

THE SCOURGE OF CONTEXTUALISM: CEREMONIAL DEISM AND THE ESTABLISHMENT CLAUSE

Abstract: Over the past twenty-five years, the Supreme Court's Establishment Clause jurisprudence has been plagued by inconsistencies and hard-to-reconcile decisions. This is largely because the Court has abandoned objective analyses in favor of a more result-oriented approach, justifying certain governmentally sponsored religious practices on the grounds that, given their historical, cultural, or physical contexts, they are sufficiently diluted of religious meaning to satisfy the First Amendment. This ad hoc practice—whether guised as an application of one of the Court's formal tests or as an instance of "ceremonial deism"—has undermined the central purpose of the Establishment Clause. This Note proffers a more principled approach, based on Justice O'Connor's endorsement test, which allows for some "secular" religious references but still gives fidelity to the commands of the Establishment Clause and the constitutional rights of nonadherents. Using this approach, this Note demonstrates that the current form of the Pledge of Allegiance is best understood as an unconstitutional endorsement of religion.

INTRODUCTION

The Pledge of Allegiance—our national invocation of patriotism and unity—may be serving a much different purpose since its alteration in 1954,¹ when the U.S. government added the words "under God" to the Pledge in an attempt to distinguish democracy from its "godless, materialistic" enemy: communism.² On February 7, 1954, Presbyterian Reverend George Docherty condemned the absence of God from the Pledge, stating that the Pledge was missing something unique about America, and further opined that he "could hear little Muscovites repeat a similar Pledge to their hammer-and-sickle flag in Moscow."³ The ears of Congress were apparently attuned, and three days later Senator Homer Ferguson of Michigan introduced a bill calling for the addition

¹ Pub. L. No. 83-396, 68 Stat. 249 (codified as amended at 4 U.S.C. § 4 (2000 & Supp. III 2003)) (adding the words "under God" after the word "nation" in the Pledge of Allegiance).

² Linda P. McKenzie, Note, *The Pledge of Allegiance: One Nation Under God?*, 46 ARIZ. L. REV. 379, 388 (2004).

³ *Id.* at 388-89.

of the words "under God" to the Pledge.⁴ By June of that year, the bill had reached the desk of President Eisenhower, who promptly signed it into law along with an accompanying statement affirming the importance of commemorating religion in our daily lives.⁵

The Pledge of Allegiance in its current form has been largely unchallenged since 1954, and countless adults can recall reciting the Pledge at school each morning with their right hands respectfully placed over their hearts.⁶ Much of the nation was therefore shocked in June 2002,⁷ when the U.S. Court of Appeals for the Ninth Circuit, in *Newdow v. U.S. Congress* (*Newdow I*), held that the 1954 statute, as well as a California school district's policy providing for daily recitation of the Pledge, violates the Constitution.⁸ Needless to say, the response was impressive: the Senate unanimously approved a resolution denouncing the decision, President George W. Bush dubbed it "ridiculous," House Minority Whip Tom Delay called it "sad" and "absurd," and Senate Majority Leader Tom Daschle referred to it as "nuts."⁹ For good measure Senator Robert Byrd of West Virginia called the judges "stupid."¹⁰

In February 2003, the Ninth Circuit amended its decision and narrowed it significantly.¹¹ No longer reaching the validity of the 1954 statute, it merely held that the school district's recitation policy violates the Establishment Clause of the U.S. Constitution, in part because the phrase "under God" is a monotheistic affirmation that instills the Pledge with a normative and ideological character.¹² The school district consequently appealed to the U.S. Supreme Court, and the Supreme Court granted certiorari to great fanfare.¹³ With the

⁴ *Id.*

⁵ Statement by the President upon Signing Bill to Include the Words "Under God" in the Pledge to the Flag, 1 PUB. PAPERS 141 (June 14, 1954) ("From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural school house, the dedication of our nation and our people to the Almighty."); McKenzie, *supra* note 2, at 388-39.

⁶ See John E. Thompson, Note, *What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, 38 HARV. C.R.-C.L. L. REV. 563, 563 (2003).

⁷ *Id.*

⁸ 292 F.3d 597, 612 (9th Cir. 2002).

⁹ Charles Lane, *U.S. Court Votes to Bar Pledge of Allegiance: Use of "God" Called Unconstitutional*, WASH. POST, June 27, 2002, at A1.

¹⁰ Carl Hulse, *Lawmakers Vow to Fight Judges' Ruling on the Pledge*, N.Y. TIMES, June 27, 2002, at A6.

¹¹ See *Newdow v. U.S. Cong.* (*Newdow II*), 328 F.3d 466, 468 (9th Cir. 2003).

¹² *Id.* at 487.

¹³ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5 (2004); see Linda Greenhouse, *Supreme Court to Consider Case on "Under God" in Pledge to Flag*, N.Y. TIMES, Oct. 15, 2003, at A1 (noting that all fifty states urged the Court to hear this important case).

most exciting Establishment Clause issue to be raised before the Court in several years, the nation awaited with great anticipation the Court's holding that could single-handedly clarify decades of muddled Establishment Clause jurisprudence and restore the Pledge to a patriotic and unifying emblem.¹⁴ The Court chose a different path in 2004, however, and in *Elk Grove Unified School District v. Newdow* dismissed the case on standing grounds due to the Mr. Newdow's lack of custodial rights over his young daughter.¹⁵ Justice O'Connor's concurrence did attempt to clarify the legal standards in this area of the law, and she expounded on the doctrine of "ceremonial deism" for the Court to use in future Establishment Clause challenges.¹⁶

Part I of this Note surveys the Court's Establishment Clause jurisprudence, particularly the Court's abdication of formal standards when dealing with matters it feels fall within a "ceremonial deism" exception.¹⁷ Part II argues that Justice O'Connor's endorsement test is the proper analysis for Establishment Clause inquiries but that the Court's overemphasis of context has undermined its efficacy.¹⁸ Part III presents a revised test that still allows for a consideration of the historical and physical context of a religious emblem, but does not overlook the real-life marginalization of nonadherents.¹⁹ Finally, Part IV applies this

¹⁴ See Z. Ryan Pahnke, Note, *Originalism, Ceremonial Deism and the Pledge of Allegiance*, 5 NEV. L.J. 742, 743 (2005) (pointing out the inconsistencies that have plagued the Court's interpretation of the "ambiguous" Establishment Clause); Greenhouse, *supra* note 13 (explaining that the Court, as in the past, has placed itself amidst a public controversy).

¹⁵ 542 U.S. at 17-18.

¹⁶ See *id.* at 33-45 (O'Connor, J., concurring in the judgment).

¹⁷ See *infra* notes 21-133 and accompanying text. The Court's muddled standards have been criticized by judges and commentators alike, with Judge Karlton for the U.S. District Court for the Eastern District of California asserting the following:

This court would be less than candid if it did not acknowledge that it is relieved that, by virtue of the disposition above [referring to the Ninth Circuit's decision in *Newdow II*], it need not attempt to apply the Supreme Court's recently articulated distinction between those governmental activities which endorse religion, and are thus prohibited, and those which acknowledge the Nation's asserted religious heritage, and thus are permitted . . . the distinction is utterly standardless, and ultimate resolution depends on the shifting, subjective sensibilities of any five members of the High Court . . . Moreover, because the doctrine is inherently a boundary-less slippery slope, any conclusion might pass muster. It might be remembered that it was only a little more than one hundred [years] ago that the Supreme Court of this nation declared without hesitation, after reviewing the history of religion in this country, that "this is a Christian nation."

Newdow v. Cong. of the U.S., 383 F. Supp. 2d 1229, 1244 n.22 (E.D. Cal. 2005).

¹⁸ See *infra* notes 134-183 and accompanying text.

¹⁹ See *infra* notes 184-212 and accompanying text.

modified standard to the Pledge of Allegiance and suggests that the "stupid" judges of the Ninth Circuit may have had it right.²⁰

I. JURISPRUDENTIAL HODGEPODGE

The Supreme Court's Establishment Clause jurisprudence is difficult to follow because it has never settled on a single analysis and its diaphanous legal standards have been applied inconsistently.²¹ This trend has been exacerbated by the Court's utilization of history and tradition to justify practices with no formal analysis whatsoever.²² Although the Establishment Clause generally prohibits governmentally sponsored religious messages, the doctrine of "ceremonial deism" embodies a class of religious activities that proponents argue have been sapped of religious meaning through their consistently secular usage in our society.²³ The Pledge of Allegiance is thought by some to fall within this generic exception to the Establishment Clause,²⁴ but in 2002, in *Newdow v. U.S. Congress (Newdow I)*, the U.S. Court of Appeals for the Ninth Circuit disagreed and applied Supreme Court precedent to invalidate the use of the Pledge in public schools.²⁵

A. *The Supreme Court and the Establishment Clause: One Test, Two Test, Three Test, Four?*

The Supreme Court first began interpreting the Establishment Clause in 1947, when it upheld a New Jersey policy reimbursing parents for their children's transportation to and from school—including sectarian private schools.²⁶ It was relevant for the Court that this policy was

²⁰ See *infra* notes 213–254 and accompanying text.

²¹ See Thompson, *supra* note 6, at 571–73. John Thompson points out that the inconsistent application of standards reveals not only a nebulous jurisprudence but also deep divisions within the Court itself. See *id.*

²² See *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). Justice Burger quotes Justice Douglas for the proposition that we are a religious people, and our institutions presuppose a Supreme Being. *Id.* Legislative prayer is a tolerable acknowledgment of this, and no formal Establishment Clause analysis need be applied. See *id.*

²³ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J. concurring). Justice O'Connor notes that "these references are not minor trespasses upon the Establishment Clause to which I turn a blind eye." *Id.* "Instead," she goes on, "their history, character, and context prevent them from being constitutional violations at all." *Id.*

²⁴ See Pahnke, *supra* note 14, at 765–66 (arguing that the Court should analyze the Pledge as an instance of ceremonial deism and uphold it, given its history and context).

²⁵ See 292 F.3d 597, 612 (9th Cir. 2002).

