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The Pledge of Allegiance, Croft v. Perry, and the Supreme Court's Second Chance to Clarify Establishment Clause Jurisprudence

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THE PLEDGE OF ALLEGIANCE, CROFT V. PERRY, AND THE SUPREME COURT'S SECOND CHANCE TO CLARIFY ESTABLISHMENT CLAUSE JURISPRUDENCE

Carrie Nie*

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I. INTRODUCTION

EVERY morning at school, public schoolrooms in the United States generally look alike—the children stand behind their desks with their right hands over their hearts while reciting the Pledge

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of Allegiance to the U.S. flag. Next, the children often recite the pledge of allegiance to their respective state flags. The majority of these children grow up committing these pledges to memory and not thinking twice about these first ten minutes every morning at school. Similarly, these children’s parents do not concern themselves with these pledges that their children make at school every morning. Generally, neither the children nor the parents are aware that the Pledge is required by law.

The current Pledge reads: “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.” The pledge did not always include “under God.” Despite various allegations against required recitation of these words, the Supreme Court has never directly addressed the constitutionality of the additional words. The Texas legislature recently modified the pledge of allegiance to the Texas flag to similarly include “under God,” which motivated parents of Texas public school children to challenge the constitutionality of the modified pledge. The Fifth Circuit then upheld the constitutionality of the modified pledge.

This decision is important because the Supreme Court has a chance to step in and finally clear the murky legislative and judicial history behind the Pledge of Allegiance and the Establishment Clause. Texas is not the only state that references God in some form in the state pledge of allegiance. Some states have their own state pledges and others have salutes. For example, Louisiana also has “under God” in its state pledge. Mississippi similarly includes “Almighty God” in its state pledge. Other states do not directly have the word “God” in the pledge, but do have words that entertain or infer a reference to a god. For example, Kentucky’s pledge ends with “grace from on High.” Other states, such as Alabama, do not make any reference to God.

As seen in Figure 1, one U.S. territory and seven states, including

2. See discussion infra Part II.
3. See discussion infra Part II.
4. Croft v. Perry, 624 F.3d 157, 161 (5th Cir. 2010); see also discussion infra Part III.
5. See Croft, 624 F.3d at 170.
10. NETSTATE.COM, Kentucky; supra note 6.
Texas, currently reference God in their state pledges or salutes.\textsuperscript{12} No other cases to date have challenged the validity of these state pledges; therefore, the Supreme Court should address the issue in \textit{Croft v. Perry} to set a precedent for the other states. Not only would this decision set an example for the other states regarding their state pledges, but it would also clear the murky waters of the Pledge of Allegiance and the Establishment Clause.

\textbf{FIGURE 1: STATE PLEDGES ALLUDING TO OR REFERENCING GOD\textsuperscript{13}}

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>Pledge of Allegiance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Guam</td>
<td>\textit{From the highest of my thoughts, from the deepest of my heart, and with the utmost of my strength, I offer myself to protect and to defend, the beliefs, the culture, the language, the air, the water, and our lands, which is our inherent god-given rights. This I will affirm by the Holy Bible and our banner the Guam Flag.}</td>
</tr>
<tr>
<td>Kentucky</td>
<td>\textit{I pledge allegiance to the Kentucky flag, and to the Sovereign State for which it stands, one Commonwealth, blessed with diversity, natural wealth, beauty, and grace from on High.}</td>
</tr>
<tr>
<td>Louisiana</td>
<td>\textit{I pledge allegiance to the flag of the state of Louisiana and to the motto for which it stands: A state, under God, united in purpose and ideals, confident that justice shall prevail for all of those abiding here.}</td>
</tr>
<tr>
<td>Mississippi</td>
<td>\textit{I salute the flag of Mississippi and the sovereign state for which it stands with pride in her history and achievements and with confidence in her future under the guidance of Almighty God.}</td>
</tr>
<tr>
<td>North Carolina</td>
<td>\textit{I salute the flag of North Carolina and pledge to the Old North State love, loyalty, and faith.}</td>
</tr>
<tr>
<td>South Carolina</td>
<td>\textit{I salute the flag of South Carolina and pledge to the Palmetto State love, loyalty and faith.}</td>
</tr>
<tr>
<td>Tennessee</td>
<td>\textit{Three white stars on a field of blue God keep them strong and ever true It is with pride and love that we Salute the Flag of Tennessee.}</td>
</tr>
<tr>
<td>Texas</td>
<td>\textit{Honor the Texas flag; I pledge allegiance to thee, Texas, one state under God, one and indivisible.}</td>
</tr>
</tbody>
</table>

This Comment will discuss the constitutionality of the words “under God” in the pledges of allegiance to the United States and Texas flags. Part I provides a general introduction to the Pledge of Allegiance. Next, Part II discusses the historical background of the Pledge of Allegiance to the U.S. flag, the Establishment Clause of the First Amendment, and Supreme Court dicta regarding the constitutionality of the Pledge. Part III discusses the pledge of allegiance to the Texas flag and the recent \textit{Croft v. Perry} decision. Finally, Part IV analyzes the Fifth Circuit’s decision in \textit{Croft v. Perry}, argues why the Supreme Court should grant certiorari to

\textsuperscript{12} See id.
hear the case, and predicts why the Supreme Court will likely view the words "under God" in the Texas pledge as unconstitutional.

II. THE PLEDGE OF ALLEGIANCE AND THE ESTABLISHMENT CLAUSE

A. HISTORY OF THE PLEDGE OF ALLEGIANCE TO THE U.S. FLAG

Francis Bellamy, children's author and Baptist minister, wrote the original Pledge of Allegiance in 1892. The Pledge was not controversial at that time because there was a strong sense of Americanism prevailing in the public; the Pledge reflected this pride by saluting the American flag. In the first half of the twentieth century, many states had flag laws and encouraged students to pledge their allegiance to the flag. Today, almost all fifty states require public schools to administer recitation of the Pledge of Allegiance. Forty-three states have statutes authorizing public schools to require the recitation of the Pledge.

Although the nation has generally shown widespread acceptance to the Pledge of Allegiance, citizens have protested as early as 1916 against the requirement of reciting the Pledge. The Jehovah's Witnesses were among the first groups to contest the required recitation of the Pledge. In West Virginia State Board of Education v. Barnette, the Court upheld the Jehovah's Witnesses' argument that a choice between reciting the Pledge or expulsion from school violated their freedom of religion rights under the First Amendment. Barnette is distinguishable from the issue in this Comment because it was decided before the words "under God" were added to the national pledge.

When Bellamy first wrote the Pledge, he did not include the words "under God." The codified pledge of 1942 also did not include "under God." Congress did not add the words "under God" to the Pledge of

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16. Id. at 434-35 (Especially in light of World War I, many state laws and organizations were dedicated to honoring the U.S. flag.).

17. Id. at 435.


19. Id.


24. Id. at 12 (noting, however, that the codified pledge in 1942 was not a mirror image of Bellamy's original text; certain phrases had been altered such as "my flag" to "the flag of the United States of America").
The Pledge of Allegiance until 1954. The Knights of Columbus pushed for the amendment in 1952 because they wanted to "[encompass] the fabric of America" by mentioning God. Though three circuit courts have attempted to determine the Pledge's constitutionality, the Supreme Court has never directly determined the constitutionality of these words. Notably, in 2010, the Court was confronted with the constitutionality of these words, but the case was resolved on a standing issue.

B. THE ESTABLISHMENT CLAUSE

1. The Establishment Clause Generally

Claimants against the Pledge of Allegiance often argue that the required recitation of the Pledge violates their right to freedom of religion under the First Amendment's Establishment Clause. The Establishment Clause reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment makes the Establishment Clause "applicable with full force to the States and their school districts."

