“UNDER GOD”: THE PLEDGE, PRESENT AND FUTURE

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indeed, the more one thinks about what “one nation under god” means, the more religious people it excludes.

many public school districts in america require daily recitation of the pledge of allegiance. at this point, school authorities know that they have to permit an exception for any child who conscientiously objects to participating. moreover, barnette by now commands not just grudging acceptance, but widespread approval. most americans think it very bad to force children to make statements that offend their conscience.

what, however, about the timid child, or the child who has reasonable worries about stigma and peer pressure? the history of the pledge and of the related school prayer issue makes it obvious that nonparticipation often comes at a cost. if ellory schempp was greeted with outright persecution for reading from the quran, we can expect that children who refuse to say the pledge—whether they stand in silence, sit, or leave the classroom—will be courting the hostility of teachers, administrators, and, perhaps most clearly, their fellow students. the whole point of the pledge, in the mind of its original supporters, was to put all americans on record as supporting patriotism, and to inculcate the value of patriotism by a daily required exercise in the schools.

lee v. weisman recognized the coercive role of peer pressure, and this problem, studied in famous experiments by solomon asch, has been prominently recognized in recent studies of the holocaust and of the social importance of dissent. it is clear that even adults are highly vulnerable to peer pressure, to the extent of being willing to say things that they know to be false, and to do things that are terrible.

at the time of barnette, the children involved objected to the pledge because it asked them to swear loyalty to an entity other than god, which their faith did not permit them to do. although jehovah’s witnesses were not the only americans who had such conscientious objections, the other concerned groups were relatively small. it seemed at the time that arranging exemptions for a small number of children was feasible without undue stigmatization and upheaval. when the words “under god” were added to the pledge in 1954, the whole issue suddenly became much more complex.

at this point, many new groups of americans acquired conscientious grounds for objection to the daily recitation: atheists, agnostics, believers in a detached god who does not take a direct interest in human affairs, believers in a god who looks for right conduct and thus does not take a particular interest in americans over russians just because americans (many of them) believe in god and russians (many of them) are atheists, believers in a plurality of gods, believers in religions that do not assert the existence of a god. hindus, buddhists, jains, sikhs, unitarians, and some types of jews and christians now have conscientious grounds for objection.

indeed, the more one thinks about what “one nation under god” means, the more religious people it excludes. as a reform jew, i hold that god loves truth and righteousness, and that these values can be imagined as residing in an ideal community—rather like immanuel kant’s “kingdom of ends.” i also believe, however (again, with kant), that no actual nation instantiates them adequately, and that, in consequence, no actual nation enjoys god’s sponsorship. merely recognizing god’s existence cuts no ice: what interests god is the committed pursuit of justice. so i myself would object to the pledge on such grounds and would now not want to recite it, although in high school i did so, not having thought very much about religious matters. i don’t think that america is “under god” any more than israel, or india, or britain, or germany, or syria, or, for that matter, the soviet union in the 1950s is “under god”: all nations should strive for right conduct, and if they do what is just, god will approve their actions. but god doesn’t play favorites: god loves justice, peace, and righteousness, and doesn’t single out a particular nation, flawed as all nations are flawed, for special loving protection. or so i hold. but at the time, the phrase (introduced by the knights of columbus) was clearly intended to show why the u.s. was superior to godless communism. well, one could argue convincingly that it is in fact superior, but that argument would have to be made, and the mere fact that the u.s. is a nation of believers (on the whole) certainly does not make it a nation of righteous believers.

maybe “under god” means “subject to god’s judgment,” not “enjoying god’s favor and protection.” that is not
what the people who introduced the words meant by them, on the whole, since most believers think that all human beings are subject to God’s judgment, but the whole point of the language was to introduce a distinction between the U.S. and the Soviet Union. This, however, is a reading through which someone like me might attempt to reconcile the disharmony between the pledge and my beliefs. Still, this leaves many Jews on the outside: those who, like many leaders of Reform Judaism through the centuries, have denied the existence of a personal God and who have conceived of God as a force of rationality and order in the cosmos, in the manner of Spinoza. Isaac Meyer Wise, one of the greatest leaders of Reform Judaism in America, was a Spinozist, and he could not have accepted the pledge in its current form.

