Received(Date): 15 AUG 2002 10:28:56
From: "Willett, Don" <Don.Willett@usdoj.gov> ("Willett, Don" <Don.Willett@usdoj.gov> [UNKNOWN])
To: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]), "Goodling, Monica" <Monica.Goodling@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Goodling, Monica" <Monica.Goodling@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN]), Anne Womack (CN=Anne Womack/OU=WHO/O=EOP@EOP [WHO]), "Charnes, Adam" <Adam.Charnes@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Charnes, Adam" <Adam.Charnes@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN])
Subject: : FW: Interesting documentation from PFAW
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CREATOR:"Willett, Don" <Don.Willett@usdoj.gov> ("Willett, Don" <Don.Willett@usdoj.gov> [UNKNOWN])
CREATION DATE/TIME:15-AUG-2002 10:28:56.00
SUBJECT:: FW: Interesting documentation from PFAW
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
TO:"Goodling, Monica" <Monica.Goodling@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Goodling, Monica" <Monica.Goodling@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN])
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TO:Anne Womack (CN=Anne Womack/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
TO:"Charnes, Adam" <Adam.Charnes@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) ("Charnes, Adam" <Adam.Charnes@usdoj.gov> (Receipt Notification Requested) (IPM Return Requested) [UNKNOWN])
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Not sure what, if anything, can be done w/ this, but it seems worth taking a look at. In this Aug. 1996 paper, Neas blasts "far right judicial litmus tests", criticizes Rs for allegedly asking judicial candidates how they'd rule on specific cases, and says isolated decisions shouldn't be twisted out of context.

Here's an example of the last one: "The true lesson of these examples is that individual cases cast in a negative light provide absolutely no legitimate basis from which to draw general conclusions about a judge's record. Any conscientious judge, regardless of which President appointed him or her, will eventually be confronted with a situation where the law requires that evidence be thrown out or a death sentence be overturned. Picking out a minute sample of such cases which happen to have fallen to Clinton appointees cannot provide an effective basis
to measure their record. As Sentor Patrick Leahy explained, "no one should be making such statements or demagoging judges based on isolated decisions. We disserve our system of justice, our system of government, and the American people when we engage in such rhetoric." Page 15.

DRW

-----Original Message-----

From: P6/b6
Sent: Wednesday, August 14, 2002 5:49 PM
To: Willett, Don
Cc: Dinh, Viet
Subject: Interesting documentation from PFAW

A 1996 report from PFAW outlining the dangers of a "far right wing ideological litmus test." Seems to me that Ralphie can't have it both ways.

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Clear And Present Danger:
The New Far Right Judicial Litmus Test

August, 1996

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Clear and Present Danger:
The New Far Right Judicial Litmus Test

On April 19, in a speech before the American Society of Newspaper Editors (ASNE), Senator Bob Dole aimed a full-scale political attack at President Clinton's federal judicial appointments.[1] Several months earlier, spurred by a ruling excluding evidence in a major narcotics case by a judge nominated by President Clinton (and approved without objection by Senator Dole and his colleagues), Senator Dole and others had initiated the attack, claiming that the President's nominations proved that he was "soft on crime."[2] The attacks have continued after the ASNE speech, and are likely to be a key part of Dole's campaign strategy in the 1996 campaign.

One significant aspect of the recent attacks on judicial nominees, however, has gone largely unnoticed. An important stimulus and source of ammunition for the attack has been far right

political groups and operatives, ranging from Paul Weyrich's Free Congress Foundation to Gary Bauer's Family Research Council. This includes individuals and organizations that have formed close connections with Senator Dole and other Republicans, worked with the Reagan and Bush administrations on judicial selection, and played an important role in the conservative "litmus test" philosophy used in picking judges in the 1980s. In 1996, the evidence from their articles, direct mail, and other pronouncements makes clear that their objectives go far beyond simply using judicial nominations as an issue in the election, or even returning to the Reagan-Bush litmus test. Instead, the agenda of these advocates is to impose a new far right litmus test on judicial nominations, avoiding what they perceive as the imperfections of the Reagan-Bush era and ensuring that new Supreme Court justices and other federal judges have "an established commitment to the conservative legal movement."[3]

This report will trace the development of the new far right judicial litmus test, beginning with its origins in the Reagan Administration and continuing with recent efforts to press it on lawmakers (including Senator Dole and the Clinton Administration). It will also examine some of the serious potential consequences of this campaign. Even on the issue of crime control, the facts demonstrate that the right-wing attacks are without basis and that the imposition of a far right judicial litmus test would actually harm crime control efforts. In addition, it would seriously harm the fundamental rights of all Americans in such areas as religious freedom, civil rights, and reproductive rights.

For example, as a result of the right-wing litmus test used under the Reagan and Bush administrations, we have already seen:

- Court decisions striking down federal crime control efforts, such as the Gun Free School Zones Act, the Child Support Recovery Act, and parts of the federal arson law
- Virtual exclusion of African-Americans from nomination as federal judges under Reagan and Bush
- A court ruling that the Violence Against Women Act, enacted by a bipartisan congressional majority in 1994, is unconstitutional
- A Supreme Court decision authorizing significant burdens on religion, overturned by an act of Congress which itself has been challenged as unconstitutional
- A state ban on all abortions at public facilities, including even at private hospitals or clinics which lease space from public agencies
- A Supreme Court ruling that even outright lies by an employer can rebut a case of job discrimination unless the victim can provide direct evidence of bias

With numerous vacancies expected in the near future on the federal courts, including the Supreme Court, imposition of a new right wing judicial litmus test threatens to cause even more harm in the future.

The Development of the New Far Right Judicial Litmust Test

At least since the Supreme Court's 1973 decision in Roe v. Wade, religious right and other conservatives have focused on the federal courts as both an important source of and a potential solution to their complaints on such issues as abortion, religion, and federal authority. While Presidents throughout history have sought to put their stamp on

the federal judiciary, the Reagan and Bush administrations took this to a new level, imposing a "litmus test" selection philosophy that itself already has produced substantial harm and has set the stage for today's new far right litmus test.

The Reagan-Bush Litmus Test

The history of judicial selection under Presidents Reagan and Bush begins at least as early as the 1980 Republican Party platform. The platform called for the President to appoint:

> women and men who respect and reflect the values of the American people, and whose judicial philosophy is characterized by the highest regard for protecting the rights of law-abiding citizens . . . [and] who respect traditional values and the sanctity of innocent human life.

Candidate Reagan embraced this philosophy, whether discussing abortion ("the sanctity of innocent human life") or other issues. "There must be new Justices on the Court," Reagan proclaimed, "who respect and reflect the values of the American majority. I pledge to make such appointments."

Once elected, President Reagan systematically sought to fulfill his pledge. Both the Reagan and Bush administrations took a concerted approach of selecting judges to seek to ensure a particular ideological bent. These administrations pre-screened candidates for ideology, appointed youthful conservative judges, looked for academics with proven conservative track records, and rejected insufficiently "pure" nominees.

