Editor's Note: On March 16, 2004, the Federalist Society's Religious Liberties Practice Group sponsored a program on the "Pledge Case," Elk Grove *v.* Newdow*, which was then pending before the United States Supreme Court. Michael Newdow, the noncustodial parent of a California public school student, argued that the school district's requirement that teachers lead an optional recitation of the Pledge of Allegience violated the Establishment Clause of the First Amendment.* Newdow *raised important questions about the constitutionality of ceremonial deism and the meaning of the Establishment Clause. It also highlighted sharp differences of opinion on the proper role of religion in American public life. The Court did not answer these questions, finding that Newdow lacked standing to bring the case. Six justices voted to overturn the Ninth Circuit's ruling, which had found the public school district's pledge recitation policy unconstitutional, on standing grounds. Justices Rehnquist, O'Connor, and Thomas, however, wrote concurring opinions that addressed the merits of the constitutional questions raised in the case, and argued, all for different reasons, that the Pledge of Allegience does not violate the Establishment Clause.*

We are pleased to print reactions to the Supreme Court's ruling authored by two of the March 16th event's panelists, Prof. Gerard V. Bradley of Notre Dame Law School, and Prof. Paul J. Griffiths of the University of Illinois at Chicago. It is likely that there will be another challenge to the Pledge, and the Federalist Society is pleased to continue discussion on this important issue.

GERARD V. BRADLEY

The *Newdow* case has gone away but the fuss about "under God" will not. Even if the Supreme Court said that Mr. Newdow lacked standing precisely to avoid the merits, at least four members – Scalia, Thomas, O'Connor, the Chief Justice – seem willing to tackle them. That is enough for *certiorari*. An appropriate plaintiff should not be hard to find.

When the Court finally does decide the issue, it is likely to turn upon the appeal of Justice O'Connor's opinion to those in the (as yet) officially-uncommitted-on-the-merits *Newdow* majority. Will any of the five vote to save "under God"? None is likely to join Justice Thomas in "rethinking the Establishment Clause" along federalism lines – despite the significant historical support for Thomas's view. None is likely to join any separate opinion by Justice Scalia, which opinion would almost certainly be too "pro-religion" for comfort. Justice Scalia said as long ago as 1993 (in the *Lamb's Chapel* case) that the Establishment Clause permits the government to promote religion, so long as no partiality to a particular church is shown. This reasoning would save the Pledge, but it will not attract any of the *Newdow* uncommitteds. Too radical: though correct as a reading of what the Establishment Clause originally was meant, it would roll back the law to pre-*Everson* (1947) days. Finally, the Chief Justice's *Newdow* opinion offers no real alternative to O'Connor's. Rehnquist said that "under God" is not a prayer, a religious exercise, or (most controversially) an endorsement of religion. Justice O'Connor said so, too. But she tells us *why*. The Chief Justice does not. Any route to agreement with Rehnquist goes through O'Connor. At least it should.

Although saving the Pledge from a declaration of unconstitutionality is an end worth our prayers, I think that O'Connor's effort to portray it as "ceremonial deism" fails. "Under God" endorses religion, and the Court should address the issue on that basis. If the phrase comports with the Constitution – as I think it does – it is because the Constitution does not prohibit governmental affirmations that "God" – a greater-than-human source of meaning and value – exists.

Justice O'Connor evidently wants to save the Pledge. And so she has to argue that when public school teachers prompt millions of kids to say each morning "one nation under God" they do not thereby endorse the idea that there is a God. For, in O'Connor's oft-repeated opinion, "endorsing" religion as such – even where there is no trace of coercion or of sect-partiality – violates the Constitution. Her position in *Newdow*, more exactly, is that "under God" belongs to the class of expressions she calls "ceremonial deism": "although these references speak the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes". The balance of her opinion argues in support of this characterization.

Note well: Justice O'Connor is *not* saying that "under God" conveys a secular message that the literal (i.e. religious) meaning of the phrase is not the meaning intended or understood. Such expressions are common enough. Someone who says "Good God!" at the ballpark communicates surprise or awe at a monstrous home run; he or she is not asserting anything about divine attributes, and everyone knows it. The exclamation "Holy Crap!" has nothing to do with the sacred. Usually, far from it.

This can be the case with expressions whose original meaning was entirely religious and which, for some people or in some contexts, still have that meaning. Our language and culture are suffused with Biblical allusions and symbols, including the symbol of the AMA (the caduceus, from the Book of Numbers); the phrase "handwriting on the wall" (from the Book of Daniel); and the phrase "apple of me eye" (one of God's OT descriptions of his Chosen People, Israel). No one now suspects an implicit endorsement of Judaism when these phrases are used, perhaps especially when they are used by public officials. Again, the religious idiom now conveys a secular message. At least arguably, even some pungent religious expressions, such as "God save the United States and this Honorable Court," have lost their religious meaning to secular function: "Court is beginning now; act accordingly."

