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The Pledge of Allegiance and the Establishment Clause of the First Amendment:
Why Vishnu and Jesus Aren't In the Constitution

by Daniel McCullum

(Criminal Justice 151)

The Assignment: The student is to write a research paper on a Constitutional topic of their choice.

Few court cases cause as much public reaction, both positive and negative, as those that deal with the First Amendment. Cases that deal with the establishment clause in particular seem to strike a chord, or a nerve, with the American public. None more so than the June 2002 ruling of the 9th Circuit Court striking down the Pledge of Allegiance as unconstitutional, based on the phrase "under God", which the court found to be in violation of the establishment clause.¹ This paper will examine the Pledge and attempt to determine if it does, in fact, constitute an "establishment of religion."

In 1892, Francis Bellamy, a Baptist minister, published the Pledge of Allegiance in *Youths' Companion*, a family magazine.² In its original form the Pledge read: "I pledge allegiance to my flag and to the Republic for which it stands, one nation, indivisible, with liberty and justice for all."³ Bellamy had been asked to write the Pledge as part of a series of events designed to commemorate the 400th anniversary of Columbus' arrival in America.⁴ Bellamy also managed to convince President Harrison to declare Columbus Day a national holiday.⁵

Gradually the Pledge worked its way into schools across the country and became the traditional way to start off every school day. The Pledge underwent several modifications over the years, including the change from the words "my flag" to "the flag of the United States of America".⁶ In 1942, the Pledge's 50th anniversary, Congress made the Pledge an official part of the flag code.⁷ On Flag Day, June 14, 1954, in an attempt to differentiate the United States from communist nations, Congress and President Eisenhower added the words "under God" to the Pledge.⁸

Up until this point there had been relatively little controversy over the Pledge. The Supreme Court had only heard a handful of challenges, and those all dealt with whether or not children in public schools could be forced to recite the Pledge. In 1943, the Court ruled in *West Virginia State Board of Education v. Barnette*, overturning an earlier ruling, that reciting the Pledge must be voluntary.⁹ Then, in 2002, Dr. Michael J. Newdow brought suit against Congress and the Elk Grove School district, where his daughter attends school.

In his case, Newdow alleged that the phrase "under God" violated the establishment clause of the First Amendment. Newdow, an atheist, alleged that his daughter was being injured by being forced to watch her teachers lead the class in what he described as "a ritual proclaiming that there is a God."¹⁰ A three judge panel of the 9th Circuit Court agreed in a 2 to 1 ruling and declared that the words "under God" did constitute a violation of the first amendment.¹¹

How did the three judge panel determine that the Pledge violated the constitution? There are several "tests" that have been developed over the years by the court to determine if a law or statute violates the establishment clause of the First Amendment. Here we will look at all three tests, we will then apply them to the Pledge.

First and foremost among these is the Lemon test. This is a three-pronged test that is derived from the case *Lemon v. Kurtzman*. The three prongs are defined here as they were by Chief Justice Warren Burger in his opinion for the Court. The first prong states that "...the statute must have a secular legislative purpose...", the second that "...[the statute's] principal or primary effects must be one that neither advances nor inhibits religion...", and the third that "...the statute must not foster 'an excessive entanglement in religion.'"¹²

In the case *Lynch v. Donnelly*, Justice O'Connor wrote a concurrence further refining the first two prongs, the "purpose" and "effect" prongs, of the Lemon test. In her concurrence Justice O'Connor said that what is important to determine is not so much whether government is advancing or inhibiting religion but whether government is endorsing or disapproving of religion. Government endorsement of religion, O'Connor says, "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."¹³ The main idea presented in O'Connor's concurrence is known as the "endorsement" test.

The third test is known as the "coercion" test, as laid out in *Lee v. Weisman*.¹⁴ In *Lee*, the Supreme Court held that religious invocations at public school graduation ceremonies were unconstitutional. They believed that while the ceremony is not mandatory, it is unreasonable to assume that someone of primary or secondary school age will be immune to the subtle coercive pressures applied to them to attend and participate in the ceremony. In the opinion for the court, Justice Kennedy said that since the ceremony took place in a secondary school environment, there existed "subtle coercive pressures... [such that] the student had no real alternative which would have allowed her to avoid the fact or appearance of participation."¹⁵ In short, the Court ruled that school children could not be put into a situation where they are forced to choose between participating in or protesting a religious ceremony.

