

Excerpts from *Newdow v. Rio Linda Union School District* (United States Court of Appeals for the Ninth Circuit) (March 11, 2010) (Opinion by CARLOS T. BEA, C. J.), at 3865, 3873-3876, 3884-3885, 3889, 3893-3899, 3901-3913, 3920, 3929:

OPINION

BEA, Circuit Judge:

1. Introduction

We are called upon to decide whether the teacher-led recitation of the Pledge of Allegiance to the Flag of the United States of America, and to the Republic for which it stands, by students in public schools constitutes an establishment of religion prohibited by the United States Constitution. We hold it does not; the Pledge is constitutional.

The Pledge of Allegiance serves to unite our vast nation through the proud recitation of some of the ideals upon which our Republic was founded and for which we continue to strive: *one Nation under God*—the Founding Fathers’ belief that the people of this nation are endowed by their Creator with certain inalienable rights; *indivisible*—although we have individual states, they are united in one Republic; *with liberty*—the government cannot take away the people’s inalienable rights; *and justice for all*—everyone in America is entitled to “equal justice under the law” (as is inscribed above the main entrance to our Supreme Court). Millions of people daily recite these words when pledging allegiance to the United States of America:

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.

4 U.S.C. § 4 (2002).

Pursuant to California Education Code § 52720, the Rio Linda Union School District in California (“the School District”) has a practice that every morning, willing students, led by their teachers, face the American Flag, place their right hands over their hearts, and recite the Pledge of Allegiance.

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Plaintiffs challenge the School District’s policy as constituting a violation of the Establishment Clause: “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. 1.

The Pledge reflects many beliefs held by the Founding Fathers of this country—the same men who authored the Establishment Clause—including the belief that it is the people who should and do hold the power, not the government. They believed that the people derive their most important rights, not from the government, but from God:

We hold these truths to be self-evident, that all men are created equal, that *they are endowed by their Creator with certain unalienable Rights*, that among these are Life, Liberty and the pursuit of Happiness.

The Declaration of Independence, 1 U.S.C. § XLIII (1776) (emphasis added). The Founders did not see these two ideas—that individuals possessed certain God-given rights which no government can take away, and that we do not want our nation to establish a religion—as being in conflict.

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The plaintiffs and the dissent focus solely on the words “under God” in isolation, stripped of all context and history. Plaintiffs and the dissent even go so far as to disregard the plain text of the preamble to 4 U.S.C. § 4 which sets forth that Congress had two primary purposes in including the phrase “one nation under God” in the Pledge: (1) to underscore the political philosophy of the Founding Fathers that God granted certain inalienable rights to the people which the government cannot take away; and (2) to add the note of importance which a Pledge to our Nation ought to have and which ceremonial references to God invoke. [* * *]

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VII. The Pledge of Allegiance Is Constitutional under the *Lemon* test.

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C. Congress’ purpose in enacting the Pledge of Allegiance was patriotic.

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[12] The purpose of public prayer is always active—to invite divine intercession, to express personal gratitude, to ask forgiveness, etc. On the other hand, the recitation of “one Nation under God” is a description of the Republic rather than an expression of the speaker’s particular theological beliefs, a recognition of the historical principles of governance, affected by religious belief, embedded in the Pledge. “[Our] institutions presuppose a Supreme Being.” *Zorach v. Clausen*, 343 U.S. 306, 313 (1952).

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[13] [* * * * *] Here, the addition of “under God” was *used* to describe an attribute of the Republic, “one Nation under God”—a reference to the historical and religious traditions of our country, not a personal affirmation through prayer or invocation that the speaker believes in God.

2. The legislative history shows Congress had a predominantly patriotic purpose when it enacted the Pledge.

Lemon mandates our inquiry look to the “plain meaning of the statute’s words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute, ... and the specific sequence of events leading to [its] passage.” *McCreary County*, 545 U.S. at 862 (quoting from *Edwards*, 482 U.S. at 594-95) (alteration in original). The dissent fails to do any of this.

