On June 17, 1963, in School District v. Schempp, the U.S. Supreme Court handed down a highly controversial decision banning state-sponsored prayer and Bible reading from the public schools. These long-standing and popular practices were, the Court declared, "religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion." In the uproar engendered by this decision, little attention was paid to the retention of the Pledge of Allegiance in the daily program of American public schools. Nevertheless, by the time School District v. Schempp was decided, the Pledge had acquired a religious element of its own: the words "under God," inserted by Congress in 1954.

For decades after this phrase was added to the Pledge, it was widely considered to be too generic to advance any religious view, and the Court mentioned it in dicta as an example of a religious ref-
ference that does not rise to the level of an Establishment Clause violation.6 In earlier generations, similar claims of religious neutrality and minimalism had been made on behalf of the King James Bible; and, just as that perspective has changed over time,8 questions have begun to arise about whether an affirmation of monotheism is consistent with governmental neutrality toward religion. This matter was taken to court in 2000 by atheist attorney Michael Newdow, who alleged that the daily recitation of “under God” in the public schools constitutes an impermissible advancement of religion.9

This Article uses Newdow’s lawsuit as a springboard for a historical consideration of religious affirmations in American public schools, analyzing the evolution of thought on this issue from the early nineteenth century to the present. Parts I and II summarize the relevant arguments presented by both sides in Newdow v. Congress of the United States10 (later Elk Grove Unified School District v. Newdow)11 with respect to two issues: whether the phrase “under God” conveys or promotes religious belief; and, if it does, whether there is sufficient justification to make its inclusion in the Pledge permissible. Parts III through VI place these arguments in a historical context, using a series of case studies to illustrate how the underlying concepts have changed—and not changed—over time. Based on this analysis, Parts VII and VIII contend that the phrase “under God” is no more nonreligious or nonsectarian than were Bible readings and the Lord’s Prayer. It appears to be so only because the existence of God is accepted by the vast majority of Americans, just as Protestant texts that are clearly sectarian by today’s standards were considered normative in earlier generations, when most Americans viewed them not as statements of con-

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5 U.S. CONST. amend. I.
6 See, e.g., County of Allegheny v. ACLU, 492 U.S. 573, 595 n.46 (1989) (Blackmun, J., writing on his own behalf in Part III.B of the majority opinion) (discussing the genericness of legislative prayer); id. at 602-03 (majority opinion) (mentioning the Pledge as an example of a non-endorsement of a particular religion); Lynch v. Donnelly, 465 U.S. 668, 676 (1983) (giving the Pledge and the national motto, “In God We Trust,” as positive examples of government use of religious references).
7 See DELFATTORE, supra note 3, at 12-66, 82-105 (discussing violent disagreements over the use of the King James Bible in public schools in the nineteenth century and contrasting this with “the widespread belief that state-sponsored school prayer had been trouble-free for some 170 years”).
8 See generally DELFATTORE, supra note 3, at 52-105 (discussing shifting tactics and perspectives in the debate over the Bible in public schools).
11 Newdow, 542 U.S. 1.
tested theological tenets but as simple acknowledgements of reality.\textsuperscript{12} Thus, as this Article will suggest, the debate over religious affirmations in public schools is not so much a straight line progressing from Point A to Point B as it is a moving stream that changes even as it remains the same, and remains the same even as it changes.

I. OVERVIEW

Representing himself before the U.S. Supreme Court, Michael Newdow opened his oral argument with the following statement:

Mr. Chief Justice, and may it please the Court:

Every school morning in the Elk Grove Unified School District’s public schools, government agents, teachers, funded with tax dollars, have their students stand up, including my daughter, face the flag of the United States of America, place their hands over their hearts, and affirm that ours is a nation under some particular religious entity, the appreciation of which is not accepted by numerous people, such as myself. We cannot in good conscience accept the idea that there exists a deity.

I am an atheist. I don’t believe in God. And every school morning my child is asked to stand up, face that flag, put her hand over her heart, and say that her father is wrong.\textsuperscript{13}

Newdow’s opening statement goes to the heart of his argument: in the context of the Pledge, “under God” is nothing less than a declaration of religious faith that the government professes (which is bad) and urges schoolchildren to affirm (which is worse).

The Supreme Court declined to decide Newdow’s challenge on its merits, electing instead to reverse a lower court ruling in his favor on the ground that, as his daughter’s noncustodial parent, he lacked standing to sue.\textsuperscript{14} This action was hardly unique in the history of jurisprudence on religion in public schools. In 1952, the Court dismissed a challenge to a state Bible-reading statute because the plaintiff student had graduated,\textsuperscript{15} thus postponing a substantive decision on that question until \textit{School District v. Schempp}\textsuperscript{16} eleven years later. Similarly, the Court dismissed \textit{Bender v. Williamsport Area School District}, which dealt with secondary-school religious clubs, because the appeal had been filed by an individual member of the school board and not by the board itself.\textsuperscript{17} Four years later, the Court upheld the constitu-
tionality of student-initiated religious clubs in *Board of Education v. Mergens ex rel. Mergens.*

Like those earlier dismissals, the decision in *Newdow* represents not a closed book but a bookmark, and the question is not whether the Court will decide such a case but what it will decide. Some would claim that the inevitability of further action with respect to governmental promotion of monotheism is based on the novelty of recent challenges to this long-accepted practice, but this is not the case. The real power of this conflict lies in the fact that it is anything but new; the premises underlying it have been part of the discourse on public education since its inception.

This Article begins with an analysis of *Newdow* that identifies four questions to be subjected to historical comparison:

- In determining whether a government action impermissibly advances religion, to what extent does it matter how many Americans share the relevant religious belief or how many generations of Americans have shared it?
- To what extent does it matter how generic the religious content of the challenged speech is or whether it takes the form of prayer?
- Do policies permitting dissenters to opt out of government-led religious expressions adequately safeguard their religious and civil rights?
- May expressions of religious belief by the government be justified on the ground that the American concept of liberty is based on God-given individual rights that must be acknowledged as such in order to ensure against infringement?

Following the discussion of *Newdow* is a brief overview of disputes involving religious expression in the public schools since the early nineteenth century. As this material demonstrates, the religious beliefs...

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19 See generally DELFATTORE, supra note 3 (refuting claims of the novelty of the issue with historical examples of similar challenges).
advanced by the government have become significantly broader with the passage of time, and public schools that once promoted Protestantism as the American religious norm now limit themselves to a generic “under God.” Nevertheless, the assertion that there is a meaningful difference between endorsing Protestantism and endorsing monotheism lies in subjective perception, not in any principled distinction between the two. In both instances, a religious view shared by the vast majority of Americans is presented by the government as fact and as an element of the national identity.21 And in both instances, this presentation of religion is viewed by its adherents as minimal and by its opponents as divisive.22 The reasons are clear: by their nature, public-school religious practices are based on beliefs that are held in common by the majority—hence the sense among adherents that little if any real doctrinal content is involved.

21 See discussion infra Parts III–VI. For a general discussion of various religious groups in public schools, see ALLEY, supra note 20; BEZANSON, supra note 20; DONALD E. BOLES, THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS (1961); DELFATTORE, supra note 3; WILLIAM KAILER DUNN, WHAT HAPPENED TO RELIGIOUS EDUCATION? THE DECLINE OF RELIGIOUS TEACHING IN THE PUBLIC ELEMENTARY SCHOOL 1776–1861 (1958); FENWICK, supra note 20; W.S. FLEMING, GOD IN OUR PUBLIC SCHOOLS (1942); FRASER, supra note 20; GREENAWALT, supra note 20; ALVIN W. JOHNSON & FRANK H. YOST, SEPARATION OF CHURCH AND STATE IN THE UNITED STATES (1948); KAESTLE, PILLARS, supra note 20; LAUBACH, supra note 20; NORD, supra note 20; and RAVITCH, supra note 20. See also DELFATTORE, supra note 3, at 286–88 (discussing attempts to formulate broadly acceptable statements of law on religious expression in public schools).

22 See People ex rel. Vollmar v. Stanley, 255 P. 610 (Colo. 1927) (holding that reading the Bible without comment was not sectarian), overruled by Conrad v. City & County of Denver, 656 P.2d 669 (Colo. 1989) (en banc), modified on rehearing en banc, 724 P.2d 1309 (Colo. 1986); People ex rel. Ring v. Bd. of Educ., 92 N.E. 251 (Ill. 1910) (holding that reading the Bible constituted worship and was prohibited); Pfeiffer v. Bd. of Educ., 77 N.W. 250 (Mich. 1898) (holding that reading Bible excerpts did not violate the state constitution); State ex rel. Weiss v. Dist. Bd. of Sch.-Dist. No. 8, 44 N.W. 967 (Wis. 1890) (holding that Bible reading was sectarian); DELFATTORE, supra note 3, at 17–18, 33–35, 44–45, 46–49 (discussing nineteenth-century conflicts between Protestants and Catholics in New York City, Philadelphia, Maine, and Boston); id. at 56–61 (discussing Board of Education v. Minor, 23 Ohio St. 211 (1872)); id. at 69–71 (discussing the 1950s dispute over the allegedly nonsectarian prayer endorsed by the New York Board of Regents); id. at 84–85 (addressing the claim that the Bible is religiously inclusive even with respect to atheists); id. at 86–88 (introducing the dispute over Bible reading in School District v. Schempp, 374 U.S. 203 (1963)); id. at 106–26 (outlining a 1964 controversy over attempts to amend the Constitution to permit majoritarian school prayer); id. at 201–05 (listing the primary points of contention regarding student-led religious meetings as permitted by the Equal Access Act of 1984, 20 U.S.C. §§ 4071–74 (2000)); id. at 286–88 (summarizing attempts to formulate broadly acceptable statements of law on religious expression in public schools); id. at 289–92 (discussing 1990s proposals to amend the Constitution to restore government-led school prayer); id. at 299–314 (discussing attempts to post displays in schools bearing the Ten Commandments, “In God We Trust,” “God Bless America,” and the like following the Columbine shootings and the terrorist attacks of September 11, 2001).

23 See DELFATTORE, supra note 3 passim.
To those outsiders, the doctrinal significance of the majority’s religious view speaks loud and clear. Accordingly, the question is not whether the government may promote universally accepted religious beliefs, as there are none. Rather, the question is and always has been whether the majority has the right to use the public schools to promote its conviction that its religious beliefs, whatever those may be at a given time, represent objective truth.

Although the Supreme Court did not decide this question in *Newdow*, Chief Justice William Rehnquist, Justice Sandra Day O’Connor, and Justice Clarence Thomas submitted concurring opinions defending the daily recitation of the Pledge in public schools. Their opinions echo the reasoning once used to justify the inclusion of Bible verses and the Lord’s Prayer in the official public-school program, particularly with respect to the premise that the government need not take seriously those beliefs that cling to the outer edges of religious diversity in America. In the nineteenth century, when differences among Protestant denominations loomed large in the public consciousness, pan-Protestantism represented the full range of religious belief generally accepted as “American.” Today, a similar claim is made for monotheism. This Article will argue that, as a matter of principle and logic, there is no more justification for one assertion than for the other. Just as reading the King James Bible promotes Protestant belief over any other, so reciting “under God” prefers monotheistic faith to atheism, agnosticism, and the various forms of polytheism and nontheism. All that differs is the level of specificity; the underlying issue of government support for one belief system over all others remains constant.

The gradual expansion of the range of beliefs encompassed by religious affirmations in public schools has led to one significant difference between *Newdow* and earlier controversies that it otherwise resembles. In the past, whenever the increasing religious diversity of the population has generated significant dissatisfaction with existing public-school practices, such conflicts have been resolved by reaching out to include a wider set of religious beliefs—hence the evolution from specific Protestant dogmas to pan-Protestantism to Judeo-

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24 See supra note 21.
25 See discussion infra Parts III–VI (demonstrating that America does not have universally held religious beliefs).
26 See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 18 (2004) (Rehnquist, C.J., concurring); id. at 33 (O’Connor, J., concurring); id. at 45 (Thomas, J., concurring).
27 See discussion infra Parts III–VI.
28 See discussion infra Part III.
29 See discussion infra Parts III–VIII.
30 See discussion infra Part VIII.
31 See infra Parts V–VI for a discussion of previous cases.
Christianity or generic monotheism.\textsuperscript{32} By satisfying enough people to take the steam out of the protest movement, such accommodations have made it possible to sidestep the underlying question of whether the majority religion should be promoted in the schools at all.\textsuperscript{33} But in challenges to the government's endorsement of generic monotheism, such as \textit{Newdow}, that approach is no longer viable because such expressions as "under God," "In God We Trust," and "God Bless America" are as generic as religious statements can be.\textsuperscript{34} The option of backing off to a broader definition of \textit{religion} no longer exists; there is nowhere left to go short of pure absurdity. The arguments raised by Americans outside the monotheistic tradition and by monotheists who support their claim to equality cannot be resolved by broadening the definition of \textit{religion}, as has been done in the past.\textsuperscript{35} If the public schools promote belief in a single God, it will have to be with full acknowledgement that the government is favoring one religious belief over all others just as it would be if the schools were continuing to endorse Protestantism.\textsuperscript{36}

\section*{II. \textit{Newdow}}

The complaint Michael Newdow filed in federal district court claimed that the 1954 federal legislation adding "under God" to the Pledge of Allegiance is unconstitutional and that the current version of the Pledge does not belong in the official public-school program.\textsuperscript{37} When the district court dismissed his complaint, Newdow took his case to the U.S. Court of Appeals for the Ninth Circuit,\textsuperscript{38} which found in his favor on both points.\textsuperscript{39} The court later amended its decision to apply only to the recitation of the Pledge in public schools.\textsuperscript{40} The Supreme Court ruled that Newdow had no standing to sue,\textsuperscript{41} but the constitutionality of reciting the Pledge in public schools was addressed in the oral argument and in concurring opinions by Chief

\begin{footnotesize}
\begin{itemize}
\item See infra Parts III-VIII for further discussion. See \textit{generally} DELFATTORE, \textit{supra} note 3 \textit{passim} (discussing the evolution of religious practices in public schools).
\item See \textit{generally} DELFATTORE, \textit{supra} note 3 \textit{passim} (providing an overview of the historical tension between promotion of majoritarian beliefs and adherence to neutrality).
\item See infra Part VIII for further discussion.
\item See infra Part VIII for further discussion.
\item See infra Part VIII for further discussion.
\item Original Complaint, \textit{supra} note 9, at 4.
\item \textit{Id.} at 612 (holding that both the 1954 Act adding "under God" to the Pledge of Allegiance and the Elk Grove School District's policy of having teachers lead students in the Pledge with those words included violate the Establishment Clause of the Constitution).
\item \textit{Newdow}, 328 F.3d at 468 (denying rehearing en banc and amending the panel decision).
\item \textit{Newdow}, 542 U.S. at 5.
\end{itemize}
\end{footnotesize}
Justice Rehnquist and by Justices O'Connor and Thomas. As indicated earlier in this Article, the arguments on both sides of the case focused on two questions: whether the Pledge promotes religion; and, if it does, whether such promotion violates the Establishment Clause.

A. Position 1: "Under God" Is Not an Affirmation of Religious Belief

All three of the Justices who wrote concurring opinions denied that "under God" embodies any doctrine or requires any act on the part of the speaker that rises to the level of "religion" for Establishment Clause purposes. To be sure, Justice Thomas acknowledged that when public schools encourage children to recite the Pledge, they thereby violate Supreme Court precedents by soliciting an affirmation of the speaker's belief in God. He went on to suggest, however, that those earlier cases were wrongly decided. Under a correct interpretation of the Constitution, he asserted, the Pledge would be acceptable for use in the schools because it is not religious in any sense that has Establishment Clause implications. This view was shared by Chief Justice Rehnquist:

I do not believe that the phrase "under God" in the Pledge converts its recital into a "religious exercise" of the sort described in Lee. Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase "under God" is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact [that,] "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a reli-

42 See id. at 18 (Rehnquist, C.J., concurring); id. at 33 (O'Connor, J., concurring); id. at 45 (Thomas, J., concurring).


44 See Newdow, 542 U.S. at 30 (Rehnquist, C.J., concurring) ("[O]ur national culture allows public recognition of our Nation's religious history and character."); id. at 37 (O'Connor, J., concurring) ("[G]overnment can . . . acknowledge or refer to the divine without offending the Constitution."); id. at 46 (Thomas, J., concurring) ("[T]he Pledge policy is not implicated by any sensible incorporation of the Establishment Clause, which would probably cover little more than the Free Exercise Clause.").

