



# Controversy over the Pledge of Allegiance Continues

By Charles J. Russo, J.D., Ed.D.

The constitutionality of requiring students to recite the Pledge of Allegiance continues to be challenged.

Shortly after the Pledge of Allegiance was introduced in 1892, a steady stream of litigation emerged over whether students could be required to take part in its daily recitation in schools.

For example, the Supreme Court held in *Minersville School District v. Gobitis* (1940) that children in Pennsylvania who were Jehovah's Witnesses could not be excused from reciting the pledge. The Court rejected the parents' argument that requiring their children to recite the pledge was equivalent to forcing them to worship an image that was contrary to their religious beliefs.

Based on significant criticism of *Gobitis*, three years later the Supreme Court revisited the status of the pledge when Jehovah's Witnesses and others questioned the constitutionality of a state regulation requiring students to participate in its recitation or risk being expelled. In *West Virginia State Board of Education v. Barnette* (1943), the Court ruled that students could not be compelled to recite the pledge while saluting the flag since this would violate their First Amendment rights.

In the almost 60 years following *Barnette*, courts have agreed that students cannot be forced to recite the pledge. Even so, courts concur that students can be expected to maintain respectful silence while the pledge is recited (*Holden v. Board of Education, Elizabeth* 1966; *Goetz v. Ansell* 1973; *Holloman ex rel. Holloman v. Harland* 2004).

On another issue involving the pledge, courts have disagreed about the constitutionality of the 1954 inclusion of the words "under God" in the pledge. On the one hand, the Seventh Circuit affirmed that school officials in Illinois could lead the pledge, including the contested words, as long as stu-

dents were free not to participate (*Sherman v. Community Consolidated School District 21 of Wheeling Township* (1992, 1993). The court reasoned that the words "under God" constituted a secular vow of allegiance that was a patriotic or ceremonial expression rather than religious speech.

On the other hand, the Ninth Circuit affirmed that a school board in California violated the establishment clause by having students recite the words "under God" (*Newdow v. United States Congress* 2003). On appeal, in *Elk Grove School District v. Newdow* (2004), the Supreme Court avoided the merits of the whether the inclusion of the words "under God" was constitutional. The Court concluded that the noncustodial father who objected to his daughter's recitation of the disputed words lacked standing to question the policy. The Court's action, or more properly, lack thereof, left the door open to future litigation.

In the first post-*Newdow* case, the Third Circuit affirmed that a statute from Pennsylvania that required school officials to provide for the daily recitation of the pledge and to notify the parents of students who declined or refrained from participating was unconstitutional viewpoint discrimination in violation of the First Amendment (*Circle Schools v. Pappert* 2004). However, the Fourth Circuit rejected the claim of a father who alleged that the daily recital of the pledge in school forced his children to worship a secular state (*Myers v. Loudoun County Public Schools* 2005).

Conversely, a federal trial court in California, relying on the Ninth Circuit case that the Supreme Court invalidated in *Newdow*, granted the plaintiffs' request to prevent students from reciting the words "under God" as a violation of the establish-

ment clause (*Newdow v. Congress of the United States* 2005).

Later, the Eleventh Circuit rejected a challenge to a local board policy in Florida, enacted pursuant to a state law, ordering students to recite the pledge unless they were excused from doing so by the written consent of their parents (*Frazier v. Winn* 2008). The court viewed the local policy as one addressing parental rights, which required that parents be notified if their children did not participate in the pledge, thereby effectuating the constitutional right to control the education of their children. The court did invalidate the part of the law that required students to stand during the pledge.

### **Freedom from Religion Foundation v. Hanover School District**

In the most recent case involving the pledge, *Freedom from Religion Foundation v. Hanover School District* (Hanover 2009), the federal trial court in New Hampshire rejected a challenge to the words “under God” contained in the pledge. At issue in this case was a state statute in New Hampshire allowing for the voluntary recitation of the pledge in schools. The law stipulated that nonparticipating students had to maintain respectful silence while the pledge was recited.

Parents who objected to the statute and the words “under God” in the pledge filed suit, alleging that the phrase violated the rights of their children under the establishment and free exercise clauses of the First Amendment, as well as their due process and equal protection rights under the Fourteenth Amendment. The plaintiffs also claimed that the recitation of the pledge violated their parental rights to raise their children in accord with their own beliefs. The parents, who identified themselves as atheists or agnostics, sought an order preventing school officials from complying with a state statute.

