RELIGIOUS FREEDOM

HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT

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2005 SUPPLEMENT

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THE AMERICAN EXPERIENCE

CHAPTER EIGHT

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7. THE BLAINE AMENDMENT

At page 287 add new note:

NOTE

1. *The "Shameful Pedigree" of the Blaine Amendment and the Persistence of a "Doctrine Born of Bigotry."* For a brief account of hostility to Roman Catholics throughout American history and the impact of this hostility on various results in constitutional law, *see* Douglas Laycock, "A Survey of Religious Liberty in the United States," 47 Ohio St. L. J. 409, 417–19 (1986). One of the most notorious examples of this bias was the Blaine Amendment, but until recently few were prepared to acknowledge it. The Blaine Amendment was clearly a prominent feature in the formation of many state constitutions in the late nineteenth century. For example, the State of Washington enacted its constitution at a moment when the Blaine Amendment had considerable influence. *See, e.g.,* Robert F. Utter and Edward J. Larson, "Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution," 15 Hastings Const. L.Q. 451 (1988). A key provision of the Wash. Const., Art. I, section 11, provides that no public money should "be applied to any religious worship, exercise, or instruction." Usually this provision is read acontextually, as though the words had nothing to do with the context of hostility to Catholics in which they were written. Thus the Washington Supreme Court relied on this provision of the State Constitution and the *Lemon* case [Chapter Fourteen, section 1] to deny aid to a visually handicapped student who was attending a Bible college to become a youth minister. In *Witters v. Washington Department of Services for the Blind,* 474 U.S. 481 (1986), the Court reversed unanimously, finding that the challenged program complied with all three criteria announced in *Lemon*. On remand, the state Supreme Court again upheld the ban on aid to the student, relying exclusively on the state constitution as an independent ground that is not reviewable by the Supreme Court. Neither court made any mention of the Blaine Amendment.

In *Mitchell v. Helms,* 530 U.S. 793 (2000) [Chapter Fourteen, section 1], JUSTICE THOMAS addressed the Blaine Amendment in an opinion for a plurality of the Court [joined by THE CHIEF JUSTICE and JUSTICES SCALIA and KENNEDY]: "Hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.... Opposition to aid to 'sectarian' schools acquired prominence in the 1870's with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitu-

tion to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic' (citing Professor Green's article).... In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of the Court bar it. This doctrine, born of bigotry, should be buried now." JUSTICE O'CONNOR (joined by JUSTICE BREYER) did not join the plurality opinion and wrote a concurring opinion expressing no view on the Blaine Amendment.

The reports of the demise of the Blaine Amendment proved to be exaggerated. Or at least the burial of a doctrine that four justices deemed "born of bigotry" has been deferred. The State of Washington denies state aid to any post-secondary student pursuing theological studies. In *Locke v. Davey,* 540 U.S. 712 (2004) [Chapter Fourteen, section 3], the Court sustained this denial of state aid, but did not reach the issue of whether the Blaine Amendment is unconstitutional. Chief Justice Rehnquist had joined Justice Thomas's plurality opinion in *Mitchell,* above. In *Locke v. Davey* Rehnquist wrote in a footnote: "The amici contend that Washington's Constitution was born of religious bigotry because it contains a so-called 'Blaine Amendment,' which has been linked with anti-Catholicism [citing plurality opinion in *Mitchell v. Helms,* above]. As the State notes and Davey does not dispute, however, the provision in question is not a Blaine Amendment. The enabling Act of 1889, which authorized the drafting of the Washington Constitution, required the state constitution to include a provision 'for the establishment and maintenance of systems of public schools, which shall be ... free from sectarian control.' Act of Feb. 22, 1889, ch. 180, § 4, & ¶ Fourth, 25 Stat. 676. This provision was included in Article IX, § 4, of the Washington Constitution ('All schools maintained and supported wholly or in part by the public funds shall be forever free from sectarian control or influence'), and is not at issue in this case. Neither Davey nor amici have established a credible connection between the Blaine Amendment and Article I, § 11, the relevant constitutional provision. Accordingly, the Blaine Amendment's history is simply not before us."

If the U.S. Supreme Court reviews a case squarely presenting the question of the constitutionality of state constitutional provisions imbedded in the history of the Blaine Amendment, how should the Court rule? May a State Constitution use code words to mask its hostility to vulnerable groups? *See Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) [Chapter Eleven, section 12] and *Romer v. Evans* (1996) [Chapter Sixteen, section 3].

PART THREE

CONTEMPORARY CONTROVERSIES

CHAPTER ELEVEN

SACRED DUTIES

3. WORSHIP OF A GRAVEN IMAGE

At page 391 add new case:

Can Atheists Be Required to Salute the Flag as a Symbol of "One Nation, Under God?" In the first flag salute case, *Gobitis* (1940), Justice Frankfurter noted in passing: "Government may not interfere with organized or individual expression of belief or *disbelief*" (emphasis added). The next sentence in Frankfurter's opinion also purported to protect agnostics and atheists, but tilted toward believers and their places of worship: "Propagation of belief—or even of *disbelief*—in the supernatural is protected, whether in church or chapel, mosque or synagogue, tabernacle or meetinghouse" (emphasis added).