The Reagan administration subjected every candidate for the bench to a series of interviews with a battery of Justice Department lawyers. Those that survived this winnowing process went on to meet with the Attorney General and undergo scrutiny by a special White House standing committee. While the content of these interviews is a matter of some dispute, Reagan administration officials acknowledged that specific legal precedents were discussed. In particular, administration officials commonly asked candidates their views on Roe v. Wade, which established a woman's constitutional right to reproductive privacy. Although Reagan Attorney General Ed Meese claimed no interest in how prospective judges would rule in specific cases,[4] several judicial

nominees stated they were asked directly about their views on abortion.[5] One rejected candidate stated: "I guess most of us have accepted that we're not going to get these judgeships unless we're willing to commit to a particular position, which we think would be improper."[6]

The second element of the Reagan appointment strategy was to select young nominees. According to the ABA Journal:

> Since the enactment of the Circuit Courts of Appeals Act of 1891, no other president, starting with Benjamin Harrison, appointed appeals court judges with a younger average age than has Ronald Reagan during his second term. And no other president has appointed such a high proportion of appeals court judges under the age of 45 (more than one-third during the second term).[7]

This emphasis on youth contributed to the ideological makeup of the federal judiciary in two ways. First, it gave judges time to build a proven track record for a possible nomination to the Supreme Court, which could also occur at a relatively early age. Second, even those judges who were not elevated to the Supreme Court could be expected to serve lengthy terms, preserving a conservative judiciary for future decades.

A third prong of the Reagan judicial selection strategy was the reliance on law professors. At least until the rejection of Robert Bork's Supreme Court nomination, Reagan judge-pickers regarded academic careers as a means of predicting likely performance on the bench. Since most professors must publish or perish, they often have a long paper trail demonstrating their ideological preferences.

Finally, and perhaps most important, the Reagan administration consistently rejected even mainstream Republicans who failed to tow the ideological line. One nominee, first in her law school class and highly rated by the ABA, was rejected because she had supported the Equal Rights Amendment (as had the Republican party itself until 1980) and several conservative groups had falsely charged her as being a closet Democrat. Another candidate, a former Deputy Solicitor General, was rejected by Administration supporters for having made small donations to Planned Parenthood and the National Coalition to Ban Handguns; thirteen senators demanded his withdrawal, and the President obliged. Prominent Republican Philip Lacovara, who had

been appointed twice by Reagan to serve on the District of Columbia Nominating Commission, was rejected on the grounds that he was "too liberal" and "not politically reliable,"[8] based on his membership in two decidedly establishment organizations, the Washington Lawyers Committee for Civil Rights Under Law and the ABA Section on Individual Rights and Responsibilities. Lacovara wrote in the New York Times that in the past:

> political affiliation has provided a source of recognition, not a litmus test for philosophical orthodoxy. Over time, this pattern has created a Federal judiciary rich in diversity and perspective. Today the message is quite different: ideology is the primary qualification, and it is a candidate's demonstrated orthodoxy that brings his name before the President and ultimately before the Senate. Unique in our nation's history, the current Justice Department has been processing any judicial candidate through a series of officials whose primary duty is to assess the candidate's ideological purity.[9]

The Bush administration continued the demand for ideological purity in judicial nominations. Just four days after Bush's inauguration, White House Counsel C. Boyden Gray declared that Bush "will continue to appoint judges in the Reagan manner."[10] The editorial pages of the Wall Street Journal praised the young conservative lawyers from the Federalist Society and elsewhere chosen to staff the process,[11] and conservative commentators lauded President Bush's appointments. Clint Bolick, Vice President of the right-wing Institute for Justice, described the Bush appointment record as "a tour de force . . . . He has been even better than Reagan. Bush has made the judiciary more solidly conservative without spending a lot of political capital on the issue."[12] Former Reagan Attorney General Ed Meese stated that his successors "have done an excellent job . . . . The results are the same as in the Reagan administration."[13]

In large measure, the Reagan-Bush litmus test proved quite successful. During the 1980s and into the 1990s, the country witnessed a major retreat by the federal courts from their traditional role of defenders of liberty in such areas as civil rights, religious freedom, and reproductive choice.[14] As the late Justice Thurgood Marshall wrote in his final dissent on the Supreme Court, the Court majority was sending a "clear signal that scores of established constitutional liberties are now ripe for reconsideration" as a result of changes in the Court's "personnel."

Marshall concluded that "[p]ower, not reason, is the new currency of the Court's decision-making."[15] Notwithstanding their victories, however, far right conservatives clearly were not satisfied.

The Justices That Got Away: Souter and Kennedy

Despite the efforts of right-wing activists, implementation of the conservative judicial litmus test was by no means perfect. Even though they had the backing of conservative groups at the time of their nominations, Justices David Souter and Anthony Kennedy have exhibited much more moderate tendencies than anticipated. It is precisely these Justices' more moderate positions that have raised the ire of the far right.

Following on the heels of the rejection of the highly controversial Robert Bork and the subsequent withdrawal of nominee Douglas Ginsburg, the Reagan administration opted for the less controversial Anthony Kennedy in 1987. Despite this clear attempt to avoid the furor surrounding the two previous nominees, Justice Kennedy's nomination still had strong conservative backing. Richard Willard, a "strong conservative" who served as an assistant attorney general under Reagan Attorney General Edwin Meese, "lobbied strenuously" for Kennedy's nomination, and Grover Joseph Rees, a former Reagan judge picker, "predicted confidently that Kennedy would not disappoint conservatives on prayer, abortion, and other social and moral issues."[16] But in the 1990s, both Kennedy and Bush appointee David Souter refused to join efforts led by Justice Scalia and Chief Justice Rehnquist that could have overruled Roe v. Wade, as well as key precedents in such areas as church-state separation, and joined with or wrote opinions in cases overturning a Colorado anti-gay initiative and single-sex education at VMI. As a result, the right wing now calls Justice Kennedy "Reagan's Biggest Disappointment" and accuses him of having "gone with the flow of elite liberal opinion."[17]

Writing about Justice Souter, Gary Bauer, head of the right-wing activist Family Research Council, stated that "you may remember that some of these nominees were stealth nominees . . . The idea was that they were secretly much more conservative than anybody thought but they were being nominated so they could get through the Senate more easily. It ends up they were stealth nominees but the stealth was in the other direction."[18]

The failure of Justices Kennedy and Souter to live up to conservative expectations has clearly disappointed and outraged right-wing activists. At the same time, activists have lavished praise on justices like Clarence Thomas and Antonin Scalia, whose predicted right-wing views have been right on the mark. Even before this year's Presidential campaign began, these activists have demanded an even stricter ideological litmus test for federal judicial appointments.

The Call for a New Right-Wing Litmus Test: "in the mold of [Clarence] Thomas"

Writing primarily in publications and direct mail addressed to their allies and believers, particularly as the 1996 election has approached, the right wing has been calling for the implementation of an ideological litmus test that would be even more severe than under Presidents Reagan and Bush. For instance, after lambasting Justice Kennedy's decisions on separation of church and state, reproductive freedom, and civil rights, one conservative publication advised that "[t]here is a crucial lesson in this for conservatives--and for Bob Dole should he become President: It is not enough for a potential judicial nominee to have a record on key issues that accords with the proper role of the courts. The potential nominee must also give some evidence of having the courage of his or her convictions--ideally, a record of sustained consistency."[19]

A more specific blueprint for a new right-wing litmus test was spelled out in 1995 in the Heritage Foundation magazine Policy Review, written by a former Reagan-Bush Justice Department official in one of the offices with major responsibility for judicial nominations during the 1980s. Impelled by the "prospects in 1996 for a new president inclined to appoint conservative justices," the article set out criteria and guidelines to help ensure that future nominees be "in the mold of [Justice] Thomas rather than [Justice] Souter."[20] Future nominees "should show an established commitment to the conservative legal movement," evidenced by active participation in and "associations" with the conservative legal movement and "contribution to conservative legal thought" as in the case of Clarence Thomas.[21] A nominee "should have been tested in Washington at some point in his career," as Thomas had been tested and "challenged by the liberal legal establishment."[22] Based on such reliable indicators of commitment to conservatism, individuals could be nominated who would be "committed to seeking the original meaning of the Constitution"[23] and would join "the pantheon of truly great Supreme Court justices," including Justices Scalia and Thomas.[24]