The Establishment Clause separates church and state; however, the framers did not necessarily intend complete separation. The Court has recognized that the Establishment Clause language is "at best opaque, particularly when compared with other portions of the Amendment." Courts must recognize that the distinction between a proper and improper relationship is not a "wall," but rather a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." The Establishment Clause does not seek to prevent a complete separation of church and state—rather, "it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any [religions]."


28. See Newdow, 597 F.3d at 1016.

29. U.S. Const. amend. I.


33. Id. at 614.

Because the Legislature and the Supreme Court have not defined a strict line between lawful and unlawful acts under the Establishment Clause, courts have used various methods to determine whether a claimant’s rights under the Establishment Clause have been violated. The courts have skirted defining a strict line or test by merely creating new tests to achieve their desired results. Consequently, the various tests contribute to the “[m]urky [w]aters of Establishment Clause jurisprudence.” Courts are not restricted to one or all of the tests; courts have used one, multiple, or all of the tests in addressing an issue. These tests include the no-sect-preference test, the *Lemon* test, the endorsement test, and the coercion test.

2. *The No-Sect-Preference Test*

*Larson v. Valente* established a no-sect-preference test to determine the validity of government action against the Establishment Clause. The Court concluded that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *County of Allegheny v. ACLU* is a good example of when a government action violates the Establishment Clause under the no-sect-preference test. There, the Court held that the government violated the Establishment Clause when it “demonstrate[d] the government’s allegiance to a particular sect or creed.” Courts have previously reasoned that a reference to “God” in general does not violate this no-sect-preference test because it simply acknowledges religion rather than showing preference for one religion over another. Part III will demonstrate why this reasoning is flawed.

3. *The Lemon Test*

The Supreme Court established the *Lemon* test in *Lemon v. Kurtzman* to distinguish which acts are permissible under the Establishment Clause. *Lemon* involved two statutes: a Pennsylvania statute that provided monetary support to nonpublic elementary and secondary schools by reimbursing certain costs in secular subjects, and a Rhode Island statute that authorized the State to pay an extra supplement to teachers in private elementary schools. The taxpayers alleged under both statutes

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35. See discussion infra Part II.B.2–5.
36. Toy, supra note 18, at 40.
37. See e.g., Lynch, 465 U.S. at 669.
38. See discussion infra Part II.B.2–5.
40. Id.
41. See Croft v. Perry, 624 F.3d 157, 166 (5th Cir. 2010) (citing Cnty. of Allegheny v. ACLU, 492 U.S. 573, 603–05 (1989)).
42. Cnty. of Allegheny, 492 U.S. at 603.
45. Id. at 606–07, 609.
that the state financially aided "church-related educational institutions," and that the acts violated their First Amendment rights. The Court held that both statutes were unconstitutional. The Court recognized that "[i]t must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" The first prong requires the statute to have a secular legislative purpose. Second, the statute's principal or primary effect cannot advance or inhibit religion. Finally, the statute cannot foster excessive government entanglement with religion. Though the Lemon test has received criticism, it is still applicable law. The Court recognized that the test would not prevent total separation because "[s]ome relationship between government and religious organizations is inevitable." Regardless, the goal behind the Lemon test is "to prevent, as far as possible, the intrusion of either [the state or religious institutions] into the precincts of the other."

4. The Endorsement Test

Justice O'Connor's concurring opinion in Lynch v. Donnelly recognized that the Establishment Clause does not allow for official preference for religion over nonreligion. Justice O'Connor introduced the test by stating that the test "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." She set forth the two main parts of the test by explaining that "government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions . . . . The second and more direct infringement is government endorsement or disapproval of

46. Id. at 624.
47. See id.
48. Id. at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).
49. Id.
51. Lemon, 403 U.S. at 613, 615 (The third prong of the Lemon test has three subsections: (a) the character and purposes of the institutions that receive the benefit; (b) the nature of the support that the state provided; and (c) the relationship between the government and the religious authority that received the benefit. These subsections will not be addressed in this Comment because it does not deal with aid, which is the issue to which these subsections are applied.); see also Walz, 397 U.S. at 668.
52. Walsh et al., supra note 25, at 264.
53. The Supreme Court modified the Lemon test in Agostini v. Felton, 521 U.S. 203, 204 (1997), by adding three subsections to the second prong of the test. Most courts still use the original version of the Lemon test and this Comment will use the original version. Note that the Supreme Court did not use the Lemon test in one case—Marsh v. Chambers, 463 U.S. 783, 792 (1983). Marsh upheld legislative prayer, an issue that is not relevant to the constitutionality of the pledge of allegiance in public schools.
54. Lemon, 403 U.S. at 614 (citing Zorach v. Clausen, 343 U.S. 306, 312 (1952)).
55. Id.
The test maintains that the government cannot endorse or disapprove of a religion. The Court in *County of Allegheny* adopted the endorsement test in 1989. The endorsement test's analysis essentially resembles the second prong of the *Lemon* test. Often, when a court analyzes an Establishment Clause issue, it will work through both the *Lemon* and endorsement tests. The endorsement test analysis is often not as in-depth as the *Lemon* test analysis because once the second prong of the *Lemon* test is established, the court may use the same reasoning to satisfy the endorsement test.

*Lynch* involved a claim challenging a nativity scene in a Rhode Island city's Christmas display. The Court held that the nativity scene in the Christmas display was not a violation of the Establishment Clause. The nativity scene was part of a Christmas display that also included secular symbols, such as Santa Clause, a Christmas tree, and a sign that read "Seasons Greetings." The Court reasoned that because the nativity scene, though religious, was displayed alongside secular symbols, the government was not simply endorsing religion and thus did not violate the Establishment Clause. Specifically, the Court reasoned that because the nativity scene was displayed alongside the secular symbols, the benefit to the religion at issue was "indirect, remote, and incidental, and is no more an advancement or endorsement of religion than the congressional and executive recognition of the origins of Christmas, or the exhibition of religious paintings in governmentally supported museums."

*County of Allegheny* also involved a claim against the constitutionality of a nativity scene in a government holiday display. The difference between *Lynch* and *County of Allegheny* is that the *County of Allegheny* holiday display did not include secular holiday symbols as in the *Lynch* display. Consequently, the Court in *County of Allegheny* struck down the constitutionality of the nativity scene in the display. Notably, the same Court upheld another holiday display that depicted symbols from various religions—such as a menorah—alongside secular symbols—such as Santa Clause and a Christmas tree.
as a Christmas tree.\textsuperscript{72}

5. The Coercion Test

Another Establishment Clause test is the coercion test. \textit{Lee v. Weisman} established that under the Establishment Clause, the government “may not coerce anyone to support or participate in religion or its exercise . . . “\textsuperscript{73} This test is what the government should “at a minimum” not do.\textsuperscript{74} \textit{Lee} involved a prayer at a public high school graduation ceremony.\textsuperscript{75} A state clergyman led the prayer.\textsuperscript{76} The Court held that the government action was a violation of the coercion test and thus violated the Establishment Clause, reasoning that “subtle coercive pressures exist[ed] . . . [and the student could not] avoid the fact or appearance of participation.”\textsuperscript{77} Furthermore, the Court established that having to remain silent or stand while the religious act was being performed could be viewed as participation.\textsuperscript{78} The Court reasoned that a student is not any less coerced when he merely stands by in silence—“the act of standing or remaining in silence signifies mere respect, rather than participation.”\textsuperscript{79} Furthermore, “[w]hat 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.”\textsuperscript{80}

6. Sister Circuits and the Constitutionality of the National Pledge

Three circuits have addressed the constitutionality of the Pledge of Allegiance, but no circuit has addressed the constitutionality of a state pledge of allegiance.\textsuperscript{81} More importantly, the Supreme Court has not yet ruled on the constitutionality of the national pledge.\textsuperscript{82} In \textit{Elk Grove Unified School District v. Newdow}, the Supreme Court skirted the issue by overruling the Ninth Circuit’s holding that the Pledge was unconstitutional on standing grounds.\textsuperscript{83} \textit{Newdow} is the closest the Court has come to ruling on the issue.\textsuperscript{84} Regarding the aforementioned three circuits, Croft v. Perry acknowledges that \textit{Sherman v. Community Consolidated School District}, \textit{Myers v. Loudoun County Public Schools}, and most re-

\textsuperscript{72} See \textit{id.} at 619.