[14] In 2002, Congress reaffirmed the current Pledge, which now includes references to how it is to be recited and which specifically sets forth Congress’ reasons for the “plain meaning of the statute’s words.” *See* Pub. L. No. 107-293, 116 Stat. 2057 (codified as amended in 4 U.S.C. § 4, 36 U.S.C. § 302) (effective November 13, 2002). It is the 2002 statute—4 U.S.C. § 4—that sets forth our current Pledge. [* * *]

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With the 2002 Act, Congress “reaffirmed the exact language that has appeared in the Pledge for decades.” *See* Pub. L. No. 107-293, 116 Stat. 2057 at 2060 (codified as amended in 4 U.S.C. § 4, 36 U.S.C. § 302) (effective November 13, 2002). *McCreary County* tells us we must also consider the legislative history of this act to determine its predominant purpose and effect. [...]

Congress chose to explain in great detail its purpose in reaffirming the language of the Pledge, for although it did not amend the text of the Pledge, it did extensively amend the text of the statute enacting the Pledge, setting forth its specific purposes in the following extensive legislative findings: [...]

Congress finds the following:

(1) On November 11, 1620, prior to embarking for the shores of America, the Pilgrims signed the Mayflower Compact that declared: “Having undertaken, for the Glory of God and the advancement of the Christian Faith and honor of our King and country, a voyage to plant the first colony in the northern parts of Virginia,”.

(2) On July 4, 1776, America’s Founding Fathers, after appealing to the “Laws of Nature, and of Nature’s God” to justify their separation from Great Britain, then declared: “We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness”.

(3) In 1781, Thomas Jefferson, the author of the Declaration of Independence and later the Nation’s third President, in his work titled “Notes on the State of Virginia” wrote: “God who gave us life gave us liberty. And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the Gift of God. That they are not to be violated but with His wrath? Indeed, I tremble for my country when I reflect that God is just; that his justice cannot sleep forever.”.

(4) On May 14, 1787, George Washington, as President of the Constitutional Convention, rose to admonish and exhort the delegates and declared: “If to please the people we offer what we ourselves disapprove, how can we afterward defend our work? Let us raise a standard to which the wise and the honest can repair; the event is in the hand of God!”.

(5) On July 21, 1789, on the same day that it approved the Establishment Clause concerning religion, the First Congress of the United States also passed the Northwest Ordinance, providing for a territorial government for lands northwest of the Ohio River, which declared: “Religion, morality, and knowledge, being necessary to good

government and the happiness of mankind, schools and the means of education shall forever be encouraged.”.

(6) On September 25, 1789, the First Congress unanimously approved a resolution calling on President George Washington to proclaim a National Day of Thanksgiving for the people of the United States by declaring “a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a constitution of government for their safety and happiness.”.

(7) On November 19, 1863, President Abraham Lincoln delivered his Gettysburg Address on the site of the battle and declared: “It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this Nation, under God, shall have a new birth of freedom—and that Government of the people, by the people, for the people, shall not perish from the earth.”.

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(9) On June 15, 1954, Congress passed and President Eisenhower signed into law a statute that was clearly consistent with the text and intent of the Constitution of the United States, that amended the Pledge of Allegiance to read: “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.”.

(10) On July 20, 1956, Congress proclaimed that the national motto of the United States is “In God We Trust”, and that motto is inscribed above the main door of the Senate, behind the Chair of the Speaker of the House of Representatives, and on the currency of the United States.

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(14) On November 20, 1992, the United States Court of Appeals for the 7th Circuit, in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), held that a school district’s policy for voluntary recitation of the Pledge of Allegiance including the

words “under God” was constitutional.

(15) The 9th Circuit Court of Appeals erroneously held, in *Newdow v. U.S. Congress* (9th Cir. June 26, 2002), that the Pledge of Allegiance’s use of the express religious reference “under God” violates the First Amendment to the Constitution, and that, therefore, a school district’s policy and practice of teacher-led voluntary recitations of the Pledge of Allegiance is unconstitutional.

(16) The erroneous rationale of the 9th Circuit Court of Appeals in *Newdow* would lead to the absurd result that the Constitution’s use of the express religious reference “Year of our Lord” in Article VII violates the First Amendment to the Constitution, and that, therefore, a school district’s policy and practice of teacher-led voluntary recitations of the Constitution itself would be unconstitutional.

4 U.S.C. § 4 (2002).

[15] These findings make it absolutely clear that Congress in 2002 was not trying to impress a religious doctrine upon anyone. Rather, they had two main purposes for keeping the phrase “one Nation under God” in the Pledge: (1) to underscore the political philosophy of the Founding Fathers that God granted certain inalienable rights to the people which the government cannot take away; and (2) to add the note of importance which a Pledge to our Nation ought to have and which in our culture ceremonial references to God arouse.

