnesses parents (who were prosecuted or threatened with prosecution) and their children (who were expelled or threatened with expulsion) maintained that the compulsory flag salute was inconsistent with the Bible which prohibited making, bowing down to, or serving any graven image.⁷⁵ Although the opinion spoke a bit about religion, the Court ruled for the challengers primarily on free speech grounds. The Court focused on the fact that forcing children to recite the Pledge and salute the flag constituted compelled speech that was forbidden by the First Amendment.⁷⁶ According to the Court, this rationale covered both the Pledge, insofar as oral speech was compelled, and the salute, insofar as expressive conduct was compelled.⁷⁷ The Court rejected the argument that the educational functions of the compulsory Pledge and flag salute trumped the relevant First Amendment considerations.⁷⁸

⁷⁰ 319 U.S. 624 (1943).

⁷¹ *Id.* at 642.

⁷² *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

⁷³ *Barnette*, 319 U.S. at 642.

⁷⁴ *Barnette* is not as clear as it should be about the nature of the salute itself. The school board resolution describes the Pledge as including a salute defined as placing the right hand on the breast, *id.* at 626–28 n.2, while the Court's opinion refers to the required salute as the "stiff-arm" salute with the saluter keeping the right hand raised with palm turned up so as to distinguish it from the Nazi salute, *id.* at 628. For the purposes of this Article, it makes no difference.

⁷⁵ *Id.* at 629–30.

⁷⁶ *Id.* at 631.

⁷⁷ *Id.* at 632–33.

⁷⁸ *Id.* at 633–34.

Barnette did not question the constitutionality of the Pledge itself which, at the time, did not contain “one Nation under God.”⁷⁹ Indeed, such a challenge on either Establishment Clause grounds or free speech grounds surely would have been rejected because the Pledge was not a prayer but was rather a legitimate part of the educational process for teaching patriotism.⁸⁰ Instead, what *Barnette* declared was that because of the Pledge’s compulsory nature and the Free Speech Clause, students, whether Jehovah’s Witnesses or not, must be permitted to opt-out of the Pledge.⁸¹ However, after *Barnette*, schools could still offer this patriotic ritual in the classroom as part of the curriculum. Further, schools could still teach everyone, including students who were Jehovah’s Witnesses, about the Pledge and about patriotism in general in an attempt to inculcate certain political values.⁸² The crux of the constitutional problem was the schools’ attempt to force students, through threat of punishment, to affirm political beliefs and values.

B. School Prayer and the Establishment Clause

In light of the Congressional insertion in 1954 of “under God” in the Pledge, the Court’s approach to school prayer should be considered.⁸³

Simply put, school prayer led by a teacher under state auspices in the classroom violates the Establishment Clause. This has been black-letter law since the early 1960’s when the Court handed down *Engel v. Vitale*⁸⁴ and *Abington School District v. Schempp*.⁸⁵ Various attempts to circumvent these rulings, such as by the imposition of a one-minute period of silence “for meditation or voluntary prayer,” have

⁷⁹ *Id.* at 642.

⁸⁰ *Id.* at 625–26.

⁸¹ *Id.* at 641–42.

⁸² The interesting argument has been made that the Pledge may be unconstitutional under the Free Speech Clause, even without “under God,” on the ground that there is psychological coercion of the sort found by the Court in *Lee v. Weisman*, 505 U.S. 577 (1992), a case involving a school-authorized Rabbi-led prayer at a “voluntary” middle school graduation ceremony. See Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451 (1995). There are threads of this position contained in Justice Thomas’s *Newdow* opinion in which he concurs in the judgment and argues that *Lee v. Weisman* went much too far in its coercion rationale. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004), 2327 (Thomas, J., concurring) (“In my view, *Lee* adopted an expansive definition of ‘coercion’ that cannot be defended however one decides the ‘difficult question’ of ‘[w]hether and how th[e] Establishment Clause should constrain state action under the Fourteenth Amendment.’”) (citation omitted).

⁸³ My purpose here is obviously not to reprise all of the Court’s Establishment Clause doctrine, but, for background purposes, very briefly to consider that doctrine as related to school prayer.

⁸⁴ 370 U.S. 421 (1962).

