Mrs. MALONEY of New York. Mr. Speaker, I thank you, Congresswoman THURMAN for organizing this important special order on the need for prescription drug coverage.

Medicare provides health care coverage to forty million retired and disabled Americans.

For decades, Medicare has worked to provide needed, lifesaving health care to millions, but it is missing a fundamental component: a prescription drug benefit.

If we have courage, this Congress can make history and give our nation's seniors what they desperately need: a real, and meaningful prescription drug plan.

I am proud to joint my Democratic Colleagues, lead by Mr. DINGELL, Mr. RANGEL, Mr. STARK and Mr. BROWN, as an original cosponsor of the ''Medicare Prescription Drug Benefit and Discount Act.''

I come to the floor this evening to discuss two points:

Number 1: unlike the Republican drug plan, the Democratic plan is simple because it builds upon a proven model—Medicare.

Just like seniors pay a Part B premium today for doctor visits, under our plan, seniors would pay a voluntary Part D premium of $25 per month for drug coverage. For that, Medicare or the government will pay 80 percent of drug costs after a $100 deductible. And NO senior will have to pay more than $2,000 in costs per year.

There is an urgent need for this plan. The most recent data indicates that almost 40 percent of serniors—an estimated 11 million—have no drug coverage. Problems are particularly acute for low income seniors and seniors over the age of 85 (the majority whom are women). Additionally, those older Americans who do have coverage find that their coverage is often inadequate for their needs.

The Democratic plan is a real plan with real numbers, not estimates.

Point 2: the Republican Plan does nothing to bring down the cost of prescription drugs. The Democratic plan is the only plan that provides real Medicare prescription drug coverage for our seniors by stopping soaring drug costs.

Under the buying power of Medicare, through competition and bargaining we can rein in drug costs. Prescription drug costs are too high for our older Americans. They need help now!

For instance, look at Prevacid. Prevacid is an unclear medication, and the second most widely used drug by American seniors. The cost for this prescription is on average $137.54 per month in New York City—cut only $45.02 in the United Kingdom, a price different of 200 percent.

Or look at Celebrex, a popular arthritis medication and a drug needed by many older women, especially, since older women are stricken more often than men by arthritis. According to a Government Reform Committee report released by Mr. WEINER and myself, a monthly supply of this drug costs $86.26 in New York City. In France, a monthly supply of Celebrex costs only $30.60. This is a price differental of 182 percent. Seniors in New York City without drug coverage must pay almost three times as much as purchasers in France.

Prices for prescriptions have risen 10 percent per years for the last several years, leading to over $37 billion in profits last year for the giant drug companies. While these corporations wallow in their spoils, seniors suffer without coverage.

Unfortunately, the brunt of the problem falls squarely on our nation's olderly women, who are nearly sixty percent of our senior citizens. We need to take care of America's older women, we need to help all of our senior citizens.

Mr. Speaker, we must pass the Democratic prescription drug plan without delay. It is built on a proven model medicare. The Republican plan only offers gap-ridden coverage. The Republican bill is about privatization. The Republican plan is all about election year politics.

For the sake of our seniors, we must pass the democratic plan, and we must pass it now.

□ 2030

GENERAL LEAVE

Mrs. THURMAN. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days within which to revise and extend their remarks on the subject of my Special Order.

The SPEAKER pro tempore (Mr. KERNS). Is there objection to the request of the gentlewoman from Florida?

There was no objection.

NINTH CIRCUIT RULES PLEDGE OF ALLEGIANCE UNCONSTITUTIONAL

The SPEAKER pro tempore. Under the Speaker's announced policy of January 3, 2001, the gentleman from California (Mr. COX) is recognized for 60 minutes as the designee of the majority leader.

Mr. COX. Mr. Speaker, I rise this evening to bring to the attention of the House the decision of the Ninth Circuit Court of Appeals in the case of Michael A. Newdow v. United States Congress. This case, Mr. Speaker, even though it was decided by the Ninth Circuit Court of Appeals only a few hours ago, has already attracted considerable national attention. Indeed, it has drawn the comment of the President of the United States.

The reason is rather simple. It is a decision involving something that is well known to all of us in this Chamber, the Pledge of Allegiance. The Ninth Circuit Court of Appeals has ruled that the Pledge of Allegiance, written into statute a half century ago, is unconstitutional. Of course this Chamber is opened each day with a recitation of the Pledge of Allegiance. Public schools across the country begin their day this way. Some Members and some students may, if they choose, listen or absent themselves, indeed, because there is no requirement of Members of Congress as we open our day this way or of students that they recite the Pledge. It is a voluntary act.

Nonetheless, a parent, Michael A. Newdow, of a student in a California public school, brought a lawsuit, one of several that he has brought, urging an injunction against the President of the United States and an injunction against this Congress. In the latter case, he wished us to be ordered by court immediately to rewrite the statute, the statute he wished that we would rewrite so that the words ''under God'' would be deleted from the Pledge of Allegiance.

I think because the Pledge is so familiar to us, particularly the Pledge has been recited by so many so often in so many public ways, whether it be at sporting events or public gatherings since September 11, that it comes as something of an unexpected surprise that a court would rule this way. I will devote a brief portion of my brief remarks this evening to the substance of the question and, that is, whether or not Congress, which was a defendant in this case, was within its rights to write the law as we did a half century ago; but I would spend most of my time drawing attention to what I consider to be the sloppy jurisprudence in this case.

