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21-4

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Lawrence K. Karlton[*]

On September 14, 2005, I issued an opinion on defendants' motion to dismiss in *Newdow v. The Congress of the United States.*[1] The case was the second attempt by plaintiff to challenge the inclusion of the words "under God" in the Pledge of Allegiance.[2] Its purpose sufficed to locate the case at the center of this nation's ongoing cultural wars. Nonetheless, I indicated in the opinion that "binding precedent requires a narrow resolution of the motions, one which will satisfy no one involved in that debate, but which accords with my duty as a judge of a subordinate court."[3] Despite the relatively narrow, and highly technical nature of the decision, however, there was a loud and widespread response. Below, I briefly note the nature of the opinion and then discuss the response.

According to the head note editor of the Federal Supplement, the holdings of the case were:

> The District Court, Karlton, Senior Judge, held that:
> (1) father of elementary school student lacked prudential standing as parent to challenge constitutionality of school districts' policy;

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[*] Senior Judge, United States District Court for the Eastern District of California.

[1] 383 F. Supp. 2d 1229 (E.D. Ca. 2005). Like everything else about the case, the title is hugely overblown.

[2] *See* 4 U.S.C. § 4 (2005).

[3] *Newdow*, 383 F. Supp. 2d at 1231.

> (2) father of elementary school student did not have prudential standing based on his attendance at school board meetings where Pledge was recited;
> (3) father did not have taxpayer standing;
> (4) father of two children had standing;
> (5) Court of Appeals' prior decision, that school district's practice violated Establishment Clause, was binding on District Court;
> (6) parents' challenge to school districts' policy was moot; and
> (7) recitation of Pledge at school board meetings did not violate Establishment Clause.[4]

It is clear to me that, despite the widespread media coverage, those who have not read the case would have no idea that, as the head notes have it, standing, precedence, and mootness were the key issues in the decision.[5] Most media reported that the court had concluded that the Pledge was unconstitutional or at least that reciting the Pledge in class was unconstitutional.[6]

The burden of this Article is not the failure of the media to get the story right—the First Amendment guarantees a free press, not an accurate one. Nor will this Article, other than describing the question, deal with the relatively esoteric issue of *stare decisis* that informed the opinion. That intricate legal issue was whether a circuit court decision reversed by the Supreme Court for lack of prudential

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[4] While the head notes were closer to right about the opinion than most anybody else, they also contain errors. Thus, the first note should probably read, "father of elementary school student, *who by court order was deprived of next friend status,* lacked prudential standing as parent to challenge constitutionality of school districts' policy."

[5] *Newdow,* 383 F. Supp. 2d at 1237-44.

[6] There were exceptions. Thus, as time passed, the local newspaper correctly reported what the decision stood for. Nonetheless, from all that I have seen, it was the exception proving the rule.

standing was "reversed on other grounds," thus leaving its substantive holding binding authority on a district court.[7] Time will tell whether I resolved that issue correctly. The burden of this brief Article is to discuss the fall-out of the *Newdow* decision, and what that fall-out tells us about the civic life of the nation.[8]

One would have to be from a distant planet not to recognize that a case, which not only touched upon a significant patriotic symbol, but also involved public affirmance of the nation's relationship to God, would have engendered deep passion. What was dispiriting was the public's confusion about what courts in our country do.[9]

This court has received innumerable letters and phone calls since the *Newdow* decision. A significant number of those communications expressed the view that the decision could not be correct because the vast majority of Americans supported the Pledge in its current form.[10] The fact that the assertion, unhampered by any

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[7] As I have previously written, "The doctrine of *stare decisis*, i.e. 'the requirement to adhere to decided cases . . . compels lower courts to follow the decisions of higher courts on a question of law' " Brewster v. County of Shasta, 112 F. Supp.2d 1185, 1194 (E.D. Cal. 2000) (citations omitted), *aff'd,* Brewster v. Shasta County, 275 F.3d 803 (9th Cir. 2001).

[8] I recognize that the traditional law review article is a more or less scholarly examination of some legal issue or case. Federal judges, however, say what they have to say about the case before them in the order disposing of it, and it would be inappropriate to say more. Nonetheless, I confess to some amusement that, despite its brevity and nontraditional character, I have managed to fill this brief comment with footnotes.

[9] This Article addresses the public's response. Another article could be written about academic responses. Two professors were called by a local legal newspaper for comment. One, although she had not read the disposition of the motion, nonetheless expressed an opinion. The other, claiming to have read the opinion, did not address the legal issue, but attacked the court's motivation. A third professor, who clearly had read the opinion, concluded I was in error since, *inter alia*, I had failed to recognize that the Supreme Court had been sloppy in deciding the first *Newdow* case, and thus didn't mean what it said. Oh well, the law, to the extent it protects academic freedom, does nothing to ensure the quality of the exercise of that freedom.

[10] I pass over those letters and calls that were scurrilous, obscene, or assured me that I

factual support, even if correct, could not influence the court in discharging its responsibility, simply did not occur to my correspondents. Nor did the notion that the First Amendment functions, among other things, as a restraint on the will of the majority.

I have tried my best to keep the tumult in perspective, keeping in mind the old Italian saying that "a hundred years from now we will all be bald." Nonetheless, that our educational system has failed so miserably should be a matter of great concern to all of us. Assuredly, it is difficult for the citizens of a democracy such as ours to accept the notion that, although the people are sovereign, their power is circumscribed by the compact made by the founders. The fact that none of my correspondents appeared to have the vaguest idea of the delicate balance that the Constitution strikes is a symptom of a grave political malaise. Appreciating that balance, however, is crucial to our understanding of ourselves and our political heritage.

Let me say in all candor that I have no notion of how to address the problem of a fundamental lack of understanding of the nature of the Bill of Rights and the function of courts in a constitutional democracy. Indeed, at least some of my correspondents claimed to be teachers. We can hardly expect those who do not understand the issue themselves, to be able to communicate the difficult notions that protection of minority beliefs is built into our scheme of government, that the court's have a duty to enforce that right, and that in any event, lower courts are bound by

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would burn in hell. The last writers may be right, but if so, it is unlikely that it will be the

the decisions of higher courts. Moreover, as the reporting of this case demonstrates, it is hard to expect that the media, with its need to grab attention, exploit the sensational, and meet deadlines, will do a good job of dealing with subtle and difficult questions. Finally, of course, court opinions will not be seen by the vast majority of lay citizens. Moreover, even if they are available, given that they resolve issues in accordance with a specialized mode of analysis, those opinions would not be readily understood. While an informed citizenry is the *sine qua non* of meaningful self-government, how to achieve that goal in connection with highly charged legal decisions, is, to say the least, elusive.

Let me not end on such a sad note. Instead, I will acknowledge that I received some wonderful and supportive letters. Unfortunately, even that fact is not an unmixed blessing. I suspect that those letters also were most likely authored by folks who hadn't read the opinion and thus didn't know what it was really about.

Let me urge the readers of this piece to a different course. Before addressing legal decisions, read them—it will be a refreshing change. Indeed, even if the opinion is pretty dry, it might not be a bad idea to read *Newdow* before either condemning or praising it.

result of following what I understand to be binding precedent.