⁸⁵ 374 U.S. 203 (1963).

been rather firmly rebuffed.⁸⁶ Such cases clearly violate the first prong of the *Lemon* test, the requirement that a statute have a secular legislative purpose.⁸⁷ Somewhat more difficult issues have arisen in connection with the inclusion of religious “invocations” at public schools’ graduation ceremonies⁸⁸ and football games.⁸⁹ However, in these cases as well, the Court has found violations of the Establishment Clause on the ground that the governmentally authorized delivery of a religious invocation would coerce those students who were either compelled, or who felt social pressure, to attend these activities.⁹⁰

How, then, to approach the 1954 inclusion of “one Nation under God” in the Pledge? The issue is not whether a student can be compelled to recite the Pledge, as that question was resolved long ago in *Barnette* on compelled speech grounds. Rather, the question is whether the state can even authorize the recitation of the Pledge. Is the Pledge, because of “one Nation under God,” the functional equivalent of a prayer and thus violative of the Establishment Clause? This is the question that the *Newdow* court answered in the affirmative, at first broadly and then later more narrowly as applied to the public schools.

⁸⁶ *Wallace v. Jaffree*, 472 U.S. 38, 38 (1985) (internal quotations omitted).

⁸⁷ *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Arising in the context of public financial support for private schools, the test has three parts: “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 excessive government entanglement with religion.” *Id.* at 612–13 (citations and quotations omitted). Although this test has been extensively and repeatedly criticized by the current Court, it has never been formally repudiated; however, the third part was effectively eliminated in *Agostini v. Felton*, 521 U.S. 203 (1997), and folded into the second “effects” part. *See id.* at 223.

⁸⁸ *See Lee*, 505 U.S. at 577.

⁸⁹ *See Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

⁹⁰ In *Lee*, 505 U.S. 577, Justice Kennedy, writing for the Court, used the coercion test to invalidate the school-authorized religious invocation at a graduation ceremony. *Id.* at 595. Interestingly, Justice Kennedy, unlike Chief Justice Rehnquist and Justices O’Connor and Thomas, did not join in the debate on the merits when the Court reversed *Newdow* on standing grounds. *See Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2305 (2004).

A third Establishment Clause test, endorsement, was initially articulated by Justice O’Connor, concurring in *Lynch v. Donnelly*, 465 U.S. 668 (1984), where the Court upheld the constitutionality of a city’s Christmas display in a privately owned park “in the heart of the city’s shopping district.” *Id.* at 668 (O’Connor, J., concurring). In her opinion concurring in the judgment in *Newdow*, 124 S. Ct. at 2301, 2312, Justice O’Connor applied the endorsement test and found that the Establishment Clause was not violated. *Id.* at 2321–26 (O’Connor, J., concurring). In addition, she argued that “under God” similarly passed the coercion test. *Id.* at 2326–27 (O’Connor, J., concurring). As discussed next, each of the three Establishment Clause tests — *Lemon*, endorsement, and coercion — were applied by the Ninth Circuit in *Newdow v. U.S. Cong.*, 292 F.3d 597 (9th Cir. 2002), with the last playing a particularly significant role in the Ninth Circuit’s amended opinion in *Newdow*, 328 F.3d 466 (9th Cir. 2003).

IV. THE SACRALIZED PLEDGE (WITH GOD) AND
THE NINTH CIRCUIT'S *NEWDOW* DECISIONA. *The Newdow Decision*

The plaintiff in *Newdow* was an atheist whose daughter attended a public school where the teachers, pursuant to state law and school district rule, began each day by leading students in a recitation of the Pledge.⁹¹ The Pledge satisfied a state requirement that public schools begin each day with an "appropriate patriotic exercise."⁹² The plaintiff Newdow claimed that his daughter was injured when she was required to watch and listen while her classmates were led in a "ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.'"⁹³ Reversing the district court, which had granted the school district defendants' motion to dismiss, the Ninth Circuit first found that the plaintiff had standing "to challenge a practice that interfere[d] with his right to direct the religious education of his daughter,"⁹⁴ specifically the Pledge as amended in 1954 to include "one Nation under God."⁹⁵ According to the court, the 1954 amendment was intended by Congress to result in the daily recitation of these words in school classrooms across the country.⁹⁶

Next, the Ninth Circuit addressed the Establishment Clause issues raised by the Pledge.⁹⁷ It initially ruled that the Establishment Clause was violated under each of the three tests set out by the Supreme Court,⁹⁸ but it subsequently amended its

⁹¹ *Newdow*, 292 F.3d at 600. The defendants were the United States Congress, President Clinton, the state of California and various others, including the school district and several officials. *Id.* at 597.