45 Id. at 47.

46 Id. at 47-49.
igious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.

... The recital, in a patriotic ceremony pledging allegiance to the flag and to the Nation, of the descriptive phrase "under God" cannot possibly lead to the establishment of a religion, or anything like it.

The Chief Justice's characterization of "under God" as "descriptive" implies that the Pledge presents the existence of a single God as fact. Moreover, his references to "any religion," "any particular God, faith, or church," and "a religion" suggest that even if the First Amendment permits endorsement of religion in general over nonreligion, it nonetheless prohibits preference for any specific denominational faith over any other. It follows from these two assertions that affirming the existence of a single God does not prefer any religion over any other, which can be true only if the concept of "religion" is limited to monotheism.

The premise implied by the Chief Justice is stated openly by Justice O'Connor. "Even if taken literally," she wrote, "the phrase is merely descriptive; it purports only to identify the United States as a Nation subject to divine authority. That cannot be seen as a serious invocation of God or as an expression of individual submission to divine authority." Justice O'Connor thus suggests, as does the Chief Justice, that the government may present the existence of a single God and his relationship to this nation as matters of objective reality rather than as theological tenets accepted by most Americans but challenged by some. Unlike Justice Rehnquist, however, Justice O'Connor explicitly acknowledges that "under God" falls outside the scope of some religions:

[The Pledge] does not refer to a nation "under Jesus" or "under Vishnu," but instead acknowledges religion in a general way: a simple reference to a generic "God." Of course, some religions—Buddhism, for instance—are not based upon a belief in a separate Supreme Being. But one would be hard pressed to imagine a brief solemnizing reference to religion that would adequately encompass every religious belief expressed by any citizen of this Nation. The phrase "under God," conceived and added at a time when our national religious diversity was neither as robust nor as well recognized as it is now, represents a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system.

47 Id. at 31–32 (Rehnquist, C.J., concurring) (footnote omitted) (citing Lee v. Weisman, 505 U.S. 577 (1992), from which the Chief Justice dissented, where the Court struck down a policy that permitted school officials to invite clergy to lead prayers at graduation ceremonies).
48 Id. at 30–31 (emphasis added).
49 Id. at 40 (O'Connor, J., concurring).
50 Id. at 42.
Justice O'Connor thus postulates that the benefits the majority derives from the government's acknowledgment of monotheism and from its employment of the "solemnizing power" of religious language justify their use even as she candidly recognizes that the religious beliefs of some citizens are incompatible with a profession of faith in one God. Although she calls these minority belief systems "religion," she relegates them to a category that falls outside Establishment Clause protection. Otherwise, it would be impossible to assert that no religion is being disfavored by the government's use of a phrase that posits the existence of a single God and thus denies the existence of multiple Gods and the validity of nontheistic beliefs.

Like the O'Connor concurrence, a question posed by Justice Stephen Breyer to Michael Newdow during the oral argument suggests an underlying distinction between monotheism as "real" religion that must be defined on its own terms and other belief systems that may reasonably be asked to adapt themselves, or at least to resign themselves, to the majority's preferences. Justice Breyer's inquiry, which grapples with the conflict between "under God" and atheism rather than with its implications for competing religious belief systems, goes beyond Justice O'Connor's assertion that the government may posit the existence of God even though some Americans disagree. The possibility Justice Breyer's question raises is that even atheists could bring themselves inside the circle of "under God" by construing the word "God" to represent

a set of beliefs, sincere beliefs, which in any ordinary person's life fills the same place as a belief in God fills in the life of an orthodox religionist. So [the Pledge is] reaching out to be inclusive, maybe to include you, . . . because many people who are not religious nonetheless have a set of beliefs which occupy the same place that religious beliefs occupy in the mind . . . of a religious mind in men and women. So do you think God is so generic in this context that it could be that inclusive? Newdow replied in the negative:

I don't think that I can include under God to mean no God, which is exactly what I think. I deny the existence of God, and for someone to tell me that under God should mean some broad thing that even encompasses my religious beliefs sounds a little, you know, it seems like the Government is imposing what it wants me to think of in terms of religion, which it may not do.

Later, he accused the government of trying to persuade him to adopt its own view that the government's declaration of faith in a deity is a relatively inconsequential matter, whereas to him it means that "the

51 Transcript of Oral Argument, supra note 13, at 34–36.
52 Id. at 34–35.
53 Id. at 36.
Government comes in here and says, no, Newdow, your religious belief system is wrong and the mother's is right and anyone else who believes in God is right.\footnote{Id. at 41 (referring to his child's mother, who is a Christian).}

The fundamentally different interpretations of the phrase "under God" expressed by Justice Breyer and Newdow echo nineteenth-century disputes between Protestants and Catholics discussed later in this Article.\footnote{See infra Parts III-IV.} In the present as in the past, adherents of any belief system that is accepted by almost the entire population have a strong tendency to perceive its most general premises as universally applicable and doctrinally minimal.\footnote{See selections from DELFATTORE, supra note 3, cited supra note 22.} To outsiders who embrace an entirely different set of assumptions, however, the majority belief stands out clearly as a distinct formulation that is treated as normative only because most people believe in it, not because it has been shown to be objectively true.\footnote{See selections from DELFATTORE, supra note 3, cited supra note 22; see also GREENAWALT, supra note 20, at 64-68 (discussing the teaching of religious ideas in public schools as fact because of the majority's acceptance of them).}

In order to appreciate the implications of Justice Breyer's inquiry about defining "under God" to encompass nontheological beliefs, it might be useful to pose a hypothesis that would reverse the roles of believers and nonbelievers. Let us suppose, for instance, that the government affirmed belief in a pantheistic oversoul defined by its adherents as including the full range of all possible belief and disbelief. Technically, Judaism, Christianity, Islam, and other monotheistic faiths could find a place within such a formulation, as could any other theory about the "big questions" such as creation, morality, the nature of human life, and the existence of an afterlife. In this hypothetical example, all that Jews, Christians, or Muslims would have to do in order to accommodate themselves to the government's preferred manner of expression would be to affirm their own faith in terms of a philosophical framework in which something whose existence they deny is defined as the ultimate source of truth. This is, in effect, what Justice Breyer proposed to Newdow: that he validate the majority's concept of God to the extent of adopting their belief that it embraces every possible approach to the "big questions," which would relegate his denial of God's existence to irrelevancy, or perhaps to paradox.

Like Justice Breyer's question and the hypothetical situation proposed above, the concurrences by Chief Justice Rehnquist and Justice O'Connor are based on the underlying assumption that the view not espoused by the government need not be treated as a clearly defined...
belief system in its own right, but may be regarded at least in part as a vacuum created by the absence of the government-endorsed belief.\textsuperscript{58} Thus, belief systems that fall outside the majority faith may reasonably be asked to adapt themselves to fit certain presuppositions because they have no meaningful boundaries of their own that are worthy of respect.\textsuperscript{59} Moreover, as a matter of history, Justice Breyer's suggestion that "under God" might be expanded to embrace atheists squarely contradicts the intent of the drafters of that phrase, who introduced it into the Pledge in the midst of the Communist scare of the 1950s precisely as a way of distinguishing the United States from the atheistic Soviet Union.\textsuperscript{60} The strongest supporters of "under God" would no doubt join Newdow in his emphatic denial that it can be extended to include atheists. It thus appears to follow that only people who are not strongly committed to either proposition and who regard the conflict about "under God" largely as a political problem that admits of a political solution could define it broadly enough to include non-believers as well as believers.

\textsuperscript{58} See DELFATORE, supra note 3, at 17-18, 33-35, 44-45, 46-49 (discussing disputes over the nineteenth-century assertion of Protestantism as the social and governmental norm in New York City, Philadelphia, Maine, and Boston); id. at 69-77 (addressing the assertion of monotheism as normative in the dispute leading to Engel v. Vitale, 370 U.S. 421 (1962)); id. at 86-94 (discussing the issue of Protestant primacy in School District v. Schempp, 374 U.S. 203 (1963)); id. at 98-101 (summarizing a Delaware lawsuit involving the standing of agnostics to sue in school-prayer cases); id. at 108 (referencing the Founders' belief in the primacy of Christianity); id. at 112-14 (defining the concepts of "religious toleration" and "religious equality"); id. at 117-18 (addressing claims that school-sponsored Protestantism is universally beneficial); id. at 121 (discussing challenges to the right of nonbelievers to direct the religious upbringing of their children); id. at 122-25 (discussing disputes over the contention that opponents of state-sponsored school prayer are not on God's side); id. at 140-43 (addressing the difficulty of composing a universally acceptable definition of "nondenominational" and its role in public worship); id. at 229-54 (demonstrating that school-sponsored majoritarian prayers and doctrinal Bible classes were viewed as normative decades after Schempp); id. at 258-65 (addressing the argument that the majority may require the minority to be present for religious observances); id. at 270-72 (demonstrating the model of toleration as applied to majoritarian prayers at school sporting events); id. at 294-95 (discussing a proposed school-prayer amendment to the Constitution); id. at 299-314 (discussing calls for prayer as "American" and normative following the Columbine school shootings and the terrorist attacks of September 11, 2001); GREENAWALT, supra note 20, at 64-68 (discussing the teaching of religious ideas in public schools as fact because of the majority's acceptance of them).

\textsuperscript{59} See sources cited supra note 58.

\textsuperscript{60} Representative Louis Rabaut made a direct connection between the Cold War and the changed Pledge language:

\textit{By the addition of the phrase "under God" to the Pledge, the consciousness of the American people will be more alerted to the true meaning of our country and its form of government. In this full awareness we will, I believe, be strengthened for the conflict now facing us and more determined to preserve our precious heritage.}

B. Position 2: "Under God" Is an Affirmation of Religious Belief, and That's Okay

The discussion thus far has focused on arguments suggesting that "under God" does not constitute an affirmation of religious belief by the government. During the oral argument, Solicitor General Theodore Olson readily acknowledged that it does but denied that such an affirmation violates the Establishment Clause. On the contrary, he asserted, the government's recognition of the existence and primacy of God is essential to the maintenance of fundamental American freedoms. His argument was based on the fact that at the time the United States became an independent nation, the prevailing systems of government in other parts of the world were based on the belief that the power of the ruler came from God. By contrast, the new nation adopted an emerging political philosophy that posited natural rights inherent in every individual. Citing the reference in the Declaration of Independence to men being "endowed by their Creator with certain unalienable Rights," Olson concluded that the government can and should proclaim its continuing obligation to limit its own power according to God's design:

The Establishment Clause does not prohibit civic and ceremonial acknowledgments of the indisputable historical fact of the religious heritage that caused the framers of our Constitution and the signers of the Declaration of Independence to say that they had the right to revolt and start a new country, because although the king was infallible, they believe that God gave them the right to declare their independence when the king has not been living up to the unalienable principles given to them by God.

The Solicitor General was not alone in seeing a connection between religious faith and the political philosophy on which this nation was founded. Some legal scholars have defended the phrase "under God" by asserting that the most effective guarantee against excessive or unjust use of government power is recognition by the government and by the people of the need to respect individual rights that are inalienable because—and only because—they are God-given. Under this theory, the power of God acts as a brake on the

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62 See id. at 23 (discussing the Declaration of Independence's signers' belief that the King was infallible).
63 See id. at 23 (explaining the right of "the framers of [the] Constitution and the signers of the Declaration of Independence" to revolt and start a new country when the King was not living up to their God-given power).
64 The Declaration of Independence para. 2 (U.S. 1776).
65 Transcript of Oral Argument, supra note 13, at 23.
66 See id. (noting that the framers' religious heritage caused their belief in the right to revolt); Berg, supra note 43, at 44 ("The phrase can be said to express the idea that our Nation's gov-
government, which must respect and acknowledge its limitations as coming from a power higher than itself (hence "under God"). This interpretation of "under God" dates back to congressional documents associated with the 1954 legislation that added that phrase to the Pledge, particularly this excerpt from the House of Representatives committee report:

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp.

In a recent article, Thomas Berg cites this passage in support of his contention "that our Nation's government is limited in status and must recognize inalienable rights that have a transcendent status because they come from God. The Establishment Clause may permit the state to recognize this religious rationale for a political assertion about rights and limited government." More broadly, he suggests, "The First Amendment, properly interpreted, permits the government to rely on religious rationales in adopting policies on matters of justice and the common good. ... [Neutrality] does not prohibit the government from relying on religious arguments in determining how to legislate on [nonreligious] matters."

This view is supported by Emily D. Newhouse, who suggests that the Pledge, far from asserting any religious belief, including monotheism, is instead "an acknowledgment of a more fundamental belief—that because individuals are endowed with certain inalienable rights by God, the authority of government with respect to such rights must necessarily be limited." In her view, the government cannot discriminate against citizens based on their religion (what she calls the "operational level"), but there is nothing to prevent it from presenting a religious justification for its political philosophy (what she calls the "justificatory level"). Like the authors of the Newdow concurrences, Berg and Newhouse appear to assume the actual existence

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67 See sources cited supra note 66.
69 Berg, supra note 43, at 44.
70 Id. at 64–65.
71 Newhouse, supra note 43, at 400.
72 Id. at 402.
of a single God. Accordingly, the fact that some people do not share this belief is addressed in terms of reasonable accommodation for the dissenters, not as a situation in which polytheistic, nontheistic, or atheistic beliefs may claim equality with monotheism with respect to influence over government decisions and pronouncements.

C. Position 3: "Under God" Is an Affirmation of Religious Belief, and That's Not Okay

The validity of atheism, polytheism, and nontheism as belief systems that cannot be accommodated by "under God" was affirmed by the Ninth Circuit Court of Appeals in a passage that was explicitly referenced and contradicted by Chief Justice Rehnquist and Justice O'Connor. The disputed passage points out that the Pledge is framed as a profession of loyalty to the nation as described therein. As such, the court found, it impermissibly co-opts schoolchildren into affirming that a single God does in fact exist, thus favoring a particular belief over all others. "In the context of the Pledge," the Ninth Circuit declared,

the statement that the United States is a nation “under God” is a profession of a religious belief, namely, a belief in monotheism. The recitation that ours is a nation “under God” is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase “one nation under God” in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism. A profession that we are a nation “under God” is identical, for Establishment Clause purposes, to a profession that we are a nation “under Jesus,” a nation “under Vishnu,” a nation “under Zeus,” or a nation “under no god,” because none of these professions can be neutral with respect to religion.

The Ninth Circuit's understanding of "under God" was reinforced by two amicus curiae briefs submitted by religious figures: one written by Peter Irons on behalf of nineteen scholars of religion and theology, and the other by Douglas Laycock on behalf of thirty-two members of the Protestant and Jewish clergy. Their support for

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76 See Newdow v. U.S. Cong., 328 F.3d 466, 487 (9th Cir. 2003) (“The . . . practice of teacher-led recitation of the Pledge aims to inculcate in students a respect for . . . the religious values [the Pledge] incorporates.”), rev'd sub nom. Newdow, 542 U.S. 1.
77 Brief of Religious Scholars, supra note 43.
78 Brief of Clergy, supra note 43.
Newdow’s position demonstrates that the argument regarding “under God” in the Pledge is not a battle between believers and nonbelievers, nor between adherents of monotheistic faiths and those who profess polytheistic and nontheistic beliefs. As Parts III through VI will show, the strongest opponents of government-sponsored religious speech have always included members of majority faiths—often clergy and scholars. Unlike those who wield religion as a political or social tool or seek to shape it into an element of group identity, they approach the meaning of each word seriously and precisely. To them, it borders on blasphemy to misappropriate the imagery, ideas, and emotional power of religion to further the secular purposes of the government or of the majority.

Among the questions addressed in these amicus briefs is whether the recitation of “under God” is noncoercive because no student has to say either those words or the Pledge itself. The most significant Supreme Court precedent is Lee v. Weisman, in which the Court struck down clergy-led graduation prayer on the ground that peer pressure and the desire to participate in a meaningful event constitute coercion even if a school does not force any student either to attend graduation or to join in the prayer. (A dissenting opinion maintains that only a direct threat of governmental force or penalties should be considered sufficient to violate someone’s religious freedom.) The applicability of Lee to Newdow is complicated by the fact that, whereas the disputed speech in Lee was undeniably a prayer, the Newdow concurrences define “under God” as something other than a religious statement. This is significant because if “under God” is not sufficiently religious to trigger the Establishment Clause, then even if public-school Pledge policies were found to be coercive no one’s reli-

78 See Brief of Religious Scholars, supra note 43, at 15, 18-19 (arguing that “the invocation of God’s name, in any setting, is a religious exercise and act”); Brief of Clergy, supra note 43, at 7 (“The operative words at issue in this case are: ‘I pledge allegiance to ... one Nation, under God.’ There is no statement about what many Americans now believe, or have believed through time; there is no statement about what the Founders believed.”). See generally DELFATTORE, supra note 3 passim (illustrating that different groups of religious believers vary in their approach to the issue of religion in public school throughout U.S. history).