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Even if we did have a situation in which the theological views of all Jews and Christians were consonant with reciting the pledge, which we don’t, that would hardly deal with the legitimate grievances of Hindus, Buddhists, Unitarians, agnostics, atheists, and others. It’s important to notice, then, that it is not simply a matter of excluding nonbelievers, and that the issue cannot be solved by retreating to a nonpreferentialist version of the Establishment Clause. Lots of believers, and more every day (as Hinduism and Buddhism continue to grow), have cogent objections to the morning ritual. It states that America is a monotheist nation with a particular type of theistic conception, and this statement, in turn, entails the further statement that they are not fully equal to those monotheists in the public square. There is bound to be stigma in this, particularly in the light of the history of the demonization of Hindu polytheism in India by British monotheists, a history that the “reasonable observer” would be sure to learn.

At this point we might try to say that the pledge, while sectarian, is voluntary, and does not coerce anyone. Certainly it is a good thing that after Barnette, recitation of the pledge cannot be made mandatory. The question is whether this disposes of the constitutional question. Justice Kennedy, as we’ve seen, has prominently emphasized a coercion-based theory of the Establishment Clause. His theory of the Establishment Clause, however, is unconvincing, for surely an establishment issue can be present even when an observance, or a display, is utterly noncoercive, as Justice O’Connor’s endorsement test has repeatedly emphasized.

Even if we liked the coercion theory, however, it would not help rescue the pledge, at least not if we accept Justice Kennedy’s analysis of Lee v. Weisman. If the suggestion that one ought to stand during someone else’s reading of a graduation prayer is viewed as coercive, on the grounds that peer pressure and fear of stigma are coercive to young people, the pledge is surely much more coercive. The children involved include far younger children, and the act of not reciting, while other children are reciting with their hands over their hearts, is more conspicuous than the act of nonparticipation in the graduation prayer—even if one thought that sitting down was the only way to express nonparticipation. Justice Thomas, in his opinion in the pledge case, helpfully recognized that under Lee v. Weisman the words “under God” are unconstitutional. His radical solution was to deny the incorporation of the Establishment Clause and to throw out a whole series of precedents. If we are not ready to accept his doctrine, we should still accept his reading of Lee and the problem it poses for the pledge.

There is one remaining way out, and this is to say that the pledge is one of those traditional historic ceremonies that does not create a problem because it is part of “ceremonial Deism” and simply expresses our historical tradition. In her opinion in the pledge case, Justice O’Connor plausibly points out that some manifestations of religion in our public life can be defended along such lines. (The Court has often said similar things.)

Some references to God may indeed be defensible in this way: the use of “In God We Trust” on our currency, the “God Save this Honorable Court” that opens the sessions of the Supreme Court. These ceremonial manifestations of religion may bother some people. And yet, they have been around for a very long time, and perhaps we now accept them as part of our history rather than as containing any devotional message. Or so Justice O’Connor’s argument goes.

Let’s now look at Justice O’Connor’s four criteria for saying that a traditional observance does not constitute a constitutional violation. And let’s compare “In God We
Trust" to the pledge. Although Justice O'Connor herself tries to argue that the pledge is all right under her criteria, I think we'll see that this argument is unconvincing.  

First, Justice O'Connor mentions history and ubiquity; the questionable item must have been in place for "a significant portion of the Nation's history." This criterion is important because it seems right to be more forgiving about something that is a historical relic than about something contentiously introduced in recent times. Here "In God We Trust" looks very different from "under God" in the pledge: the former has been in place since right after the Civil War, the latter only since 1954. "Reasonable observers have reasonable memories," Justice O'Connor once said, and many living Americans remember the sudden change in the pledge, as well as the debate surrounding it, which was highly theistic in content, stressing the need to get Americans to stand behind a symbolic affirmation of our difference from "godless Communism.