What is really at issue in what shall become a very well known decision of Newdow v. U.S. Congress is the rule of law. Precious little respect was paid to precedent in this case, because many of the questions, procedural questions indeed, not just the substance here, many of the questions have already been decided. But this court chose to decide the same questions differently, and that lack of respect for precedent raises questions about the rule of law in America, about the predictability of the law, about the ability of any of us to know in advance what are the rules to which we must conform our conduct.

Let me begin by just describing a little bit about the case, a little bit about the facts of the case. Newdow, the fellow who brought the lawsuit, is an atheist whose daughter attends public elementary school in the Elk Grove Unified School District in my State of California. In the public school that she attends, like many public schools, they start the day with the Pledge of Allegiance.

But Newdow, according to the Ninth Circuit, does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge. Rather, he claims that his daughter is injured when she is compelled to watch and listen. That is what this lawsuit is all about, according to the Ninth Circuit. The gravamen of the complaint is there is injury, that is the word that is used, and it is an important word, as I shall return to in just a moment. There is injury when someone is required to be in the presence of others who are reciting something in which they believe. The United States Supreme Court was asked to decide this question, this very question, in another case, Valley Forge Christian College v. Americans United for Separation of Church and State, Incorporated, 1982. Here is what the Court said in the Valley Forge case:

''The psychological consequence presumably produced by observation of conduct with which one disagrees is

not an injury sufficient to confer standing under article 3, even though the disagreement is phrased in constitutional terms.''

Let me describe a little bit about what the Court was saying here. The Court said there was no standing under article 3. That is lawyer language which means there was no case. The very jurisdiction of a Federal court requires as a condition for proceeding to hear the facts and apply the law that there be an injury in fact, somebody be injured by the thing about which they are complaining. And so that was a threshold question that the Court had to decide here: Was this man, Mr. Newdow, sufficiently injured personally by what was going on in this case, particularly by the act of Congress, which is what he was suing about? And the Supreme Court said ''no'' in the case of Valley Forge. They could not have said ''no'' in plainer terms, because he pleaded in his action that his daughter's teacher and the school district did not require his daughter to participate in reading the Pledge of Allegiance. That was his allegation about this case. Rather, he claims that his daughter is injured when she is compelled to watch and listen.

So now let us go back to that language of the Supreme Court. The Supreme Court said, ''The psychological consequence presumably produced by observation of conduct with which one disagrees is not an injury sufficient to confer standing under article 3, even though the disagreement is phrased in constitutional terms.''

The Ninth Circuit Court of Appeals was aware of this binding U.S. Supreme Court precedent. And what did they say to deal with that fact? They said, ''Valley Forge remains good law.'' They acknowledge that case has not been overturned. It has not been reversed. It is still there. But what they chose to do is to say essentially that the law is progressing here, we want to take it the next step, because they view the law as an organism, something that is ever evolving and changing and developing. Leave aside whether they are right or wrong in the application of that principle, if one chooses to call it that, in this case. What does it mean if the law is the plastic, malleable instrument of judges? It means that none of us as citizens knows in advance how the case is going to be decided, how it is going to turn out.

Everyone here, in addition perhaps to having said the Pledge of Allegiance in school when they were schoolchildren, probably learned about Hammurabi. Hammurabi is well known for erecting in the town square stone tablets bearing the written law. For the first time, the law was written down. Why was that important? Why was written law important? It was important because, for the first time, the subjects of Hammurabi, the citizens, knew in advance the standard to which they should conform their conduct. And at that moment the law stopped being arbitrary. We have heard it said that we are a government of laws, not men. Yet what does it mean when it is essentially a lottery? We roll the dice. We do not know how these cases are going to turn out in advance because it is up to the judges and their personal view.

One of the contests in constitutional law, in constitutional interpretation, is between those who believe in what is sometimes referred to as original intent, those who believe that what the people who wrote it matters in interpreting the words, versus those who believe in the Constitution as a living document, that the way we choose to interpret those words in our time and place ought to govern.

It is of some great consequence how one answers that question, because the Founders lived some time ago; and whether or not one agrees with them or disagrees with them subsequently, in subsequent ages, at least what was settled at the time becomes an objective standard. And the Founders left us with an article in the Constitution, article 5, that permits us in our time and place to amend the document if we decide that it is too much of a tight collar for us and we cannot live within those strictures in our place and time. So is there anything about the first amendment which is at issue here in the time of its drafting and what was on the mind of the Founders that can help us understand whether they thought that references to God in public places, not references to a particular establishment of religion, were violative of the Constitution?

Let us turn to the first amendment. With respect to religion, it is very concise. It says, ''Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.'' So the question is, should this clause be interpreted as barring the government from giving preferment to a particular religion? That is one interpretation. Or should it be interpreted as requiring the complete and total elimination of any reference to God in our public institutions? That is a different interpretation.

The Supreme Court considered this very question in an earlier case involving the Pledge of Allegiance. They considered it in a different way, however. Remember that the language that we are talking about, ''under God,'' was added a half century ago. A few years before that language was added, the Supreme Court first considered the Pledge without those words, and it decided that students cannot be required to recite it. Students cannot be required to salute the flag, either. ''The action of the local authorities in compelling the flag salute and Pledge transcends constitutional limits on their power.'' That is what the Supreme Court said in West Virginia State Board of Education against Barnette in 1943. Compelling someone to recite or to do something against their will that affects or represents their beliefs is not within the power of our government. Indeed, it was pointed out in that connection and in other connections that that is what the Pledge of Allegiance is about. If there is liberty for all, that means we have to be free in our minds as well as in our physical actions, and so we cannot be compelled to say we believe something that we do not believe. A very important case.