⁹² *Id.* at 600.

⁹³ *Id.* at 601.

⁹⁴ *Id.* at 602.

⁹⁵ *Id.* at 602–05.

⁹⁶ *Id.* at 605.

⁹⁷ *Id.* at 605–11.

⁹⁸ *Id.* at 611. In its first opinion, though, the Ninth Circuit determined that the Pledge violated the *endorsement* test because it was the profession of a religious belief in monotheism. *Id.* at 607. The court explained:

The text of the official Pledge, codified in federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of God. A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion.

Id. at 607–08. The court further asserted that the Pledge impermissibly sent "a message to unbelievers 'that they [were] outsiders, not full members of the political community.'" *Id.* at 608.

opinion by limiting it to the coercion test and thereby to the public schools. But in that portion of its initial opinion which still remained the law in the Ninth Circuit — until the Supreme Court reversed on prudential standing grounds — the court found the Pledge violated the coercion test because it placed students in what the court described as “the untenable position of choosing between participating in an exercise with religious content or protesting.”⁹⁹ This was especially the case here because the students were young and impressionable and were inclined to follow “the norms set by their school, their teacher and their fellow students.”¹⁰⁰ The Ninth Circuit emphasized the coercive effect of the Pledge by quoting President Eisenhower who, at the amendment’s signing, declared: “From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty.”¹⁰¹

It also ruled that the Pledge failed the *Lemon* test as well. *Id.* at 611. The court had little doubt that the words “one Nation under God” were intended to advance religion. *Id.* at 610. In this connection, the court rejected the argument that the Pledge must be considered as a whole and that, when so considered, it had the secular purpose of “solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.” *Id.* (quoting *Lynch*, 465 U.S. at 693). To the contrary, the Ninth Circuit responded that it was not the Pledge as a whole that was challenged but rather the 1954 amendment alone, and its sole purpose was “to advance religion in order to differentiate the United States from nations under communist rule.” *Id.* (quoting the legislative history which contained, among other things, the following: “The inclusion of God in our pledge . . . would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.” H.R. Rep. No. 83-1693, at 1–2 (1954)). Furthermore, even though the school district policy as to the Pledge (in contrast to the policy of Congress) had a secular purpose, namely, the promotion of patriotism, the policy failed the second part of the *Lemon* test because it was highly likely to convey to young and impressionable students a message of endorsement of beliefs regarding a monotheistic God. *Id.* at 611. The Ninth Circuit concluded by observing that the Supreme Court had not dealt with the Establishment Clause issue raised by the Pledge and that various Justices’ dicta suggesting that the Pledge was constitutional should not be considered dispositive. *Id.* at 611–12 n.12. It also criticized the analysis of a contrary Seventh Circuit decision, *Sherman v. Cmty. Consol. Sch. Dist.*, 980 F.2d 437 (7th Cir. 1992). *Id.*

⁹⁹ *Id.* at 608.

¹⁰⁰ *See id.* at 609.

¹⁰¹ *Id.* at 609 (quoting 100 CONG. REC. 8618 (1954)). Judge Fernandez dissented on the Establishment Clause issue in an interesting opinion. *Id.* at 612–15. He did not argue, as others have done, that the Pledge, even with “one Nation under God,” was “ceremonial deism” with no real religious meaning. *Id.* at 614. Indeed, he specifically rejected that “euphemism.” *Id.* Instead, after commenting that the Establishment Clause primarily mandated neutrality, he argued that “the danger that ‘under God’ in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody’s beliefs is so minuscule as to be

