SUPREME COURT OF THE UNITED STATES

No. 02–1624

ELK GROVE UNIFIED SCHOOL DISTRICT AND DAVID W. GORDON, SUPERINTENDENT, PETITIONERS *v.* MICHAEL A. NEWDOW ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 14, 2004]

JUSTICE THOMAS, concurring in the judgment.

We granted certiorari in this case to decide whether the Elk Grove Unified School District's Pledge policy violates the Constitution. The answer to that question is: "no." But in a testament to the condition of our Establishment Clause jurisprudence, the Court of Appeals reached the opposite conclusion based on a persuasive reading of our precedent, especially *Lee* v. *Weisman,* 505 U. S. 577 (1992). In my view, *Lee* adopted an expansive definition of "coercion" that cannot be defended however one decides the "difficult question" of "[w]hether and how th[e Establishment] Clause should constrain state action under the Fourteenth Amendment." *Zelman* v. *Simmons-Harris,* 536 U. S. 639, 678 (2002) (THOMAS, J., concurring). The difficulties with our Establishment Clause cases, however, run far deeper than *Lee*.[1]

[1] This is by no means a novel observation. See, *e.g., Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U. S. 819, 861 (1995) (THOMAS, J., concurring) (noting that "our Establishment Clause jurisprudence is in hopeless disarray"); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.,* 508 U. S. 384, 398–401 (1993) (SCALIA, J., concurring in judgment). We have selectively invoked particular tests, such as the "*Lemon* test," *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971), with predictable outcomes. See, *e.g., Lamb's Chapel*, *supra*, at 398–401 (SCALIA, J.,

Because I agree with THE CHIEF JUSTICE that respondent Newdow has standing, I would take this opportunity to begin the process of rethinking the Establishment Clause. I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation. Moreover, as I will explain, the Pledge policy is not implicated by any sensible incorporation of the Establishment Clause, which would probably cover little more than the Free Exercise Clause.

I

In *Lee*, the Court held that invocations and benedictions could not, consistent with the Establishment Clause, be given at public secondary school graduations. The Court emphasized "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." 505 U. S., at 592. It brushed aside both the fact that the students were not required to attend the graduation, see *id.,* at 586 (asserting that student "attendance and participation in" the graduation ceremony "are in a fair and real sense obligatory"), and the fact that they were not compelled, in any meaningful sense, to participate in the religious component of the graduation ceremony, see *id.,* at 593 ("What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it"). The Court surmised that the prayer violated the Establishment Clause because a high school student could—in light

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concurring in judgment). Our jurisprudential confusion has led to results that can only be described as silly. In *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U. S. 573 (1989), for example, the Court distinguished between a crèche on the one hand and an 18-foot Chanukah menorah placed near a 45-foot Christmas tree on the other. The Court held that the first display violated the Establishment Clause but that the second did not.

of the "peer pressure" to attend graduation and "to stand as a group or, at least, maintain respectful silence during the invocation and benediction," *ibid.*—have "a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow," *ibid.*

Adherence to *Lee* would require us to strike down the Pledge policy, which, in most respects, poses more serious difficulties than the prayer at issue in *Lee*. A prayer at graduation is a one-time event, the graduating students are almost (if not already) adults, and their parents are usually present. By contrast, very young students, removed from the protection of their parents, are exposed to the Pledge each and every day.

Moreover, this case is more troubling than *Lee* with respect to both kinds of "coercion." First, although students may feel "peer pressure" to attend their graduations, the pressure here is far less subtle: Students are actually compelled (that is, by law, and not merely "in a fair and real sense," *id.,* at 586) to attend school. See also *School Dist. of Abington Township* v. *Schempp,* 374 U. S. 203, 223 (1963).

Analysis of the second form of "coercion" identified in *Lee* is somewhat more complicated. It is true that since this Court decided *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624 (1943), States cannot compel (in the traditional sense) students to pledge their allegiance. Formally, then, dissenters can refuse to pledge, and this refusal would be clear to onlookers.[2] That is, students have a theoretical means of opting out of the exercise. But as *Lee* indicated: "Research in psychology supports the common assumption that adolescents are often susceptible

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[2] Of course, as *Lee* and subsequent cases make clear, "'[l]aw reaches past formalism.'" *Santa Fe Independent School Dist.* v. *Doe,* 530 U. S. 290, 311 (2000) (quoting *Lee* v. *Weisman,* 505 U. S. 577, 595 (1992)).

to pressure from their peers towards conformity . . . ." 505 U. S., at 593–594 (citations omitted). On *Lee*'s reasoning, *Barnette*'s protection is illusory, for government officials can allow children to recite the Pledge and let peer pressure take its natural and predictable course. Further, even if we assume that sitting in respectful silence could be *mistaken* for assent to or participation in a graduation prayer, dissenting students graduating from high school are not "coerced" to pray. At most, they are "coerced" into possibly appearing to assent to the prayer. The "coercion" here, however, results in unwilling children actually pledging their allegiance.[3]