But they went on. They said that it was unconstitutional because it invades the sphere of intellect and spirit which it is the purpose of the first amendment to our Constitution to reserve from all official control. It was the compulsory aspect of what was going on in that case that bothered the Court. The Court noted that the school district was compelling the students to declare a belief and requiring the individual to communicate by word and sign. Remember, the Pledge was accompanied by a flag salute or a hand over the heart. ''The compulsory flag salute and Pledge requires affirmation of a belief and an attitude of mind,'' those further words from the Court's decision in the Barnette case.

The Court also said, ''If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox, in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.''

□ 2045

Note what was going on in the Barnette case.

Listen to this list of things that the government cannot force us to believe in: politics, nationalism, religion, or other matters of opinion. They were dealing with the Pledge of Allegiance even before it had the words ''under God,'' and they said that the government cannot force you to say it. The government cannot force you to believe in a particular religion; the government cannot force you to believe in particular politics either.

So, fast forward to today when we are watching as a court throws out the words ''under God'' from the Pledge of Allegiance and ask yourselves why the rest of it can remain. If there is some element of compulsion, even though you are not required to recite the Pledge, just in being forced to witness others say it, then is it there to precisely the same degree, that kind of compulsion, to the rest of the Pledge, even if we were to excise the words ''under God,'' and does not the Barnette case say that there can be no such compulsion?

In this Newdow case, that is the name of the Ninth Circuit decision handed down today, the court said, ''The Pledge, as currently codified, is an impermissible government endorsement of religion,'' and it is so common in court opinions these days to cite authority. It is the reason we can call the cases decided by courts case law. It is not supposed to be the mental invention of the judges; it is supposed to be

an application of well-known principles of law to the facts at hand.

So having said, ''The Pledge, as currently codified, is an impermissible government endorsement of religion,'' the court cited some authority. What did they cite for authority? They cited Justice O'Connor's words in another case, and they cited Justice Kennedy's words in another case. Here is how they interpreted Justice Kennedy's words: Justice Kennedy agreed with us. That is what they are saying. Justice Kennedy agreed with us that ''The Pledge, as currently codified, is an impermissible government endorsement of religion,'' but Justice Kennedy does not agree with that. There is plenty of case law making it very clear that the language that they are quoting from Justice Kennedy was written for the opposite purpose.

Here is what Justice Kennedy said in his dissent, in his dissent in a case called Allegheny County v. Greater Pittsburgh ACLU. Now that case, by the way, involved holiday displays in the downtown area in Pittsburgh. On some public property they were displaying a menorah and they were displaying a nativity scene; and the ACLU, the American Civil Liberties Union, sued, and by a 5 to 4 majority, the Court said that could not go on because a menorah signified a particular religion, Judaism, and the nativity scene signified a particular set of religions, Christianity. So there were particular sects being promoted by the government, not just sort of general references to God and, for that reason, it was unconstitutional.

Justice Kennedy dissented from that case, and he would have allowed it. He was among the four members who would have allowed it; and yet he is being cited for authority in this case striking down the words ''under God'' in the Pledge of Allegiance. Why would they do that?

Here is what Justice Kennedy is quoted as having said, quoted by the Ninth Circuit in their decision today as having said: ''By statute, the Pledge of Allegiance to the flag describes the United States as 'one Nation under God.' To be sure, no one is obligated to recite this phrase, but it borders on sophistry to suggest that the reasonable atheist would not feel less than a full member of the political community every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.'' That is what they quote him as saying. And they say, therefore, he agrees with our decision that ''The Pledge, as currently codified, is an impermissible government endorsement of religion.''

But Justice Kennedy went on to say, in the immediately-following sentence, which the Ninth Circuit fails to quote, ''Likewise, our national motto, 'In God We Trust,' which is prominently engraved in the wall above the Speaker's dais in the Chamber of the House of Representatives,'' and Mr. Speaker, I would observe that you are sitting under the very model that Justice Kennedy is referring to in this decision, it says right over your chair, ''In God We Trust.'' He says it is ''prominently engraved in the wall above the Speaker's dais in the Chamber of the House of Representatives and is reproduced in every coin minted and every dollar printed by the Federal Government.''

He is saying that these things must have the same effect if the intent of the establishment clause is to protect individuals from mere feelings of exclusion; and it is his opinion that that is not what the establishment clause does. That is what Justice Kennedy was saying. So it stands Justice Kennedy on his head to cite him as authority for the proposition in Newdow that the Pledge, as currently codified, is an impermissible government endorsement of religion.

So I find it interesting that in this tradition of judges citing authority for their rulings, that we have cited the language of Justice Kennedy as well as the language of Justice O'Connor. But Justice O'Connor, likewise, does not support this proposition.

In this case of Allegheny County v. the Greater Pittsburgh ACLU, the majority opinion was written by Justice Blackmun. Justice Blackmun discussed, before he got to his result, a case called Marsh against Chambers in which legislative prayers were challenged. Now, Mr. Speaker, my colleagues may be in memory of what happened at the beginning of the day today and what happens at the beginning of every one of our sessions every day. We begin with our Chaplain saying a prayer here in the House Chamber, standing, more to the point, under the motto, ''In God We Trust.''

There was a lawsuit challenging legislative prayers; State legislatures do this as well. It went to the U.S. Supreme Court and the case that decided the question is called Marsh against Chambers. Now, we can guess what the result was in that case, because our prayers are still going on. Justice Kennedy, in the case of Allegheny County against the Greater Pittsburgh ACLU, the one that they decided about the nativity scene and the menorah, Justice Kennedy dissented in that case and he cited this Marsh case. And Justice Blackmun did not like his use of the Marsh case, did not like the reference that he made.

