SUPREME COURT OF THE UNITED STATES

No. 02–1624

ELK GROVE UNIFIED SCHOOL DISTRICT AND DAVID W. GORDON, SUPERINTENDENT, PETITIONERS *v.* MICHAEL A. NEWDOW ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 14, 2004]

JUSTICE O'CONNOR, concurring in the judgment.

I join the concurrence of THE CHIEF JUSTICE in full. Like him, I would follow our policy of deferring to the Federal Courts of Appeals in matters that involve the interpretation of state law, see *Bowen* v. *Massachusetts,* 487 U. S. 879 (1988), and thereby conclude that the respondent does have standing to bring his constitutional claim before a federal court. Like THE CHIEF JUSTICE, I believe that we must examine those questions, and, like him, I believe that petitioner school district's policy of having its teachers lead students in voluntary recitations of the Pledge of Allegiance does not offend the Establishment Clause. But while the history presented by THE CHIEF JUSTICE illuminates the constitutional problems this case presents, I write separately to explain the principles that guide my own analysis of the constitutionality of that policy.

As I have said before, the Establishment Clause "cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet,* 512 U. S. 687, 720 (1994) (O'CONNOR, J., concurring). When a court confronts a challenge to government-sponsored speech or displays, I continue to believe that the endorsement test "captures

the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'" *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U. S. 573, 627 (1989) (opinion of O'CONNOR, J.) (quoting *Wallace* v. *Jaffree,* 472 U. S. 38, 70 (1985) (O'CONNOR, J., concurring in judgment)). In that context, I repeatedly have applied the endorsement test, *Capitol Square Review and Advisory Bd.* v. *Pinette,* 515 U. S. 753, 772–773 (1995) (opinion of O'CONNOR, J.) (display of a cross in a plaza next to state capitol); *Allegheny*, *supra*, at 625 (display of crèche in county courthouse and menorah outside city and county buildings); *Wallace*, *supra*, at 69 (statute authorizing a meditative moment of silence in classrooms); *Lynch* v. *Donnelly,* 465 U. S. 668, 688 (1984) (O'CONNOR, J., concurring) (inclusion of Nativity scene in city government's Christmas display), and I would do so again here.

Endorsement, I have explained, "sends a message to nonadherents 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." *Ibid.* In order to decide whether endorsement has occurred, a reviewing court must keep in mind two crucial and related principles.

First, because the endorsement test seeks "to identify those situations in which government makes adherence to a religion relevant . . . to a person's standing in the political community," it assumes the viewpoint of a reasonable observer. *Pinette*, *supra*, at 772 (internal quotation marks omitted). Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if

a "heckler's veto" sufficed to show that its message was one of endorsement. See *Pinette*, 515 U. S. at 780 ("There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion"). Second, because the "reasonable observer" must embody a community ideal of social judgment, as well as rational judgment, the test does not evaluate a practice in isolation from its origins and context. Instead, the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape. See *id.,* at 781.

The Court has permitted government, in some instances, to refer to or commemorate religion in public life. See*, e.g.*, *Pinette*, *supra*; *Allegheny*, *supra*; *Lynch*, *supra*; *Marsh* v. *Chambers,* 463 U. S. 783 (1983). While the Court's explicit rationales have varied, my own has been consistent; 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. One such purpose is to commemorate the role of religion in our history. In my view, some references to religion in public life and government are the inevitable consequence of our Nation's origins. Just as the Court has refused to ignore changes in the religious composition of our Nation in explaining the modern scope of the Religion Clauses, see*, e.g.*, *Wallace*, *supra*, at 52–54 (even if the Religion Clauses were originally meant only to forestall intolerance between Christian sects, they now encompass all forms of religious conscience), it should not deny that our history has left its mark on our national traditions. It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find refer-

ences to divinity in its symbols, songs, mottoes, and oaths.* Eradicating such references would sever ties to a history that sustains this Nation even today. See *Allegheny*, *supra*, at 623 (declining to draw lines that would "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens").

