Stealth Indoctrination: Forced Speech in the Classroom*

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In the 2003 Term, the Supreme Court of the United States agreed to consider whether the Constitution permits the recitation of the Pledge of Allegiance in the public schools. One would have thought this question was resolved long ago. Twice before, in 1940 and then in 1943, the Court took up related questions.

This Article takes the renewed interest in the constitutionality of the Pledge as an opportunity to reexamine the role of public schools in instilling civic values and principles in children. Part I discusses the Supreme Court’s prior jurisprudence with respect to the Pledge, and Part II reviews the particular case that has brought the Pledge back before the Court. Part III discusses the questions to which the Supreme Court granted certiorari and separates out the particular question of whether using the Pledge in a school setting is constitutional.

Turning to the Pledge’s effects on children, Part IV concludes that the lower court likely overstated the singular effects of the inclusion in the Pledge of the words “under God.” Part V discusses the remaining, and more general, implications of the pressures on schoolchildren to recite the Pledge, particularly in light of the apparent fact that few students who recite the Pledge know that they are under no obligation to do so. Part VI considers recent cases that have required the Supreme Court to strike a balance between the interests of children and the interests of schools. Because the Court has shifted this balance away from

* Editor’s Note:
   This article was originally presented in October 2003 and was completed before the Supreme Court handed down its decision in Elk Grove Unified School District v. Newdow, 542 US ___, 124 S Ct 2301 (2004). In the article, Professor Guggenheim predicted that the Court might well rule that the plaintiff lacked standing to challenge the constitutionality of the use of the Pledge of Allegiance in public schools. This was the Court’s ruling. The focus of the article, however, is on the merits of the challenge to conducting the Pledge in public schools, an issue still to be decided by the court.

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the constitutional rights of children and toward the administrative powers of school officials, these cases imply that the Court, since its earlier Pledge cases, may have become less inclined to place limits on the authority of public school officials.

Accordingly, Part VII proposes that, rather than banning the Pledge, schools could place the Pledge at the center of civics lessons on both the constitutional limits of state authority and the dangers of governmental control. This Article concludes that we can and should require public school officials to use the Pledge, conducted within constitutional limits, as an opportunity to teach children these fundamental lessons.

I. SUPREME COURT PLEDGE PRECEDENT

In *Minersville School District v Gobitis*, the Supreme Court ruled that the Constitution does not require an exemption from participation for Jehovah's Witnesses who are opposed to saluting the flag of the United States in mandatory school ceremonies. As a result, the Court upheld a statute which required the expulsion from public school of all students who refused, for whatever reason, to participate in the flag salute ceremony. After the *Gobitis* decision, in 1942, Congress codified the language of the Pledge as: "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."

At about the same time, many state legislatures, including West Virginia's, enacted new legislation requiring all schools "to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State 'for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government.'" As a result, West Virginia's State Board of Education directed that each school day all teachers and students must participate in a salute and pledge of allegiance to the American flag, and refusal to participate would result in expulsion.

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2 310 US 586 (1940).
3 See id at 597-98.
4 See id.
7 See id at 629.
Jehovah’s Witnesses, seeking an exemption from the ceremony on the basis of the First Amendment’s Free Exercise Clause, challenged the West Virginia law. But this time, the Court chose not to reach the issue of an exemption from a requirement to participate. Instead, in *West Virginia School Board v Barnette*, the Court held that government lacks the power in the first place to compel any of its citizens, including schoolchildren, to demonstrate publicly their agreement with ideas or views that the government deems correct.

*Gobitis* assumed, without deciding, that “power exists in the State to impose the flag salute discipline upon schoolchildren in general.” The Court in *Barnette* declared the mandatory ceremony to be unconstitutional because it compelled “a form of utterance,” which “requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks.”

The Court observed that the combination of requiring a flag salute with utterance of the Pledge of Allegiance “requires affirmation of a belief and an attitude of mind.”

The Court held that, under the First Amendment, it does not matter whether what the government demands people say or believe is something that the Justices of the Court would regard as “good, bad or merely innocuous.” In the Court’s words:

> [V]alidity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

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8 Id.
9 319 US 624 (1943).
10 See id at 641 ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.").
11 See id at 635 (discussing the assumption in *Gobitis* that the State may impose a flag salute requirement).
12 Id at 632, 633.
13 *Barnette*, 319 US at 633. “To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.” Id at 634.
14 Id.
15 Id.
The opinion emphasized the potential ultimate cost to society if state officials could force any citizens, but particularly children, to express a particular view. Since 1943, public schools have been allowed to conduct a flag salute and Pledge of Allegiance ceremony, but the schools could not require students to participate.

Now, more than sixty years later, the Court was to decide a question that Barnette took for granted, but never ruled upon: whether the Constitution allows state officials to recite the Pledge in public schools. The reason this question is being asked is because eleven years after Barnette was decided, Congress changed the Pledge by inserting the words “under God” after the word “nation.”

If this looks like a shocking question, that is because there are an ever shrinking number of Americans who grew up before the Pledge was recited in public schools. Moreover, the vast majority of American adults today who grew up in the United States learned the Pledge after the inclusion of “under God.” One would have to be older than sixty-five years of age to have entered school before “under God” was part of the Pledge. Because it is shocking for many even to think that such a thing is unconstitutional, I predict that the Court will eventually declare that the Constitution does not forbid the recitation of the Pledge in public school. But, instead of using this history as a basis for a prediction, I want to use it as a basis for saying something extremely important about American principles of freedom and their connection to children’s rights: that children should not have to wait until they are adults to learn lessons about the limits we place on governmental power and the dangers of governmental control.