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3. History supports Congress’ view of the Pledge.

[16] Not only must we examine the words “under God” in the context of the rest of the Pledge, we must also examine them in the context of history. Without knowing the history behind these words, one might well think the phrase “one Nation under God” could not be anything but religious. History, however, shows these words have an even broader meaning, one grounded in philosophy and politics and reflecting many events of historical significance.

The words “under God” were added to the Pledge of Allegiance in 1954 in response to the oppressive governments forming around the World. Congress wanted to emphasize that in America, the government’s power is limited by a higher power. But to understand this concept, we must look back to the beginning of our nation.

Among the “self-evident truths” the Framers believed was the concept that all people are entitled to certain inalienable rights given to them by the “Laws of Nature and Nature’s God” and that the purpose of government should be “to secure these rights.” In the monarchies of Europe, it was believed that God gave the King his power, and the people had only such limited rights as the King graciously bestowed upon them. When drafting the Establishment and Free Exercise Clauses of the First Amendment, the Founders had this religious history of Europe in mind:

[T]o the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity. In England, and in some Colonies at the time of the separation in 1776, the Church of England was sponsored and supported by the Crown as a state, or established, church; in other countries ‘establishment’ meant sponsorship by the sovereign of the Lutheran or Catholic Church. *See Engel v. Vitale*, 370 U.S. at 428 n. 10, 82 S. Ct. at 1265. *See generally* C. Antieau, A. Downey, & E. Roberts, *Freedom from Federal Establishment* (1964). The exclusivity of established churches in the 17th and 18th centuries, of course, was often carried to prohibition of other forms of worship.

Walz v. Tax Comm’n, 397 U.S. 664, 667 (1970); *see also Everson v. Bd. of Educ.*, 330 U.S. at 8-11 (“A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.”).

In contrast, the Framers believed that God endowed people with certain inalienable rights, rights no government could take away and no church could regulate. These rights were inalienable by the government because they were derived from a source more powerful than, and entitled to more respect than, the government—even a democratically elected government. The government could

regulate only those rights the people gave to the government. This fundamental debate—whether government has only limited rights given to it by the people, or whether the people have only limited rights given to them by the government—remains one of the crucial debates around the world to this day. Whether government is limited or unlimited has a profound impact on people’s day-to-day lives. For instance, if the police arrest an individual, in many countries, the only question is whether there is a law forbidding the arrest. If there is no such law, the arrest is legal because the government is all powerful and not to be questioned. In America, the question is what law allows the police to arrest the person. If there is no such law, then the arrest is unlawful and the person can petition the courts to be released because the government has only such power as the people have chosen to give it through their elected representatives.

In 1776, limited government was a rare concept. If the new government of this nation would have only limited powers, what authority limited these powers? If the people would retain certain rights that did not emanate from the government, whence came those rights? The Framers referred to the source of the people’s rights as the “Creator,” the “Supreme Judge,” and “Nature’s God.” The Declaration of Independence, 1 U.S.C. § XLIII (1776). [...](21)

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[n 21:] After the Revolutionary War, a committee consisting of James Madison, Alexander Hamilton, and later Chief Justice Oliver Ellsworth drafted an “Address to the States, by the United States in Congress Assembled.” According to the Address, the Revolutionary War was won for the rights of human nature, rights that had an “Author”:

Let it be remembered, finally, that it has ever been the pride and boast of America that the rights for which she contended were the rights of human nature. By the blessings of the *Author* of these rights on the means exerted for their defence, they have prevailed against all opposition, and form the basis of thirteen independent States.

William Hickey, *The Constitution of the United States of America* 139-40 (1853) (emphasis added), *cited in* Anthony R. Picarello, Jr., *Establishing Anti-Foundationalism Through the Pledge of Allegiance Cases*, 5 *First Amend. L. Rev.* 183, 188 (2006) (filed as part of the brief for Defendant-Intervenor Carey).