As right-wing columnist and activist Don Feder more bluntly put it in a pointed "[m]emo to the next Republican president," be "damned sure you're putting a Scalia clone on the bench, and not another Kennedy."[25]

The FRC's Gary Bauer has related the judicial litmus test issue directly to the subject closest to the hearts of religious right activists in the Republican party this summer: the party's platform plank on abortion. In a letter to supporters last December, Bauer turned to history in defending against anticipated efforts to water down the anti-abortion plank. He noted specifically that beginning in 1980, the platform called for "the appointment of judges at all levels who respect traditional family values and the sanctity of human life," and that this "language has been part of the Republican platform ever since." Bauer exhorted his supporters to help retain the platform language because it will "help ensure that the next Republican President will appoint pro-life judges."[26] Interestingly, while tolerance clauses and other possible changes have been discussed as genuine possibilities by Senator Dole and others in the party, neither Dole nor any other official has even hinted at any change in the provisions concerning appointment of judges.[27]

Bauer's ambitions for the new far right litmus test go even further, however. As he told a radio audience this May, the "pro-family movement needs to become so strong that whoever is President, they will get the clear strong unambiguous message that they better put more traditional judges on the Court or they're going to face a major battle with us in any confirmation proceedings."[28] In fact, right-wing activists have already had a serious effect on judicial nominations during the Clinton Administration, and presidential candidate Dole so far appears to be following their wishes on judicial selection.

The Far Right Flexes its Muscles and Influence

Conservative activists have already begun to fulfill Bauer's prescription, particularly after Republicans took control of the Senate in 1994. Reports indicate that a number of candidates for Clinton judgeship nominations were dropped by the Administration itself because of conservative ideological objections, such as a state judge who had committed the unpardonable right-wing sin of awarding child custody to a male partner in one case. A Clinton Justice Department official has admitted that the Administration "steered clear of a few people who might have been fabulous judges, but who would have provoked a fight that we were likely to lose."[29]

The influence of far right activists' views on Senator Dole so far has been even more pronounced. Although Dole claimed in April that he would not employ a litmus test, and observers have noted that judges he recommended to Presidents Reagan and Bush were relatively moderate, his specific actions and campaign pronouncements clearly signal a willingness to comply with far right demands in this area. "When I am president," Dole proclaimed in May, "only conservative judges need apply."[30] Dole identified Chief Justice Rehnquist, who is in many ways the leader of the Court's right wing, as his own judicial "ideal."[31] He has pledged to fulfill the far right's often-expressed crusade[32] to eliminate the role of the American Bar Association in reviewing the qualifications of judicial nominees.[33] Almost a year before his ASNE speech, Dole signed a fund-raising letter for the most active right-wing group on judicial nominations -- the Judicial Selection Monitoring Project of the right-wing Free Congress Foundation -- endorsing JSMP and attacking many of the very same judges he criticized in his speech and others as "handpicked liberal activists" seeking to "subvert the will of the voters."[34] And Dole's rhetoric in discussing how he would appoint judges -- which refers to the need for judges who are "faithful to the text of the Constitution" and to conduct a "thorough screening" of candidates' "associations and past decision-making"[35] -- echoes the advice of last year's Heritage article on avoiding nominees like Justice Souter.

In fact, during the same Larry King interview in July in which he announced that a pro-choice Republican would deliver the convention keynote speech, Dole reassured the far right on judges. Notwithstanding his earlier disavowal of litmus tests, Dole proclaimed that he would have "litmus tests for all judges" to ensure that they are "tough on crime" and "interpret the Constitution, not try to amend it." Asked specifically about whether his judicial nominees would have to be anti-abortion, Dole stated, "that's going to be probably part of our platform -- they want us to consider that, it ought to be a consideration."[36]

If actions speak louder than words in this area, moreover, Dole's actions speak loudly indeed. During the first six months of 1996, including all of Dole's time as majority leader, not a single Clinton judicial nominee was approved by the Senate.[37] As Attorney General Reno pointed out, this not only delayed court cases and hurt the administration of justice across the country, but was also completely different than the situation in past election years such as 1992, when 66 Republican-nominated judges were confirmed by a Democratic-controlled Senate. In the weeks before Senator Dole resigned as majority leader, rumors suggested that

he might be willing to break the logjam. Groups like JSMP howled in protest[38]. The result: not a single confirmation until July, when minority leader Tom Daschle negotiated a partial confirmation resumption with Dole's successor Trent Lott, after Dole left the Senate.[39] Lott has been criticized harshly for that compromise by Tom Jipping of the JSMP, who declared that "Mr. Lott and Mr. Hatch make Mr. Dole look positively principled."[40]

The most recent example of far right influence in this area is found in the draft Republican Party platform, released on August 5. The draft platform includes the traditional litmus test language supported by activists like Gary Bauer, as well as a repeat of Dole's pledge that upon his election, "only conservative judges need apply."[41] But the draft platform goes even further. It specifically incorporates the radical proposals of Pat Buchanan and others that the federal courts should be stripped of jurisdiction over selected subjects and that the Constitution should be amended to eliminate life tenure for federal judges and require their "periodic reconfirmation."[42] These platform provisions would seriously undermine the fundamental principle of judicial independence, which Chief Justice Rehnquist himself has characterized as "one of the crown jewels of our system of government"[43] which should not be changed by threatening judges with removal because of their rulings.

Not surprisingly, religious right and other activists have rewarded Dole's fealty on this issue by implicitly (if not explicitly) endorsing him and opposing Clinton, and urging their followers to do the same, for the sake of the courts. For example, in June, Christian Coalition founder Pat Robertson exhorted "Christian voters" to become involved in the presidential election in order to get "conservative Supreme Court judges put on the Court, which could indeed reverse Roe v. Wade" as well as decisions on school prayer and other subjects.[44] An article by the Institute for Justice's Clint Bolick warned that "if Clinton wins again, one appointment could topple [the] highest court's conservative tilt."[45] Jipping told his TV audience that "President Reagan gave us Justice Antonin Scalia and President Bush gave us Justice Clarence Thomas", but "President Clinton will never give us anything that comes close."[46]

Right-wing activists are clearly correct in at least one respect: the stakes are high indeed. Numerous vacancies are expected on the federal courts over the next several years, including on the Supreme Court. Imposition of a new far right judicial litmus test, no matter who is

President, risks serious damage to the rights and the safety of all Americans.

Dangers of the New Far Right Judicial Litmus Test

Right-wing activists, echoed by Senator Dole and other conservative political leaders, claim that their recipe for judicial selection is necessary to reverse the harm to crime control efforts allegedly caused by President Clinton's judicial nominations. In fact, the real danger comes from the critics themselves. Not only do the facts belie their attacks, but the record shows that in the area of crime control, as well as with respect to such areas as religious freedom, reproductive choice, and civil rights, the new far right judicial litmus test threatens all Americans.

CRIME AND GUN CONTROL

A central theme of recent attacks on federal judges nominated by President Clinton, both by far right advocacy groups and by Senator Dole and other Republican spokesmen, has been the charge that they are "soft on crime" compared with Reagan-Bush judges. In fact, almost precisely the opposite is true. The record of court decisions demonstrates that the "soft on crime" charge is fallacious. In addition, Reagan-Bush appointees to the Supreme Court and the lower courts have seriously hurt efforts to combat crime and gun-related violence by striking down important federal anti-crime laws. Imposition of a new far right judicial litmus test threatens to make the problem even worse in the future.