II. THE NINTH CIRCUIT’S NEWDOW DECISION

In Newdow v US Congress, a Panel of the Ninth Circuit ruled unconstitutional a California school district’s policy requiring “[e]ach elementary school class [to] recite the pledge of allegiance to the flag once each day” because this policy violates the

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16 See Barnette, 319 US at 636-37.
19 328 F3d 466 (9th Cir 2003).
20 Id at 483.
Establishment Clause of the First Amendment.\textsuperscript{21} The case was brought by the father of an elementary-school-aged girl.\textsuperscript{22} Newdow, an atheist, opposes his daughter’s attending public school where state officials recite, and encourage students to recite, the words “under God.”\textsuperscript{23} Newdow never married his daughter’s mother, though he provided a house in Sacramento for the mother and his daughter during the early part of his daughter’s life.\textsuperscript{24} At the time Newdow filed his lawsuit in federal district court, he was not living with his daughter or her mother; the mother was the primary caregiver and Newdow enjoyed unofficial visitation privileges.\textsuperscript{25} After the lawsuit was filed, the mother obtained a court order awarding her full custody rights, including the right to make all educational decisions for her daughter.\textsuperscript{26} Newdow continued to possess visitation rights.\textsuperscript{27}

The mother then filed a motion to dismiss the federal case on the ground that Newdow lacked standing.\textsuperscript{28} She successfully argued that Newdow may not name his daughter as a party to the lawsuit against the mother’s wishes because, under California law, the custodial parent has the responsibility “to make the decisions relating to the health, education, and welfare of” her daughter.\textsuperscript{29} The Ninth Circuit, however, ruled that Newdow had standing to bring the case for himself, holding that “a noncustodial parent, who retains some parental rights, may have standing to maintain a federal lawsuit to the extent that his assertion of retained parental rights under state law is not legally incompatible with the custodial parent’s assertion of rights.”\textsuperscript{30} Though he still needed to show “injury in fact that is fairly traceable to

\textsuperscript{21} See id at 490.
\textsuperscript{22} See id at 482. The opinion tells us nothing more about the child, and news articles reveal only that at the time of the initial lawsuit the daughter was eight years old. Adam Tanner, \textit{Girl whose father sued over ‘under God’ recites the Pledge}, San Diego Union-Trib A5 (May 2, 2003).
\textsuperscript{23} See \textit{Newdow}, 328 F3d at 483.
\textsuperscript{24} See Charles Lane, \textit{An Allegiance to Dissent}, Wash Post A1 (Dec 2, 2003). See also Tony Mauro, \textit{The Custody Dispute Behind the Pledge of Allegiance Case}, 174 NJ L J 474 (2003) (noting that when his daughter turned five, Newdow asked the mother and daughter to move to Florida to be near him).
\textsuperscript{25} See Lane, \textit{Allegiance to Dissent}, Wash Post at A1 (cited in note 24).
\textsuperscript{26} \textit{Newdow v US Congress}, 313 F3d 500, 502 (9th Cir 2003) (quoting text of custody order).
\textsuperscript{27} See Lane, \textit{Allegiance to Dissent}, Wash Post at A1 (cited in note 24).
\textsuperscript{28} \textit{Newdow}, 313 F3d at 501.
\textsuperscript{29} Id at 505, citing Cal Fam Code § 3006.
\textsuperscript{30} Id at 503-04.
the challenged action," 31 Newdow made that showing to the satisfaction of the Panel.

The Panel reasoned that because, under California law, non-custodial parents with the visitation rights that Newdow possessed may expose their children to their preferred religious views (regardless of the religious views of the custodial parent), Newdow has a legally recognized interest in the religious upbringing of his child. 32 As a result, the Panel ruled that Newdow has standing as a parent to prevent harms to himself resulting from the recitation of the Pledge in his daughter's class. 33 The Panel based its ruling, in part, on the ground that the mother "may not consent to unconstitutional government action in derogation of" the father's rights. 34 The father possessed the right "to be free from the government's endorsing a particular view of religion and unconstitutionally indoctrinating his impressionable young daughter on a daily basis in that official view." 35

III. THE SUPREME COURT'S GRANT OF CERTIORARI

In Elk Grove Unified School District v Newdow, 36 the Supreme Court granted certiorari to the Ninth Circuit enumerating two questions: (1) whether Newdow has standing to challenge as unconstitutional a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, and (2) whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applied through the Fourteenth Amendment. 37

A. Standing

Although the standing issue is problematic, and the Court might well reverse on that ground without reaching the merits of the constitutional question, the merits of the case have caught the public's attention and deserve to be addressed. Even if the

31 Id at 504.
32 See Newdow, 313 F3d at 504.
33 See id at 505.
34 Id.
35 Id.
37 See id.
Court dismisses Newdow on standing grounds, another case will surely be brought by a parent who unquestionably has standing. Nonetheless, it is worth noting that Newdow’s standing as a father is attenuated at best. He was denied the right to bring the case on his daughter’s behalf because the mother has the substantive right under California law to direct her daughter’s education. Additionally, the mother does not wish to have her daughter challenge the conditions of her own education. Thus, Newdow’s standing depends entirely on a showing that as a father he suffers a cognizable injury because his daughter’s teacher recites the Pledge in the classroom.\(^{38}\)

There is little to say to support the claim that Newdow suffers an “injury in fact” because his daughter attends a public school which recites the Pledge each day. His injury surely cannot be that his daughter is exposed to religious training with which he disagrees. His daughter’s mother has the right to expose the child to whatever religious indoctrination she desires.

Yet, the Ninth Circuit Panel reasoned that because California substantive law, absent a showing of harm to the child, refuses “to place restraints on a noncustodial parent who wished to expose his children to his particular religious views,”\(^{39}\) Newdow retains a legally recognized interest in his daughter’s religious upbringing.\(^{40}\) The Panel held that because the mother’s right to direct the religious upbringing of her daughter without interference by the father did not include the power “to insist that her child be subjected to unconstitutional state action,” Newdow has sufficient parental rights to secure standing in federal court.\(^{41}\)

B. Banning the Pledge

It would hardly be surprising for the Court to conclude that Newdow lacks standing and reverse without reaching the merits. At the same time, it is likely that at least some Justices would like to address the merits in order to reverse (and likely condemn) a widely unpopular ruling.\(^{42}\)

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38 See Newdow, 313 F3d at 504-05.
39 Id at 504.
40 Id.
41 Id at 505.
42 The decision certainly was among the most discussed and ridiculed of any federal court pronouncement over the past several years. See, for example, D. Chris Albright, The Words “Under God” Do Not Render the Pledge of Allegiance Unconstitutional, Nev Law 9 (May 11, 2003) (“The history of the Establishment Clause’s enactment, the Supreme
There is a long history of the Court paying scrupulous attention to circumstances in which public schools entangle themselves with religion or religious ceremony.\textsuperscript{43} The Court's prior decisions arose within the parameters of fundamental American principles regarding the role of the government in childrearing.\textsuperscript{44} These principles, combined with the related prohibition against the government undertaking any role in religious training or indoctrination, stand for a limited state role in religious value inculcation in children.