Facially religious references can serve other valuable purposes in public life as well. Twenty years ago, I wrote that such references "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." *Lynch*, *supra*, at 692–693 (O'CONNOR, J., concurring). For centuries, we have marked important occasions or pronouncements with references to God and invocations of divine assistance. Such references can serve to solemnize an occasion instead of to invoke divine provenance. The reasonable observer discussed above, fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over non-

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* Note, for example, the following state mottoes: Arizona ("God Enriches"); Colorado ("Nothing without Providence"); Connecticut ("He Who Transplanted Still Sustains"); Florida ("In God We Trust"); Ohio ("With God, All Things Are Possible"); and South Dakota ("Under God the People Rule"). Arizona, Colorado, and Florida have placed their mottoes on their state seals, and the mottoes of Connecticut and South Dakota appear on the flags of those States as well. Georgia's newly-redesigned flag includes the motto "In God We Trust." The oaths of judicial office, citizenship, and military and civil service all end with the (optional) phrase "[S]o help me God." See 28 U. S. C. §453; 5 U. S. C. §3331; 10 U. S. C. §502; 8 CF R §337.1. Many of our patriotic songs contain overt or implicit references to the divine, among them: "America" ("Protect us by thy might, great God our King"); "America the Beautiful" ("God shed his grace on thee"); and "God bless America."

religion.

There are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them. Given the values that the Establishment Clause was meant to serve, however, I believe that government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of "ceremonial deism" most clearly encompasses such things as the national motto ("In God We Trust"), religious references in traditional patriotic songs such as the Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions ("God save the United States and this honorable Court"). See *Allegheny,* 492 U. S., at 630 (opinion of O'CONNOR, J.). These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.

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.

History and Ubiquity

The constitutional value of ceremonial deism turns on a shared understanding of its legitimate nonreligious purposes. That sort of understanding can exist only when a given practice has been in place for a significant portion of the Nation's history, and when it is observed by enough persons that it can fairly be called ubiquitous. See *Lynch*, 465 U. S., at 693. By contrast, novel or uncommon references to religion can more easily be perceived as government endorsements because the reasonable observer cannot be presumed to be fully familiar with their origins. As a result, in examining whether a given practice constitutes an instance of ceremonial deism, its "history and

ubiquity" will be of great importance. As I explained in *Allegheny, supra*, at 630–631:

> "Under the endorsement test, the 'history and ubiquity' of a practice is relevant not because it creates an 'artificial exception' from that test. On the contrary, the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion."

Fifty years have passed since the words "under God" were added, a span of time that is not inconsiderable given the relative youth of our Nation. In that time, the Pledge has become, alongside the singing of the Star-Spangled Banner, our most routine ceremonial act of patriotism; countless schoolchildren recite it daily, and their religious heterogeneity reflects that of the Nation as a whole. As a result, the Pledge and the context in which it is employed are familiar and nearly inseparable in the public mind. No reasonable observer could have been surprised to learn the words of the Pledge, or that petitioner school district has a policy of leading its students in daily recitation of the Pledge.

It cannot be doubted that "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside." *Walz* v. *Tax Comm'n of City of New York,* 397 U. S. 664, 678 (1970). And the history of a given practice is all the more relevant when the practice has been employed pervasively without engendering significant controversy. In *Lynch*, where we evaluated the constitutionality of a town Christmas display that included a crèche, we found relevant to the endorsement question the fact that the display had "appar-

ently caused no political divisiveness prior to the filing of this lawsuit" despite its use for over 40 years. See 465 U. S., at 692–693. Similarly, in the 50 years that the Pledge has been recited as it is now, by millions of children, this was, at the time of its filing, only the third reported case of which I am aware to challenge it as an impermissible establishment of religion. See *Sherman* v. *Community Consol. School Dist. 21*, 980 F. 2d 437 (CA7 1992); *Smith* v. *Denny*, 280 F. Supp. 651 (ED Cal. 1968). The citizens of this Nation have been neither timid nor unimaginative in challenging government practices as forbidden "establishments" of religion. See, *e.g.*, *Altman* v. *Bedford Central School Dist.*, 245 F. 3d 49 (CA2 2001) (challenging, among other things, reading of a story of the Hindu deity Ganesha in a fourth-grade classroom); *Alvarado* v. *San Jose*, 94 F. 3d 1223 (CA9 1996) (challenge to use of a sculpture of the Aztec deity Quetzalcoatl to commemorate Mexican contributions to city culture); *Peloza* v. *Capistrano Unified School Dist.*, 37 F. 3d 517 (CA9 1994) (high school biology teacher's challenge to requirement that he teach the concept of evolution); *Fleischfresser* v. *Directors of School Dist. 200*, 15 F. 3d 680 (CA7 1994) (challenge to school supplemental reading program that included works of fantasy involving witches, goblins, and Halloween); *United States* v. *Allen*, 760 F. 2d 447, 449 (CA2 1985) (challenge to conviction for vandalism of B–52 bomber, based on theory that property-protection statute established a "'national religion of nuclearism . . . in which the bomb is the new source of salvation'"); *Grove* v. *Mead School Dist. No. 354*, 753 F. 2d 1528 (CA9 1985) (challenge to use of The Learning Tree, by Gordon Parks, in high school English literature class); *Crowley* v. *Smithsonian Inst.*, 636 F. 2d 738 (CADC 1980) (challenge to museum display that explained the concept of evolution). Given the vigor and creativity of such challenges, I find it telling that so little ire has been directed at the Pledge.