\textsuperscript{74} Id.

\textsuperscript{75} Id. at 586.

\textsuperscript{76} Id. at 587.

\textsuperscript{77} Id. at 588.

\textsuperscript{78} See \textit{id.}

\textsuperscript{79} Id.

\textsuperscript{80} Id.

\textsuperscript{81} Croft v. Perry, 624 F.3d 157, 164 (5th Cir. 2010).

\textsuperscript{82} Id. at 593.

\textsuperscript{83} Id.

Recently Newdow v. Rio Linda Union School District are the three circuit court cases that address the national pledge’s constitutionality.\(^8\)

In Sherman v. Community Consolidated School District, the Seventh Circuit upheld the constitutionality of the Pledge of Allegiance.\(^6\) Sherman involved a father suing his son’s public school district, alleging that the Illinois statute requiring the recitation of the Pledge was a violation of the First Amendment’s Establishment Clause.\(^7\) The court resolved the issue by allowing the public schools in Illinois to recite the Pledge, reasoning that the students did not have to participate.\(^8\) The court looked at the Illinois statute and determined that because the statute did not say “all” pupils, and because the statute did not provide for a penalty for refusing to recite the Pledge, the statute was constitutional.\(^9\)

Thirteen years later, in Myers v. Loudoun County Public Schools, a parent of public school children made a similar claim against a Virginia public school’s school board and superintendent.\(^10\) The Fourth Circuit held that the Pledge of Allegiance was constitutional against the parent’s Establishment Clause claim.\(^11\) The court placed particular emphasis on the nation’s history of endorsing documents that reference God.\(^12\) Some examples include the Declaration of Independence, the Constitution, and a public day of thanksgiving.\(^13\)

Finally, in 2010, the Ninth Circuit joined the Fourth and Seventh Circuits in Newdow v. Rio Linda Union School District and held that the national pledge was constitutional.\(^14\) The parents of children in a California public school district challenged the validity of the California statute that codified the amended 1954 Pledge of Allegiance.\(^15\) The parents were atheists.\(^16\) The court reasoned that “both the purpose and effect of the Pledge are that of a predominantly patriotic, not a religious, exercise.”\(^17\) To determine whether the Pledge was religious or patriotic, the court declined to read the religious aspect of the Pledge in isolation.\(^18\) Instead, the court read the Pledge in light of its original purpose: to inspire patriotism.\(^19\) The court determined that the Pledge did not violate the Establishment Clause under the Lemon, endorsement, and coercion tests.\(^20\)

\(^8\) Croft, 624 F.3d at 164–65.
\(^6\) Sherman, 980 F.2d at 448.
\(^7\) Id. at 439–440.
\(^8\) See id. at 439.
\(^9\) Id. at 440 (Although later in the opinion, the court expressed that the omission of a penalty from the statute is not germane to the Establishment Clause analysis.).
\(^11\) See id. at 397.
\(^12\) See id. at 403–05.
\(^13\) Id. at 404.
\(^14\) Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1037 (9th Cir. 2010).
\(^15\) Id. at 1047–48.
\(^16\) Id. at 1012–13.
\(^17\) Id. at 1037.
\(^18\) See id. at 1014.
\(^19\) See id.
\(^20\) Id. at 1037–40.
III. CURRENT STATE OF THE LAW: CROFT V. PERRY

A. THE TEXAS LEGISLATURE ADDS “GOD” TO THE TEXAS PLEDGE OF ALLEGIANCE

In March 1933, the Texas House of Representatives adopted a state pledge of allegiance.\textsuperscript{101} House Bill 575 § 3 included the first Texas pledge of allegiance: “Honor the Texas Flag of 1836; I pledge allegiance to thee, Texas, one and indivisible.”\textsuperscript{102} Almost seventy-five years later in 2007, Representative Debbie Riddle pushed for House Bill 1034 to establish a new pledge of allegiance.\textsuperscript{103} Her amended bill proposal added the words “one state under God” to the pledge.\textsuperscript{104} The Texas legislature amended the bill, and the current Texas pledge of allegiance reads: “Honor the Texas flag; I pledge of allegiance to thee, Texas, one state under God, one and indivisible.”\textsuperscript{105}

The Texas Education Code requires students to recite the pledges of allegiance every day.\textsuperscript{106} Specifically, the Texas Education Code requires each child in each public school district to recite both the Pledge of Allegiance to the U.S. flag\textsuperscript{107} and the pledge of allegiance to the Texas flag.\textsuperscript{108}

Under Texas Education Code § 25.082(c), a student may be excused from reciting the pledges with a written request from his parent or guardian.\textsuperscript{109}

I. Elk Grove Unified School District v. Newdow

In 2002, the Ninth Circuit held that the Pledge of Allegiance was unconstitutional in \textit{Elk Grove Unified School District v. Newdow}.\textsuperscript{110} Michael Newdow originally sued his daughter’s school district, claiming that the Pledge of Allegiance was unconstitutional because it contained the words “under God” and this was a “religious indoctrination” of his daughter.\textsuperscript{111} Specifically, he opposed the school district’s policy requiring elementary school classes to recite the Pledge of Allegiance every morning.\textsuperscript{112} He argued that the policy was a violation of his and his daughter’s freedom of religion rights under the Establishment Clause of the First Amendment.\textsuperscript{113}

\begin{itemize}
\item \textsuperscript{102} Id.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Tex. Gov’t Code Ann. § 3100.101 (West 2007).
\item \textsuperscript{108} See Educ. § 25.082; see also Gov’t § 3100.101.
\item \textsuperscript{109} See Educ. § 25.082.
\item \textsuperscript{110} Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 5 (2004).
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Id. at 7-8.
\item \textsuperscript{113} Id. at 24-25.
\end{itemize}
The Ninth Circuit ultimately decided that the national pledge was unconstitutional because it endorsed “not just religion generally, but a monotheistic religion organized ‘under God.’” The court reasoned that:

The pledge to a nation “under God,” with its imprimatur of governmental sanction, provides the message to Newdow’s young daughter not only that non-believers, or believers in non-Judeo-Christian religions, are outsiders, but more specifically that her father’s beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom. Just as the foundational principle of the Freedom of Speech Clause in the First Amendment tolerates unpopular and even despised ideas, so does the principle underlying the Establishment Clause protect unpopular and despised minorities from government sponsored religious orthodoxy tied to government services.

The Court in Newdow v. U.S. Congress recognized the Lemon test, the endorsement test, and the coercion test. The court ultimately decided that the Pledge of Allegiance was unconstitutional under the coercion test, but it did not elaborate on the Lemon or endorsement tests. The court reasoned that “[w]e are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them.” Because the coercion test is the “minimum” of what a government cannot do, and the court already determined that the national pledge did not even meet this constitutional minimum, the court decided that it was not necessary to also discuss the Lemon and endorsement tests.

The Ninth Circuit determined that the Pledge of Allegiance was unconstitutional under the coercion test. Specifically, the court determined that acknowledging that the United States is one nation “under God” is not “merely descriptive of the undeniable historical significance of religion in the founding of the Republic.” The court also emphasized that the Pledge is especially coercive in the context of schools because of the “age and impressionability of school children, and their understanding that they are required to adhere to the norms set by their school, their teacher[,] and their fellow students.” The court did not require a showing that the daughter had actually been coerced into reciting the Pledge; in fact, the court was satisfied that simply being present while her fellow classmates and teacher recited the Pledge was enough to make the Pledge a violation of the Establishment Clause.

