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Preventing Divisiveness: The Ninth Circuit Upholds the 1954 Pledge Amendment in *Newdow v. Rio Linda Union School District*

I. INTRODUCTION

In October of 2010, a Mississippi state court judge requested that all in his courtroom recite the Pledge of Allegiance. Each person did so—except an attorney who stood but refused to recite it.¹ In response, the judge held the attorney in contempt of the court and jailed him for five hours.² The judge’s order was uncompromising: “[the attorney] shall purge himself of said criminal contempt by complying with the order of this Court by standing and reciting the Pledge of Allegiance in open court.”³ Though this is clearly a case of judicial misconduct, this story also demonstrates, more importantly, the magnitude of disagreement that arises from the recitation of the Pledge. The patriotic, religious, and political dimensions heighten its controversy, especially when government actors lead its recitation—whether they be judges, public school employees, or other officials.

Such was the case in *Newdow v. Rio Linda Union School District*.⁴ The plaintiff, Michael Newdow, challenged the recitation of the Pledge in his daughter’s public school classroom because of the words “under God.”⁵ Newdow’s Pledge challenge was just one of his several constitutional challenges to the government’s use of the word “God” in the public sphere.⁶ These challenges have included requests for injunctive relief enjoining Chief Justice John Roberts’s use of the words “So help me God” after administering the presidential oath during inaugurations,⁷ the use of opening prayers in legislative sessions,⁸ the

1. Holbrook Mohr, *Mississippi Judge Jails Attorney for Not Reciting Pledge*, SAN ANGELO STANDARD-TIMES, Oct. 7, 2010, <http://www.gosanangelo.com/news/2010/oct/07/bc-us--jailed-over-pledge1st-ld-writethru0317>.

2. *Id.*

3. *Id.*

4. 597 F.3d 1007 (9th Cir. 2010).

5. *Id.* at 1012.

6. See *Current Litigation Page*, RESTORE OUR PLEDGE OF ALLEGIANCE, <http://www.restorethepledge.com/> (last updated June 23, 2011), for the status of Dr. Newdow’s ongoing litigation.

7. *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010).

use of the phrase “In God We Trust” on currency,⁹ and President Bush’s invitation to a clergyman to give a prayer at his presidential inauguration.¹⁰ Though the subject matter of these challenges has been varied, Newdow’s claim was the same in each case: the challenged government action violates the Establishment Clause of the First Amendment. In *Rio Linda*, the Ninth Circuit ruled against Newdow, upholding the constitutionality of the “under God” language in the Pledge.¹¹ It also upheld the constitutionality of a California statute that requires school teachers to lead students in a daily patriotic exercise—a requirement that the statute suggests is fulfilled by the recitation of the Pledge of Allegiance.¹²

Although the Ninth Circuit correctly upheld the constitutionality of the state Pledge statute, it overreached by ruling on the constitutionality of the 1954 Pledge amendment, which added the words “under God.” To justify its holding under the Supreme Court’s current tests, the Ninth Circuit improperly relied upon the doctrine of ceremonial deism, which is an unsuitable rationale for arguing the constitutionality of governmental references to deity. As an alternative to the Supreme Court’s current tests in this area, this Note will argue that judicial review of longstanding government references to deity should be analyzed with a legal standard advocated by Justice Breyer, which takes into account the *divisiveness* along religious lines caused by the government’s “purg[ing] from the public sphere all that in any way partakes of the religious.”¹³ Although Justice Breyer advanced this rationale in the context of government monuments that contain references to deity, this Note will argue for its application to all longstanding government references to deity. This standard would help avoid “creat[ing] the very

8. Newdow v. Eagen, 309 F. Supp. 2d 29 (D.D.C. 2004).

9. Newdow v. Lefevre, 598 F.3d 638 (9th Cir. 2010).

10. Newdow v. Bush, 355 F. Supp. 2d 265 (D.D.C. 2005).

11. Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1042 (9th Cir. 2010).

12. *Id.* The statute reads:

In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

CAL. EDUC. CODE § 52720 (West 2009).

13. Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in judgment) (citing Marsh v. Chambers, 463 U.S. 783 (1983)).

kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”¹⁴

This divisiveness rationale provides a pragmatic compromise to a difficult issue: a monument on government property that includes a reference to deity, if it has survived unchallenged for at least forty years, is constitutional if tearing it down would create the divisiveness that the Establishment Clause seeks to prevent. The same would be true for the Pledge and other governmental references to deity: if the tradition has survived Establishment Clause review for forty years, it is constitutional if its compelled discontinuance would create the divisiveness that the Establishment Clause seeks to prevent. New governmental religious references, fewer than forty years old, would be analyzed under the Supreme Court’s current Establishment Clause tests.

This Note proceeds as follows. Part II gives further insight into Newdow’s Establishment Clause challenge to the 1954 amendment to the Pledge. Part III provides context and background regarding the Pledge of Allegiance, including relevant Supreme Court cases. Part IV explains the Ninth Circuit’s *Rio Linda* decision. Part V analyzes *Rio Linda* and argues for the application of a divisiveness standard to all longstanding governmental references to deity.

II. FACTS AND PROCEDURAL HISTORY

A. Elk Grove: Newdow’s First Constitutional Challenge to the Pledge

Rio Linda was not Newdow’s first challenge to the Pledge. His first challenge to California’s Pledge statute came in *Elk Grove Unified School District v. Newdow*. There, the Ninth Circuit held that California’s Pledge statute was unconstitutional.¹⁵ However, the Supreme Court reversed the Ninth Circuit and held that Newdow did not have prudential standing because his ability to bring claims on behalf of his daughter was questionable.¹⁶ By so holding, the Supreme Court avoided ruling on the constitutionality of the Pledge.¹⁷

14. *Id.* at 704 (Breyer, J., concurring in judgment) (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 717–29 (2002)).

15. *Newdow v. U.S. Cong.*, 328 F.3d 466, 490 (9th Cir. 2003) (amending the panel’s opinion, which, in fact, made a determination as to the constitutionality of Congress’s 1954 amendment to the Pledge, which added the words “under God”), *rev’d sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

16. *Elk Grove*, 542 U.S. at 17–18.

17. *Id.* at 18.

B. Rio Linda: Newdow's Second Constitutional Challenge to the Pledge

Shortly after the Supreme Court's ruling in *Elk Grove*, Newdow again brought his claim in a federal district court to challenge the constitutionality of the 1954 amendment to the Pledge and the California Pledge statute, but this time he was joined by two other sets of plaintiff-parents whose custody rights did not raise standing concerns.¹⁸ Other than the newly added plaintiffs, Newdow's renewed constitutional claim in *Rio Linda* was "almost identical"¹⁹ to the case that the Supreme Court had recently dismissed in *Elk Grove*. As was expected in *Rio Linda*, the district court held that Newdow still lacked standing, noting that Newdow's custody arrangement had not changed since the Supreme Court decided *Elk Grove*.²⁰ However, the district court determined that the other plaintiff-parents had standing to challenge the state statute on behalf of their children.²¹

Ultimately, the district court concluded that it was bound by the Ninth Circuit's prior determination that the school district's Pledge recitation policy was unconstitutional.²² The district court reasoned that because the Supreme Court had only reversed the Ninth Circuit in *Elk Grove* for prudential standing reasons, the Ninth Circuit's prior determination on the merits of the case was still binding.²³ It therefore held that the school district's Pledge policy violated the First Amendment.²⁴ The *Rio Linda* appeal followed.