Absence of worship or prayer

"[O]ne of the greatest dangers to the freedom of the individual to worship in his own way [lies] in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services." *Engel* v. *Vitale,* 370 U. S. 421, 429 (1962). Because of this principle, only in the most extraordinary circumstances could actual worship or prayer be defended as ceremonial deism. We have upheld only one such prayer against Establishment Clause challenge, and it was supported by an extremely long and unambiguous history. See *Marsh* v. *Chambers*, 463 U. S. 783 (1983) (upholding Nebraska Legislature's 200-year-old practice of opening its sessions with a prayer offered by a chaplain). Any statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate secular purposes of solemnizing an event and recognizing a shared religious history. *Santa Fe Independent School Dist.* v. *Doe,* 530 U. S. 290, 309 (2000) ("[T]he use of an invocation to foster . . . solemnity is impermissible when, in actuality, it constitutes [state-sponsored] prayer").

Of course, any statement *can* be imbued by a speaker or listener with the qualities of prayer. But, as I have explained, the relevant viewpoint is that of a reasonable observer, fully cognizant of the history, ubiquity, and context of the practice in question. Such an observer could not conclude that reciting the Pledge, including the phrase "under God," constitutes an instance of worship. I know of no religion that incorporates the Pledge into its canon, nor one that would count the Pledge as a meaningful expression of religious faith. Even if taken literally, the phrase is merely descriptive; it purports only to identify the United States as a Nation subject to divine authority. That cannot be seen as a serious invocation of

God or as an expression of individual submission to divine authority. *Cf. Engel*, *supra*, at 424 (describing prayer as "a solemn avowal of faith and supplication for the blessing of the Almighty"). A reasonable observer would note that petitioner school district's policy of Pledge recitation appears under the heading of "Patriotic Observances," and the California law which it implements refers to "appropriate patriotic exercises." Cal. Educ. Code §52720. Petitioner school district also employs teachers, not chaplains or religious instructors, to lead its students' exercise; this serves as a further indication that it does not treat the Pledge as a prayer. *Cf. Lee* v. *Weisman*, 505 U. S. 577, 594 (1992) (reasoning that a graduation benediction could not be construed as a *de minimis* religious exercise without offending the rabbi who offered it).

It is true that some of the legislators who voted to add the phrase "under God" to the Pledge may have done so in an attempt to attach to it an overtly religious message. See H. R. Rep. No. 1693, 83d Cong., 2d Sess., pp. 2-3. But their intentions cannot, on their own, decide our inquiry. First of all, those legislators also had permissible secular objectives in mind—they meant, for example, to acknowledge the religious origins of our Nation's belief in the "individuality and the dignity of the human being." *Id.*, at 1. Second—and more critically—the *subsequent* social and cultural history of the Pledge shows that its original secular character was not transformed by its amendment. In *School Dist. of Abington Township* v. *Schempp,* 374 U. S. 203 (1963), we explained that a government may initiate a practice "for the impermissible purpose of supporting religion" but nevertheless "retai[n] the la[w] for the permissible purpose of furthering overwhelmingly secular ends." *Id.*, at 263–264 (citing *McGowan* v. *Maryland,* 366 U. S. 420 (1961)). Whatever the sectarian ends its authors may have had in mind, our continued repetition of the reference to "one Nation under God" in an exclusively

patriotic context has shaped the cultural significance of that phrase to conform to that context. Any religious freight the words may have been meant to carry originally has long since been lost. See *Lynch*, 465 U. S., at 716 (Brennan, J., dissenting) (suggesting that the reference to God in the Pledge might be permissible because it has "lost through rote repetition any significant religious content").