Violation of any one of these tests would be enough for a court to find the Pledge unconstitutional. Now that we understand them, we can apply the tests to the Pledge. However, for purposes of clarity later, we will first demonstrate that the Pledge is, in its current form, of a religious nature. There is ample evidence to show that it is and that it was intended to further religion, specifically Judeo-Christian monotheism, in America. Demonstrating this first will make it easier to apply the tests and see their results.

Congress and President Eisenhower did not decide to add the words "under God" themselves; rather, it was under pressure from the Catholic organization Knights of Columbus.¹⁶ Senator Homer Ferguson, who introduced the resolution to change the Pledge in the Senate, said at the time "I believe this modification of the pledge is important because it highlights one of the real fundamental differences between the free world and the Communist world, namely belief in God."¹⁷ Congress also stated at the time that "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*. At the same time it would serve to *deny the atheistic and materialistic concepts of communism*." (Emphasis added)¹⁸ President Eisenhower said at the bill signing ceremony that "From this day forward, the millions of our school children will daily proclaim...the dedication of our nation and our people to the Almighty."¹⁹ All this taken together is a clear indication of the religious nature and intent behind the addition to the Pledge. We can now apply the tests to the Pledge.

We will start with the Lemon test. It is clear from the statements made by Congress and President Eisenhower that they intended the Pledge to foster and encourage devotion to God and to act as a counter agent to atheism. The idea of the Pledge and its use is certainly a secular one, but the inclusion of the words "under God" had a specifically religious purpose. That is, the addition of the words served no purpose that could be achieved in some other secular manner, which means that the Pledge violates the first prong of the Lemon test.

The words were also intended to have a twofold effect, as stated above, of promoting belief in the Almighty and inhibiting the spread of atheism. This is an obvious violation of the second prong of the Lemon test, the effect prong. We can also see from this that the Pledge in its current form fails the endorsement test as well. In *Barnette* the Supreme Court ruled that the Pledge requires "affirmation of a belief and an attitude of mind."²⁰ This ruling came before the addition of the words "under God", however, given that ruling, it is impossible to view the phrase "under God" as anything other than an endorsement of monotheistic beliefs and values.

As Judge Goodwin eloquently stated in his opinion in the Newdow case "[a] profession that we are a nation 'under God' is identical, for Establishment Clause purposes, to a profession that we are a nation 'under Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no god,' because

none of these professions can be neutral with respect to religion."²¹ The Pledge as it is now is a clear example of what Justice O'Connor said would make non-adherents outsiders; thus the Pledge also fails the endorsement test.

The third and final test, the coercion test, presents yet another insurmountable barrier to the Pledge. The religious nature of the current Pledge cannot be denied, and it thus puts students in the untenable situation of being forced to actively participate in or protest a religious ceremony, as laid down in *Lee*. This effect is exacerbated the younger the child is; the younger they are, the more impressionable and more apt they are to succumb to such coercive pressures.

It is clear that the Pledge stands in violation of the Constitution, and the 9th Circuit Court was right to rule the way they did. However, judging by the backlash against the ruling in 2002, there are many people who would disagree. Many say that the Pledge cannot have such a profound impact on students as to make a violation of the establishment clause. One wonders, however, how these same people would react if, as Judge Goodwin said, the Pledge contained the phrase "under no god." Indeed, it is hard to imagine those who believe in God not feeling excluded by their own government if the Pledge did have the phrase "under no god," so how can it be different to replace that with a phrase acknowledging a single, all-powerful God?

The debate in this country over the role religion plays in daily life, both public and private, will not be resolved anytime soon. The courts will play a large role in many of these issues, but most of these decisions are ones that will ultimately have to be resolved by the citizens of this country, not the government. This much at least is clear: if the wall of separation that Thomas Jefferson spoke of is to be preserved, then the government must be neutral towards religion, neither favoring it nor discouraging it. Anything less and the wall will crumble.

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