As a result, the Court has issued a number of rulings striking down advancement and perceived advancement of religion in the public schools. It is unconstitutional for public schools to permit a student-led prayer before football games,\textsuperscript{45} to open a graduation ceremony with a prayer,\textsuperscript{46} to require the teaching of creation science,\textsuperscript{47} to employ a moment of silent prayer,\textsuperscript{48} to post the Ten Commandments on a classroom wall,\textsuperscript{49} to forbid the recitation of the Pledge as "outrageous".\textsuperscript{43}

Court's rulings in Establishment Clause cases, and the history of the country since inclusion of the words "under God" to the Pledge, all demonstrate that the Ninth Circuit got it wrong.\textsuperscript{43} Charlotte Allen, \textit{Pledge of Allegiance: 'Under God': An 'Injury' with Almost No Victims}, LA Times M3 (Oct 5, 2003) (describing the Ninth Circuit as famous for "loopy, ultra-liberal rulings"); Joseph Perkins, \textit{Separating God from Country}, San Diego Union-Trib B9 (May 2, 2003) (describing Newdow's decision to bring a federal lawsuit over the recitation of the Pledge as "outrageous").

\textsuperscript{43} See, for example, McCollum v Board of Education of School District No 71, Champaign County, IL, 333 US 203, 231 (1948) ("In no activity of the State is it more vital to keep out divisive forces than in its schools."); \textit{Engel v Vitale}, 370 US 421 (1962) (holding that use of the public school system to encourage recitation of prayer was inconsistent with the Establishment Clause, even though pupils were not required to participate).

\textsuperscript{44} See \textit{Meyer v Nebraska}, 262 US 390 (1923) (holding a law forbidding the teaching of a foreign language prior to eighth grade unconstitutional as interfering with the liberty guarantees of the Fourteenth Amendment); \textit{Pierce v Society of Sisters}, 268 US 510 (1925) (holding a law establishing compulsory public education unconstitutional as interfering with the liberty of parents to direct the education of their children); \textit{Wisconsin v Yoder}, 406 US 205 (1972) (holding unconstitutional a law that required Amish parents to send their children to formal high school); \textit{Troxel v Granville}, 530 US 57 (2000) (striking down a broad statute permitting third-party visitation petitions because it violated the fundamental right of parents to rear their children).

\textsuperscript{45} \textit{Santa Fe Independent School District v Doe}, 530 US 290, 312 (2000) ("[T]he delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.").

\textsuperscript{46} \textit{Lee v Weisman}, 505 US 577, 587 (1992) (holding that a nonsectarian prayer at a public school graduation ceremony is impermissible because the state "may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a [state] religion or religious faith, or tends to do so") (internal quotations omitted).

\textsuperscript{47} \textit{Edwards v Aquillard}, 482 US 578 (1987) (defining "creation science" as a religious theory that a supernatural being created humankind).


teaching of evolution,\textsuperscript{50} to read daily from the Bible,\textsuperscript{51} or to read a "denominationally neutral" prayer.\textsuperscript{52} This analysis is based, to a certain extent, on the age of the children involved.\textsuperscript{53} While courts seem to be much more protective of elementary schoolchildren, and slightly less so of those in secondary education, these decisions make clear the Court's contempt of religious indoctrination endorsed by the school at any level of public education for children.\textsuperscript{54}

At this point, it is useful to separate two questions. The first is the constitutionality of the enactment of the federal law that includes "under God" in the Pledge. The other is the constitutionality of the recitation of the Pledge in the public school setting. There is no doubt, of course, that if it were unconstitutional to place "under God" in the Pledge, it would be unconstitutional to recite the Pledge with those words in it. But, as \textit{Newdow} reaches the Supreme Court, it is not the Pledge itself that has been held to be unconstitutional, only its recitation in the public schools. \textit{Newdow} held that reciting the Pledge "impermissibly coerces a religious act."\textsuperscript{55} It did not also conclude that the phrase "under God" itself constitutes an establishment of religion.\textsuperscript{56}

For the remainder of this Article, I assume it was constitutional for Congress to insert "under God" into the Pledge. Others, better versed in the First Amendment's religion clauses, have more to say on whether this assumption is correct. My special interest lies in examining what we expect of public schools when educating children and in the implications in other contexts of the Ninth Circuit Panel's conclusion that public schools may not allow Pledge recitations in their classrooms—again, assuming that the Pledge itself is constitutional.

\textsuperscript{50} \textit{Epperson v Arkansas}, 393 US 97 (1968).
\textsuperscript{52} \textit{Engel}, 370 US at 421.
\textsuperscript{53} For example, in \textit{Aguillard}, the Court noted that it "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary or secondary schools" and contrasted this with the lesser care taken with universities, where older students may choose to enroll in classes that may have religious content. \textit{Aguillard}, 482 US at 584. The Court in \textit{Epperson} declared that "the vigilant protections of constitutional freedoms is nowhere more vital than in the community of American schools." \textit{Epperson}, 393 US at 104 (internal citations omitted). And in \textit{Rodriguez}, the Court discussed the particular susceptibility of adolescents to peer pressure. \textit{Santa Fe}, 530 US at 311.
\textsuperscript{54} See, for example, \textit{Santa Fe}, 530 US at 315 ("We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.").
\textsuperscript{55} \textit{Newdow}, 328 F3d at 487.
\textsuperscript{56} See id.
If the Panel’s reasoning that the words “under God” in the Pledge of Allegiance means its recitation constitutes a religious ceremony, then its conclusion that the First Amendment is violated when it is recited in public school logically follows. But the premise is highly suspect.57

Well established constitutional doctrine makes clear that a court is not supposed to isolate a word or symbol in assessing whether an object or undertaking constitutes endorsement or advancement of religion: instead, an object or undertaking must be evaluated in context.58 For this reason, the Supreme Court deemed even the deeply religious Christian symbol of a nativity scene as not advancing religion when erected by a city.59

Since Lee v Weisman,60 courts must consider the impact on the listener or viewer in determining whether state action violates the Establishment Clause.61 In Lee, the Court found unconstitutional the practice of including invocations and benedictions at public school graduation ceremonies, declaring that school officials “may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so.”62 The Supreme Court was able to rely upon precedent which recognizes “heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”63 More than fifty years ago, Justice Frankfurter stressed that with respect to school-aged children, “[t]he law of imitation operates” because “non-conformity is not an outstanding characteristic of children.”64

57 As the dissenting opinion in the denial of rehearing en banc noted, “[i]f reciting the Pledge is truly ‘a religious act’ in violation of the Establishment Clause, then so is the recitation of the Constitution itself, the Declaration of Independence, the Gettysburg Address, the National Motto, or the singing of the National Anthem.” Id at 473 (O'Scannlain dissenting) (noting that “In God we trust” is the United States' national motto, 36 USC § 302 (2002)).


