

US Supreme Court overturns Pledge of Allegiance ruling on technical grounds

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On June 14, the US Supreme Court reversed an appellate court decision that had ruled that permitting elementary school children to recite the Pledge of Allegiance's affirmation that the US is a nation "under God" violated the principles of separation of church and state embodied in the First Amendment to the US Constitution.

The majority of justices declined to decide the issue of the Pledge's constitutionality. Instead, the justices decided the case on a dubious technicality, ruling that the adult plaintiff in the case had no right or "standing" to sue. The ruling nevertheless deals a blow to those who seriously defend the democratic principles enunciated in the Constitution's Bill of Rights.

The Pledge of Allegiance states: "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." The US Congress inserted the language about God in 1954 during the Cold War "to acknowledge the dependence of our people and our Government upon the moral directions of the Creator" and "to deny the atheistic and materialist concepts of communism."

The state of California, like most states, requires that public grade schools begin each school day with a recitation of the Pledge (although students may decline to recite it). Michael Newdow, an atheist, sued his elementary school daughter's school district to invalidate the Pledge as a violation of the Establishment Clause of the First Amendment to the US Constitution. That clause provides that "Congress shall make no law respecting an establishment of religion," a provision that was made fully applicable to the states and their school districts by the Fourteenth Amendment to the Constitution, enacted after the Civil War.

In 2002, the federal appeals court for the western United States (the Ninth Circuit) agreed with Newdow that the Pledge clearly endorses religion and belief in God. As the Ninth Circuit explained, the Pledge plainly compels impressionable children to watch and listen to state-employed teachers proclaim that there is a God, and that the United States is a nation under the authority of that God. In effect, it impels students to pledge allegiance to that God.

To support its ruling, the Ninth Circuit applied prior US Supreme Court cases that left no legal room for any other conclusion, such as *Lee v. Weissman*, decided in 1992. There the Supreme Court held that "nonsectarian" invocations and benedictions at public secondary school graduations violated the Establishment Clause, because high school students, even if they were not compelled to attend the graduation ceremony, could feel compelled by peer pressure to attend and stand as part of the group, and either join in the prayer or maintain a respectful silence out of a sense of compulsion.

As the Ninth Circuit pointed out, if anything, given the age of elementary school students and the daily repetition of the Pledge of Allegiance, its affirmation of religious belief is even more constitutionally objectionable than the graduation prayer invalidated in the *Lee* case.

The Ninth Circuit ruling emphasized that the state's motivation in 1954 was precisely to inculcate a belief in God. It cited the House Report on the 1954 change to the Pledge, which stated that "our Nation was founded on a fundamental belief in God" and that the phrase "under God" was inserted to "recognize the guidance of God in our national affairs."

The Ninth Circuit also ruled that Newdow had a sufficient stake in the education of his daughter

concerning religious matters to give him standing to pursue the lawsuit. That court said that the Pledge presents a message by the state endorsing not just religion generally, but a monotheistic religion organized “under God.” It “provides the message to Newdow’s young daughter not only that non-believers, or believers in other than Judeo-Christian religions, are outsiders, but more specifically that her *father’s* beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom.”

The court concluded that Newdow had a right “to be free from the government’s endorsing a particular view of religion and unconstitutionally indoctrinating his impressionable young daughter on a daily basis in that official view.”

The Ninth Circuit’s decision caused an uproar among Republican and Democratic politicians alike. Each tried to outdo the other in expressing outrage that an “activist” court would dare question a patriotic ceremony and uphold secularist principles that are fundamental to constitutional protections and democratic rights. Congress passed a resolution falsely asserting that the US republic was founded on religious belief, and affirming the text of the Pledge.

After the Ninth Circuit ruled, the mother of Newdow’s child obtained sole legal custody over her in a California state court and then attempted to intervene in Newdow’s Ninth Circuit case. The mother asserted that her daughter was a Christian who believes in God, and that she did not object to reciting the Pledge. She further claimed that her custodial status deprived Newdow of his standing to sue. The Ninth Circuit disagreed, stating that, even as sole legal custodian, the mother had no power to insist that her child be subjected to unconstitutional state action.

In reversing the Ninth Circuit’s decision, a five-justice majority of the Supreme Court ruled that it would not be “prudent” to find that Newdow had a sufficient interest to prosecute the case, because of a general reluctance on the part of federal courts to intervene in family law issues such as child custody, which are left to the states to determine.

In the decision, the majority purports to worry about the federal courts getting involved in a dispute between the two parents. But this rationale is clearly a pretext to avoid dealing with the constitutionality of the Pledge. No child custody issues were implicated whatsoever

under the Ninth Circuit ruling, only the father’s rights to object to unconstitutional conduct.

The five justices in the majority include the four considered to constitute the court’s moderate-to-liberal wing—Paul Stevens, Stephen Breyer, Ruth Ginsburg and David Souter. The fifth justice signing onto the majority decision is Anthony Kennedy, who often blocs with the Court’s right-wing faction.

This action by the four supposedly liberal justices is a craven evasion of an important constitutional matter. It is undoubtedly influenced both by the generally compromised and cowardly posture of American liberalism in the face of growing attacks on democratic rights, and specific political pressures connected to the upcoming presidential election. Those justices inclined to support Democratic candidate John Kerry over George W. Bush are eager to sidestep the substantive issue in the case for fear of the right-wing backlash that would inevitably have been orchestrated by the Republicans in the event of a ruling upholding the lower court.

Despite the generally reactionary and cowardly character of the majority ruling, it does not dispose of the underlying constitutional issue. As a result, there is little doubt that other challenges to the Pledge will be filed by parents opposed to government endorsement of religion, which will eventually end up back in the Supreme Court.

Avoidance of political controversy did not restrain three conservative justices—Sandra Day O’Connor and two out-and-out reactionaries, Chief Justice William Rehnquist and Associate Justice Clarence Thomas. Mocking the majority’s standing arguments as strained and novel, they dissented and addressed the merits of the constitutional issues.

All three wrote that the Pledge does not violate the Establishment Clause. Another reactionary justice, Antonin Scalia, undoubtedly would have joined them in that view, but he disqualified himself from the case because of public statements he made earlier criticizing the Ninth Circuit ruling.



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