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114. Newdow v. U.S. Cong., 313 F.3d 500, 505 (9th Cir. 2002).
115. Id. at 505.
117. See id. at 488.
118. Id. at 487.
119. Id.
120. See id.
121. Id.
122. Id. at 488.
123. See id.
To support its conclusion, the court pointed to previous Supreme Court cases that had struck down the constitutionality of a government’s actions because they did not comport with the Establishment Clause. The court also considered the legislative history of amending the national pledge to include “under God.” The court pointed to President Eisenhower’s statement that the Pledge was for every school child to “[d]edicate... our Nation and our people to the Almighty.” Furthermore, when the classes recite the Pledge, they swear under the values of the flag, including monotheism since 1954. The court went even further and analogized pledging “under God” as identical to pledging “‘under Jesus,’ a nation ‘under Vishnu,’ a nation ‘under Zeus,’ or a nation ‘under no god,’ because none of these professions can be neutral with respect to religion.” The court also noted that the Pledge put the public school students “in the untenable position of choosing between participating in an exercise with religious content or protesting.”

The Supreme Court reversed the decision but not based on the Ninth Circuit’s analysis. Rather, the Court held that Newdow did not have standing to bring suit; therefore, the Court dismissed the case. Newdow had originally brought suit on his own behalf and on behalf of his daughter as next friend. In the Supreme Court decision, Chief Justice Rehnquist concurred but recognized that the Court averted the real issue of the Pledge’s constitutionality by characterizing the dismissal as “a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim.” To this day, the Supreme Court has not readressed the Ninth Circuit’s holding that “schools may [not] coerce impressionable young schoolchildren to recite [the Pledge], or even to stand mute while it is being recited by their classmates.”

2. Croft v. Perry

In Croft v. Perry, the Fifth Circuit recently decided that the words “one state under God” in the Texas pledge of allegiance are constitutional and not a violation of the Establishment Clause. The Crofts, parents of minor Texas public school children, sued Governor Rick Perry, alleging that the Texas pledge of allegiance and the Texas Education Code were

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124. See id. at 485–86.
125. Id. at 488.
126. Id. at 488 (citing 100 CONG. REC. 8618 (1954) (statement of Sen. Ferguson incorporating signing statement of President Eisenhower)).
127. Id. at 487.
128. Id.
129. Id. at 488.
131. See id.
132. Id. at 8.
133. Id. at 18 (Rehnquist, C.J., concurring).
134. Newdow, 328 F.3d at 489.
135. Croft v. Perry, 624 F.3d 157, 162 (5th Cir. 2010).
unconstitutional. They sought injunctive and declaratory relief. The district court granted the defendants' motion for summary judgment. The court tested the pledge and education code against all the applicable Establishment Clause tests and held that they were constitutional. The Crofts then appealed to the Fifth Circuit. The Fifth Circuit affirmed the lower court and held that the pledge and the education code were constitutional and did not violate the Establishment Clause. Because the court analyzed the complaints as a facial challenge, the Crofts had the burden to prove that "there was no set of circumstances under which either the language of the pledge or the requirement that children recite the pledge in classrooms is constitutional." Therefore, the Crofts had the burden to show that both the pledge and the Texas Education Code were unconstitutional under every test.

The Crofts argued that the Texas pledge of allegiance was a violation of the Establishment Clause because:

(1) the pledge's use of the singular "God" impermissibly favors monotheistic over polytheistic beliefs; (2) the amendment does not have a secular purpose or effect, as any stated purpose is pretext for a religious motivation; (3) the pledge impermissibly endorses religious belief by affirming that Texas is organized "under God"; and (4) the pledge's recitation in schools pursuant to § 25.082 of the Texas Education Code impermissibly coerces religious belief.

The government set forth two rationales behind the addition of "under God" in the Texas pledge. The first argument stemmed from the pledge's legislative history. Representative Riddle, the representative who first advocated for the additional words, pushed that the state pledge needed to be amended to better mirror the national pledge. Under her theory, because the national pledge included the words "under God," the state pledge should similarly include those words. However, Representative Riddle was selective in her choice of what to mirror from the national pledge of allegiance. For example, she declined to include the words "with liberty and justice for all." The second argument for the

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136. Id. at 161.
137. Id.
138. Id. at 163.
139. See supra Part II.
140. Croft, 624 F.3d at 161 (The court also decided that the Crofts brought facial, rather than as-applied, challenges to the pledge of allegiance.).
141. Id. at 161–62.
142. See id. at 162.
143. Id. at 164.
144. See supra Part II.
145. Croft, 624 F.3d at 162–63.
146. Id. at 162.
147. Id.
148. Id.
149. Id.
150. Id.
151. Id.
additional words arose from Texas Senator Dan Patrick. He proposed that because several other founding-era documents demonstrated the Founding Fathers' intention to “acknowledge our Judeo-Christian heritage,” the state should also honor this intention by placing “under God” in the new pledge. He was concerned with honoring the heritage of the United States by using the reference to God to acknowledge the nation’s religious heritage.

The Fifth Circuit began its analysis by laying out the history of the Pledge of Allegiance. The court agreed with the Crofts that the circumstances around the national pledge's adoption are not directly applicable to the constitutionality of the Texas pledge; however, the court did reason that analyzing the national pledge would still be relevant. The court acknowledged that the Supreme Court never “directly addressed the constitutionality of the national pledge,” but relied instead on Supreme Court dicta. The Fifth Circuit read the Supreme Court cases to indicate that the Supreme Court would uphold the Pledge of Allegiance's constitutionality. The court did acknowledge, however, that it would not take the dicta as determinative of the Croft case. Next, the court acknowledged that three circuits have upheld the constitutionality of the national pledge on the basis that it was a patriotic—not a religious—activity, and thus did not violate the Establishment Clause.

Analyzing the Texas pledge, the court worked its way through the tests to determine whether the pledge violated the Establishment Clause. The Crofts challenged the Texas pledge’s constitutionality under four tests: the no-sect-preference test, the Lemon test, the endorsement test, and the coercion test. First, the no-sect-preference test stemmed from Larson v. Valente. Larson stated that under the Establishment Clause, “one religious denomination cannot be officially pre-

152. Id.
153. Id.
154. Id.
155. See id. at 164–65 (The court addressed this issue first to address House Representative Riddle’s argument that she wanted to mirror the national pledge.).
156. See id. at 165.
158. See Croft, 624 F.3d at 165; see also Elk Grove, 542 U.S. at 7–8, Cnty. of Allegheny, 492 U.S. at 602–03; Lynch, 465 U.S. at 675.
159. See Croft, 624 F.3d at 164.
161. Croft, 624 F.3d at 164–65; see also Newdow, 597 F.3d at 1037; Myers, 418 F.3d at 407–08; Sherman, 980 F.2d at 445.
162. See supra Part II.
163. See Croft, 624 F.3d at 165.
164. Id. at 165–70.
ferred over another." The government cannot show preference for or allegiance to one sect or religion over another. The court rejected the Crofts' argument that a reference to "God" shows a preference for monotheistic religions. The court instead followed Justice O'Connor's rationale in *Elk Grove* that a reference to "God" does not violate this test because it is an acknowledgement of religion in general and not a preference for a particular sect.

Second, the court held that the Texas pledge is constitutional under the *Lemon* test, which makes a statute unconstitutional "if (1) it does not have a secular purpose, (2) its principal or primary effect advances or inhibits religion, or (3) it creates excessive government entanglement with religion." The court rejected the Crofts' argument under the first prong that the legislature did not really intend to mirror the national pledge. The Crofts argued that the national pledge's legislative history did not have a secular purpose and there was no secular purpose behind the Texas legislature adopting the additional words. The Fifth Circuit sided with the government's rationale of mirroring the national pledge. It decided that "[a]cknowledgement of religious heritage, although religiously oriented, 'is no less secular simply because it is infused with a religious element.'" Furthermore, the court distinguished *Croft* from other Supreme Court decisions that involved secular purposes that were "shams." The court also dismissed the Crofts' argument that the secular purpose was a sham because the legislature refused to include the national pledge's phrase "with liberty and justice for all."