59 Id. See also County of Allegheny v ACLU, 492 US 573 (1989) (holding that displaying a menorah next to a Christmas tree did not have the unconstitutional effect of endorsing the Christian and Jewish faiths).


61 Id at 592. See, for example, Good News Club v Milford Central School, 533 US 98, 116 (2001).

62 Lee, 505 US at 587 (citations omitted).

63 Id at 592 (citations omitted).

64 McCollum, 333 US at 227 (Frankfurter concurring).
The Newdow Panel concluded that merely reciting the Pledge puts the "students in the untenable position of choosing between participating in an exercise with religious content or protesting." The Panel was particularly concerned with the impact on young children because the "coercive effect of the policy here is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students." The constitutional solution, according to the Panel, is to prohibit the Pledge's recitation in public school.

IV. ANALYZING THE PLEDGE'S EFFECT ON SCHOOLCHILDREN

The Ninth Circuit's analysis of the merits of the Newdow case stands in sharp contrast with a central assumption in Barnette. Since Barnette was decided in 1943, it has been clear that, although public school officials may conduct Pledge ceremonies in class, students cannot be forced to participate in public ceremonies such as flag saluting and pledging allegiance. In Barnette, the Court focused on the impermissibility of school officials punishing students who choose (for any reason) not to salute the flag or not to recite the Pledge of Allegiance.

It is difficult to overstate the significance of the Barnette holding. West Virginia's justification for the mandatory Pledge ceremony, written in 1942 in the midst of war fever, could easily have been the product of any state school board in the wake of the September 11, 2001 attacks on the World Trade Center and the Pentagon. Stressing that "national unity is the basis of national security," that the flag "is the symbol of our National Unity transcending all internal differences," and declaring that

65 Newdow, 328 F3d at 488.
66 Id.
67 Id.
68 Barnette, 319 US at 624.
69 See id at 642.
70 See id at 634.
71 That such a sentiment could arise again in the wake of such attacks is not far-fetched. Immediately after the attacks of September 11th, the House and Senate passed a concurrent resolution "expressing the sense of the Congress that, as a symbol of solidarity following the terrorist attacks on the United States on September 11, 2001, every United States citizen is encouraged to display the flag of the United States." H Con Res 225, 107th Cong, 1st Sess (Sept 12, 2001), in 147 Cong Rec S 9410 (Sept 13, 2001).
the flag is an "emblem of freedom in its truest, best sense [and] that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression," the West Virginia Board of Education required all public school students to pledge allegiance each day in school.\textsuperscript{72} The rule was enacted on the premise that schoolchildren are in "the formative period in the development in citizenship" and that teaching children the values of patriotism is an important, and legitimate, aspect of their education.\textsuperscript{73} These are powerful sentiments which resonate with many Americans today. Indeed, they are so strong that it is appropriate to wonder if the current Court would decide \textit{Barnette} the same way today. But before looking more closely at the question of what the current Court would do, it is instructive to study carefully what the \textit{Barnette} Court said.

\textbf{A. The \textit{Barnette} Reasoning}

Justice Jackson’s opinion in \textit{Barnette} focused on the limitations of government officials to force ideas upon citizens. "We set up government by consent of the governed," he reasoned, "and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."\textsuperscript{74} Justice Jackson found it particularly important that the required recitation of the Pledge was to be imposed on children: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."\textsuperscript{75}

According to \textit{Barnette}, the threat to democracy was more compelling precisely because the state sought to compel children to believe certain ideas. If the state could standardize the next generation’s beliefs, the state could control the people and by stealth transform American democracy into blind adherence to state-identified values.\textsuperscript{76} Instead, American principles of democ-

\textsuperscript{72} See \textit{Barnette}, 319 US at 627-28 n 2.

\textsuperscript{73} Id.

\textsuperscript{74} Id at 641.

\textsuperscript{75} Id at 637.

\textsuperscript{76} See \textit{Barnette}, 319 US at 640-42.
racy, according to Barnette, call for maximization of ideas.\textsuperscript{77} Through pluralism and a maximally diverse set of ideas, the American people will reach the best choices for self-rule.\textsuperscript{78}

But Barnette ruled that as long as students were not forced to participate in the Pledge ceremony, it was acceptable to perform it.\textsuperscript{79} The Court assumed either that schoolchildren possessed the individual capacity to decide whether to participate, or that, even if many would feel pressured to participate, these pressures were acceptable as long as children were not literally forced to participate.

The Newdow Panel assumed the opposite. It ruled that because of the age and impressionability of schoolchildren, reciting the Pledge has an impermissibly coercive effect on students. Students are likely to regard the Pledge as a message of endorsement of religion and disapproval of beliefs questioning the existence of God.\textsuperscript{80} The Panel ruled that such coercion is unconstitutional because of the Pledge's religious overtones.\textsuperscript{81}

\textbf{B. Children's Understanding of “Under God”}

Courts ordinarily evaluate the constitutionality of certain actions, such as placing a crèche in a public square, with reference to the reaction of a reasonable adult.\textsuperscript{82} But in primary or secondary school, determining whether a particular action has a coercive effect on a school's captive audience requires considering its impact on children, rather than adults. The Court in \textit{Santa Fe Independent School District v Doe} \textsuperscript{83} held that adolescents attending a high school football game were particularly likely to feel the social pressure to conform and participate in a shared prayer ceremony arranged by the school officials.\textsuperscript{84} In effect, \textit{Santa Fe} held that because adolescents are particularly prone to such social pressure, and also are of sufficient maturity and intelligence

\textsuperscript{77} See id at 642.
\textsuperscript{78} Nearly seventy-five years ago, the Court explicitly rejected a “general power of the State to standardize its children.” \textit{Pierce v Society of Sisters}, 268 US 510, 535 (1925).
\textsuperscript{79} \textit{Barnette}, 319 US at 640 ("National unity as an end which officials may foster by persuasion and example is not in question.").
\textsuperscript{80} See \textit{Newdow}, 328 F3d at 488.
\textsuperscript{81} See id at 488.
\textsuperscript{83} 530 US 290 (2000).
\textsuperscript{84} See id at 311.
to comprehend the religious meaning of the event, schools may
not begin events with a prayer.\textsuperscript{85}

Thus, the identity of the audience makes all the difference. That is why it is not unconstitutional to begin each congressional session with a prayer.\textsuperscript{86} The congressional audience understands that the prayer is not a governmental endorsement of religion. But not all age groups of children are alike, and what may be impermissible for adolescents may be acceptable for primary school-age children.\textsuperscript{87}

The Panel has conceptualized elementary school-age children as both too sophisticated and too young. Though too young to resist the coercive impact of their environment, they are so sophisticated that the words “under God” in the Pledge “may reasonably appear to be an attempt to enforce a ‘religious orthodoxy’ of monotheism.”\textsuperscript{88} One may concede that adults who pay careful attention to the words of the Pledge may fear that “under God” suggests an endorsement of religion, just as Judges Goodwin and Reinhardt of the Ninth Circuit did.\textsuperscript{89} But this hardly means that primary school-aged children would do the same thing. It requires a sophistication unassociated with primary school-aged children to think that way.

