

# Crusading Against the Courts

The New Mission to Weaken the Role of the Courts in  
Protecting Our Religious Liberties



**Justice at Stake**  
c a m p a i g n

*Written by*  
**Bert Brandenburg and Amy Kay**

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Justice at Stake is a nonpartisan national campaign of more than 45 partners working to keep our courts fair, impartial and independent. Justice at Stake Campaign partners educate the public and work for reforms to keep politics and special interests out of the courtroom—so judges can do their job protecting our Constitution, our rights and the rule of law. The positions and policies of Justice at Stake partners are their own, and do not necessarily reflect those of other campaign partners.

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## I. Introduction

For more than two centuries, America has shown the world how a constitutional democracy can support faith and freedom. Helping both to thrive will never be simple. Religion by its nature often deals in profound faith and personal absolutes. Political society seeks to accommodate difference and diversity. A democracy could attempt to echo the religious beliefs of the majority, but America's founders chose a different course. Chastened by the religious dogma of old Europe that their fathers and mothers fled, they wrote a Bill of Rights.

Thus, the very first amendment to the Constitution begins, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Thomas Jefferson referred with "sovereign reverence" to what he famously dubbed the First Amendment's "wall of separation between Church and State."<sup>1</sup> Added James Madison, the chief drafter of the Bill of Rights: "A mutual independence is found most friendly to practical Religion, to social harmony, and to political prosperity."<sup>2</sup> Freed from state entanglements, religion has flourished as a central force in American life and history. Today, the United States is home to more than 2,000 different faiths and denominations,<sup>3</sup> living peacefully alongside many agnostics and non-believers.

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"Congress shall make no law respecting an establishment of  
religion, or prohibiting the free exercise thereof."

—*First Amendment, Constitution of the United States*

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In a nation of laws, courts create critics every time someone wins and someone loses. But when one side claims a deeply held religious justification for its position, contrary decisions can seem to sanction sin. As New York University Law School Professor Noah Feldman explains, the "question of the right relationship between religion and government also underlies some of the more profound debates that are very much alive and which will come before the judiciary in the future. And those are the debates about when life begins, when life ends, and with whom one can form the most intimate bonds of partnership in life."<sup>4</sup>

This Justice at Stake Issue Brief documents a recent wave of religious-based attacks on the judiciary and how they are spilling over into legislatures, judicial elections and a rising culture of vitriol designed to weaken the legitimacy of the courts that protect our rights. These attacks often seek to undermine the independence of the courts

by injecting religious politics into the selection of judges, how cases are decided, and whether to deny certain Americans their day in court.

Courts are not perfect. And some people of faith are honestly repelled when decisions in controversial matters conflict with their deeply held tenets. But these good-faith believers are being abetted by political opportunists for whom the war on the courts is a way to harvest votes, donations and daily victories in the 24/7 culture wars. A rising outrage industry seeks to paint fidelity to the law as an assault on faith. Their mission, year in and year out, is to chip away at our constitutional culture.

The Constitution does not mention God. But it does devote its third article to the establishment of a judiciary strong enough to resist political pressure and protect human liberty. And it offers every word of its text as a master blueprint for the courts that enforce it. Judges swear an oath to the Constitution, not any sacred text. Their hands may rest on a Bible, Torah or Koran. Their spirits may be promised to a God in whom they deeply believe. But here on earth, they pledge their duty to the Constitution and a nation of laws.

Most Americans of faith have no difficulty revering God and treasuring their Constitution. They intuitively distrust political or religious tampering

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When any group of people insists that the rule of law must give way to their religious views, Americans of all beliefs ought to worry.

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with our system of checks and balances. They may not agree with every court decision—who does?—but above all they want courts to be fair and impartial.<sup>5</sup>

When any group of people insists that the rule of law must give way to their religious views, Americans of all beliefs ought to worry. When

these complaints lead to political tampering with the judiciary, as they did during Terri Schiavo's end of life case in 2005, Americans need to stand up for the courts that stand up for their rights. This Issue Brief is designed for policy makers, civic leaders, judges, bar leaders, clergy, and everyone else who cares about protecting America's freedom of faith, and its heritage of liberty under law.

## II. Closing the Courthouse Doors: Legislative Efforts to Deny Church-State Litigants Their Day in Court

When politicians try to exceed their authority under the Constitution, courts are called upon to act as referees. When these disputes involve church-state issues, or the outcomes offend someone's religious views, losing litigants have sometimes lashed out at the very idea of judicial review. In Congress and in many states, legislators have been busy devising legislation to circumvent the courts. Such measures are often called *court-stripping* efforts, because they seek to strip the courts of jurisdiction and power to uphold the law. Since 2000 a bundle of bills have been introduced to deny church-state litigants a day in court to argue for their constitutional rights, erect barriers to their access to the courts, evade court decisions, and even make it an impeachable offense for a judge to hear certain church-state claims.

At their core, such court-stripping efforts threaten the whole point of Constitutional rights. As Justice Robert Jackson wrote in *West Virginia v. Barnette*, "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."<sup>6</sup>

## Court-stripping in Washington

Federal court-stripping efforts often throw issues of federal law to the state courts. This raises the very real prospect that the law of the land could be different in different states: citizens in Nebraska could have a different set of federal constitutional rights than citizens in Florida or Montana. Such inconsistencies are why Chief Justice John Roberts called court-stripping "bad policy" in his confirmation hearings.<sup>7</sup> Indeed, Senator Barry Goldwater, a frequent critic of court decisions,<sup>8</sup> called court-stripping a "frontal assault on the independence of the Federal courts [that] is a dangerous blow to the foundations of a free society."<sup>9</sup> Such warnings have not stopped numerous recent efforts to manipulate the jurisdiction of the federal courts.

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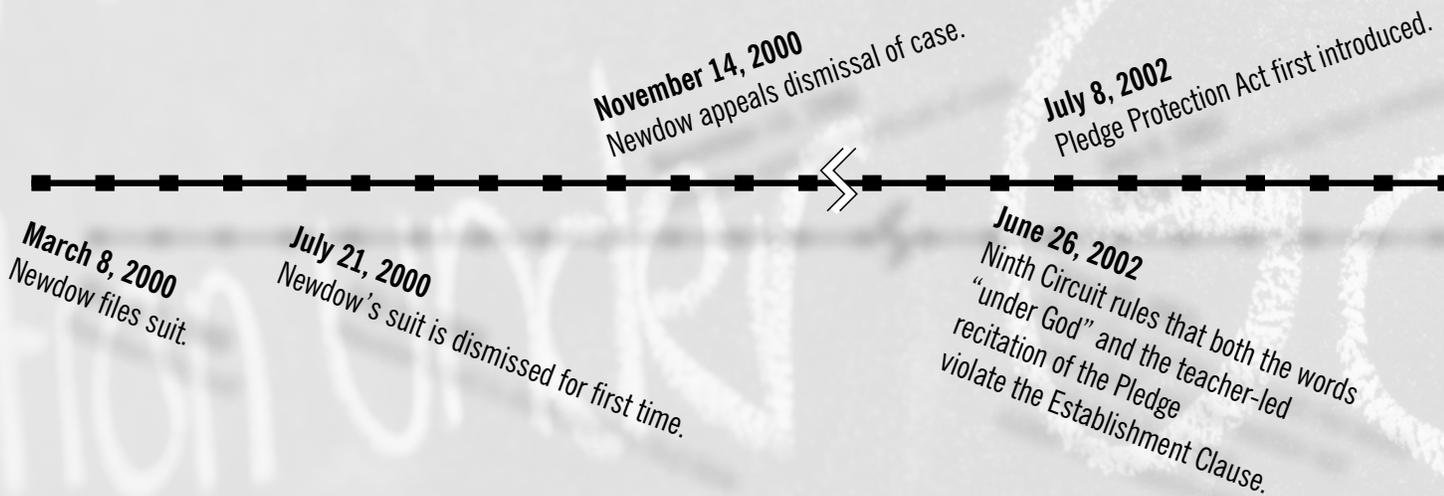
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### *The Pledge Protection Act*