79 See sources cited supra note 78.

80 See Brief of Religious Scholars, supra note 43, at 27-28 (discussing the likelihood that children who opt out of reciting the Pledge of Allegiance because they do not adhere to a monotheistic religious belief will be seen as outsiders by their peers); Brief of Clergy, supra note 43, at 15-20 (arguing that teacher-led recitation of the Pledge, though voluntary, nevertheless unconstitutionally burdens religious minorities with the responsibility of refusing to affirm the implied majoritarian religious proposition).


82 Id. at 642 (Scalia, J., dissenting).

gious rights would be implicated. As Justice O'Connor expressed it, "[a]ny coercion that persuades an onlooker to participate in an act of ceremonial deism [such as the Pledge] is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character." 84

In contrast with Justice O'Connor's view, the brief of the nineteen religious scholars asserts that "under God" does indeed affirm a specific religious belief and that including it in the official public-school program constitutes impermissible coercion:

[T]he addition by Congress of the words "under God" in the Pledge was not merely intended to "acknowledge" a dusty historical fact. Congress intended to enlist schoolchildren in "acknowledging" that the United States today is or should be a nation "under God," and to affirm their own belief in God.

... From a theological perspective, recitation of the Pledge including the words "under God" and, more specifically, the term "God" affirms a belief in a particular religious doctrine, that of monotheism. The brief further argues that "[t]he term 'God' in its singular, capitalized form[] is exclusively monotheistic in meaning. It excludes religions that are nontheistic or polytheistic in tradition and doctrine, as well as the philosophical positions of agnosticism and atheism." 85

Based on their conviction that "under God" favors monotheism over other religions, the religious scholars maintain that peer pressure is indeed sufficient to coerce unwilling students into endorsing a particular religious view:

Schoolchildren who do not adhere to the monotheism endorsed in the Pledge are impermissibly forced to choose between affirming religious beliefs they do not hold and foregoing participation in an official patriotic ritual. Those who adhere to their convictions by remaining silent or leaving the classroom during recitation risk being seen as "outsiders" by their peers and branded as unpatriotic. 86

The thirty-two members of the clergy who filed an amicus curiae brief shared the religious scholars' belief that excusing individual students from reciting either "under God" or the entire Pledge is not an acceptable solution. Their argument is based on the premise that opt-out policies do not adequately address the real problem: that "under God" represents promotion by the government of a particular

84 Id. at 44 (O'Connor, J., concurring).
86 Id. at 17.
87 Id. at 28.
religious view even if no one is compelled to participate. Their brief maintains that

[t]he lack of any article or modifier necessarily affirms that there is one and only one God, that there is no other possible meaning or referent in the category mentioned. And if there is only one God, then worshipers of other alleged gods are mistaken. They are worshiping false gods; the God of the Pledge is the one true God.

While acknowledging that the identity of this one true God may be interpreted differently by different people, the amici suggest that the most plausible interpretation is one that takes into account the heavily Christian population in this country from the time of its foundation to the present. They note that,

[g]iven those [historical and demographic] facts, few students would understand the Pledge to mean that the United States is under the God of the Muslims, or of the Sikhs, or of the Zoroastrians. . . . Many students probably assume that at least this is also the God of the Jews, but this equivalence works only from a Christian perspective. From a Jewish perspective, the Triune God of Father, Son, and Holy Spirit is quite different from the Old Testament's more unified conception of God.

Defenders of "under God" in Newdow denied that the phrase conveys any meaningful religious content, but far from being reassured by this assertion, the amici were troubled by the secularization of religious language:

To take these claims [that the Pledge is not a religious expression] seriously is to say that the children are not expected to believe what they are asked to recite, and that the Pledge is not intended to mean what it plainly says. According to the school district and the United States, the students say the nation is "under God," but they do not actually mean that the nation is "under God." The Pledge is not a profession of belief, but a false or insincere recitation. It is an apparent statement of religious faith redirected—misappropriated—to secular and political purposes.

To this statement of the spiritual implications of the government's secularization of religious language and content, Douglas Laycock adds an analysis of its legal dangers in a law review article based in part on the clergy brief. Commenting upon Chief Justice Rehnquist's interpretation of "under God," he observes that, "[i]f the Court simply decrees the religious to be secular, instead of conceding that it is religious and then carefully defining a permitted subset of religious references or observances, then any religious statement can

89 Id. at 4–5.
90 Id. at 5–6.
91 Id. at 6.
92 Laycock, supra note 43.
be labeled secular in the same essentially arbitrary way. Similarly, reflecting on Justice O'Connor's concurrence, he suggests that the government should refrain from conflating religious affirmations with secular purposes:

This rationale is unconvincing both to serious nonbelievers and to serious believers. Justice O'Connor cannot solve the problem for nonbelievers, who will experience the government's "language of religious belief" as a singularly inappropriate and exclusionary means of achieving secular purposes. Nor can she solve the problem for thoughtful believers, who see their religious language and images explained away and appropriated for purposes deemed secular. The attempt to secularize religious language is a collective choice, overriding individual choices on both sides.

III. "THE PAST IS NEVER DEAD. IT'S NOT EVEN PAST."

Throughout the Newdow case, the notion that this country was founded on generic monotheism of the kind reflected in "under God" went almost unchallenged except for a few brief references to early Protestant-Catholic battles. Even Solicitor General Olson, who came close to the truth when he spoke of the Founders' belief in God-given individual rights, sidestepped the question of the specific religious tradition to which that political philosophy was widely attributed. In reality, when American public education as we now know it was beginning to take shape in the early nineteenth century, the vast majority of Americans identified not generic monotheism but doctrinal Protestantism as the source of belief in limited government and individual rights. Among other things, advocates of this view

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93 Id. at 240.
94 Id. at 235 (footnote omitted).
95 WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951).
96 See Transcript of Oral Argument, supra note 13, at 19 (statement of Solicitor Gen. Olson) (arguing that the phrase refers to the Framers' religious ideals but failing to specify which ideals).
97 See ALLEY, supra note 20, at 59–70 (noting that, upon the arrival of Catholic immigrants, "Protestants were shaken by a challenge to their belief in a national messianism that saw Roman Catholics as enemies of the faith"); RAY ALLEN BILLINGTON, THE PROTESTANT CRUSADE 1800–1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM 118–19 (Quadrangle Books 1964) (1938) (describing the Protestant sentiment that Catholics aimed to take over the United States and "establish Popery and despotism"); WM. OLAND BOURNE, HISTORY OF THE PUBLIC SCHOOL SOCIETY OF THE CITY OF NEW YORK WITH PORTRAITS OF THE PRESIDENTS OF THE SOCIETY 301–02 (New York, Wm. Wood & Co. 1870) (statement of Bishop Hughes) ("[Methodist 'priest'] John Wesley held and wrote that no government ought to grant toleration to Catholics; because... they held it lawful to murder heretics."); MICHAEL FELDBERG, THE PHILADELPHIA RiOTS OF 1844: A STUDY OF ETHNIC CONFLICT 59–60 (1975) ("[M]ost often political nativists attacked Catholic priests for their politics and not their theology."); FLEMING, supra note 21, at 36–43 (discussing how "wherever the school went, the Bible went, essential in public education"); KAESTLE, PILLARS, supra note 20, at 76 (discussing the belief among school leaders that...
cited the congregational decision making that is characteristic of Protestantism, as contrasted with the hierarchical authoritarianism of the Catholic Church. They also noted the Protestants' respect for direct contact between the individual soul and God independent of priestly intervention.

As this Part will show, there was a great deal of fear that America's democratic values would be compromised if Roman Catholicism were allowed to flourish here as it had in the repressive divine-right monarchies of Europe. And, it need hardly be mentioned, little thought was given to non-Christian religions other than with respect to controlling them or converting their members. As a result, the religious values taught in the early public schools were unequivocally those of Protestantism, and the justifications for this practice were the same as the reasons offered in Newdow for government endorsement of monotheism: that it reflects simple truth, that it encompasses the beliefs of the vast majority of the population, and that it constitutes the source and safeguard of individual liberty. Accordingly, debates

the three ideals of "republicanism, Protestantism, and capitalism . . . were intertwined and mutually supporting"); RAVITCH, supra note 20, at 6–9 (discussing Puritan-influenced laws passed in 1642 and 1647 requiring all children to become literate); see also Debate on the Claim of the Catholics to a Portion of the Common School Fund, FREEMAN'S J. (Cooperstown, N.Y.), 1840, Magazine, at 8–57 [hereinafter Catholic Debate] (debating the Catholics' request for their own portion of the Public School Fund in light of Protestantism being the norm in the public schools).

88 See BILLINGTON, supra note 97, at 69–70 (noting a Congregationalist minister who equated Catholicism with despotism); BOURNE, supra note 97, at 264–65, 272–73 (statements of Rev. Dr. Bond and Rev. John Knox) (contrasting Protestant and Catholic values); DELFATTORE, supra note 3, at 22 (citing Billington as an example of Protestant sentiment against the Catholic Church's structure); DUNN, supra note 21, at 245–55 (noting that the Catholic Church had to maintain both "the faith in her people" and a stand "against bigotry until the older American group got over their resentment and fears"); FELDBERG, supra note 97, at 78 ("[T]he Native American riots arose out of the incompatibilities between the Irish Catholic and native Protestant systems of moral behavior and religious training . . .").

89 See BOURNE, supra note 97, at 350–496 (recounting the debate between Catholics and Protestants over both political and religious theoretical differences).

90 See infra notes 151–54 and accompanying text.

91 See DELFATTORE, supra note 3, at 15, 29–31 (discussing the fear of giving equal weight to minority religions with regard to school instruction and funding); see also REPORT OF THE SELECT COMMITTEE OF THE BOARD OF EDUCATION, TO WHICH WAS REFERRED A COMMUNICATION FROM THE TRUSTEES OF THE FOURTH WARD, IN RELATION TO THE SECTARIAN CHARACTER OF CERTAIN BOOKS IN USE IN THE SCHOOLS OF THAT WARD 5–11 (New York, Levi D. Slamm 1843) [hereinafter REPORT OF THE SELECT COMMITTEE] (emphasizing the complaints of non-Christians concerning the choice of books used in some schools).

92 Compare BOURNE, supra note 97, at 328 (statement of Bishop Hughes) (demonstrating that Protestant values dominated the early public school system), DELFATTORE, supra note 3, at 43–46, 54–55, 58–60, 70 (spelling out the historical justifications for teaching Protestant values in schools), FELDBERG, supra note 97, at 23, 25, 49 (discussing the Catholic founding of parochial schools in Philadelphia in response to "the Protestant nature of the public schools"), and RAVITCH, supra note 20, at 6–9 (recounting the Protestant origins of New York schools), with Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 51 (Rehnquist, C.J., concurring) ("The phrase 'under God' is in no sense a prayer, nor an endorsement of any religion, but a simple recogni-
about public funding of religious teachings in the early public schools focused not on whether there is a God—which was generally taken for granted as a nondebatable element of reality—but on what the schools should teach about such specific matters as predestination and the proper form of baptism. Only later, as the population grew more diverse, did the public schools begin the long journey toward generic monotheism by backing away from the doctrines of specific denominations and limiting themselves to generic Protestant teachings and practices as a way of providing widely acceptable religious education.

An example of this movement toward pan-Protestantism occurred in the early 1820s when the publicly funded schools of New York City experienced one of the first of the upheavals that have never ceased to enliven them. At that time, it was common not only for public schools to teach religion, but also for the city to allocate state and local education funds to denominational church schools, almost all of which were Protestant. In this instance, the Bethel Baptist Church...
in New York had, or was accused of having, misappropriated public funds intended to support its school.107 Following a heated dispute, the Common Council of New York declared that no more funds would be granted to denominational schools except in a few special cases.108 Instead, the bulk of the school funds was allocated to the Public School Society (originally the Free School Society), a private organization whose schools were considered religiously neutral because their daily program included no denominational instruction but only the Protestant version of the Lord’s Prayer, readings from the King James Bible, and Protestant hymns.109 Not surprisingly, the denial of funds to schools that provided doctrinally robust instruction and the preference shown to practices that, by the standards of the time, appeared to be watered-down and generic triggered angry protests that meaningful religion was being excluded from the schools.110

As the middle of the nineteenth century approached, a different kind of complaint about the schools’ promotion of pan-Protestantism took center stage, particularly in New York, Philadelphia, Baltimore, and other cities along the east coast where Irish Catholic immigrants were arriving in large numbers.111 Coming from outside the circle of Protestantism that represented the world view of most native-born Americans of the time, these new residents brought a different perspective to bear on the question of nonsectarian worship.112 Protestantism as a whole was as sectarian to them as, in Protestant eyes, any religious charity schools”); RAVITCH, supra note 20, at 9 (discussing the origins of New York’s public schools in a Protestant organization).

107 See RAVITCH, supra note 20, at 20–21 (providing an account of the troubles encountered by the Bethel Baptist Church when it opened a school for poor children of all faiths with public funding).

108 See id. (noting that the dispute resulted in an exclusion of religious societies from public funding).

109 See id. (explaining the design of the Public School Society); see also BOURNE, supra note 97, at 473 (statement of Bishop Hughes) (criticizing the Public School Society).

110 See DELFAITTORE, supra note 3, at 14–15 (discussing the controversy over attempts “to minimize divisiveness in education”); FRASER, supra note 20, at 56–57 (noting that the “final compromise” over religious teaching in public school “pleased no one”); KAESTLE, PILLARS, supra note 20, at 145 (“An attack on Protestant influence in government and schooling was an attack on a coherent ideological perspective in which republicanism and universal education were nurtured by Protestant Christianity and all three were linked in a view of progress and morality.”).

111 See DELFAITTORE, supra note 3, at 18–22, 41–43; FRASER, supra note 20, at 49–66; RAVITCH, supra note 20, at 27–32.

112 See DELFAITTORE, supra note 3, at 18–22, 27–29, 41–43, 46–49 (discussing controversies and skirmishes that resulted from Protestant responses to Catholic outsiders). For further discussion regarding alternative perspectives on nonsectarian worship in the nineteenth century, see BILLINGTON, supra note 97; BOURNE, supra note 97; BRANN, supra note 105; FELDBERG, supra note 97; HASSARD, supra note 105; JOSEPH L. J. KIRLIN, CATHOLICITY IN PHILADELPHIA: FROM THE EARLIEST MISSIONARIES DOWN TO THE PRESENT TIME (1909); LANNIE, supra note 104; JOHN J. O’SHEA, THE TWO KENRICKS: MOST REV. FRANCIS PATRICK, ARCHBISHOP OF BALTIMORE, MOST REV. PETER RICHARD, ARCHBISHOP OF ST. LOUIS (1904).
individual denomination might be. Their firm and sometimes angry rejection of "nonsectarian" practices that the vast majority of the population saw as unifying and wholesome bewildered and often offended that majority.

The most heated conflicts centered on the King James Bible, which Protestants regarded as the cornerstone of individual liberty and as the embodiment of their rebellion against the Catholic Church's claim to be both the sole interpreter of God's word and the intermediary between God and humanity. The original dedication, still in use at that time, referred to the Pope as "that man of Sinne," and the original preface denied the validity of the Catholic Church and accused it of withholding the scriptures from all but those dedicated Catholics who "are, if not frozen in the dregs, yet soured with the leaven of their superstition." Naturally, the Catholic immigrants objected to their children being given that Bible and told that it is the word of God, while the Protestant majority resented this hostility toward the book that they saw as encapsulating and inspiring their whole way of life.