The court similarly rejected the Crofts' argument that the second prong of the *Lemon* test was not satisfied. The Crofts alleged that the pledge promoted monotheistic religion to the exclusion of polytheistic or non-religions. They argued that the pledge effectively forced public school children who were not monotheistic to endure listening to their teacher and the rest of the class recite a pledge that disapproved of their religion or nonreligion. The court struck down this argument because it rea-

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167. *Id.* at 166 (citing *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 603–05 (1989)).
168. *See id.*
169. *See id.*
170. *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).
171. *See id.* at 167.
172. *Id.* at 166.
173. *See id.* at 167.
174. *Id.* (quoting *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 345 (5th Cir. 1999)).
175. *Id.* For example, the court discussed *Wallace v. Jaffree*, 472 U.S. 38, 40 (1985). *See id.* The *Wallace* Court struck down Alabama's attempt to amend the moment of silence statute to read "meditation or voluntary prayer" because the old statute already satisfied the purported purpose to add the additional words. *Id.*
176. *Id.*
177. *See id.* at 168.
178. *Id.* at 168.
179. *See id.*
The Pledge of Allegiance

soned that the pledge should be viewed in its entirety.\textsuperscript{180} The court followed the rationale from \textit{Lynch} that "[f]ocus[ing] exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."\textsuperscript{181} The court concluded that the Crofts offered no reason, in viewing the Texas pledge as a whole, to show that the words "under God" changed the pledge from a patriotic act to an act that "primarily endorses religious belief in violation of the Establishment Clause."\textsuperscript{182} Rather, the court reasoned that the pledge still satisfies the second prong of the \textit{Lemon} test because "[a] reasonable observer would conclude that the pledge remains a patriotic exercise, intended to inculcate fidelity to the state and respect for its history and values, one of which is its religious heritage."\textsuperscript{183}

Next, the court held that the pledge is valid in light of the endorsement test.\textsuperscript{184} Under the endorsement test, the government violates the Establishment Clause when "it endorses a particular religious belief, because ‘[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community.’"\textsuperscript{185} The Crofts argued that a polytheistic public school child should not have to listen to the rest of his class endorse a belief or pledge that is blatantly against his beliefs.\textsuperscript{186} They argued that the pledge would make the child feel less a member of that community, which is against the endorsement test rationale.\textsuperscript{187} Because the endorsement test is similar to the second prong of the \textit{Lemon} test, the court used the same reasoning to conclude that the addition of "under God" "acknowledges but does not endorse religious belief;" therefore, the pledge does not violate the endorsement test.\textsuperscript{188}

Finally, the Fifth Circuit held that the Texas Education Code mandating the recitation of the pledge does not violate the coercion test.\textsuperscript{189} Under the coercion test, the "government may not coerce anyone to support or participate in religion or its exercise."\textsuperscript{190} Furthermore, the coercion test is split into three parts: "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors."\textsuperscript{191} The Crofts argued that the teacher-led pledge coerces students to participate.\textsuperscript{192} Analyzing the validity of the pledge under the coercion

\textsuperscript{180} See id. (The court compared this analysis to two other cases in which a state flag and city insignia were viewed as a whole rather than looking at a cross on either individually.).
\textsuperscript{181} Id. (quoting Lynch v. Donnelly, 465 U.S. 668, 680 (1984)).
\textsuperscript{182} Id.
\textsuperscript{183} Id. (Note that the Crofts only argued that the pledge violated the first two prongs of the \textit{Lemon} test, so this Comment will not discuss the third prong in detail.).
\textsuperscript{184} See id. at 169.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} See id. at 170.
\textsuperscript{190} Id. at 169 (quoting Lee v. Weisman, 505 U.S. 577, 587 (1992)).
\textsuperscript{191} Id. (quoting Doe ex rel. Doe v. Beaumont Indep. Sch. Dist., 173 F.3d 274, 285 (5th Cir. 1999)).
\textsuperscript{192} Id.
test, the court reasoned that "religious components are placed in context and the ultimate question is whether 'the religious component of any government practice or policy . . . overwhelm[s] the nonreligious portions.'"\textsuperscript{193}

IV. ANALYSIS

The Supreme Court should grant certiorari to \textit{Croft v. Perry} and the Court should reverse the Fifth Circuit's decision. The Establishment Clause does not allow official endorsement of any type of religion, even if it is not specified.\textsuperscript{194} Many cases have challenged the constitutionality of the words "under God" in the United States, and now the Texas pledge of allegiance has been challenged.\textsuperscript{195} The Supreme Court will most likely see in \textit{Croft} the opportunity to clarify once and for all what \textit{Elk Grove} already addressed in 2003—that the words "under God" in the Pledge of Allegiance violate the Establishment Clause.

Applying the different Establishment Clause tests in Part III, the Supreme Court should reverse \textit{Croft v. Perry} because the words "under God" in the Texas pledge of allegiance violate the Crofts' rights under the no-sect-preference, Lemon, endorsement, and coercion tests. Courts are often less inclined to limit themselves to one single Establishment Clause test; rather, courts have walked through the several tests to determine whether there has been a violation of the Establishment Clause.\textsuperscript{196} Therefore, this Comment will reanalyze the Texas pledge of allegiance under each test mentioned in \textit{Croft}. In doing so, this Comment will demonstrate why the government's arguments in \textit{Croft} were flawed.

A. APPLYING THE NO-SECT-PREFERENCE TEST

The Texas pledge of allegiance fails under the no-sect-preference test. \textit{Larson v. Valente} established the no-sect-preference test.\textsuperscript{197} The test is a "basic threshold criterion" for determining the constitutionality of a government action under the Establishment Clause of the First Amendment.\textsuperscript{198} \textit{Larson} stated that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."\textsuperscript{199} The Fifth Circuit was incorrect in using Justice O'Connor's statement to conclude that "under God" was just an acknowledgement of religion in general.\textsuperscript{200} The Crofts are correct in ar-

\textsuperscript{193} Id. (quoting \textit{Doe ex rel. Doe}, 173 F.3d at 291).
\textsuperscript{197} Larson v. Valente, 456 U.S. 228, 244 (1982).
\textsuperscript{198} \textit{Croft}, 624 F.3d at 165; \textit{Larson}, 456 U.S. at 244.
\textsuperscript{199} \textit{Larson}, 456 U.S. at 244.
The Pledge of Allegiance

arguing that the Texas pledge does not pass the no-sect-preference test because it shows governmental preference for monotheistic religions over other religions and nonreligions. The government did in fact engage in "legislative favoritism" by amending the Texas pledge to include "under God" because it shows a preference for people who believe in one God over people like atheists, agnostics, and polytheists. For example, atheists are individuals who “critique and den[y] . . . metaphysical beliefs in God or spiritual beings.” They do not believe in any gods, which excludes them from the phrase “under God.” Agnostics repudiate traditional Judeo-Christian theism, but agnostics are not atheists. Furthermore, agnostics differ from monotheists, atheists, and polytheists in that they often have not decided whether they believe in a god. Therefore, because there are populations of atheists, agnostics, and polytheists in the United States, the government has violated the no-sect-preference test by adding “under God” to the Texas pledge.

B. APPLYING THE LEMON TEST

The Texas pledge also fails under the Lemon test. Under the first prong of the Lemon test, the government’s purpose behind amending the pledge must be secular. The court stated that if the purpose had actually been a “sham,” then the amendment would not pass the first prong of the Lemon test. The government has two alleged purposes behind amending the Texas pledge. The government argued that when the Texas legislature amended the Texas pledge of allegiance to include the words “under God,” Representative Riddle and Senator Dan Patrick urged that the purpose and rationale behind the amendment was to mirror the national pledge and to honor the Founding Fathers’ apparent intention to acknowledge the nation’s Judeo-Christian heritage. The government’s argument is flawed.