III. SIGNIFICANT LEGAL BACKGROUND

This Part will first provide a brief history of the Pledge, including two important Supreme Court cases stemming from its recitation. Next, it will address the Supreme Court's Establishment Clause tests, which the Court uses to determine whether a government action violates the Establishment Clause. This analysis will not attempt a comprehensive treatment of those Establishment Clause tests, but it will provide a foundation that is necessary for an understanding of *Rio Linda*. Last, this

18. *Newdow v. U.S. Cong.*, 383 F. Supp. 2d 1229 (E.D. Cal. 2005), *rev'd sub nom.* *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010).

19. *Id.* at 1233.

20. *Id.* at 1239.

21. *Id.* at 1240.

22. *Id.* at 1241.

23. *Id.*

24. *Id.* at 1242.

Part will summarize three of the Supreme Court's key decisions that guided the Ninth Circuit's opinion in *Rio Linda*.

A. *The Pledge and the Supreme Court*

1. *The Pledge's authorship and codification*

The original Pledge, authored by Francis Bellamy in 1892, reads: "I pledge allegiance to my Flag and to the Republic for which it stands—one Nation indivisible—with Liberty and Justice for all."²⁵ It was later codified by the U.S. Congress during World War II and slightly modified to "I pledge allegiance to *the flag of the United States of America* and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all."²⁶ In 1954, Congress amended the Pledge to add the words "under God,"²⁷ and this is the version that exists today: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."²⁸

2. *Early Supreme Court cases dealing with the Pledge*

The first court challenge to a public school's Pledge recitation policy occurred before Congress's 1954 "under God" amendment. In *Minersville School District v. Gobitis*,²⁹ two Jehovah's Witness school children were expelled for refusing to recite the Pledge in public school.³⁰ To the students, pledging allegiance to the flag would be a violation of scripture, namely:

Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. Thou shalt not bow down thyself to them, nor serve them.³¹

25. RICHARD J. ELLIS, *TO THE FLAG: THE UNLIKELY HISTORY OF THE PLEDGE OF ALLEGIANCE* 19 (2005).

26. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1031 (9th Cir. 2010) (emphasis added).

27. *Id.* at 1032.

28. 4 U.S.C. § 4 (2006).

29. 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

30. *Id.* at 591.

31. *Id.* at 592 n.1 (quoting *Exodus* 20:3–5 (King James)).

The father of the students sued to enjoin the school from forcing the students to recite the Pledge.³² The Supreme Court denied relief to the children, reversing the trial court and court of appeals.³³ In doing so, the Court framed its decision in terms of judicial modesty, reasoning that granting relief “would in effect make [the Court] the school board for the country.”³⁴ Allowing broad discretion in such patriotic exercises, the Court noted: “A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties.”³⁵ Therefore, under *Gobitis*, school officials could permissibly force students to recite the Pledge.

However, in a nearly identical case just a few years later, the Supreme Court reversed itself in *West Virginia State Board of Education v. Barnette*.³⁶ Here, the Court framed much of its rationale around the freedom of thought and its accompanying protection of disagreement. The Court stated: “[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.”³⁷ It reasoned, “Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.”³⁸ These evils, according to the Court, were what the First Amendment was designed to prevent.³⁹ “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.”⁴⁰ Thus, *Barnette* firmly established a right not to say the Pledge.

32. *Id.*

33. *Id.* at 600.

34. *Id.* at 598.

35. *Id.* at 600.

36. 319 U.S. 624 (1943).

37. *Id.* at 633.

38. *Id.* at 641.

39. *Id.*

40. *Id.* at 642.

B. The Establishment Clause and the Supreme Court's Tests

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"⁴¹ The Supreme Court's interpretation of the Establishment Clause seeks to protect the "right to select any religious faith or none at all."⁴² The Supreme Court has noted that although the Amendment may have initially been interpreted as protecting diversity among Christian faiths, "today [it is] recognized as guaranteeing religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'"⁴³ To serve these aims, the Supreme Court has created three separate tests or frames of analysis to assess whether a government action violates the Establishment Clause.

First, the *Lemon* test, created by the Supreme Court to "refine" or combine Establishment Clause principles found in its earlier precedents, focuses on three criteria.⁴⁴ To survive an Establishment Clause claim under the *Lemon* test, the statute, first, "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.'"⁴⁵

Second, the Supreme Court may analyze a governmental action under the endorsement test. Here, the Court invalidates a governmental practice if it "either has the purpose or effect of 'endorsing' religion."⁴⁶ Additionally, the governmental action is held unconstitutional if its purpose or effect favors or promotes religion, "particularly if it has the effect of endorsing one religion over another."⁴⁷ The doctrine also forbids "government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."⁴⁸

Third, the Supreme Court may also use the coercion test to determine the constitutionality of government actions, especially those affecting

41. U.S. CONST. amend. I.

42. *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985).

43. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989) (quoting *Wallace*, 472 U.S. at 52).

44. *Allegheny*, 492 U.S. at 592; *see also* *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

45. *Lemon*, 403 U.S. at 612–13 (citations omitted) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

46. *Allegheny*, 492 U.S. at 592.

47. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1037 (9th Cir. 2010) (citing *Allegheny*, 492 U.S. at 578–79).

48. *Allegheny*, 492 U.S. at 592 (O'Connor, J., concurring) (quoting *Wallace*, 472 U.S. at 70).

students in secondary and elementary schools. In *Lee v. Weisman*, the Supreme Court reasoned that “the government may no more use social pressure to enforce orthodoxy than it may use more direct means.”⁴⁹ Therefore, the Court reasoned that a public school may not put its students in the position of either participating in a religious exercise or protesting it.⁵⁰ The *Lee* Court based this reasoning on its observation that “adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”⁵¹ Therefore, the Supreme Court will not uphold any school actions that “compel a student to participate in a religious exercise.”⁵²

C. The Establishment Clause and Public Education

The Supreme Court has consistently invalidated government-sponsored religious exercises in public schools. A brief analysis of the three following cases will demonstrate this scrutiny and will provide context for the Ninth Circuit’s ruling in *Rio Linda*. In the earliest Establishment Clause challenge to a school policy, *Engel v. Vitale*, the Supreme Court struck down a school district’s policy mandating daily prayer in classes.⁵³ Since that decision, the Court has subsequently applied increasing scrutiny to any religious exercises in public schools that could be perceived as being sponsored by the government.

1. Prayer endorsement: Wallace v. Jaffree

Twenty years after it decided *Engel*, the Supreme Court struck down an Alabama statute that required school teachers to announce a daily one-minute moment of silence, which could be used, according to the statute, “for meditation or voluntary prayer.”⁵⁴ Applying the first element of the *Lemon* test, the Court noted that it was “appropriate to ask ‘whether government’s actual purpose is to endorse or disapprove of religion.’”⁵⁵ Using this analysis, the Court concluded that the statute was “not motivated by any clearly secular purpose—indeed, the statute had

49. 505 U.S. 577, 594 (1992).

50. *Id.* at 593.

51. *Id.*

52. *Id.* at 599.

53. 370 U.S. 421, 424 (1962).

54. *Wallace v. Jaffree*, 472 U.S. 38, 40 (1985).

55. *Id.* at 56 (O’Connor, J., concurring) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1985)).

*no secular purpose.*⁵⁶ Noting that the statute said “or voluntary prayer,” the Court held that the statute violated the endorsement test because those words showed that “the State intended to characterize prayer as a favored practice.”⁵⁷

2. *Prayers at graduation exercises: Lee v. Weisman*

The Supreme Court also invalidated a Rhode Island school practice in which principals invited religious leaders from various local denominations to give an invocation and benediction at graduations for middle schools and high schools.⁵⁸ The Court noted that it had “heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”⁵⁹ Further, the “preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere.”⁶⁰ Accordingly, the Court held that the school’s practice of allowing prayers at graduation ceremonies unconstitutionally persuaded or compelled students to “participate in a religious exercise.”⁶¹

3. *Prayer at football games: Santa Fe Independent School District v. Doe*

Most recently, the Supreme Court struck down a Santa Fe School District policy that allowed students to vote on whether to have an invocation at their football and baseball games, and to vote on which student should give those invocations for the entire school year.⁶² The Court concluded that this election system placed students with minority views “at the mercy of the majority.”⁶³ This program impermissibly sponsored a religious message, the Court reasoned, “because it sends the ancillary message to members of the audience who are 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.’”⁶⁴ Accordingly, the Court

56. *Id.*

57. *Id.* at 60.

58. *Lee v. Weisman*, 505 U.S. 577 (1992).

59. *Id.* at 592.

60. *Id.* at 589.

61. *Id.* at 599.

62. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 297 (2000).

63. *Id.* at 304.

64. *Id.* at 309–10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1985) (O’Connor, J., concurring)).

concluded that the prayers at football games had the “improper effect of coercing those present to participate in an act of religious worship.”⁶⁵

IV. THE COURT’S DECISION

In *Rio Linda*, the Ninth Circuit upheld the constitutionality of the California Pledge statute. The court further held that the 1954 amendment to the Pledge was constitutional.⁶⁶

A. *The Court’s Analysis of the Pledge’s History and Purpose*

The *Rio Linda* majority concluded that the Pledge’s purpose was to create national unity through an expression of historical ideals.⁶⁷ The Pledge, according to the majority, is not an expression of religious belief, but rather an expression of the Founding Fathers’ beliefs.⁶⁸ The words, “One Nation under God,” according to the majority, are a mere “reference to the *historical* and *political* underpinnings of our nation.”⁶⁹ Therefore, the Pledge is “one of allegiance to our Republic, not of allegiance to the God or to any religion.”⁷⁰ The majority bolstered this conclusion by quoting the Supreme Court’s assessment in *Elk Grove* that the Pledge is a “patriotic exercise designed to foster national unity and pride.”⁷¹

Notwithstanding this characterization, the court acknowledged the “religious connotations” of the Pledge.⁷² Nevertheless, the majority concluded: “Not every mention of God or religion by our government or at the government’s direction is a violation of the Establishment Clause.”⁷³ The majority cited six cases in which a government’s reference to religion or God was upheld by the Supreme Court, emphasizing that when those religious references were considered “in context, none of the government actions violated the Establishment Clause.”⁷⁴ The majority’s emphasis on context persists throughout its

65. *Id.* at 312.

66. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1012 (9th Cir. 2010).

67. *Id.*

68. *Id.*

69. *Id.* at 1036 (emphasis added).

70. *Id.* at 1014.

71. *Id.* (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004)).

72. *Id.* at 1036.

73. *Id.* at 1013.

74. *Id.* at 1013 (citing *Van Orden v. Perry*, 545 U.S. 677, 681 (2005); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 578–79 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 670–71 (1984); *Marsh v.*

opinion in an attempt to diminish the religious weight of the words “under God.”

B. The Ninth Circuit’s Application of the Establishment Clause Tests

The majority opinion analyzed the Pledge under all three of the Supreme Court’s Establishment Clause tests. The court’s analysis under each test will be addressed in turn.

1. The Lemon test

The majority used a sort of two-tiered *Lemon* approach,⁷⁵ finding that both the California Pledge statute and the federal Pledge itself passed the *Lemon* test.⁷⁶ California’s Pledge statute reads,

In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.⁷⁷

In its review of the Pledge statute, the majority noted that the parties had agreed that the statute satisfied the requirements of *Lemon*’s first and third elements: it had a secular purpose and did not promote government entanglement with religion.⁷⁸ Next, the majority reasoned that the Pledge was merely one way that teachers could fulfill the requirements of the statute, since it only requires some sort of a daily patriotic exercise.⁷⁹ Because the Pledge constitutes just one activity that would meet the requirements of the statute, and because the statute does not mention anything religious, the majority concluded that the statute passed the second prong of the *Lemon* test.⁸⁰

After it concluded that California’s Pledge statute was constitutional, the majority next held that the 1954 amendment to the Pledge was also

Chambers, 463 U.S. 783, 784–86 (1983); *Walz v. Tax Comm’n*, 397 U.S. 664, 667 (1970); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–11 (1947)).

75. *See supra* text accompanying notes 44–45.

76. *Rio Linda*, 597 F.3d at 1017.

77. CAL. EDUC. CODE § 52720 (West 2009).

78. *Rio Linda*, 597 F.3d at 1018.

79. *Id.*

80. *Id.*

constitutional under the *Lemon* test.⁸¹ The majority's analysis began with the "least controversial"⁸² second and third prongs of the *Lemon* test. It concluded that the Pledge did not violate the third element of the *Lemon* test because the Pledge did not cause excessive entanglement between government and religion.⁸³ Likewise, the majority held that the Pledge did not violate the second prong of the *Lemon* test because the Pledge had the "effect of promoting an appreciation of the values and ideals that define our nation," namely "patriotism, pride, and love of country, not of divine fulfillment or spiritual enlightenment."⁸⁴

After its brief treatment of the latter two prongs, the majority addressed the purpose prong of the *Lemon* test, to which it devoted the bulk of its opinion. Here, the majority emphasized the patriotic context of the words "under God."⁸⁵ The court supported this reasoning by noting that the California statute suggests a recitation of the *entire* Pledge.⁸⁶ Having thus defined the Pledge as a patriotic exercise, the majority used this characterization to distinguish several Supreme Court cases holding that religious exercises constituted violations of the Establishment Clause.⁸⁷ Those cases, the majority noted, had "a fundamental characteristic absent from the recitation of the Pledge: the exercise, observance, classroom lecture, or activity was predominantly religious in nature—a prayer, invocation, petition, or a lecture about 'creation science.'"⁸⁸

The majority further reasoned that the legislative history showed that Congress had a secular purpose when it enacted the Pledge.⁸⁹ The majority filled nearly four consecutive pages of its sixty-page opinion with a direct quotation from the Pledge's legislative history.⁹⁰ In addition, the majority reasoned that history itself supports Congress's view of the Pledge, highlighting the role that God played in the lives of

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1018–19.

85. *Id.* at 1019.

86. *Id.* at 1020.

87. *Id.* (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962)).

88. *Id.*

89. *Id.* at 1023.

90. *Id.* at 1025–28.

the framers of the Constitution.⁹¹ Having considered the legislative history and the patriotic purpose of the Pledge, the majority concluded that the school district's recitation of the Pledge did not violate the Establishment Clause.⁹²

2. *The endorsement test*

Likewise, the majority concluded that the Pledge was constitutional under the endorsement test⁹³ because its purpose and effect were "that of a predominantly patriotic, not a religious, exercise."⁹⁴ As before, the majority emphasized the patriotic context of the words "under God," rejecting the dissent's concentration on the two words alone.⁹⁵ Therefore, the majority concluded, the Pledge endorses "our form of government, not of religion or any particular sect."⁹⁶

3. *The coercion test*

The majority conceded that the district policy coerced⁹⁷ students into listening to the daily Pledge recitation.⁹⁸ The majority further conceded that the Pledge recitation may have induced students to *say* the Pledge.⁹⁹ However, the majority reasoned that despite these concerns, the Pledge did not raise the Establishment Clause issues presented in *Lee v. Weisman*, wherein the Supreme Court found a violation because students were coerced into listening to a prayer at their graduation.¹⁰⁰ The majority noted that the Pledge does not coerce students to affirm a belief in God.¹⁰¹ It further reasoned that because the Pledge is not a prayer, the coercion to participate in that patriotic exercise did not raise Establishment Clause concerns.¹⁰² The majority explained that *Lee's* analysis was limited to religious exercises, which is why *Lee's* result did

91. *Id.* at 1028–31.