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113 See sources cited supra note 112.
114 See sources cited supra note 112.
115 See DELFA TTORE, supra note 3, at 21–28, 43–46 (explaining that the King James Bible has historically "functioned as the icon of Protestantism: the embodiment of the defiance that the early Protestants hurled into the teeth of the Catholic Church").
116 Dedication to the Most High and Mighty Prince James, by the Grace of God, King of Great Britain, France, and Ireland, Defender of the Faith, etc., THE HOLY BIBLE (King James).
117 Preface to THE HOLY BIBLE (King James) (1611 Translation).
118 See BILLINGTON, supra note 97, at 142–43 ("Propaganda writers tried to show that...the Bible was forbidden to Catholics by their clergy lest they discover in reading the true word of God that their religion was false."); BOLES, supra note 21, at 32–33 ("Protestants did not see the Bible as a sectarian book, and could not conceive of Bible reading in the public schools as sectarian instruction."); BOURNE, supra note 97, at 466–67 (statement of Bishop Hughes) ("The third and last complaint is, that our Catholic brethren cannot consent to have this Bible read in the hearing of their children." (quoting Protestant Hiram Ketchum)); BRANN, supra note 105, at 74–75 (discussing Protestant opposition to the Catholic objection to Bible reading in schools); DELFA TTORE, supra note 3, at 43–46 (quoting a Catholic claim that Protestant school officials had stated, "We are determined to protestantize the Catholic children; they shall read the Protestant Bible or be dismissed from the schools, and should we find them loafing around the wharves, we will clap them into jail" (internal quotations omitted)); DUNN, supra note 21, at 258–62 (asserting that "[r]eliance upon the Bible as the sole criterion of faith is one of the most fundamental dogmas of Protestantism"); FELDBERG, supra note 97, at 84–86 (noting the Protestant reaction to "reviled foreigners" reading "their own Bibles"); HASSARD, supra note 105, at 176–78, 280–81 (discussing the tension between Protestants and Catholics over the Bible in schools); KAESTLE, PIL LARS, supra note 20, at 171 (discussing the severe treatment of children who refused to read the Protestant Bible); KAESTLE, EVOLUTION, supra note 20, at 151–52 (noting that for Protestants "Bible reading per se played a large role in religious instruction"); KIRLIN, supra note 112, at 504–30 (discussing the controversy over differing versions of the Bible in the public schools of Philadelphia); LANNIE, supra note 104, at 64 (discussing the Protestant defense of the King James Version); O'SHEA, supra note 112, at 120–37 (discussing how the use of the Protestant Bible in schools "was felt as a grievous injustice by the shepherds of the Catholic fold"); RAVITCH, supra note 20, at 33–45 (discussing Catholic dissent to Protestant Bible read-
The concerns engendered by the Catholic newcomers were expressed at length by Hiram Ketchum, a trustee of the Public School Society, who in 1840 engaged in a public debate with Bishop John Hughes of New York. In reply to the Catholics' attack on the exclusive use of the King James translation of the Bible in New York public schools, he declared,

The institutions of liberty and the altars of piety have sprung up in the path of that translated Bible; and wherever that translated Bible has gone, popular institutions have risen. All those glorious principles, which here in this country are so conspicuous, have come from that Bible; and wherever that translated Bible has been kept from the hands of the laity, there has been darkness and despotism.

Similarly, a memorandum from a Methodist group spoke of the danger of allowing immigrant children to retain "unqualified submission, in all matters of conscience, to the Roman Catholic Church," and a Presbyterian minister added that the Catholic Church "continues to be almost uniformly the enemy of liberty."

Although concerns such as these were widespread, they were not universally shared, particularly in the parts of the city with the most heterogeneous populations. Not long after Ketchum gave that speech, the New York state legislature forced New York City to establish local school boards which, in some instances, disagreed with the prevailing opinion about religion in the public schools. This tension crystallized when a local board in a culturally diverse, poverty-stricken part of lower Manhattan made the then-outrageous suggestion that Christianity as a whole is a sectarian faith. The board pro-

119 See Speech of Hiram Ketchum, reprinted in BOURNE, supra note 97, at 259-49.
120 Id. at 246.
121 Letter from N. Bangs et al. to the Honorable the Common Council of the City of New York, reprinted in BOURNE, supra note 97, at 198, 200.
122 Catholic Debate, supra note 97, at 39.
123 See DELFATTORE, supra note 3, at 52-66 (explaining how "the resistance of school officials began to weaken as the non-Protestant population grew larger, more powerful, and better integrated into the American mainstream"); RAVITCH, supra note 20, at 241-42 (discussing the effects of cultural and racial segregation); KAESTLE, EVOLUTION, supra note 20, at 186-87 (discussing the effects of merging cultures in the wake of immigration).
124 See Act of Apr. 11, 1842, ch. 150, 1842 N.Y. Laws. 184 (creating a school board for the City of New York and mandating that public funding should not be provided to schools teaching religious tenets and doctrines). For further exploration of the creation of school boards amidst religious controversy, see BOURNE, supra note 97, at 576-99; BRANN, supra note 105, at 76-79; DELFATTORE, supra note 3, at 29-31; HASSARD, supra note 105, at 230-41; KAESTLE, EVOLUTION, supra note 20, at 159-84; LANNIE, supra note 104, at 59-63; RAVITCH, supra note 20, at 75; REPORT OF THE SELECT COMMITTEE, supra note 101.
125 See REPORT OF THE SELECT COMMITTEE, supra note 101, at 11 (discussing the view that Christianity may be sectarian).
posed to remove the King James Bible and other Christian works from the schools under its control, reasoning that the Jews’ denial of Christ’s divinity and the Universalists’ disbelief in heaven and hell made traditional Christian texts less than neutral toward religion.\textsuperscript{126} A select committee appointed by city officials soon quelled this insurrection, noting that the dissident board’s position would justify the Mahometans, the Chinese or Pagans, on their coming among us, to object to our whole system of public instruction, because it interfered with their monstrous, absurd and unintelligible dogmas and superstitions.

Even the Jews . . . cannot have the same privileges as those who embrace the Christian religion . . . . [Christianity] is in various ways incorporated and interwoven with our political systems, and recognized as the predominant religion of our State.\textsuperscript{127}

As this clash between the local school board and the select committee illustrates, opposition to traditional practices roused the ire of school officials and caused a backlash that led to increasingly stringent policies requiring all students to do such things as read the King James Bible and recite the Protestant Ten Commandments.\textsuperscript{128} Children who refused to engage in the prescribed religious activities were subject to discipline and, ultimately, expulsion.\textsuperscript{129} In some communities, their parents could then be prosecuted for their children’s truancy.\textsuperscript{130} A Catholic newspaper in Philadelphia carried the story of one little girl who

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\item \textsuperscript{126}See id. at 5–9 (discussing Jewish and other views outside of the generic Protestant teachings in public schools).
\item \textsuperscript{127}Id. at 7.
\item \textsuperscript{128}The Protestant second commandment, a prohibition against the worship of graven images, is missing from the Catholic version of the Decalogue. As a result, the commandments that follow are one number higher in the Catholic version than in the Protestant. For example, “Thou shalt not kill” is the Protestant sixth commandment but the Catholic fifth commandment. The Catholic version has ten rather than nine commandments because it divides the Protestant tenth commandment, an omnibus prohibition against coveting, into two commandments. See Jim Myers, \textit{Which Ten Commandments?}, http://www.biblicalheritage.org/Bible\%20Studies/10\%20Commandments.htm (last visited May 18, 2006).
\item \textsuperscript{129}See, e.g., Donahoe v. Richards, 38 Me. 379 (1854) (dismissing an action brought by a father on behalf of his daughter, who was expelled from school for refusing to read from the Protestant version of the Bible). For more examples of persecution of those who refused to acquiesce in the religious activities of the majority, see DELFATTORE, \textit{supra} note 3, at 65–66 (discussing cases challenging mandatory reading of the Protestant Bible); Feldberg, \textit{supra} note 97, at 130–31 (discussing the persecution of the Irish in retaliation for their challenge of the Protestant Bible); Kirlin, \textit{supra} note 112, at 311–30 (discussing the difference between the request of Catholics for their children’s exclusion from Protestant Bible-reading and the Protestant interpretation thereof).
\item \textsuperscript{130}See THOMAS H. O’CONNOR, FITZPATRICK’S BOSTON 1846–1866: JOHN BERNARD FITZPATRICK, THIRD BISHOP OF BOSTON 112–13 (1984) (discussing Catholic parents who reacted to Protestant Bible reading in schools by removing their children and the subsequent criminalization of truancy); see also 2 ROBERT H. LORD ET AL., HISTORY OF THE ARCHDIOCESE OF BOSTON
had to submit to corporal punishment, before her companions, with a spiritual lecture from the Teacher.... The child returned to her parents, exhibiting the marks of violence inflicted upon her.

....

It will not do to affirm, "that no one is compelled to read the Protestant Bible." This is sheer cant. The children are called up in class to read it, and disobedience is a punishable offence. The poor children know it, and fear to refuse. Hence, they are compelled to violate their conscience, lest they be subject to the punishment inflicted by the pious Teacher, for refusing to read the blessed word of God.131

In Boston, an eleven-year-old boy named Thomas Wall, who led a revolt against the mandatory recitation of the Protestant version of the Ten Commandments, was caned until he complied.132 According to the Boston Police Court decision in a lawsuit filed by his parents, teacher McLaurin F. Cooke "struck, beat and wounded Thomas with a stick for the space of thirty minutes, inflicting serious wounds,"133 although the beating was not continuous.134 The court concluded that the teacher had been justified because "[e]very blow given was for a continued resistance and a new offence.... The punishment ceased when the offence ceased."135

Far more deadly than classroom beatings was the violence that exploded in the streets as Catholics clashed with anti-immigrant Protestants, particularly members of the extremist Native American Party, which later evolved into the Know-Nothings.136 The most severe manifestation of this conflict began in Philadelphia in 1842, when the city school board passed a resolution requiring all children in public schools to read the King James Bible.137 The Catholic bishop of

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131 See Report of the Trial of McLaurin F. Cooke, Sub-Master of the Eliot School, of the City of Boston, for an Assault and Battery upon Thomas J. Wall, a Pupil of that School, with the Arguments of Counsel, and the Opinion of the Court Reported in Full 81 (Boston, A. M. Lawrence & Co. 1859).

132 Id.

133 Id.

134 See id. at 86.

135 Id.

136 See BILLINGTON, supra note 97, at 380–406 (detailing the rise of the Know-Nothings).

137 See Feldberg, supra note 97, at 78–79 ([B]y making the King James version optional as a school text, the Protestant majority would have been admitting that it could no longer set itself above the Irish Catholic minority whose culture it considered inferior.); KIRLIN, supra note 112, at 312 (discussing "the un-American conduct of teachers who had attacked the faith of some of their pupils"); 2 ELLIS Paxson Oberholtzer, Philadelphia: A History of the City and Its People; A Record of 225 Years 292–93 (1912) ("It was held that the Bible might be read without meeting objection from any side."); O'Shea, supra note 112, at 120–37 (recounting how Bishop Kenrick "temperately stat[ed] the grounds of the objection which the Catholics of the city entertained to the existing regulations in the schools"); JOHN B. Perry, A Full and
Philadelphia, Francis Patrick Kenrick, asked that Catholic children be excused, thus enraged members of the Native American Party, more familiarly known as nativists. Open warfare erupted in the summer of 1844 when a scuffle between Irish Catholics and nativists resulted in the death of a nativist and the subsequent burning of the Catholic neighborhood. The no-holds-barred nature of this battle was apparent in a contemporary account:

Even women and boys joined in the affray, some of the women actually throwing missiles. . .

Many of the women who were not engaged with weapons, incited the men to vigorous action, pointing out where they could operate with more effect, and cheering them on and rallying them to a renewal of the conflict whenever their spirits fell or they were compelled to retreat.

As in most other riots which we have noticed in our city and county, small and half grown boys formed no inconsiderable portion of the combatants on both sides, and contended with the most sanguinary spirit.

Before that summer was over, more than twenty people had been killed in the rioting. Countless others were wounded, and the destruction of property included two Catholic churches, a library, a convent, and most of a Catholic neighborhood. The city was placed under martial law for months while barefooted marines patrolled the streets with cutlasses. Citizens’ watch groups also joined the fray, including a patrol organized by the Philadelphia Bar Association and composed of approximately sixty lawyers, law students, and clerks. As the Pennsylvania Law Journal later reported,
[i]t is a matter of some congratulation, that the Philadelphia bar, at the
time of the late emergency, was so fully buckled up to the occasion, as to
resolve to go through the duty that might be prescribed, without much
regard to those technicalities by which the profession so often suffers it-
tself to be hampered in extreme cases. That gentlemen of all ages,—from
the jurist who has retired from the clash of courts to the quiet of cham-
bers, to the student who has yet to look before him at the epoch of the
first speech,—that all classes of a profession, to say the least, the most
sedentary, and the least acquainted with gymnastics, should have hurried
together at the first call, and for five long nights should have carried
muskets and undergone drill,—is a thing most creditable. . . . If no glory
was won,—for fortunately whatever personal disarrangements took place,
were occasioned rather from the awkwardness of allies than the malice of
foes,—at least good feeling was extended . . . .

An attempt to spread the conflagration to New York City was
quelled by nativist leaders after Bishop Hughes informed the mayor
that, if Catholic churches were burned, Protestant churches would
not be far behind. The ultimate resolution in Philadelphia was a
new school board policy stating that Catholic students should be nei-
ther forced to read the King James Bible nor permitted to use the of-


The chief reason given for banning the Douay Bible from the schools was that it
contained extensive notes telling Catholics what they were to believe
about ambiguous scriptural texts, and Protestants were troubled by
the Vatican’s opposition to the interpretation of scripture by individ-

See supra note 105, at 92–94 (discussing the Protestant belief that Catholic chil-
dren needed direct exposure to the Bible so they could interpret it for themselves).

147 See FELDBERG, supra note 97, at 92–94 (discussing the Protestant belief that Catholic chil-
dren needed direct exposure to the Bible so they could interpret it for themselves).

148 See id. For further exploration of the bishops’ condemnation of Protestant practices, see
BILLINGTON, supra note 97, at 146–49; BOLES, supra note 21, at 178–82; BOURNE, supra note 97,
at 202–24, 277–312 (statements of Bishop Hughes); BRANN, supra note 105, at 72–74;
DELFATTORE, supra note 3, at 14–22, 43–46; DUNN, supra note 21, at 204–20; HASSARD, supra
To Protestants who placed a high value on independent interpretation of scripture and saw it as a symbol of personal liberty in a broader sense, the Vatican's insistence that only Catholic Church officials could correctly interpret the word of God reinforced its image as a dictatorship bent on undermining the respect for individual rights and dignity that Americans claimed as the basis for their system of government.\textsuperscript{150}

Adding to the Protestants' concerns was the long history of Protestant-Catholic conflicts in the European nations from which most Americans or their forebears had come, particularly instances in which Catholic monarchs had persecuted Protestants and severely curtailed their ability to practice their religion (as Protestant rulers had in turn done to Catholics).\textsuperscript{151} The Catholic Church's control of scriptural interpretation, its authoritarian power structure, and its association with European monarchies all helped to convince the Protestant majority in America that Catholic immigrants who remained unconverted to Protestant values represented a real and present danger to the continuation of democratic principles and a republican form of government in what was still a very young country.\textsuperscript{152} In the words of historian Ray Allen Billington, the Catholic immigrants to America were considered "a Rome-directed group of papal serfs, bent on the planned destruction of the United States."\textsuperscript{153} Viewed from this perspective, the inculcation of Protestantism through the public schools was nothing more or less than an act of self-defense.\textsuperscript{154}

The reactions of nineteenth-century Protestants to what they believed to be the danger posed by the Vatican foreshadowed similar responses to other perils later in this nation's history.\textsuperscript{155} In the 1950s, for instance, when the perceived threat to American values was no longer the Vatican but Soviet Communism, essentially the same ar-

\textsuperscript{150} See Bourne, supra note 97, at 307 (recounting a disagreement over official or lay interpretation of the Bible); DelfatORE, supra note 3, at 20–21 (discussing the Protestant argument against limiting Bible interpretation to clergy); Feldberg, supra note 97, at 92–93 (observing that most Protestants felt their Bible contained "basic teachings of American morality").

\textsuperscript{151} See BILLINGTON, supra note 97, at 118–35 (discussing the American Protestant belief in a Catholic plot to spread Catholicism to America from Europe and take over the country); Bourne, supra note 97, at 277–80 (statement of Bishop Hughes) (rebutting the assertion that Protestants were treated poorly in Catholic-controlled regions of Europe).

\textsuperscript{152} See sources cited supra note 151. For further discussion of the Protestant majority's distrust of Catholic immigrants, see DelfatORE, supra note 3, at 13–21; Feldberg, supra note 97, at 24–26.

\textsuperscript{153} BILLINGTON, supra note 97, at 127.

\textsuperscript{154} See BILLINGTON, supra note 97, at 142–58 (discussing the causes of the movement to promote Protestantism in children).