School-aged children likely pay far less attention to the words in the Pledge than their elders may hope. Educators do not fail to appreciate this. The significance of the Pledge’s public recitation is not in the words but in the communal act of participating. Thus, the Panel need not have been wrong in concluding that, given the age and impressionability of school-aged children, they are likely to feel pressured (“coerced”) into participating. The Panel’s error was in suggesting that the addition of the words “under God” adds anything to the pressure students feel.

\textsuperscript{85} See id at 317.

\textsuperscript{86} \textit{Marsh v Chambers}, 463 US 783 (1983) (holding that the Nebraska Legislature's practice of beginning each session with a prayer by a state-paid chaplain does not violate the Establishment Clause). The Court has never ruled that the Constitution allows a prayer at the opening of Congress, but the Court has made reference to Congress's prayer a number of times, indicating in dicta that the practice is constitutional. See, for example, \textit{Lynch}, 465 US at 686; \textit{Abington School District v Schempp}, 374 US 203, 213 (1963).

\textsuperscript{87} Several years ago, Emily Buss wisely suggested that decisions about how the law treats children would be improved if lawmakers studied more carefully the developmental literature and, consequently, made better informed judgments about children. See Emily Buss, \textit{The Adolescent's Stake in the Allocation of Educational Control Between Parent and State}, 67 U Chi L Rev 1233, 1255-56 (2000).

\textsuperscript{88} \textit{Newdow}, 328 F3d at 488.

\textsuperscript{89} See id (opinion by Goodwin and joined by Reinhardt).
The problem, of course, is that those two words stand out more in the minds of the Newdow Panel’s majority than they do in the minds of the children engaging in the ritual.

The Supreme Court would be more likely to uphold the result in Newdow if the words “under God” had been inserted into the Pledge in 2002, instead of in 1954. If the words were newly inserted, children attending school would be aware that something had changed and that, for some reason, they must now say that the nation was founded “under God” when that was not true before.\(^9\) The opponents to the Pledge would be able to predict a negative impact on a generation of children.

Having waited nearly fifty years to challenge the Pledge, however, opponents cannot argue persuasively that most Americans (which means, of course, most people who, during their childhood, recited the current version of the Pledge) consider the Pledge to constitute an endorsement of religion by the government. From most accounts, Americans well comprehend the difference between government establishing or endorsing religion on the one hand, and permitting government to recognize the importance of religion in the lives of many Americans on the other.

Another reason it would be more likely that a challenge to the Pledge would be sustained in 1954 than in 2004 is the impact these temporal differences have on the decisionmaker. As Anthony Amsterdam and Jerome Bruner have shown in a book applying the teachings of cognitive psychology and narrative theory to the practice of law, the central storyline that is at the core of most narratives can also be found in legal narratives at the trial and appellate levels. That storyline begins with the disruption of a “Steady State” by the emergence of “Trouble,” and it proceeds with the confrontation and eventual resolution of the Trouble, culminating in the restoration of a Steady State. See Anthony G. Amsterdam and Jerome Bruner, *Minding the Law* 110-13, 134-42 (Harvard 2000). Had Newdow been litigated in 1954, the Steady State would have been the Pledge as it existed at that time: a statement that was exclusively patriotic and lacked any religious connotations. At that point in time, the trouble would have been Congress’s desire to add religion to the Pledge. Under these circumstances, Congress would have been the antagonist (and, perhaps, the villain) of the story. All of these elements would have driven the “story” to a resolution in which the Trouble is vanquished by preventing the addition of religion to the Pledge. But Newdow reads like a very different story at this point in our history. Now, the Steady State is the Pledge as it has been recited for nearly fifty years, with no observable harmful effects. See Newdow, 328 F3d at 493 (Fernandez concurring and dissenting) (finding that the Pledge had not caused any real harm since it was amended in 1954). The disruption of the Steady State (the Trouble) is Newdow’s displeasure with the state of affairs. Now, Newdow is the antagonist (and, to read the editorials commenting on the case, clearly the villain, too). Thus, the previous transformation of the Pledge and the longstanding acceptance of the Pledge in its current form point the way to the proper outcome, just as any good story flows naturally from the beginning to the end. In the story as it reads now, the most logical and fitting ending is to uphold the familiar Steady State.
For all of these reasons, the Panel’s conclusion that “[t]he ‘subtle and indirect’ social pressure which permeates the classroom also renders more acute the message sent to non-believing schoolchildren that they are outsiders” seems wrong. If it was wrong to suggest that school-aged children feel particularly pressured to participate in the Pledge because it contains the words “under God,” however, the Panel certainly was right to suggest that school-aged children feel pressured to recite the Pledge in public schools. In the Panel’s words, elementary and secondary public school “students are subjected to peer pressure and public pressure which is ‘as real as any overt compulsion.’”

V. PRESSURES ON CHILDREN TO RECITE THE PLEDGE

What’s left to consider, then, is the constitutional significance of Newdow’s insight concerning the pressure to conform felt by schoolchildren. Does Newdow stand for the proposition that it is perfectly acceptable to coerce children into patriotic displays, but that the state goes too far when the display contains the phrase “under God”?

This question suggests that we ought to revisit Barnette itself and reconsider whether leading the Pledge’s recitation (even without “under God”) should be constitutionally permissible. Was not an important principle in Barnette that school officials may not coerce students to utter ideas? Should it matter if the “coercion” is explicit or implicit? If courts must consider whether it is meaningful to expect primary school students to possess the maturity and self-assuredness to invoke their rights not to participate in public rituals, this may mean that teachers should be prohibited from asking them to recite the Pledge, even in the absence of “under God.”