Religious words/secular meaning. Justice O'Connor flirts with this route to non-endorsement by referring to "idiom" (suggesting style or form, not substance) and when she says "*[f]acially* religious references can serve....valuable purposes in public life." (emphasis added.) But Justice O'Connor nowhere in *Newdow* offers a secular meaning for "under God." Nowhere does she assert that the phrase *means* anything but what it says. So far considered, "under God" endorses religion.

In fact, Justice O'Connor's *Newdow* opinion takes a quite different path. She asserts that religious expressions can serve secular purposes and sometimes there is no other practical way to serve them. So long as the expression is itself not a prayer or form of worship or sect specific, she says, the Constitution is not offended. O'Connor does not say that "under God" has a secular meaning, but that it is a religious bridge to a secular objective. But how is this not an endorsement?

Justice O'Connor identifies two secular purposes for "under God." One is to "commemorate the role of religion in our history." The other is to "solemn[ize] public occasions." About the second she says: "such references can serve to solemnize an occasion *instead of* to invoke divine providence." (emphasis added.) O'Connor here likens the Pledge to "God Save this Honorable Court." But the comparison is not nearly sound. The Court opens with the solitary call of an employee; audience members (almost all adults) are not asked to join in. Besides, if California *had* required students to begin the day by saying: "God save this school and this state," the statute would have been invalidated by simple citation to the school prayer cases starting with *Engle*. If the Court's opening does not endorse religion it is only because by usage and custom and context everyone understands that it is a pious relic, a bit of inherited theater divorced from anyone's present intentions or spiritual aspirations. Not so the Pledge: it is by context and by design of those who require its recitation (by willing students) a genuine affirmation. The whole point (as Justice O'Connor recognizes) is to *change* students' beliefs – to make them more "patriotic".

What Justice O'Connor means – what she is really saying – is that 'such references can serve to solemnize an occasion *by* invoking divine providence". But such "invo[cations]," one would surely have thought, are unconstitutional endorsements of religion, as the Court (including O'Connor) has said many times.

Let's now look at the first secular purpose. Because of our history as a religious nation, Justice O'Connor says, "eradicating such references [as "under God"] would sever ties to [our] history..." Maybe, but even here she is either confused or backsliding. She illustrates her point by reference to a passage from the *Allegheny* case, where the Court was concerned not to "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens." *Now,* the *Allegheny* Court meant, in present-day citizens, and not way back then, as O'Connor seems to suggest in *Newdow.*

It is indeed true that cultivation of a certain "idiom" (form or style of expression) might be necessary to gain effective access to the history of a family, church, or nation. One has to study ancient languages to really study the Bible. One needs familiarity with ancient Jewish custom and middle-eastern history to understand the New Testament, and some understanding of Greek philosophical concepts to really understand parts of it (the Gospel of John, for example).

Given our Christian pedigree, biblical literacy is probably necessary to understand our history and even features of our contemporary culture. But none of this would justify daily Bible recitation, in season and out, throughout the primary and secondary grades, led by teachers. The biblical content of American history justifies instead particular curricular undertakings, always carefully guarded by conditions to ward off the impression of endorsement.

The ritualistic and regular recitation of "under God" is *not* a bridge to our past; it is too curt and untutored for that. As Justice O'Connor says in *Newdow (*and here is the sentence fragment omitted above, as indicated by the ellipsis): it "ties" us to a "history" that "*sustains this Nation today."* The phrase serves, then, to place us in the company of our forbears in acknowledging that we are indeed "one nation under God." And so children are invited to affirm, each day, in California's public schools.

There is no honest way to analyze the Pledge save as an affirmation that we are indeed a nation "under God."

Paul J. Griffiths

The Supreme Court decided on 14 June that Michael A. Newdow lacked legal standing to challenge, on behalf of his daughter, a California school district's policy of optional daily recitation of the Pledge of Allegiance for its elementary-school children. The Court reversed the Ninth Circuit's decision that Newdow had standing, and that the school district's pledge-recitation policy amounted to religious indoctrination of his child, in violation of the First Amendment. The Court's decision thus restored the legality of pledge recitation; but by ruling that Newdow lacked standing to bring the suit in the first place, it sidestepped the substantive and much more interesting issue of whether the Pledge's "under God" clause violates the First Amendment's ban on religious establishment.