So here is what Blackmun said about Marsh and about Justice Kennedy. He said, Justice Kennedy argues that such practices as our national motto, ''In God We Trust'' and our Pledge of Allegiance with the phrase ''under God'' added in 1954 are in danger of invalidity if we were to say it is unconstitutional to have a nativity scene or it is unconstitutional to have a holiday menorah. Justice Blackmun said, that is silly. That is not what we mean. That is not what we are saying.

Here is a quote from Justice Blackmun: ''Our previous opinions have considered indicative the motto and the Pledge characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief.'' And he cites for that proposition the words of two justices in other cases, Justice O'Connor and Justice Brennan.

Now, Justice O'Connor is the other Justice that the Ninth Circuit was relying upon to reach today's result. So we now have on the record both Justice Kennedy and Justice O'Connor for the opposite proposition, and that is that the Pledge and our motto, ''In God We Trust,'' do not raise these establishment clause questions. That is certainly how I read those opinions, Mr. Speaker.

Justice Blackmun goes on to say, we need not return to the subject, because there is an obvious distinction between creche displays, creche meaning the nativity scene, there is an obvious distinction between creche displays and references to God in the motto and in the Pledge. So we have Justice Kennedy raising the specter of: boy, if we go this way and throw out a nativity scene, pretty soon it is going to be the motto and the Pledge, and then Justice Blackmun saying, nonsense. We have already considered those questions, and there is no need to consider them here further.

Justice Blackmun goes on to say: ''However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.''

Why is that so important? Let us go back to the language of the first amendment. It is very short: ''Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.''

Well, the free exercise clause obviously would tend in the opposite direction of this case: ''Government shall make no law prohibiting the free exercise of religion.'' So one should be free to practice religion in America. That is what the Constitution guarantees. But this other portion, the establishment clause says: ''Congress shall make no law respecting an establishment of religion.'' Now, some people like to do a little bait and switch with the specific article, the definite article. They substitute ''the'' for ''an,'' and ''the'' is specific and ''an'' is general. I do not know if we are all grammarians here this evening, but it matters. ''A baseball game'' is different than ''the baseball game.''

''Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.'' What if it said instead: Congress shall make no law respecting the establishment of religion? Would that matter?

Mr. Speaker, I think it would matter a great deal, because if it is religion that we are concerned about rather than an establishment of religion, an instance, one of many, then I think we

have given some ammunition to those who say the real purpose of this clause in the first amendment is to say, no religion can be discussed. But if what the Constitution is enjoining us to do is not to make any law respecting particular religions, particular kinds of religions, then it is something else entirely different.

Mr. Speaker, I do not know that we can this evening, to everyone's satisfaction, resolve this basic question of whether the establishment clause in the first amendment should be better interpreted as barring the government from giving preferment to a particular religion, on the one hand, or rather as requiring the complete and total elimination of any reference to God in our public institutions on the other hand. But I think it is awfully clear that that is what is at stake here, because the court, the Ninth Circuit Court is troubled by the fact that there is the most conceivably abstract reference possible to God, not to even religion or to a specific religion, but simply to God.

I am put in mind, and this will escape almost all of my hearers, of a National Lampoon parity of ''Desiderata'' called ''Deteriorata.'' This was popular in the 1970s. And they sort of made fun of the well-known, at the time at least, ''Desiderata,'' and in ''Deteriorata'' they said, ''Therefore, make peace with your God, whatever you conceive him to be, Harry Thunderer or Cosmic Muffin.'' A little bit of humor that illustrates the point that one person's God is not another person's God is not another person's God. In fact, what God is, in the minds of physicists, it could be the entire universe as we know it. For animists, it could be the plants or the animals.

□ 2100

God is as general and as high on the ladder of abstraction as one can be, and it is very different, this reference to God, than a particular religion.

That is important, Mr. Speaker, because I think the court betrays its fundamental error in logic when it says, and I will find the precise language here, but it says essentially that for constitutional purposes there is no distinction between the words ''under God'' in the Pledge and ''under Jesus'' or ''under Vishnu'' or ''under Zeus.''

That is what the opinion says. And I think there is a world of difference. There is a world of difference, because one is as respectful as possible of the right that is guaranteed in the rest of the first amendment, the free exercise of one's particular religion. It does not give a preferment to any religion, which is what the establishment clause at a minimum is meant to guard against.

Mr. Speaker, here is precisely what the Ninth Circuit Court of Appeals said on this point:

''A profession that we are a nation under God is identical for establishment clause purposes to a profession that we are a nation under Jesus, a nation under Vishnu, a nation under Zeus, or a nation under no God, because none of these professions can be neutral with respect to religion.''

Of course, here is the rabbit in a hat. It is interchangeable for the Ninth Circuit in this opinion that we might be dealing with religion as a general noun, a class of things, the dictionary definition of religion, which could be almost anything, on the one hand; or a religion, a specific religion.

And again, that gets us back to the fundamental question of what the first amendment means. Does it mean that government shall make no law respecting an establishment of religion; or, in fact, forget the business about the definite article, but just religion? Maybe ''establishment'' should be read out of the first amendment: ''And government shall make no law respecting a religion.'' That would certainly be directly to the point made by the Ninth Circuit today.

It is worth drawing attention to what the Ninth Circuit believes here because not all the judges were in agreement. There was a two-person majority and a one-person dissent. And in a three-judge panel, of course, that is all it takes, is two judges.