At The University of Chicago Legal Forum Symposium at which I presented this Article, I asked the audience (about seventy members, most of whom were law students) to indicate whether they had attended a primary school at which the Pledge of Allegiance was recited daily. Virtually every member of the audience indicated that they had. Then I asked how many knew

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91 Newdow, 328 F3d at 488 n 5, quoting Lee, 505 US at 592-93.
92 Id. This does not mean that there is no difference between overt compulsion and peer pressure or that primary schoolchildren are unable to discern the difference.
that they had no obligation to participate (not to mention a constitutional right to refuse to do so). Only one member of the audience claimed to know.

For better or worse, this has become the legacy of Barnette, one of the most eloquent statements of the limitations on state officials to indoctrinate citizens (of whatever age) ever penned by the Court. School boards and teachers go about their daily business as if Barnette had ruled that teachers may require all students in the class to recite the Pledge. If the paradigmatic Martian were to attend any public primary school classroom in the United States at the beginning of the day and was asked to guess the law concerning the Pledge of Allegiance, he would surely conclude that it is permissible for school officials to require that all students participate in this patriotic ritual.

Even if the Newdow Panel was correct that patriotic rituals in public schools are conducted with an understanding that students are likely to feel compelled to join in, this does not prove that the Constitution is offended. There is a crucial difference between students being forced to do something because of peer pressure and because their failure to conform will result in official punishment.

Moreover, children can discern the difference between overt compulsion and peer pressure. Even young children recognize when they have a choice in the matter, regardless of whether they have any interest in exercising their freedom. They understand that when they do something because they are succumbing to their friends' pressure, they retain an important measure of choice that is completely lacking when a teacher assigns them a task which they must perform or suffer a sanction.

Indeed, part of growing up involves the tentative use of such freedom in various experiments children conduct as they progress to independence. In this sense, the unavoidable exposure to this soft form of "coercion"—to which students commonly succumb—is a useful aspect of their education and growth. It is true that childhood is a period of exaggerated imitation when peer pressure is very strong, but this hardly means that students are unaware of it, or do not feel they are exercising personal choice when they decide to do what others are doing.

VI. BALANCING INTERESTS

The remaining question is whether, in light of this important distinction, the Constitution ought to require educators to
clarify which form of "coercion" is involved in state-sponsored events. The all-or-nothing quality of *Newdow* is too categorical. The *Newdow* Panel's response to the unavoidable coercion in the classroom is to forbid the recitation of the Pledge. This is not only extreme, it also demonstrates an extremely limited perception of the capacity of schools and teachers to educate.

Justice Ginsberg recently quoted Justice Brandeis's famous observation that "[g]overnment is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."94 And she correctly observed that "government is nowhere more a teacher than when it runs a public school."95 It may be that, in light of recent Supreme Court decisions, the *Newdow* Panel shied away from relying on public educators to teach important constitutional lessons.

Perhaps the Panel was able to imagine a broader educational role for public school teachers, but, because of recent Supreme Court pronouncements, it feared how teachers would discharge their role. This fear may have led the Panel in Newdow to settle for the lesser of two evils. Banishing the Pledge may have seemed to the Panel the safer course in light of recent Supreme Court precedent. The Supreme Court's caselaw—especially in the First Amendment context, but also regarding privacy-related issues addressed in Fourth Amendment cases—suggests that the Court believes it is important, above everything else, to teach children to be obedient and respectful of teachers, principals, and other students.96 No one can doubt the importance of such lessons. But these lessons are also something one would expect totalitarian regimes to emphasize. The issue is not whether these lessons are important, but whether we can afford to teach them at the cost of principles of American freedom.

Over the past twenty years, the Supreme Court has decided a number of cases concerning the power of teachers to regulate the conduct of students in school.97 These decisions, in the aggregate, suggest that the Court has a different vision of the function of public educators than it did when it decided *Barnette*. Even if its vision of the educator's primary function has not changed significantly, the modern Court appears to place a far greater em-

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95 Earls, 536 US at 855.
96 See Parts VI A-B (discussing these cases).
97 Id.
phasis on the need for, and appropriateness of, disciplining children and teaching them how to behave properly than the Court did two generations ago. Though it may be too much to suggest that the Rehnquist Court would overturn *Barnette*, a number of its rulings suggest that the Court holds that teaching children to be obedient is among the most important foundational values for future citizenship.

A. Restrictions on Students' First Amendment Rights

This shift in emphasis is evident in a series of First Amendment and Fourth Amendment cases decided between 1984 and 2002. The Court has never repudiated the claim in *Tinker v Des Moines Independent Community School District* that students are "persons" within the meaning of the Fourteenth Amendment and that students do not shed their constitutional rights at the schoolhouse door. Nonetheless, since 1986 the Court has paid strange homage to the rule that the First Amendment places limits on the actions of public schools. In that year, the Court ruled that even though the First Amendment technically applies, school officials may punish students for making speeches that the officials deem "inappropriate." 

In *Bethel School District No 403 v Fraser*, a student gave a speech at a high school assembly which contained sexual metaphors. The student, insufficiently certain of the appropriateness of the speech, asked two faculty advisors to read it beforehand. They neither forbade him to give the speech nor warned him that he was violating a school rule by doing so, although both informed him that it was inappropriate and that he probably should not deliver it. Though the advisors did not officially authorize the speech, the student reasonably could have construed their noncommittal reaction as implicit consent

After the student delivered the speech, his principal promptly suspended him for three days and removed his name

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99 Id at 511.
100 Id at 506.
103 Id at 678.
104 Id.
105 Id.
106 See *Fraser*, 478 US at 695 (Stevens dissenting).
from the list of candidates for graduation speaker.\textsuperscript{107} The Supreme Court reasoned that the power to punish students for their speech is consistent with the First Amendment because the school was performing its important role as an educator of the next generation, a generation that needs to be taught "the boundaries of socially appropriate behavior."\textsuperscript{108} These boundaries, the Court made clear, are among the things that students must learn as "necessary to the maintenance of a democratic political system."\textsuperscript{109}

Two years later, in \textit{Hazelwood School District v Kuhlmeier},\textsuperscript{110} a principal committed the greatest of First Amendment sins: he engaged in prior restraint. The principal censored—by excising two pages from the student-written school newspaper—because he considered the content inappropriate.\textsuperscript{111} One of the excised articles dealt with teen pregnancy in the school. Although no names were used, the principal claimed to be concerned that the students interviewed were too easily identifiable.\textsuperscript{112} The other article related to the impact of divorce on students. This time, the principal refused to permit its publication because a student, who was identified by name, had complained about her father's behavior, and the father had not been given an opportunity to respond.\textsuperscript{113}

The principal's conduct was sustained by the Supreme Court because "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."\textsuperscript{114} Moreover, because of the limited expertise of federal judges in matters of education, the Court stressed that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."\textsuperscript{115}

\textsuperscript{107} See id at 678.
\textsuperscript{108} Id at 681.
\textsuperscript{109} Id at 683 (citations omitted).
\textsuperscript{110} 484 US 260 (1988).
\textsuperscript{111} Id at 265.
\textsuperscript{112} Id at 263.
\textsuperscript{113} See id at 263-64.
\textsuperscript{114} \textit{Kuhlmeier}, 484 US at 273.
\textsuperscript{115} Id (citations omitted).
Never mind that the principal never explained his actions to the students, whose weeks of hard work producing the articles were erased, or that the newspaper’s masthead promised the students a publication based on a commitment to the values of responsible, free speech. If the principal thought that the articles should not be published, and justified his censorship as advancing the students’ education, the Court was satisfied with that result.