Absence of reference to particular religion

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente,* 456 U. S. 228, 244 (1982). While general acknowledgments of religion need not be viewed by reasonable observers as denigrating the nonreligious, the same cannot be said of instances "where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ." *Weisman*, *supra,* at 641 (SCALIA, J., dissenting). As a result, no religious acknowledgment could claim to be an instance of ceremonial deism if it explicitly favored one particular religious belief system over another.

The Pledge complies with this requirement. It does not refer to a nation "under Jesus" or "under Vishnu," but instead acknowledges religion in a general way: a simple reference to a generic "God." Of course, some religions—Buddhism, for instance—are not based upon a belief in a separate Supreme Being. See Brief for Buddhist Temples, Centers, and Organizations as *Amicus Curiae* at 15–16. But one would be hard pressed to imagine a brief solemnizing reference to religion that would adequately encompass every religious belief expressed by any citizen of this Nation. The phrase "under God," conceived and added at a time when our national religious diversity was neither as robust nor as well recognized as it is now, represents a

tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system.

Minimal religious content

A final factor that makes the Pledge an instance of ceremonial deism, in my view, is its highly circumscribed reference to God. In most of the cases in which we have struck down government speech or displays under the Establishment Clause, the offending religious content has been much more pervasive. See, *e.g.*, *Weisman*, *supra*, at 581–582 (prayers involving repeated thanks to God and requests for blessings). Of course, a ceremony cannot avoid Establishment Clause scrutiny simply by avoiding an explicit mention of God. See *Wallace* v. *Jaffree,* 472 U. S. 38 (1985) (invalidating Alabama statute providing moment of silence for meditation or voluntary prayer). But the brevity of a reference to religion or to God in a ceremonial exercise can be important for several reasons. First, it tends to confirm that the reference is being used to acknowledge religion or to solemnize an event rather than to endorse religion in any way. Second, it makes it easier for those participants who wish to "opt out" of language they find offensive to do so without having to reject the ceremony entirely. And third, it tends to limit the ability of government to express a preference for one religious sect over another.

The reference to "God" in the Pledge of Allegiance qualifies as a minimal reference to religion; respondent's challenge focuses on only two of the Pledge's 31 words. Moreover, 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. As a result, students who wish to avoid saying the words "under God" still can consider themselves meaningful participants in the exercise if they join in reciting the remainder of the Pledge.

I have framed my inquiry as a specific application of the endorsement test by examining whether the ceremony or representation would convey a message to a reasonable observer, familiar with its history, origins, and context, that those who do not adhere to its literal message are political outsiders. But consideration of these factors would lead me to the same result even if I were to apply the "coercion" test that has featured in several opinions of this Court. *Santa Fe Independent School Dist.* v. *Doe,* 530 U. S. 290 (2000); *Lee* v. *Weisman,* 505 U. S. 577 (1992).

The coercion test provides that, "at a minimum . . . government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' " *Id.*, at 586 (quoting *Lynch*, *supra*, at 678). Any coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character. As a result, symbolic references to religion that qualify as instances of ceremonial deism will pass the coercion test as well as the endorsement test. This is not to say, however, that government could *overtly* coerce a person to participate in an act of ceremonial deism. Our cardinal freedom is one of belief; leaders in this Nation cannot force us to proclaim our allegiance to *any* creed, whether it be religious, philosophic, or political. That principle found eloquent expression in a case involving the Pledge itself, even before it contained the words to which respondent now objects. See *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624, 642 (1943) (Jackson, J.). The compulsion of which Justice Jackson was concerned, however, was of the direct sort—the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory.

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Michael Newdow's challenge to petitioner school district's policy is a well-intentioned one, but his distaste for the reference to "one Nation under God," however sincere, cannot be the yardstick of our Establishment Clause inquiry. Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty. It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it.