On March 8, 2000, a California atheist filed a lawsuit in federal court challenging the constitutionality of a policy that required his child's public school teachers to lead students in reciting the Pledge of Allegiance.<sup>10</sup> He argued that because the Pledge contains the words "under God," it is a religious exercise that the state cannot sponsor in public schools.<sup>11</sup> His suit was initially dismissed by a federal district court.<sup>12</sup> On appeal, however, on June 26, 2002, the Ninth Circuit Court of Appeals ruled that both the statute that had inserted the words "under God" into the Pledge in 1954, as well as the teacher-led recitation of the Pledge, violate the Establishment Clause of the First Amendment.<sup>13</sup>

The court's decision triggered a torrent of angry replies. Rev. Louis Sheldon of the Traditional Values Coalition called the judges who made the

## Timeline of Events Leading to Pledge Protection Act



decision “robed tyrants.”<sup>14</sup> Christian Coalition founder Pat Robertson said if “something much more terrible than September 11th befalls our beloved nation,” and people ask “Where was God,” then the answer might be, “He was excluded by the 9th Circuit.”<sup>15</sup> But the response went well beyond words. Just twelve days after the ruling, Congressman Todd Akin from Missouri introduced the “Pledge Protection Act.”<sup>16</sup> The bill would have stripped the lower federal courts of jurisdiction to hear or decide any challenge to the Pledge of Allegiance under the Constitution’s First Amendment.<sup>17</sup> Akin said the bill was needed to “rein in a renegade judiciary.”<sup>18</sup> After an appellate rehearing limited the scope of the ruling<sup>19</sup> the U.S. Supreme Court decided that the plaintiff did not have legal standing to bring the case because he was not his daughter’s custodial parent.<sup>20</sup> The constitutional issue was postponed, though new litigation is underway.<sup>21</sup>

The Pledge Protection Act was reintroduced in the 108th, 109th, and 110th Congresses, and its subsequent iterations have struck even harder and more broadly at the courts. They would strip the Supreme Court and all other federal courts of jurisdiction to hear or decide any case pertaining

to the interpretation or constitutional validity of the Pledge of Allegiance.<sup>22</sup> During consideration of the legislation in 2004 and 2006, lawmakers even rejected amendments to allow federal courts to hear such cases from schoolchildren whose religions prohibited them from reciting the Pledge.<sup>23</sup> (The change was proposed in order to uphold religious freedom under the U.S. Supreme Court’s historic 1943 ruling in *West Virginia v. Barnette*, where Jehovah’s Witnesses successfully challenged a state policy mandating that schoolchildren recite the Pledge of Allegiance even when it violated their religious beliefs.<sup>24</sup>) Angry lawmakers also rejected a bipartisan proposal to preserve the Supreme Court’s power to review lower court decisions on these issues.<sup>25</sup> The amended 2006 version, reintroduced in 2007, would even yank cases out of court that were filed before the bill becomes law.<sup>26</sup>

In 2004 and again in 2006, the House of Representatives passed the bill shortly before the November elections.<sup>27</sup> The Senate Republican Policy Committee argued that the bill “sends a long-needed signal to the judicial branch that the people will not tolerate” such rulings, and that the courts should “leave the core meaning of the



September 23, 2004  
U.S. House of Representatives passes  
Pledge Protection Act.

Constitution to the people.”<sup>28</sup> But some conservatives turned against the bill in 2006 and sided with moderate and liberal colleagues who resisted political tampering with checks and balances. When Congressman Bob Inglis, a conservative South Carolina Republican, voted against the bill in committee, he issued a press release arguing that “citizens deserve the full protection of the Constitution and a fully empowered federal court system to protect those rights. . . . This is the wrong way to try to protect our clear right to recite the pledge of allegiance.”<sup>29</sup> During the debate on the House floor, Congressman Dana Rohrabacher, a conservative Republican from California, said, “Here we are neutering our ability to have protections for the constitutional things we believe in the future, in order to achieve a temporary, I might even say a political, goal in the Pledge of Allegiance. The supporters of [the Pledge Protection Act] will come to regret this day when they are being quoted by some future liberal Congress in order to strip [a conservative Supreme] Court of a decision made to protect our liberties.”<sup>30</sup>

### *The Constitution Restoration Act*

In 2001, Alabama Chief Justice Roy Moore had a 5,280-pound granite monument hauled into the central rotunda of the court.<sup>31</sup> The monument depicted the Ten Commandments on its top, and references to God from U.S. historical documents on its sides.<sup>32</sup> Declared Moore at the unveiling of the monument, “Today a cry has gone out across our land for the acknowledgment of that God upon whom this nation and our laws were founded....may this day mark the restoration of the moral foundation of law to our people and the return to the knowledge of God in our land.”<sup>33</sup> He later expanded that the God he was referring to was the Judeo-Christian God – the “God of the Holy Scripture.”<sup>34</sup>

The constitutionality of the display was challenged in federal court on the grounds that it violated the Establishment Clause of the First Amendment to the Constitution.<sup>35</sup> The federal district court and the 11th Circuit Court of Appeals agreed that the display was unconstitutional,<sup>36</sup> and the U.S. Supreme Court declined to review the case.<sup>37</sup> Since Moore refused to remove the monument, his colleagues on the Alabama Supreme Court ordered it removed.<sup>38</sup> Alabama’s special Court of the Judiciary found unanimously that Moore had violated the Alabama Canons of Judicial Ethics, and on November 13, 2003, removed him from office.<sup>39</sup> His ouster was later upheld by the Alabama Supreme Court, and the U.S. Supreme Court declined to review it.<sup>40</sup>

Just three months after Moore’s removal from office, the Constitution Restoration Act was introduced in Congress in 2004 by Congressman Robert Aderholt and Senator Richard Shelby, both from Alabama.<sup>41</sup> It was reintroduced in 2005.<sup>42</sup> The legislation struck directly at the court rulings in the Roy Moore case. Like the Pledge Protection Act, the bills threatened to strip all federal courts of jurisdiction, including Supreme Court appeals, to hear a single category of constitutional



The Ten Commandments monument that was installed in the Alabama state judicial building by Chief Justice Roy Moore.

Photo ©—#922918 Index Stock Imagery, Inc./Pat Canova.

cases—in this instance, cases challenging a state actor’s “acknowledgement of God as the sovereign source of law and liberty.”<sup>43</sup> But the Constitution Restoration Act would have gone much further: it would have nullified as binding precedent on the states *all previous or future federal court rulings* on the issues stripped from jurisdiction,<sup>44</sup> thus eviscerating the Supremacy Clause of the U.S. Constitution<sup>45</sup> and reversing any church-state precedent that underpinned the action against Moore. Furthermore, the Act would have allowed Congress to impeach any judge who invoked such jurisdiction.<sup>46</sup>

The language of the Act was written so vaguely that it would have thwarted court review of almost any violation of the Constitutional doctrines separating church and state, so as long as the perpetrator claimed that their behavior was just an “acknowledgment of God as the sovereign source of law, liberty and government.” For example, if a teacher proselytized in public schools, and argued he or she was simply “acknowledging God,” no one could challenge his or her conduct.

The broad language of the Constitution Restoration Act was also aimed at other Ten Commandments disputes that were making their way through the courts when it was introduced. One involved a display of a framed copy of the Ten Commandments (and religious portions of other documents) in a courthouse in McCreary County, Kentucky.<sup>47</sup> The other involved a Ten Commandments monument on the grounds of the Texas state capitol.<sup>48</sup> Both displays were challenged as violations of the Establishment Clause.<sup>49</sup> In both cases, federal courts resolved the challenges using routine doctrine, by considering the purpose of the display in the context of how it was erected and the extent to which the display endorsed religion in that context.<sup>50</sup> In Kentucky, the district court held that the display was unconstitutional, and the Sixth Circuit Court of Appeals affirmed.<sup>51</sup> In Texas, the district court held that display to be constitutional, and the Fifth Circuit Court of Appeals affirmed.<sup>52</sup> The U.S. Supreme Court affirmed both decisions.<sup>53</sup> The sponsors of the Constitution Restoration Act lamented the Kentucky outcome, arguing that it made the case for their brand of court-stripping.<sup>54</sup>

### *The We the People Act*

The We the People Act cuts an even broader swath, seeking to bar courts from ruling on a host of cases involving religious questions and disputes that evoke arguments based on religious viewpoints. Introduced in 2004 and in each Congress since, the bill claims an unfettered Congressional power to limit the jurisdiction of the federal courts (a power that is disputed by legal scholars<sup>55</sup>) and lists a host of complaints against the federal courts and their jurisprudence on particular subjects.<sup>56</sup> It charges, for example, that the Supreme Court's Establishment Clause jurisdiction is "indefensible," and that the federal courts should not be ruling on local laws dealing with "religious liberty, sexual orientation, family relations, education, and abortion,"<sup>57</sup> (ignoring that challenges to those laws are brought to federal court because they are alleged to violate the Constitution).

