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Banality and the Pledge of Allegiance

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It is by now common knowledge that on June 26, 2002, the 9th Circuit rendered its highly controversial decision in *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002), finding that the statutory addition of the words "under God" to the Pledge of Allegiance and a school district's policy and practice of teacher-led recitation of the pledge were unconstitutional. While much has been written about this decision, what is the story behind the story?

Michael Newdow has been praised by the left and excoriated by the right, but who is Michael Newdow, why did he bring this suit, and how will this information affect the case as it moves through rehearing *en banc* and inevitably to the Supreme Court?

The Internet is a wonderful tool for discovering the story behind the story, and I have discovered that one of the first places to start is to look for a personal Web site. Michael Newdow's Web site, www.restorethepledge.com, not surprisingly is chock full of quotes hailing him as the savior of the First Amendment and the champion of atheists everywhere.

Interestingly enough, far from being a crackpot, Newdow is both an emergency room physician and a licensed lawyer. He also has an 8-year-old daughter out of wedlock with his ex-girlfriend. Interestingly, we also learn that the man challenging "under God" in the Pledge "[i]n 1977, [] became an ordained minister, and has since lived his life according to the tenets of the Universal Life Church."

So why would a doctor, lawyer, and ordained minister tilt at windmills and challenge the words "under God" in the pledge? Is he truly the high-minded defender of the First Amendment he claims to be, or is he motivated by much more mundane concerns?

The Universal Life Church was begun in May 1962 in Modesto, Calif., and has become infamous as, first, a shield for Vietnam-era draft dodgers and later as a tax haven for wealthy professionals. According to its website, www.ulc.org: "Become an ordained minister in less than 3 minutes and start your own ministry or church of any faith or religion, TODAY. After your instant ordination, proceed to print your instant full color ordination credential with our name and ordination date, all *within 3 minutes* and absolutely 100 percent legal."

Focusing on his wife and daughter next, we learn quite a bit more about Newdow. In press interviews Newdow stated "[m]y daughter is in the lawsuit because you need that for

standing. I brought this case because I am an atheist and this offends me, and I have the right to bring up my daughter without God being imposed into her life by her schoolteachers." www.cnn.com/2002/LAW/06/26/Newdow.cnn.

However, other press interviews given by the girl's mother paint a far different picture and give us our first clues as to the story behind the story, the banal underpinnings of the suit. According to Sandy Banning in an interview with Fox News, "I'm speaking out because my daughter is being raised in a Christian home. We are not atheists, and I need to communicate to the American people that my daughter's not being harmed by reciting the Pledge of Allegiance." www.foxnews.com/story/0,2933,57683,00.html.

We also learn from the same interview that Newdow, far from being either the atheist that he claims to be on his Web site or the ULC ordained minister, is indeed quite religious with his daughter. This interview also indicates that Banning and Newdow have been engaged in a bitter long-running custody dispute over Glen. Banning now has sole legal custody of her daughter.

Indeed it was in the context of these custody battles that Newdow attempted his first challenge to the pledge. On June 5, 1998, Newdow sued then-President Clinton, the Congress, and a local school corporation over the pledge. However, on Dec. 1, 1998, that suit was dismissed for a variety of reasons, including the fact that he lacked standing as a noncustodial parent and because his claims lacked legal merit. *Newdow v. United States*, Cause No. 98-CV-6585 (S.D. Fla. 1998). Newdow appealed the case to the 11th Circuit and the 11th Circuit affirmed the dismissal. *Newdow v. United States*, 207 F.3d 662 (11th Cir. 2000) (unpublished disposition).

Following his failures in Florida, Newdow pursued Banning to California, where she had fled, and began anew his attempts to obtain custody of his daughter. News articles quoting Newdow make it quite clear that the "Pledge" case is far more about the long-running custody fight between him and Banning than the First Amendment: "Newdow is involved in custody proceedings with his child's mother. He wants 50/50 visitation. While he believes there is harm done from the mix of religion and government, he says it's nothing like the harm done by the family law courts." www.kovr13.com/07jul02/071202b.htm.

Indeed Newdow has challenged the entire California child custody system on constitutional grounds. Though Newdow's constitutional challenge may have some bearing on the future of family court law, it will have to wait until Newdow concludes his own custody case, which is still under way after three years, he said. But the physician-turned-lawyer is convinced that he has a greater chance of winning his case against the 'best interest of the child' standard than he did in the pledge case. <http://www.newsreview.com/issues/sacto/2002-12-19/news.asp>.

Indeed, the story behind the story has the potential for hijacking the entire case following Banning's assertions that Newdow had no custody over Glen and that Glen is a Christian and does not object to saying the pledge. The issue was characterized by the 9th Circuit as "Whether under California state law the award of sole legal custody to one parent deprives the other of standing to object on constitutional grounds to the contents of the school's curricula, observances and ceremonies affecting the child's education and religious upbringing? If the answer is yes, is the California rule constitutional?"

The 9th Circuit on rehearing found that even though Newdow did not have legal custody of Glen, the fact that he retained some parental rights under California law meant that he had standing to maintain the pledge lawsuit. *Newdow v. United States Congress*, 313 F.3d 500 (9th Cir. 2002). The 9th Circuit's decision notwithstanding, it may very well be that the story behind the story, the underlying mundane motivations of a custody battle will indeed supplant the main story line and the case will die a quiet and unspectacular death in the United States Supreme Court on standing grounds. Thus in the end banality conquers all.

And Dr. Newdow, what does he intend to do with his 15 minutes of fame?

Neville: What about the currency? Do you think it should be taken off the coins and currency here?

Newdow: Absolutely.

Neville: How long have you been contemplating this suit?

Newdow: One day I was just looking at the coins (that) is what brought this up. I saw "In God We Trust" on my coins. I said, "I don't trust in God," what is this? And I recalled there was something in the Constitution that said you're not allowed to do that and so I did some research. And as soon as I did the research, I realized the law seemed to be on my side and I filed the suit. It's a cool thing to do. Everyone should try it."

www.cnn.com/2002/LAW/06/26/Newdow.cnn/

Thomas E. Wheeler is a partner in the Indianapolis firm of Locke Reynolds and is a director of the DTCL. He was recently asked to become involved at the appellate level in the Pledge of Allegiance case. The opinions expressed in this column are those of the author.

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