\textsuperscript{155} See DelfatORE, supra note 3, at 52–53 (discussing the expanding circle of inclusion that nevertheless preserved the problem between insiders and outsiders).
Arguments were made with respect to belief in God that had once been made about adherence to Protestantism. Whereas earlier generations had associated divine-right monarchies with Catholicism, Americans of the 1950s attributed Soviet collectivism and totalitarianism to atheism. As the House committee report and the House and Senate conference report indicated, the purpose of the 1954 legislation adding the words “under God” to the Pledge was to affirm that God is the source of individual rights and the inspiration for the political philosophy that protects those rights. According to those documents, the recitation of the Pledge by schoolchildren was explicitly intended to defend against Communism by promoting the belief that American freedoms flow from God. Moreover, just as nineteenth-century Catholics had been considered mindless thralls of the Vatican, so 1950s Communists were accused of being brainwashed into compliance with the Communist party line. In both instances,

156 See H.R. REP. NO. 83-1693, at 3 (1954), as reprinted in 1954 U.S.C.C.A.N. 2339, 2341 (noting that President Eisenhower had recently argued that “all the history of America bears witness to the truth that in time of test or trial we instinctively turn to God” (internal quotations omitted)); see also DelFattore, supra note 3, at 68 (explaining that many Americans viewed the Soviet Union as not a political threat but a religious threat).

157 See H.R. REP. NO. 83-1693, at 2 (1954), as reprinted in 1954 U.S.C.C.A.N. 2339, 2340 (arguing that the Pledge’s reference to God “would serve to deny the atheistic and materialistic concepts of communism”); see also 108 Cong. Rec. 9, 11675, 11719, 11732, 11734 (1962) (debating the “tenet[s] of American law and... principle[s] of the spirituality of man” violated by the Supreme Court decision outlawing state-sponsored prayer).


159 Id.

adherence to a religious view antithetical to that of most Americans was associated with blind loyalty to a totalitarian political system bent on destroying the freedom and dignity of the individual.

Since September 11, 2001, it has become commonplace to hear the claim that only through a national commitment to God can Americans hope to sustain our freedoms in the face of yet another foreign, totalitarian belief system: radical Islam. There is, of course, no doubt about the reality of the threat posed by violent religious extremists, but there is room for debate about the contention that linking loyalty to America with the profession of some form of majority religious belief is a necessary or appropriate step toward keeping the nation safe. The identity of the real or perceived threat to American political values has changed over time, just as the scope of majority religious beliefs has broadened from sectarian Protestant denominations to pan-Protestantism to Judeo-Christianity and monotheism. What remains constant is the conviction that the nation’s adherence the majority faith is essential to defining America’s political values and defending them against a totalitarian foreign system that threatens liberty and individual rights.

As this brief summary of nineteenth-century controversies suggests, there are unmistakable parallels between them and the dispute that gave rise to Newdow. In each instance, the challenged public-school practices reflect a religious view that most of the population

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161 See Douglas Jehl, U.S. General Apologizes for Remarks About Islam, N.Y. Times, Oct. 18, 2003, at A6 (discussing the apology of a top Pentagon official, Lt. General William Boykin, who compared Islamic militants to “Satan,” remarked that they did not worship a “real God,” and explained that terrorists were attacking the United States because “we’re a Christian nation”); Paul Krugman, Op-Ed, Gotta Have Faith, N.Y. Times, Dec. 17, 2002, at A35 (quoting Congressman Tom DeLay’s statement that “[o]nly Christianity offers a way to live in response to the realities that we find in this world—only Christianity”); Susan Sachs, Baptist Pastor Attacks Islam, Inciting Cries of Intolerance: Jewish and Muslim Groups Join in Protest, N.Y. Times, June 15, 2002, at A10 (describing a speech by Reverend Jerry Vines in which he called the Prophet Muhammad a pedophile and insisted that the Christian God would not “turn you into a terrorist”).

162 See generally DelFatteore, supra note 3, at 112–13 (noting that the premise underlying religious toleration is that what “the majority believes, however it is defined, is inherently worthy of greater deference than any other belief system”).

163 Compare Brief of Religious Scholars, supra note 43, at 6 (observing that the Pledge implicates “the national values the flag symbolizes”), and Brief of Clergy, supra note 43, at 2–3 (discussing “[t]he conflation in the Pledge of religious and political affirmations”), with DelFatteore, supra note 3, at 68–69 (discussing the Cold War origins of patriotic references to religion), Fraser, supra note 20, at 49–59 (discussing disputes over school funding between Protestants and Catholics), and Nord, supra note 20, at 75–76 (discussing the “almost sacred status” of Americanism as a belief system).
regards not as an article of faith but as a description of reality. Indeed, to most adherents, the level of generality of religious affirmations in public schools is, if anything, objectionably broad. Certainly they cannot be seen as favoring one religion over another if the definition of religion is limited to the tradition accepted by the majority in a particular period: Protestantism in earlier generations, monotheism today. Nonadherents to the majority tradition may not be molested solely for professing their beliefs, but political activism against popular public-school exercises is likely to generate deep resentment. Perhaps most significantly, their belief systems are not deemed religious in the sense that government endorsement of tenets inconsistent with them would prefer one religion over another. Linked with these assumptions is the conviction that the majority religious view is not only the wellspring of democratic principles and a republican form of government but also the sole guarantee of their preservation.

164 See sources cited supra note 163; see also supra note 22 and accompanying text (discussing the effects of the presentation of the majority religious view as fact).
165 See discussion supra note 110.
166 Compare Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 42 (2004) (O'Connor, J., concurring) (opining that the reference to God in the Pledge "is a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system"), and id. at 54 (Thomas, J., concurring) (concluding that the Pledge does not constitute an establishment of religion), with People ex rel. Vollmar v. Stanley, 255 P. 610, 616 (Colo. 1927) (discussing how sectarian referred to the various sects of Christianity, not to Christianity or Protestantism as a whole, at the time the Constitution was ratified), overruled by Conrad v. City & County of Denver, 656 P.2d 662 (Colo. 1982) (en banc), modified on reh'g en banc, 724 P.2d 1309 (Colo. 1986), Donahoe v. Richards, 38 Me. 379, 380 (1854) (involving a dispute over instruction of the Protestant King James Bible in school), Pfeiffer v. Bd. of Educ., 77 N.W. 250, 253 (Mich. 1898) (holding that reading extracts from the Bible does not violate the constitution of Michigan), Engel v. Vitale, 176 N.E.2d 579, 581 (N.Y. 1961) (holding that daily recitation of the "Regents' Prayer" is not unconstitutional religious instruction), rev'd, 370 U.S. 421 (1962), Engel v. Vitale, 206 N.Y.S.2d 183, 186 (N.Y. App. Div. 1960) (per curiam) (Beldock, J., concurred in part and dissenting in part) ("The recital of this prayer does nothing more than acknowledge the existence of God and dependence upon him."); aff'd, 176 N.E.2d 579 (N.Y. 1961), rev'd, 370 U.S. 421 (1962), and DELFATORE, supra note 3, at 17–18, 33–35, 44–45, 46–49 (discussing nineteenth-century conflicts between Protestants and Catholics in New York City, Philadelphia, Maine, and Boston).
167 See supra note 166.
168 See Transcript of Oral Argument, supra note 13, at 19 (statement of Solicitor Gen. Olson) (discussing the Framers' belief in a sacred right to revolt); BOURNE, supra note 97, at 246 (statement of Hiram Ketchum) ("The institutions of liberty and the altars of piety have sprung up in the path of that translated Bible. . . ."); FELDBERG, supra note 97, at 78–80 (discussing Protestant resistance to acknowledgment of Bibles other than the King James Version); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION §§ 1865–73 (Boston, Hilliard, Gray & Co. 1839) (asserting that, the Establishment Clause notwithstanding, the government should promote "the great doctrines of religion, the being, and attributes, and providence of one Almighty God; the responsibility to him for all our actions, founded upon moral freedom and accountability; [and] the cultivations
A further example of the similarity between past and present is the fact that, throughout two centuries of debate, there have always been members of the majority faith who disagree with the use of government power to promote their religious view. Just as the nineteen religious scholars and the thirty-two members of the clergy who filed amicus curiae briefs in *Newdow* risked the wrath of some coreligionists by opposing "under God" in the Pledge, so some nineteenth-century Protestant leaders stood out against the equally popular use of the King James Bible in the public schools of their time. Prominent among them was a Presbyterian preacher and scholar, Samuel Thayer Spear, who criticized "Protestants [who] substantially ask for themselves in respect to the public schools what they deny to Catholics" by imposing Protestant practices on publicly funded schools:

King James's version is all very well for them, since they are agreed in accepting it; but it is not so for these other parties, who are taxed in common with them for the support of public schools, and who under our theory of government have just as many and just as sacred rights as they have in these schools. The very terms of their doctrine commit them to a species of self-preference in the schools of the State, which they claim for themselves, but will not concede to anybody else.

Despite the numerous similarities between the early Protestant-Catholic battles and *Newdow*, there is at least one significant difference: the redefinition of *coercion*. In today's schools, it is taken for granted that students have the right to opt out of saying "under God" or the Pledge itself; the question is whether the risk of a negative response by their peers constitutes a sufficient disincentive to make the recitation less than truly voluntary. Clearly, this concept of coer-

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of all the personal, social, and benevolent virtues"; Berg, *supra* note 43, at 69–70 ("A state that declines to acknowledge a deity is different from one that affirmatively requires worshiping the emperor. But if 'under God' were removed from the Pledge, ... a substantial number of religious Americans ... will view the state as asserting that it is the highest authority."); Newhouse, *supra* note 43, at 387–88 ("[O]ur American form of government was founded on the belief that individuals are endowed by God with certain inalienable rights, which necessarily limit the authority of government.").


171 Id. at 42.

172 See Brief of Religious Scholars, *supra* note 43, at 27–30 (arguing that the Pledge forces children to confront a "Hobson's choice of affirming the religious beliefs they do not hold or forgoing participation in a patriotic exercise"); Brief of Clergy, *supra* note 43, at 15–17 (arguing that "[t]he government has no legitimate role in shaping the religious opinions of the American people—not by coercion, and not by persuasion or endorsement either"); Petitioners' Brief on the Merits, *supra* note 102, at 23–24 ("[A]n objecting student's First Amendment rights are not violated when he or she is exposed to willing students reciting the Pledge."); Respondent's Brief on the Merits at 15–16, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (No. 02-1624) (asserting that "[c]oercion stems not only from the didactic nature of the teacher-student relationship... but from the aversion youngsters have to being saddled with... 'outsider'
cion does not even approach the standards of the nineteenth century, when refusal to participate in prescribed religious practices resulted in school-imposed penalties such as beatings and expulsions. At that time, newly arrived Catholic immigrants asked nothing more than to have their children excused from reading the King James Bible, and they usually asked in vain. Ironically, by the time later generations of Catholics and their Protestant supporters had acquired enough power and influence to induce school officials to excuse dissenting students from prayer, this no longer seemed sufficient. Opt-out policies that would have delighted Catholics of the pre–Civil War period were, by the late nineteenth century, scorned as second-class treatment.

The question of whether opt-out policies are sufficient to guarantee the rights of dissenters reflects a conflict between two models of religious liberty: toleration and equality. Under the model of toleration, the government may endorse a religious view as long as dissenters are not prevented from worshiping as they see fit. More liberal interpretations of this approach extend to atheism, whereas others envision only a choice among religions. Either way, the underlying idea is that minorities have the right to exercise individual freedom of conscience but not to stop the government from promoting the majority religious belief. As its name suggests, the competing model—that of equality—requires the government to treat all views

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173 See supra note 129 and accompanying text.
174 See supra note 129 and accompanying text.
175 See DELFATTORE, supra note 3, at 57–59 (discussing how the justification "that no parent could reasonably complain if other people's children read the Bible . . . enjoyed wide acceptance, but not everyone agreed with it, and disputes involving opt-out policies began to make their way into the courts").
176 Id.
177 Id. at 112–14.
178 Id.
179 Id.; see also Lee v. Weisman, 505 U.S. 577, 644–45 (1992) (Scalia, J., dissenting) (invoking tradition to support the view that the Establishment Clause does not forbid prayer at official ceremonies); Transcript of Oral Argument at 13–14, Weisman, 505 U.S. 577 (No. 90-1014), 1991 WL 636285 (statement of Mr. Cooper) (arguing that a state could adopt a "state religion" if actual coercion did not accompany the act); Brief for United States as Amicus Curiae at 18, Weisman, 505 U.S. 577 (No. 90-1014) (urging the Court to agree that inclusion of invocations and benedictions in graduation ceremonies does not involve coercion); Reply Brief for the Petitioners at 1–2, Weisman, 505 U.S. 577 (No. 90-1014), 1991 WL 527616 (arguing that the Establishment Clause must permit some civic expression of religion); BEZANSON, supra note 20 (manuscript at 87–123, on file with the University of Pennsylvania Journal of Constitutional Law) (arguing that a proper understanding of both the Establishment and Free Exercise Clauses would allow for state-sponsored school prayers to promote religion in general so long as they did not promote one religion over others).
about religion the same. 180 Under this model, people are entitled not only to the free exercise of religion as individuals but also to a government that neither normalizes nor marginalizes, neither privileges nor disfavors, any religious view. 181 Here, too, there is some inconsistency about whether to embrace all religious beliefs or all beliefs about religion, including atheism. 182 Predictably, those who adopt the toleration model see opt-out provisions as sufficient protection for dissenters, 183 whereas advocates of equality maintain that dissenters

180 See Weisman, 505 U.S. at 584–86 (announcing that “even [a prayer] excluding any mention of the Deity [cannot] be offered at a public school graduation ceremony”); id. at 604 (Blackmun, J., concurring) (“Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.”); id. at 610 (Souter, J., concurring) (“[T]he [Establishment] Clause [is] applicable no less to government acts favoring religion generally than to acts favoring one religion over others.”); Everson v. Bd. of Educ., 330 U.S. 1, 11 (1947) (discussing the origins of the belief that government should not establish a state church); People ex rel. Ring v. Bd. of Educ. of Dist. 24, 92 N.E. 251, 255 (Ill. 1910) (“The only means of preventing sectarian instruction in the school is to exclude altogether religious instruction, by means of the reading of the Bible or otherwise.”); State ex rel. Weiss v. Bd. of Sch.-Dist No. 8, 44 N.W. 967, 973 (Wis. 1890) (reasoning that the Bible is inherently sectarian because it “contains numerous doctrinal passages, upon some of which the peculiar creed of almost every religious sect is based, and . . . such passages may reasonably be understood to inculcate the doctrines predicated upon them”); ALLEY, supra note 20, at 49–56 (discussing the views of the Framers as they adopted the religion clauses of the First Amendment); ROBERT S. ALLEY, WITHOUT A PRAYER: RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS 43–58 (1996) (noting a recurring pattern “in which minorities have been castigated for refusal to accommodate or exercise tolerance for the dominant cultural patterns in a given community”); DONALD BOLES, THE TWO SWORDS: COMMENTARIES AND CASES IN RELIGION AND EDUCATION 74–76 (1967) (discussing the debate over the tolerance and equality interpretations of the Establishment Clause); DELFATTORE, supra note 3, at 52–55 (discussing the emerging belief that tolerance of Catholicism was not enough where the state espoused Protestantism); GREENAWALT, supra note 20, at 17–22 (giving a brief historical account of the way the Supreme Court came to adopt the equality model); Daniel L. Dreisbach, Everson and the Command of History. The Supreme Court, Lessons of History, and Church-State Debate in America, in EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS 23, 24–27 (Jo Renée Formicola & Hubert Morken eds., 1997) (discussing the basic agreement in the Everson opinions that there should be a separation between church and state).

181 See supra note 180; see also Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (5–4 decision) (O’Connor, J., concurring) (clarifying that the Constitution prohibits both government “entanglement with religious institutions” and “government endorsement or disapproval of religion”); Brief of Religious Scholars, supra note 43, at 12–13 (arguing that the Pledge’s “under God” phrase violates neutrality principles); Brief of Clergy, supra note 43, at 4–5 (“The lack of any article or modifier [between ‘under’ and ‘God’ in the Pledge] necessarily affirms that there is one and only one God . . . .”). Compare Petitioners’ Brief on the Merits, supra note 102, at 24–25 (distinguishing constitutionally prohibited intrusion on religion by the state from constitutionally benign relationships between the two), with Respondent’s Brief on the Merits, supra note 172, at 8 (arguing that the Establishment Clause requires government neutrality with respect to religion).

182 See supra note 181.

183 See Weisman, 505 U.S. at 637–38 (Scalia, J., dissenting) (arguing that a student is not coerced into action, and that even action does not necessarily signify participation in a religious exercise); People ex rel. Vollmar v. Stanley, 255 P. 610, 614 (Colo. 1927) (concluding that children cannot be required to attend Bible readings), overruled by Conrad v. City & County of Denver, 656 P.2d 662 (Colo. 1982) (en banc), modified on reh’g en banc, 724 P.2d 1309 (Colo. 1986);
are harmed when the government puts a thumb on the scale in favor of the majority religious belief even if no unwilling person is forced to take part in any ceremony or exercise. Indeed, the very act of absenting oneself from a government-sponsored activity because of the religious views it expresses is seen as a mark of subordination and exclusion on the basis of religious faith.