As with seemingly countless cases involving religion in the schools, the court applied the tripartite test from *Lemon v. Kurtzman* (1971) in dismissing the parents’ claims. According to this test,

[e]very analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster “an excessive government entanglement with religion. (pp. 612–13)

In applying the tripartite test, the court was first satisfied that the law passed constitutional muster because it had a secular purpose insofar as its legislative history revealed that it was enacted to teach students American history and patriotism. The court declared that the inclusion of the words “under God” was motivated by patriotism rather than a support of religion over atheism or agnosticism.

As to the statute’s effect, the court determined that since participation in the pledge is voluntary, the law was constitutional because, consistent with *Barnette*, it did not coerce students to support or participate in religion. The court summarily noted that the statute did not create excessive entanglement because the plaintiffs did not raise this argument.

### **Judges must examine the effect that striking down the pledge might have.**

Turning to the parents’ claims over the words “under God,” the court compared the approaches taken by the Seventh Circuit in *Sherman* and Fourth Circuit in *Loudoun* with that of the Ninth Circuit in *Newdow*. Consequently, the court decided that when Congress added the words

“under God” to the pledge in 1954, “its actual intent probably had more to do with politics than religion—more to do with currying favor with the electorate than with an Almighty” (*Hanover* 2009, p. 9).

The court also acknowledged the sentiment of former justice William J. Brennan Jr., a jurist who typically supported separation of church and state, that the rote repetition of the words “under God” has so robbed them of any religious value that they are more a form of ceremonial deism than a threat to the establishment clause.

In rejecting the free exercise claim, then, the court observed that simply exposing children to the recitation of the words “under God” without more did not infringe on their rights to freedom of religion.

The court next rejected the parents’ due process and equal protection charge in pointing out that the board simply did not treat their children differently from other students. Finally, the court rebuffed the parental rights claim on the basis that since the earlier allegations failed, this one too had to be dismissed.

### **Discussion**

Perhaps the most interesting aspect of the court’s analysis in upholding the pledge in *Hanover* was its agreement with the perspective that Justice Kennedy, often the swing vote in close Supreme Court cases, enunciated in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter* (Allegheny 1989).

In a concurring opinion in *Allegheny*, wherein the Court upheld a display of religious symbols on public property at Christmas time, Justice Kennedy discussed the pledge’s use of the words “under God,” recognizing that it was a form of secular deism that did not encourage an establishment of religion. Justice Kennedy explained that although “no one is obligated to recite the phrase . . . it borders on sophistry to suggest that the ‘reasonable’ atheist would not feel

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” (p. 673).

Justice Kennedy’s treatment of the words “under God” in the pledge as a form of civic deism notwithstanding, controversy is likely to continue. When additional litigation occurs, it is incumbent on the courts to consider whether the words “under God” are, in fact, civic deism, the recognition of the place that religion has occupied in American life and history, or whether the phrase is a step toward establishment of a state religion.

As courts discuss “under God” in the pledge, judges must examine the effect that striking down the pledge might have on American schools and society as a whole in terms of what it means for national unity. Put another way, might the public lose respect for the judiciary as an institution if it were to strike down the pledge? If judges find governmental establishment of religion in such matters as the words “under God” in the Pledge of Allegiance, then perhaps congressional leaders will make good on the earlier promise that they made when *Newdow* was being litigated to

restrict the jurisdiction of the federal courts in matters of religion.

In the event that such a situation occurs, it might set off a potentially divisive constitutional crisis over the words “under God” and congressional authority to exercise its power to limit the jurisdiction of the federal courts that is rooted in Article III of the Constitution.

In another interesting aspect of *Hanover*, in opposition to the Ninth Circuit’s position in *Newdow*, the trial court rejected the parents’ allegation that their children should not have been exposed to ideas with which they disagreed. Had the court entered a judgment in favor of the parents in *Hanover*, there is no telling how far such actions might lead.

Courts are generally unreceptive to similar arguments on such matters when parents challenge curricular content with which they disagree, such as dealing with the origins of humankind and sexuality education, thereby deferring to the discretion of educational decision makers in setting curricula. To this end, it is not surprising that the court in *Hanover* rejected the parental claims about exposing their children to ideas with which they take exception since their children were free not to participate in the recitation of the pledge.

## Conclusion

As disputes over the words “under God” play themselves out, the courts will be on the front line of sustaining long-held traditions, such as recitation of the Pledge of Allegiance or setting in motion further conflict that will affect the day-to-day activities of school business officials and other education leaders who are charged with educating the nation’s students.

## References

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*Lemon v. Kurtzman*, 403 U.S. 602 (1971).

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