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Long before this nation could be founded, the Framers had to convince the people in the American colonies that their individual rights were important enough to start a war. Important enough to die for. Important enough to send their sons to die for. We must remember the Framers, urged a rationale for committing treason against Great Britain. For this, they needed to draw upon every weapon in their intellectual arsenal. They needed to call upon divine inspiration, as so many armies before them had.(22)

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[n 22:] In his General Orders, George Washington invoked the phrase “under God” to inspire his troops when describing the fate of America if the King of Great Britain, with his unlimited powers, should win the Revolutionary War:

The fate of unborn Millions will now depend, *under God*, on the Courage and Conduct of this army—Our cruel and unrelenting Enemy leaves us no choice but a brave resistance, or the most abject submission; this is all we can expect—We have therefore to resolve to conquer or die.

George Washington, General Orders (July 2, 1776) (emphasis added), *cited in* Picarello, 5 First Amend. L. Rev. at 187.

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Alexander Hamilton argued in February 1775, “The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sun-beam, in the whole volume of human nature, by the hand of the Divinity himself, and can never be erased or obscured by mortal power.” Alexander Hamilton, *The Farmer Refuted* (1775).

And so when the Second Continental Congress of the United States met on July 4, 1776, the original thirteen states sought to convince not only the Colonists, but also the world that a higher power granted rights directly to the people, who would in turn grant only limited powers to their new government:

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which *the Laws of Nature and of Nature’s God* entitle them,[...] a decent respect to the opinions of mankind requires that they

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should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that *they are endowed by their Creator with certain unalienable Rights*, that among these are Life, Liberty and the pursuit of Happiness.

The Declaration of Independence, 1 U.S.C. § XLIII (1776) (emphasis added).

“The Declaration of Independence was the promise; the Constitution was the fulfillment.”(24) The Constitution fulfilled the promise of the Declaration by creating a government of limited powers. The government was divided into three co-equal but separate branches that would check and balance one another to ensure the government remained limited, and the people’s rights secure.

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[n 24:] Charles Alan Wright, *Warren Burger: A Young Friend Remembers*, 74 Tex. L. Rev. 213, 219 (1995) (quoting Chief Justice Warren Burger).

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While the Revolutionary War was waged against the abusive King of Great Britain, the Civil War was waged against abusive State governments.[...] Many abolitionists asserted that slaves were also endowed by the Creator with certain inalienable rights that could not be taken away by the government. During his Gettysburg Address, President Abraham Lincoln called upon this higher power, using the very same phrase—“nation, under God”—to describe a belief in equality and limited government:

[T]he great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that *this nation, under God*, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.

Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) (emphasis added).

The original Pledge of Allegiance was drafted by Frances Bellamy in 1892: “I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible,(26) with Liberty and Justice for all.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004). It was published in a national youth magazine

commemorating the 400th anniversary of Christopher Columbus' arrival in America. *Id.*

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[n 26:] Reinforcement of the idea that this nation is indivisible, a concept most Americans today would not even think was up for debate, reflects the fact that the Pledge was first drafted in 1892, not long after the Civil War.

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During World War II, Congress formally codified the Pledge of Allegiance. Unlike Bellamy's version, the 1942 Pledge referred expressly to the United States of America because there was a worry that a Pledge to "my Flag" would allow those who sympathized with other nations to appear to be supporting America, while secretly supporting Germany, Japan, or the like: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." *Id.* (citation and internal quotation marks omitted). Pub. L. No. 623, Ch. 435, § 7, 56 Stat. 380 (1942) (codified at 36 U.S.C. § 1972, now repealed).

In the early 1950s America became involved in the war waged between North and South Korea. North Korea was aided by communist regimes of the Soviet Union and China, while South Korea was aided by the United Nations, including the United States, Australia, and Great Britain. This was just one of many times when the West opposed the spread of communism. American soldiers had just fought and died in this war, not returning until after the cease fire in July 1953. Encyclopedia Britannica Online Ed. available at <http://search.eb.com/eb/article-9046072> (last visited August 4, 2009). Indeed, America still has troops in South Korea. The tensions over the differences in political systems continue today. *Id.* It was while the scars of the Korean War were still fresh that Congress decided to amend the Pledge again.

[17] In 1954, during the escalating Cold War with North Korea, the Soviet Union and other communist countries, Congress further amended the Pledge by changing the phrase "one Nation indivisible" to "one Nation under God, indivisible." Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954). The words "under God" were added as a description of "one Nation" primarily to reinforce the idea that our nation is founded upon the concept of a limited government, in stark contrast to the unlimited power exercised by communist forms of government. In adding the words "under God" to the Pledge, Congress reinforced the belief that our nation was one of individual liberties granted to the people directly by a higher power:

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At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. [O]ur American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp.