The Far Right "Crime Control" Attack on Clinton Judges

In his speech before the American Society of Newspaper Editors on April 19, 1996, Senator Dole spelled out in detail his attack on President Clinton's judicial nominees as allegedly soft on crime. Describing Americans' confidence in their courts and trust in the rule of law as perhaps the most important issue of the presidential campaign, Dole identified a number of Clinton's appointees, including New York Judge Harold Baer, Virginia Judge Leonie Brinkema, Third Circuit Judge H. Lee Sarokin, and Eleventh Circuit Judge Rosemary Barkett, as forming a judicial "Hall of Shame" characterized by a willingness "to use technicalities to overturn death sentences for brutal murderers" and by an "outright hostility to law enforcement."[47] Senator Dole's assault has

been followed by similar accusations by other conservative political figures, including no less than three floor speeches by Senate Judiciary Committee Chairman Orrin Hatch.

As discussed previously, these political attacks were, at the very least, clearly inspired by similar attacks from far right advocacy groups. For example, the fund-raising letter signed by Dole almost a year before his 1996 speech for the Judicial Selection Monitoring Project of the far right Free Congress Foundation specifically criticized Judges Barkett and Sarokin as well as other Clinton "activist judges," attacking their "liberal bias" on issues like "crime prevention."[48] The same letter contained strong endorsements of JSMP by both Senator Dole and Senator Hatch.

These attacks generally follow a common pattern. They begin with a gruesome description of the facts in individual criminal cases, leaving no room for doubt as to the guilt of the criminal defendants. They then proceed to describe in extremely derogatory terms how Clinton-appointed judges have either reversed defendants' convictions or reduced their sentences. On the basis of a very small number of such anecdotal cases, it is concluded that Clinton's judicial appointees are liberal activists who regularly set free murderers, drug dealers, and other criminals, in contrast to Republican-appointed judges.

The facts, however, belie these attacks on Clinton's judicial nominees. The attacks are contradicted by the voting record of Senator Dole and his colleagues. The entire Senate, including Senators Dole and Hatch, has approved unanimously 182 of Clinton's 185 appointments to the federal Courts of Appeals and District Courts. Included in the group of unanimously approved appointees are Judges Baer and Brinkema, both of whom Dole personally singled out for criticism, and North Carolina Judge James Beaty, whom Orrin Hatch and a number of far right advocacy groups have criticized.[49] Indeed, Republican Senator Jesse Helms "lavishly praised" Judge Beaty during his nomination as "the kind of judge who applies the law as it is written and rules on the facts as they are presented."[50] As for Judge Barkett, another member of Dole's judicial "Hall of Shame" and a frequent target for extremist conservatives, six of the seven criminal opinions for which she has been criticized during her tenure on the Eleventh Circuit were unanimous decisions, with one or more Reagan-Bush appointees joining Barkett in all but one of those cases.[51] Furthermore, as a member of the Florida Supreme Court, Barkett voted to affirm the death penalty in over 200 cases, and she voted to uphold a state contraband forfeiture law for

drug traffickers which a lower court had declared unconstitutional.[52] Judge Barkett received praise and support at her nomination hearing from conservative Senator Connie Mack.[53] Even Judge Sarokin, whose recent resignation was cited as a triumph by the Dole campaign,[54] received the approval of a number of conservative senators, such as Senator Alan Simpson.[55]

This discrepancy between rhetoric and reality highlights an even deeper methodological flaw in conservative attacks on the Clinton judiciary: the anecdotal approach of choosing a few criminal law cases with grisly facts and criticizing a judge who reversed a conviction or a death sentence due to legal error by police or prosecutors. Using that approach, any President in the history of the United States could be characterized as soft on crime, and even the most hard-line judge could end up in a judicial "Hall of Shame." Consider the following cases:

- In Quartararo v. Fogg and Quartararo v. Mantello, two brothers were convicted of the brutal murder of a thirteen year old boy. The victim caught the brothers and two other men stealing a bicycle. They proceeded to stomp the child to death and stifle his screams by pushing stones down his throat. Even though all four men were convicted in state court, and all their appeals were rejected, the U.S. District Court for the Eastern District of New York granted habeas corpus and freed them on $3,000 bail on the basis of so-called "troubling inconsistencies" in the story told by law enforcement officials. Were these decisions issued by "liberal" Clinton appointees? No; the decision in both cases was written by Judge Richard Korman, a Reagan appointee.[56]
- In Joubert v. Hopkins, the death sentence of a three-time confessed child murderer was overturned. One of the victims was bound, gagged, and placed in the trunk of the defendant's car. He was later removed from the trunk, stripped to his underwear and pinned to the ground with a knife when he tried to roll away. The boy was then slashed and stabbed to death even as he begged for his life. Another of the victims suffered a similar fate, and his corpse was found with a drawing of a plant cut into the torso. The defendant confessed to both of these murders, as well as a third. He also said that he would kill again if he were ever set free. Nevertheless, the U.S. District Court for the District of Nebraska vacated the defendant's death sentence based on the legal technicality that the phrase "exceptional depravity" as used in the

death penalty statute was too vague. This decision was issued by Judge William Cambridge, a Reagan appointee.[57] Judge Cambridge was reversed and the death sentence was reinstated on appeal. The deciding vote to do so was cast by Eighth Circuit Judge Diane Murphy, a Clinton appointee.[58]

- In Reeves v. Hopkins, a double murderer's death sentence was overturned. The defendant in this case was convicted of stabbing to death his cousin and her houseguest while he was trying to rape them. Even though the Nebraska Supreme Court twice rejected appeals in this case, the U.S. District Court for the District of Nebraska granted a petition for habeas corpus on the basis of a conclusion that the Nebraska Supreme Court had improperly weighed the aggravating and mitigating circumstances involved in the case. Judge Richard Kopf, a Bush appointee, wrote the decision.[59]
- In United States v. Chen, the defendants were being prosecuted for crimes related to the seizure of 1,000 pounds of heroin, the largest heroin bust of all time. The trial court judge suppressed key pieces of evidence and released two defendants on bail. Was this another example of Clinton's Judge Harold Baer at work? No; the trial judge was Vaughn Walker, nominated by President Bush.[60]
- In Hitchcock v. Dugger, an appellate judge wrote an opinion reversing the death sentence of a Florida man convicted of strangling his 13-year-old niece. The slayer had confessed that he killed the girl to prevent her from telling her parents that the defendant had statutorily raped her. Although the jury sentenced him to death and the judge agreed, the sentence was reversed because the appellate court found that several excuses offered by the killer were not satisfactorily considered, including even the claim that the murderer was allegedly a fond and affectionate uncle. Was this another case where Judge Barkett overruled a Florida death sentence? No; it was a decision reversing the Florida Supreme Court by Reagan-appointed Supreme Court Justice Antonin Scalia, joined by Reagan appointees Sandra Day O'Connor and Chief Justice Rehnquist.[61]

What lessons can be derived from these examples? Should Judges Korman, Cambridge, Kopf, and Walker, as well as Justices Scalia, O'Connor, and Rehnquist, all be inducted into Dole's judicial "Hall of Shame?" Of course not. The true lesson of these examples is that

individual cases cast in a negative light provide absolutely no legitimate basis from which to draw general conclusions about a judge's record. Any conscientious judge, regardless of which President appointed him or her, will eventually be confronted with a situation where the law requires that evidence be thrown out or a death sentence be overturned. Picking out a minute sample of such cases which happen to have fallen to Clinton appointees cannot provide an effective basis to measure their record. As Sentor Patrick Leahy explained, "no one should be making such statements or demagoging judges based on isolated decisions. We disserve our system of justice, our system of government, and the American people when we engage in such rhetoric."[62]