Judge Fernandez, circuit judge in the Ninth Circuit Court of Appeals, said this: ''We are asked to hold that inclusion of the phrase 'under God' in this Nation's Pledge of Allegiance violates the religion clause of the Constitution of the United States. We should do no such thing. We should, instead, recognize that those clauses were not designed to drive religious expression out of public thought; they were written to avoid discrimination.

''We can run through the litany of tests and concepts which have floated to the surface from time to time. Were we to do so, the one that appeals most to me, the one I think to be correct, is the concept that what the religion clauses of the First Amendment require is neutrality; that those clauses are, in effect, an early kind of equal protection provision and assure that government will neither discriminate for nor discriminate against a religion or religions . . . when all is said and done, the danger that 'under God' in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody's beliefs is so minuscule as to be de minimis. The danger that that phrase presents to our First Amendment freedoms is picayune at most.

''Judges, including Supreme Court Justices, have recognized the lack of danger in that and similar expressions for decades, if not for centuries, as have presidents and members of our Congress.''

At this point, Judge Fernandez cites four preceding Supreme Court opinions and goes into some great detail with his authority. He refers to the case of the County of Allegheny, to which I made reference earlier, in which the majority said, ''Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief.''

Now, the Seventh Circuit Court of Appeals decided a case very similar to this one, and the Seventh Circuit is, of course, a different jurisdiction of equal dignity with the Ninth Circuit Court of Appeals. And because there was no identical case previously decided by any precedent in the Ninth Circuit, the panel in this case was required to at least acknowledge it, and they did.

They said the only other court to consider this was the Seventh Circuit, and even though the Seventh Circuit decided it consistently with the Supreme Court dicta, we are going to go the other way. So they acknowledged they are blazing a new trail out there in the Ninth Circuit.

Again, whatever one feels about the decision, this takes us back to the question of the rule of law and predictability. When precedent does not matter, when we are always trying to move that ratchet one more notch, we are always trying to take the law in new directions and expand it and make sure it is a living organism and reflective of what is new and modern, there is not any predictability, and it becomes the rule of men and not law.

Judge Fernandez went on to say, ''such phrases as In God We Trust'' or ''under God'' have no tendency to establish a religion in this country or suppress anyone's exercise or non-exercise of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity. Those expressions have not caused any real harm of that sort over the years since 1791 and are not likely to do so in the future. As I see it, that is not because they are drained of meaning. Rather, as I have already indicated, it is because their tendency to establish religion (or affect its exercise) is exiguous. I recognize that some people may not feel good about hearing the phrases recited in their presence, but, then, others might not feel good if they are omitted. At any rate, the Constitution is a practical and balanced charter for the just governance of a free people in a vast territory. Thus, although we do feel good when we contemplate the effects of its inspiring phrasing and majestic promises, it is not primarily a feel-good prescription.

''In West Virginia Board of Education v. Barnette, for instance,'' and remember, the Barnett case which I discussed earlier is the one involving the Pledge of Allegiance and the flag salute, in which the court held that it is not constitutional to force people to do these things, to say these things, to recite the Pledge. If people do not believe that America is a country that stands for liberty and justice for all, then they do not have to recite the Pledge. That is what the court said there.

''In West Virginia Board of Education v. Barnett . . . '' Judge Fernandez says,

''the Supreme Court did not say that the Pledge could not be recited in the presence of Jehovah's Witness children; it merely said they did not have to recite it. That fully protected their constitutional rights by precluding the government from trenching upon 'the sphere of intellect and spirit.' As the court pointed out, their religiously based refusal 'to participate in the ceremony [would] not interfere with or deny the rights of others to do so. . . . We should not permit Newdow's feel-good concept to change that balance.''

So this is a different judge of the Ninth Circuit giving us a very different point of view from the minority, and citing, I think rather more correctly, the holding in Barnette.

''My reading of the stelliscript suggests that upon Newdow's theory of our Constitution,'' and Newdow, remember, is the plaintiff in this case, the father whose daughter goes to school and has to watch as others recite the Pledge of Allegiance, ''My reading of the stelliscript suggests that upon Newdow's theory of our Constitution, accepted by my colleagues today, we will soon find ourselves prohibited from using our album of patriotic songs in many public settings. 'God bless America' and 'America the Beautiful' will be gone for sure, and while use of the first and second stanzas of the Star-Spangled Banner will still be permissible, we will be precluded from straying into the third. And currency beware! Judges can accept those results if they limit themselves to elements and tests, while failing to look at the good sense and principles that animated those tests in the first place.''

So judge Fernandez is now giving us a view of where we might be headed if this decision holds and becomes law, the decision from which he dissented.

He says, ''What about God Bless America in a public setting?'' What about it? What if it is the Marine Corps band? What if it is on the steps of the Capitol? Is that it? Is it all over for God bless America on the Capitol steps, or performed anywhere by our people, our men and women in uniform?

Perhaps that is the sort of thing designed to scare people away from the results in the case at hand, which is not about God Bless America. But remember the decision in Allegheny, in which we had Justice Kennedy in his opinion dialogue with Justice Blackmon in the majority saying, Mr. Justice, if you go this way, if you say no creche, no menorah, then I think you are going to have to take a look at the Pledge of Allegiance and our motto in God We Trust, and you had the majority in that case say, Oh, pshaw, that is not what we mean. Do not worry about the Pledge or the motto, and here we are today, just as Justice Kennedy predicted, worrying about the Pledge.

So perhaps we ought not to dismiss out of hand what Judge Fernandez is telling us: All right, if we do what the Ninth Circuit wishes us to in the Newdow case today, then we had better be prepared to get rid of God Bless America, we had better be prepared to get rid of that motto In God We Trust, right over the Speaker pro tempore's head, and we had better be prepared to get it off of our currency, because the same principle must apply. That is what Judge Fernandez says.