²⁶ *Everson v. Bd. of Educ.*, 330 U.S. 1, 17 (1947).

applicable neutrally and promoted the public welfare.²⁷ In 1962, the Court took a more hard-nosed approach and held that school prayers violate the Establishment Clause, even if they are nondenominational and optional.²⁸ The following year, the Court held that school-sponsored Bible reading is unconstitutional, again despite the fact that the practice was entirely optional.²⁹ The Court's opinion suggested a two-pronged approach to delineate the boundaries of the Establishment Clause: first, whether a secular legislative purpose exists, and second, whether the practice's primary effect neither advances nor inhibits religion.³⁰

Since these early cases, the Court's jurisprudence has continued to evolve, and this path is somewhat confusing to follow: since 1971 the Court has promulgated no fewer than three distinct tests to be used, and never once has it expressed precisely which test is to be used and when.³¹ Beginning with *Lemon v. Kurtzman* in 1971, the Court formulated a three-pronged test to be used in Establishment Clause challenges: (1) the statute must have a secular legislative purpose, (2) the statute's principal or primary effect must neither advance nor inhibit religion, and (3) the statute must not foster an excessive entanglement between government and religion.³² The Court in *Lemon* applied this test to strike down a Pennsylvania statute allowing the state to reimburse certain parochial school costs, including teacher salaries, deeming it to foster excessive "entanglement" between government and religion.³³

In 1986, Justice O'Connor tendered a clarification of the *Lemon* test in her concurring opinion in *Lynch v. Donnelly*.³⁴ The majority in *Lynch* held that a crèche depicting the birth of Christ erected and maintained by the city of Pawtucket, Rhode Island, did not violate the Establishment Clause because of its context within a larger display including a Santa Claus, a Christmas tree, and a "Season's Greetings"

²⁷ *Id.* at 18.

²⁸ *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

²⁹ *See Sch. Dist. v. Schempp*, 374 U.S. 203, 205–07 (1963).

³⁰ *Id.* at 222.

³¹ *See Thompson, supra* note 6, at 571–73.

³² 403 U.S. 602, 612–13 (1971). Some have criticized the relevance of a statute's legislative purpose to the analysis as too difficult to ascertain and have argued that the focus of the analysis should instead be on how the religious symbol is properly understood. *See* Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 515 (1992).

³³ 403 U.S. at 614.

³⁴ *See* 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring).

sign.³⁵ The Court used this secularized context in applying the *Lemon* test to conclude that the purpose and effect of this display, in light of its relevant historical context, was not an advancement of religion.³⁶ Further, no excessive entanglement occurred because no continuous governmental surveillance was required.³⁷ In her concurrence, Justice O'Connor proffered a clarification of the *Lemon* test, and her modified "endorsement test" effectively combines the first two prongs of *Lemon*, asking whether the governmental action has either the purpose or effect of endorsing—or disapproving of—religion.³⁸ She sought to illuminate the analytical connection between the inquiries within *Lemon* and the purposes of the Establishment Clause: the First Amendment prevents the government from making adherence to a faith in any way relevant to an individual's standing in the political community, and the government violates this fundamental tenet when it either becomes excessively entangled with religion (in other words, violates the third prong of *Lemon*) or endorses/disapproves of religion.³⁹ Endorsement of a faith, according to Justice O'Connor, makes it known to individuals outside that faith that they are not as welcome in the political community.⁴⁰

A majority of the Court, in 1989, adopted the endorsement test in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, banning the display of an unadorned crèche on public property but permitting a menorah displayed on public property because of its secularized context.⁴¹ There, the City of Pittsburgh erected a crèche on the Grand Staircase of the Allegheny County Courthouse and placed a menorah outside the City-County Building within a larger holiday display that included a Christmas tree and a sign asserting the city's "salute to liberty."⁴²

The Court, in an opinion written by Justice Blackmun, relied heavily on the physical context within which the crèche was erected to con-

³⁵ *Id.* at 680 (majority opinion).

³⁶ *See id.* at 680–81. The Court focused on the "context of the Christmas Holiday season," and determined that the crèche depicted merely the historical origins of this traditional event long recognized as a national holiday. *Id.* at 680.

³⁷ *Id.* at 684.

³⁸ *See id.* at 688 (O'Connor, J., concurring).

³⁹ *See Lynch*, 465 U.S. at 687–88 (O'Connor, J., concurring).

⁴⁰ *Id.* at 688 ("Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

⁴¹ *See* 492 U.S. 573, 621 (1989).

⁴² *Id.* at 579, 587.

clude that it was likely to be perceived as an endorsement of Christianity—unlike the crèche upheld in *Lynch*, the display here stood alone with no secularized context to detract from its unequivocal religious message.⁴³ The physical location was also relevant, as the crèche was placed on the Grand Staircase—the ‘main’ and ‘most beautiful part’ of the building—and thus sent an unmistakable message that the county supports and promotes this religious message.⁴⁴

The majority then split on the issue of the menorah, with Justices Blackmun and O'Connor, along with the dissenters on the crèche issue, holding that the menorah does not violate the Establishment Clause.⁴⁵ Justices Blackmun and O'Connor reasoned that the menorah satisfies the endorsement test given its juxtaposition with a Christmas tree, providing an “overall holiday setting” that did not endorse either Christianity or Judaism.⁴⁶ Justice Kennedy, along with Chief Justice Rehnquist and Justices Scalia and White, joined the two in this result but argued that the reason why neither the crèche nor the menorah offend the Establishment Clause was that our history and culture have firmly established that governmental accommodation, acknowledgment, and outright support of religion are consistent with the intent of the Framers of the Constitution.⁴⁷ The four Justices further asserted that the endorsement test derogates the role of religion in our nation's culture and, when faithfully applied, would invalidate many governmental practices including the inclusion of the words “under God” in the Pledge of Allegiance.⁴⁸ Finally, Justices Brennan, Marshall, and Stevens agreed with the majority on the crèche but argued that the menorah also failed the endorsement test notwithstanding its context.⁴⁹ The extremely long and divisive decision in *Allegheny* exemplifies the confusing state of Establishment Clause doctrine given the various contextual analyses that the different Justices have espoused.⁵⁰

⁴³ See *id.* at 598.

⁴⁴ See *id.* at 599–600.

⁴⁵ See *id.* at 614; *id.* at 632 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part).

⁴⁶ *Allegheny*, 492 U.S. at 614 (citing *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)); *id.* at 635 (O'Connor, J., concurring in part and concurring in the judgment).

⁴⁷ See *id.* at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part).

⁴⁸ *Id.* at 670–73.

⁴⁹ See *id.* at 637 (Brennan, J., concurring in part and dissenting in part).

⁵⁰ See *id.* at 677 (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Kennedy, for example, noted that the confused majority holding illustrates the flaws of the endorsement test and its “reasonable observer” standard. See *id.*

Finally, in 1992, in *Lee v. Weisman*, Justice Kennedy invoked what has come to be known as the "coercion test" to strike down a nonsecarian prayer at a public school graduation.⁵¹ The Court relied on the principle that government may not coerce anyone to support or profess a religious ideal, and the school prayer violated that tenet.⁵² Although students were not required to participate, the Court stated that in the context of a public school graduation students are pressured to at least stand and behave respectfully.⁵³ The Court asserted that the state may not use social pressure to enforce a belief any more than it could enforce it directly.⁵⁴

B. *History and Tradition Enter the Scene*

In 1983, in *Marsh v. Chambers*, the Supreme Court departed from precedent and abdicated the *Lemon* test to hold that the Establishment Clause does not proscribe legislative prayer.⁵⁵ In *Marsh*, Nebraska's use of paid chaplains to lead the legislature in a prayer at the beginning of each day was held to be consistent with the Establishment Clause, given its role in the history and tradition of our nation.⁵⁶ Justice Burger's majority opinion assuredly noted that historical patterns—standing alone, at least—cannot justify contemporary violations of the Constitution.⁵⁷ Because the First Continental Congress engaged in legislative prayer, however, it clearly did not intend for the Establishment Clause to forbid that very practice and, therefore, it is constitutional.⁵⁸ The Court relied heavily on the practice of the Framers and the ubiquity of legislative prayer to justify it as a tolerable acknowledgment of beliefs widely held amongst our citizens.⁵⁹ This decision is an important benchmark in the Court's Establishment Clause history because the Court in *Marsh* abandoned formal doctrine and

⁵¹ See 505 U.S. 577, 593, 599 (1992).

⁵² *Id.* at 587.

⁵³ *Id.*

⁵⁴ See *id.* at 590–94.

⁵⁵ See 463 U.S. at 795.

⁵⁶ *Id.* at 794–95.

⁵⁷ *Id.* at 790.

⁵⁸ *Id.* at 790–91. It has been argued that this approach is correct but that the Court should look to history to determine whether the religious practice is also nonpreferential so as not to alienate some religious groups at the expense of others. See Ashley M. Bell, Comment, "God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions, 50 AM. U. L. REV. 1273, 1308–12 (2001).

⁵⁹ See *Marsh*, 463 U.S. at 792.

used history and tradition to inform the meaning of the Establishment Clause and to incorporate a fundamentally religious practice into the fabric of our society.⁶⁰ Justice Brennan dissented in *Marsh*, arguing that any group of law students asked to apply the *Lemon* test to legislative prayer would almost unanimously find it unconstitutional.⁶¹ Some scholars have agreed with Justice Brennan and revile this decision as an abdication of formal standards,⁶² although others consider historical tradition to be an important consideration in Establishment Clause cases.⁶³

In 1992, in *Sherman v. Community Consolidated School District*, the U.S. Court of Appeals for the Seventh Circuit relied on the reasoning from *Marsh* to hold that the words "under God" in the Pledge of Allegiance are a secular vow rather than a religious one, and thus do not implicate the Establishment Clause.⁶⁴ According to the court in *Sherman*, the word "God" in the Pledge of Allegiance is a mere ceremonial reference to a deity, akin to other religious references in daily life and, therefore, does not implicate the Establishment Clause.⁶⁵ The Seventh Circuit did not use any formal test and refused to apply either the *Lemon* test or the endorsement test, but relied instead on two considerations: (1) ceremonial references to God existed in early American history, and (2) the

⁶⁰ See *id.*; Charles Gregory Warren, Comment, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence*, 54 MERCER L. REV. 1669, 1681 (2003) (arguing that the Court shifted from a separationist to an accommodationist model in *Marsh*, utilizing history as a vehicle both to illuminate the original intent behind the Establishment Clause and to alter the religiousness of a practice).