The Act would strip all federal courts of jurisdiction, including the Supreme Court's appellate jurisdiction, to hear any claim involving state or local laws, regulations or policies relating to the religion clauses of the First Amendment, any claim based on the right of privacy (including those relating to abortion, reproduction, or sexual orientation) and any claim regarding same-sex marriage that is premised on the Constitution's guarantee of equal protection of the laws.<sup>58</sup> Like the Constitution Restoration Act, the We the People Act would nullify earlier decisions in these areas with regard to the states.<sup>59</sup> It would also make it an impeachable offense for a judge to hear prohibited cases.<sup>60</sup> The sponsor of the legislation called it a "preemptive strike" against "out of control federal judges."<sup>61</sup>

### *The Marriage Protection Act*

The Marriage Protection Act is yet another measure aimed at preventing the courts from ruling on a class of cases in part because of religious views about how those cases should be decided. In 1996,

the Defense of Marriage Act defined "marriage" as the union of one man and one woman (for purposes of interpreting federal law and regulations) and allowed states to refuse to recognize other state laws regarding same-sex relationships approximating marriage.<sup>62</sup> The Marriage Protection Act, first introduced in 2003 by Indiana Congressman John Hostettler,<sup>63</sup> would deny a day in court to anyone seeking to challenge the 1996 law.<sup>64</sup> The bill passed the House of Representatives in 2004<sup>65</sup> and has been reintroduced in each subsequent Congress.<sup>66</sup>

In 2004, as the bill moved toward House passage, opponents warned that court-stripping would become a pattern, but advocates of the bill denied it.<sup>67</sup> Just a few weeks later, the House took up the Pledge Protection Act. Congressman Hostettler had been quite clear about his goals along, arguing, "The marriage issue gives us a great political window of opportunity into what Congress can do to limit the courts."<sup>68</sup>

### *The Terri Schiavo Tragedy*

The Terri Schiavo tragedy is the most famous recent effort to use religion to manipulate the role and jurisdiction of the courts. In March of 2005, after years of litigation, the Florida state courts concluded that the law gave Ms. Schiavo's husband the legal right to remove a feeding tube that had kept her alive in a persistent vegetative state.<sup>69</sup> Desperate to get a contrary ruling, and flouting a long history of state court jurisdiction over family law matters, Congressional leaders from both parties pushed through a bill giving the federal courts special jurisdiction to hear new and specious constitutional challenges to the state court rulings.<sup>70</sup> House Majority Leader DeLay said, "No little judge sitting in a state district court in Florida is going to usurp the authority of Congress."<sup>71</sup> (A House Committee also issued subpoenas for Ms. Schiavo, her husband, and several of her caregivers to appear at hearings and a Senate Committee formally "invited" Ms.

Schiavo and her husband to testify,<sup>72</sup> while Senate Majority Leader Bill Frist warned of criminal penalties for “anyone who may obstruct or impede a witness’s attendance or testimony.”<sup>73</sup>) Ultimately, the federal courts declined to rule any differently than the state courts. Wrote federal appeals court judge Stanley Birch, “The legislative and executive branches of our government have acted in a manner demonstrably at odds with our Founding Fathers’ blueprint for the governance of a free people—our Constitution.”<sup>74</sup>

The Schiavo episode also showed how positions on deeper principles—like the proper role for state and federal courts in a federalist system—can be tossed aside in the midst of a court-bashing frenzy. Supporters of the Pledge Protection Act and its ilk argued that jurisdiction should be *taken* from federal courts, and that state courts were entirely capable of deciding federal constitutional questions.<sup>75</sup> But in the Schiavo case, under pressure from a noisy minority, these same representatives and others in Congress decided jurisdiction should be *given* to the federal courts, in order to seek a federal ruling they liked better. Wrote John C. Danforth, an Episcopal minister and former Republican U.S. Senator, “Empowering a federal court to overrule a state court can rightfully be interpreted as yielding to the pressure of religious power blocs.”<sup>76</sup>

### *Other Measures*

Efforts to prevent Americans from vindicating their First Amendment rights in court have not been limited to direct court-stripping. For example, after a federal district court in Indiana ruled that a Ten Commandments display had to be removed from the grounds of the Gibson County courthouse, the House of Representatives passed an amendment to a spending bill prohibiting U.S. Marshals from expending any funds to carry out the judge’s order.<sup>77</sup> The amendment’s sponsor, Congressman Hostettler, wrote to President Bush, imploring him to direct the Marshals not

to carry out the court order: “As you know, the federal judiciary has no constitutional or statutory means by which to enforce its own opinion.”<sup>78</sup> The Administration refused, and the spending amendment did not become law.

Other measures have been proposed to interfere with enforcement and litigation over religion-based issues. One came in response to federal court rulings that a 43-foot cross had to be removed from its perch atop the Mt. Soledad National Veteran’s Memorial. In 2006, Congress passed a law transferring the property to the federal government.<sup>79</sup> The move had the intended effect

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“The marriage issue gives us a great political window of opportunity into what Congress can do to limit the courts.”

—Congressman John Hostettler

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of altering the legal claims in the case to thwart litigants who had been winning cases arguing that the cross constituted an illegal government establishment of religion.<sup>80</sup> Another bill would prevent courts from awarding normal damages and attorney’s fees to litigants whose rights under the First Amendment’s Establishment Clause have been violated.<sup>81</sup> The bill was introduced after the plaintiffs won attorney’s fees in a case challenging the incorporation of statements on intelligent design into a Pennsylvania school district’s curriculum. As passed by the House in 2006, and reintroduced in 2007, the measure would also bar the award of attorney’s fees in the Mt. Soledad litigation.<sup>82</sup> As the Traditional Values Coalition put it, the bill would “remove financial damages from the equation.”<sup>83</sup>

The bluntest anti-court instrument of recent times is the Congressional Accountability for Judicial Activism Act. The measure seeks to negate two centuries of checks and balances by allowing Congress, by a two-thirds vote, to overturn any

Supreme Court decision that invalidates a law on constitutional grounds.<sup>84</sup> Judicial review would be essentially dissolved, and Congress could evade the Constitution.

### **Beyond the Beltway: Court-Stripping In the States**

Echoes of this anger have been heard in many state houses, where lawmakers have tried to strip their own state courts of jurisdiction over many church-state issues. When added together with federal court-stripping efforts, a perilous possibility emerges. If both federal and state courts were stripped of jurisdiction to hear church-state issues, there would be *no forum at all* to review certain government violations of the First Amendment. No court could vindicate the most basic of constitutional rights.

The threat is real. Several states have recently considered resolutions urging Congress to adopt the Constitution Restoration Act. The Louisiana legislature passed such a resolution in 2005, claiming it was necessary to protect the ability of the people of Louisiana to express their faith in public, adding that “the federal judiciary has overstepped its constitutional boundaries.”<sup>85</sup> In 2006, the Idaho legislature adopted a similar measure, which claimed the *McCreary* decision “will be used by litigants who want to remove God from the public square in America.”<sup>86</sup> The Tennessee Senate adopted a substantially similar resolution,<sup>87</sup> and such measures were also considered in Georgia in 2004,<sup>88</sup> and Alabama in 2006.<sup>89</sup>

At the same time, states have also recently seen measures to strip their own courts of jurisdiction. For example, in Arizona in 2007, a proposed amendment to the state constitution would have mimicked the federal Constitution Restoration Act at the state level, by stripping the state courts of jurisdiction to hear challenges to government officials’ conduct involving “acknowledgment of God as the sovereign source of law, liberty or

government.”<sup>90</sup> The sponsor of the measure, state Senator Karen Johnson, introduced the amendment because she disagreed with the way courts have ruled to preserve Constitutional rights in certain church-state cases.<sup>91</sup> She asserted that courts are not supposed to decide when government officials have violated First Amendment rights.<sup>92</sup> “[W]e’re supposed to have religion in everything—I want religion in my government, I want my government to have a faith-based perspective,” she said.<sup>93</sup>