VI. "THE PAST IS ONLY SO HEROIC AS WE SEE IT"

During the school-prayer conflicts of the early to mid-nineteenth century, the toleration model was rarely challenged. What most non-Protestants sought was excusal from Bible reading, not the exclusion of the Bible from the public schools. By the early twentieth cen-

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184 See Weisman, 505 U.S. at 587–88 (noting the "subtle coercive pressures" in "a secondary school environment"); id. at 605–06 (Blackmun, J., concurring) ("[T]he rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." (quoting 1 ANNALS OF CONG. 757 (Joseph Gales ed., 1789) (statement of Rep. Carroll))); id. at 615–14 (Souter, J., concurring) (discussing the legislative history of the Establishment Clause); Lynch, 465 U.S. at 688 (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."); Brief of Religious Scholars, supra note 43, at 27–30 (noting the coercive pressures on children to recite the Pledge); Brief of Clergy, supra note 43, at 15–17 (arguing that the Pledge should be treated as "government-sponsored religious speech"); Petitioners' Brief on the Merits, supra note 102, at 30–34 (arguing that the Pledge is not a religious act and that therefore there is no coercion); Respondent's Brief on the Merits, supra note 172, at 12–15 (arguing that "both endorsement (of Monotheism) and disapproval (of Atheism) were intended by the Act of 1954"); ALLEY, supra note 20, at 212–13 (noting the argument that coercion depends on the context and fact pattern); ALLEY, supra note 180, at 130–34 (discussing the attempt to overrule the Lemon test by introducing the element of coercion); DELFATTORE, supra note 3, at 259–66 (discussing briefs laying out arguments on both sides in the Weisman school prayer case); GREENAWALT, supra note 20, at 47 (noting that a critical element is school "sponsorship" of prayer).

185 See Weisman, 505 U.S. at 588, 592–93 (explaining why "prayer exercises in public schools carry a particular risk of indirect coercion"); Sch. Dist. v. Schempp, 374 U.S. 205, 228 (1963) (Douglas, J., concurring) ("The prayers announced are not compulsory, though some may think they have that indirect effect because the nonconformist student may be induced to participate for fear of being called an 'oddball.'"); Engel v. Vitale, 370 U.S. 421, 430 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion . . . ."); DELFATTORE, supra note 3, at 274–75 (noting that the court found the "coercion" in Santa Fe Independent School District v. Doe significant).

186 HENRY DAVID THOREAU, A Week on the Concord and Merrimack Rivers, in 1 THE WRITINGS OF HENRY DAVID THOREAU 310–11 (1906).

187 See Bourne, supra note 97, at 466–67 (statement of Bishop Hughes) (suggesting alternative versions of the Bible); BRANN, supra note 105, at 72–74 (arguing that Catholics object to
tury, however, some degree of religious diversity had become a fact of life in many parts of the country, and a series of lawsuits raised questions about the right of public schools to promote Protestantism even where dissenters were excused. Like the early Protestant-Catholic conflicts discussed in Part III, these post–Civil War lawsuits over opt-out policies reflected long-standing assumptions and dynamics that have surfaced most recently in *Newdow*.

In *Newdow* and in the earlier conflicts discussed above, arguments about opt-out policies were inextricably linked with the problem of defining sectarianism, since the justification for Bible reading and prayer in the public schools was that these practices represented generic religion as opposed to promoting any particular sect. The more traditional view held a practice to be sectarian if it represented the teaching of a single denomination or if it took sides on a matter of contention among religions. (In context, the term *religion* meant Protestantism, since pan-Protestant practices were deemed nonsectarian even when they clearly conflicted with Catholicism or with non-

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188 See Vollmar, 255 P. 610; People ex rel. Ring v. Bd. of Educ. of Dist. 24, 92 N.E. 251 (Ill. 1910); Pfeiffer, 77 N.W. 250; Bd. of Educ. v. Minor, 23 Ohio St. 211 (1872); State ex rel. Weiss v. Dist. Bd. of Sch.-Dist. No. 8, 44 N.W. 967 (Wis. 1890); see also Boles, supra note 21, at 100–36 (discussing the evolution of the law regarding Bible reading in schools); DelFatte, supra note 3, at 52–66 (discussing early attempts by Catholics to establish a right to opt out of school prayer and Bible reading); Feldberg, supra note 77, at 78–79 (discussing the Catholic desire for an opt-out policy); Fraser, supra note 20, at 33–34 (discussing the Protestant desire to indirectly influence Catholics to convert); Hassard, supra note 105, at 230–32 (“We feel it is unjust that such passages should be taught at all in schools . . . . But that such books should be put into the hands of our own children . . . . was in our opinion unjust, unnatural, and at all events to us intolerable.”); Kaestle, Evolution, supra note 20, at 145–51 (discussing the Catholic view that “[m]oral education apart from sectarian religion was a Protestant delusion”); Kaestle, Pillars, supra note 20, at 101–02 (discussing the belief that the Catholic desire to be excused from Bible reading was an attack on Protestant ideology); Ravitch, supra note 20, at 46–57 (discussing Bishop Hughes’s attempt to change the mandatory Bible-reading policy in New York schools); Shaw, supra note 105, at 147 (“[T]he inculcation of Protestantism in young children would lead, so [Catholics] felt, to infidelity. A true neutrality in religious teachings being impossible, the Catholics . . . . wanted monies to run schools that were as Catholic as the common schools were Protestant.”).

189 See sources cited supra note 188.

190 See Donahoe v. Richards, 38 Me. 379, 380 (1854) (discussing the use of the generic “Protestant version” of the Bible among “divers [sic] religious sects”); Murray v. Curlett, 179 A.2d 698, 699 n.1 (Md. 1962), rev’d sub nom. Schempp, 374 U.S. 203 (dismissing the contention that the practice was sectarian because the petitioners’ brief failed to distinguish between sectarian and nonsectarian religious teachings); Pfeiffer, 77 N.W. at 252–53 (allowing the reading of the Bible in public schools for purposes other than religious instruction); Engel v. Vitale, 176 N.E.2d 579, 581 (N.Y. 1961), rev’d, 370 U.S. 421 (1962) (distinguishing between adoption of a particular sect and a generic acknowledgement of God); DelFatte, supra note 3 passim (discussing shifting definitions of sectarian).
Christian faiths.) Competing with this viewpoint was an emerging understanding of religion in which nonsectarian referred to tenets or exercises that are common to all religious belief systems and contradict none—leading to the conclusion that, for practical purposes, there is no such thing as nonsectarianism.191

Among the best-known of the early state court decisions dealing with the sectarianism problem was Board of Education v. Minor, in which thirty-seven Protestants unsuccessfully challenged the city school board’s removal of Bible reading and prayer from the public-school program.192 The primary reason for the board’s decision was that any devotional exercise, no matter how generic it might be within a given religious tradition, would nonetheless exclude someone’s beliefs.193 The Ohio Supreme Court, having decided the case on the basis of the board’s right to determine the school program, added:

To teach the doctrines of infidelity, and thereby teach that Christianity is false, is one thing; and to give no instructions on the subject is quite another thing. The only fair and impartial method, where serious objection is made, is to let each sect give its own instructions, elsewhere than in the state schools, where of necessity all are to meet; and to put disputed doctrines of religion among other subjects of instruction, for there are many others, which can more conveniently, satisfactorily, and safely be taught elsewhere.194

Similarly, a ruling by the Illinois Supreme Court ordered the termination of Bible reading, prayer, and hymn singing in the public schools on the ground that all religions are entitled to equal treatment under the law:195

The majority of [Illinois citizens] adhere to one or another of the Protestant denominations. But the law knows no distinction between the Christian and the Pagan, the Protestant and the Catholic. All are citizens. Their civil rights are precisely equal. The law cannot see religious differ-

191 See Schempp, 374 U.S. at 213-15 (reasoning that government ought to be neutral with respect to religion, which meant staying away from the matter altogether); Engel, 370 U.S. at 433-36 (reasoning that “[i]t is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers”); Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947) (“No person should be punished for entertaining or professing religious beliefs or disbeliefs . . . .”); Ring, 92 N.E. at 255 (concluding that the Bible is inherently sectarian); Minor, 23 Ohio St. at 242-43 (reasoning that the state constitution required the teaching of morals in schools, not particular religious views); Weiss, 44 N.W. at 972-73 (noting the presence of faiths, such as Judaism, that reject fundamental assertions of the Christian Bible, such as the divinity of Jesus); DELFATTORE, supra note 3, at 87-88, 93-94, 108, 141-42, 297, 309, 313 (discussing fundamental disagreements over the content of religious messages in schools).

192 Minor, 23 Ohio St. 211.

193 Id. at 211-12.

194 Id. at 253.

195 Ring, 92 N.E. at 257.
ences, because the [state] Constitution\textsuperscript{196} has definitely and completely excluded religion from the law's contemplation in considering men's rights.\textsuperscript{197}

Consistent with this model of equality, the court found that opt-out policies are inappropriate because they marginalize nonadherents while allowing the schools to continue promoting the majority religion. "If the instruction or exercise is such that certain of the pupils must be excused from it because it is hostile to their or their parents' religious belief," the decision stated, "then such instruction or exercise is sectarian and forbidden by the [state] Constitution."

A similar case arose in Wisconsin when a local board of education, having voted to continue using the King James Bible in its schools, offered to excuse Catholic children.\textsuperscript{199} The Wisconsin Supreme Court rejected the board's claim that Bible reading is nonsectarian and found that the opt-out policy was not enough to make the practice acceptable:

When, as in this case, a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible, which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult. But it is a sufficient refutation of the argument [that the opt-out policy is appropriate] that the [opt-out policy] tends to destroy the equality of the pupils which the [state] constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others.\textsuperscript{200}

At the opposite extreme is a decision by a court that was so convinced of the efficacy of opt-out policies that it ordered one over the objections of both sides. In \textit{People ex rel. Vollmar v. Stanley}, a Colorado school board required all children to participate in Protestant religious exercises, and a Catholic family sued not for an opt-out policy but to have the devotionals terminated.\textsuperscript{201} In a ruling that resembled Justice O'Connor's observation that "under God" favors no particular religion even if it conflicts with religions like Buddhism,\textsuperscript{202} the Supreme Court of Colorado declared that sectarianism must be assessed

\textsuperscript{196} A disproportionate number of the late nineteenth- and early twentieth-century lawsuits that tested opt-out policies and the concept of nonsectarianism took place in midwestern and western states whose state constitutions imposed stricter rules on government involvement with religion than did the First Amendment as it was then interpreted.

\textsuperscript{197} \textit{Ring}, 92 N.E. at 255.

\textsuperscript{198} \textit{Id.} at 256.

\textsuperscript{199} State ex rel. Weiss v. Dist. Bd. of Sch.-Dist. No. 8, 44 N.W. 967, 969 (Wis. 1890).

\textsuperscript{200} \textit{Id.} at 975.

\textsuperscript{201} 255 P. 610, 613 (Colo. 1927), \textit{overruled by} Conrad v. City & County of Denver, 656 P.2d 662 (Colo. 1982) (en banc), \textit{modified on reh'g en banc}, 724 P.2d 1309 (Colo. 1986).

only with respect to Christian (i.e., Protestant) faiths. By that standard, the court found that pan-Protestant practices are nonsectarian even though they are incompatible with the Catholic faith. Nevertheless, the court ruled that Catholics have a right to individual freedom of conscience and thus cannot be required to participate in a religious exercise even if it is nonsectarian. In another decision, *Pfeiffer v. Board of Education*, Michigan’s Supreme Court scolded a Catholic parent who sought the termination of Protestant exercises even though his own child was permitted to opt out. Having declared the King James Bible nonsectarian, the court chided the plaintiff for religious intolerance.

As the last two examples suggest, not all state courts of this period were embracing a broader definition of sectarianism, and the same was true of the movement toward or beyond opt-out policies. Nevertheless, although the line was far from straight, there was a discernable trend toward declaring pan-Protestantism sectarian and either requiring opt-out policies or ordering the public schools to terminate their devotions. When the matter finally reached the U.S. Supreme Court in the early 1960s, its decisions in *Engel v. Vitale* and *School District v. Schempp* were highly significant because they asserted the right of the federal courts to apply First Amendment standards to public-school prayer. Those decisions did not, however, break new conceptual ground. On the contrary, the conclusions the Court reached about public-school promotion of religion had been on the map for generations.

V. “The Test of Courage Comes When We Are in the Minority; the Test of Tolerance Comes When We Are in the Majority.”

Although decided a year earlier than *Schempp*, *Engel* was the more modern of the two cases in that it concerned a broad conceptualization of sectarianism and a highly generic form of worship. (The morning exercises in *Schempp*, which consisted of Bible reading and the Lord’s Prayer, were similar to the nineteenth-century practices to

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203 Vollmar, 255 P. at 616.
204 Id.
205 Id. at 618.
206 77 N.W. 250, 251 (Mich. 1898) (“Is it not intolerant for one not required to attend [readings of the Bible] to object to such readings?”).
207 Id.
210 See supra notes 162–70 and accompanying text.
211 See supra notes 162–70 and accompanying text.
which Bishops Hughes and Kenrick had objected.\(^{213}\) The prayer at issue in *Engel* was composed by the Board of Regents of the University of the State of New York, whose members “included representatives of the Hebrew, Catholic and Protestant faiths, and at least one prominent Unitarian.”\(^{214}\) It said, “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”\(^{215}\) The Regents proposed the prayer in response to

the dire need, in these days of concentrated attacks by an atheistic way of life upon our world and in these times of rising juvenile delinquency, of crime increasing both numerically and in gravity of offense, with an ever-swelling number of criminals being counted in the younger age groups, of finding ways to pass on America’s Moral and Spiritual Heritage to our youth through the public school system.\(^{216}\)

The Regents thus defined generic monotheism, not the King James Bible, as the source of morality, the foundation of democracy, and the only true defense against the threat of domination by a totalitarian foreign power.\(^{217}\) They also maintained that their prayer did not represent “[f]ormal religion,” which they defined as “any and all sectarianism or religious instruction which advocates, teaches or prefers any religious creed.”\(^{218}\) Like proponents of “under God” in the Pledge, they did not regard monotheism as one religious creed among many. Rather, they viewed it as normative and deemed the opt-out provision to be sufficient protection for the rights of those whose beliefs about religion were based on something other than a single God.\(^{219}\) Their stand was conceptually similar to nineteenth-century court decisions stating that pan-Protestant practices did not prefer any religion over any other even if Catholics objected to them.\(^{220}\) Chief Justice Rehnquist and Justice O’Connor made a simi-

\(^{213}\) Compare *Schempp*, 374 U.S. at 205–06 (discussing the Bible-reading practices), with discussion *supra* Part III (discussing the nineteenth-century practices).


\(^{215}\) *Engel*, 370 U.S. at 422.

\(^{216}\) *Motion for Leave to Submit a Brief Amicus Curiae* at 14, *Engel*, 370 U.S. 421 (No. 468), reprinted in 56 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 214, at 959, 974 [hereinafter Brief of the Board of Regents].

\(^{217}\) See *id.* at 22–23 (“It is thus clear that the recognition of, and acknowledgment of, our dependence on ‘the Supreme Lawgiver of the Universe’ was [a] duty . . . in the transaction of important functions of the body politic.”).

\(^{218}\) Transcript of Record at 32, *Engel*, 370 U.S. 421 (No. 468).

\(^{219}\) Brief of the Board of Regents, *supra* note 216, at 17–18, 22–23.

\(^{220}\) See *supra* Parts III–IV.
lar point in their Newdow concurrences with respect to polytheistic and nontheistic religions.\(^{221}\)

On the other side of the debate, opponents of the Regents' proposal denied that the prayer was dogma-free. Rather, they asserted, it promoted beliefs whose widespread acceptance blurred the fact that, to nonadherents, they were indeed doctrinal. When a school district in northern New York adopted the Regents' Prayer for daily use, a group of dissenting parents sued. Their argument was based on the premise that no prayer can be considered nonsectarian if it conflicts with any belief about religion. "The Regents' Prayer is sectarian and denominational," their brief stated,

since it includes a declaration of belief in the existence of God, which is a belief not shared by several faiths in this country, including the Society for Ethical Culture, to which one petitioner belongs. . . . Moreover, [the trial court] found, as a fact, that the prayer is contrary to the religions of petitioners who have a religion and to the beliefs of petitioner who professes none.\(^{222}\)

The Engel plaintiffs lost in the lower courts, which agreed with the school district that the prayer was nonsectarian and consistent with America's theistic heritage.\(^{223}\) In a statement that finds echoes in Solicitor General Olson's oral argument in Newdow\(^{224}\) the New York Court of Appeals associated monotheism with the American political system:

Belief in a Supreme Being is as essential and permanent a feature of the American governmental system as is freedom of worship, equality under the law and due process of law. Like them it is an American absolute, an application of the natural law beliefs on which the Republic was founded and which in turn presuppose an Omnipotent Being.\(^{225}\)

\(^{221}\) See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 32–33 (2004) (Rehnquist, C.J., concurring) (reconciling the provision in question with atheist beliefs); id. at 36 (O'Connor, J., concurring) (arguing that a reasonable observer would not perceive the Pledge as endorsing religion or nonreligion). But see id. at 48–49 (Thomas, J., concurring) (arguing that, although the Pledge does coerce students into declaring a belief in God, earlier Establishment Clause cases had been wrongly decided and should not apply to Newdow).