First, Representative Riddle argued that she wanted to “mirror” the national pledge. This purpose may on its face appear secular; however, when we take her alleged purpose and compare it to the actual amendment, it appears that the purpose was in fact religious and not secular at all. The Fifth Circuit states that we should view the pledge in its en-

201. See Croft, 624 F.3d at 165.
205. Id.
206. See supra Part II.
207. See Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971); Croft, 624 F.3d at 166.
208. See Croft, 624 F.3d at 166; see also Lemon, 403 U.S. at 613.
209. Croft, 624 F.3d at 162.
At least when the court is determining whether the amendment had a secular purpose, the court should look at the additional words in light of the alleged legislative purpose and compare whether they are in line with each other. It is odd that Representative Riddle refused to also add "with liberty and justice for all" and only elected to add the selective words "under God." The amendment effectively transformed the Texas pledge, which was originally secular in nature, to a religious action. Furthermore, the Fifth Circuit also acknowledged that it looked to the three circuits that have already directly addressed the constitutionality of the national pledge. One should not use an analysis of the constitutionality of the national pledge to determine the validity of a state pledge. The history surrounding the enactment of the national pledge was over a hundred years before the enactment of the Texas pledge. The circumstances surrounding these pledges are not comparable, and thus the pledges should be analyzed separately.

Secondly, Senator Patrick's alleged purpose of honoring our Founding Fathers' intentions is flawed. He purports that the amended Texas pledge aims to honor the Founding Fathers' acknowledgment of our Judeo-Christian heritage; however, it again seems odd that the words "liberty and justice for all," cornerstone ideals of the nation, would not be honored as the Founding Fathers' intention as well. Even the 2010 Newdow court recognized that the nation's fundamental ideals include the nation's indivisibility, the people's "liberty," and a system that provides "justice for all." Therefore, if the legislature really wanted to mirror the national pledge and honor the ideals of our Founding Fathers, it appears that it excluded at least three very important ideals while selectively choosing to incorporate only the religious aspect of the national pledge.

Furthermore, it is erroneous to compare the enactment of the national pledge to the Texas pledge because the circumstances are very different. For example, the national pledge was written in celebration of Columbus discovering America. Some of the purposes behind amending the national pledge to include "under God" were "distinguishing the United States from the atheistic Soviet Union, affirming that this is a religious country, and teaching children that the nation is under God." Argua-
bly, these are not the circumstances that the Texas legislature faced when it amended the Texas pledge in 2007. In fact, as shown in Figure 2 below, statistical data from the United States Census Bureau demonstrates that there are over thirty self-identified religions and nonreligions in the United States.218

**FIGURE 2: SELF-DESCRIBED RELIGIOUS IDENTIFICATION OF ADULT POPULATION: 1990 TO 2008**219

<table>
<thead>
<tr>
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<th></th>
<th></th>
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<th></th>
</tr>
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<tbody>
<tr>
<td>Adult population, total</td>
<td>175,440</td>
<td>207,983</td>
<td>228,182</td>
<td>Church of the Brethren</td>
<td>206</td>
<td>358</td>
<td>231</td>
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<tr>
<td>Total Christian</td>
<td>151,225</td>
<td>159,514</td>
<td>173,402</td>
<td>Nondenominational</td>
<td>184</td>
<td>2,489</td>
<td>8,032</td>
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<tr>
<td>Catholic</td>
<td>46,004</td>
<td>50,870</td>
<td>57,199</td>
<td>Disciples of Christ</td>
<td>144</td>
<td>492</td>
<td>263</td>
</tr>
<tr>
<td>Baptist</td>
<td>33,964</td>
<td>33,820</td>
<td>36,148</td>
<td>Reformed/Dutch Reformation</td>
<td>161</td>
<td>289</td>
<td>206</td>
</tr>
<tr>
<td>Protestant-no denomination supplied</td>
<td>17,214</td>
<td>4,647</td>
<td>5,197</td>
<td>Apostolic/New Apostolic</td>
<td>117</td>
<td>254</td>
<td>970</td>
</tr>
<tr>
<td>Methodist/Wesleyan</td>
<td>14,174</td>
<td>14,039</td>
<td>11,366</td>
<td>Christian Reformation</td>
<td>40</td>
<td>79</td>
<td>381</td>
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<td>Lutheran</td>
<td>9,110</td>
<td>9,580</td>
<td>8,674</td>
<td>Foursquare Gospel</td>
<td>28</td>
<td>70</td>
<td>116</td>
</tr>
<tr>
<td>Christian-no denomination supplied</td>
<td>8,073</td>
<td>14,190</td>
<td>16,834</td>
<td>Total other religions</td>
<td>5,853</td>
<td>7,740</td>
<td>8,796</td>
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<td>Presbyterian</td>
<td>4,965</td>
<td>5,506</td>
<td>4,723</td>
<td>Jewish</td>
<td>3,137</td>
<td>2,637</td>
<td>2,680</td>
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<tr>
<td>Pentecostal/Charismatic</td>
<td>3,116</td>
<td>4,407</td>
<td>5,416</td>
<td>Muslim</td>
<td>527</td>
<td>1,104</td>
<td>1,349</td>
</tr>
<tr>
<td>Episcopalian/Anglican</td>
<td>3,043</td>
<td>3,451</td>
<td>2,405</td>
<td>Buddhist</td>
<td>404</td>
<td>1,082</td>
<td>1,189</td>
</tr>
<tr>
<td>Mormon/Latter-Day Saints</td>
<td>2,487</td>
<td>2,697</td>
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<td>Unitarian/Universalist</td>
<td>502</td>
<td>629</td>
<td>586</td>
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<td>Churches of Christ, Christ</td>
<td>1,769</td>
<td>2,526</td>
<td>1,921</td>
<td>Hindu</td>
<td>227</td>
<td>766</td>
<td>582</td>
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<td>Jehovah's Witness</td>
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<td>1,331</td>
<td>1,914</td>
<td>Native American</td>
<td>47</td>
<td>103</td>
<td>186</td>
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<td>Seventh-Day Adventist</td>
<td>659</td>
<td>724</td>
<td>938</td>
<td>Wiccan</td>
<td>9</td>
<td>134</td>
<td>342</td>
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<td>Assemblies of God</td>
<td>617</td>
<td>1,105</td>
<td>810</td>
<td>Pagan</td>
<td>(NA)</td>
<td>140</td>
<td>346</td>
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<td>Holiness/Holy</td>
<td>610</td>
<td>569</td>
<td>352</td>
<td>Spiritualist</td>
<td>(NA)</td>
<td>116</td>
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<td>1,378</td>
<td>756</td>
<td>Other unclassified</td>
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<td>386</td>
<td>735</td>
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<td>Church of the Nazarene</td>
<td>549</td>
<td>544</td>
<td>358</td>
<td>No religion specified, total</td>
<td>14,331</td>
<td>26,481</td>
<td>34,169</td>
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<tr>
<td>Church of God</td>
<td>590</td>
<td>943</td>
<td>663</td>
<td>African American</td>
<td>(*)</td>
<td>902</td>
<td>1,621</td>
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<tr>
<td>Orthodox (Eastern)</td>
<td>502</td>
<td>645</td>
<td>824</td>
<td>Agnostic</td>
<td>1,186</td>
<td>991</td>
<td>1,985</td>
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<tr>
<td>Evangelical/Born Again</td>
<td>548</td>
<td>1,088</td>
<td>2,154</td>
<td>No religion</td>
<td>13,116</td>
<td>27,486</td>
<td>30,427</td>
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<tr>
<td>Mennonite</td>
<td>235</td>
<td>346</td>
<td>438</td>
<td>Refused to reply to question</td>
<td>4,031</td>
<td>11,246</td>
<td>11,815</td>
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</table>

The statistics show that, although Christianity is the predominant religion in the United States, there is a diverse variety of religions and nonreligions, including atheists, in the United States. The Establishment Clause provides freedom of religion to all citizens of the United States, not just the majority religion. *Lemon* recognized that "what would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion."220 While pledging one's allegiance to God may be "essential" to a good portion of the United States, the statistics show that it may also intrude on other individuals' freedom of religion rights under the Establishment Clause.221 There is a group of individuals in the United States that specifically stands against what Senator Patrick wants to honor. As previously discussed, agnostics

amendment to the Pledge] was specifically tailored to encourage children to recite the phrase in classrooms in order to advance a belief in God, as an attempt to distinguish the United States from the atheistic beliefs of communist countries."))