92. *Id.* at 1037.

93. *See supra* text accompanying notes 46–48.

94. *Rio Linda*, 597 F.3d at 1037.

95. *Id.*

96. *Id.*

97. *See supra* text accompanying notes 49–52.

98. *Rio Linda*, 597 F.3d at 1038.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

not apply.¹⁰³ Accordingly, the Court concluded that the Pledge statute did not violate the coercion test.¹⁰⁴

Having concluded that the Pledge statute survived analysis under the *Lemon* test, the endorsement test, and the coercion test, the Court held that the California Pledge statute was constitutional as it did not violate the Establishment Clause.¹⁰⁵ It likewise held that the federal Pledge itself was constitutional.¹⁰⁶

V. ANALYSIS

A. The Majority Overreached by Declaring that the Pledge was Constitutional

The majority came to the correct result in *Rio Linda*, but in doing so, it overreached by ruling on the constitutionality of the Pledge itself. The first section of this Part will argue that because the plaintiffs had no standing to challenge the Pledge of Allegiance, the majority overreached by declaring that the Pledge was constitutional. The next section will compare the Ninth Circuit's decision with other decisions by federal circuit courts to show that no other circuit court has made such an overreaching ruling when called upon to decide the same question presented to the *Rio Linda* court.

1. No standing to challenge the issue, no reason to rule

The majority opinion noted that the district court dismissed the plaintiffs' challenge to the Pledge and its 1954 amendment, which added the words "under God," and that the plaintiffs did not cross-appeal the district court's dismissal of those claims.¹⁰⁷ Moreover, the majority added that the plaintiffs did not have standing to challenge the constitutionality of the Pledge,¹⁰⁸ reasoning that because the Pledge itself does not mandate that school children or anyone else say it, the plaintiffs failed to show that that the Pledge "causes them to suffer any concrete and particularized injury."¹⁰⁹ Despite this, the majority nevertheless analyzed and ruled on the Pledge's constitutionality because, as the court

103. *Id.* at 1039.

104. *Id.* at 1040.

105. *Id.* at 1042.

106. *Id.*

107. *Id.* at 1016.

108. *Id.*

109. *Id.*

noted, California's statute encourages a recitation of the Pledge. Though the dissent noted this logical error,¹¹⁰ the dissent likewise would have unnecessarily reached the constitutionality of the 1954 amendment to the Pledge on a questionable "as-applied" basis.¹¹¹

2. *No other circuit court has employed such a broad analysis*

None of the other federal circuit courts, when answering virtually the same question presented to the *Rio Linda* court, have ruled on the constitutionality of the 1954 amendment to the Pledge. These courts have restricted their analyses and holdings to the state statutes that mandate the Pledge's recitation.

For example, the Seventh Circuit, the first circuit presented with an Establishment Clause challenge to a state Pledge statute, confined its analysis to the Illinois statute that required elementary school students to recite the Pledge.¹¹² Its analysis included a review of the Illinois legislative history surrounding the state statute, rather than a review of the federal Pledge's legislative history.¹¹³ The Seventh Circuit concluded that the students' recitation of the Pledge was a mere "ceremonial invocation[] of God," and therefore the statute did not raise Establishment Clause concerns.¹¹⁴ The Seventh Circuit also observed the Founders' use of ceremonial invocations of God, noting that "Madison, the author of the first amendment, issued presidential proclamations of religious fasting and thanksgiving,"¹¹⁵ and that "[t]he tradition of thanksgiving proclamations began with President Washington, who presided over the constitutional convention."¹¹⁶ All of the court's analysis refrained from addressing the constitutionality of the 1954 amendment to the Pledge.

110. *Id.* at 1081 (Reinhardt, J., dissenting) ("Has the majority admitted to rendering an unconstitutional advisory opinion?").

111. *Id.* (emphasis omitted).

112. *Sherman v. Cmty. Consol. Sch. Dist.*, 980 F.2d 437, 439 (7th Cir. 1992) (quoting Ill. Rev. Stat. ch. 122 ¶ 27-3 (current version at 122 ILL. COMP. STAT. ANN. 5/27-3 (West 2011))) ("The Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions supported or maintained in whole or in part by public funds.").

113. *Id.* at 443.

114. *Id.* at 445. As a result of this conclusion, the Seventh Circuit did not apply any of the Supreme Court's Establishment Clause tests.

115. *Id.* at 445-46 (citing LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 100 (1986)).

116. *Id.* at 446.

Likewise, the Fourth Circuit confined its review to the Virginia Pledge statute in an Establishment Clause challenge to its validity.¹¹⁷ It held that the state statute did not violate the Establishment Clause.¹¹⁸ Much like the *Rio Linda* court, the Fourth Circuit avoided much of the coercion analysis by reasoning that the Pledge recitation is a patriotic exercise, noting that “nothing in any of the school prayer cases suggests the same analysis applies when the challenged activity is not a religious exercise.”¹¹⁹ Finding strong support in national historical references to deity, the Fourth Circuit held that the Virginia Pledge statute was constitutional.¹²⁰ Like the Seventh Circuit, the Fourth Circuit limited its analysis to the state statute, avoiding a broad exploration of the legislative history of the 1954 amendment to the Pledge of Allegiance.

Recently, the First Circuit upheld the constitutionality of New Hampshire’s Pledge statute.¹²¹ The district court rejected the plaintiffs’ argument that the federal Pledge statute was being applied to them because “the statute merely prescribes the text of the Pledge and does not command any person to recite it or lead others in its recitation.”¹²² The First Circuit confined its holding to the state Pledge statute because the constitutionality of the federal Pledge itself was not at issue on appeal.¹²³ The court rejected the traditional ceremonial deism reasoning, acknowledging that the words “under God” have religious value, noting, “[t]hat the phrase has some religious content is demonstrated by the fact that those who are religious, as well as those who are not, could reasonably be offended by the claim that it does not.”¹²⁴

Most notably, the former Ninth Circuit opinion in *Newdow*, now overturned by the Supreme Court in *Elk Grove*, did not go so far as to declare the Pledge’s 1954 amendment unconstitutional.¹²⁵ Without engaging in an analysis of the 1954 Pledge amendment, the Ninth Circuit concluded that “[t]he school district’s policy here, like the school’s action in *Lee*, places students in the untenable position of choosing between participating in an exercise with religious content or

117. *Myers v. Loudoun Cnty. Pub. Sch.*, 418 F.3d 395 (4th Cir. 2005).

118. *Id.* at 408.

119. *Id.* at 407.

120. *Id.* at 408.

121. *Freedom From Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1 (1st Cir. 2010).

122. *Id.* at 5 n.8.

123. *Id.* at 6.

124. *Id.* at 7.

125. *Newdow v. U.S. Cong.*, 328 F.3d 466, 488 (9th Cir. 2003), *rev’d sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

protesting.”¹²⁶ Therefore, despite holding that the school board’s Pledge policy was unconstitutional, the prior Ninth Circuit opinion did not go so far as to rule on the constitutionality of the 1954 amendment to the Pledge.

B. The Ninth Circuit Inappropriately Used Ceremonial Deism Reasoning

Though the *Rio Linda* opinion never uses the phrase “ceremonial deism,” its reasoning is very much grounded in the doctrine. Before discussing specific examples from the opinion, this Note will explain what the ceremonial deism doctrine is and how it has come to be used by courts.