B. Restrictions on Students’ Fourth Amendment Rights

The Supreme Court’s treatment of the Fourth Amendment in public schools closely parallels its treatment of the First Amendment. In 1985, the Court ruled that the Fourth Amendment applies to searches of students conducted by school officials. But, it promptly added, “strict compliance” with the Amendment’s probable cause requirements is not required for “the accommodation of the privacy interests of schoolchildren” because of “the substantial need of teachers and administrators for freedom to maintain order in the schools.”

In 1995, the Court struggled to justify a rule under the Fourth Amendment that would permit school officials to conduct random, suspicionless searches of student athletes. In Vernonia School District 47J v Acton, the Court reasoned that schools fall within the “special needs” rule of Skinner v Railway Labor Executives’ Association. Because school officials perceived an “epidemic” of drug use among student athletes, a special need existed to discourage drug use among student athletes or to discover such use in order to treat the students. Students may be searched, in other words, when educators believe doing

116 Id.
117 Justice Brennan’s famous and insightful criticism of the majority opinion is that the lessons the principal communicated were “particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees.” Id at 290 (Brennan dissenting).
119 Id at 341.
123 See Acton, 515 US at 663.
so serves the best interests of the students. Because the school’s relationship to children is “custodial and tutelary,” officials regularly exercise “a degree of supervision and control that could not be exercised over free adults.”124 Because children, unlike adults, are always in some form of custody, state officials may take actions with respect to children that would obviously offend the Fourth Amendment.125

But by 2002, the exception became the rule. Acton was about addressing an emergency and fashioning an appropriate response to a drug-use epidemic, but Board of Education of Indiana School Dist No 92 of Pottawatomie County v Earls126 concerned a school district regulation permitting the random testing of virtually every student—a dramatic expansion over the athlete-only rule of Acton—even in the absence of extensive drug use among the students. The Court found that the school’s decision to randomly test every student who “voluntarily” took part in any extracurricular activity was an “entirely reasonable” method of preventing at least some drug usage among students.127 The Court deemed the policy to be a “reasonably effective means” for “preventing, deterring, and detecting drug use.”128 For these purposes, it is constitutionally irrelevant that all students with an interest in going to college are almost certain to feel constrained to participate in extracurricular activities. Indeed, the more students who can be subjected to drug testing, the better. Not because those students plausibly waived their privacy rights, but rather, according to Justice Thomas in Earls, because the public school’s mission as “guardian and tutor” includes the responsibility “for maintaining discipline, health, and safety.”129 These choices are constitutional because in public schools, the government acts as a child’s “guardian and tutor” with responsibility “for maintaining discipline, health, and safety.”130

This line of cases addressing both the First Amendment and Fourth Amendment provide reasons to wonder whether the current Court’s vision of the teacher’s role in educating children would permit requiring students to recite the Pledge as part of

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124 Id at 655.
125 See id at 654.
127 See id at 836.
128 Id at 837.
129 Id at 830.
130 Earls, 536 US at 830.
developing the future citizen's patriotism. The modern rule has granted an enormous measure of authority to teachers and school officials to conduct business as they see fit, limited only by the requirement that their decisions be deemed "rational" if reviewed by federal judges. If *Barnette* were not already precedent, one could easily imagine the current Court upholding the power of schoolteachers to compel students to recite the Pledge when it was conducted as part of a pedagogical exercise seeking to instill patriotism in children.

VII. THE PLEDGE AS A CIVICS LESSON

The Supreme Court's First and Fourth Amendment jurisprudence hardly suggests that the current Court is likely to overturn *Barnette*. One hopes that the current Court will be troubled to know that the civics lesson typically learned by schoolchildren is that they are *supposed* to pledge allegiance. One also hopes the Court will object when school officials deliberately design their practices so that students are never informed that *Barnette* is still the controlling law of the land. Justice Brennan has stressed that "[p]ublic education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic," because "[t]he public school conveys . . . the 'fundamental values' necessary to the maintenance of a democratic political system."131

At the heart of *Newdow* lies two crucial questions. The first concerns the capacity of young children to comprehend and absorb information. The second is what we should be teaching our children in order to maximize the likelihood that our next generation will embrace the first principles of American values. The *Newdow* Panel erred, in my opinion, because it considered children to be as sophisticated as federal appeals judges. By doing so, the Panel placed more significance on the words "under God" than schoolchildren are likely to. They compounded this error by failing to use the school setting as a place to talk about the limits on the government in shaping the ideas of the next generation. Consequently, the *Newdow* Panel was unable to perceive any role for public school teachers in teaching the First Amendment. This extremely confining vision of education led the Panel to insist that the only proper remedy is to ban the Pledge altogether.

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Schoolteachers should be required to use the Pledge ceremony as an opportunity to provide students with a civics lesson. We should be instructing students in the first principles of American civics during the performance of patriotic exercises. Why do we permit American students, including those who end up in The University of Chicago Law School, to learn for the first time when they are adults that they had the right not to participate in ceremonies—ceremonies to which they were exposed thousands of times in their childhood?

It may be that when a city erects a religious symbol at holiday time citizens are confused about whether the symbol represents an endorsement of religion. The problem in that situation is that there is no one in a position of authority with whom to discuss the matter and allay the citizen's concern. But in a classroom, of all places, we should expect that these ambiguities can be resolved.