\(^{222}\) Brief for Petitioners at 7, Engel, 370 U.S. 421 (No. 468), reprinted in 56 LANDMARK BRIEFS AND ARGUMENTS, supra note 214, at 761, 771.


\(^{224}\) Transcript of Oral Argument, supra note 13, at 19–23.

\(^{225}\) Engel, 176 N.E.2d at 582.
Accordingly, the lower courts allowed the prayers to continue as long as the school district adopted an explicit opt-out policy. 226

The opt-out policy was not well-received by the plaintiffs, whose focus was not on having their own children excused but on inducing the school district to adopt the model of equality rather than that of toleration. 227 In their view, as long as the schools promoted monotheism, the government was not maintaining neutrality with respect to religion:

The same officials who teach children, and demand that the latter learn, that two plus two equals four and that "c-a-t" spells "cat", now say that there is a God, to Whom children should say a specified daily prayer, and from Whom children may ask, and expect to receive, blessings for themselves as well as others. Under these circumstances, petitioners respectfully submit, the effect on the children involved will be much the same whether they say the Regents' Prayer, or remain silent while it is said, or even if they leave the classroom or the school building during its recitation. 228

The Supreme Court agreed:

There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is "non-denominational" and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, ... [which,] unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. ... When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. 229

The Court's attention to "indirect coercive pressure" and its description of monotheism as an "officially approved religion" set the bar for violations of religious neutrality much lower than many peo-

226 See id. at 581 ("The order here appealed from contains adequate provisions to insure that no pupil need take part in or be present during the act of reverence, so any question of compulsion or free exercise is out of the case." (internal quotations omitted)).

227 See Brief for Petitioners, supra note 222, at 9 ("[T]he influence on the minds of pupils ... cannot be avoided by permitting the pupils to leave their classroom ... ").

228 Id. at 32.

ple had thought it to be. This was particularly bad news for the defendant school districts in Schempp v. School District\textsuperscript{230} and Murray v. Curlett,\textsuperscript{231} two school-prayer cases that were on their way to the Supreme Court. In accordance with the laws in their respective states, the public schools in both cases were starting the day with a reading from the Bible—usually from the King James Version—and the recitation of the Lord’s Prayer.\textsuperscript{232} A Unitarian family in Abington, Pennsylvania, and the atheist leader Madalyn Murray (later O’Hair) in Baltimore, Maryland, first tried to have their own children excused from the exercises.\textsuperscript{233} When the schools refused, both families filed suit: the Murrays in the Maryland state courts, and the Schempps in federal district court. The Murrays lost their case, and the Schempps won theirs, in the lower courts.\textsuperscript{234} The two cases went to the Supreme Court at about the same time, and the Court heard them together and issued a single decision covering both.\textsuperscript{235}

Although the doctrinal content of Bible reading and the Lord’s Prayer is significantly more substantial than that of the Regents’ Prayer, the decision in Engel made it advisable to minimize the religious element as much as possible.\textsuperscript{236} Accordingly, the Baltimore school district’s brief to the Court conceded the religious nature of the Bible and the Lord’s Prayer but contended that they

are not used in the challenged opening exercises as a form of religious instruction or as a religious service. Rather, these materials are utilized as a source of inspirational appeal to inculcate moral and ethical precepts of value in a salutary and sobering exercise with which to begin the school day.\textsuperscript{237}

At the suggestion of the Maryland attorney general, the Baltimore schools also established an opt-out policy, arguing that any possible violation of anyone’s freedom of conscience had thereby been eliminated.\textsuperscript{238} Similarly, Abington school officials maintained that “[t]he

\textsuperscript{231} 179 A.2d 698 (Md. 1962), rev’d sub nom. Schempp, 374 U.S. 203.
\textsuperscript{232} Schempp, 201 F. Supp. at 816; Murray, 179 A.2d at 699.
\textsuperscript{233} See Schempp v. Sch. Dist., 177 F. Supp. 398, 400 (E.D. Pa. 1959) (describing high school student Ellory Schempp’s attempts to be allowed not to participate in his school’s habitual Bible-reading exercises), vacated, 364 U.S. 298 (1960) (per curiam); Murray, 179 A.2d at 699 (describing how the petitioner, a fourteen-year-old, had been “required and compelled” to attend a school Bible-reading program).
\textsuperscript{234} Schempp, 201 F. Supp. at 820–21; Murray, 179 A.2d at 699.
\textsuperscript{235} Schempp, 374 U.S. 203.
\textsuperscript{236} See Engel v. Vitale, 370 U.S. 421, 424 (1962) (“We think that by using its public school system to encourage recitation of the Regents’ prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause.”).
\textsuperscript{238} See Transcript of Oral Argument at 43, Murray, 374 U.S. 203 (No. 119) (consolidated with Sch. Dist. v. Schempp) (statement of the Court), reprinted in 57 LANDMARK BRIEFS AND
statutory Bible reading practice is not a religious practice. It requires only that those who wish to do so may listen to daily readings without discussion or comment from a great work that possesses many values, including religious, moral, literary and historical.\textsuperscript{229} Consistent with this claim, they initially refused to excuse dissenters on the ground that there was no need to do so if the exercise was not religious, but the state law was later amended to include an opt-out provision.\textsuperscript{240}

The skepticism with which the Court greeted attempts to dilute the religious significance of the Bible was evident in an admonition delivered by Justice Hugo Black during the oral argument:

It seems to me like . . . you'd do better if you'd face the issue. I don't know what's the answer to it, but how can you assert seriously or argue or ask us to consider seriously this is not a religious ceremony based on the Bible and the Lord's Prayer? Those who are strongest for it I doubt, would not hesitate to say that.\textsuperscript{241}

Douglas Laycock uses unusually direct language to make a similar point with respect to "under God" in the Pledge. "Of course," he wrote, "the government's secular interpretation of the Pledge was a polite lie, told only to the Court. Perhaps the government hoped the Court would repeat the lie, but surely it did not expect that the Court would believe the lie."\textsuperscript{242}

Predictably, having found the generic prayer in \textit{Engel} to be religious, the Supreme Court reached the same conclusion about Bible reading and prayer in \textit{Murray} and \textit{Schempp}.

\textit{[I]n both cases the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the [Schempp and Murrays]. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause."}\textsuperscript{243}

Moreover, the Court ruled that:

\begin{quote}
we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of re-
\end{quote}
ligion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs. . . .

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. 244

The Court's decision in Schempp drew heavily on its reasoning in Engel a year earlier, although Engel involved a recently composed monotheistic prayer and Schempp dealt with long-standing Protestant practices. The close relationship between Engel and Schempp with respect to the time period in which they occurred, the arguments presented on both sides, and the rationales on which they were decided is yet another indication that the main point in such cases is not the theological content of government-sponsored speech, whether Bible reading or generic monotheistic prayer. The real issue is the underlying tendency to identify a majority religious view, present it as normative and quintessentially American, and attribute to it a certain significance, symbolism, and power in relation to the American system of government.

With respect to religious content, one obvious difference between Engel and Schempp on the one hand and Newdow on the other is that the two 1960s cases involved prayer, which is by its nature religious, whereas Newdow's "under God" is not a prayer. As Solicitor General Olson pointed out in his oral argument, the Court, in dicta, has repeatedly contrasted the Pledge with challenged practices that involved prayer as such: "[T]his Court has also said the ceremonial rendition of the Pledge of Allegiance in context repeatedly over the years . . . would cause a reasonable observer to understand that . . . this is not a religious invocation. It is not like a prayer, it is not a supplication, it's not an invocation." Chief Justice Rehnquist agreed, stating that "'under God' is in no sense a prayer, nor an endorsement of any religion." Similarly, Justice O'Connor maintained that a reasonable observer "could not conclude that reciting the Pledge, including the phrase 'under God,' constitutes an instance of worship. I know of no religion that incorporates the Pledge into

244 Id. at 225–26 (footnote omitted).
its canon, nor one that would count the Pledge as a meaningful expression of religious faith.\(^\text{247}\)

The nineteen scholars of religion who filed an amicus curiae brief disagreed with Olson, Rehnquist, and O'Connor about the importance of the fact that "under God" is not a prayer:

As scholars from divergent religious traditions, amici submit that the invocation of God's name, in any setting, is a religious exercise and act. In the classroom setting, recitation of the words "under God" in the Pledge constitutes a religious act that is closely akin to formal prayer, and identical in purpose. The relevant question is not the form of address to God, but the reverent and solemn manner in which God's name is invoked.\(^\text{248}\)

The clergy brief made the same point: "None of the dicta tentatively or casually approving the religious portion of the Pledge of Allegiance considered or even noticed the fact that the Pledge is unique in requesting a religious affirmation from individual citizens."\(^\text{249}\) The brief further denied "that leading students in recital of a creed is any more defensible than leading them in prayer."\(^\text{250}\)

VI. SEQUE INTO THE PRESENT

Following Engel and Schempp, hundreds of proposals for constitutional amendments were introduced into both Houses of Congress in an effort to supersede the Supreme Court's rulings and return state-sponsored prayer to the public schools.\(^\text{251}\) Only four such proposals have come to a vote, the earliest in 1966 and the most recent in 1998.\(^\text{252}\) All of them received a simple majority, but none garnered the required two-thirds vote.\(^\text{253}\) The problem, from the perspective of amendment supporters, may be stated in the classic line from the comic strip Pogo: "We have met the enemy, and he is us."\(^\text{254}\)

\(^{247}\) Id. at 40 (O'Connor, J., concurring).
\(^{248}\) Brief of Religious Scholars, supra note 43, at 19.
\(^{249}\) Brief of Clergy, supra note 43, at 24.
\(^{250}\) Id. at 25.
\(^{251}\) See Alley, supra note 20, at 111-17 (discussing the "rush by members of Congress... proposing constitutional amendments to override the Court's decision" in Engel); Delfatore, supra note 3, at 106-43 (discussing proposed constitutional amendments regarding school prayer); Fenwick, supra note 20, at 133-36 (discussing the "nearly one hundred fifty [amendments] proposed" following the Engel and Schempp decisions); Fraser, supra note 20, at 147-50 (describing the public opposition to the Court's rulings); Laubach, supra note 20, at 47-97 (discussing a constitutional amendment proposed by Rep. Frank Becker).
\(^{252}\) See Delfatore, supra note 3, at 135, 142-43, 198, 298 (discussing amendment proposals entertained in Congress).
\(^{253}\) Id.
the undeniable popularity of school prayer in the abstract, no specific proposal has ever had sufficiently broad appeal to pass.

Not surprisingly, two major sticking points concern sectarianism and opt-out policies—issues that have been in contention for generations. Some proponents of state-sponsored school prayer, particularly those who focus on states’ rights, want no restrictions of any kind on the authority of states to establish their own policies about school prayer, including the ability to decide what prayer should be said and whether it should be mandatory. Other school-prayer supporters oppose sectarian or nonvoluntary prayer; many members of the clergy, in particular, have spoken out against government coercion in matters of religion. Indeed, some clergy groups, notably the National Council of Churches of Christ and the Baptist Joint Committee on Public Affairs, have gone so far as to oppose a return to state-sponsored school prayer on any terms. Like Samuel Thayer Spear in the nineteenth century and the thirty-two members of the clergy and nineteen religious scholars in Newdow, they take the position that, although the government would be unlikely to endorse beliefs incompatible with their own, its promotion of any religious view is objectionable.

An early example of this clerical stance may be found in testimony offered to the House Judiciary Committee in 1964. Speaking on behalf of the National Council of Churches, Edwin Tuller, general

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255 DELFATORE supra note 3, at 107–08.
256 Id.
257 Id.
258 The National Council of Churches of Christ has “urge[d] parents and others to refrain from the temptation to use public schools to advance the cause of any one religion or ethnic tradition, whether through curriculum or through efforts to attach religious personnel to the public schools.” NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., THE CHURCHES AND THE PUBLIC SCHOOLS AT THE CLOSE OF THE TWENTIETH CENTURY (1999), http://www.ncccusa.org/about/edpol.html. Representatives of the Baptist Joint Committee for Religious Liberty and the Interfaith Alliance make a similar argument:
The goal of our nation’s public schools is education, not indoctrination. We serve our children best when we help to shape character in a way that appreciates an increasingly diverse society, not when we treat them as a captive audience convened for the transmission of one particular set of religious beliefs. We wholeheartedly agree that public schools should accommodate the religious rights of students. But, as the administration’s own guidelines for educators indicate, that accommodation must be made without disrupting the learning process or interfering with the rights of others.


259 SPEAR, supra note 170, at 107–10.
secretary of the American Baptist Convention, outlined the dangers of government-sponsored prayer:

Another very real danger is the possibility that in time this amendment could bring about a kind of "state religion" in which forms of religious observance and patriotism could become confused. . . . The act of worship might become part of being an American or being patriotic and in time the ideas of God and the Nation can fuse into one. There would be a real danger, then, that religion could become the tool of the state and eventually be used for the state's purposes as has already happened in the history of many countries.262

Tuller's remarks pertained to the use of prayer as part of the official public-school program, but the underlying sentiment is also applicable to the use of a Pledge that describes the nation to which one is professing loyalty as being "under God." As the thirty-two members of the clergy observed in their amicus brief,

[unlike any previous case in this Court, the Pledge explicitly links religious faith to political loyalty and thus to standing in the political community. A student cannot affirm her allegiance to the nation unless she can also affirm the religious message that this nation is "under God." Government requests simultaneous affirmation of both the patriotic and religious professions of faith. The message of exclusion is unmistakable. What kind of citizens can they be if they cannot even recite in good faith the full pledge of allegiance to the nation?]263

Throughout the debate over state-sponsored religious expression in public schools, opposition by moderate-to-liberal clerics has been a major source of frustration to advocates of those practices.264 As they point out, the majority of Americans want the government to acknowledge the existence of God. Representative George Goodling, a Republican from Pennsylvania, wrote to the National Council of Churches in 1964 expressing his exasperation at the situation:

Frankly, I am somewhat annoyed and greatly concerned about the present-day philosophy of some of our so-called religious leaders. . . . Let me suggest you come from your exalted position and mingle with the 40 million rank and file as I do constantly. You will discover beyond any shadow of doubt the chiefs and indians [sic] are in violent disagreement.265

Two years later, Senator Everett Dirksen, a Republican from Illinois, advocating a return to state-sponsored school prayer in the name of what he called "the common man," referred to the clergy who opposed the majority will as "the social engineers, the panacea hunters,

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262 Id. at 660 (statement of Edwin Tuller, Gen. Secretary, American Baptist Convention).
263 Brief of Clergy, infra note 43, at 11.
264 See DELFATTORE, infra note 3, at 122-25, 133-34 (explaining the views of some moderate and liberal clerics who oppose state-sponsored prayer).
265 School Prayers, infra note 261, at 520.
the world savers, and the brittle professors," and claimed that they consisted of "a few ivory-towered leaders here who have lost contact with the people of this country." Indeed, the sponsors of all four school-prayer constitutional amendments that have come up for a vote in Congress have treated the assertion that the majority favors school prayer as if it were an unanswerable argument. Most recently, Representative Ernest Istook (R-Oklahoma) deliberately took a back seat to religious advocacy groups to underscore his commitment to carrying out the wishes of his constituents and supporters. His own press release concerning his introduction of the legislation that bore his name was headed, "Groups Announce Religious Freedom Amendment." It is, of course, not surprising that political debates about government religious speech, far more than court decisions, focus on what the majority wants. Representative Gillespie "Sonny" Montgomery, a Democrat from Mississippi, candidly acknowledged this reality on the floor of the House:

Most Americans are not interested in the arguments about whether or not the prayer amendment will change the Bill of Rights or weaken the Constitution. What the American people are interested in is that the

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"112 Cong. Rec. 17, 23532 (1966); see also School Prayer: Hearings on S.J. Res. 148 Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary, 89th Cong. 13 (1966) (statement of Sen. Dirksen) (observing that the committee was hearing "every sophisticated argument except an argument from the common man of this country")."

"67 Representative Chalmers Wylie, a Republican from Ohio, similarly relied on public opinion:
I am nonetheless happy at this time to be able to inform my colleagues that a poll taken by the National Enquirer... shows that 92.6 percent of those responding in a 2-week period are in favor of prayer in schools and of a constitutional amendment to guarantee that as a right.

This, Mr. Speaker, is no piddling poll...

I am greatly impressed with the heavy margin favoring the school prayer amendment. I hope that my colleagues will—as representatives of all the people and not just special interest groups—be impressed also.

Now, public opinion favors voluntary prayer. The American people are openly and overwhelmingly in favor of allowing prayer in our public schools. Several polls taken recently by leading pollsters in America indicated the following results: 80 percent of those polled approved of allowing prayer in public schools; 73 percent agreed that the Supreme Court and Congress have gone too far in keeping religious and moral values like prayer out of our laws, our schools, and our lives; and 71 percent favored a constitutional amendment to allow daily prayers to be recited in school classrooms.

There are few issues in my many years in the Senate which have commanded such strong and clear support by the American people. I believe that we in Congress, therefore, have a responsibility to address this very important matter.

Proposed Constitutional Amendment to Permit Voluntary Prayer: Hearings Before the S. Comm. on the Judiciary, 97th Cong. 2 (1982) (statement of Sen. Thurmond)."

Supreme Court has restricted prayer in public schools and they do not like it one bit. If the people want voluntary prayer in the public schools and we represent the people, then I think we should approve this resolution.

Let us lay our cards on the table. A vote for the proposed constitutional amendment is going to be a lot easier to explain back home than a vote against it. I know that if I vote against the resolution today, my opponent next year will make me do a lot of explaining.269

On a more philosophical level, the question of state-sponsored religious speech implicates two of the most basic American principles: majority rule and individual rights. According to the model of toleration, there is no conflict between these principles as long as minorities are not forced by the government to participate in any particular form of religious expression.270 Indeed, if minorities succeeded in thwarting the majority's desire to have the government express a belief in God, that would be seen as violating the religious freedom of the majority. But to those who adopt the model of equality, the individual right to freedom of conscience is compromised whenever the government puts the weight of its influence behind any religious view, and the number of individuals who wish it to do so is irrelevant.271 In this model, religious belief is solely a matter of individual rights and may not even be influenced, let alone coerced, by the government.272 Attorney Henry Sawyer, representing the Schempps, addressed this point in his oral argument before the Supreme Court:

The question is: Is it a constitutional right, under the free exercise clause, to have the state conduct the prayer, or "to pray," in other words, under the aegis of the state? And I think clearly not. Even if the overwhelming majority so feel, I think it probably has nothing to do with the question of majorities.273

Decades later, Douglas Laycock elaborated on this point:

On religious matters, citizens do not vote and government does not lead. . . . Government statements on religion seem harmless only when a vote seems unnecessary because the statement is bland enough to have overwhelming support. But government has no more legitimate power to lead religious opinion on the basis of an implicit vote than on the basis of an explicit vote.274
VII. LIFE OUTSIDE THE BOX

By the 1980s, when a generation of Americans had grown up without having experienced traditional state-sponsored school prayer, proponents of religious expression in the public schools found it easier to think in terms of new approaches as opposed to focusing on the reinstatement of school prayer as it had existed before 1963. The most widely accepted of these new models was based on the premise that students as individuals may engage in religious speech during noninstructional time, but the state must neither encourage nor inhibit such activities. A limited application of this principle is embodied in the Equal Access Act of 1984, which forbids federally funded secondary schools that have even one noncurricular club from rejecting any proposed student-initiated group “on the basis of the religious, political, philosophical, or other content of the speech at such meetings.”

The original aim of the Equal Access Act was to make it possible for students to start Bible clubs and prayer groups, and for the first few years after its passage it was used largely for that purpose. It was declared constitutional by the Supreme Court in Board of Education v. Mergens ex rel. Mergens, which also rejected an attempt by school officials to define noncurricular narrowly enough to permit a chess club or a scuba-diving group to meet without triggering the requirement that religious clubs must also be permitted. Similarly, in Hsu ex rel. Hsu v. Roslyn Union Free School District, a student religious group won the right to remain an official school club while restricting some of its leadership positions to Christians. More recently, the Equal Access Act has been used to protect the right of secondary-school students to form controversial nonreligious clubs, primarily dealing with homosexuality and atheism.

Although the Equal Access Act affects only public secondary schools and then only under certain stated conditions, the underlying distinction between government and private action applies more

275 See DELFATTORE, supra note 3, at 178–228 (discussing the causes of emerging ideas about school prayer).
276 Id.
278 Id. § 4071.
280 85 F.3d 839, 848 (2d Cir. 1996).
281 See E. High Sch. PRISM Club v. Siedel, 95 F. Supp. 2d 1239 (D. Utah 2000) (ordering a high school to admit the PRISM Club, which served to raise awareness of gay and lesbian contributions to history and culture, because it was likely curriculum related and hence protected alongside other clubs by the Equal Access Act); E. High Gay/Straight Alliance v. Bd. of Educ., 81 F. Supp. 2d 1166 (D. Utah 1999) (holding that a high school did not violate the Equal Access Act by excluding the Gay/Straight Alliance since, unlike permitted clubs, it was noncurricular).
WHAT IS PAST IS PRELUDE

broadly. Unlike public-school employees, students are not agents of the state. Their First Amendment rights to freedom of speech and religion are not coextensive with those of adults, but they retain some rights within the public schools. The precise definition of those rights remains a thorny question, as does the line of demarcation between the actions of students and those of teachers and administrators. In C.H. v. Oliva, for instance, the parents of a first grader challenged his teacher’s decision not to allow him to read a children’s Bible aloud to the class when she had permitted other children thus to share books they had brought from home. Bringing in the Bible was the act of the child as an individual, but the teacher was called upon to give him permission to read it to the class. This raised the issue of school involvement with religious speech in two ways: the other children would be compelled by the teacher to sit quietly and listen to the Bible reading, and children as young as first graders might not distinguish between merely allowing the Bible to be read and signifying approval of its message. The district court ruled in favor of the school, and the Third Circuit Court of Appeals, hearing the case en banc, tied. As this outcome suggests, there is significant uncertainty about how—or whether—the distinction between government and private action should be operationalized in the schools, although it enjoys wider acceptance than any other current method of dealing with religion in public education.

The second major approach to religious expression in today’s public schools involves proposals to post generically monotheistic materials associated with American history and heritage: examples include the Ten Commandments, “In God We Trust,” “God Bless America,” and “One Nation under God.” If the posting of such items by public-school officials were declared legal, it would unques-

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283 226 F.3d 198, 203 (3d Cir. 2000) (en banc).

284 Id. at 204.


286 Oliva, 226 F.3d at 200.


288 See DELPATORE supra note 3, at 301.

289 See id.

290 See id.
tionably involve a degree of government endorsement that is not present in applications of the equal-access principle, under which school officials do not engage in their own religious speech but merely accommodate that of students. For this reason, such postings are favored by people who believe that an official, national acknowledgment of faith in God is necessary in order to recognize this country's heritage and protect its liberties and security. The student-initiated religious speech permitted under the equal-access model is insufficient to satisfy this purpose for exactly the reason that led the Supreme Court to declare it constitutional: it reflects the personal views of individual students, not a statement of an American religious norm or a declaration of the government's dedication to it. Conversely, the display of religious sayings in the schools would not, in and of itself, represent the same level of commitment by the students that equal access does. Under equal access, students willingly engage in the religious speech of their choice, sectarian or otherwise. In most schools, anything posted by employees would probably be very generic, and students would be likely to act as passive readers of speech that is not their own and that does not necessarily reflect their views.

Like "under God" in the Pledge, displays of the Ten Commandments and of traditional religious mottos are often described as representing "religion in general," as if they encompassed the universe of religious beliefs. Advocates of posting such material in the public schools either claim that it covers all religions or, as nineteenth-century decisions do with respect to Christianity and as Justice O'Connor does in her Newdow concurrence, they acknowledge the existence of conflicting faiths but treat them as irrelevant to determining whether a government action favors or disfavors any particular religious belief. Moreover, even in defining monotheism itself, there is a tendency to presume that it refers to the notion of God most prevalent in the United States. For this reason, it is not uncommon to see the term Judeo-Christianity used as if it were interchangeable with monotheism. But even if it were true that Jewish and Christian teachings constitute the totality of conceptualizations of a

291 See id. at 300-01 (discussing Rep. DeLay's ideas about posting religious messages in schools to discourage tragedies like Columbine).
292 See generally id. at 299-314 (describing the current state of the controversy over religion in the classroom).
293 See id.
294 Id.
295 See ALLEY, supra note 20, at 137 ("Jews do not have a Christian heritage, while Christians more certainly do have a Jewish heritage. . . . [The term Judeo-Christian] is an effort at tolerance that is flawed by an inherent imbalance."); DELFATTORE, supra note 3, at 311-12 (discussing the problems with the term Judeo-Christianity).
single deity, the notion that they form a composite religious tradition makes sense only from a Christian-centered viewpoint. When one religion stands or falls on its belief that Jesus is God, and the other denies his divinity, it is ludicrous to describe that as a single faith. What the term Judeo-Christianity really means is that Christianity has Judaic roots, so that Judaism functions as the source faith and Christianity as the successor faith. This is not the same as treating the two faiths equally or amalgamating them into a new whole, and even as an historical continuum it ends with Christianity only because the Christian majority believes that it does. Just as Christianity arose out of Judaism, Islam has its roots in both faiths, but we do not hear about a Judeo-Christian-Islamic tradition in which a religion other than Christianity is the end point of the evolutionary process. On the contrary, the term Judeo-Christianity is not merely historically descriptive but theologically argumentative, implying that Christianity is the ultimate successor faith, unsucceeded and unparalleled by any other and subject to no further evolution.

This point is addressed in the clergy brief in Newdow, which suggests that, although God could refer to any deity,

most students will understand their government to be asking them to pledge allegiance to one nation under the God of the Christians. Many students probably assume that at least this is also the God of the Jews, but this equivalence works only from a Christian perspective. From a Jewish perspective, the Triune God of Father, Son and Holy Spirit is quite different from the Old Testament’s more unified conception of God.\footnote{Brief of Clergy, supra note 43, at 6.}

Monotheism, as it is represented in “under God” and in proposals to post religious sayings in the public schools, appears to be a far more generic concept of religion than the pan-Protestantism of earlier periods, and in most respects it is. Nevertheless, the comparisons between Engel and Schempp discussed in Part V, together with the conflation of monotheism with Judeo-Christianity, suggest that for practical purposes the distinction between pan-Protestantism and monotheism may be partially semantic rather than entirely substantive.

VIII. CONCLUSIONS

Throughout past and present, there runs a common thread: not the specific content of whatever is alleged to be the (all but) universal faith, but the notion that the government may constitutionally and justly promote whatever that faith is deemed to be at a given time. Consider this observation by Justice Joseph Story, appointed to the U.S. Supreme Court in 1811:
Probably at the time of the adoption of the constitution, and of the [first] amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.297

By today’s standards, Story’s claim that treating all faiths equally under the law would prostrate Christianity, knock it flat from what he conceives to be the privileged position it deserves, would make many people squirm. Yet the vast majority of Americans see no inconsistency in placing monotheism on the same exalted plane. As an example, Justice O’Connor’s privileging of monotheism over polytheistic and nontheistic religions, such as Buddhism and Hinduism, might cause some discomfort to advocates of governmental neutrality to all faiths. Nevertheless as Newdow pointed out, there is significantly less support for promoting governmental neutrality between belief and disbelief.298 Laycock addresses this problem:

Once we get past the polite lie and agree that “under God” is religious, it is common to assume that “under God” is so generic that it includes all believers, and that only atheists and agnostics could dissent. The legal relevance of this assumption is unclear; atheists and agnostics have as much right as anyone else to invoke the Establishment Clause. But the assumption matters politically . . . 299

Although it is now widely acknowledged that Christianity is one faith among many in terms of equality under the law, there remains a crucial political difference between leveling the playing field for all belief systems and placing faith itself on the same plane as atheism. But that distinction is viable only from the viewpoint of believers, just as similar claims with respect to the primacy of pan-Protestantism or Judeo-Christianity make sense only from inside, not from outside, the relevant belief system. The debate over government’s role in promoting majority religious beliefs is not one of absolutes, and it never has been; it is one of perspective.

297 Story, supra note 168, at §§ 1868, 1871.
298 Transcript of Oral Argument, supra note 13, at 19 (statement of Michael Newdow).
299 Laycock, supra note 43, at 226.
Despite the inconclusive outcome of Newdow, the case represents a milestone in the evolution of thought about religion in the public schools because its focus on generic monotheism renders obsolete the model used to resolve earlier disputes. In the past, protests over school prayer led to shifts in scope from specific Protestant denominations to pan-Protestantism to Judeo-Christianity/monotheism, all of which was possible within the bounds of terrestrial logic. Beyond that, however, lies intellectual chaos. A formulation addressing "whatever god or gods there may be, if any, and if indeed you take any role in earthly affairs, or possibly not" is clearly insufficient to fulfill the alleged secular purposes of government-sponsored references to religion, such as solemnizing occasions and recognizing the nation's religious heritage. We are rapidly approaching the point at which we will have to stop broadening the question and simply face it: is it in fact appropriate for the government to use religious means to achieve secular purposes, to explain its political philosophy, or to determine its public policies? The statements by Chief Justice Rehnquist, Justices O'Connor and Thomas, and Solicitor General Olson, together with the work of legal scholars Thomas Berg and Emily Newhouse, assert that the answer is yes. Michael Newdow's statements, the Ninth Circuit decision, the briefs of the thirty-two members of the clergy and the nineteen religious scholars, and the article by Douglas Laycock take the opposite stand, as does the present Article.

It is a contradiction in terms to say that the government must proclaim as fact the most fundamental tenet of the majority's religious faith in order to explain a political philosophy based on respect for the individual. Government is quintessentially collective, whereas beliefs about the so-called big questions, such as the existence of God and the nature of our relationship to him, are inherently individual. The claim that individual liberty is served when the government asserts that that liberty arises from, and depends upon, the objective truth of the majority religious tradition is not an absolute; it makes sense only from the perspective of people who accept that tradition. To those whose line of vision originates outside the circle of that belief, the naked majoritarianism of "under God" has nothing to do with the individual rights of nonbelievers or of people who believe in God but not in professions of religious faith by the government. To be sure, many issues require majority decisions by the electorate or by its representatives. The principle of majority rule rightly applies, however, only when a decision must be made on behalf of the community—whether taxes will be raised, for instance, or where a new landfill will be located. The government is not called upon to decide whether God exists, nor is it justified in linking the official pledge of loyalty to this nation with the ratification of majoritarian theology in
the name of individual rights that apparently do not extend fully to those individuals who are distinct from the majority.

There is no doubt that majorities and minorities alike have the right to practice and promote their religious views in public, and the more numerous the adherents of a particular belief system, the more impact their collective expressions of faith will have on the community and, cumulatively, on the nation. All this is entirely in keeping with a free society, and arguing that the government should not put a thumb on the scale in matters of religion does not mean that religion should be taken out of the public sphere. Religion is a private matter as opposed to a governmental one, not as opposed to a public one; and although the majority's votes give it the power to blur the line between the two, it has no right to do so.

A particularly apt expression of this distinction between public and governmental displays of the will of the majority may be found in the oral argument in *School District v. Schempp*, when Justice Potter Stewart asked Henry Sawyer, the attorney for the Schempp family, "But isn't it a gross interference with the free exercise of their religion, of those, in my imaginary case—those 98 percent of the student body who say our religious beliefs tell us that [public group prayer] is what we want to do?" Sawyer's reply was direct, pithy, and absolutely on target. "Well, they have a right to do it, Your Honor," he said, "but they haven't got a right to get the state to help them." Although Protestant practices were at issue in that particular case, Sawyer's underlying point pertains to any manifestation of the majority's desire to have its world view pronounced valid by the government. As this Article suggests, there is no principled distinction between government promotion of Protestantism or of monotheism. The former would not be feasible in most of the country today because the population is more heterogeneous than it was in the nineteenth century, and monotheism now serves as the religious tradition that almost all Americans embrace as objectively true. But the game is the same; all that has changed is the size of the ball.

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301 *Id.* (statement of Mr. Sawyer).