Instead of focusing on a handful of sensationalist-sounding cases, academic observers have utilized broader measuring tools and concluded that Clinton's judicial appointees have been middle-of-the-road, not liberal or "soft on crime." University of Houston political science professor Robert Carp and his colleagues have cataloged 36,500 judicial decisions since the Nixon administration. On the basis of this comprehensive study, Carp has described as "a bunch of nonsense" Dole's characterization of the Clinton judiciary.[63] Professor Donald R. Songer, one of Carp's co-authors, has characterized Clinton's judicial appointees as "decidedly less liberal than [those of] other modern Democratic presidents" and as most resembling the appointees of President Ford.[64] Along the spectrum of judicial decisions, Clinton judges have issued liberal decisions in criminal cases 33% of the time, about the same as Ford appointees (32%) and Nixon appointees (30%), and well below Carter appointees (38%).[65] Additionally, forty percent of Clinton nominees in 1995 were former prosecutors, and 62% were deemed well qualified by the American Bar Association, compared to 52% in the Bush administration.[66] These statistics demonstrate clearly the fallacy of the "soft on crime" charges by conservative critics of Clinton's nominees. Indeed, as the *Washington Post* has observed, most pre-election year complaints about Clinton's judges have come from liberals, including an appellate court judge appointed by President Carter, who believe that the President's nominees have been too moderate in light of the conservative Reagan-Bush judges who preceded them.[67]

Federal Crime Control Laws and the Reagan-Bush Courts

Although a review of the facts concerning individual criminal cases thus shows little basis for "soft on crime" attacks on Clinton judges, the

record does reveal a little-known fact about Reagan-Bush judges and crime control. A significant part of the ideological framework of jurists like Scalia, Thomas, and Rehnquist is their extremely narrow view of federal authority.[68] In the area of crime control, that ideology threatens to significantly impair national anti-crime efforts. Perhaps the clearest example is the 1995 case of United States v. Lopez.[69] In Lopez, the Supreme Court dramatically transformed the interpretation of the Constitution's Commerce Clause by striking down as unconstitutional the Gun Free School Zones Act of 1990, which forbade "any individual knowingly to possess a firearm at a place that [he or she] knows . . . is a school zone."[70] The 5-4 decision in the case was written by Chief Justice Rehnquist, with all four of the other justices in the majority appointed by either President Reagan or President Bush. Lopez represents an extreme departure from decades of Supreme Court precedent, and poses a substantial threat to past and future anti-crime initiatives.

The Supreme Court has recognized for decades that Congress has the power "to regulate those activities having a substantial relation to interstate commerce. . . i.e. those activities that substantially affect interstate commerce."[71] In a series of decisions prior to Lopez, the Court found this power sufficiently broad to authorize a number of laws with far less connection to interstate commerce than the Gun Free School Zones Act, including a federal statute making it a crime to engage in local loan sharking, a federal statute prohibiting racial discrimination at local restaurants, and the application of a federal agricultural statute to prohibit the growth and consumption of wheat locally on one's own land.[72] In finding the Gun Free School Zones Act unconstitutional, the Reagan-Bush majority chose to fly in the face of established law in order to establish a regime more in line with their conservative views. By choosing the conservative activist path, the Lopez Court has not only overruled one specific law aimed at combating violence in our nation's schools, but it has also called into question the validity of more than 100 sections of the United States Code, including at least 25 criminal statutes whose validity had previously seemed well settled.[73] As Justice Breyer explained in dissent, the endangered statutes include federal laws prohibiting arson of buildings used in activity affecting interstate commerce and forbidding possession of machine guns.[74]

Even though Lopez was issued only last year, it has already severely harmed anti-crime efforts. As a direct result of Chief Justice Rehnquist's decision in Lopez:

- Two appellate courts have ruled the federal arson law unconstitutional as applied to intentional burning of homes or other residences, reversing the conviction of one arsonist who maliciously burned down his neighbors' home and freeing another arsonist who conspired in the burning down of her own home to collect over $4 million in fraudulent insurance claims.[75]
- The Child Support Recovery Act, which calls for criminal penalties for deadbeat parents who willfully fail to pay past due child support for children residing in other states, has been declared unconstitutional by a number of federal courts.[76]
- One court has specifically suggested that the federal law banning machine gun possession may be invalid under Lopez.[77]
- Another court has stated that Lopez may make unconstitutional the dual sovereignty doctrine, under which Rodney King's assailants were successfully prosecuted for federal criminal civil rights violations even though they were acquitted under state law.[78]

A recent ruling by Reagan-appointed Judge Jackson Kiser of the U.S. District Court for the Western District of Virginia in July provides a chilling omen of things to come under a far right judicial litmus test. In Brzonkala v. Virginia Polytechnic and State University[79] Judge Kiser seized on the Supreme Court's holding in Lopez to declare unconstitutional the Violence Against Women Act (VAWA), which gives female victims of gender-motivated violent crime a federal cause of action against their attackers.[80] Though technically a civil statute, VAWA "is criminal in nature . . . [It] was designed to address problems in the state criminal justice system, and, in attempting to supplement deficiencies in the state criminal system, it creates a civil cause of action that seeks to vindicate a criminal act."[81] In Brzonkala, the plaintiff was raped by two adult male members of Virginia Polytechnic Institute's (VPI) football team. Despite twice audibly saying "no" to requests for sexual intercourse, she was pinned to her bed by her elbows and legs and forced to submit to vaginal intercourse three times. Even though one of the attackers confessed to the sexual contact and that he had been told "no" twice, neither attacker was ever prosecuted by the state. One was found guilty of sexual assault by the school's judicial committee and suspended from school for two semesters; this penalty was later set aside when the charge was reduced to "using abusive language," and the attacker was allowed to return to VPI without notice to the plaintiff. The net result was that the plaintiff, out of fear for her

own safety, was forced to cancel her plans to return to VPI for the fall semester.[82] Notwithstanding these facts, Judge Kiser dismissed the plaintiff's VAWA claim on the grounds that VAWA exceeded Congress' authority under the Commerce Clause. Disregarding Congressional findings that "[g]ender-based crimes and fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy" and that "studies report that almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime,"[83] Judge Kiser relied on Lopez to declare VAWA unconstitutional.[84] Judge Kiser is the same lower court judge who found constitutional the Virginia Military Institute's exclusion of female cadets, only to be reversed five years later by the Supreme Court.[85] The ultimate result in Brzonkala is unclear.

As these examples suggest, the conservative judicial activism that led to Lopez may well produce further harm to important federal anti-crime efforts, particularly if far right advocates are successful in imposing their version of the right-wing judicial litmus test on future nominations.