Legislators in Kentucky have also sought to undermine the role of the courts in protecting Constitutional rights. A 2006 measure would have amended the state constitution to prohibit courts from determining that the display of the Ten Commandments on public property is impermissible under the Kentucky constitution.<sup>94</sup> The Family Foundation of Kentucky called the amendment “a defense of the Constitution against activist judges.”<sup>95</sup> In response, one editorial said it “would irresponsibly assault the authority of the courts” and “weaken citizens rights to seek justice . . . . It is dangerous demagoguery—to the point of being unpatriotic.”<sup>96</sup> The amendment was rejected by the state Senate.<sup>97</sup> A 2007 bill would prohibit courts from awarding normal financial damages and attorney’s fees in cases brought to enforce the U.S. Constitution’s Establishment Clause in order to shield violators from the kind of monetary punishment that losing litigants routinely face.<sup>98</sup>

### III. Using My Religion: Religious Identity and the Confirmation and Election of Judges

#### Religious Identity and Federal Judicial Nominations

The U.S. Constitution states that “all . . . judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.”<sup>99</sup> Thus, regardless of their religious beliefs, judges must uphold the Constitution. But the battle to fill two seats on the U.S. Supreme Court in 2005 and 2006 were plagued by assumptions that the nominees’ religions could be a predictor for their future rulings, along with claims that nominees should be confirmed at least in part because of their religious identity.

During their Senate confirmation debates, much was made of the religious identities of Supreme Court nominees John Roberts, Harriet Miers, and Samuel Alito. When two “well-connected Christian conservative lawyers” were sent by the White House to shore up support for the Roberts nomination among social conservatives, they argued that his Catholic conviction was an important selling point.<sup>100</sup> Rick Scarborough of the Judeo Christian Council for Constitutional Restoration praised Roberts as “loyal to the real Constitution . . . and the Judeo-Christian values on which our Republic was founded.”<sup>101</sup> (Days earlier he had reacted to Justice Sandra Day O’Connor’s retirement by admonishing the President that he “has a God-given opportunity to change the balance on the Supreme Court,” because O’Connor had sided with liberals on “abortion, sodomy, [and] public display of the Ten Commandments” and “used the Constitution

as an excuse to force weird social experiments on the nation.”<sup>102</sup> Senator Tom Coburn said, “If you have somebody first of all who has that connection with their personal faith and their allegiance to the law, you don’t get into the *Roe v. Wade* situation.”<sup>103</sup>

But as Roberts’ nomination hearings approached and questions arose regarding his judicial philosophy on a wide array of constitutional questions – including abortion and church-state matters – his supporters decided that religious questions were off limits. When Senators raised questions about Roberts’ views on the First Amendment and the separation of church and state, along with the Constitutional rights that relate to abortion and intimate family relationships, they were charged with anti-Catholic and anti-Christian prejudice. Conservatives accused liberals of a “Christians need not apply” policy,<sup>104</sup> claiming they harbored biased assumptions that a practicing Catholic “couldn’t be trusted to . . . even-handedly administer justice” on issues like abortion and same-sex marriage.<sup>105</sup> In response to Senator Diane Feinstein’s question of Roberts on whether he believed in an absolute separation of church and state, the Concerned Women for America’s Wendy Wright said, “Feinstein is dipping her toe into the very ugly, muddy waters of religious bigotry.”<sup>106</sup> Father Richard McBrien, a Professor of Theology at the University of Notre Dame, defended queries about whether a nominee’s religious beliefs would interfere with the ability to uphold the Constitution. He argued that evangelical and fundamentalist Protestants and conservative Catholics had “forced the issue of religion,” by waging an “unwarranted intrusion of a particular type of Christian religion . . . in the workings of government at the executive, legislative, and judicial levels alike.”<sup>107</sup>

It was after Roberts’ confirmation to the post of Chief Justice, when religious conservatives rebelled against the nomination of Harriet Miers for the second open seat on the Court, that the religious

ante was raised. Miers had a relatively thin public record that made religious conservatives unsure of whether she would reliably rule in their favor.<sup>108</sup> Consequently, most of them expressed extreme displeasure over her nomination and withheld their support.<sup>109</sup> In an effort to vouch for her fealty, the Administration sought to use Miers' religion as a proxy for her judicial views. White House politi-

pro-family to vote in the national elections. . . . They recognized one of the most critical problems facing our nation was the unbridled power of the federal judiciary. . . . they passed out literature in the rain. . . . distributed signs, made thousands of phone calls and walked precinct after precinct in the hopes of bringing reform to the Supreme Court. They did not exhaust all of that energy to

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“It is out of bounds for anyone to pursue a strategy of establishing the religious identity of a judicial nominee as criteria for confirmation.”

– *The Interfaith Alliance*

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cal advisor Karl Rove called influential evangelical James Dobson of Focus on the Family to assure him, as Dobson later revealed, that “Harriet Miers is an evangelical Christian, that she is from a very conservative church, which is almost universally pro-life.”<sup>110</sup> Texas Supreme Court Justice Nathan Hecht, a longtime friend of Miers, was put on a White House conference call with evangelical leaders to convince them of her faith and character.<sup>111</sup> President Bush said, “People asked me why I picked Harriet Miers. They want to know Harriet Miers’ background . . . . And part of Harriet Miers’ life is her religion.”<sup>112</sup> Questioned about the Administration’s motives for promoting Miers’ religious background and ties, White House spokesman Scott McClellan argued it was just “outreach” to help people get to know her.<sup>113</sup> For religious leaders like Pat Robertson, however, these assurances were more significant: he questioned how Republican Senators who voted to confirm Ruth Bader Ginsburg but didn’t intend to support Miers could turn “against a Christian who is a conservative picked by a conservative president.”<sup>114</sup>

Despite this religious branding campaign, most religious conservatives were unsatisfied with Miers’ evangelical profile. Warned the Christian Defense Coalition’s Patrick J. Mahoney: “I was involved in a 20-city tour . . . challenging the pro-life and the

see Harriet Miers nominated to the court. . . . will these activists make the same kinds of sacrifices in the ’06 midterm elections . . . ? . . . Many are asking . . . why should I work so hard only to have the White House let us down with another pick like Harriet Miers?”<sup>115</sup>

Miers eventually withdrew her nomination. The debate over her successor, Samuel Alito, was more like that during the Roberts nomination. As they had before, religious conservatives gave their blessing of Alito in advance.<sup>116</sup> “I trust a friend of mine [the President] who promised me that he would appoint people to the justice system that would be attentive to the needs I care about,” said Herb Lusk II, a Philadelphia minister who provided his church for a pro-Alito rally on the eve of his confirmation hearings.<sup>117</sup> Ties were again more quietly drawn between Alito’s religion and his views. The Agape Press, which says it offers “reliable news from a Christian source,” reported that Matt Staver of Liberty Counsel, a church-state litigation organization, thought Alito’s philosophy would “not support any kind of abortion right coming out of the Constitution,” and that this would be “consistent with Alito’s religious background” as a Catholic.<sup>118</sup> The week before Alito’s confirmation hearings, clergy entered the Senate Office Building and consecrated the hearing room with prayers and anointing oil.<sup>119</sup> They

said it was to “give this process to God and pray that His will and not our own prevails.”<sup>120</sup> Alito was confirmed.

Such episodes have not just been limited to the U.S. Supreme Court. Similar battles occurred with regard to other federal court nominations as well. For example, religious conservatives enthusiastically welcomed the nomination of Alabama Attorney General William Pryor to serve on the U.S. Court of Appeals for the 11th Circuit,<sup>121</sup> in part because he had called *Roe v. Wade* “the worst abomination in the history of constitutional law”<sup>122</sup> and had said that it resulted in “slaughter.”<sup>123</sup> When Senators questioned whether Pryor, who is Catholic, could fairly and impartially uphold the law in light of such rhetoric, they were met with the same accusations of anti-Catholic bigotry that then reemerged during the Roberts nomination.<sup>124</sup>

The incidents reveal attempts to use religion to stack the bench. As put by The Interfaith Alliance, a Justice at Stake partner, “A person’s religious identity should remain outside the inquiry related to a judicial nominee’s suitability for confirmation. . . . It is out of bounds for anyone . . . to pursue a strategy of establishing the religious identity of a judicial nominee as criteria for confirmation. . . . [But because]. . . there are those who would use the legislative and judicial processes to turn the social-moral agenda of their own sectarian commitment into the highest law of the land[,] the Senate Judiciary Committee has an obligation to serve as a watchdog and sound a clear warning signal when such a philosophy seeks endorsement within the judiciary.”<sup>125</sup>

## Religious Identity and State Court Elections

More than 87% of America’s state judges must stand for election.<sup>126</sup> As these contests rapidly grow more like elections for ordinary political office, religious interest groups are employing campaign trail politics to pressure judges into delivering campaign promises and courthouse rulings tailored to their agendas. In some cases, judicial candidates themselves are injecting religious issues into their voter appeals.