1. A brief history of ceremonial deism

The doctrine of ceremonial deism was first articulated in Supreme Court jurisprudence by Justice Brennan, who described it in his dissent to *Lynch v. Donnelly*.¹²⁷ He explained that ceremonial references to deity, like the one found in the Pledge and in the national motto, are “protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.”¹²⁸ Such references, according to Justice Brennan, have perfectly secular purposes, including “solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases.”¹²⁹ Justice Brennan reasoned that such references have “essentially secular meaning” because they serve secular purposes and because they have a part in the nation’s history.¹³⁰

Justice O’Connor’s concurring opinion in *Elk Grove* builds upon the reasoning of Justice Brennan.¹³¹ Speaking of the words “under God” added by Congress’s 1954 amendment, O’Connor argued that “[a]ny religious freight the words may have been meant to carry originally has

126. *Id.*

127. 465 U.S. 668, 716 (1984) (Brennan, J., dissenting); see generally William Trunk, *The Scourge of Contextualism: Ceremonial Deism and the Establishment Clause*, 49 B.C. L. REV. 571, 578–83 (2008) (giving a history of the ceremonial deism arguments in Supreme Court precedent and arguing that the Pledge of Allegiance is unconstitutional under the Supreme Court’s precedents).

128. *Lynch*, 465 U.S. at 716 (citing *Marsh v. Chambers*, 463 U.S. 783, 818 (1983)).

129. *Id.* at 717.

130. *Id.*

131. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33 (2004) (O’Connor, J., concurring in judgment).

long since been lost.”¹³² Justice O’Connor also attempted to articulate an analytical framework for addressing ceremonial deism claims. She explained a four-factor test in which the court determines whether a practice can survive Establishment Clause review because of ceremonial deism based on (1) the history and ubiquity of the practice, (2) the “absence of worship or prayer,” (3) the absence of reference to particular religion, and (4) whether the disputed practice has minimal religious content.¹³³ Concluding that the Pledge constitutes an instance of ceremonial deism, Justice O’Connor would have reached the merits in *Elk Grove* and held that the Pledge statute did not violate the Establishment Clause.¹³⁴

Justice O’Connor also joined Chief Justice Rehnquist’s concurring opinion, wherein he asserted that the Pledge is constitutional chiefly because its tradition, history, and purpose—words that are characteristic in ceremonial deism arguments—save it from Establishment Clause review.¹³⁵ According to Chief Justice Rehnquist, the majority erred in not finding standing.¹³⁶ Chief Justice Rehnquist cited numerous occasions in history where public officials have invoked the name of deity in the public arena.¹³⁷ “The phrase ‘under God’ in the Pledge seems, as a historical matter, to sum up the attitude of the Nation’s leaders, and to manifest itself in many of our public observances.”¹³⁸ Therefore, the Pledge, according to Chief Justice Rehnquist, is not an affirmation of personal belief in God but rather in the Founders’ belief in God.

2. Rio Linda’s ceremonial deism arguments

The majority in *Rio Linda* employs reasoning similar to that in the *Elk Grove* concurrences to argue that the Pledge is devoid of any serious

132. *Id.* at 41.

133. *Id.* at 37–45.

134. *Id.* at 33.

135. *Id.* at 18 (Rehnquist, C.J., concurring in judgment).

136. *Id.* at 24.

137. *Id.* at 26–30 (noting George Washington’s 1789 inauguration wherein he opened the Bible that he would swear upon to Psalms 121:1 and added “So help me God” after his oath; Washington’s issuance of a proclamation designating a day of thanksgiving and prayer; Lincoln’s Gettysburg and second inaugural addresses, each mentioning God; Woodrow Wilson’s appeal to Congress to declare war against Germany, mentioning God; a mention of God by Presidents Roosevelt and Eisenhower; “In God We Trust” on currency; and the court marshal of the Supreme Court’s declaration, “God save the United States and this honorable court”).

138. *Id.* at 26.

religious meaning. Much like Chief Justice Rehnquist's observation in *Elk Grove*, the *Rio Linda* court reasoned that the words "under God" were not religious, but were merely "a reference to the historical and political underpinnings of our nation."¹³⁹ Additionally, according to the majority, the words "under God" can be read as "a powerful admission by the government of its own limitations."¹⁴⁰ Quoting Justice Brennan, the *Rio Linda* majority reasoned that the words of the Pledge "may merely recognize the historical fact that our Nation was believed to have been founded 'under God.'"¹⁴¹

For the reasons that will follow, this reasoning is inappropriate.

3. A criticism of ceremonial deism

The principal problem with ceremonial deism is that it offends the very persons that it purports to support—the religious.¹⁴² It seems to offend, for example, Christian scripture that counsels directly against vain repetitions of religious sayings.¹⁴³ Perhaps this is why the doctrine has not garnered the complete support of religious individuals. In the Seventh Circuit's opinion upholding the constitutionality of a state pledge statute, the majority's reliance upon ceremonial deism elicited an indignant concurrence, which complained that it was not necessary to "totally denude the Pledge by reducing its language to the lowest common denominator of 'ceremonial deism'" in order to uphold the

139. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1036 (9th Cir. 2010).

140. *Id.*

141. *Id.* at 1036–37 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 304 (Brennan, J., concurring)).

142. See, e.g., Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 497, 504 (1996) (calling such characterizations "offensive fictions"). Professor Smith asserts that

it is offensive to all concerned—and, more important, obfuscating and unhelpful—to engage in far-fetched, systematic denials of the nation's (admittedly very ambiguous) religious character, as in the now official view that practices such as legislative prayer or the national motto "In God We Trust" do not have religious content and significance. Our commitment to principled constitutional doctrine, coupled with the particular principles currently in vogue, has forced us into a situation where these sorts of disingenuous claims seem almost mandatory.

Id.; see, e.g., Peter Steinfels, *Beliefs; Some Believers, Believe It or Not, Are Cringing at the Defense of 'One Nation Under God.'*, N.Y. TIMES, Mar. 27, 2004, at B6 ("And why aren't more believers distressed when language that pretty clearly affirms an existing, active, transcendental God must be defended as nothing more than language about what the nation's framers thought two centuries ago?").

143. *Matthew* 6:7 (King James) ("But when ye pray, use not vain repetitions, as the heathen do: for they think that they shall be heard for their much speaking.").

constitutionality of the Pledge.¹⁴⁴ Moreover, the concurrence reasoned, such a reference does not “become permissible under the First Amendment only when it has been repeated so often that it is sapped of religious significance.”¹⁴⁵

Ceremonial deism is also met with incredulity by strict separatists who stringently oppose any government reference to deity. For example, Erwin Chemerinsky, who adamantly advocates for a strictly secular government,¹⁴⁶ notes a significant discrepancy between the ceremonial deism arguments often asserted by religious persons and the *actual* motivations of those religious persons. He observes that when he argued against Texas’s Ten Commandments monument in *Van Orden v. Perry*,¹⁴⁷ he received “a large amount of what can only be described as hate mail” from those who wished to keep the religious symbols on the government’s property.¹⁴⁸ “Some of it, in its viciousness, was shocking.”¹⁴⁹ He contrasted the religious motivations in the hate mail with what the State of Texas argued before the Supreme Court regarding *its* motivations for keeping the monument: “[T]hat it wanted the Ten Commandments monument to remain because of the historical importance of the Ten Commandments as a source of law.”¹⁵⁰

Likewise, in Justice Blackmun’s dissent to *Lynch v. Donnelly*, he criticized the majority’s decision because it encouraged the use of a religious display in “a setting where Christians feel constrained in acknowledging its symbolic meaning”¹⁵¹ Powerfully, he concluded, “Surely, this is a misuse of a sacred symbol.”¹⁵²

Lastly, the ceremonial deism justification for religious references to deity is problematic because it does not make logical sense. One scholar argues that if the words “under God” have no meaning at all, then there

144. *Sherman v. Cmty. Consol. Sch. Dist.*, 980 F.2d 437, 448 (7th Cir. 1992) (Manion, J., concurring) (noting that words used in public ceremonies must retain their meaning because if the phrase “under God” has lost all of its meaning, so have the rest of the words in the pledge); *see also* Trunk, *supra* note 127, at 599 (“[W]hy has only the religious part lost meaning?”).