THE CHIEF JUSTICE would distinguish *Lee* by asserting "that the phrase 'under God' in the Pledge [does not] conver[t] its recital into a 'religious exercise' of the sort described in *Lee*." *Ante*, at 14 (opinion concurring in judgment). In *Barnette*, the Court addressed a state law that compelled students to salute and pledge allegiance to the flag. The Court described this as "compulsion of students to declare a belief." 319 U. S., at 631. The Pledge "require[d] affirmation of a belief and an attitude of mind." *Id.,* at 633. In its current form, reciting the Pledge entails pledging allegiance to "the Flag of the United States of America, and to the Republic for which it stands, one Nation under God." 4 U. S. C. §4. Under *Barnette*, pledging allegiance is "to declare a belief" that now includes that this is "one Nation under God." It is difficult to see how this does not entail an affirmation that God exists. Whether or not we classify affirming the existence of God as a "formal religious exercise" akin to prayer, it must present the same or similar constitutional problems.

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[3] Surely the "coercion" to pledge (where failure to do so is immediately obvious to one's peers) is far greater than the "coercion" resulting from a student-initiated and student-led prayer at a high school football game. See *Santa Fe Independent School Dist.*, *supra.*

To be sure, such an affirmation is not a prayer, and I admit that this might be a significant distinction. But the Court has squarely held that the government cannot require a person to "declare his belief in God." *Torcaso* v. *Watkins,* 367 U. S. 488, 489 (1961); *id.,* at 495 ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion'"); see also *Employment Div., Dept. of Human Resources of Ore.* v. *Smith,* 494 U. S. 872, 877 (1990) ("The government may not compel affirmation of religious belief"); *Widmar* v. *Vincent,* 454 U. S. 263, 269–270, n. 6 (1981) (rejecting attempt to distinguish worship from other forms of religious speech). And the Court has said, in my view questionably, that the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief." *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U. S. 573, 594 (1989). See also *Good News Club* v. *Milford Central School,* 533 U. S. 98, 126–127 (2001) (SCALIA, J., concurring).

I conclude that, as a matter of our precedent, the Pledge policy is unconstitutional. I believe, however, that *Lee* was wrongly decided. *Lee* depended on a notion of "coercion" that, as I discuss below, has no basis in law or reason. The kind of coercion implicated by the Religion Clauses is that accomplished "*by force of law and threat of penalty*." 505 U. S., at 640 (SCALIA, J., dissenting); see *id.,* at 640–645. Peer pressure, unpleasant as it may be, is not coercion. But rejection of *Lee*-style "coercion" does not suffice to settle this case. Although children are not coerced to pledge their allegiance, they are legally coerced to attend school. Cf., *e.g., Schempp*, *supra; Engel* v. *Vitale,* 370 U. S. 421 (1962). Because what is at issue is a state action, the question becomes whether the Pledge policy implicates a religious liberty right protected by the Fourteenth Amendment.

II

I accept that the Free Exercise Clause, which clearly protects an individual right, applies against the States through the Fourteenth Amendment. See *Zelman*, 536 U. S., at 679, and n. 4 (THOMAS, J., concurring). But the Establishment Clause is another matter. The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause. In any case, I do not believe that the Pledge policy infringes any religious liberty right that would arise from incorporation of the Clause. Because the Pledge policy also does not infringe any free-exercise rights, I conclude that it is constitutional.

A

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." Amdt. 1. As a textual matter, this Clause probably prohibits Congress from establishing a national religion. But see P. Hamburger, Separation of Church and State 106, n. 40 (2002) (citing sources). Perhaps more importantly, the Clause made clear that Congress could not interfere with state establishments, notwithstanding any argument that could be made based on Congress' power under the Necessary and Proper Clause. See A. Amar, The Bill of Rights 36–39 (1998).

Nothing in the text of the Clause suggests that it reaches any further. The Establishment Clause does not purport to protect individual rights. By contrast, the Free Exercise Clause plainly protects individuals against congressional interference with the right to exercise their religion, and the remaining Clauses within the First Amendment expressly disable Congress from "abridging

[particular] *freedom[s]*." (Emphasis added.) This textual analysis is consistent with the prevailing view that the Constitution left religion to the States. See, *e.g.,* 2 J. Story, Commentaries on the Constitution of the United States §1873 (5th ed. 1891); see also Amar, The Bill of Rights, at 32–42; *id.,* at 246–257. History also supports this understanding: At the founding, at least six States had established religions, see McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1437 (1990). Nor has this federalism point escaped the notice of Members of this Court. See, *e.g., Zelman*, *supra,* at 677–680 (THOMAS, J., concurring); *Lee*, *supra*, at 641 (SCALIA, J., dissenting).

Quite simply, the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right. These two features independently make incorporation of the Clause difficult to understand. The best argument in favor of incorporation would be that, by disabling Congress from establishing a national religion, the Clause protected an individual right, enforceable against the Federal Government, to be free from coercive federal establishments. Incorporation of this individual right, the argument goes, makes sense. I have alluded to this possibility before. See *Zelman*, *supra*, at 679 (THOMAS, J., concurring) ("States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights *or any other individual liberty interest*" (emphasis added)).