A legislative or executive candidate is supposed to make promises to voters, and then keep them if they’re elected. But a judge has a different job, to decide cases one at a time, based on the facts and the law, without regard to campaign promises. Telegraphing decisions in advance, explicitly or implicitly, would make a mockery of equal justice. That’s why state ethics codes have traditionally been crafted to promote the impartiality and independence of the courts—in reality, and in appearance—by preventing judicial candidates from making promises about how to decide cases, or in engaging in speech which comes too close to implying such a promise.<sup>127</sup>

In 2002, in *Republican Party of Minnesota v. White*, the U.S. Supreme Court changed the rules for judicial elections in America. By a 5-4 vote, the Court struck down Minnesota’s “Announce Clause,” which prohibits a candidate for judicial office from “announc[ing] his or her views on disputed legal or political issues.”<sup>128</sup> *White* means that special interests can pressure judicial candidates to publicize their political views, and target them for defeat if they don’t.

### Questionnaires

Religious interest groups have been among the most aggressive exploiters of the post-*White* world, disseminating questionnaires demanding that candidates reveal their beliefs and commit to their intentions for ruling on specific matters. Should a candidate refuse to answer because check-the-box justice could weaken the impartiality of the courts, he or she will face a negative rating and no financial support.

At their worst, these questionnaires amount to religious litmus tests. For example, in 2004, a questionnaire by the Alabama League of Christian Voters asked, “Are you a born again Christian? Please give your testimony.”<sup>129</sup> Said Jim Zeigler, chairman of the group, “You’ve got Ten Commandments, you’ve got ten questions.”<sup>130</sup> The state’s judicial ethics panel refused to support the League’s request to submit its questions to candidates.<sup>131</sup> But in other states, questionnaire sponsors have distributed surveys without reservation.

For example, in Iowa, a group of conservative religious and social organizations calling themselves “Iowans Concerned

About Judges”—including Concerned Women for America of Iowa, Focus on the Family, the Iowa Christian Alliance, the Iowa Family Policy Center, and the Professional Educators of Iowa—sent questionnaires to judges preparing to face retention elections in 2006. The questionnaire asked whether they supported “a judge’s choice to display the Ten Commandments in his or her courtroom,” and whether they agreed with a U.S. Supreme Court decision that posting it in a public school classroom violated the U.S. Constitution.<sup>132</sup> It asked, “as a matter of constitutional law,” whether the judges agreed with the “result” in *Roe v. Wade* that recognizes a Constitutional right to privacy that encompasses abortion.<sup>133</sup> It asked whether the judges believed that the Iowa Constitution permitted either same-sex marriage or civil unions, and whether the Iowa Constitution required legal recognition of same-sex relationships sanctioned out of state.<sup>134</sup> It even asked whether the judges believed that homosexual relations themselves were permitted under the Iowa Constitution.<sup>135</sup> The survey concluded by demanding to know “each and every organization” among a list in which the judge had been a member or contributed money or had any other affiliation, or from which the judge had received an endorsement or donation, in the last 20 years.<sup>136</sup> It also wanted to know the judge’s church.<sup>137</sup> In response to

the questionnaire,  
Iowa’s

**Question:**  
**Are you a born again Christian?**

YES  NO

**Please give your testimony.**

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Chief Justice warned that, “the public should be wary of voting for a judge who promises to rule a certain way. In our system of government, we expect judges to rule according to the law regardless of their personal views. We also expect them to make decisions free of political intimidation and influence.”<sup>138</sup>

they belonged and had made contributions.<sup>144</sup> It then asked whether they agreed or disagreed that “The Florida Constitution recognizes a right to same-marriage.”<sup>145</sup> It went on to ask whether candidates agreed with a Florida Supreme Court ruling that a law requiring parental consent for abortion violated the Constitution, agreed with

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Judicial candidates will be tempted to speak out on controversial issues they may have to rule on in court, including religious issues, in order to pander to interest groups.

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Another remarkably intrusive questionnaire surfaced in 2006 in Kansas. This survey, sponsored by “Kansas Judicial Watch PAC” and closely associated with a group called “Kansas Judicial Review,”<sup>139</sup> demanded to know judges’ views on whether marriage should only be between one man and one woman, and whether the Kansas Supreme Court would have the authority to strike down a statute defining marriage as between one man and one woman (even if it violated the Kansas Constitution.)<sup>140</sup> It asked whether the judges agreed with the statement, “The unborn child is biologically human and alive and that the right to life of human beings should be respected at every stage of their biological development.”<sup>141</sup> The questionnaire also asked whether the judges believed that the U.S. and Kansas Constitutions made local community standards the determinant of the “definition of pornography as a punishable offense.”<sup>142</sup> The website of Kansas Judicial Review accused the Kansas Supreme Court of violating the separation of powers and called for Kansans to remove “recalcitrant judges.”<sup>143</sup>

In Florida, judicial candidates were also asked to answer a questionnaire sponsored by a group called the Florida Family Policy Council. The questionnaire started out by asking if candidates were married, how many children they had, and to what religious and civic organizations

a ruling on a Florida law dealing with adoption by homosexual parents, and agreed with a Florida Supreme Court ruling holding an educational voucher program unconstitutional.<sup>146</sup>

When the results were tabulated in the Florida Family Policy Council’s voter guide, only “decline,” “undecided,” or “unsure” answers were published next to the names of candidates who responded. Substantive “agree” or disagree” answers, or expansions upon them, were indicated only by a triangle symbol next to the candidates’ names.<sup>147</sup> The Florida Family Policy Council noted the meaning of the triangle: “This judicial candidate did respond to this question, but because of the type of response received, the Florida Family Policy Council has decided not to report the response in order to avoid potentially exposing the candidate to required disqualification or recusal.”<sup>148</sup> In other words, in a questionnaire ostensibly issued to provide voters with more information about judicial candidates, the Florida Family Policy Council decided to keep some candidate responses a secret. If litigation on one of the subject questions came before a judge who gave an answer, the litigants and the public would have no way of knowing if the judge committed to deciding the issue a certain way and if the judge was truly impartial, thus undermining at least the appearance and possibly

even the reality of impartiality. Only the Florida Family Policy Council would know whether that judge agreed with their views, and thus whether they wanted that judge to hear that case.

### *Candidate Speech*

The other rising risk in the post-*White* era is that judicial candidates will be tempted to speak out on controversial issues they may have to rule on in court, including religious and moral issues, in order to pander to interest groups.

In 2004, Tom Parker, a protégé of Roy Moore, won election to the Alabama Supreme Court. Parker, the founding Executive Director of the Alabama Family Alliance and Alabama Family Advocates, stresses his links to “groups associated with Dr. James Dobson and Focus on the Family” in his official court biography.<sup>149</sup>

In 2006, Parker ran for Chief Justice. He unofficially kicked off his campaign with an op-ed savaging the U.S. Supreme Court’s decision in *Roper v. Simmons* that the Constitution prohibits applying the death penalty to juveniles,<sup>150</sup> and excoriating the Alabama Supreme Court for following that precedent by vacating a death sentence for a juvenile. Parker, who did not participate in the decision, wrote “The proper response . . . would have been for the Alabama Supreme Court to decline to follow [the precedent]. . . . Faithful adherence to the judicial oath requires resistance to such activism.”<sup>151</sup> Parker concluded, “After all, the liberals on the U.S. Supreme Court already look down on the pro-family policies, Southern heritage, evangelical Christianity, and other blessings of our great state,” he wrote, “so we should stand up for what we believe without apology.”<sup>152</sup> The controversy, he said, helped him “reach voters [he] never could have reached.”<sup>153</sup> Parker lost his race, as did a slate of like-minded candidates he endorsed, though he remains on the bench as an Associate Justice.