221. See id. at 619.
"repudiate[ ] traditional Judeo-Christian [theism]." In light of the above, the Texas statute codifying the amended Texas pledge does not satisfy the first prong of the Lemon test because it was not amended for a secular purpose.

Secondly, the Texas pledge does not satisfy the second prong of the Lemon test. The second prong does not allow a statute to have a "principal or primary effect [that] advances or inhibits religion." The court looked at the pledge in its entirety and erroneously concluded that reasonable individuals could not "fairly understand [its] purpose" to endorse religion. A reasonable individual could have arguably considered the previous Texas pledge a mere patriotic act; however, because of the analysis established for the first prong, the pledge could easily be seen as a religious act. Looking at the entire text as the court argues we should, the words "I pledge allegiance" to a "nation under God" could be seen as a religious act by many individuals in the United States who believe in no god or several gods. Furthermore, the court attempts to use dicta from Lynch to establish that just because a state legislature infers an "incidental benefit upon religion," that action does not violate the Establishment Clause. On the contrary, the benefit upon religion in this case is not "incidental" at all. In fact, in light of the analysis set forth under the first prong of the Lemon test, it appears that the Texas legislature intentionally conferred this benefit upon those individuals who believe in a God over individuals who do not. In light of the above, the Texas pledge also does not satisfy the second prong of the Lemon test.

Finally, the Texas pledge does not satisfy the third prong of the Lemon test. Croft does not even go into the third-prong analysis. The third prong of the Lemon test does not allow a statute to "[create] excessive government entanglement with religion." Because the pledge already does not satisfy the first two prongs of the test, the pledge also fails the third prong because the Texas legislature decided to amend the pledge and to compel recitation of the new words "under God." Therefore, the amended Texas pledge fails all three prongs of the Lemon test and violates the Establishment Clause of the First Amendment.

C. APPLYING THE ENDORSEMENT TEST

Allegheny adopted the endorsement test and held that endorsing more than one religion (for example, Judaism and Christianity) is "no less con-

223. Lemon, 403 U.S. at 612; Croft v. Perry, 624 F.3d 157, 167–68 (5th Cir. 2010).
224. Croft, 624 F.3d at 168 (citing Cnty. of Allegheny v. ACLU, 492 U.S. 573, 594 (1989)).
226. See id.
stitutionally infirm than endorsement of Christianity alone.” Following this analysis, the majority's reasoning in *Croft* is flawed because the phrase “under God,” although it does not endorse a specific religion, still endorses a religion that recognizes one or several gods. Under *Allegheny*, the Court recognized that any endorsement of any religion is still a violation of the Establishment Clause. Individuals such as atheists, who believe in no god, would be excluded from this group of individuals. Furthermore, the Court in *Allegheny* recognized that the government could not argue history as a reason for acts that show the government’s preference to a particular religion.

Justice O'Connor's concurrence in *Lynch* first established the endorsement test. Even that Court recognized that although “[o]ur history is pervaded by official acknowledgement of the role of religion in American life . . . equally pervasive is evidence of accommodation of all faiths and all forms of religious expression and hostility toward none.” Following this rationale, Representative Riddle and Senator Patrick's purpose behind amending the Texas pledge is flawed because, although our Founding Fathers may have recognized our “Judeo-Christian” heritage, the reality is that in the past century a variety of religions and nonreligions have migrated or formed in the United States. Justice O'Connor's concurrence confirmed that the Court would not tolerate any government endorsement of any religion. She reasoned that any endorsement of any religion would “send[] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the . . . community.” Considering the nation's diverse population, “under God” does not satisfy the endorsement test.

Some scholars have argued that the national pledge passes the endorsement test because “[the] phrase ['under God'] merely acknowledges, in a neutral way, that many Americans have believed and do believe in God.” However, in the same argument, scholars have cited Justice O'Connor's reasoning behind the endorsement test. This argument seems flawed and contradictory in itself because the scholars are acknowledging that simply “many” and not “all” Americans have believed or do believe in God. In propounding the endorsement test, Justice O'Connor did not say that a government action would be valid under the endorsement test if at least it protected “many” Americans. In fact, her language shows that she is concerned more with the “outsiders” who will

228. *Cnty. of Allegheny*, 492 U.S. at 615.
229. *Id.* at 620–21.
230. *See id.* at 603.
233. *See id.* at 690.
234. *Id.* at 688.
236. *Id.* at 46–47.
not feel like they are members of the community. 237

Finally, the history of the Pledge of Allegiance claims against the Establishment Clause is itself indicative that the Texas pledge fails the endorsement test. Going back to Justice O’Connor’s main rationale behind the test, the test was established so that no religion or individual would feel like an outsider, nor would anyone feel that the government was endorsing one religion or belief over another. 238 The fact that there are individuals even bringing claims against the school districts or governments shows that the recitation of the Pledge does make individuals feel like outsiders to the point that they are protesting to the legal system. Furthermore, it is not just one religion or faith that is protesting against the Pledge. For example, in Sherman and Newdow, the complaining fathers were atheists. 239 In Myers, the father belonged to the Anabaptist Mennonite faith, which is a Christian sect that is highly against the intertwining of church and state. 240 Going further back into the history of the Pledge, the Jehovah’s Witnesses were among the first protestors against the Pledge of Allegiance. 241 This diversity in complainants demonstrates that the recitation of the Texas pledge of allegiance does offend and exclude those individuals about whom Justice O’Connor was concerned. 242

D. Applying the Coercion Test

Under the coercion test, the Texas pledge violates the Establishment Clause. The coercion test was established in Lee v. Weisman when the Court struck down the validity of a clergyman conducting prayer at a public high school graduation. The Court reasoned that the students could not help but feel “subtle coercive pressures” to participate or watch the participation. 243 Similarly, in a classroom, the students cannot help but feel coerced into participating or at least witnessing the pledge recitation every morning. While some states do have statutes excusing students from reciting the pledge, 244 in reality these statutes do not diminish the pressure that students feel to go along with what the other students and teachers are doing.

Courts have recognized that often students will simply go along with what the majority is doing, simply because that is what they are exposed to. 245 In fact, many students probably do not even know that they have the right to refrain from participating in the pledge. Lee showed that the

238. See Cnty. of Allegheny v. ACLU, 492 U.S. 573, 603–05 (1989); see also Lynch, 465 U.S. at 688 (O’Connor, J., concurring).
244. See, e.g., TEX. EDUC. CODE ANN. § 25.082(c) (West 2003).
245. See Lee, 505 U.S. at 593.
The Pledge of Allegiance

Court is not looking for a great amount of pressure on the student; rather, the Court acknowledged that "subtle coercive pressures" existed and that was enough for the Court to invalidate the government action.\textsuperscript{246} In \textit{Croft}, these "subtle coercive pressures" also existed. Just as the Court struck down the recitation of a prayer at the high school graduation in \textit{Lee}, the Court should similarly strike down the constitutionality of the additional words in the Texas pledge. As discussed in the analysis of prior tests, the additional words make the pledge an endorsement of religion, which is already in itself a violation of the Establishment Clause.\textsuperscript{247} The violation is also in light of the pledge being recited every morning and the Texas Education Code requiring public school children to recite the pledge.\textsuperscript{248}