So he says, ''Judges can accept those results,'' these extensions of the principle in Newdow, ''if they limit themselves to elements and tests, while failing to look at good sense and principles that animated those tests in the first place. But they do so'', judges would be doing so, ''at the price of removing a vestige of the awe we all must feel at the immenseness of the universe and our own small place within it, as well as the wonder we must feel at the good fortune of our country. That will cool the febrile nerves of a few at the cost of removing the healthy glow conferred upon many citizens when the forbidden verses or phrases are uttered, read, or seen.

''In short,'' he concludes, ''I cannot accept the eliding of the simple phrase ''under God'' from our Pledge of Allegiance, when it is obvious that its tendency to establish religion in this country or to interfere with the free exercise (or non-exercise) of religion is de minimis.''

And he drops a footnote at this point, because there are going to be constitutional scholars who are going to say, wait a moment, are you saying there is such a thing as a constitutional violation that is so small we will just ignore it? And he is saying, that is not what I mean at all. ''Lest I be misunderstood, I must emphasize that to decide this case it is not necessary to say, and I do not say, that there is such a thing as a de minimis constitutional violation. What I do say is that the de minimis tendency of the Pledge to establish a religion or to interfere with its free exercise is no constitutional violation at all.''

Mr. Speaker, I am sure that almost everyone in the country will end up having an opinion about this case, but I think it is very important that everyone in the country, as we enter into this debate, not assume that they know everything about it. They ought to take the time, as we have here this evening, to examine the facts.

We were, of course, defendants in this case. We have a real stake in it. But it matters, for example, that the plaintiff in this case specifically pleaded or specifically alleged that she, or was her father pleading that his daughter was not required to recite the Pledge of Allegiance. So this is not a case about someone being required to say the Pledge, which happens to include the words ''under God.''

That is an important fact to bear in mind. It may not affect Members' opinions one way or another in the end, but for some people the notion that someone might be coerced is very material, and those people should note that the Supreme Court dealt with that question 60 years ago. That is not an open question. We cannot be forced to say the Pledge in this country.

I pulled up the legislative history because what the court did today is throw out an act of this Congress. I thought it was instructive in reading the court's opinion that they said that the reason that Congress did what it did was very important. Let us take a look at Congress' motive, they said. What was the purpose in enacting the statute? That might tell us whether what Congress was really trying to do this on the sly by inserting those words was to promote religion in violation of the First Amendment.

They said, and I ought to be sure to quote the opinion directly to make sure that I do not mischaracterize it, but they said, in essence, that the legislative history in their mind was clear evidence of an unconstitutional purpose. Then they quoted a very, very small part of it.

The problem, they say, is that when the Congress did this in 1954, and Mr. Speaker, I will have it here in just a moment, that the purpose of the Congress was not establishing a religion.

□ 2115

That is the language that they quote. It rather befuddles one to understand why, therefore, they infer that was the purpose. Here is the legislative history that they quote: ''The sponsors of the 1954 act expressly disclaimed a religious purpose.'' So in those days, in 1954, when political correctness was not at large, they still did not get tripped up by the test that we are applying now in 2002. They said: ''This is not an act establishing a religion.'' The act's affirmation of ''a belief in the sovereignty of God and its recognition of 'the guidance of God' are endorsements by the government of religious beliefs,'' the court says. But the legislature, this Congress at the time that we passed the law, said that there was no such purpose.

The establishment clause they say is not limited to religion as an institution. And so they are again retreating to this abstract notion of all religion being the problem, not just an establishment, even though that is the plain word of the first amendment.

Here is what the legislative history says, Mr. Speaker. I have taken it from our official documents in May 1954. They say: ''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.'' That was their purpose. ''The consciousness of the American people will be more alerted to the true meaning of our country and its form of government.'' That, Mr. Speaker, is a secular purpose. In this full awareness we will, I believe, be strengthened for

the conflict now facing us and more determined to preserve our precious heritage. ''Fortify our youth in their allegiance to the flag by their dedication to one nation under God.''

So the purpose is to fortify our youth in their allegiance to the flag. Is that not a secular purpose? So it is a legislative history as important as the Ninth Circuit says it is, I think it pays to read it. They went on to say, ''It should be pointed out that the adoption of this legislation in no way runs contrary to the provisions of the first amendment to the Constitution. It is not an act establishing religion or one interfering with the free exercise of religion.''

So what they did in Congress at the time was look to what they thought was the law, the decisions of the Supreme Court interpreting the first amendment. ''The Supreme Court has clearly indicated that the references to the Almighty which run through our laws, our public rituals, and our ceremonies in no way flout the provisions of the first amendment.'' Then they cite the Supreme Court authority of the day.

So what has happened is between then and now, perhaps, the Constitution has changed. The language of the first amendment has not changed. It is the very same language. The Congress did the best it could at the time. They relied on the Supreme Court, which clearly indicated that ''the references to the Almighty which run through our laws, our public rituals, and our ceremonies in no way flout the provisions of the first amendment.'' They went on to say in 1954: ''In so construing the first amendment, the Court,'' referring to the Supreme Court, ''pointed out that if this recognition of the Almighty was not so, then an atheist,'' the plaintiff in this case, ''could object to the way in which the Court itself opens each of its sessions, namely, 'God save the United States and this honorable Court.' ''

Well, today, across the street at the United States Supreme Court that is how the Court opens its sessions. They still say as they did in 1954, ''God save the United States and this honorable Court.'' So these questions are all of a piece, the motto, Mr. Speaker, over your head; indeed, the fact that the great law givers of all time ring this Chamber, and that the central one who looks directly at you is Moses, all of these things are of a piece; and it is quite clear the slope that we are on.