A Kentucky judge in 2006 took a page from the same playbook. Announcing his candidacy for the Supreme Court, Court of Appeals Judge Rick Johnson opened by quoting the Bible and praying “that justice will prevail throughout our beloved commonwealth, our great country, and all of God’s creation.”<sup>154</sup> At a campaign stop, he told voters, “I want you, the voters, to know that I oppose abortion. I support having the Ten Commandments in our schools and courthouses . . . . I believe marriage is between only one man and one woman. I live a life of traditional western Kentucky values. I think the way you think.”<sup>155</sup> The state’s Judicial Campaign Conduct Committee issued a news release arguing that “judicial candidates who publicly state their views on disputed issues inevitably create the impression that such views would affect how they would rule from the bench, and that runs counter to the principle of judicial independence.”<sup>156</sup> Johnson was defeated.

Minnesota, too, saw a judicial candidate invoke religious purposes and intentions to win a role on the court. Tim Tingelstad, a magistrate judge, ran in 2004 for the state Supreme Court, and in 2006 for district court. His religious beliefs, and their influence on his positions, were at the heart of his campaigns. “I believe not only in God but that his word is true and that his word is the foundational truth to which our civil law is based . . . . I believe divine law is the foundation of civil law,” Tingelstad said in his 2004 campaign.<sup>157</sup> He promised to seek God’s wisdom in every decision.<sup>158</sup> In 2006, Tingelstad wrote on his campaign website that he was seeking office because “justice is served when judges fear God,” and that citizens should look to the biblical standard in selecting judges.<sup>159</sup> He added, “It is particularly vital that a worldview, based upon the Truth of God and his Word, is returned to our highest courts.”<sup>160</sup> Tingelstad lost both elections.

To date, most of the legal and judicial establishment has resisted the notion that judicial candidates should discuss their positions on specific issues that could come before them. They recognize the serious threat that such disclosures pose to their ability to fairly and impartially uphold the law, and to public confidence in their neutrality. “It’s not just important that our court system be just; it must appear to be just,” said Bill Cunningham, who ran against Rick Johnson for the Kentucky Supreme Court and tried to avoid disclosing such views for fear of compromising his objectivity.<sup>161</sup> “We’re talking about our third branch of government, and whether we want it to be judicial or political,” he said.<sup>162</sup> Explains the American Judicature Society, “Once the public can no longer distinguish between judicial campaigns and other campaigns, it may no longer be willing to accord the judiciary the independence that is justified by the differences between judges and other government officials. Therefore, to preserve the independence of the judiciary, judicial candidates must resist the pressure to change the nature of judicial campaign speech and to make pronouncements of personal positions on issues such as abortion, the death penalty, and the exclusionary rule.”<sup>163</sup> The American Bar Association’s Model Code of Judicial Ethics, as well, precludes candidates from committing to how they’ll decide cases in advance of hearing them.<sup>164</sup> Even former Supreme Court Justice Sandra Day O’Connor, who authored a concurring opinion in *White*<sup>165</sup> recently said that the *White* case “does give [her] pause.”<sup>166</sup>

## **IV. Punishing Heresy: The Drive to Demonize and Impeach Noncompliant Judges**

For those seeking to use the courts to impose their own religious views in violation of the Constitution, any judge who doesn’t obey their wishes, even if simply upholding settled law, is a target. Such judges are increasingly finding themselves, and their courts in general, the object of impeachment threats and venomous speech.

A typical example is U.S. Senator Sam Brownback’s 2004 warning on the Senate floor that a federal court decision on late-term abortion was “yet another example of why we need to reign in an increasingly reckless judiciary . . . through impeachment, when necessary at both the Federal and State level.”<sup>167</sup> Interest groups have followed suit with their own hyperbole, as when Andrea Lafferty of the Traditional Values Coalition said that “many judges . . . view themselves as the real rulers of our nation.”<sup>168</sup>

Most Americans disagree, regardless of their religion, ideology or political affiliation. Former Senator John C. Danforth, an Episcopal minister, argues that “conservative Christians approach politics with a certainty that they know God’s truth, and that they can advance the kingdom of God through governmental action,” while moderate Christians “support the separation of church and state, both because that principle is essential to holding together a diverse country, and because the policies of the state always fall short of the demands of faith.”<sup>169</sup> And as the late Chief Justice William Rehnquist explained, a judge may not be impeached over unpopular decisions.<sup>170</sup>

But as the Terri Schiavo episode demonstrated, broad American acceptance of the need for an independent judiciary has not deterred attempts to use religion to punish, intimidate and demon-

ize the courts. In the five years from 2002 to 2006, there have been 58 impeachment threats against judges, compared to 42 in the five years from 1997 to 2001. A similar surge in anti-court rhetoric has sought to undercut the very legitimacy of the courts. These threats and catcalls have often stemmed from anger over decisions involving church-state issues.

### **Attacks Against Federal Courts**

Recent federal church-state decisions have frequently triggered impeachment threats. After the Ninth Circuit's 2002 Pledge of Allegiance decision, for example, former Speaker of the House Newt Gingrich dared Congress to remove the judges who had issued the opinion "and settle the issue of one nation under God once and for all."<sup>171</sup> Religious conservatives likewise called for the impeachment of the district court judge who handled the Roy Moore case. "There needs to be some impeachment of judges like. . . Myron Thompson," said Jerry Falwell, founder of the group Moral Majority.<sup>172</sup> Impeachment threats grew hysterical at the 2005 "Confronting the Judicial War on Faith" conference, organized by the Judeo Christian Council on Constitutional Restoration in the midst of the Schiavo episode. There, Michael Schwartz, chief of staff to U.S.

after Tom DeLay warned that "the time will come for the men responsible for this to answer for their behavior," and refused to rule out impeachment even as he backpedaled from his comments.<sup>176</sup> "I believe in an independent judiciary. I believe in proper checks and balances," the president said.<sup>177</sup> Vice President Cheney echoed his words, saying of the impeachment threats, "I don't think that's appropriate."<sup>178</sup>

But the rhetorical war on the courts shows no sign of easing up. Indeed, some religious activists seem to believe they are owed something in the courts. For example, U.S. District Judge John E. Jones, an appointee of President George W. Bush, was pilloried as a traitor after ruling that a Pennsylvania school district's effort to undermine evolution and promote intelligent design violated the First Amendment. Phyllis Schlafly, founder of the Eagle Forum, said Jones owed his position to the evangelical Christians who voted for George Bush, and his ruling "stuck the knife in the backs of those who brought him to the dance."<sup>179</sup> Jones had anticipated the backlash: "Those who disagree with [the holding in the case] will likely mark it as the product of an activist judge. If so, they will have erred . . . . Rather, this case came to [the court] as the result of the activism of an ill-informed faction on a school board, aided by

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For those seeking to use the courts to impose their own religious views, any judge who doesn't obey their wishes is a target.

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Senator Tom Coburn, said he was "in favor of mass impeachments, if that's what it takes."<sup>173</sup> "I don't want to impeach judges, I want to impale them!"<sup>174</sup>

When threats reached a fever pitch during the Schiavo controversy, and it became clear that Americans disapproved,<sup>175</sup> cooler heads prevailed. President Bush distanced himself from the attacks

a national [group] eager to find a constitutional test case on [intelligent design], who in combination drove the Board to adopt an imprudent and ultimately unconstitutional policy," he wrote in his ruling.<sup>180</sup>

Still, in a recent "Constitutionalist Manifesto," the Eagle Forum declared that, "America is engulfed in the fires of a Culture War and federal judges have been whipping the flames to a white-hot heat."<sup>181</sup>

The Manifesto demands that judges “responsible for this constitutional and cultural tragedy must be repelled,” and asserts that “[t]he provisions of our Constitution have a fixed meaning . . . [that] can express the values of only one world view. . . . the Judeo Christian world view.”<sup>182</sup> The Eagle Forum has also called on Congress to pass measures assuring that no action stripping courts of jurisdiction or denying funds to enforce court decisions can ever be reviewed by any “national court.”<sup>183</sup>

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“I believe in an independent judiciary. I believe in proper checks and balances.”