Thereafter, the Supreme Court, in an opinion by Justice Stevens, reversed and held in a five-three decision (Justice Scalia had recused himself) that the plaintiff did not have prudential standing.¹⁰² The majority did not address the merits; however, Chief Justice Rehnquist, joined by Justice O'Connor and in part by Justice Thomas, concurred in the judgment, declaring that the plaintiff had prudential standing and arguing on the merits that the phrase "under God" was essentially "a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents" and was "in no sense a prayer, nor an endorsement of any religion."¹⁰³

Justice O'Connor concurred in the judgment, maintaining that under the endorsement test she had regularly applied, the phrase "under God" did not violate the Establishment Clause because it constituted an example of "ceremonial deism."¹⁰⁴ She also argued that the result would be the same even if she were to apply the coercion test.¹⁰⁵ Justice Thomas also concurred in the judgment, contending that under the Court's precedents, including its wrongly decided coercion decision in *Lee v. Weisman*, the phrase was probably unconstitutional.¹⁰⁶ However, he went on to argue that the Court's Establishment Clause jurisprudence should be reexamined, particularly that dealing with incorporation, and that so reexamined, the Establishment Clause was not violated by the phrase "under God."¹⁰⁷

B. Newdow Evaluated

A powerful argument can be made that the Ninth Circuit got it right on the Establishment Clause merits both initially and especially after amending to rely solely on the coercion test as applied to public schools. While the primary purpose of the Pledge is essentially secular in nature — the fostering of patriotism — the reference to "one Nation under God" introduces a clearly religious element. It will not do to characterize this as *de minimis*,¹⁰⁸ as Judge Fernandez did in his dissent,

de minimis. The danger that phrase presents to our First Amendment freedoms is picayune at most." *Id.* at 613. For this reason, there was no Establishment Clause violation. Judge Fernandez's dissent essentially remained unchanged even though the Ninth Circuit amended its initial opinion. *See Newdow*, 328 F.3d at 490–93 (Fernandez, J., concurring and dissenting). Note that Justice O'Connor in her *Newdow* opinion expressly rejected the view that there were *de minimis* constitutional violations. *Newdow*, 124 S. Ct. at 2323 (O'Connor, J., concurring).

¹⁰² *Newdow*, 124 S. Ct. at 2312.

¹⁰³ *Id.* at 2319–20.

¹⁰⁴ *Id.* at 2323.

¹⁰⁵ *Id.* at 2326–27.

¹⁰⁶ *Id.* at 2330.

¹⁰⁷ *Id.* at 2330–31.

¹⁰⁸ *See* Steven G. Gey, "Under God," *The Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865 (2003) (arguing that the Establishment Clause claim in

because the Pledge is recited daily by millions of school children in the classroom and the intended and actual impact of this sacred political ritual is significant.¹⁰⁹

Furthermore, describing the Pledge as “ceremonial deism” is similarly unpersuasive, even though Justice O’Connor in her *Newdow* concurring opinion took this position.¹¹⁰ If ceremonial deism is thought of as referring to God in the truly deistic sense of a non-revealed God who does not intervene in history but is rather “nature’s God” or the Aristotelean first cause, then “under God” does not qualify. The Pledge strongly and theistically implies (as its legislative history indicates) that God is on the side of the United States and that the government and people of the United States live by God’s law.¹¹¹

Alternatively, if ceremonial deism is thought of as referring to God almost in passing, absent-mindedly and by rote, so that the reference to God in the Pledge is not sacralizing, then “under God” still does not pass muster. The Pledge places God immediately after the Nation (without even a comma) and uses God to ground, and to provide a religious charge to, the national political community. God is thus an integral element of the Pledge as presently constituted.¹¹² Without a comma between “one Nation” and “under God” but with a comma after “God,” the remainder of the Pledge (“indivisible, with liberty and justice for all”) modifies “one Nation under God.” This implies that the central characteristic of the political community is that it is “under God,” with the remainder of the Pledge being secondary. In contrast, if there had been a comma after “Nation,” then “under God” would have been one of the characteristics of the political community, and the other characteristics, “indivisible” and “with liberty and justice for all,” would have as much weight.

