Worth A Look: Elk Grove Unified School District v. Newdow (2004)

The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake. Even in cases concededly within our jurisdiction under Article III, we abide by a series of rules under which we have avoided passing upon a large part of all the constitutional questions pressed upon us for decision... Always we must balance the heavy obligation to exercise jurisdiction... against the deeply rooted commitment not to pass on questions of constitutionality unless adjudication of the constitutional issue is necessary...

Consistent with these principles... [a] plaintiff must show that the conduct of which he complains has caused him to suffer an "injury in fact" that a favorable judgment will redress... Without such limitations… the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights...

Thus, while rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts.

(from the majority opinion by Justice John Paul Stevens; internal quotes and citations omitted for clarity)

The Court today erects a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim. I dissent from that ruling. On the merits, I conclude that the Elk Grove Unified School District policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," does not violate the Establishment Clause of the First Amendment...

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.

(from the opinion of Chief Justice William Rehnquist, concurring in the judgement)

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… 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"). 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.*

(from the opinion of Justice Sandra Day O'Connor, concurring in the judgement)

Adherence to [this Court's own precedents] would require us to strike down the Pledge policy, which, in most respects, poses more serious difficulties than the prayer at issue in Lee [v. Weisman *(1992)*]. *A prayer at graduation is a one-time event, the graduating students are almost (if not already) adults, and their parents are usually present. By contrast, very young students, removed from the protection of their parents, are exposed to the Pledge each and every day…*

I conclude that, as a matter of our precedent, the Pledge policy is unconstitutional. I believe, however, that Lee *was wrongly decided.* Lee *depended on a notion of "coercion" that… has no basis in law or reason…*

(from the opinion of Justice Clarence Thomas, concurring in the judgement)

Elk Grove v. Newdow involved an issue the Supreme Court has otherwise tried very hard to avoid: the inclusion of "under God" in the Pledge of Allegiance, at least in terms of its mandatory recitation in classrooms across the nation every school day. The Court determined in *West Virginia v. Barnette* (1943) that students could not be required to stand and swear their fealty to the U.S. above all other gods, ideologies, or locations. In *Lee v. Weisman* (1992), however, the Court found state-sponsored prayer at graduation ceremonies – whether students actively participated or not – to be a violation of the Establishment Clause. By inserting religious dogma, however briefly, into an important educational ritual, the State was effectively coercing students into choosing between silent acquiescence or the potential disruption and embarrassment of some form of overt protest.

Michael Newdow, an eccentric but sincere atheist, was convinced the daily conflation of patriotism with religious belief in his daughter's elementary school classroom was at least equally inappropriate. He filed suit on behalf of both himself and his daughter, claiming among other things that this was a blatant violation of the Establishment Clause and he didn't want his child subjected to it any longer.

General, brief references to the Almighty have been a part of innumerable American traditions since long before the First Amendment was an ink spot at the top of James Madison's parchment. It has thus been difficult at times for the Court to reconcile the proverbial "wall of separation" with a history demonstrating that the authors of the sentiment obviously didn't mean *in everything*. Unlike compromises over slavery or state vs. federal power, there's no evidence the Framers willingly kicked this constitutional can down the road for their scions to sort out. They simply saw no conflict between a reasonable degree of religious acknowledgement in public life while shielding personal faith from the machinery of government.

As the nation evolved and the concept of "personal belief system" expanded a bit beyond what could have been reasonably envisioned a few centuries ago, this particular balance has proven trickier than expected. It doesn't help that the religious majority hasn't always shown itself to be overly accommodating or sympathetic to anyone outside their treehouse. Self-identifying as a spiritual "other" has often resulted in personal, professional, or physical harm, making governmental choices about even "ceremonial" prayers or displays a tad more problematic than other types of traditions or observations.

The Ninth Circuit Court of Appeals agreed with Newdow and declared the use of the Pledge in public schools unconstitutional. Other federal courts, however, had ruled differently in similar cases, setting up the exact sort of confusion that often prompts the Supremes to take up a subject they might otherwise prefer to avoid. Once the details were officially before them, the majority found they had a very convenient out – Newdow was not

the custodial parent of his daughter. While sharing custody in practice, the girl's mother was the legal guardian and not thrilled with either the attention or the issue itself. Mom was a church-goer, as was the daughter, and neither wanted to take this particular stand.

Unable to establish "unwanted exposure" through his kid, Newdow insisted he nevertheless had standing based on a combination of factors:

- He sometimes attended class with his daughter and intended to continue to do so.
- He had considered teaching elementary school in the district.
- He sometimes attended school board meetings at which the Pledge was recited and intended to continue to do so.
- He paid child support to his daughter's mother, who in turn paid taxes in the district.

Despite the impressive audacity of his reasoning, Newdow's claims to standing did not impress the Court. Three were based entirely on voluntary actions on his part and the fourth was so indirect as to be unpersuasive by the usual standards of the Court. Had the mom shared Newdow's objections, she might have had a case. It doesn't mean she'd have won, but it would have put the Court in a much more awkward position. Instead, the Court refused to rule on the constitutional question because a majority was unpersuaded Newdow had standing to bring the complaint in the first place.

Technically, they may have been correct. Realistically, there were doubtless a number of relieved sighs. Maybe even cupcakes. Then again, a few justices seemed disappointed to have missed the chance of a good First Amendment kerfuffle.

Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas concurred with the result, but not the reasoning. Each submitted a separate opinion suggesting that they'd be more than happy to declare a little patriotic Jesus here and there as perfectly acceptable, because the whole "wall of separation" thing has been overblown from the beginning and people-need-to-just-get-over-it-God-rules-secularism-drools. (With concurrences like that, who needs dissents?)

Nearly two decades later, the "Pledge" issue remains foggy and unlikely to reach the Supreme Court again anytime soon. It is thus safe to keep stumbling and mumbling your way through the daily Pledge of Uh, Legions before the roughly 3-second "minute of silence." This mandated bit of generally unenthusiastic ceremony is constitutionally safe for now.

The question of standing still largely depends on either the mix of Establishment Clause violations combined with taxpayer status (as outlined in *Flast v. Cohen,* 1968) or a more general "unwanted exposure" (a term coined by Professor Carl H. Esbeck of the University of Missouri School of Law). In some cases, the Court will grant standing to plaintiffs who object to a perceived government "endorsement" of one faith over another (or of the idea of faith in general over a lack thereof), even if the presumed violation doesn't actually cost taxpayers anything. It's this "unwanted exposure" and perceived "endorsement" to which Newdow objected, but he wasn't impacted sufficiently to earn the right to complain, at least in the eyes of the Court. His daughter was "exposed" to the message but it wasn't "unwanted"; Newdow unwanted it but simply wasn't all that exposed.