Furthermore, \textit{Barnette} held that schools could not directly coerce students to recite the national pledge.\textsuperscript{249} The \textit{Barnette} decision was decided even before Congress added the words "under God" to the national pledge.\textsuperscript{250} The Court emphasized that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."\textsuperscript{251} Furthermore, \textit{Lee} sympathized that "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."\textsuperscript{252} Especially in light of this decision, the Supreme Court should overturn \textit{Croft} because students should be at least as protected, or even more so protected, than the students in \textit{Barnette} because "under God" makes the recitation a more religious act.\textsuperscript{253}

Finally, holding that the Texas pledge violates the coercion test is not contradictory to Supreme Court dicta. The \textit{Newdow} court acknowledged that this holding would not be inconsistent with the Supreme Court's previous holding that allowed students to recite the Declaration of Independence, which has religious affiliations.\textsuperscript{254} The court distinguished the two cases by looking at the text of the Declaration of Independence versus the Pledge of Allegiance.\textsuperscript{255} The distinguishing factor is that the Pledge requires the student to recite, "I pledge," which, unlike the Declaration,

\begin{itemize}
  \item \textsuperscript{246} \textit{Id.} at 588.
  \item \textsuperscript{247} \textit{See supra} Part IV.A--C.
  \item \textsuperscript{248} \textit{See EDUC.} \S 25.082; \textit{Croft v. Perry}, 624 F.3d 157, 161--62 (5th Cir. 2010).
  \item \textsuperscript{250} \textit{Id.} at 626.
  \item \textsuperscript{251} \textit{Id.} at 642.
  \item \textsuperscript{252} \textit{Lee v. Weisman}, 505 U.S. 577, 592 (1992).
  \item \textsuperscript{253} \textit{See Barnette}, 319 U.S. at 641--42.
  \item \textsuperscript{254} \textit{Newdow v. U.S. Cong.}, 328 F.3d 466, 489 (9th Cir. 2002), \textit{rev'd sub nom.} \textit{Elk Grove Unified Sch. Dist. v. Newdow}, 542 U.S. 1 (2004).
  \item \textsuperscript{255} \textit{See id.} (citing J.L. \textsc{Austin}, \textsc{How To Do Things With Words} (J.O. \textsc{Urmsson} & Marina \textsc{Sbisa} eds., Harvard Univ. Press 1975) (1962)).
\end{itemize}
“is not merely a reflection of the author’s profession of faith . . . [but rather] an affirmation by the person reciting it.”256

E. Final Flaws in the Government’s Justifications

The government’s historical argument that the words “under God” were added to the Texas pledge of allegiance as an act of patriotic reverence to the national pledge is flawed.257 The government claims that it added the words to recognize the Christian practices that our Founding Fathers revered.258 Allegheny recognized that although the Court had previously characterized the references to God in the Pledge as not an endorsement of religion, “history cannot [legitimize] practices that demonstrate the government’s allegiance to a particular sect or creed.”259 Furthermore, Allegheny recognized that in Marsh v. Chambers,260 the Court did not support the opinion that “all accepted practices 200 years old and their equivalents are constitutional today.”261 Even in 1997, the Court already recognized that although the government has endorsed Christianity in the past, dating back to our Founding Fathers, “this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause.”262

Some scholars have erroneously argued that the words “under God” in the Texas pledge of allegiance are constitutional. Many of these arguments are based on Supreme Court dicta concerning cases that in fact do not have similar fact patterns to Elk Grove or Croft.263 This line of reasoning is erroneous because it is an attempt to apply the analysis to an issue with which it does not fit. Although the nation has witnessed many breaches of the Establishment Clause, the Court itself has recognized that “they cannot diminish in any way the force of the command [of the Establishment Clause].”264 Elk Grove is the closest that the Court has come to directly addressing the constitutionality of the words “under God” in the Pledge of Allegiance because that was the exact matter before the Court.265 The Croft court should have followed the analysis in Elk Grove.

In Newdow, the Ninth Circuit stated that the addition of “under God” to the Pledge is a profession of a religious belief and that to recite it is to “swear allegiance to the values for which the flag stands: unity, indivisibility, justice—and since 1954—monotheism.”266 Representative Lon

256. Id. (citing AUSTIN, supra note 255).
257. See Croft v. Perry, 624 F.3d 157, 168 (5th Cir. 2010).
258. Id. at 169.
262. Id. at 604–05.
263. See, e.g., Wheeler, supra note 26.
Burnam recognized that the new Texas pledge of 2007 would raise viable constitutional issues. He tried to amend the 2007 bill to include a provision directing schools to “(1) ensure that students are not coerced to participate in the recitation of the pledge of allegiance . . . and (2) require a sign to be posted in each classroom near the state flag that states a student may not be coerced to participate in the recitation of the pledge of allegiance.” Ultimately, his proposed amendment did not gain enough support. During the discussions in the House of Representatives over the new Texas pledge, Representative Burnam posed tough questions to the House of Representatives challenging the bill. He challenged Representative Riddle, the proponent of the bill, by pointing out the diverse religions and nonreligions in Texas: “Native American, Buddhist, Hindu, Muslim, Sikh, Baha’i, Zoroastrian, Wiccan . . . [and noted the] 88 Buddhist, 34 Hindu, and 13 Sikh congregations in Texas.” When posed with the fairness of putting “under God” in the Texas pledge in light of this diversity, Representative Riddle’s response that the bill’s purpose is to reflect the national pledge seems weak.

Along with arguing that the purpose of the Texas pledge “is to simply . . . reflect our national pledge,” the government also proposes that the Texas pledge aims to honor how the national pledge reflected the Christian heritage of our Founding Fathers. This argument is flawed because, as mentioned previously, the Court recognized that “this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause.” Furthermore, times have greatly changed since the Founding Fathers based the national pledge on their Christian heritage. That is not to say that the Christian population has diminished in the United States; in fact, it is the most widespread religion in the nation. Times have changed, however, because one must now take into account the large groups of immigrants who came to the United States. These immigrants came in search of the religious freedom, among other rights, which they believed America could offer. Although some of these immigrants were Christian, most of the immigrants were from diverse cultures and religions. Although the Texas government may attempt to argue that they are mirroring the national pledge at the state level, the underlying purpose of the national pledge is clearly to reflect the religious heritage of the United States.

268. Id.
269. Id.
270. Id.
271. Id.
272. Id. 
273. Croft v. Perry, 624 F.3d 157, 162 (5th Cir. 2010).
pledge, this argument cannot be viable because of the circumstances surrounding the foundation of the national pledge in 1892 versus the Texas pledge in 2007. As established, the 1892 pledge did not take into account the diverse citizenship that now embodies the United States. In 2007, the Texas government could not have claimed that it was motivated by the same motivations of the 1892 government because the circumstances were not the same.

V. CONCLUSION

In light of the analysis of the Establishment Clause tests, the Supreme Court should reverse the Croft decision. Croft gives the Supreme Court another chance to step in where it left off in Elk Grove. A clear Supreme Court holding regarding religious references in the Texas pledge of allegiance will set a solid precedent in the event that the other states with similar religious references in their pledges encounter the same issue.\(^\text{278}\) This decision would save courts from trying to balance each case through a long analysis of each Establishment Clause test. If the Supreme Court decides to strike down religious references in the state pledges, the state legislatures will be able to remedy the pledges accordingly. Furthermore, in ruling on the Texas state pledge, the Supreme Court can use its analysis as dicta toward future challenges against the national pledge. This analysis is not only applicable to the Pledge of Allegiance, but can also be used as an example toward various church-and-state related activities that have not yet been addressed. Most importantly, if the Court can clarify or redefine the various Establishment Clause tests, the Court can finally clear the "[m]urky [w]aters of Establishment Clause [j]urisprudence."\(^\text{279}\)

\(^{278}\) See discussion \textit{infra} Part I. 

\(^{279}\) Toy, \textit{supra} note 18, at 40.