Second, she mentions absence of worship or prayer: there is a difference, she says, between asking someone to join in a ritual observance and simply making a statement that doesn't ask people to affirm anything. Here "In God We Trust" looks pretty good: we pass money around all the time without thinking of ourselves as endorsing that sentiment, and it would take a real haggler (of the sort that Justice O'Connor spoke when she mentioned the possibility of a "heckler's veto") to be very upset about the presence of time-honored words on the coins we use. The pledge is of course entirely different: impressionable children are being asked to join in a ritual observance that is an affirmation of God as well as of country. The whole point of the pledge was that it was an act of quasi-worship, suited to inculcate strong patriotic emotions in young children. The whole point of adding the language of God was to make those same children think that we (unlike the Soviet Union) are in a nation that is protected by God. Barnette has sufficiently established that the recitation is not devoid of affirmation: that's why the children had a legitimate grievance. Now the affirmation includes religious affirmation.

The third criterion, and an important one, is absence of reference to particular religion. As we've seen, it's virtually impossible to construct a religious reference that is not somehow particular, and Justice O'Connor acknowledges that the pledge is indeed particular, excluding Buddhists,
Hindus, and others. She then retreats to the position that it derived from a time "when our national religious diversity was neither as robust nor as well recognized as it is now." I find this unconvincing. First of all, the numbers of people who accept a divergent religion should not decide the constitutional question. Second, the reason there were not many Hindus here until recently was that immigration law kept them out by restricting immigration quotas to the proportion of the population that a given national origin occupied in 1895; this imbalance was rectified only by the Immigration and Nationality Act of 1965.3 So it seems doubly churlish to keep people out unfairly and then to say, "Because we succeeded in keeping you out for so long, we don't have to take your religious sensibilities into account."

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Third, there were lots of agnostics, atheists, Reform Jewish Spinozists, Deists, Unitarians, and others who could not endorse the religious conception of the pledge all along. Moreover, there can be little doubt that the movement to add "under God" to the pledge was connected to a desire to denigrate most of these people, as fellow travelers with "atheistic communism." ("Ceremonial Deism" is an odd name for a ritual affirmation that a Deist would be very reluctant to endorse, since Deists think of God as a rational causal principle but not as a personal judge and father.)

What about "In God We Trust?" Well, it has in principle the same problem, but it was not introduced with intent to exclude and denigrate, and the fact that it does so much better on the first two criteria seems to me to suggest that the third criterion might be waived in that case. The criteria are not supposed to be necessary conditions of acceptability, just good things to look for.

Finally, minimal religious content: the reference must be "highly circumscribed" and easy to avoid. On this count the pledge does well enough, if one imagines that children who object could simply drop those two words, while reciting the rest. We do have the Lee v. Weisman worry, however, again in this case: if what the objector wants to do is to make it clear that she doesn't go along with the ritual as the majority practice it, she will have to do something more than silently omit two words. She will have to ask for an excuse, or stay seated, and this will make the pledge every bit as onerous as the prayers that were rejected in the whole string of school prayer cases. If the defender of "under God" now says that the words don't mean anything much, have no content, she has the history of the addition of the words to contend with: for people felt that they were very important and had significant religious content. Moreover, defenders of the pledge today argue that it does have substantial content.4

Here again, "In God We Trust" seems on stronger ground: most people don't think of it as religious at all, and are able to use the currency without noticing it.

We should agree with Justice O'Connor and the entirety of the tradition that I've described: there are traditional references to religion in our public life that should not be pruned away and that pose no constitutional problem. It is extremely doubtful, however, that the pledge, in its current form, is among them.

Given public feeling on the issue, it would cause a national crisis were the Supreme Court to say that the words "under God" are unconstitutional. If we adopt Justice Breyer's theory of interpretation, then, we can find a way round the problem: a test of constitutionality is whether deciding the other way would threaten civil peace. This principle seemed, and seems here, unfortunately ad hoc, favoring majority beliefs and making a virtue of convenience. As an account of the meaning of the religion clauses, Breyer's conflict principle should be rejected.