⁶¹ *Marsh*, 463 U.S. at 800-01 (Brennan, J., dissenting). Professor Steven B. Epstein agrees, pointing out that Congress is a public body and its gallery is typically filled with visitors including schoolchildren. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2137 (1996). These visitors, he points out, would undoubtedly feel that they were outside the political norm if they did not ascribe to the religious denomination of the prayer. *Id.* at 2138.

⁶² See, e.g., Warren, *supra* note 60, at 1701 (arguing that history and tradition are encumbrances to the Establishment Clause and impede individual liberty).

⁶³ See, e.g., David A. Toy, *The Pledge: The Constitutionality of an American Icon*, 34 J.L. & EDUC. 25, 54 (2005) (arguing that religious practices can be infused into our culture and thus can be constitutional even if they fail the Supreme Court's formal tests); Pahnke, *supra* note 14, at 760 (warning against "blindly applying" the Establishment Clause tests without considering history and tradition).

⁶⁴ See 980 F.2d 437, 445 (7th Cir. 1992). Some scholars find this basic reasoning upon which *Marsh* relied ironic, pointing out that legislators would be surprised to learn that their opening prayer was the conceptual equivalent of a gavel banging a meeting to order. See Timothy L. Hall, *Sacred Solemnity: Civil Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 63 (1993).

⁶⁵ See 980 F.2d at 445.

Supreme Court had expressed in dicta that the Pledge of Allegiance in its present form is not a violation of the Establishment Clause.⁶⁶

The Seventh Circuit's decision is in sharp contrast to the Ninth Circuit's 2002 decision in *Newdow I* striking down the Pledge, primarily because the Seventh Circuit in *Sherman* did not use any formal test but relied on the Court's holding in *Marsh* that immunized certain practices from Establishment Clause scrutiny because of their historical context.⁶⁷ The *Sherman* court referenced historical facts including James Madison's Thanksgiving proclamations and the Declaration of Independence's references to the "Creator."⁶⁸ It conceptualized the Pledge as a bare historical recognition of the religious beliefs of our Founding Fathers, which makes this invocation as innocuous as would be the recitation of Lincoln's Gettysburg Address each morning.⁶⁹ The court invoked a slippery-slope argument, alleging that if the words "under God" are a violation of the Establishment Clause then the Constitution necessarily forbids books, essays, tests, and discussions that offend any student's beliefs.⁷⁰ It concluded its analogy with the assertion that "objection by the few does not reduce to silence the many who *want* to pledge allegiance to the flag and to the republic for which it stands."⁷¹

C. Ceremonial Deism

The class of activities alluded to in *Marsh* and *Sherman*, which do not implicate the Establishment Clause because of their unique role in our history and secular culture, has been given a name: ceremonial

⁶⁶ See *id.* at 446–48. The Seventh Circuit professed that it would take such dicta seriously because a lower court would do better to respect what the Supreme Court says rather than attempt to read between the lines. *Id.* "If the Justices are just pulling our leg," the court went on, "let them say so." *Id.* at 448; see Pahnke, *supra* note 14, at 759–60 (pointing out that context matters and that *Sherman* was right to rely on the reasoning from *Marsh* to uphold the Pledge).

⁶⁷ *Newdow I*, 292 F.3d at 612; *Sherman*, 980 F.2d at 446–48; see *Marsh*, 463 U.S. at 790–91.

⁶⁸ 980 F.2d at 445–46. Some have criticized this reasoning because the Seventh Circuit listed an array of historical references to religion but did not mention the multiple historical figures—including Founding Fathers—who emphasized the importance of a separation between church and state. Lori A. Catalano, Comment, *Totalitarianism in Public Schools: Enforcing a Religious and Political Orthodoxy*, 34 CAP. U. L. REV. 601, 628 (2006).

⁶⁹ See *Sherman*, 980 F.2d at 446.

⁷⁰ See *id.* at 444 (reasoning that the government retains the right to control the public school curriculum, even if some pupils find the contents offensive).

⁷¹ *Id.* at 445. Some scholars cite *Sherman* with approval: David Toy, for example, points out that even if the Pledge once had a religious meaning, it no longer does today, and that it now serves the purely secular function of solemnizing public occasions. Toy, *supra* note 63, at 37.

deism.⁷² The term was coined by former Yale Law School Dean Walter Rostow in a 1962 lecture, and it references activities that are so infused into secular culture that they have become sufficiently conventional and uncontroversial as to be deemed constitutional.⁷³ In other words, certain religious manifestations in our government have been around for so long that their history and context have essentially left them as secularized shells of their original forms.⁷⁴ Under this rubric, the Pledge of Allegiance should now be understood—given its secularized context—to be a celebration of patriotic values and recognition of our Founding Fathers' religious beliefs, rather than an endorsement of any particular religion.⁷⁵

Ceremonial deism had been discussed explicitly in only two Supreme Court decisions prior to *Newdow I*.⁷⁶ In one instance, Justice Brennan hesitantly opined in his *Lynch* dissent (without deciding) that the designation of "In God We Trust" as our national motto and the reference to God in the Pledge can best be characterized as instances of ceremonial deism, primarily because they have lost, through rote repetition, any significant religious content.⁷⁷ He did add, however, that it is *necessity* coupled with their long histories that helps insulate these references from Establishment Clause challenges.⁷⁸ Justice Brennan suggested that these religious references are likely needed to fulfill secular functions such as solemnizing public occasions or inspiring commitment to meet some national challenge.⁷⁹ Echoing this sentiment, Justice O'Connor's concurrence in *Lynch*, though not invoking the term explicitly, alluded to ceremonial deism as she harmonized the result in *Marsh* with her newly fashioned endorsement test by arguing that legis-

⁷² See Pahnke, *supra* note 14, at 763–64.

⁷³ *Id.*

⁷⁴ See *id.*

⁷⁵ See *id.* Z. Ryan Pahnke endorses this reasoning, arguing that historical context can be a vehicle for altering the religiosity of a practice. *Id.* at 760. Some scholars disagree, responding that this trend moves us away from a diverse and welcoming nation toward one of religious homogeneity. See William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 771.

⁷⁶ See *Allegheny*, 492 U.S. at 603; *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting).

⁷⁷ See *Lynch*, 465 U.S. at 716–17 (noting that these references are aptly suited to fulfill secular goals such as solemnizing public occasions and fostering nationalism that cannot otherwise be fulfilled using nonreligious phrases) (Brennan, J., dissenting).

⁷⁸ *Id.* at 717.

⁷⁹ *Id.*

lative prayer is a form of acknowledgment that serves legitimate secular goals.⁸⁰

The term was again used by Justice Blackmun in *Allegheny*, when he distinguished the crèche in that case from instances of ceremonial deism by pointing out the "obvious distinction" between a crèche display and the reference to God in the national motto, the Pledge of Allegiance, or the Supreme Court's own invocation.⁸¹ The crèche is an obvious Christian endorsement, according to Justice Blackmun, whereas the examples of ceremonial deism he mentioned are more innocuous references to religion generally.⁸² He pointed out that ceremonial deism can never embrace a practice that evinces the government's allegiance to a particular sect or creed.⁸³

The Court has also implicitly invoked the doctrine on several occasions, typically in a "slippery slope" context to illuminate the disastrous results that would follow if certain practices were to be invalidated under the Establishment Clause.⁸⁴ Chief Justice Burger referred in *Lynch* to an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life."⁸⁵ For example, the day after the First Amendment was proposed, Congress urged President Washington to proclaim a day of public thanksgiving and prayer, and Thanksgiving was made a national holiday in 1870.⁸⁶ The government has further acknowledged religious holidays and prescribed "In God We Trust" as our national motto, has provided chapels in the Capitol for religious worship and meditation, and Presidential Proclamations have often invoked "God."⁸⁷ The argument typically follows that, because these references cannot possibly be unconstitutional, any religious reference that is no more an establishment of religion

⁸⁰ See *id.* at 693 (O'Connor, J., concurring) (positing that legislative prayers "serve in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society").

⁸¹ *Allegheny*, 492 U.S. at 603.

⁸² *Id.*

⁸³ See *id.* at 605 ("Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions).").

⁸⁴ See, e.g., *Lynch*, 465 U.S. at 674-78 (noting that our society is replete with governmental references to religion, including a statute of Moses and the Ten Commandments in the very chamber in which oral arguments were held for this case).

⁸⁵ *Id.* at 674.

⁸⁶ *Id.* at 675 n.2.

⁸⁷ *Id.* at 676-77.

than these paradigmatic instances of ceremonial deism cannot be either.⁸⁸

More recently, Justice O'Connor described ceremonial deism at length in her concurring opinion in *Elk Grove*.⁸⁹ In an attempt to clarify this muddled area of jurisprudence, she set forth a test including four factors that could help determine whether a religious practice should be constitutionally permitted because of its context: (1) the "history and ubiquity" of the practice, (2) the "absence of worship or prayer," (3) the "absence of reference to a particular religion," and (4) "minimal religious content."⁹⁰ If analysis of these four factors leads to a balance suggesting a secularized context, then Justice O'Connor argued the practice is nonreligious in character and would not send a message to nonadherents that they are "not full members of the political community."⁹¹

D. *The Pledge of Allegiance: Ceremonial Deism?*

Some have argued that the Pledge of Allegiance falls within the vague contours of the ceremonial deism doctrine.⁹² To assess the arguments in support of this, however, it is important to remember that the Pledge of Allegiance has not existed in its current form since its creation.⁹³ The original "Pledge to the Flag" was written by Baptist Minister Francis Bellamy and was published in the magazine, *The Youth's Companion*, in 1892, in preparation for the four-hundredth anniversary of Christopher Columbus's discovery of America.⁹⁴ This original Pledge was as follows: "I Pledge allegiance to my Flag and to the Republic for which it stands—one Nation indivisible—with liberty and justice for all."⁹⁵ The words "of the United States of America"

⁸⁸ See *Newdow I*, 292 F.3d at 614–15 (Fernandez, J., concurring in part and dissenting in part). Judge Fernandez provided a scathing derision of those who challenge instances of ceremonial deism under the Establishment Clause, asserting that these activities do not cause any real harm "except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity." *Id.* at 614.

⁸⁹ See 542 U.S. at 33–45 (O'Connor, J., concurring in the judgment).

⁹⁰ See *id.* at 37–45.

⁹¹ See *id.* at 34, 43 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). These four factors are not requirements, because Justice O'Connor reconciles her test with the holding in *Marsh* by conceding that in "the most extraordinary circumstances" actual worship or prayer can be deemed ceremonial deism. See *id.* at 40.

⁹² See Pahnke, *supra* note 14, at 765–66.

⁹³ Stephen G. Gey, "Under God," *the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1874 (2003).

⁹⁴ *Id.*

⁹⁵ *Id.* at 1875.

were eventually added to ensure that foreigners would not have in mind the flag of their country of origin.⁹⁶ The Pledge began to grow in popularity, and over the decades states began to require that the Pledge be recited in schools each morning as part of their daily patriotic exercises.⁹⁷

Harsh penalties were sometimes enforced for dissenters, and the Court entered the fray when a Pennsylvania school expelled two students who refused to participate because, as Jehovah's Witnesses, they maintained that their religion forbade them from paying homage to false gods in this way.⁹⁸ In 1940, in *Minersville School District v. Gobitis*, the Supreme Court implied that religious freedom is not absolute and that the societal interests in national unity outweigh the right to religious autonomy retained by these Jehovah's Witnesses.⁹⁹ In 1942, Congress formally recognized the Pledge as the national patriotic invocation, and in 1943, the Court overturned the *Gobitis* decision in *West Virginia State Board of Education v. Barnette*.¹⁰⁰ In *Barnette*, Jehovah's Witness children again objected to the mandatory Pledge, and Justice Jackson led the Court in holding that coerced speech is not justified by an interest in patriotism.¹⁰¹ Justice Jackson's words remain immortalized as unequivocal reminders that, if the Constitution does anything, it protects the individual's autonomy of conscience: "If 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."¹⁰²

Although *Barnette* put to rest the First Amendment issues raised by mandatory recitation of the Pledge,¹⁰³ entirely new First Amendment issues were raised in 1954, when the words "under God" were inserted.¹⁰⁴ The House Report surrounding that legislation explained that Congress's goal in revising the Pledge was to acknowledge the dependence of our citizens and our democracy on the moral direc-

⁹⁶ *Id.*

⁹⁷ Catalano, *supra* note 68, at 605.

⁹⁸ See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591-92 (1940).

⁹⁹ See *id.* at 599-600.

¹⁰⁰ See 319 U.S. 624, 642 (1943); Catalano, *supra* note 68, at 607.

¹⁰¹ See 319 U.S. at 642.

¹⁰² *Id.*

¹⁰³ See *id.*

¹⁰⁴ Pub. L. No. 83-396, 68 Stat. 249 (codified as amended at 4 U.S.C. § 4 (2000 & Supp. III 2003)).

tions of a creator and to contrast ourselves with atheism.¹⁰⁵ The circumstances surrounding the legislation include statements disparaging atheists apparently because they were perceived as representative of the nefarious Soviet regime and thus were not "true" Americans.¹⁰⁶

The Court has never directly ruled on the substantive constitutionality of the Pledge of Allegiance, and in *Newdow I* the Ninth Circuit noted the Court's failure to clarify which of its three Establishment Clause tests is the proper inquiry.¹⁰⁷ The Ninth Circuit, therefore, proceeded to use each of them.¹⁰⁸ Turning first to the endorsement test, the majority held both the 1954 statute and the California policy to be endorsements of religion.¹⁰⁹ It explained that the inclusion of the words "under God" was a clear expression of belief—monotheism—and that the government is not constitutionally permitted to take a stance on the issue of whether God exists.¹¹⁰ The court asserted that the Pledge was ineluctably normative in character and that "to recite the Pledge is . . . to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism."¹¹¹ The panel agreed with Justice Kennedy's separate opinion in *Allegheny* in which he argued that the Pledge clearly fails a faithful application of the endorsement test.¹¹²

The Ninth Circuit went on to hold that both the 1954 Act and the California policy violate the coercion test.¹¹³ As in *Lee*, the recitation policy here placed students in the untenable position of choosing

¹⁰⁵ H.R. REP. NO. 83-1693, at 2340 (1954).

¹⁰⁶ See *id.* At least one scholar has argued that the addition of these words is not only a permissible accommodation of religion, but is even desirable. See Toy, *supra* note 63, at 42. Several secular purposes are pointed to, including the generation of patriotism and commemorating the role of religion in our nation's history. *Id.* Others argue, however, that by combining a religious and political affirmation into a single statement the government is blurring the line between governmentally shaped political opinions and governmentally influenced religious ones. See Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 231 (2004).

¹⁰⁷ See 292 F.3d at 607.

¹⁰⁸ *Id.* at 607–08.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 607.

¹¹¹ *Id.*

¹¹² *Newdow I*, 292 F.3d at 608. Justice Kennedy asserted that "it borders on sophistry to suggest that the 'reasonable' atheist would not feel like less than a full member of the political community every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false." *Allegheny*, 492 U.S. at 673 (Kennedy, J., concurring in the judgment in part and dissenting in part).

¹¹³ *Newdow I*, 292 F.3d at 608–09.

between participating in a religious exercise or engaging in protest.¹¹⁴ The Act itself was also coercive given Congress's unequivocal intent that its adoption lead to the daily affirmation of the existence of God by our nation's schoolchildren.¹¹⁵

Finally turning to the *Lemon* test, the Ninth Circuit first held that the 1954 Act violates the "purpose" prong because it lacks a legitimate secular purpose.¹¹⁶ The court refused to accept the government's argument that the Pledge as a whole should be considered a secular instrument meant to solemnize public occasions, but rather focused on the 1954 addition alone ("under God"), concluding that its sole purpose was to advance religion.¹¹⁷ Although the school district's recitation policy did have a secular purpose—to foster patriotism—the Court found that the policy had the impermissible effect of promoting religion and thus failed *Lemon*'s second prong.¹¹⁸

The amended 2003 decision in *Newdow v. U.S. Congress* (*Newdow II*) was much narrower, and the Ninth Circuit addressed only the California recitation policy.¹¹⁹ Furthermore, it relied entirely on the coercion test in its holding, presumably the grounds it found most persuasive.¹²⁰ Much of the analysis from *Newdow I* was folded into its coercion discussion, however, and the Ninth Circuit still held that "under God" impermissibly expresses a belief in monotheism.¹²¹ The court discussed the legislative history of the 1954 Act to support this notion.¹²²

In sum, the Ninth Circuit's application of the Establishment Clause—in both *Newdow I* and *Newdow II*—appears to correspond with Supreme Court precedent.¹²³ The court logically concluded that the addition of "under God" is religious in purpose, given the copious legislative history and Eisenhower's own statement when he signed it;

¹¹⁴ *Id.*; see *Lee*, 505 U.S. at 593.

¹¹⁵ *Newdow I*, 292 F.3d at 605, 609.

¹¹⁶ *Id.* at 609. The legislative history of the 1954 Act suggests that its purpose was not only to make the Pledge religious, but to make it distinctly Christian. See 100 CONG. REC. 5, 6919 (1954) (statement of Rep. Angell). Representative Homer D. Angell, arguing in support of the Pledge's revision, quoted a statement by Billy Graham: "We are directing the Ship of State, unassisted by God, past the reefs and through the storms of time. We have dropped our pilot, the Lord Jesus Christ, and are sailing blindly on without divine chart or compass, hoping somehow to find our desired haven." *Id.* (quoting 98 CONG. REC. A910-11 (1952)).

¹¹⁷ *Newdow I*, 292 F.3d at 610.

¹¹⁸ *Id.* at 611.

¹¹⁹ See 328 F.3d 466, 487 (9th Cir. 2003).

¹²⁰ See *id.*

¹²¹ See *id.* at 487-90.

¹²² *Id.* at 488.

¹²³ See *id.* at 488-90; *Newdow I*, 292 F.3d at 607-12.

religious in effect, because young children are not mature enough to understand the words “under God” to be anything other than an expression that God exists in the eyes of the government; and that it tacitly coerces children to participate in its recitation.¹²⁴

Justice O'Connor came to a different conclusion in her concurring opinion in *Elk Grove*, where she set forth the four-factor ceremonial deism analysis mentioned in the previous Section: history and ubiquity, absence of worship or prayer, absence of reference to a particular religion, and minimal religious content.¹²⁵ Beginning with the Pledge's history and ubiquity, Justice O'Connor pointed out that fifty years have passed since the Pledge's alteration, and this time span was not “inconsiderable.”¹²⁶ Further, she noted that the current Pledge has become very familiar and routine in the minds of Americans.¹²⁷ As to the absence of worship or prayer, she maintained—after distinguishing *Marsh*—that no reasonable observer would perceive the Pledge's recitation as an instance of worship.¹²⁸ Conceding that the legislative history surrounding the Pledge's alteration suggests an overt religious connotation, Justice O'Connor argued that the subsequent social and cultural history—our daily recitation in a solely patriotic context—has diluted any religious meaning it originally carried.¹²⁹

In discussing the absence of reference to a particular religion, Justice O'Connor pointed out that the Pledge refers to a generic “God” and not a denomination-specific creator.¹³⁰ This is as safe as it gets, she pointed out: although there are some religions that do not worship a single Supreme Being, along with countless atheists and agnostics, “one would be hard pressed to imagine a brief solemnizing reference to religion that would adequately encompass every religious belief expressed by any citizen in this Nation.”¹³¹ Finally, as to minimal religious content, she relied on the brevity of the reference to “God”—only two out of thirty-one words—to show that the words are not necessary to the Pledge, and so it is very easy for participants to “opt out” if they choose not to say them.¹³² In sum, Justice O'Connor concluded that the weight of these four factors allowed for a conclusion that the words

¹²⁴ See *Newdow II*, 328 F.3d at 488–90; *Newdow I*, 292 F.3d at 607–12.