Gun Control: The Brady Bill

A similar problem is posed with respect to gun control efforts. In 1993, Congress enacted the Brady Handgun Violence Prevention Act as an amendment to the Gun Control Act of 1968. The Brady Act requires the Department of Justice within five years to establish and maintain an instant national criminal background check system for handgun purchasers. In the interim, the Brady Act imposes a waiting period of up to five days, and requires the chief law enforcement officer of the prospective purchaser's place of residence to perform a reasonable background check during that waiting period. According to the Bureau of Alcohol, Tobacco and Firearms, 44,274 felons have been prevented from illegally obtaining handguns under this procedure.[86] Despite such reports of the Brady Act's significant success in keeping handguns out of the possession of convicted felons, it has regularly drawn criticism from extremist conservatives who label it a violation of handgun owners' rights.[87]

Across the country, federal judges appointed by Presidents Reagan and Bush repeatedly have voted to invalidate the Brady Act on constitutional grounds. In Printz v. U.S., Reagan-appointed Judge Charles Lovell struck down the Brady Act on Tenth Amendment grounds, finding it to

have "substantially commandeered state executive officers and indirectly commandeered the legislative processes of the states to administer a federal program."[88] In Mack v. U.S., Bush-appointed Judge John Roll struck down the Brady Act on similar Tenth Amendment grounds, as well as Fifth Amendment Due Process grounds because of the Brady Act's allegedly "imprecise and indefinite" statutory duty.[89] These two decisions were reversed in Mack v. U.S., with Bush-appointed Circuit Judge Ferdinand Fernandez dissenting.[90] The majority looked to established law and observed that "[t]he obligation imposed on state officers by the Brady Act is no more remarkable than, say, the federally-imposed duties of state officers to report missing children . . . or traffic fatalities."[91] Such reasoning, however, did not prevent Bush-appointed Judges Charles Pickering and Rebecca Doherty individually from striking down the Brady Act on Tenth Amendment grounds in McGee v. U.S.[92] and Romero v. U.S.[93] In Frank v. U.S. Bush-appointed Judge Fred Parker also found the Brady Act unconstitutional on Tenth Amendment grounds.[94] Like Judges Lovell and Roll, but unlike Judges Pickering and Doherty, Judge Parker was reversed on appeal. A unanimous Second Circuit held that the Brady Act imposes neither "a structural burden inconsistent with the plan established by the Constitution," nor "an onerous quantitative burden on state or local officials."[95]

As of this summer, two federal courts of appeals have thus sustained the validity of the Brady Act, but one appellate court has ruled that the law is unconstitutional in an opinion by Reagan appointee E. Grady Jolly.[96] The Supreme Court has decided to consider the issue in 1996-97, and will review the Ninth Circuit decision upholding the law in Mack v. U.S. At stake in this decision will be not only the Brady Act itself, but also the broader question of whether any such federal anti-crime and anti-gun violence laws can stand. Although it is unclear whether conservative judicial activists will prevail in Mack as in Lopez, there is no question that Reagan-Bush judges have already damaged federal crime control efforts and that imposition of a far right judicial litmus test threatens to cause even more harm in the future.

FREEDOM OF RELIGION

Religious freedom has long been a fundamental American value. The protections for religion embodied in the Establishment and Free Exercise Clauses of the Constitution, as interpreted by the Supreme Court over the years, have preserved and fostered a breadth and depth of religious expression and practice unrivaled in the modern world.[97]

But despite lip service to the principles of religious freedom, Reagan-Bush judges have in fact harmed religious freedom over the past fifteen years and threaten to do more harm in the future. Several years ago, the Supreme Court decided that government could pass laws which substantially interfere with an individual's ability to worship as he or she sees fit. It also, for the first time, allowed and in one case required direct government funding of religious activities, blurring the separation of church and state. And the more conservative members of the Court have expressly advocated a weak reading of the Establishment Clause that would permit a wide range of government-sponsored religious activities and allow religious majorities to use government to advance their religion at the expense of religious minorities and non-believers. The addition of several Justices to the Court based on a far right judicial litmus test could seriously threaten constitutional protection for freedom of religion.

Free Exercise of Religion

The Free Exercise Clause of the First Amendment was designed to protect individuals against government activity that interferes with their ability to practice their religion. In the 1963 case of Sherbert v. Verner,[98] the Supreme Court ruled that a state law could not burden the free exercise of religion unless the law was narrowly tailored to achieve a compelling government interest. This rule subjected even laws of general application to the most exacting level of judicial scrutiny if the law burdened a free exercise right. For example, a local law prohibiting all consumption of alcoholic beverages would have to exempt the use of wine for religious ceremonies such as communion, unless the government could demonstrate a compelling justification for an absolute ban.

But the Supreme Court reversed course and dealt a severe blow to religious liberty in 1990 with Employment Division v. Smith.[99] In an opinion authored by Justice Scalia, a 5-4 majority of the Court ruled that the Free Exercise Clause does not prevent government from enforcing generally applicable criminal laws even when such enforcement effectively prevents individuals from practicing their religious beliefs or holding religious ceremonies. This new standard not only departed from the Court's settled First Amendment doctrine, but also, as Justice O'Connor pointed out, was an example of judicial activism because the Court could have reached the same result without declaring a new constitutional rule.[100]

The new constitutional rule announced in Smith left people of all faiths vulnerable to restrictive laws. For instance, courts have relied on Smith in authorizing government agencies to:

- Force families of accident victims and others to endure intrusive government autopsies of family members, even though the autopsies were directly contrary to their religious beliefs and there was no finding that the autopsies were necessary for government purposes;[101]
- Dismiss the challenges of Catholic and Quaker groups to employer sanction provisions of the Immigration Reform and Control Act that they contended interfered with the operation of their religious facilities;[102]
- Enforce boarding house rules that violated the religious practices of the Salvation Army;[103]
- Require a religious student at a state veterinary school to perform fatal surgical operations on healthy animals, without even considering the student's religious objections.[104]

Disturbed by the result in Smith, Congress effectively reinstated the law as it existed prior to Smith by passing the Religious Freedom Restoration Act ("RFRA"), creating a statutory right to religious freedom equivalent to the constitutional protection that existed before Smith.[105] But even this legislation may not be sufficient to safeguard religious freedom. Federal judges have disagreed on RFRA's constitutionality.[106] Parties in one case have recently asked the Supreme Court to determine whether RFRA is constitutional.[107] Since four of the five Justices from the Smith majority are still on the Court, any Supreme Court challenge to RFRA in the near future would likely be heard by these same Justices, along with one of the current Court's most conservative Justices, Clarence Thomas. Indeed, some right-wing commentators who have praised Justices Thomas and Scalia have criticized RFRA,[108] suggesting possible danger to this statutory protection for religious freedom, particularly if a new right-wing judicial litmus test is used in selecting future Justices.

Establishment Clause

A. Vouchers and Government Funding of Religion

From the time of the Framers of the Constitution, prohibition of government funding of religion has been at the heart of our nation's concept of religious liberty. James Madison vehemently opposed a tax assessment bill in Virginia which would have collected public funds for religious purposes. He wrote: "Who does not see that . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"[109] After the defeat of the bill, Thomas Jefferson wrote the Virginia Bill for Establishing Religious Freedom. The bill's preamble declared that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical," and its text provided "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever."[110]

Supreme Court precedent has followed the lead of Madison and Jefferson by interpreting the Establishment Clause as prohibiting government funding of religion. When religious organizations received government funding as a part of a more general funding program, the Supreme Court traditionally examined whether the organization's religious activities could be separated from its secular activities, and whether the program ensured that the government funds would flow only to the secular ones.[111] For instance, in Committee for Public Education v. Nyquist, the Court struck down a state tax credit for parents who sent their children to private schools; since many of these schools would have been sectarian, the program would have impermissibly used public funds for sectarian as well as secular purposes.[112] By requiring that government funds be used only for secular activities, the Court safeguarded religious liberty by protecting religion from government fiscal influence and protecting taxpayers from mandatory funding of religious beliefs and practices.

