

Comedy of Errors

The Ninth Circuit's over-reaching into state courts' domain in the Pledge case could derail its ruling before the First Amendment issues are even reached.

H A R O L D J O H N S O N

AS A topical tale of family feuding, *Kramer v. Kramer* or *The War of the Roses* has nothing on *Elk Grove Unified School District v. Newdow*. *Newdow*, due to be heard by the U.S. Supreme Court on March 24, is commonly known as the “Pledge of Allegiance Case” — the appeal from the Ninth Circuit’s 2002 ruling that having public school students say the Pledge breaches the separation of church and state. But before the Supreme Court can decide whether the Pledge is constitutional or not, it must first confront knotty issues of California family law.

Michael Newdow is the Sacramento physician who brought a federal lawsuit in 2000 to have the words “Under God” stricken from the Pledge. He filed on behalf of his daughter, now nine, a student in the Elk Grove district, where reciting the Pledge was a morning exercise. He also asserts his own rights as a parent.

But Sandra Banning doesn’t agree with him, and she has submitted an *amicus* brief to the Supreme Court (authored by former Solicitor General Kenneth Starr) challenging Newdow’s Establishment Clause arguments. This is significant because Banning, although never married to Newdow, is the biological mother of Newdow’s daughter. During much of the life of the lawsuit, Banning had sole legal custody of the girl. Even now, when Newdow and Banning share custody, it is Banning whom a California Superior Court has granted final say in major decisions about the girl’s education and health. Banning’s decision is that her daughter should continue reciting the Pledge — with “under God” intact.

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Does California law permit a non-custodial parent to prosecute a lawsuit to enforce what he claims are his parental rights to shield his daughter from the Pledge — when the parent with custody objects? A fair reading of California Court of Appeals precedents says no. But the California Supreme Court has never addressed the issue, so the Ninth Circuit should have certified the matter to the state’s high court for clarification of where state law stands. Instead, the Ninth Circuit simply declared that, by its own (strained) interpretation of California case law, *Newdow* could sue as a parent.

So *standing* is the threshold question for the Supreme Court: Should *Newdow* have been allowed to continue with his lawsuit once Banning raised her voice in opposition? It’s a little uncertain when she first made her position known, but by September 2002, a California Superior Court judge, at Banning’s request, ruled that *Newdow* could not continue pressing his daughter’s “rights” in the case. This was months before the Ninth Circuit’s final ruling.

SO DON’T be surprised if the Supreme Court never reaches the merits of the matter: *i.e.*, the constitutionality of the Pledge. It should find that the Ninth Circuit erred on the preliminary matter of standing, either because the Ninth Circuit read California case precedents incorrectly or because it failed to defer properly to the California courts by asking the California Supreme Court for clarification of the state’s precedents.

If the Ninth Circuit had to arrogate to itself the role of interpreter of a murky area of state law, it should have recognized that the weight of California court rulings go against *Newdow*. For instance,

THE FRONT LINE

Conservative California

by Ray Haynes

The good news for conservatives in the March voting: not one Republican candidate in any primary ran as a "moderate." The battle of ideas in the GOP seems once more to be resolved, for now at least, in favor of conservative positions.

Not that all is well in the conservative movement. A political force that was once energized and focused is now diffuse and directionless. Conservatives still agree on the ideas that drive the movement; what is missing is the next step: the strategy to capitalize on the victory of ideas.

The Primary also showed that this victory is not limited to the Republican Party. Conservative ideas have won the day throughout the state. Although 48 percent of Democrats turned out to vote compared to a 37 percent Republican turn-out, Proposition 56, the tax-hikes-made-easy initiative masquerading as a "budget accountability" measure, went down to a stunning defeat.

This was the dream election for the big spending lobby — a Democrat presidential

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Primary fight and no real, well-funded, high-profile statewide Republican fights, accounting for a voter mix decidedly in the big spending lobby's favor. In raw numbers, 2,736,108 Democrats voted against 2,002,206 Republicans — that's some 734,000 more Democrat than Republican voters. Still, the spending forces lost, and lost badly, Proposition 56 garnering just 35 percent support.



Perhaps even more interestingly, Proposition 55 — the school bond — barely squeaked through. Its winning margin was only 70,000 votes out of 6 million cast. The mood of the electorate is changing. School bonds used to be a gimme. No more.

In legislative and congressional fights, conservatives, or candidates calling themselves conservative, won every race. Unfortunately, some highly promising potential leaders lost. Perhaps most disappointing in this regard

was the 63rd district where Elia Pirozzi lost by 147 votes.

The conservative vote was split by at least three people: Pirozzi, Michael Morrell, and Sam Stavros. Nearly 9,000 votes went to Morrell; Stavros received almost 2,500. Winner Bill Emmerson received just 10,460 votes. Had either Morrell or Stavros not been in the race, Pirozzi, a solid conservative leader, would be poised to go to Sacramento.

In the 3rd Congressional District, both Rico Oller and Dan Lungren ran as conservatives, Lungren edging out Oller 39 to 36 percent. Mary Ose, sister of outgoing incumbent Doug Ose, received 24 percent. Losing Oller as an up-and-coming star is a serious loss to the movement.

Which brings us back to the point about California conservatives being lost in the wilderness. Diffuse and directionless, the movement suffers strategic losses despite winning the idea war. Conservative leaders should sit down, bury the hatchet, formulate and agree to pursue a strategic plan, and work the plan.

With such a plan — agreed to by all the leaders — the movement can recapture its vigor and actually advance the ideas that carried the state in the last election.

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