145. *Sherman*, 980 F.2d at 448.

146. Erwin Chemerinsky, *Why Church and State Should Be Separate*, 49 WM. & MARY L. REV. 2193, 2195 (2008) (averring that he agreed to argue *Van Orden v. Perry*, 545 U.S. 677 (2005), a Ten Commandments case, because he believes that the government should be secular).

147. 545 U.S. 677 (2005).

148. Chemerinsky, *supra* note 146, at 2193.

149. *Id.*

150. *Id.* at 2194.

151. *Lynch v. Donnelly*, 465 U.S. 668, 727 (1984) (Blackmun, J., dissenting).

152. *Id.*

is no reason to leave them in the Pledge.¹⁵³ Furthermore, according to the same scholar, Justice O'Connor's admission that the words are unnecessary supports this assertion.¹⁵⁴ And if, as the *Rio Linda* majority asserts, "the Pledge is one of allegiance to our Republic, not of allegiance to the God or to any religion,"¹⁵⁵ certainly the removal of the words "under God" would not hinder the Pledge's patriotic efficacy. Thus, efforts to devalue religious references do not support their inclusion in the Pledge or in other government declarations.

For each of these reasons, ceremonial deism justifications supporting the constitutionality of the Pledge of Allegiance should be rejected. By doing so, religious individuals can be honest about their motivations for allowing government officials to refer to deity or for allowing a government to maintain religious objects on its property.¹⁵⁶ Furthermore, religious persons can avoid offending their own moral principles by not relegating their sacred symbols to the realm of the meaningless in order to argue in favor of their constitutionality.

*D. Courts Should Use the Divisiveness Test to Evaluate the
Constitutionality of Existing Government References to Deity*

Having argued that ceremonial deism is not a proper justification for the Pledge's constitutionality, this Note proposes, as an alternative to the Supreme Court's current Establishment Clause tests, a standard that would allow an acknowledgement of a religious element in existing government references to deity. This proposed standard would guide courts' decisions in reviewing the constitutionality of longstanding government references to deity, such as the Pledge and existing government monuments. The standard was advocated by Justice Breyer in his concurrence to *Van Orden v. Perry*, wherein he advocated for the exercise of "legal judgment" in determining whether the government action causes religious divisiveness.¹⁵⁷ Though this divisiveness rationale is not new,¹⁵⁸ its application has not yet been used in cases

153. Trunk, *supra* note 127, at 599.

154. *Id.*

155. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1014 (9th Cir. 2010).

156. *See, e.g.*, Chemerinsky, *supra* note 146 (contrasting religious individuals' motivations with the State of Texas's posited motivations for maintaining the Ten Commandments monument on the Texas State Capitol grounds).

157. *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in judgment).

158. *See, e.g.*, Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006) (summarizing the history of the religious divisiveness reasoning in Establishment Clause jurisprudence).

analyzing the constitutionality of state Pledge statutes and other governmental references to deity. This Note will explain the divisiveness rationale and will argue for its application in cases involving state Pledge statutes and existing monuments that have religious elements and have existed for at least forty years.

1. Justice Breyer's divisiveness analysis in Van Orden v. Perry

In 2005, the Supreme Court issued two seemingly contradictory decisions on the same day. The first case upheld the constitutionality of a monument containing the Ten Commandments that sat on the grounds of the Texas State Capitol,¹⁵⁹ but the second held unconstitutional two Ten Commandments monuments that were located in state courthouses.¹⁶⁰ Though Justice Breyer joined the majority opinion in *McCreary County*, holding that the Ten Commandments displays were unconstitutional,¹⁶¹ he concurred in the judgment in *Van Orden*, upholding the constitutionality of the Ten Commandments monument on the grounds of the Texas state capitol.¹⁶² His analysis of the potential divisiveness was the deciding factor in his *Van Orden* concurrence, and his reasoning provides valuable guidance for interpreting future cases involving existing government references to deity, such as in the Pledge and in monuments.

In *Van Orden*, the Court considered whether the Ten Commandments monument on the grounds of the Texas state capitol was permissible under the Establishment Clause.¹⁶³ The grounds of the capitol are decorated with twenty-one historical markers and seventeen monuments, including a six-foot tall monument inscribed with the Ten Commandments.¹⁶⁴ For six years, the plaintiff, Van Orden, often visited the grounds.¹⁶⁵ He commenced an Establishment Clause action under 42 U.S.C. § 1983 to obtain an injunction requiring the removal of the monument.¹⁶⁶ The Supreme Court's plurality opinion affirmed the trial

159. *Van Orden*, 545 U.S. at 681.

160. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 850, 858 (2005).

161. *Id.*

162. *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in judgment).

163. *Id.* at 681 (majority opinion).

164. *Id.* A map of the grounds is included in Justice Breyer's concurrence. *Id.* at 706 app. B (Breyer, J., concurring in judgment).

165. *Id.* at 681 (majority opinion).

166. *Id.* at 682.

court and appeals court, holding that there was no Establishment Clause violation.¹⁶⁷

Justice Breyer concurred in the judgment.¹⁶⁸ His opinion notes that because there is no mechanical, easy dividing line between establishments and nonestablishments of religion, judges must look to the “basic purposes” of the Religion Clauses.¹⁶⁹ According to Justice Breyer, one of these basic purposes is to avoid divisiveness based upon religion.¹⁷⁰ To serve this purpose, Justice Breyer notes, “The government must avoid excessive interference with, or promotion of, religion.”¹⁷¹

However, Breyer rejects an Establishment Clause “absolutism” that would “compel the government to purge from the public sphere all that in any way partakes of the religious.”¹⁷² To do so, according to Breyer, is inconsistent with American tradition, and “would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.”¹⁷³ As this Note will also advocate, Breyer asserts that there is “no test-related substitute for the exercise of *legal judgment*.”¹⁷⁴ In exercising this legal judgment, a judge uses the Court’s current Establishment Clause tests only as guideposts, “remain[ing] faithful to the underlying purposes of the [Religion] Clauses,” and “tak[ing] account of context and consequences measured in light of those purposes.”¹⁷⁵

Applying this legal judgment standard, Justice Breyer concluded that the context of the Ten Commandments monument suggests that its predominant purpose was to convey a secular, moral message, although

167. *Id.* at 683.

168. *Id.* at 698 (Breyer, J., concurring in judgment).

169. *Id.*

170. *Id.*; see also Philip C. Aka, *Assessing the Constitutionality of President George W. Bush’s Faith-Based Initiatives*, 9 J.L. SOC’Y 53, 66 (2008) (noting that “political divisiveness and fragmentation along religious lines” was one of the main problems that the Establishment Clause was intended to prevent (citing *Walz v. Tax Comm’n*, 397 U.S. 664, 668, 695 (1970); *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 859–60 (2005))).

171. *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in judgment) (citing *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989); *Zelman v. Simmons-Harris*, 536 U.S. 639, 723–25 (2002) (Breyer, J., dissenting)).

172. *Id.* (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)).

173. *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *Lynch v. Donnelly*, 465 U.S. 668, 672–78 (1984)); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 866 (2007) (Breyer, J., dissenting) (“And what of law’s concern to diminish and peacefully settle conflict among the Nation’s people?”).

174. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in judgment) (emphasis added) (citing *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

175. *Id.*

the monument's contents include a religious message.¹⁷⁶ Not relying upon a "literal application of any particular test," Justice Breyer concluded that the Texas monument did not infringe upon the Establishment Clause.¹⁷⁷ To rule otherwise would, according to Justice Breyer, "lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions."¹⁷⁸ Additionally, finding a violation might "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid" because it would encourage challenges to existing Ten Commandments monuments in public buildings nationwide.¹⁷⁹

According to Justice Breyer, the monument was not that divisive because it had stood unchallenged for nearly forty years.¹⁸⁰ He suggests that a *newly* constructed monument would likely run afoul of his "legal judgment" because it would be more divisive. "[A] more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not."¹⁸¹

2. Justice Breyer's legal judgment standard and similar arguments

Justice Breyer is not alone in his rejection of the Court's Establishment Clause tests in favor of the exercise of legal judgment.¹⁸² For example, Steven D. Smith has argued that "there is not and cannot be any satisfactory theory or principle of religious freedom."¹⁸³ Professor Smith argues in favor of a *prudential* approach to Establishment Clause review, as opposed to what he characterizes as the Supreme Court's principle-driven jurisprudence.¹⁸⁴ Likewise, Justice Breyer uses identical

176. *Id.* at 702.

177. *Id.* at 703–04.

178. *Id.* at 704.

179. *Id.* (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 717–29 (2002) (Breyer, J., dissenting)).

180. *Id.* at 704.

181. *Id.* at 703.

182. *Id.* at 700 (arguing for the exercise of "legal judgment" rather than the Court's Establishment Clause tests when deciding "difficult borderline cases").

183. STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM*, at v (1991) ("Virtually no one is happy with the Supreme Court's doctrines and decisions in this area or with its explanations of those doctrines and decisions."); see also Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI.-KENT L. REV. 729, 729 (2003) (quoting and agreeing with Smith that nearly everyone is dissatisfied with the Supreme Court's Religion Clause doctrines).

184. Smith, *supra* note 142, at 499.

language to characterize his own jurisprudence: “I belong to a tradition of judges who approach the law with *prudence* and *pragmatism*.”¹⁸⁵

These ideas are born out of a dissatisfaction with the Court’s current tests. Professor Smith asserts that the Supreme Court’s attempts in the past fifty years to develop and follow a principled approach have been mistaken.¹⁸⁶ Such attempts, according to Smith, are futile:

If after half-a-century of fairly intensive research and thinking no consensus about the proper principle of religious freedom has emerged, but instead every principle proposed by scholars or judges has met with serious objections from other scholars and judges, we might begin to suspect that the quest for a satisfactory constitutional principle of religious freedom is misguided.¹⁸⁷

For this reason, Smith advocates an unprincipled approach to Establishment Clause jurisprudence, one that he characterizes as being on a “largely ad hoc basis.”¹⁸⁸

Smith’s advocacy for an unprincipled approach to the Establishment Clause seems to mirror Breyer’s approach, in that Smith seeks to avoid divisiveness caused by overzealous adherence to principle. According to Smith, converting religious liberty interests into issues of principle has not furthered the goal of promoting civil peace and avoiding alienation, since “if you believe there is a ‘true’ constitutional principle of religious freedom, then you may also believe that we must enforce that principle regardless of the turmoil and alienation that this course may entail.”¹⁸⁹ These same considerations motivated Justice Breyer’s divisiveness reasoning in *Van Orden*, wherein Justice Breyer avoided the rigid

185. Jeffrey Toobin, *Without a Paddle: Can Stephen Breyer Save the Obama Agenda in the Supreme Court?* NEW YORKER, Sept. 27, 2010, at 38 (emphasis added) (quoting Justice Breyer in a personal interview) (internal quotation marks omitted). Justice Breyer’s continued characterization of his legal philosophy provides additional insight into his *Van Orden* opinion: “That tradition [of prudence and pragmatism] is not subjective, and that tradition is not politics. It is a tradition that tries to understand the values and purposes underlying the Constitution and the laws. It’s a tradition that says there’s a need to maintain stability in the law, without freezing the law” *Id.* (quoting Justice Breyer in a personal interview) (internal quotation marks omitted).

186. Smith, *supra* note 142, at 497.

187. *Id.* at 499.

188. Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. REV. 120, 166 n.172 (2008) (citing Smith, *supra* note 142).

189. Smith, *supra* note 142, at 501; *see also* Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?* 60 STAN. L. REV. 155, 156–57 (2007) (speculating that the Supreme Court’s refusal to reach the merits in *Elk Grove* was out of a fear that its ruling would provoke public outrage).

application of the Court's Establishment Clause tests because to do so would have exhibited hostility to religion.¹⁹⁰

3. *Justice Breyer's legal judgment of divisiveness applied to the facts of Rio Linda*

Justice Breyer's arguments for the exercise of legal judgment provides a valuable framework for future cases involving Establishment Clause challenges to governmental references to deity. Justice Breyer's preference for exercising legal judgment combined with his attention to divisiveness, when properly applied to the *Rio Linda* case, provides an example of how Justice Breyer's approach may help judges in subsequent cases to reach the right result. Such an approach does not require parties to resort to ceremonial deism rationales or other questionable justifications for advocating the constitutionality of government references to deity in the Pledge and in existing monuments.

For example, in the facts of *Rio Linda*, a judge exercising Justice Breyer's legal judgment standard would take into account the basic purposes of the First Amendment, including avoiding divisiveness along religious lines.¹⁹¹ Using the existing Establishment Clause tests as guideposts, a judge would examine the context and the consequences of the Pledge recitation to see if the government was causing divisiveness based upon religion.¹⁹² Like the monument in *Van Orden*, the Pledge predominantly conveys a secular message but includes a religious element, suggesting that it would pass Justice Breyer's legal judgment standard. Furthermore, the Pledge's religious content has survived Establishment Clause review for more than forty years, longer than the Ten Commandments monument had sat upon the grounds of the Texas capitol in *Van Orden*. The Pledge's age suggests that its inclusion in schools has not been extremely divisive along religious lines.

To find a violation under the facts of *Rio Linda* would certainly "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."¹⁹³ The Pledge, as it is currently written, is highly valued by many people.¹⁹⁴ To many religious

190. *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in judgment); see also *supra* text accompanying notes 168–81.

191. *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in judgment).

192. *Id.* at 700.

193. *Id.* at 704 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 717–29 (2002) (Breyer, J., concurring in judgment)).

194. See, e.g., Evelyn Nieves, *Judges Ban Pledge of Allegiance from Schools, Citing 'Under*

adherents, the acknowledgement in the Pledge that their nation is “under God” is of profound importance.¹⁹⁵ A judge exercising the legal judgment espoused by Justice Breyer would take into account the divisiveness among religious lines that would be created by a ruling that the Pledge is unconstitutional. Therefore, a court employing Justice Breyer’s legal judgment methodology would likely come to the same result reached by each federal circuit court referenced above, but would do so without relying upon reasoning that denies the deeply religious meaning of the words “under God.”

4. The legal judgment of the divisiveness standard: prudent and pragmatic

The approach advocated by this Note provides a pragmatic approach to difficult cases: government references to deity, in declarations and monuments that have been in place for more than forty years,¹⁹⁶ are analyzed under Breyer’s legal judgment standard for divisiveness. Government cannot construct new monuments containing religious elements or standardize new references to deity.¹⁹⁷ Therefore, old monuments and governmental references to deity would likely be permitted so as to further the First Amendment’s purpose of preventing divisiveness along religious lines. For example, the Supreme Court marshal’s proclamation, “God save the United States and this Honorable Court,”¹⁹⁸ would likely survive under this test. But new references would

God, N.Y. TIMES, Jun. 27, 2002, at A1 (reporting on the aftermath of the Ninth Circuit’s 2002 ruling that the Pledge violated the Establishment Clause, including the “protest across the political spectrum” and the “immediate reaction in Washington, where senators unanimously passed a resolution condemning the ruling”); Jimmie E. Gates, *Judge Admits He Violated Rights*, THE CLARION LEDGER, Dec. 2, 2010, at B1 (reporting on an attorney who was held in contempt and jailed because of his refusal to say the Pledge of Allegiance in court).