Nonetheless, one might reach the conclusion that the Supreme Court ought to hold off in this case by a different route—for example, one might introduce considerations of judicial modesty and caution, arguing that, for institutional reasons, judges should usually be reluctant to cause a national crisis. If there is uncertainty about the correct way of proceeding in such a momentous case, it is probably wise for the Court to avoid the issue as long as possible—hoping that, in the meanwhile, greater public understanding of Hinduism, Buddhism, and other related religions, as well as a greater appreciation for conscientious moral atheism and agnosticism, will undermine the perception that the opponents of the pledge are all dangerous subversives. From the vantage point of these practical concerns, it was extremely unfortunate that the case that went to the Supreme Court was brought by an outspoken atheist who
openly scoffs at religious belief. It was a good thing that the Court was able to find a way around the case, by holding that Newdow did not have standing, since he did not have custody of his daughter. It was also basically good for Justice O’Connor to do what she did, misapplying her own analytical criteria: it is much better to have the analytical framework right and make a mistake about this or that case than to veer to a new analytical framework that is on balance weaker (as Justice Breyer did in the Ten Commandments case).

On July 19, 2006, the U.S. House passed, by a vote of 260-167, a bill removing jurisdiction, in the matter of the words “under God” in the pledge, from the federal appellate courts and the U.S. Supreme Court. This move is deeply to be regretted, because it undermines judicial independence and the very idea of the separation of powers. Proponents seem to be pursuing their immediate goal in a way that neglects the larger long-term structural issues the bill implicates. Fortunately, a companion bill in the Senate is likely to fail.

How can we make progress on this divisive issue? First of all, we simply need to talk about the issue and its history far more than we do, and members of affected minority religions need to get involved. It would be good if all Americans understood the history of “under God” in the 1950s, and understood, as well, the reasons many believing Americans, as well as nonbelievers, have for being troubled by the words. The participation of the Hindu and Buddhist communities in the recent Ten Commandments case is a welcome sign for the future. Hindus sometimes duck away from challenging monotheism, and can even represent themselves, at times, as quasi-monotheists, because they are tired of being pilloried for their polytheism and, as new immigrants in a vulnerable position, they desire respectability. It would be wonderful if they would tell Americans frankly that they worship Rama and Shiva and Ganesha and other gods, and that the pledge refers to a monotheistic conception that denigrates them. Buddhists, whether immigrants or American converts, should also join this conversation, explaining that theirs is a genuine religion and yet recognizes no God. Confucianists, Taoists, and others should enter the debate as well. It would also be very helpful if more Jews and Christians who hold views that render the language of the pledge problematic would say forthrightly what these reasons are.

Meanwhile, we need to talk more about Justice O’Connor’s helpful criteria and how they apply in a wide range of cases, refining the criteria themselves, adding to them if new helpful criteria can be found, and saying more about how many of them need to be present in order for a religiously divisive practice to be constitutional.

This national conversation is not taking place. One reason is the reluctance of many dissident religions to get involved in public discussions of their dissident conceptions, for fear of stigma for themselves and their children. That is why it ended up being an atheist who brought the famous case, a fact that proved very bad for public understanding of the issues. The pledge, as I’ve argued, is offensive to many believers, as well as to atheists. Most Americans, however, currently think that only atheists have a problem with it.

Another reason the conversation is failing, more problematic still, is the reliance of American liberals on the language of “separation of church and state”: because they think it’s self-evident that “under God” violates “separation” and is bad for that reason alone, many liberals don’t bother to investigate the deep inequalities and hierarchies that it constitutes. Let’s, then, try speaking the language of equality and endorsement, and see how far we can get.


1 Asch’s experiments are discussed in detail in both Christopher Browning, Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland (New York: Harpercollins, 1992), and Cass R. Sunstein, Why Societies Need Dissent (Cambridge, MA: Harvard University Press, 2005).
2 See also Douglas Laycock, “Theology Scholarships, the Pledge of Allegiance and Religious Liberty,” Harvard Law Review 117 (2004), 155–246, who similarly likes her criteria but not her application of them to the Pledge.
4 See Laycock, discussing a number of interpretations by believers.