¹²⁵ See 542 U.S. at 37–43 (O'Connor, J., concurring in the judgment).

¹²⁶ *Id.* at 38.

¹²⁷ *Id.*

¹²⁸ *Id.* at 40.

¹²⁹ *Id.* at 41.

¹³⁰ *Elk Grove*, 542 U.S. at 42 (O'Connor, J., concurring in the judgment).

¹³¹ See *id.*

¹³² *Id.* at 43.

"under God" in the Pledge are an acceptable instance of ceremonial deism that do not implicate the Establishment Clause.¹³³

II. RESTORATION OF THE ENDORSEMENT TEST TO GIVE THE ESTABLISHMENT CLAUSE C.P.R. (CONSISTENT, PRINCIPLED REVIEW)

The Establishment Clause is meant to protect individuals from their personal religious beliefs affecting their standing in the political community, and the endorsement test is the judicial analysis that best enforces this norm.¹³⁴ If the Supreme Court continues, however, to overemphasize extrinsic factors that purport to secularize religious practices—an imprudent method that this Note refers to as "contextualism"—then its jurisprudence will continue to be plagued with inconsistencies, and the Establishment Clause will be left a shell of its original form.¹³⁵

A. *The Endorsement Test as the Proper Analysis for Establishment Clause Cases*

To give full force to the Establishment Clause, the Supreme Court should rely upon the endorsement test because it best reflects the norms embodied in the First Amendment.¹³⁶ Our nation was largely founded by individuals with firmly rooted notions of religious liberty, as they were themselves fleeing religious persecution in Europe.¹³⁷ Therefore, although many were strongly religious and this religion was in many ways allowed to permeate political life, the Framers recognized the disparaging effects that religion could have if it was in any way tied to the status of citizens in our nascent democracy.¹³⁸ The constitutional

¹³³ See *id.*

¹³⁴ See *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring).

¹³⁵ See, e.g., *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 616 (1989) (focusing on the physical context of a holiday setting to characterize it as an overall holiday setting rather than a display of religious symbols); *Marsh v. Chambers*, 463 U.S. 783, 791 (1983) (relying on the unique history of legislative prayer to immunize it from scrutiny under an objective analysis); see also Warren, *supra* note 60, at 1685 (asserting that the internal inconsistencies of the endorsement test stem from the Court's infusion of ceremonial deism into a model that is largely separationist).

¹³⁶ See *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

¹³⁷ See Epstein, *supra* note 61, at 2099.

¹³⁸ See *id.* The endorsement test is more effective than the *Lemon* test or the coercion test at enforcing these principles because these other analyses do not emphasize the perceptions of the nonadherent. See Warren, *supra* note 60, at 1682. The endorsement test is effectively a refinement of *Lemon*—by collapsing *Lemon*'s first two prongs it emphasizes the

norm that was thus embodied in the First Amendment includes intractable notions of neutrality and tolerance such that no citizen shall be denied the ability to participate fully in political life based on his or her privately held religious beliefs.¹³⁹ Justice O'Connor recognized this truth in 1984, in *Lynch v. Donnelly*, when she modified the *Lemon* test to reformulate the fulcrum of analysis: whether the religious practice sends a message to nonadherents that they are not full members of the political community.¹⁴⁰

This principle of nonendorsement is strongly embedded within the Establishment Clause and is not limited to the political rights and privileges exercisable by full citizens, but goes further.¹⁴¹ There are inevitable psychological harms flowing from governmental endorsement that send messages to nonadherents that their beliefs are not entitled to the same respect as the majority's.¹⁴² This tacit ostracism is precisely the harm that the Establishment Clause seeks to avoid, and in our heterogeneous culture it is of paramount import that our government respects all religions equally.¹⁴³ The best—and only—way for the government to do this is to leave religion in its proper place within the hearts and minds of those who choose to believe, without alienating those who choose otherwise.¹⁴⁴ Allowing religion to divide us as a nation not

perceptions of a reasonable person who is cognizant of the relevant context behind the religious symbol. *See id.* In this way, it is more effective than *Lemon* at reflecting the norms of individual conscience that are embodied by the First Amendment. *See id.* The coercion test is ineffective because it takes a neutrality approach to the Establishment Clause and sanctions any religious endorsement so long as no one is coerced into participating or conforming. *See Lee v. Weisman*, 505 U.S. 577, 592 (1993); Catalano, *supra* note 68, at 617. This ignores the effects on the personal conscience of nonadherents who may not feel induced to conform but are nevertheless reminded by the political majority that their beliefs are not as respected. *See Karst, supra* note 32, at 504–05. This foments social divisiveness and perpetuates religious discrimination, which undermines the purpose of the First Amendment's division between government and religion. *See id.* at 507–08 (discussing the polarizing effects that are particularly apposite to the state-sponsored deployment of religious emblems).

¹³⁹ *See* Alexandra D. Furth, Comment, *Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court's Secularization Analysis*, 146 U. PA. L. REV. 579, 594–95 (1998) (arguing that the history of the Establishment Clause suggests that it was ratified in response to local concerns of religious discrimination).

¹⁴⁰ *See* 465 U.S. at 687–88 (O'Connor, J., concurring).

¹⁴¹ *See* Karst, *supra* note 32, at 518–19.

¹⁴² *Id.* at 519 ("The nativity scene [in *Lynch*] left intact the rights of non-Christians in Pawtucket to vote and to speak. The loss they suffered was mainly psychic: the slap-in-the-face reminder that they were not full members of the community.").

¹⁴³ *See id.*

¹⁴⁴ *See* Furth, *supra* note 139, 594.

only offends the Establishment Clause but also contravenes the principles that underlie many of the religious practices in question.¹⁴⁵

The endorsement test has its critics, however, many of whom claim that if this test were faithfully applied then it would overrule scores of practices that have traditionally been considered constitutional.¹⁴⁶ In 1989, in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, Justice Kennedy argued that few of our traditional religious practices would withstand scrutiny under the endorsement test, noting that a reasonable atheist would clearly feel ostracized from the political community when his or her fellow citizens recite as part of their expression of patriotism and love for country a phrase he or she believed to be false.¹⁴⁷ This slippery-slope argument suffers from two major flaws: (1) it presumes that practices that have been considered constitutional in the past must, therefore, be immune from further scrutiny, and (2) it ignores the fact that the Pledge is different in kind from other religious practices that are feared will likewise be invalidated.¹⁴⁸

As to the first flaw, it should suffice to say that a constitutional test must not be eschewed by the Court simply because it fears the result of its faithful application.¹⁴⁹ Tradition does not insulate a practice from scrutiny, and as a neutral arbiter the Court should faithfully apply constitutional mandates even if doing so departs from some traditional habits.¹⁵⁰ The Supreme Court deemed school prayer to be unconstitutional in 1962, in *Engel v. Vitale*,¹⁵¹ despite the fact that school prayer was firmly entrenched in the concept of public schooling for over one hundred years.¹⁵² In 1954, in *Brown v. Board of Education*, the Court de-

¹⁴⁵ Karst, *supra* note 32, at 528. It is ironic to allow arguments over a nativity scene to divide a community, given that the feast it represents intends to champion peace and good will. *Id.*

¹⁴⁶ See *Allegheny*, 492 U.S. at 670-71 (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Kennedy denounced the analysis, asserting that an Establishment Clause analysis that would invalidate long-standing traditions when faithfully applied cannot be a proper reading of the First Amendment. *Id.*

¹⁴⁷ *Id.* at 673.

¹⁴⁸ See Laycock, *supra* note 106, at 227. Professor Douglas Laycock notes, for example, that the Pledge is an unlikely candidate to fall within a ceremonial deism exception, given its captive audience of children and its request for a personal affirmation. *Id.*

¹⁴⁹ See Thompson, *supra* note 6, at 584 (arguing that the Constitution is not a static document but a "blueprint of freedom and equality" that may apply in contemporary societies in ways the Framers could not anticipate).

¹⁵⁰ See *id.*

¹⁵¹ 370 U.S. 421, 436 (1962).

¹⁵² Epstein, *supra* note 61, at 2102. Professor Steven B. Epstein notes that the Massachusetts Board of Education was comprised mostly of members of the clergy, and Bible

parted from its own long-standing precedent and cultural tradition by declaring that racially segregated schools offend the Equal Protection Clause of the Constitution.¹⁵³

The second flaw is apposite with particularity to the Pledge.¹⁵⁴ The Pledge has unique characteristics that distinguish it from other ceremonial references to religion in civic life, making the slippery-slope argument unworkable: it is most frequently used in public schools among impressionable children, asks for a personal statement of belief in God, and ties that belief in God to our national profession of patriotism and love for our nation.¹⁵⁵ It has long been recognized that the school is the most sensitive forum for governmentally sponsored religious conduct.¹⁵⁶ Further, other examples of traditionally accepted religious observances are directed principally to adults, as in legislative sessions, or to no one explicitly, as with the motto on our currency.¹⁵⁷ For these reasons, the "slippery slope" argument proffered by Justice Kennedy and others against the use of the endorsement test is not a basis to ignore the commands of the Establishment Clause in order to preserve religious practices.¹⁵⁸

In sum, the Supreme Court should clarify its Establishment Clause jurisprudence by definitively stating that the endorsement test is the proper inquiry.¹⁵⁹ This would most effectively enforce the principles underlying the Establishment Clause and provide much needed guidance to conflicted circuit courts.¹⁶⁰

instruction was considered to be an important part of the curriculum. *Id.* All seventeen of the state colleges and universities in existence prior to 1860 considered themselves Christian and required their students to attend religious services. *Id.*

¹⁵³ 347 U.S. 483, 493 (1954).

¹⁵⁴ See Laycock, *supra* note 106, at 227.

¹⁵⁵ *Id.*

¹⁵⁶ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987). The Court explained this concern with the school forum, stating:

The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.

Id.

¹⁵⁷ See Laycock, *supra* note 106, at 227.

¹⁵⁸ See Warren, *supra* note 60, at 1686.

¹⁵⁹ See *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

¹⁶⁰ Compare *Newdow v. U.S. Cong. (Newdow I)*, 292 F.3d 597, 612 (9th Cir. 2002) (applying all three Establishment Clause tests to invalidate Pledge), with *Sherman v. Cmty.*

B. Contextualism Has Undermined the Endorsement Test

The word "contextualism" is used in this Note to refer to the Court's method of emphasizing the secular context surrounding religious practices in order to insulate them from invalidation under the Establishment Clause: this can mean their physical context used to justify their secular status or their historical context used to justify their categorization as instances of ceremonial deism.¹⁶¹ Contextualism's role in recent Establishment Clause jurisprudence has been a dynamic one, providing the Supreme Court great flexibility in assessing the religiosity of a practice by allowing it to make various inquiries to weigh toward secularization: physical context, history and tradition, and the related concept of ceremonial deism.¹⁶²

The Court has strived to secularize facially religious practices, and in the process the true meaning of the Establishment Clause has been obscured.¹⁶³ Circuit courts have consequently been divided, with some following the Supreme Court's lead in allowing contextualism to replace traditional Establishment Clause analysis, and others remaining true to the norms embodied by the Establishment Clause and faithfully applying the objective analyses set forth by the Court.¹⁶⁴ Although context should undoubtedly be a part of the Court's analysis, its overemphasis has undermined the application of the Establishment Clause because the Court has used contextualism as a protective sheath to insulate certain unconstitutional practices from rigorous Establishment Clause scrutiny.¹⁶⁵ The Court has done so by overemphasizing their

Consol. Sch. Dist., 980 F.2d 437, 445-48 (7th Cir. 1992) (utilizing the history and tradition analysis from *Marsh* to uphold Pledge).

¹⁶¹ See Bell, *supra* note 58, at 1298. The context of a religious message is an important consideration in the Establishment Clause query, but the flaw in the Court's method is its reliance on the secular context of a religious message, without due regard for the message's religious and cultural milieu, which are of paramount significance under the endorsement test. See *infra* notes 184-212 and accompanying text. It is this overemphasis of the secular that this Note dubs "contextualism." See *infra* notes 184-212 and accompanying text.

¹⁶² See, e.g., *Lynch*, 465 U.S. at 680; *Marsh*, 463 U.S. at 790-92.

¹⁶³ See Bell, *supra* note 58, at 1298. Ashley M. Bell refers to ceremonial deism as a way to sweep under the rug certain religious practices that would otherwise violate the Establishment Clause. *Id.*

¹⁶⁴ Compare *Newdow I*, 292 F.3d at 607-12 (reasoning that the normative and ideological character of the Pledge causes it to fail each of the three Supreme Court analyses), with *Sherman*, 980 F.2d at 445 (criticizing the U.S. District Court for the Northern District of Illinois because it "trudged through" the Supreme Court's three analyses, and instead applying a more direct approach of simply asking whether the Pledge can be characterized as sending a message of exclusion, answering in the negative).

¹⁶⁵ See, e.g., *Marsh*, 463 U.S. at 795. Justice Burger refused to apply any formal analysis to legislative prayer, and although he did not doubt the sincerity of those who believed it

secular context without due regard for the forum in which they are portrayed and the pervasiveness with which they will convey messages of marginalization to the nonbeliever.¹⁶⁶

The role that contextualism has played in Establishment Clause jurisprudence has been just this: a backdoor through which the Court has grasped secularizing factors to justify a religious practice's existence despite its certain invalidation under the Court's objective analyses.¹⁶⁷ The use of contextualism in this way will continue to undermine judicial legitimacy, the endorsement test, and, by extension, the Constitution itself.¹⁶⁸

One ill effect of this use of contextualism is the degradation of judicial legitimacy.¹⁶⁹ It is not the role of the judge to enter a legal dispute with certainty of the right answer—for example, that the Pledge of Allegiance could not possibly be unconstitutional—and then proceed to finesse legal standards until he or she can confirm the correctness of that original conclusion.¹⁷⁰ Once a judge begins to use personal predilections in lieu of constitutional mandates, he or she has abdicated the role of interpreter and instead has become a life-tenured, unelected legislator.¹⁷¹ For this reason, legal standards should be as firmly fixed as reality allows—and, if a practice is unconstitutional under that standard, perhaps the problem is not with the standard's rigidity but with the practice itself.¹⁷²

Another disparaging effect of the Court's reliance on contextualism has been its perpetuation of practices which do, in fact, violate the

to be one step toward an establishment of religion, he reassured us of the Court's ability to "distinguish between real threat and mere shadow." *Id.* (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 308 (1963)).

¹⁶⁶ See *Lynch*, 465 U.S. at 680.

¹⁶⁷ See Laycock, *supra* note 106, at 238 (stating that, in particular, Justice O'Connor's four ceremonial deism factors "do not capture all the important considerations; they were designed to uphold the Pledge, so they omit the strongest reasons for invalidating it").

¹⁶⁸ See Warren, *supra* note 60, at 1706 (discussing the corruptive influences that an inconsistent application of the endorsement test has on the judiciary).

¹⁶⁹ See *id.*

¹⁷⁰ See *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J., concurring) (stating that "the very 'flexibility' of this Court's Establishment Clause precedent leaves it incapable of consistent application . . . the unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections").

¹⁷¹ See *id.*

¹⁷² See *id.*

Establishment Clause because they marginalize minority religions.¹⁷³ The endorsement test purports to give full force to the Establishment Clause by ensuring that government in no way makes adherence to religion—any religion—at all relevant to an individual's standing in the political community.¹⁷⁴ Would a Buddhist legislator not feel slightly less a part of the political community when, beginning each legislative session, his or her fellow representatives collectively bowed their heads and are led in a prayer to Jesus Christ?¹⁷⁵ Does an atheist father not feel the least bit marginalized as he sends his daughter to a public school each day, where she will be asked to place her hand respectfully over her heart and join the class in proclaiming that her father is wrong and that God does indeed exist?¹⁷⁶ Do the presence of a plastic Santa Claus and a cutout figure of a clown make a Jewish woman feel any less that she is in a "Christian town" as she strolls past a life-size reenactment of the birth of Jesus Christ?¹⁷⁷ It is clear that these are indeed the types of marginalization that the Establishment Clause is concerned with.¹⁷⁸

Personal opinions of the religious instances above are wholly irrelevant for the purposes of constitutional application.¹⁷⁹ The practices may appear innocuous, even beneficial, but that is the mistake the Court has made: it has relied on personal opinions about religious displays and sought out contextual justifications for their secularization, rather than adjudging them objectively under its own legal rubric.¹⁸⁰ The endorsement test should be applied faithfully because, unless one is a member of the trivialized group, it is difficult to understand how its adherents feel when confronted with religious endorsements that others perceive as "innocuous."¹⁸¹ The choice not to believe in any formal-

¹⁷³ See Warren, *supra* note 60, at 1699 ("[A] polity saturated with civil religion, complete with ubiquitous public rituals with obvious religious overtones and residual spiritual meaning, confronts nonbelievers with a crisis of conscience . . .").

¹⁷⁴ See *Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring).

¹⁷⁵ See generally *Marsh*, 463 U.S. 783.

¹⁷⁶ See generally *Newdow I*, 292 F.3d 597.

¹⁷⁷ See generally *Lynch*, 465 U.S. 668.

¹⁷⁸ See Gey, *supra* note 93, at 1916 (pointing out that the Establishment Clause has never been considered to prohibit only the formation of a theocracy or the suppression of one's religious beliefs, but goes much further).

¹⁷⁹ See *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring).

¹⁸⁰ See Warren, *supra* note 60, at 1699-703 (arguing that by secularizing the religious, the Court is sanctifying the secular and thereby limiting the nonadherent's ability to exercise full citizenship).

¹⁸¹ See Karst, *supra* note 32, at 519. Professor Kenneth L. Karst draws an analogy to past exclusion, noting that the most painful harm for Jim Crow was not the denial of specific rights but the symbolic exclusion that he suffered as his fellow Americans denied him full participation in the community. *Id.*

ized religion at all is one that is very personal and spiritual in its own right, and the Establishment Clause protects the rights of atheists and agnostics just as firmly as it protects the rights of Christians and Jews.¹⁸² The current jurisprudence ignores this fact—most notably in the context of the Pledge of Allegiance—and a clarification is desperately needed to help restore religious autonomy to its rightful place in the hearts and minds of believers, free from derogating governmental endorsements.¹⁸³

III. A REVISED ANALYSIS—THE JUSTICE O'CONNOR TWO-STEP

Justice O'Connor, in her 2004 concurrence in *Elk Grove Unified School District v. Newdow*, recognized the overpowering influence that context has come to play in the Supreme Court's Establishment Clause jurisprudence.¹⁸⁴ Justice O'Connor therein provided her four-factor analysis to help clarify when a religious practice does not send a message of endorsement to a reasonable observer—and consequently falls within the ceremonial deism exception.¹⁸⁵ In defining the metes and bounds of ceremonial deism, Justice O'Connor folded contextualism into her analysis in recognition of the prominent role it has played in recent Establishment Clause jurisprudence.¹⁸⁶ In her first factor—history and ubiquity—she clearly recognizes the influence that historical context has had on recent precedent, and her final factor—minimal religious content—seems to acknowledge the emphasis that the Court has placed on physical context in recent jurisprudence.¹⁸⁷

Justice O'Connor should be commended for valiantly attempting to clarify this confused area of the law, but unfortunately her new test

¹⁸² See *Van Orden*, 545 U.S. at 695 (Thomas, J., concurring) ("The declaration that our country is 'one Nation under God' necessarily entails an affirmation that God exists. This phrase is thus anathema to those who reject God's existence and a validation of His existence to those who accept it."); see also Gey, *supra* note 93, at 1906 (arguing that the establishment of a generic belief in God is just as much a violation of the Establishment Clause as the establishment of a particular sect).

¹⁸³ See Van Alstyne, *supra* note 75, at 771 ("[We are seeing] a movement from one national epigram to another; it is the movement from 'E Pluribus Unum' to 'In God We Trust,' from the ideal expressed by our original Latin motto—one nation out of highly diverse but equally welcome states and people—to an increasingly pressing enthusiasm in which government re-establishes itself under distinctly religious auspices.").

¹⁸⁴ See 542 U.S. 1, 35 (2004) (O'Connor, J., concurring in the judgment).

¹⁸⁵ *Id.* at 37–45. These factors are (1) history and ubiquity, (2) absence of worship or prayer, (3) absence of reference to a particular religion, and (4) minimal religious content. *Id.*

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

may further perpetuate the Court's unfortunate habit of falling back on contextualism to legitimize practices that otherwise violate the Establishment Clause.¹⁸⁸ In setting forth her standard, she even acknowledges how difficult it is to reconcile the Court's 1983 holding in *Marsh v. Chambers*, which upheld legislative prayer under a historical context analysis, with *any* cogent Establishment Clause standard.¹⁸⁹ Indeed, sectarian legislative prayers violate three of her four factors, but yet—just as the Court in *Marsh*—she distinguished the practice based on its significant historical context.¹⁹⁰ This is confounding: while attempting to clarify already nebulous standards by setting forth a comprehensive set of factors to assist in the application of the endorsement test, Justice O'Connor is making exceptions to them *as she sets them out*.¹⁹¹ The Court desperately needs an analysis that it can apply with some consistency in order to provide coherence to this area of the law and remove Establishment Clause jurisprudence from the ad hoc, result-oriented world in which it currently resides.¹⁹²

These four factors are a good step, and at least Justice O'Connor is forthright in her recognition of the overwhelming influence that context has played.¹⁹³ But her ceremonial deism factors may overdichotomize the analysis: so long as these factors suggest that a practice has become secularized to some degree, the Establishment Clause is not implicated.¹⁹⁴ This hides the ball in a way, because by focusing all four factors on the secularizing context of a practice it is easy to forget about its religiousness that brought it under scrutiny in the first place.¹⁹⁵ Even the phraseology of the four factors suggests that they are weighted against invalidating religious practices: "minimal religious content" rather than "religious content," and "absence of refer-

¹⁸⁸ See Warren, *supra* note 60, at 1713. Charles Gregory Warren notes that the objective observer standard in the endorsement test should rightly be impervious to ceremonial deism arguments and that its faithful application would overturn an array of practices including the Pledge and the national motto. *Id.*

¹⁸⁹ See *Elk Grove*, 542 U.S. at 40 (O'Connor, J., concurring in the judgment); *Marsh v. Chambers*, 463 U.S. 783, 795 (1983).

¹⁹⁰ *Elk Grove*, 542 U.S. at 40 (O'Connor, J., concurring in the judgment) (stating that "only in the most extraordinary circumstances could actual worship or prayer be defended as ceremonial deism").

¹⁹¹ See Laycock, *supra* note 106, at 236.

¹⁹² See *id.*

¹⁹³ See *Elk Grove*, 542 U.S. at 43 (O'Connor, J., concurring in the judgment).

¹⁹⁴ See *id.* at 35 ("I believe that although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes.").

¹⁹⁵ See Epstein, *supra* note 61, at 2166–69.

ence to a particular religion" instead of "sectarian references," for example.¹⁹⁶ A refined analysis is needed to inform the endorsement test, which could ideally be used objectively and without caveat, permitting the Court to consider the secularizing context of a religious practice without having it dominate the analysis.¹⁹⁷

This Note proposes the following analysis to ascertain whether a religious practice sends a message of endorsement in violation of the Establishment Clause: the Court should (1) use O'Connor's four *Elk Grove* factors to gauge the "secularization" that a practice has suffered, given its historical and physical context in addition to its level of religious content and nonsectarian references,¹⁹⁸ and (2) look to the circumstances under which it is conveyed (including its typical audience and forum), as well as its political and cultural pervasiveness.¹⁹⁹ The former "secularizing" factors should then be balanced against the latter "endorsement" factors, allowing the Court to determine whether the practice may genuinely be deemed an instance of ceremonial deism that has been sapped of any religion-endorsing influence.²⁰⁰

When looking to the circumstances under which it is conveyed, the Court might ask how often it is displayed and whether it is a personal statement by an individual governmental official or rather has the imprimatur of the government behind it more generally.²⁰¹ If a religious message is endorsed frequently and with the support of the sovereign, it is more likely to violate the nonendorsement principles of the Establishment Clause than if it is endorsed infrequently and given by a single political figure.²⁰² Furthermore, the typical audience should be considered because, for example, a group of legislators would feel less marginalized by an invocation prayer than a group of impressionable students in a classroom being led in the same prayer.²⁰³ A religious message such as "In God We Trust" on our currency is not directed at any audience explicitly, whereas the use of the Bible to swear in a witness or an elected public officer is directed at a single individual.²⁰⁴

The political and cultural pervasiveness is relevant because some religious messages are tangential to our political society whereas others

¹⁹⁶ See *Elk Grove*, 542 U.S. at 42 (O'Connor, J., concurring in the judgment).

¹⁹⁷ See *id.* at 37-44.

¹⁹⁸ See *id.*

¹⁹⁹ See Laycock, *supra* note 106, at 228.

²⁰⁰ See *id.* at 227-28.

²⁰¹ See *id.* at 224-29.

²⁰² See *id.*

²⁰³ See *id.* at 227.

²⁰⁴ See Epstein, *supra* note 61, at 2145.

send clear indications that a religious belief is favored by the body politic and all others are disfavored.²⁰⁵ A Christmas display, for example, is certainly less politically pervasive if placed in a town park than if erected on the lawn of the state capitol.²⁰⁶ Using "in the year of our Lord" to date public documents is likely less politically pervasive than a display of the Ten Commandments on the steps of a federal courthouse.²⁰⁷ The Supreme Court's own invocation "God save the United States and this Honorable Court" does not appear as infused into our political culture as a prayer given by a Christian minister at the presidential inauguration.²⁰⁸ To be clear, this analysis does not purport to be a bright-line litmus test for Establishment Clause cases; rather, it proffers some intractable realities that the Court should consider before it emphasizes contextualism to reason that a practice has become sufficiently secularized.²⁰⁹ This analysis is a more effective approach because, rather than allowing contextualism and its secularizing "mitigating factors" to dominate the analysis, it allows for consideration of secularizing factors while also accounting for the real-life marginalization of the nonbeliever—which should be the paramount consideration under the endorsement test.²¹⁰

In sum, by considering the typical audience, the means of portrayal, and the pervasiveness of the religious emblem, the Court is on firmer ground to discern whether the nonadherent will feel like an "outsider, not a full member of the political community."²¹¹ Furthermore, by focusing on the realities under which the religious emblem is experienced by the public, the Court may no longer resort to contextualism to circumvent the unfortunate truth that perhaps religious traditions held so dearly by some are violating the constitutional rights of others.²¹²

²⁰⁵ See Karst, *supra* note 32, at 516. Though it may be futile to determine the one true meaning that any governmental religious message conveys, Professor Karst concedes, he states that one answer to this problem of perspective is to ground the determination in the pains of exclusion that led to the adoption of the Establishment Clause itself. *Id.*

²⁰⁶ See *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

²⁰⁷ See Laycock, *supra* note 106, at 236–38.

²⁰⁸ See Epstein, *supra* note 61, at 2141–44.

²⁰⁹ See Furth, *supra* note 139, at 579. This secularization process hurts us all, according to Furth, because the government simultaneously dilutes religion, thereby insulting its adherents, and imposes this new watered-down faith upon the body politic. *See id.*

²¹⁰ See Warren, *supra* note 60, at 1711–12.

²¹¹ See *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

²¹² See Karst, *supra* note 32, at 511 ("When government displays the symbols of the dominant religion . . . the pain is not distributed evenly. In the zero-sum game of status-

IV. THE PLEDGE TIPS THE SCALE

To analyze the Pledge of Allegiance under this new standard, the Court would begin with Justice O'Connor's four factors.²¹³ In 2004, Justice O'Connor subjected the Pledge of Allegiance to these factors in *Elk Grove Unified School District v. Newdow*, after which she determined that it was sufficiently secularized such that it does not send a message of endorsement to nonadherents who are fully cognizant of its historical context.²¹⁴ She determined the weight of these four factors indicated that the words "under God" in the Pledge are an acceptable instance of ceremonial deism that do not implicate the Establishment Clause.²¹⁵

This conclusion based on her four factors alone is arguable, and Justice O'Connor admits as much.²¹⁶ For instance, Justice O'Connor's argument that the subsequent social and cultural history of the Pledge alteration has diluted its religious meaning has flaws.²¹⁷ First, why has only the religious part lost meaning?²¹⁸ And if it has lost its meaning, why leave it in?²¹⁹ Justice O'Connor admits that its inclusion in the Pledge is unnecessary.²²⁰ Furthermore, if the reasonable observer should be apprised of the historical context surrounding the words "under God," this would only enhance the message of endorsement: not only would atheists, agnostics, Hindus and other polytheists be excluded by the reference to a divine being, but all monotheists not of the Christian faith would learn that the inclusion of the words was in-

dominance, it is only the losers in the politics of religious division who suffer the pain of status subordination.").

²¹³ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37-44 (2004) (O'Connor, J., concurring in the judgment).

²¹⁴ *Id.* at 43.

²¹⁵ *Id.*

²¹⁶ See *id.* at 37 ("This case requires us to determine whether the appearance of the phrase 'under God' in the Pledge of Allegiance constitutes an instance of such ceremonial deism. Although it is a close question, I conclude that it does, based on my evaluation of the following four factors.").