The legislative history makes it very clear that to the extent that it was possible for human beings to do so in 1954, the drafters and the Members of Congress at the time went out of their way to make sure that they were following the guidance of the United States Supreme Court.

What has happened over the last several decades intervening makes it clear that whatever one's view about whether the law should be a living document on the one hand or whether it should be a text that means from age to age, whatever the society or perhaps the Court thinks it ought to mean, that that question looms very, very large. We may not ever know if that is the rule that we follow what the law is and we will have to wait until the oracles tell us.

Here in Congress as we seek to write laws consistent with the Constitution, we simply do not have sufficient guidance when all we have is the text of the Constitution and all of the Court's decisions interpreting it, because those can be changed and are very mutable, and precedence are only so good as the paper they are written on. But they can be overturned at will.

The fact that the Seventh Circuit has already disagreed with the Ninth Circuit and the Seventh Circuit came first and that that precedent was ignored here; the fact, Mr. Speaker, that the very remedies that the plaintiff were seeking here are all illegitimate remedies and the Ninth Circuit found that that was so, none of that seemed to slow them down. It is worth bringing to the Members' attention that what Newdow was asking for here is that the court should order the President of the United States to alter, modify or repeal the Pledge. So he is drafting the complaint. He has brought a lawsuit, and he wants the court to order the President to alter, modify or repeal the Pledge by removing the words ''under God.'' He asked for one other element of relief. He wanted the court to order the United States Congress immediately to act to remove the words ''under God'' from the Pledge.

Well, now, in our juris prudence in America you cannot do that. The courts cannot do that. The President is not an appropriate defendant in an action challenging the constitutionality of a Federal statute. Period. And in light of the speech and debate clause just as much part of the Constitution as is the first amendment, article 1, section 6, clause 1: ''The Federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation.''

The words that the plaintiff in this case is challenging included the Pledge of Allegiance were enacted into law by statute by this Congress; and therefore, no court may direct this Congress to deleted those words any more than it may order the President to take such action. An injunction against the President is not in order, and an injunction against the Congress is not in order. And that is all that the plaintiff was asking for, so there is nothing left of the case. And yet, even after acknowledging these things, the Ninth Circuit moved on.

The Ninth Circuit also just zipped right past the article 3 standing question even though that is jurisdictional, even though you must address standing in order to have a case to decide at all. And they skipped beyond the article 3 holding of the United States Supreme Court that ''the psychological consequence presumably produced by observation of conduct with which one disagrees is not an injury sufficient to confer standing under article 3 even though the disagreement is phrased in constitutional terms.''

That is a holding that the Ninth Circuit Court says is still good law, and they just breeze right past that as well.

Now, Mr. Speaker, we may find after an en banc court of the Ninth Circuit takes this case and rewrites it, that these mistakes are corrected. We may find even a different result in the case; but at a minimum I would expect that if the same result is reached, it will be reached in a much more legitimate manner than this.

But what are we to think in the meantime? The Ninth Circuit is a big circuit. It governs a lot of States. My whole State of California, 30 million people, Nevada, Arizona, Washington, Oregon, Montana, Alaska, Hawaii. Public school students in all of these States, what are they to do on the anniversary of September 11 next? Do they say the Pledge at all? Do they say it the old way? The new way? What are their teachers to do and what are their parents to do?

We do not know because we now find when judges make new law that none of us knows really what the law is.

Some of our constituents are already lighting up the phones saying, Congress has got to do something. But the truth is in our system when a court throws out an act of Congress on constitutional grounds there is nothing to be done about it. The Constitution does indeed trump acts of Congress; and the Court, not the Congress is the ultimate arbiter of the constitutionality of statutes. Now, I suppose we could reenact it in precisely the same way, but that would be something of a tedious, if not fatuous, merry-go-round. I do not think that would be serving our constituents well.

I think, rather, we can expect with the leadership of the President of the United States and the Attorney General that there will be a petition for rehearing en banc in this case, and that the Ninth Circuit itself will have a chance to reconsider the enormous impact they are having without perhaps giving just that ounce of good judgment that would have made the difference if they had taken into consideration what the Supreme Court has said about this.

The only things that the Supreme Court has said about the Pledge, albeit in dicta, are exactly the opposite from the result that was achieved in this case. The only thing that the Supreme Court has said about this question of whether observing something that one does not like being the source of injury, runs exactly the opposite way from the decision in this case.

I think if a court normally sets out to avoid constitutional questions and decide cases on other simpler grounds, statutory grounds, procedural grounds and so on, there were ample ways that

a court could have handled this Newdow litigation. Newdow was a pro se plaintiff. That means he represented himself without a lawyer although he has had some legal training apparently. He made a lot of mistakes in his pleadings. They were very sloppy. And the court below, even though it was lenient, the district court, the trial court, threw out his case.

The Ninth Circuit Court of Appeals came and resuscitated it. They had to put a lot of Band-aids on it because procedurally it was in bad shape. It took a nearly superhuman effort to put this case up on stilts so that we could get the constitutional question for decision. It was to all appearances, Mr. Speaker, something of a reach, and I think our country deserves better. But we shall see. We shall see how this is accepted by the public, what the court itself may do about it.