But this basic principle of church-state separation has been thrown into doubt by two recent religious funding cases where the conservative members of the Supreme Court allowed government funding of religious activities. Both of these cases were decided by 5-4 votes. These decisions could have grave implications for more widespread government funding of religion, including government-funded school voucher programs that would

appropriate public funds for sectarian education and which are opposed by most Americans.[113]

In Zobrest v. Catalina Foothills School District,[114] parents enrolled their deaf child in a religious high school and claimed that federal law required the State of Arizona to provide a sign-language interpreter for the child. The State refused on the ground that providing a government employee to promote religious instruction would violate the Establishment Clause. The Court's conservative majority of Chief Justice Rehnquist, Justice White, and Reagan-Bush appointees Scalia, Kennedy, and Thomas rejected this argument and held that the Establishment Clause did not bar a State from providing an interpreter to advance the child's sectarian education.[115] The Court relied in part on the theory that filtering of government funds through "private choices" of individual parents negated the government's role in supporting religious schools, despite the fact that such "choice" is made possible only through public financial assistance provided by the government and so is not truly private. Such reliance on "private choice"[116] could open the floodgates to massive government funding of religion so long as the funds are first funneled through individual citizens.

Zobrest has already had an important effect with respect to church-state separation. In Walker v. San Francisco Unified School District,[117] the Ninth Circuit Court of Appeals relied on Zobrest as well as other Supreme Court cases in allowing the use of federal funds to provide certain materials and equipment to parochial schools--in spite of the court's recognition that prior Supreme Court precedent squarely prohibited such uses of government funds.[118] According to the Walker court, Zobrest implied that the Supreme Court's prior prohibition on such funding had been implicitly overruled, even though the Court had not yet done so itself.[119]

In Rosenberger v. Rector and Visitors of the University of Virginia,[120] the conservative bloc of the Court in another 5-4 decision again eroded the wall of separation between church and state by actually requiring government funding of a student religious publication. Although the University of Virginia reimbursed expenditures by some student groups through a Student Activities Fund, it refused to reimburse the expenses of a

student newspaper dedicated to discussing and promoting Christian perspectives and beliefs on the ground that such funding would violate the Establishment Clause. Chief Justice Rehnquist and Reagan-Bush appointees Kennedy, O'Connor, Scalia, and Thomas struck down the school's refusal to fund religious student publications as unconstitutional. While the Court focused on free speech concerns, the Court's decision may not only allow but require government funding of religion in some circumstances. The potential consequences of Rosenberger were recognized by Justice Souter in dissent, who stated that the Court's reasoning "would commit the Court to approving direct religious aid beyond anything justifiable for the sake of access to speaking forums."[121]

Chief Justice Rehnquist, Justice Scalia, and Justice Thomas have already made clear that they would allow virtually any government funding of religious activities, regardless of the potentially substantial benefits received by religious groups, so long as the grants are made without explicit reference to religion. Justice Kennedy's decision to join the majority in Zobrest and his authorship of the opinion in Rosenberger cast considerable doubt on his willingness to protect the independence of religion and the consciences of taxpayers by prohibiting government funding of religious activities. Justice O'Connor's emphasis on a case-by-case analysis[122] makes it difficult to evaluate what her position would be concerning a voucher program including sectarian schools, but voucher advocates clearly hope to win her vote based on her concurring opinion in Rosenberger.

Consequently, there are at least three votes on the Court, and possibly four or five, that would support a voucher program including sectarian schools. Several voucher cases are already winding their way through the judicial system, including an Ohio case in which a lower court judge has approved a voucher plan, and may very well be heard by the Supreme Court in the near future. Imposing a new right-wing litmus test for judicial appointments would almost certainly lock in a Supreme Court majority that would authorize vouchers and other significant government funding of religion, dismantling the historic separation of church and state and eroding religious liberty.

B. Weakening the Establishment Clause: The Coercion Test

For the past generation, federal courts have required government neutrality in religious matters by applying a three-part test enunciated in the 1971 Supreme Court decision of Lemon v. Kurtzman, written by Chief Justice Burger.[124] Under the Lemon test, government violates religious freedom and neutrality when its action has a primarily religious reason, has the primary effect of advancing or inhibiting religion, or results in excessive government entanglement with religion.[125] Although Lemon itself has been applied inconsistently by the Supreme Court and criticized by a number of Justices and commentators, a majority of Justices have continued to rely on key principles underlying the decision, such as the principle that government should not endorse religion.[126]

If the conservative wing of the Court had its way, however, such principles would be disregarded entirely and replaced by a much more permissive "coercion" test which would allow government involvement in and promotion of all but the most invasive religious activities. In Lee v. Weisman, Justice Scalia wrote for four dissenters (three of whom remain on the Court) that the Establishment Clause should not apply whatsoever to state promotion of religion unless the state threatens to impose a penalty on nonparticipants. Under this view, the Constitution would permit a wide range of government-sponsored religious activities. In the public schools, officials could require that the school day begin with sectarian devotionals, teachers could proselytize to their students, and student religious majorities could determine what religious service or which religious leader to have at school events regardless of the beliefs of religious minorities, so long as objecting students faced no formal punishment. In other contexts, a coercion test would allow government-erected symbols of a single faith to the exclusion of others on public buildings and in public space, and judges, military officers, and government employers could proselytize to those under their supervision.

The support for such an interpretation of the Establishment Clause by three present members of the Court raises serious concerns about the future of religious liberty in America. If right-wing groups are successful in establishing their litmus test for judicial appointments, this coercion test could command a majority on the Court, allowing public officials and whoever can effectively

> pressure those pubic officials to use the machinery of government to advance their beliefs at the expense of those with other beliefs. In a nation with such a variety of religious beliefs and practices, where shifting populations can cause today's religious majority to become tomorrow's religious minority, it is more important than ever for our federal judges to ensure that our basic religious freedoms do not become subject to the popular whims of the moment. This protection for religious liberty would clearly be endangered by a new right-wing judicial litmus test for federal judges.

FREEDOM FROM DISCRIMINATION[128]

The far right's objective of imposing right-wing litmus tests on future judicial appointments poses great danger to Americans' freedom from arbitrary discrimination. Even putting aside the issue of affirmative action, and focusing only on decisions since 1992, in a wide variety of cases the Reagan-Bush federal courts have demonstrated a startling inclination to overturn or otherwise erode long-settled protections of individual liberties.[129] Reagan-Bush appointees to the federal courts have emasculated both statutory and constitutional protection of minority voting power, called into question the very basis for the nation's civil rights laws, and sanctioned significant encroachments on statutory and constitutional protections against discrimination and against arbitrary interference in Americans' private affairs. Just as important, dissenting views in civil rights cases that now command only three or four votes on the Supreme Court offer a chilling forecast of the future damage that could be done by one or two additional appointments to the Court based on a far-right judicial litmus test, which would also threaten civil rights and diversity on the courts themselves.

Voting Rights and Racial Discrimination

Nowhere is the retreat from the Supreme Court's traditional commitment to equality more evident than when considering the voting rights of minority citizens. Since 1992, the Supreme Court has rendered virtually meaningless some of the protections afforded by the Voting Rights Act. In Holder v. Hall,[130] the Supreme Court ruled that the Voting Rights Act could not be used to challenge a single-commissioner form of government. In that case, the Court rejected the complaint of African-

American voters of Bleckley County, Georgia, who comprise 22 percent of the county's population, that its single-commissioner form of county government illegally diluted their voting power. Bleckley County's county commissioner, who always has been white, controls all county property, levies taxes, spends public money, builds and repairs roads and bridges and makes the legal rules governing county government operations. The oppressiveness of such a system on the articulation of minority interests has deterred many of the African-American voters in that county from running for office because of their relatively weak voting strength and even from voting because all poll watchers in the county are white. Nonetheless, the five-member Reagan-Bush majority of the Court failed to recognize, much less advance, the statute's primary purpose of augmenting minority representation to remedy past discrimination.