—President George W. Bush

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Another recent phenomenon are “Justice Sunday” events, political rallies invoking religious values to attack the “misdeeds” of federal judges. Organized in the wake of the Terri Schiavo tragedy and on the eve of the recent Supreme Court confirmation battles, each has featured a parade of speakers vilifying courts and the judges who serve on them. At the first rally, Tony Perkins of the Family Research Council told attendees that “the Court has become increasingly hostile to Christianity, and it poses a greater threat to representative government – more than anything, more than budget deficits, more than terrorist groups.”<sup>184</sup> At the second, Phyllis Schlafly of the Eagle Forum said, “The biggest threat facing America today is the out-of-control judges who are banning our acknowledgment of God in schools and public places, overturning marriage and morality, and imposing their social views on us. I call these judges supremacists.”<sup>185</sup> James Dobson of Focus on the Family declared that the Supreme Court has created “an oligarchy.”<sup>186</sup> Bishop Harry Jackson added at the next event, “You and I can bring the rule and reign of the Cross to America and we can change America on our watch, together.”<sup>187</sup>

For some lawmakers and candidates, Justice Sunday events have provided a politically lucrative audience for anti-court venom. At the second event, House Majority Leader Tom DeLay assured participants that, “all wisdom does not reside in nine persons in black robes.”<sup>188</sup> Added former U.S. Senator Zell Miller, “[The court] has removed prayer and Bible from schools. Each Christmas it kidnaps the baby Jesus, halo, manger, and all, from the city square. It has legalized the barbaric killing of unborn babies, and is ready to discard like an outdated hula hoop the universal institution of marriage between a man and a woman. It will even put you in jail if you dare to put up a copy of the Ten Commandments in a public place.”<sup>189</sup> At another such rally, U.S. Senator Rick Santorum warned that liberal judges are “destroying traditional morality, creating a new moral code and prohibiting dissent.”<sup>190</sup>

### **Attacks Against State Courts**

State judges have also faced impeachment threats over decisions in cases involving religious and moral issues. Florida Judge George Greer was threatened with impeachment and even death after his rulings in the Terri Schiavo case.<sup>191</sup> After Iowa Judge Jeffrey Neary dissolved a lesbian couple’s Vermont civil union, Christian conservatives were furious over what they saw as recognition of the underlying same-sex relationship. Focus on the Family’s James Dobson and the Iowa Family Policy Center led a rally calling for Neary’s ouster.<sup>192</sup> Protesters called him a member of an “antichristic court.”<sup>193</sup>

A judge in Colorado faced impeachment threats after ruling that joint custody of an adopted child was to be shared with the former partner of a lesbian woman who had become a Christian, and ordering that the custodial mother could not instill homophobic teachings.<sup>194</sup> The Christian Coalition of Colorado and State Rep. Greg Brophy worked to pass a resolution of impeach-

ment, with Coalition president Chuck Gosnell commenting that the “tyranny of the black robe must be stopped here in Colorado.”<sup>195</sup> Though the effort failed, Brophy bragged about the power of intimidation: “The judicial branch in the state of Colorado and around the country got this message.”<sup>196</sup> According to Peter Brandt, senior public policy director of Focus on the Family, “Where opportunities arise, we would like to impeach judges” who have ruled against traditional marriage or ruled for privacy rights involving abortion.<sup>197</sup>

Nor have the state courts escaped the fire hose of hysterical rhetoric that is growing more popular in 24/7 America. When the Massachusetts Supreme Judicial Court ruled that that state’s constitution required that same-sex couples be permitted to marry, a national group branded many of its members “renegade justices.”<sup>198</sup> When the Supreme Court of New Jersey said that same-sex couples had to be accorded either marriage or civil unions under the New Jersey constitution, they were accused of being criminal hostage-takers.<sup>199</sup>

## V. The Broad Deference of Courts to Religious Claims

In our democracy, where courts must answer to human law instead of holy scripture, some decisions are bound to disappoint some people of faith. Critics claim that the courtroom is a dangerous place for people of faith and their institutions. They are upset when courts point out that the Bill of Rights puts limits on prayer in schools, taxpayer funding for religious groups, and the display of sacred icons on government property. The Supreme Court “has simply abolished your right to the free exercise of your religion in public,” says Mark Levin, a former chief of staff to the U.S. Attorney General.<sup>200</sup>

But the most cursory look at American history shows that religious worshippers and their institutions are regular and repeated winners in the courts. Indeed, since the earliest days of the republic, judges and courts have staunchly used the rule of law to defend religious liberties. Given their thankless Constitutional marching orders—to fairly balance an array of liberties and spiritual beliefs—our courts have upheld religious claims and positions quite often.

To begin with, courts have proved to be broadly deferential to a marbling of religious observances throughout American public life and government. Presidents Jefferson and Madison attended worship services in the House of Representatives, a tradition that continued until after the Civil War. Jefferson allowed church services in executive branch buildings, and in America’s early days the Christian gospel was preached in the Supreme Court chambers.<sup>201</sup> Today, it is the Supreme Court of the United States that begins with a marshal declaring, “God save the United States and this Honorable Court.”<sup>202</sup> The Court has continued to uphold the right of legislatures to open their sessions with prayers.<sup>203</sup> Every year,



justices and judges gather with lawmakers and other government officials at a Catholic cathedral in Washington, D.C. for the “Red Mass,” where attendees “request guidance from the Holy Spirit for the conduct of the legal profession.”<sup>204</sup> And courts have not interfered with traditions like prayers at presidential inaugurations, the use of God and the Bible in oaths, references to God on coins and to “the year of our Lord” in public documents, public holidays for Thanksgiving and Christmas, or the National Day of Prayer.<sup>205</sup>

It is the authority of the federal courts that puts teeth into a host of laws that Congress has enacted to protect religious liberties. For example, the Civil Rights Act of 1964 bars discrimination based on religion in government facilities, in public accommodations like hotels and restaurants, and in public schools and colleges.<sup>206</sup> The Act also prohibits employers from discriminating in hiring based on religion, and requires that they reasonably accommodate their workers’ religious observances and practices.<sup>207</sup> Discrimination based on religion is also prohibited in the Fair Housing Act and the Equal Credit Opportunity Act.<sup>208</sup> Federal laws—backed up by the federal courts—protect houses of worship and religious schools from abu-

sive land-use regulations, along with the religious rights of inmates.<sup>209</sup> Indeed, because of doctrine established by the courts, the government cannot inquire into the sincerity and reasonableness of religious belief in enforcing federal laws.<sup>210</sup>

Nobody wins in court all the time. But court decisions have frequently decided controversial cases on behalf of religious interests. In the schools, court decisions have allowed school systems to excuse students from classes to receive religious instruction,<sup>211</sup> allowed Amish parents to keep their children home after the 8th grade,<sup>212</sup> and ruled that religiously affiliated schools may participate in taxpayer-funded tuition voucher programs.<sup>213</sup> Courts have allowed school districts to pay for bus rides<sup>214</sup> and materials<sup>215</sup> for parochial school students. Courts have permitted states to give parents a tax deduction for their children’s religious school tuition, books, and transportation.<sup>216</sup> Federal court decisions have allowed groups to use their high schools for prayer and Bible-reading meetings, on the same terms as other nonreligious groups,<sup>217</sup> and guaranteed religious organizations the same access to university facilities as secular groups.<sup>218</sup> Courts have also okayed direct financial aid to religiously spon-

sored colleges and universities,<sup>219</sup> and to students at religious colleges,<sup>220</sup> as long as the aid is not directly subsidizing religion.