The second flag salute case, *Barnette,* reversed *Gobitis* in 1943. It contained the ringing declaration: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters or opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

For two reasons neither the *Gobitis* court nor the *Barnette* court had an opportunity to reflect upon the impact of a mandatory flag salute upon agnostics or atheists. First, the claim presented by Jehovah's Witnesses in the 1940s was that the flag salute offended against the biblical prohibition of worshipping a graven image. Second, it was not until 1954, during the Cold War, that Congress added two words, "under God," intended by its sponsors to differentiate this country from "atheistic communism" (Representative Rabaut said the purpose of the addition of the words "under God" was to contrast this country's belief in God with the Soviet Union's embrace of atheism), to affirm the nation as a religious one, and to infuse children with the belief that the United States is "under God." These two words eventually provoked litigation by Michael Newdow, an American atheist who was ordained more than 20 years ago in a ministry that "espouses the religious philosophy that the true and eternal bonds of righteousness and virtue stem from reason rather than mythology"; his daughter was regularly exposed to the pledge ceremony in a California school.

In the post–9/11 world the flag had become an omnipresent symbol around which an overwhelming majority of Americans rallied to share their grief and their anger, their fear and their yearning for security. In June of 2002 a divided panel of judges in the Ninth Circuit ruled that the Pledge of Allegiance to the Flag violated the Establishment provision of the Religion Clause. It invoked *Lemon* (1971) [Chapter Fourteen, section 1] discussing all three of its "tests," and it relied principally on *Lee v. Weisman* (1992) [Chapter Fourteen, section 2] for its conclusion.

Congress and the White House responded swiftly with official outrage. Senate Majority Leader Tom Daschle said it was "nuts." Senator John Edwards called the opinion "wrong." Senator Robert Byrd called the judges "stupid." And the Senate unanimously approved a resolution denouncing the decision. House Majority Whip Tom DeLay deemed it "sad" and "absurd," but could only muster a vote of 416 to 3 in support of a similar resolution condemning the decision in the House of Representatives. President Bush called it "ridiculous." Editorial writers all over the country denounced the decision.

The school district and the Justice Department promptly called for rehearing en banc. On December 4, 2002, the panel rejected a motion by the student's mother, Sandra Banning, to strip Michael Newdow of standing on the ground that she mother had exclusive legal custody (both parents shared physical custody). This issue was dispositive when the case reached the Supreme Court.

On February 28, 2003, the Ninth Circuit panel issued an amended opinion, focusing on coercion as the gist of why the mandatory Pledge violates the First Amendment. But the full court refused to hear the case en banc. Nine judges dissented. Six of them joined a strong dissent by Circuit Judge Diarmid O'Scannlain, who reviewed the Supreme Court's school prayer cases and concluded that the Supreme Court had barred only religious acts (such as prayer) in public schools, but that it had not barred mere references to religion (such as the Pledge of Allegiance). The panel's decision "contradicts our 200–year history and tradition of patriotic references to God' and conflicts with the Founders' understanding." O'Scannlain argued that the logic of *Newdow* would forbid recitation of the Declaration of Independence, the Constitution, the Gettysburg Address, and the National Motto "In God We Trust," or the singing of the National Anthem, since all contain religious references; and it would forbid observance of the national holidays of Thanksgiving and Christmas. O'Scannlain touched themes that reverberated in the opinions of the Chief Justice and Justice O'Connor.

The passions of the country were again stirred by a dispute over the requirement of saluting the flag. *Barnette* was decided on Flag Day, June 14, 1943. So was *Elk Grove Unified School District and David W. Gordon, Superintendent v. Michael Newdow*, on June 14, 2004. The Court declined

to rule on the merits, dismissing the case for lack of prudential standing by the father, whom the Court characterized as a "noncustodial parent."

Michael Newdow represented himself very ably at all stages of complicated litigation, including oral argument in the Supreme Court, over the constitutionality of the pledge. When his suit was dismissed for lack of standing, he vowed to help another atheist with standing to challenge the two words he deemed injurious and beyond the power of Congress to enact: "under God." Biblical theologians noted that the words do not amount to a triumphalistic, "my country right or wrong" ideology, but a humble statement that the American community is under divine judgment. They were closer to the spirit of Lincoln's original use of the term in the Gettysburg address, with its soft prayer that "this nation, *under God*, shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth." [Chapter Eight, section 4].

Terence J. Cassidy, Sacramento, CA, for petitioners.

Solicitor General Theodore B. Olson, Washington, D.C., for United States as respondent, supporting the petitioners.

Michael A. Newdow, pro se, by special leave of the Court, Sacramento, CA, for respondent.

■ JUSTICE STEVENS delivered the opinion of the Court.