This is true, anyway, of the majority opinion written by Justice Stevens. Three justices (Rehnquist, O'Connor, Thomas), however, dissented from the ruling on the standing question while concurring on the principal effect of that ruling, which is to vacate the Ninth Circuit's ruling that state-sponsored pledge recitation is unconstitutional. And their opinions do discuss the constitutional question, though in profoundly incompatible ways.

Rehnquist, for example, agrees with the Court's reversal of the Ninth Circuit, but not with its reasons. He disagrees with the majority opinion's "novel" views on the standing question, but he is glad to see Pledge recitation reinstated because he takes it to be not a religious exercise but a patriotic one, and therefore not in violation of the First Amendment. The Pledge as a whole, he writes, "is a declaration of belief in allegiance and loyalty to the United States Flag and the Republic that it represents." The mention of God in the pledge doesn't change this, Rehnquist thinks. Rather, it simply acknowledges a historical fact about the nation--that elected and appointed representatives have often made appeals to God in its name. Use of the phrase, then, has no tendency to establish religion. O'Connor makes essentially the same point in her opinion, though for slightly different reasons. If religious language is used for secular purposes, she thinks, then it is constitutionally unproblematic. One such purpose "is to commemorate the role of religion in our history." This is what the reference to God does in the Pledge, and so it does not offend against the First Amendment. Essential to O'Connor's view is the claim that some apparently religious language has either no religious function, or such a minimal one that it presents no constitutional problem.

Common to O'Connor's and Rehnquist's view is the claim that the God mentioned in the Pledge is not the God of Abraham, Isaac, and Jacob, not the God who became incarnate in Jesus Christ, and not the God who inspired Mohammed. Rather, it is the god of ceremonial deism, a god whose only function is to solemnize national rituals, to burnish national pride to a bright sheen.

Justice Thomas has quite a different view. He notes, as he has before, that "our Establishment Clause jurisprudence is in hopeless disarray." He thinks that by the criteria in previous key Establishment Clause cases Pledge recitation is unconstitutional because it mandates a state-sponsored act in which belief in God is affirmed. Thomas, however, thinks Pledge recitation is still constitutional because he has a quite different view (a view shared by Justice Scalia, who recused himself from this case) of what does and does not place substantively religious state-sponsored acts in violation of the Establishment Clause. His view that the Establishment Clause should be read principally to protect the states against Congress, runs counter to the main trend of Establishment Clause jurisprudence during the last thirty years. Thomas' view of the Establishment Clause has little or nothing to do with individual rights of the sort addressed in the *Newdow* case. This, Thomas acknowledges, is not a view likely to find broad support on the Court. He adds to it, therefore, the claim that state-sponsored Pledge recitation does not infringe upon religious free exercise rights because it coerces no one.

Leaving aside the standing question (a question only lawyers could love), *Newdow* yields two families of opinion on the Court. The first says that state-sponsored pledge recitation is not a religious act and is therefore constitutional. The second says that state-sponsored pledge recitation is a religious act, but is constitutional so long as the states (rather than Congress) sponsor it, and so long as no one is coerced by it. These two families of views are doubly incompatible: first, about what does and does not count as a religious act; and second, about whether the Establishment Clause has principally to do with relations between Congress and the states. Neither disagreement is susceptible of easy resolution. The first because it is utterly unclear what should count as relevant to making such a decision: History? The beliefs and intentions of the majority of those saying the Pledge's words? The plain meaning of the words? Or what? The second because it rests upon fundamental differences in the theory of constitutional interpretation, differences that have not gone away in spite of decades of lively discussion of them.

It seems fair to say, however, that strict-constructionism of the Scalia/Thomas variety is likely to remain a minority interest on the Court, and that the kinds of argument offered by Rehnquist and O'Connor are likely to remain dominant. It's important to note a paradox about such arguments, however, since its presence is unlikely to permit the Court's current position to remain stable. The paradox is this: On the Rehnquist/O'Connor argument, the likelihood that pledge recitation is constitutional is in inverse proportion to the extent that it is religious. They think it not religious, and so they think it constitutional. But the vast majority of Americans (I suspect) who want pledge recitation to be constitutional do so because they want a religious exercise to be part of their children's school day. If this substantial majority pays attention to the reasons offered by the Court for pledge-recitation's constitutionality, they will have to conclude that on the Court's understanding of pledge-recitation, it is nothing more than blasphemy: an act of taking the Lord's name in vain, which in this case consists in making the name of God subservient to the nation's name. If the only way in which the Court can defend the Pledge's constitutionality is by interpreting it blasphemously, this view is likely to deepen still more the gulf between the majority of US citizens and our nation's judicial exercises. And that is not a happy situation.