In grant and employment cases, it is because of court decisions that governments are permitted to give grants directly to religious social service groups as long as recipients were not “pervasively sectarian.”<sup>221</sup> A 2005 decision allowed the Salvation Army to hire and fire based on religious criteria, even when acting as a contractor for a government institution (the city of New York).<sup>222</sup> Another recent decision ruled that employers must accommodate employees with the whole day off if requested for religious purposes, rather than just time for worship services.<sup>223</sup>

Cases over display of religious imagery in public places have proven especially difficult to balance, and thus even more likely to anger some people of faith. Testy complaints about a “war on Christmas” are becoming an annual fund-raising tradition.<sup>224</sup> But here too, the record reveals plenty of decisions on each side, including approval of nativity scenes on city property<sup>225</sup> as well as a Menorah next to a Christmas tree outside of a county office building.<sup>226</sup>

In other arenas, a federal appeals court ordered municipal governments not to exclude houses of worship from space approved for commercial zoning.<sup>227</sup> Courts have rejected challenges to blue laws closing businesses on Sundays.<sup>228</sup> And courts have issued prison time of a decade or more to people found guilty of religious bias crimes.<sup>229</sup>

The courts’ central role in protecting religious liberties is not just the stuff of textbooks and time past. As the U.S. Department of Justice pointed out, in religious liberty cases where it filed a friend of the court brief during the last half decade, federal courts “have agreed with the position advocated by the Civil Rights Division in almost every case.”<sup>230</sup> In 2004, for example, federal court decisions afforded religious groups the ability to use bulletin boards, back-to-school

night tables, and notices sent home in student backpacks, on the same terms as other groups.<sup>231</sup> And, in other recent cases in which the Justice Department participated, courts barred schools from suspending students for handing out candy canes to other students with religious messages attached,<sup>232</sup> and censoring a Christian song from a school talent show.<sup>233</sup> In another major recent case, the Supreme Court required schools to give religious groups equal access to their facilities.<sup>234</sup>

## VI. Conclusion: The Growing War on the Courts

“Federal courts have no army or navy.... At the end of the day, we’re saying the court can’t enforce its opinions.”

—*U.S. Rep. John Hostettler*.<sup>235</sup>

The assault on our courts is not limited to the church-state arena. Nor are court-stripping and impeachment threats a new phenomenon. For more than a decade, if not a generation, an increasingly aggressive band of lawmakers, pundits and special interest groups have been working to weaken the power of our courts and the legitimacy of our judges on issues.

After the Supreme Court’s 1954 *Brown v. Board of Education* decision that school segregation violated the Constitution, furious lawmakers sought to exempt federal courts from ruling on public

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Courts shouldn’t be immune from criticism and controversy. But our founders gave judges a special job—to protect the Constitution, and decide cases based on the facts and the law.

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education laws.<sup>236</sup> “Impeach Earl Warren” signs dotted the southern countryside.<sup>237</sup> During the 1960s and 1970s, issues like the draft, *Miranda* warnings, and busing sparked efforts to cut the courts’ power to hold laws up to the standards of our Constitution.<sup>238</sup>

The Big Bang for the latest round of impeachment and intimidation came in 1996, when Presidential candidate Bob Dole called for the impeachment of federal judge Harold Baer after he disallowed certain evidence in a drug case.<sup>239</sup>

President Clinton’s spokesman, eager to deflect Dole’s attack, suggested the Administration would consider asking the judge to resign unless he reversed his ruling.<sup>240</sup> In 1997, Congressman Tom DeLay announced that impeachment was a “proper solution” for “particularly egregious” rulings.<sup>241</sup> Congressional hearings on “judicial activism” and more impeachment threats soon followed.<sup>242</sup> “We have a whole big file cabinet full” of names, said DeLay. “We are receiving nominations from all across the country of judges that could be prime candidates for the first impeachment.”<sup>243</sup> He bragged that Congressional leaders would “take no prisoners” in dealing with the courts<sup>244</sup> and that “judges need to be intimidated.”<sup>245</sup>

This intimidation campaign has continued in recent years. In 2002, a Reagan-appointed judge was hauled before a congressional committee to explain comments that weren’t, in the eyes of congressional investigators, properly supportive of sentencing guidelines.<sup>246</sup> After court rulings that certain antiterrorism tactics violated the Bill of Rights, Attorney General Ashcroft accused the judiciary of endangering national security.<sup>247</sup> A 2006 measure, reintroduced in 2007, would establish an Inspector General for the federal courts, whose office would report to Congress and wield such broad and vague powers it could be used to investigate and intimidate disfavored judges.<sup>248</sup>

Court-stripping legislation and attacks on the role of the courts well beyond church-state issues have also flourished since the mid-1990s. For example, in the immigration arena, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act eliminated or severely restricted the ability of immigrants to seek a federal court review as they seek asylum from persecution or fight deportation efforts.<sup>249</sup> In that same year, Congress also passed a bill that dramatically restricted federal judicial review for many immi-

grants facing deportation.<sup>250</sup> A measure passed in 2005 gives the Secretary of Homeland Security unilateral power to waive any law on the books that might interfere with the building of border fences—including civil-rights and minimum-wage protections, and even criminal laws—with scant court review.<sup>251</sup>

Congress has also weakened the traditional role of the courts in criminal justice cases and their power to mete out punishments that fit the crime. The 1996 Prison Litigation Reform Act drastically diminished the ability of prisoners to get a day in court to object to abusive prison conditions, and weakened the authority of federal judges to craft remedies when those conditions actually break the law.<sup>252</sup> The same year, the Antiterrorism and Effective Death Penalty Act limited judicial review for death row inmates.<sup>253</sup> A few years later, in 2003, the “Feeney Amendment”—protested strongly by Chief Justice Rehnquist—sharply limited the ability of federal judges to issue sentences below federal guidelines in order to set punishments that fit the crime.<sup>254</sup>

In response to the terrorist attacks of September 11, the USA PATRIOT Act weakened the power of the courts to ensure that the government obeys the Constitution. For example, it crippled the power of the special Foreign Intelligence Surveillance Act Court to oversee secret government demands for information, and severely limited an individual’s ability to challenge the demand.<sup>255</sup> It also lowered the standard under which intelligence information can be gathered and then used in ordinary criminal cases.<sup>256</sup> Meanwhile, the White House authorized the National Security Administration to conduct a secret, ongoing program of electronic surveillance without obtaining warrants, outside the safeguards set up by the Foreign Intelligence Surveillance Act.<sup>257</sup> And, after the courts ruled that those labeled enemy combatants could challenge their detentions via a writ of habeas corpus—a centuries-old human rights protection to prevent unjust imprisonment—the

federal courts were stripped of jurisdiction to hear such habeas petitions.<sup>258</sup>

Legislators have also sought to use anti-court measures to interfere with case settlements. A 2005 proposal would have encouraged defendants to renege on promises they made in consent decrees—such as pledges to clean up pollution and dilapidated schools—by forcing judges to let defendants reopen the agreements every few years, or any time a new governor or mayor is elected.<sup>259</sup>

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## We must defend fair and impartial courts from political interference.

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Of course, courts shouldn’t be immune from criticism and controversy. But our founders gave judges a special job—to protect the Constitution, and decide cases based on the facts and the law, not pressure and politics. Tearing down the courts that protect our rights, in the name of religion or any other cause, can only weaken the American judicial system that Chief Justice Rehnquist calls the “crown jewel” of our democracy.

## VII. How to Keep Courts From Becoming a Casualty of the Culture Wars

Most Americans believe that everyone deserves a day in court to make their case, and that courts need constitutional power and political breathing room to do their job protecting our rights. They want courts to be accountable to the law and the Constitution, not religious arguments or political pressure. That's why the public overwhelmingly rejected special interest meddling with the courts at the end of Terri Schiavo's life.

But those who want to weaken the courts rely on public apathy and ignorance. The unfortunate fact is that courts now face a more or less permanent campaign against their independence and impartiality. Ongoing vigilance will be required to keep them strong.

What can Americans do to protect the courts from political tampering?

- **Educate:** The more people know about how courts work, the more likely they are to support checks and balances when they come under fire. In the schools, work to ensure that curricula and special programs teach the rudiments of a fair court system. In civic groups, invite judges and host panels and debates. Judges themselves ought to spend time every month educating Americans on how the courts work.
- **Speak Up:** When courts are unfairly targeted, policymakers need to hear about it. Citizens can make a difference by writing a letter to the editor, calling into a radio show, or making their views known in other ways.
- **Join Up:** When civic groups talk, politicians listen. Citizens can multiply their power by joining groups like the League of Women Voters, professional associations and business groups—and then pressing them to defend independent courts.
- **Keep it Simple:** Use plain language and avoid legal jargon when helping others understand why courts must uphold the Constitution for *all* Americans. Describe the threats the courts are facing, and how courts are accountable to the Constitution and the law, not politicians and special interest groups. Explain that to protect access to justice for all and our rights under the Constitution, we must defend fair and impartial courts from political interference. Don't get bogged down debating individual controversial cases—this is about the bigger fight over the role of the courts.
- **Avoid “Us vs. Them”:** Most people of faith, regardless of their politics, realize the need for impartial courts. No matter what their views, all people of faith should be welcomed to the public square, not stereotyped or ridiculed.

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