Each day elementary school teachers in the Elk Grove Unified School District (School District) lead their classes in a group recitation of the Pledge of Allegiance. Respondent, Michael A. Newdow, is an atheist whose daughter participates in that daily exercise. Because the Pledge contains the words "under God," he views the School District's policy as a religious indoctrination of his child that violates the First Amendment. A divided panel of the Court of Appeals for the Ninth Circuit agreed with Newdow. In light of the obvious importance of that decision, we granted certiorari to review the First Amendment issue and, preliminarily, the question whether Newdow has standing to invoke the jurisdiction of the federal courts. We conclude that Newdow lacks standing and therefore reverse the Court of Appeals' decision.

I

"The very purpose of a national flag is to serve as a symbol of our country," *Texas v. Johnson* (1989), and of its proud traditions "of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations," id. (STEVENS, J., dissenting). As its history illustrates, the Pledge of Allegiance evolved as a common public acknowledgement of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles.

The Pledge of Allegiance was initially conceived more than a century ago. As part of the nationwide interest in commemorating the 400th

anniversary of Christopher Columbus' discovery of America, a widely circulated national magazine for youth proposed in 1892 that pupils recite the following affirmation: "I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all." In the 1920's, the National Flag Conferences replaced the phrase "my Flag" with "the flag of the United States of America."

In 1942, in the midst of World War II, Congress adopted, and the President signed, a Joint Resolution codifying a detailed set of "rules and customs pertaining to the display and use of the flag of the United States of America." Chapter 435, 56 Stat. 377. Section 7 of this codification provided in full:

> That the pledge of allegiance to the flag, "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all", be rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words "to the flag" and holding this position until the end, when the hand drops to the side. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute.

This resolution, which marked the first appearance of the Pledge of Allegiance in positive law, confirmed the importance of the flag as a symbol of our Nation's indivisibility and commitment to the concept of liberty.

Congress revisited the Pledge of Allegiance 12 years later when it amended the text to add the words "under God." Act of June 14, 1954, ch. 297, 68 Stat. 249. The House Report that accompanied the legislation observed 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." H.R.Rep. No. 1693, 83d Cong., 2d Sess., p. 2 (1954). The resulting text is the Pledge as we know it today: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4.

II

Under California law, "every public elementary school" must begin each day with "appropriate patriotic exercises." Cal. Educ.Code § 52720 (1989). The statute provides that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" this requirement. *Ibid.* The Elk Grove Unified School District has implemented the state law by requiring that "[e]ach elementary school class recite the pledge of allegiance to the flag once each day." Consistent with our case law, the School District permits students who object on religious grounds to abstain from the recitation. See *Barnette*.

. . . . In its first opinion [*Newdow* I] the appeals court unanimously held that Newdow has standing "as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter." That holding sustained Newdow's standing to challenge not only the policy of the School District, where his daughter still is enrolled, but also the 1954 Act of Congress that had amended the Pledge, because his " 'injury in fact' " was " 'fairly traceable' " to its enactment. On the merits, over the dissent of one judge, the court held that both the 1954 Act and the School District's policy violate the Establishment Clause of the First Amendment.

After the Court of Appeals' initial opinion was announced, Sandra Banning, the mother of Newdow's daughter, filed a motion for leave to intervene, or alternatively to dismiss the complaint. She declared that although she and Newdow shared "physical custody" of their daughter, a state-court order granted her "exclusive legal custody" of the child, "including the sole right to represent [the daughter's] legal interests and make all decision[s] about her education" and welfare. Banning further stated that her daughter is a Christian who believes in God and has no objection either to reciting or hearing others recite the Pledge of Allegiance, or to its reference to God. Banning expressed the belief that her daughter would be harmed if the litigation were permitted to proceed, because others might incorrectly perceive the child as sharing her father's atheist views. Banning accordingly concluded, as her daughter's sole legal custodian, that it was not in the child's interest to be a party to Newdow's lawsuit. On September 25, 2002, the California Superior Court entered an order enjoining Newdow from including his daughter as an unnamed party or suing as her "next friend." That order did not purport to answer the question of Newdow's Article III standing.

In a second published opinion [*Newdow* II], the Court of Appeals reconsidered Newdow's standing in light of Banning's motion. The court noted that Newdow no longer claimed to represent his daughter, but unanimously concluded that "the grant of sole legal custody to Banning" did not deprive Newdow, "as a noncustodial parent, of Article III standing to object to unconstitutional government action affecting his child." The court held that under California law Newdow retains the right to expose his child to his particular religious views even if those views contradict the mother's, and that Banning's objections as sole legal custodian do not defeat Newdow's right to seek redress for an alleged injury to his own parental interests.

On February 28, 2003, the Court of Appeals issued an order amending its first opinion and denying rehearing en banc. [*Newdow III*]. The amended opinion omitted the initial opinion's discussion of Newdow's standing to challenge the 1954 Act and declined to determine whether Newdow was entitled to declaratory relief regarding the constitutionality of that Act. Nine judges dissented from the denial of en banc review. We granted the School District's petition for a writ of certiorari to consider two questions: