AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era—Judicial Power and Constitutional Authority

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Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004)

As in many states, schoolchildren in California start the day with a voluntary recital of the Pledge of Allegiance. Michael Newdow, who claimed to be a minister of atheism, objected that his daughter was subjected to the recital of a pledge that included the words "under God" and contended that the school's policy interfered with his right to raise his daughter as an atheist. Consequently, he filed suit in federal district court to have the public recital of the Pledge in schools declared to be a violation of the establishment clause of the U.S. Constitution. Many expected that the case would force the Court to confront the implications of its establishment clause doctrine for a central feature of American life, especially after the Ninth Circuit Court of Appeals embraced Newdow's constitutional argument.

But the history of the case was complicated. Newdow filed his suit in 2000, when his daughter began elementary school, but Newdow was involved in an ongoing custody dispute with the child's mother. The district court dismissed the case on the merits, but the circuit court reversed with three separate decisions. The court of appeals first concluded that Newdow had standing to bring suit as a parent with the right to direct the religious education of his child. With those parent rights potentially injured, Newdow could bring suit not only against the school district's Pledge recital policy but also against the federal statute adopting the Pledge itself. The circuit court then struck down both as unconstitutional. At that point, Sandra Banning, the child's mother, intervened. She was armed with a 2002 state court order giving her "exclusive legal custody" of the child, including sole right to make all decisions regarding her education and welfare (the custody order was further modified in 2003). Banning asserted that the child shared her mother's Christian beliefs and did not herself object to the Pledge or its recital. A California court enjoined Newdow from filing lawsuits on the child's behalf (as a "next friend"). The federal circuit court issued a new opinion concluding that Newdow no longer claimed to be acting on behalf of his daughter but could sustain his suit on the grounds that the school policy violated his own noncustodial parental rights and that Newdow retained the right to expose the child to his own religious views in these circumstances. Finally, the circuit court issued a revised opinion that dropped the ruling against Congress while retaining the ruling against the school district. In a 5–3 decision, the U.S. Supreme Court reversed the circuit court, dismissing the case for lack of standing. The three dissenters would have accepted the circuit court's conclusions on Newdow's standing while rejecting its conclusions on the merits of the case. The Court's majority avoided any statement regarding the merits of the case while contending that Newdow lacked standing to bring the suit because his standing involved disputed custodial issues that should be left to the state courts. As a result, the Court avoided a highly symbolic decision on the establishment clause, but created a rule restricting constitutional litigation by noncustodial parents.

Is the majority right to regard this as a case in which the rights of "third parties" (the child) are implicated? Did the majority believe that the Constitution required that the case be dismissed? Would Newdow have standing to renew his suit if he won legal custody of his daughter? Could a noncustodial parent advance other constitutional claims regarding tensions between government policies and parental beliefs? Could a noncustodial parent object to a school's science curriculum? Why were the justices unanimous regarding the judgment in the case? Why might the justices take different views on the desirability of resolving this case on the merits?

JUSTICE STEVENS delivered the opinion of the Court.

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In every federal case, the party bringing the suit must establish standing to prosecute the action. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." . . .

The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake. . . . Always we must balance "the heavy obligation to exercise jurisdiction," against the "deeply rooted" commitment "not to pass on questions of constitutionality" unless adjudication of the constitutional issue is necessary. . . .

Consistent with these principles, our standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing, which embodies "judicially self-imposed limits on the exercise of federal jurisdiction." . . . Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen v. Wright* (1984. . . . "Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth v. Seldin* (1975).

One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." . . .

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. . . . This case concerns not merely Newdow's interest in inculcating his child with his views on religion, but also the rights of the child's mother as a parent generally and under the Superior Court orders specifically. And most important, it implicates the interests of a young child who finds herself at the center of a highly public debate over her custody, the propriety of a widespread national ritual, and the meaning of our Constitution.

. . . . What makes this case different is that Newdow's standing derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend. . . .

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. . . . The California cases simply do not stand for the proposition that Newdow has a right to dictate to others what they may and may not say to his child respecting religion. . . .

In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law. . . .

Reversed.

JUSTICE SCALIA took no part in the consideration or decision of this case.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, and with whom JUSTICE THOMAS joins in part, concurring in the judgment.

The Court today erects a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim. I dissent from that ruling. On the merits, I conclude that the Elk Grove Unified School District (School District) policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," does not violate the Establishment Clause of the First Amendment.

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The domestic relations exception is not a prudential limitation on our federal jurisdiction. It is a limiting construction of the statute defining federal diversity jurisdiction, which "divests the federal courts of power to issue divorce, alimony, and child custody decrees." This case does not involve diversity jurisdiction, and respondent does not ask this Court to issue a divorce, alimony, or child custody decree. Instead it involves a substantial federal question about the constitutionality of the School District's conducting the Pledge ceremony, which is the source of our jurisdiction. Therefore, the domestic relations exception to diversity jurisdiction forms no basis for denying standing to respondent.

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The correct characterization of respondent's interest rests on the interpretation of state law. As the Court recognizes, we have a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." . . . In contrast to the Court, I would defer to the Court of Appeals' interpretation of California law because it is our settled policy to do so, and because I think that the Court of Appeals has the better reading. . . .

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. . . . Surely, under California case law and the current custody order, respondent may not tell Banning what she may say to their child respecting religion, and respondent does not seek to. Just as surely, respondent cannot name his daughter as a party to a lawsuit against Banning's wishes. But his claim is different: Respondent does not seek to tell just anyone what he or she may say to his daughter, and he does not seek to vindicate solely her rights.

Respondent asserts that the School District's Pledge ceremony infringes his right under California law to expose his daughter to his religious views. While she is intimately associated with the source of respondent's standing (the father–daughter relationship and respondent's rights thereunder), the daughter is not the source of respondent's standing; instead it is their relationship that provides respondent his standing, which is clear once respondent's interest is properly described. . . .

Although the Court may have succeeded in confining this novel principle almost narrowly enough to be, like the proverbial excursion ticket—good for this day only—our doctrine of prudential standing should be governed by general principles, rather than ad hoc improvisations.

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There is no doubt that respondent is sincere in his atheism and rejection of a belief in God. But the mere fact that he disagrees with this part of the Pledge does not give him a veto power over the decision of the public schools that willing participants should pledge allegiance to the flag in the manner prescribed by Congress. There may be others who disagree, not with the phrase "under God," but with the phrase "with liberty and justice for all." But surely that would not give such objectors the right to veto the holding of such a ceremony by those willing to participate. Only if it can be said that the phrase "under God" somehow tends to the establishment of a religion in violation of the First Amendment can respondent's claim succeed, where one based on objections to "with liberty and justice for all" fails. Our cases have broadly interpreted this phrase, but none have gone anywhere near as far as the decision of the Court of Appeals in this case. The recital, in a patriotic ceremony pledging allegiance to the flag and

to the Nation, of the descriptive phrase "under God" cannot possibly lead to the establishment of a religion, or anything like it.

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JUSTICE O'CONNOR, concurring in the judgment.

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JUSTICE THOMAS, concurring in the judgment.

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