H.R. Rep. No. 83-1693, 1954 U.S.C.C.A.N. 2339, 2340 (May 28, 1954). The House Report adopted this statement from Representative Rabaut:

By the addition of the phrase ‘under God’ to the pledge, the consciousness of the American people will be more alerted to the true meaning of our country and its form of government. In this full awareness we will, I believe, be strengthened for the conflict now facing us and more determined to preserve our precious heritage.

More importantly, the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins. As they grow and advance in this understanding, they will assume the responsibilities of self-government equipped to carry on the traditions that have been given to us.

Id. at 2341.(27)

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[n 27:] The dissent appears to think the historical context for the Pledge extends back no more than to the Sunday when Reverend Docherty gave his sermon. With respect, Reverend Docherty was never elected to office and, though he may indeed have delivered a moving sermon, the concept of this nation being “one Nation under God” extended back long before his time, at least to General Washington’s address to his troops in 1776 and to President Lincoln’s Gettysburg address in 1863. George Washington, General Orders (July 2, 1776); Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

We do not doubt some members of Congress were motivated to add the phrase “under God” to the Pledge to serve wholly religious ends. Nevertheless, under

Supreme Court precedent, our Establishment Clause inquiry focuses solely on “the legislative purpose of the statute, not the possibly religious *motives* of the legislators who enacted the law.” *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion of O’Connor, J.); see *United States v. O’Brien*, 391 U.S. 367, 384 (1968) (“What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.”).

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The dissent points to instances where individual Congressmen proclaimed, as politicians often do in election years, the obvious religious elements of the amendment. But we are called upon to discern Congress’ ostensible and predominant purpose, not the purpose of an individual. See *McCreary County*, 545 U.S. at 867-68. That purpose is not the statement of one or more individual members of Congress, but what the committees putting forth the amendment actually stated and, more important, what the *text* of the statute says. *Id.*; *Mergens*, 496 U.S. at 248-49.

One related point is important. The dissent attributes one meaning to the words “under God” and proclaims that is the end of the inquiry. We are called upon to discern Congress’ purpose. We first stated what we thought the purpose of the words was in *Newdow III*. Congress thought we misinterpreted its purpose. See page 3903 *supra*. Thus, Congress set forth its reasons in detail in the 2002 Act.

Another related point is that:

It cannot be the case that Congress may override a constitutional decision by simply rewriting the history upon which it is based. For instance, Congress surely cannot negate the effect of a Fourth Amendment decision by penning its own account of the scope of lawful searches at the time of the Founding. *Cf. Florida v. White*, 526 U.S. 559, 563-64 (1999) (“In deciding whether a challenged governmental action violates the [Fourth] Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed.”).

United States v. Enas, 255 F.3d 662, 675 (9th Cir. 2001) (en banc). This principle applies when Congress is trying to rewrite history, not when Congress is trying to clarify our misunderstanding of *its* own purpose in enacting a statute. The 2002 Congress made it clear that we had misunderstood Congress’ purpose in our ruling in *Newdow III*. [* * *]

The dissent calls the 2002 Congress' purpose a sham but does not point to even one place where Congress is incorrect in its recitation of history. The dissent disregards the fact that the Supreme Court has also recognized that the Founders' religious beliefs are a part of our nation's history. "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Schempp*, 374 U.S. 213.

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[18] In the context of the Pledge, the phrase "one Nation under God" constitutes a powerful admission by the government of its own limitations. [...] Although the phrase also has religious connotations, "one Nation under God" in the Pledge is a reference to the historical and political underpinnings of our nation. As Justice Brennan noted, "[T]he revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." *Schempp*, 374 U.S. at 304 (Brennan, J., concurring).

[19] In light of the patriotic context in which the phrase "under God" is recited and the historical context in which that phrase has been enacted into law, we hold its voluntary recitation as part of the Pledge by school children, as practiced by the Rio Linda Union School District, does not violate the Establishment Clause.

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XI. Conclusion

[27] We hold that California Education Code § 52720 and the School District's Policy of having teachers lead students in the daily recitation of the Pledge, and allowing those who do not wish to participate to refuse to do so with impunity, do not violate the Establishment Clause. Therefore, we reverse the decision of the district court holding the School District's Policy unconstitutional and vacate the permanent injunction prohibiting the recitation of the Pledge by willing students.

REVERSED.