But at a time when so many people are working so hard to pay their taxes, at a time when the courts are as busy as they are, and most middle Americans know if they were to bring a lawsuit it might be 3 to 5 years before they could get a decision because of the backlog and the expense, is it not interesting that the people in San Francisco seem to have sufficient time on their hands so to finely perch this question of angels on the head of a pin, so that they can reach a constitutional question that was not procedurally put to them in a way that required its decision?

I think laying out a case in this way, Mr. Speaker, will it better inform the debate? And that while I recognize with 435 Members in the House we might have some diversity of opinion about the case, even here it is bound to occupy the minds of our constituents for some time to come.

I appreciate the indulgence of the Chamber in considering it at first blush because the opinion was just issued today, this evening.

□ 2130

PRESCRIPTION DRUG BENEFIT

The SPEAKER pro tempore (Mr. KERNS). Under the Speaker's announced policy of January 3, 2001, the gentleman from New Jersey (Mr. PALLONE) is recognized for 60 minutes.

Mr. PALLONE. Mr. Speaker, let me say to the gentleman from California that I listened very carefully to what he said in analyzing that Federal court opinion that came down today; and I do agree with him that the opinion does not make any rational sense and that the use of the term ''in God we trust'' does not in any way violate the Constitution.

I wanted to take to the floor this evening, however, as I have so many times in the last couple of months, and talk about the need to pass a prescription drug benefit and also to give a little status report, if I can, about where I think we are on this, because I am very concerned from some of the statements that I have been hearing today and some of the reports in the media, as well as some of the things I am hearing tonight, leading up possibly to Committee on Rules action or inaction, that there is a real possibility the Republicans will not bring up their prescription drug bill for a vote before we recess for July 4, for the Independence Day celebration.

I say that because for several months now I have been asking that the Republicans bring up this bill because I think that the issue of prescription drugs for seniors and the issue of increasing high drug prices is one of the major issues that the Congress needs to address.

When I go home to New Jersey, to my district in New Jersey, many seniors and even people in general, not just seniors, complain to me constantly about drug prices, about their inability to buy prescription drugs and the consequences that fall to their health because of their inability to buy the prescription drugs, the medicines that they need.

So I was rather happy a couple of months ago when the Republican leadership announced that they would bring a prescription drug bill to the floor before the Memorial Day recess, and I was disappointed when we went home for Memorial Day and that had not happened.

I was once again hopeful when after the Memorial Day recess in early June we heard the Republican leadership once again say they were going to bring a prescription drug bill to the floor before the July 4 recess.

Last week, we actually did have the Republican bill unveiled; and we had a 3-day and all-night marathon in the Committee on Energy and Commerce, where I serve, where the bill was discussed and the Democratic alternative was discussed. Although I think that the Democratic bill is the only really meaningful bill, and I will discuss that in a minute, I was at least happy to see that we did have the opportunity in committee to discuss medicines or prescription drugs for seniors.

So I would be extremely disappointed and very critical of the Republican leadership once again if we find out tonight or tomorrow that they still do not intend to bring this bill up. I am not surprised because I have said many times that the Republican bill is basically a sham. It does not provide any benefit for seniors. It has no real hope of providing any kind of prescription drug benefit for seniors. It does not even try to reduce price, the price of drugs, but at least if we had the opportunity to have this bill on the floor tomorrow or Friday we could then offer our Democratic substitute and see which side gets the most votes.

I am actually here tonight, Mr. Speaker, because I understand that within the next half hour or so we will be hearing from the Committee on Rules as to whether or not they will be considering the Republican bill tonight, either at 10:00 or 10:30 or 12 o'clock or possibly tomorrow morning. If we hear that they are not, then that is a very good indication that the bill will not come to the floor for a vote. So I am waiting here, Mr. Speaker, to see what the Committee on Rules is going to do, hoping that they will allow this bill to come up and we will have a debate on probably one of the most important issues facing this country.

I am still hopeful, although I have less and less reason I suppose to be hopeful, given some of the comments that have been in the media today.

Let me explain why the Republicans may not bring the bill up. The reason they may not be able to bring the bill up is because they do not have the votes. The talk this afternoon around the House of Representatives was that they were shy 20 or 30 votes on the Republican side; and, of course, they are getting practically none, if any, Democratic votes.

Some of the reasons that were articulated today in Congress Daily, in the lead story, says, House GOP still shy of majority to pass prescription bill, and it mentions about three or four reasons why different Members were having problems with the Republican bill, which I think go far to explain why the bill is a bad bill.

So I would like to mention some of these reasons. It says lawmakers, this is the Republicans now, variously want more money for home State hospitals and rural health care, more attention to drug costs rather than coverage and guarantees to protect local pharmacies. The GOP leadership aides conceded that these groups of Republicans, in the face of the very few Democrats expected to cross party lines on a vote for the GOP bill, have left the measure short of the 218 votes needed to pass it.

Let us talk about some of these issues that some of my Republican colleagues, rightfully so, believe are wrong or do not justify their voting for the Republican bill. Maybe before I do that I should say that I am very happy to see that there might be 20 or 30 colleagues on the other side of the aisle, on the Republican side, who would be willing to say to their leadership that they do not want to vote for this bill, because I have said many times, and again, I will give some third party documentation, that this bill is nothing more than a boon to the pharmaceutical drug industry. In other words, the reason why the Republicans have put forth a bad bill and one that will not work is because they are beholden to the brand-name drug industry.

If my colleagues doubt what I say, let me mention that last week when we had a markup in the Committee on Energy and Commerce of the Republican bill, last Wednesday, a week ago today, they actually had to adjourn, the chairman adjourned the markup, the committee markup at 5 o'clock, because the Republicans had to go to a fund-raiser that was primarily being underwritten by the prescription drug