195. See, e.g., Nieves, *supra* note 194 (noting the harsh, swift response to the Ninth Circuit’s decision holding that the Pledge was unconstitutional, including the most “vehement reactions” from conservative religious groups).

196. *Van Orden*, 545 U.S. at 682. Justice Breyer found it persuasive that the Ten Commandments monument in this case had survived unchallenged for forty years. This Note adopts this age as a bright-line compromise. *Id.* at 701 (Breyer, J., concurring in judgment). Such line-drawing is not unheard of in the Court’s precedents. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (expressing an expectation that the racial preferences condoned by the Court’s opinion would be unnecessary in twenty-five years); *Salazar v. Buono*, 130 S. Ct. 1803, 1817 (2010) (noting that “[t]ime also has played its role” in its constitutional analysis of a cross constructed on federal land).

197. *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in judgment) (“[A] more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not.”).

198. *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 632 (2007) (Scalia, J., concurring

fail this test, since this would also serve the First Amendment's purpose of preventing religious divisiveness. Thus, religious individuals would not lose deeply important, longstanding monuments and other references to deity, but strict separatists could be confident that no new deific references would pass this test.

Such a pragmatic approach would not be new or radical. Suzanna Sherry, for example, argues that the Rehnquist Court's First Amendment jurisprudence was "quintessentially pragmatist[c]."¹⁹⁹ She writes, "Not every constitutional case requires recourse to first principles, and indeed, most require more subtlety than such recourse can produce. The Rehnquist Court's free-speech cases provide an example of the benefits of a more nuanced and pragmatist approach in the context of a mature jurisprudence."²⁰⁰

Moreover, an ad-hoc approach to cases involving old government monuments and references to deity would not be entirely new to the Supreme Court. Professor Kyle Duncan suggests that, despite the Court's seemingly objective Establishment Clause tests, the results have been subjective, although the cases are worded in the tests' terms. "Applying even sophisticated rules to such situations has not led the Court consistently toward nonsubjective solutions, but rather has invited various justices simply to reformulate church-state problems in the rule's terms."²⁰¹ Duncan asserts that the Supreme Court has created "spiraling confusion in its jurisprudence" by attempting to "erect complex rules that ostensibly balance the various competing interests and policies in these conflicts."²⁰² Likewise, Professor Brett Scharffs has noted with agreement criticisms that the Court's religious liberty jurisprudence is "confusing and chaotic."²⁰³ This confusion is evident in the above

in judgment).

199. Suzanna Sherry, *Hard Cases Make Good Judges*, 99 NW. U. L. REV. 3, 4. *But see* Eugene Volokh, *Pragmatism vs. Ideology in Free Speech Cases*, 99 NW. U. L. REV. 33, 36 (responding to Sherry and arguing that "under any but the broadest (and least useful) definitions of pragmatism, the majority of these cases are indeed decisions about matters of 'principle'").

200. Sherry, *supra* note 199, at 30–31.

201. Kyle Duncan, *Subsidiarity and Religious Establishments in the United States Constitution*, 52 VILL. L. REV. 67, 128 (2007).

202. *Id.* at 128–29.

203. Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217, 1224 (citing MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 247 (1988); Stuart Buck, *The Nineteenth-Century Understanding of the Establishment Clause*, 6 TEX. REV. L. & POL. 399, 400 (2002); Michael W. McConnell, *Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine*, in LAW AND RELIGION 63, 64 (Rex J. Adhar ed., 2000)).

decisions of the four circuit courts that have heard constitutional challenges to state Pledge statutes, since each employed widely different reasoning and applied the tests differently.²⁰⁴

Given the Court's "confused and chaotic"²⁰⁵ precedent in this area, adopting a legal judgment standard would give greater freedom to judges to apply the non-divisiveness principle of the First Amendment without being constrained by the tests articulated by the Supreme Court. This Note does not advocate the abandonment of the Court's Establishment Clause tests in all instances, but rather advocates allowing judges to exercise their legal judgment in a narrow area of cases—those cases that involve government monuments that include references to deity, forty years and older, and existing government declarations or practices that include references to deity, such as the Pledge of Allegiance. Such a small deviation would help alleviate religious divisiveness but would not be so drastic as to completely abandon fidelity to the Court's Establishment Clause jurisprudence.

5. Criticisms of the legal judgment standard

This legal judgment standard of divisiveness has not been without its critics.²⁰⁶ However, most criticisms of the legal judgment standard are directed at its use in all Establishment Clause cases. This Note argues for its application only in narrow circumstances where the court reviews the constitutionality of longstanding government references to deity. Moreover, despite these criticisms, the Court has used divisiveness reasoning in past decisions,²⁰⁷ and it continues to do so.²⁰⁸ If Justice

204. *Freedom From Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1 (1st Cir. 2010); *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010) (applying the *Lemon*, endorsement, and coercion tests in upholding the constitutionality of the state Pledge statute); *Myers v. Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 407 (4th Cir. 2005) (resting much of its decision on dicta by the United Supreme Court suggesting that the Pledge is constitutional and declining to apply specific tests because the pledge is a "patriotic exercise"); *Sherman v. Cmty. Consol. Sch. Dist.* 21, 980 F.2d 437, 445 (7th Cir. 1992) (applying none of the Establishment Clause tests because the Pledge is a "ceremonial invocation[] of God").

205. Scharffs, *supra* note 203, at 1224.

206. See, e.g., Erwin Chemerinsky, *Why Justice Breyer Was Wrong in Van Orden v. Perry*, 14 WM. & MARY BILL RTS. J. 1 (2005); Garnett, *supra* note 158; Edward McGlynn Gaffney Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205 (1980) (criticizing the divisiveness rationale in general).

207. Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312, 389 n.336 (1992). See also Garnett, *supra* note 158, for a history of the divisiveness rationale in the Supreme Court's precedent.

208. See *Salazar v. Buono*, 130 S. Ct. 1803, 1817 (2010) (plurality opinion) (quoting the

Kennedy's recent plurality opinion, which favorably quotes the divisiveness language from *Van Orden*,²⁰⁹ is any indication, it is likely that the reasoning will continue to find a place in the Court's future Establishment Clause decisions.

VI. CONCLUSION

Regardless of the legal standard applied, the Ninth Circuit did not need to rule on the constitutionality of the 1954 amendment to the Pledge. Had the *Rio Linda* court been able to apply this Note's proposed test, the court likely would have come to the same conclusion, but could have done so without resorting to ceremonial deism arguments.

The divisiveness standard advocated by this Note seeks to develop a solution to the strong and sometimes emotional disagreements about the acceptability of governmental references to deity. For many individuals, judicial removal of such references is hurtful on both a religious and political level. Contrariwise, strict separatists have valid and compelling arguments against such references. This Note's proposed standard constitutes a compromise between both of these interests: no *new* government references to deity, but no judicial removal of longstanding references to deity in government monuments and no judicial prohibitions on longstanding government references to deity. Unlike the Supreme Court's current Establishment Clause jurisprudence, this compromise adequately considers the divisiveness that is created when courts hold that nearly every government reference to deity is unconstitutional.

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divisiveness language from *Van Orden* and noting the disrespect to fallen soldiers that would be caused by removing a cross located on federal land). Compare Chemerinsky, *supra* note 206, at 14–15 (“The passage of time cannot justify a government action that violates the Constitution; there is no statute of limitations for Establishment Clause claims.”), with *Salazar*, 130 S.Ct. at 1817 (plurality opinion) (“Time also has played its role.”).

209. *Salazar*, 130 S.Ct. at 1817.

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