

Lunacy of Pledge Protection Act

Lunacy of only state courts interpreting First Amendment

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Special to CNN.com

(FindLaw) -- The U.S. House of Representatives on Thursday approved the Pledge Protection Act.

The Act -- a bill that has many cosponsors -- would deprive all federal courts, even the Supreme Court, of jurisdiction to hear constitutional challenges to the "under God" Pledge of Allegiance.

This is only the latest attempt by Congress to force a pluralist society into a one-size-fits-all set of beliefs.

This is a remarkable violation of the separation of powers and the Establishment Clause. If the Act were to become law -- and if it were, itself, to be upheld as constitutional -- only state courts would be able to hear constitutional challenges to the pledge.

We would therefore have a 50-state collection of views as to what the Free Exercise Clause, and the Establishment Clause, mean in this context. And that would be constitutional lunacy.

Moreover, we would have Congress making its actions that involve compelled speech and religious viewpoint unreviewable!

Decisions on "under God" phrase in the pledge

The Act was introduced as a response to two high-profile decisions in a case involving the pledge.

First, there was the federal decision by the U.S. Court of Appeals for the Ninth Circuit in *Newdow v. Elk Grove United School District*. There, the Ninth Circuit held that it is unconstitutional to require students to recite the phrase "under God" in the Pledge of Allegiance. This requirement, the Ninth Circuit reasoned, violates the Establishment Clause. (I believe the Ninth Circuit's ruling was correct.)

The Act may also have arisen from Congressional disappointment with the United States Supreme Court's ruling in *Newdow*. Rather than reaching the Establishment Clause issue, the Court held the plaintiff lacked standing -- that is, the legal right -- to bring the

challenge.

The Supreme Court's ruling opened the way for another possible challenge to the "under God" pledge -- one that, with a plaintiff who did have standing -- could go all the way to the Supreme Court on the merits.

That, of course, is as it should be. The U.S. Supreme Court is properly the ultimate forum for questions concerning the interpretation of the U.S. Constitution. But the new Act would cut off that proper, time-honored path -- and, as I have noted, it would leave pledge issues to the state courts alone.

Grave mistake and craven political pandering

The reason the Act is moving through Congress now is no mystery.

Various polls showed that a majority of the American public believed that the phrase "under God" should stay in the Pledge of Allegiance. So now, in an election year, politicians are pandering to their constituents by supporting a bill that they can spin as one that would protect the pledge.

Congress's actions are appalling. Of course, polls do not determine what laws should be laws. Far from it. Our elected representatives are supposed to be acting in the public good and according to constitutional principles, not led around by polling numbers.

And if members of Congress looked to their constituents' deeper beliefs about the freedom of conscience and the freedom of speech, and to the good of the country, they would strongly oppose the Pledge Protection Act. There should be memorable oratory fighting this latest attempt to impose popular views on every American.

Americans do not support forcing children to choose between pledging allegiance to their country and being true to their religious beliefs. Nor do they support giving the government the power to force its citizens to recite any mantra, whether it is patriotic or not.

The powers that be at the moment have covered over these fundamental beliefs with misleading blather about how this is a "Christian" nation, implying that Christians are the sole keeper of conscience and morals in the country.

The truth is, when forced to choose and not responding to some abstract polling question, Americans support the very freedoms our Constitution guarantees: The freedom to freely exercise one's religion, and the freedom from any religion established by the government. This is a country built on the freedom of conscience, a right that must be renewed by each subsequent generation.

Constitutional principles are being betrayed

The Establishment Clause was motivated by the fear that Congress would oppress the American people in exactly the way Congress is now trying to do. It says that "Congress shall make no law establishing religion. . ."

But by attempting to insulate the monotheistic "under God" pledge from court review, in

the Pledge Protection Act, that is exactly what Congress is trying to do. It's a one-God-fits-all formula that harkens back to Britain under Queens Mary and Elizabeth, who practiced the same principle, and only differed on which religion received their imprimatur.

From their own experiences in Britain and Europe, the framing generation knew the baleful consequences of joining the power of a national government with religion. The colonists came here in the wake of the Reformation and the extreme religious turbulence that resulted when Protestants and Catholics jockeyed for power under the British monarchs. They knew, many of them firsthand, what happens when a centralized government becomes a partner with a particular religion.