The Supreme Court stresses that "[p]ublic education... 'fulfills a most fundamental obligation of government to its constituency.' The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions."\textsuperscript{132} Schools, we are reminded, prepare individuals for participation as citizens and are a social institution "transmitting 'the values on which our society rests.'"\textsuperscript{133}

In upholding a New York statute that prohibited the certification of a public schoolteacher who had not manifested an intent to apply for United States citizenship, the Supreme Court in \textit{Ambach v Norwich}\textsuperscript{134} cited approvingly the New York education statute which explained that public schools are expected "to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war."\textsuperscript{135} \textit{Barnette}'s values are as important in meeting the obligations of citizenship (at least in peace) as any in the constellation of American rights.

"Public schools," writes Stanley Ingber, "are an indoctrinator's dream."\textsuperscript{136} Educators should adopt a robust appreciation of

\textsuperscript{132} \textit{Ambach}, 441 US at 76 (citations omitted).
\textsuperscript{133} \textit{Plyler v Doe}, 457 US 202, 221 (1982), citing \textit{Ambach}, 441 US at 76.
\textsuperscript{134} 441 US 68 (1979).
\textsuperscript{135} Id at 78 n 8 (citation omitted).
\textsuperscript{136} Stanley Ingber, \textit{Socialization, Indoctrination, or the "Pall of Orthodoxy": Value
the meaning of "preparing children for citizenship and transmitting basic cultural values."\textsuperscript{137} We should do a better job of ensuring that the next generation of Americans learn the values for which \textit{Barnette} stands. To accomplish this, we should cultivate an appreciation for the flag by teaching students the constitutional principles involved when we permit the flag salute.

Rather than banning the Pledge in public schools, we should insist that students be told on a regular, ongoing basis that they have the right not to participate, and that if they exercise that right, no adult figure will think less of them.\textsuperscript{138} Some teachers might go even further and explain to students that it is not in their interest to simply do what others choose to do, and that they should strive to become independent thinkers who make important decisions on the basis of what \textit{they} think they ought to do.

A civics lesson centered on the Pledge could also teach students that American principles of liberty are based on the notion that state officials, including public schoolteachers, may not make students believe certain ideas and may not force them to express their allegiance to the United States. The teachers could explain that we have this rule because of two related concepts. First, we don't trust state officials to control the minds of Americans. Our democratic values, our students should be informed, are based on the notion that the citizens run the government, not the other way around. The teachers should tell their students that if we permitted schoolteachers to tell students what is true about the world of politics, students may grow up believing only what state officials want them to believe.\textsuperscript{139}

Second, teachers should further explain why allowing state officials to compel students to believe certain ideas would be dangerous. Students should learn that the second reason we insist that they are free to decide what to believe is that the rest of us have more to gain from hearing as wide a range of ideas as


\textsuperscript{139} \textit{Barnette}, 319 US at 637 ("That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").
possible. That lesson will also prepare them to reject ideas that they regard as foolish or wrong.\textsuperscript{140}

This proposal for placing the Pledge at the center of a civics lesson would go a long way towards implementing the true meaning of \textit{Barnette}, but it would not quite satisfy the \textit{Newdow} majority. To do this, teachers also should make clear to their students, by means tailored to their developmental stage,\textsuperscript{141} that by including the words “under God” in the Pledge, the government is not endorsing any particular religion, nor even acknowledging the existence of God. American freedom, students should learn, includes the freedom of individual conscience.

Teachers should want students to understand that the Founding Fathers consciously created a country that forbids the government from endorsing religion or taking a religious position. Students should be told that because many Americans are deeply religious, our government also must allow each person the free exercise of his own religion. At the same time, because many Americans are deeply religious, we try to compromise as best we can and to recognize that God plays a significant role in many people's lives. For this reason, the reference to God in the Pledge “may merely recognize the historical fact that our Nation was believed to have been founded ‘under God.’”\textsuperscript{142}

The most important thing teachers should tell students is that no one should feel uncomfortable as the Pledge is recited. Students should be told explicitly that regardless of their decision on whether to recite the Pledge, they are exercising one of the greatest freedoms of all: the right to make their own decision about the life they wish to lead. For this reason, they should be told to not participate if they are uncomfortable participating, or simply would prefer not to.

\textbf{CONCLUSION}

Educating our children is among our most important social functions. The principles we teach our children will shape the

\textsuperscript{140} Teaching students these core values of free speech prepares them for obligations of citizenship, assists in the refinement of their ability to pursue truth and helps them achieve self-fulfillment. Consider John H. Garvey, \textit{Children and the First Amendment}, 57 Tex L Rev 321, 333-49 (1979).

\textsuperscript{141} For example, while the youngest students may not be capable of participating in a theoretical discussion of these principles, their teachers could design appropriate exercises and activities for instilling the underlying values.

\textsuperscript{142} \textit{Abington School District v Schempp}, 374 US 203, 304 (1963) (Brennan concurring).
future of America. The question remains as to the best means of raising a generation of Americans to respect independence of mind and the right to disagree within a broader, common society of good will.

Certainly, blind adherence to peer pressure fails to accomplish that. On the other hand, is it necessary to create a forced environment for young people—much as is done in religious training—in order to bring young people along to the point when individual thought may take over? If the ideas expressed in this Article disturb some, it is likely because they believe that we cannot allow too much freedom in the minds of young people before we have inculcated them into the spirit of belonging to American society.

Regrettably, courts tend to pay virtually no attention to important empirical statements about education, learning theory, and acculturation theory. The *Newdow* Panel’s decision rests on an understanding of children, their capacity to think, and how they learn. That opinion strikes me as misguided in its understanding of children. But the specter it raises of inappropriate coercion of children by public school officials is important and deserves more careful attention by our courts.

A careful student of the American educational system might reasonably conclude that ours is a country committed to avoiding teaching children about the dangers of government control. That is a lesson reserved for adults—after they’ve been subjected to years of value inculcation in “patriotism.” Though *Barnette* is a powerful statement about the limits of state officials to control the minds of its citizens, it has not been implemented as a statement that our children need to learn these things while they are children. Nor is it interpreted as a vision that our public schools must teach children of their right to disagree even with fundamental patriotic claims. *Barnette* eloquently stands for the proposition that because schools “are educating the young for citizenship [there] is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”

The ultimate irony is that public school officials have been able to reduce *Barnette* to a mere platitude.

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143 *Barnette*, 319 US at 637.
We should demand more of school officials. The Newdow Panel evinced an understandable, but ultimately unacceptable, lack of faith in a public school's ability to do better. Banning the Pledge from the public school avoids the need for public schools to teach American children the limits of governmental authority to inculcate children with religious and political ideas. Instead, we should take every possible opportunity to teach this lesson.