It is also relevant to the Establishment Clause merits that the Pledge is recited in a compulsory education setting involving young and impressionable children.¹¹³ One of the advantages of the coercion test is that it takes express account of the setting in which the alleged Establishment Clause violation occurs. The result is that while the Pledge may violate the Establishment Clause in a compulsory public

Newdow is far from trivial). Also, as noted earlier, Justice O’Connor expressly rejected the position that constitutional violations could be de minimis. 124 S. Ct. at 2323 (O’Connor, J., concurring).

¹⁰⁹ *Newdow*, 124 S.Ct. at 1870–71.

¹¹⁰ *Id.* at 2323 (O’Connor, J., concurring).

¹¹¹ See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2123 (1996).

¹¹² See *supra* Part II.A. Therefore, I disagree with Justice O’Connor’s view that the Pledge has minimal religious content because the phrase “under God” is only two of thirty-one words and “the presence of those words is not absolutely essential to the Pledge, as demonstrated by the fact that it existed without them for over 50 years.” *Newdow*, 124 S. Ct. at 2326 (O’Connor, J., concurring).

¹¹³ See Epstein, *supra* note 111, at 2120–21.

school setting,¹¹⁴ it does not necessarily violate the Establishment Clause, for example, to open official government proceedings with the Pledge since adults would constitute the participants and audience. For the same reason it does not necessarily violate the Establishment Clause to sing “God Bless America” at official government functions.¹¹⁵ Indeed, such considerations likely induced the Ninth Circuit to rely solely on the coercion test in its amended opinion and thereby limit its decision to the public schools.

Thus, the Ninth Circuit’s amended decision correctly resolved the Establishment Clause issue.

CONCLUSION

American civil religion,¹¹⁶ whose roots, according to W. Lance Bennett, “can be traced to the religious mythology of colonial America,”¹¹⁷ continues to be grounded on myth. But it is also perpetuated by political rituals which are the acting out of principles that “reinforce the political order, reify belief in the regime’s capacity to handle problems, and integrate citizens into the political culture in the most meaningful of ways.”¹¹⁸ One of these important political rituals is the sacralized Pledge of Allegiance, a ritual made more significant because it is required by law and has been recited daily by elementary and secondary school students (and their parents and grandparents) for decades. The Pledge was a powerful political ritual even before “under God” was added by Congress in 1954, but the two words (the twenty-third and twenty-fourth of the thirty-one word Pledge) explicitly made it sacred. Indeed, the furor following *Newdow* suggests that “under God” provides a significant patriotic effect. At the same time, these two words were the reason that *Newdow* found a violation of the Establishment Clause.

There is no gainsaying the importance of teaching students, our future citizens, about patriotism and political community. The Pledge, as a sacred political ritual, probably does a decent job of inculcating and promoting such values. In addition, the government sends an important message of patriotism and solidarity to the

¹¹⁴ Recall that Justice Thomas argues that *Lee*, which was grounded on coercion, was wrongly decided. *Newdow*, 124 S. Ct. at 2327–30 (Thomas, J., concurring).

¹¹⁵ This point might be made in terms of the *Lemon* and endorsement tests as well. Thus, the Pledge flunks the “effects” part of the *Lemon* test in a compulsory public school setting but not when it opens an official government proceeding. Similarly, the Pledge constitutes much more of an endorsement of religion in a compulsory public school setting than when it opens an official government proceeding. Therefore, Justice O’Connor unsuccessfully strains to find “under God” constitutional under the endorsement test. *See id.* at 2321–27. (O’Connor, J., concurring).

¹¹⁶ *See* Bennett, *supra* note 41, at 79.

¹¹⁷ *Id.* at 85.

¹¹⁸ *Id.* at 91.

entire political community when it requires the recitation of the Pledge, particularly because the Pledge renders God foundational. This message of patriotism and solidarity may be of even greater import now after the terrorist attacks of September 11, 2001.

Nevertheless, the Pledge, an important component of American civil religion, functioned as a powerful political ritual for decades before “under God” was inserted. Without an expressly religious reference, it promoted solidarity, encouraged political community, and connected the individual to the history, myths, and transcendent values of the United States. It would still do so in the public schools even if, by virtue of the Establishment Clause, God were removed and the Pledge desacralized.