²¹⁷ See *id.* at 41.

²¹⁸ See *Sherman v. Cmty. Consol. Sch. Dist.*, 980 F.2d 437, 448 (7th Cir. 1992) (Manion, J., concurring) ("[Ceremonial deism] selects only religious phrases as losing their significance through rote repetition.").

²¹⁹ See McKenzie, *supra* note 2, at 411 ("Proponents of leaving 'Under God' in the Pledge would be offended to learn that these words are constitutional only because they have lost the very meaning they were intended to convey.").

²²⁰ See *Elk Grove*, 542 U.S. at 43 (O'Connor, J., concurring in the judgment) ("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.").

tended by many to refer to a Christian God only.²²¹ Finally, Justice O'Connor's statement that it would be impossible to craft a solemnizing reference to religion that would encompass all the diverse beliefs in our great nation is unarguably correct.²²² As she finds this to be an excuse to keep the reference to God in the Pledge, however, it may instead be a perfectly articulated explanation for why it should be removed.²²³

Assuming, *arguendo*, that the four "secularizing" factors weigh in favor of the Pledge of Allegiance constituting an instance of ceremonial deism, this would not end the revised analysis.²²⁴ The secularized context of the Pledge must now be weighed against the "endorsement" factors to determine whether the Pledge of Allegiance as presently amended is a violation of the endorsement test.²²⁵

First, what is the forum through which the religious message is typically conveyed?²²⁶ The Pledge is most commonly recited in our public schools, as was the intent of the framers of the 1954 amendment.²²⁷ The Supreme Court has repeatedly discussed the particular sensitivity of public schools when it comes to matters of the Establishment Clause.²²⁸ It is quite reasonable for parents to desire that their children be sent to secular schools at which they will not be influenced on matters of religion.²²⁹ Religion—particularly a belief in a supreme deity—is a very individual and sacred affair that implicates fundamental notions of the autonomous conscience and, therefore, should be dealt with on an individual level within the family.²³⁰ Furthermore, the Establishment Clause forbids a governmentally sponsored message that evinces an

²²¹ See *supra* note 116.

²²² *Elk Grove*, 542 U.S. at 42 (O'Connor, J., concurring in the judgment).

²²³ See *id.*

²²⁴ See *id.* at 37–44.

²²⁵ See Laycock, *supra* note 106, at 228.

²²⁶ See *id.* at 227.

²²⁷ See *supra* note 5 and accompanying text.

²²⁸ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987). In striking down a law that required any school that teaches evolution to also teach creationism, Justice Brennan, writing for the majority, emphasized the impressionability of students—and their compulsory attendance—which make it all the more important to exercise vigilance in the classroom with matters of the First Amendment. *Id.* Furthermore, he noted that parents place trust in the schools not to proselytize views with which they do not agree. *Id.*; see also Laycock, *supra* note 106, at 227.

²²⁹ See Laycock, *supra* note 106, at 227 (asserting that nowhere has the Court been more sensitive with matters of the Establishment Clause than on the battlegrounds of the public schools).

²³⁰ See *id.*

endorsement of a religious belief.²³¹ Our public schools are an especially problematic forum in Establishment Clause cases because they are state-run facilities that educate our youth on basics such as math, science, and history.²³² When religion finds its way into this dynamic, it gains the same credence as these other subjects and carries with it the force of the state.²³³

Second, who is the typical audience of the religious message?²³⁴ The Pledge of Allegiance's primary audience, by far, includes schoolchildren between the ages of five and eighteen.²³⁵ Not only are children of this age unlikely to understand the "secularized" context that the reasonable observer is assumed to comprehend under Justice O'Connor's analysis, but they also are far more impressionable.²³⁶ They will take the Pledge of Allegiance at face value to mean precisely what the 1954 legislature intended it to mean: that a God exists, and our nation is guided by the forces of that deity.²³⁷ Furthermore, children are unlikely to "opt out"—as Justice O'Connor suggests—if they do not want to participate, because at a young age standing out is akin to alienation, and there is a tacit pressure to conform and participate.²³⁸ Contemporary examples of intolerance over this "opting out" illustrate the schism that our revised Pledge has created in certain areas: in Washington state a teacher forced a thirteen-year-old Jehovah's Witness to stand in the rain for refusing to recite the Pledge at school,²³⁹ and in California a teacher placed a sixteen-year-old student in detention for refusing to recite the Pledge because she was an atheist.²⁴⁰ Although the marginalization of atheists was

²³¹ See, e.g., *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 595 (1989).

²³² See Laycock, *supra* note 106, at 227.

²³³ See *Newdow v. U.S. Cong. (Newdow II)*, 328 F.3d 466, 487 ("[The Pledge] inculcate[s] in students a respect for the ideals set forth in the Pledge, including the religious values it incorporates.").

²³⁴ See Laycock, *supra* note 106, at 227.

²³⁵ See *id.*

²³⁶ See *id.* ("[P]ublic schools, with a captive audience of children subject to compulsory education laws are the most sensitive place to recognize an exception for government-sponsored religious observances.").

²³⁷ See H.R. REP. NO. 83-1693, at 2340 (1954) ("The inclusion of God in our Pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator.").

²³⁸ See *Lee v. Weisman*, 505 U.S. 577, 592-93 (1992).

²³⁹ Dionne Searcey, *Student May Sue District over Pledge*, SEATTLE TIMES, Mar. 10, 1998, at B1.

²⁴⁰ Brad K. Brown, *The Pledge Not Taken*, S.F. CHRON., June 29, 1998, at A3.

explicitly a goal of the revised Pledge,²⁴¹ we must ask ourselves whether the perpetuation of this unfortunate trend is consistent with constitutional ideals.²⁴²

Finally, how politically and culturally pervasive is the religious message?²⁴³ This particular religious endorsement occurs in the middle of our Pledge of Allegiance, and a more culturally and politically pervasive ceremony is difficult to imagine.²⁴⁴ The Pledge of Allegiance is first and foremost a pledge: it requires its speaker to swear devotion to the values it espouses.²⁴⁵ By asking for a personal statement of belief in God and linking that statement to a profession of loyalty to our nation, the religious endorsement in the Pledge of Allegiance is far more culturally and politically pervasive than religious endorsements that the Court has struck down in the past.²⁴⁶ The solemnity and formality of the ceremony under which the Pledge is recited enhances its pervasiveness: children are asked to stand, remain silent, place their hands over their hearts, and follow the instructor in reciting the Pledge while facing our national flag.²⁴⁷ This so closely adheres patriotism to a belief in God that it seems the embodiment of what the endorsement test expressly forbids: making religion in any way relevant to a citizen's standing in the political community.²⁴⁸ Nonadherents are asked to choose from two options: either not recite the Pledge at all or to drop the two words that are anathema to their individual beliefs.²⁴⁹ This begs the question: what type of citizen cannot in good faith recite in full his or her own Pledge of Allegiance?²⁵⁰

In sum, the endorsement factors weigh strongly against the Pledge of Allegiance constituting an instance of ceremonial deism.²⁵¹ Justice

²⁴¹ See H.R. REP. NO. 83-1693, at 1-2 ("[In addition to the revised Pledge recognizing the existence of a God] at the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.").

²⁴² See Catalano, *supra* note 68, at 637-39.

²⁴³ See Laycock, *supra* note 106, at 227-29.

²⁴⁴ See *id.*

²⁴⁵ *Newdow v. U.S. Cong. (Newdow I)*, 292 F.3d 597, 607 (9th Cir. 2002) ("[T]o recite the Pledge is . . . to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism.").

²⁴⁶ See, e.g., *Lee*, 505 U.S. at 599 (striking down nondenominational graduation prayer); *Wallace v. Jaffree*, 472 U.S. 38, 40 (1985) (prohibiting a period of silence for meditation or voluntary prayer at the beginning of class each day); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (invalidating the portrayal of the Ten Commandments in Kentucky public schools).

²⁴⁷ See Laycock, *supra* note 106, at 228.

²⁴⁸ See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

²⁴⁹ See Laycock, *supra* note 106, at 229.

²⁵⁰ *Id.*

²⁵¹ See *id.* at 227-29.

O'Connor concedes that the Pledge of Allegiance is a close question under the four secularization factors; and, once the real-life circumstances of its religious message are considered, it becomes clear that any secularization it has suffered does not overcome the message of endorsement it conveys each morning to countless schoolchildren.²⁵² The Supreme Court should abandon its reliance on contextualism and adopt an analysis that considers the realities for the nonadherent.²⁵³ Only then will the Pledge of Allegiance recover the principles for which it stood prior to 1954: unity, indivisibility, and justice for all.²⁵⁴

CONCLUSION

The Supreme Court's Establishment Clause jurisprudence is inconsistent and confusing, and it often reflects what seem to be result-oriented rationalizations more than objective analyses. The Court has relied on contextualism to justify many of its seemingly unprincipled results and has refused to rigorously scrutinize religious practices to which we have all become accustomed. In attempting to strike an appropriate balance between separation and accommodation, however, the Court should have an objective standard it can rely upon without turning to ad hoc exceptions to uphold practices that majority religions likely find inoffensive. The Establishment Clause, after all, intends to protect the sanctity of religion and the individual consciences of citizens—it should do so by insulating religion from the disparaging effects of politics and protecting the polity from the divisive effects of religion. The Court should clarify its jurisprudence and rely solely on the endorsement test to best preserve these important principles underlying the Establishment Clause. Further, balancing Justice O'Connor's four secularizing factors against endorsement factors will offer cohesion to the endorsement test and more effectively acknowledge the marginalization of minority beliefs. This would restore the Establishment Clause to its proper place within our constitutional constellation, and we as a nation can then place our hands respectfully over our hearts and pledge allegiance to the great nation that chose inclusion over exclusion.

WILLIAM TRUNK

²⁵² See *Catalano*, *supra* note 68, at 633–34.

²⁵³ See *Furth*, *supra* note 139, at 608–12.

²⁵⁴ See *Newdow I*, 328 F.3d at 607.