But even assuming that the Establishment Clause precludes the Federal Government from establishing a national religion, it does not follow that the Clause created or protects any individual right. For the reasons discussed above, it is more likely that States and only States were the direct beneficiaries. See also *Lee*, *supra*, at 641 (SCALIA, J., dissenting). Moreover, incorporation of this

putative individual right leads to a peculiar outcome: It would prohibit precisely what the Establishment Clause was intended to protect—*state* establishments of religion. See *Schempp,* 374 U. S., at 310 (Stewart, J., dissenting) (noting that "the Fourteenth Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy"). Nevertheless, the potential right against federal establishments is the only candidate for incorporation.

I would welcome the opportunity to consider more fully the difficult questions whether and how the Establishment Clause applies against the States. One observation suffices for now: As strange as it sounds, an incorporated Establishment Clause prohibits exactly what the Establishment Clause protected—state practices that pertain to "an establishment of religion." At the very least, the burden of persuasion rests with anyone who claims that the term took on a different meaning upon incorporation. We must therefore determine whether the Pledge policy pertains to an "establishment of religion."

B

The traditional "establishments of religion" to which the Establishment Clause is addressed necessarily involve actual legal coercion:

> "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. L. Levy, The Establishment Clause 4 (1986). Thus, for example, in the Colony of Virginia, where the Church of

> England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches. *Id.,* at 3–4." *Lee*, 505 U. S., at 640–641 (SCALIA, J., dissenting).

Even if "establishment" had a broader definition, one that included support for religion generally through taxation, the element of legal coercion (by the State) would still be present. See *id.,* at 641.

It is also conceivable that a government could "establish" a religion by imbuing it with governmental authority, see, *e.g., Larkin* v. *Grendel's Den, Inc.,* 459 U. S. 116 (1982), or by "delegat[ing] its civic authority to a group chosen according to a religious criterion," *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet,* 512 U. S. 687, 698 (1994); *County of Allegheny,* 492 U. S., at 590–591. A religious organization that carries some measure of the authority of the State begins to look like a traditional "religious establishment," at least when that authority can be used coercively. See also *Zorach* v. *Clauson,* 343 U. S. 306, 319 (1952) (Black, J., dissenting) (explaining that the Establishment Clause "insure[s] that no one powerful sect or combination of sects could use *political or governmental power* to punish dissenters whom they could not convert to their faith" (emphasis added)).

It is difficult to see how government practices that have nothing to do with creating or maintaining the sort of coercive state establishment described above implicate the possible liberty interest of being free from coercive state establishments. In addressing the constitutionality of voluntary school prayer, Justice Stewart made essentially this point, emphasizing that "we deal here not with the establishment of a state church, . . . but with whether

school children who want to begin their day by joining in prayer must be prohibited from doing so." *Engel*, 370 U. S., at 445 (dissenting opinion).[4]

To be sure, I find much to commend the view that the Establishment Clause "bar[s] governmental preferences for *particular* religious faiths." *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U. S. 819, 856 (1995) (THOMAS, J., concurring). But the position I suggest today is consistent with this. Legal compulsion is an inherent component of "preferences" in this context. James Madison's Memorial and Remonstrance Against Religious Assessments (reprinted in *Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1, 63–72 (1947) (appendix to dissent of Rutledge, J.)), which extolled the no-preference argument, concerned coercive taxation to support an established religion, much as its title implies.[5] And, although "more extreme notions of the separation of church and state [might] be attribut[able] to Madison, many of them clearly stem from 'arguments reflecting the concepts of natural law, natural rights, and the social contract between government and a civil society,' [R. Cord, Separation of Church and State: Historical Fact and Current Fiction 22 (1982)], rather than the principle of

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[4] It may well be the case that anything that would violate the incorporated Establishment Clause would actually violate the Free Exercise Clause, further calling into doubt the utility of incorporating the Establishment Clause. See, *e.g.,* A. Amar, The Bill of Rights 253–254 (1998). *Lee* v. *Weisman,* 505 U. S. 577 (1992), could be thought of this way to the extent that anyone might have been "coerced" into a religious exercise. Cf. *Zorach* v. *Clauson,* 343 U. S. 306, 311 (1952) (rejecting as "obtuse reasoning" a free-exercise claim where "[n]o one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools"); *ibid.* (rejecting coercion-based Establishment Clause claim absent evidence that "teachers were using their office *to persuade or force* students to take religious instruction" (emphasis added)).

[5] Again, coercive government preferences might also implicate the Free Exercise Clause and are perhaps better analyzed in that framework.

nonestablishment in the Constitution." *Rosenberger*, *supra*, at 856 (THOMAS, J., concurring). See also Hamburger, Separation of Church and State, at 105 (noting that Madison's proposed language for what became the Establishment Clause did not reflect his more extreme views).

C

Through the Pledge policy, the State has not created or maintained any religious establishment, and neither has it granted government authority to an existing religion. The Pledge policy does not expose anyone to the legal coercion associated with an established religion. Further, no other free-exercise rights are at issue. It follows that religious liberty rights are not in question and that the Pledge policy fully comports with the Constitution.