Volume 2, Chapter 11: Freedom Religion
Section III. B. 1. Government Sponsorship of Religious Speech
Page 1520. Add before "2. Government Financial Aid to Religious Institutions"

Elk Grove Unified School District v. Newdow (2004)
542 U.S. ___ (2004)

In June 2004, the United States Supreme Court considered a case involving the constitutionality of a public school policy requiring teacher-led recitation of students in the Pledge of Allegiance. The father of a school child objected, claiming that the inclusion of the words "Under God" in the Pledge constituted religious indoctrination in violation of the religion clauses of the First Amendment (even though his daughter was not compelled to participate in the recitation). The United States Court of Appeals for the Ninth Circuit found that the recitation violated the Establishment Clause.

The Supreme Court held that the father, who was a non-custodial parent, lacked prudential standing to bring the action. The Court emphasized that the father's standing derived entirely from his relationship with his daughter, but that their interests were not parallel and were potentially in conflict. Hence, the Court dismissed the appeal.

Three justices would have reached the merits of the claim and found that the recitation of the Pledge with the "under God" language *did not* offend the Establishment Clause. (A fourth justice, Antonin Scalia, recused himself in the case because of prior public comments critical of the Ninth Circuit's ruling.)

Chief Justice William Rehnquist, in a concurring opinion, noted that the Ninth Circuit had relied on the Supreme Court's decision in *Lee v. Weisman* (1992) in finding the recitation unconstitutional. Rehnquist rejected the notion that the Pledge recitation was a "religious exercise," and hence concluded that *Lee v. Weisman* was inapplicable:

> I do not believe that the phrase "under God" in the Pledge converts its recital into a "religious exercise" of the sort described in *Lee*. Instead, it is a belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase "under God" is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted [in the Congressional report accompanying the 1954 legislation that amended the Pledge to add the "under God" language]: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.

Justice Sandra Day O'Connor also filed a concurring opinion, arguing that the recitation of the Pledge did not violate the "endorsement test." For O'Connor, quoting her earlier concurring opinion in *Lynch v. Donnelly* (1984), endorsement "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message that they are insiders, favored members of the political community." O'Connor concluded that recitation of the Pledge sent no such message. O'Connor concluded that the "under God" language in the Pledge constituted an expression of "ceremonial deism" which did not offend the Establishment Clause:

> I believe that the 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").

Finally, Justice Clarence Thomas filed a concurring opinion in which he argued that under *Lee v. Weisman* the recitation of the Pledge *did* violate the Establishment Clause because it "coerced" young children "to declare a belief" that this is "one Nation under God." Hence, for Thomas, "as a matter of our precedent, the Pledge policy is unconstitutional." But, Thomas went further, arguing that *Lee v. Weisman* was wrongly decided because the Establishment Clause does not apply to the states. Thomas recognized that the Court in prior cases had "incorporated" the Establishment Clause through the Fourteenth Amendment to apply to the states, but he concluded that that incorporation was inappropriate as a matter of history. Because, in Thomas's view, the Establishment Clause does not apply to the states, the recitation of the Pledge by a local California school district was not

unconstitutional.

In light of the resolution of the case on standing grounds, the constitutionality of recitations of the Pledge in public schools remains uncertain.