This was why the framing generation instituted one of the most innovative aspects of the Constitution: a rule that denied any religious entity sovereign power, and thereby privatized religion. The result has been to make America a teeming, robust, and extraordinary marketplace in religion like the world has never seen.

The framers also believed in the absolute freedom to believe whatever one wants -- and therefore, they coupled the Establishment Clause with the Free Exercise Clause.

They did not believe, of course, in an unfettered right to act, because actions can harm others, and the framing generation believed bad actions should be capable of being punished, regardless of the identity of the actor. But they believed religious practices ought to be left sacrosanct, as long as they stayed within the bounds of the duly enacted laws. They also believed in protecting, under the Constitution, a diversity of religious beliefs.

This is not a country that is based on any single religious vision -- nor do we have a Constitution based on any single source, whether religious or secular. To the contrary, the Constitution was built on ideas taken from more than one Protestant theology, Roman and Greek government, and philosophers like Locke, Burke, and Hume. (The framers also drew heavily on their experiences under the Articles of Confederation -- when the country came very close to dissolving into 13 potentates, as opposed to a collection of states with common interests.)

Many of the framers had rich classical educations -- as did those with whom they corresponded. It is an insult to the framers to reduce the sources from which they derived the Constitution to one aspect of some of their religious beliefs.

In sum, the House is not doing its homework if it believes that the government imposition of "under God" phrase reflects the views of the framers. The country we have now is the one the framers envisioned -- one filled with religious believers of every stripe. It is an experiment they initiated that has had breathtaking success. Attempting to impose uniformity at this point through the "under God" pledge betrays, rather than serves, the framers' vision.

Attempt to destroy judicial check

The Pledge Protection Act also betrays the framers' vision in another way -- it is a frontal attack on the valuable constitutional check provided by the federal judiciary.

The framers, of course, believed in the absolute necessity of limiting power and pitting

power against power so that no entity could get overweening power. Yet Congress is now attempting, with the Act, to deprive the federal courts of jurisdiction to check Congress's wayward ways -- in an arena where Congress was specifically believed by the framers to be dangerous. (Recall that phrase from the First Amendment's Establishment Clause, "Congress shall make no law.....")

Do the members of Congress genuinely think that 50 state supreme courts -- with a host of disparate views -- could possibly keep Congress in check? Or do they perhaps, believe that as members of Congress, they need no check? My money is on the latter, but either way, they are very wrong.

Public square doesn't need protection from federal courts

There is no majority religion in the United States. No sect commands a majority of the United States population, though Protestants (which is in fact a category containing a collection of wildly differing beliefs) have formed a bare majority. However, that majority is slipping away year-by-year. Thus, it will not be long before the multiplicity of religions in this country will be such that Protestants are no longer a majority, and Protestantism is one among many other beliefs. That variety of beliefs fills the public square and fosters debate.

The fundamental disconnect in this entire debate was beautifully illustrated by former Alabama Judge Roy Moore's testimony before the House Judiciary Committee on an even more extreme bill stripping the federal courts of constitutional review.

Moore said that current Establishment Clause doctrine "requires the complete removal of God from the public square." This is constitutional sleight of hand. The public square is that place where the many private voices in this society can be heard. The First Amendment exists to keep the government from intruding on that square, not to ensure the government -- or a cabal of believers--dominates it.

In fact, after many years of federal judicial review of First Amendment issues, the public square is filled with a wide array of voices, including many religious voices, like Moore's. What Moore and those behind this embarrassing bill are chafing against is the fact they cannot use the government's power to back up their religious views.

They can hardly succeed in arguing that their views are excluded from the culture. If they are not influencing Congress to enact this crazy law, who is?

A number of religious organizations are admirably fighting this bill. Other religious interests should not squander their moral authority in an attempt to achieve political ends that are inimical to the Constitution and freedom.

The Pledge Protection Act is just such an attempt. It is doomed to fail in the courts (for federal courts -- least of all the Supreme Court -- cannot be stripped of jurisdiction this way). Yet it also signals a larger failure on the part of institutions and persons who should be upholding our system, not trying to undermine it. This is not the time to abandon liberty.

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