The Court has also systematically invalidated so-called "majority-minority" districts drawn by state legislatures to remedy past discrimination by boosting minority representation. In a series of cases since 1992, the Reagan-Bush appointees on the Supreme Court have imposed the most rigorous standards on these districts and, consequently, left such attempts at increasing minority representation highly vulnerable to constitutional attack. Prior to these decisions, the federal courts intervened in voting district cases only to enforce the one-person-one-vote requirement and to prevent dilution of a minority group's voting strength.[132] The Reagan-Bush majority, though, has added a third category to the list of when federal courts may intervene in these cases: whenever white voters feel disenfranchised by the creation of majority-minority districts, even if they are intended to remedy proven discrimination and even if such voters cannot show a dilution of their voting strength. In Shaw v. Reno,[133] the Court held that if white plaintiffs could show that a voting district scheme was so irrational on its face or so bizarre in geographical contour that it can only be understood as an effort to segregate voters into separate voting districts because of their race, such districts would be invalidated unless it was shown to be narrowly tailored to further a compelling governmental interest. The Court further sharpened that standard, however, in Miller v. Johnson,[134] when it determined that white voters need not show that a voting district is bizarrely shaped, but only that race was the dominant and controlling rationale in drawing voting district lines. Although the Court acknowledged that eradicating the effects of past racial discrimination was a "significant" state interest, the Court rejected the notion that it

rose to the level of a "compelling" state interest. On this basis, the Court invalidated the majority-minority voting district at issue.

In its most recent term, the 5-4 Court majority solidified its work in Bush v. Vera[135] and Shaw v. Hunt.[136] In those cases, the majority struck down four congressional districts designed to augment Hispanic and Black representation. The Bush opinion seems to indicate that even when other traditional political and geographical factors influence state officials' district line drawing, the presence of race as a major factor will trigger strict judicial investigation into the plan. In dissent, Justice Stevens aptly stated that "I [do not] see how our constitutional tradition can countenance the suggestion that a State may draw unsightly lines to favor farmers or city dwellers, but not to create districts that benefit the very group whose history inspired the Amendment that the Voting Rights Act was designed to implement."[137] Particularly if a new far-right litmus test is used to select future Supreme Court justices, the protections of the Voting Rights Act are likely to be even further eviscerated.

Similar problems are evident in other recent Supreme Court decisions on racial discrimination. In Purkett v. Elem,[138] the Court eroded the protections afforded by a decade-old precedent which forbids the use of race in peremptory challenge settings. Under Batson v. Kentucky,[139] once the opponent of a peremptory challenge has made out a case of racial discrimination, the proponent of the challenge may counter with a race-neutral explanation for such challenge. In Purkett, the Court undermined Batson's protections by ruling that a race-neutral explanation tendered by a proponent of a peremptory challenge need not be persuasive. Indeed, any race-neutral explanation, no matter how "implausible or fantastic" or "silly or superstitious" is sufficient to rebut a case of racial discrimination![140]

In United States v. Armstrong,[141] Chief Justice Rehnquist wrote for the Supreme Court that African-American criminal defendants who presented evidence that only minorities were being prosecuted on crack charges in federal court were not even entitled to discovery on their claim of selective prosecution unless they could show the existence of similarly situated white criminal defendants who could have been prosecuted but were not. In dissent, Justice Stevens noted that "it is undisputed that the brunt of the elevated federal penalties [for trafficking crack cocaine as opposed to powder cocaine] falls heavily on blacks. While 65% of the persons who have used crack are white, in 1993 they

represented only 4% of the federal offenders convicted of trafficking in crack. Eighty-eight percent of such defendants were black."[142] Justice Stevens countered the Rehnquist-led majority in asserting that the stark disparity of such statistics raises an inference of racial discrimination for which the trial judge properly ordered discovery but which the Supreme Court disregarded.

In another area of deep and divisive concern over racial equality, the Supreme Court recently ordered that a federal district judge exceeded his authority in trying to desegregate the Kansas City public schools. In Missouri v. Jenkins,[143] the Court vacated the district court's orders designed to attract, not coerce, white students back into the inner city school district. In writing for the majority, Chief Justice Rehnquist equated the goal of returning local control of the schools to the goal of remedying the effects of past racial segregation in public schools. As the dissent pointed out, the majority's opinion will seriously harm efforts to remedy the vestiges of racial segregation.

Employment Discrimination

The Constitution does not protect against arbitrary discrimination in most private sector employment decisions. Rather, workers unfairly treated because of their religion, race, or gender must resort to statutory remedies adopted by Congress, the states, and localities. However, even though Congress adopted the 1964 Civil Rights Act as a broad remedial measure for such injustices, the Supreme Court has appeared intent on narrowing the Act's protections and forcing workers to meet seemingly insurmountable burdens of proof in support of their claims. Recently, in St. Mary's Honor Center v. Hicks,[144] the Supreme Court, in an opinion written by Justice Antonin Scalia, determined that a fired worker does not automatically win his case even if he proves that his former employer is lying in its defense of a job discrimination claim. Beyond evidence that the former employer's excuse for the firing is merely a ruse, a worker alleging arbitrary discrimination now needs direct evidence of impermissible bias.

Hicks, an African-American supervisor at a Missouri prison, had a satisfactory work record until a new boss, who was white, took over. Thereafter, Hicks was frequently disciplined, then demoted. After a confrontation with his supervisor, Hicks was fired and replaced with a white worker. Hicks proved in a lower court that his employer's case was based on outright falsehoods. The prison administration asserted

that the severity and frequency of Hicks' rulebreaking was the reason for his termination. But Hicks proved that similar or more serious infractions were often ignored when committed by white workers. He also proved his white supervisor manufactured a confrontation in order to fire him. The Supreme Court nevertheless ruled that Hicks failed to prove that the discrimination was racially motivated and that the fact that his employer lied in court yielded nothing.

As a result of Hicks, in such a case the fired employee must now produce more, direct evidence of discrimination. This not only contradicts two decades of established precedent, but it also has the effect of sanctioning lying as a defense in bias suits and of requiring fired workers to produce concrete evidence of a typically subtle and difficult to prove occurrence. Justice Souter, in dissent, lamented that the Court's decision placed fired workers in an impossible position "for the simple reason that employers . . . are not likely to announce their discriminatory motive."[145]

The Validity of Anti-Discrimination Statutes

In United States v. Lopez,[146] Chief Justice Rehnquist, writing for a five-member Reagan-Bush majority, struck down the federal Gun-Free School Zones Act on the basis that Congress exceeded its authority under the Commerce Clause of the Constitution in enacting the legislation. Lopez marks the first time since 1936 that the Court has relied on the Commerce Clause to invalidate federal legislation. Although Congress presumably believed that gun violence interjected in a school environment interfered with the quality of education which, in turn, is intimately tied to the future economic viability of individuals, the Supreme Court struck down the statute because such concerns do not "substantially" affect interstate commerce.

The troubling aspects of the Lopez decision lie not only in the Court's evident reversal of 60 years of settled Commerce Clause jurisprudence, but also in the fact that Congress has passed major pieces of civil rights legislation upheld by prior Supreme Court opinions on the basis of Congress' power to regulate interstate commerce. For instance, Title II of the 1964 Civil Rights Act bans discrimination in places of public accommodation by covering any establishment which serves interstate commerce. In Heart of Atlanta Motel v. United States,[147] and Katzenbach v. McClung,[148] the Supreme Court upheld the 1964 Civil Rights Act against a commerce clause attack. While Lopez itself does

not speak to this issue, the addition of right-wing justices to the Court could well threaten Congress' authority to enact anti-discrimination statutes.

Very recently, this threat has proven much more than hypothetical. In 1994, Congress passed the Violence Against Women Act, a measure intended to create federal crimes for those who attack women. Congress enacted this piece of legislation based in part on its power to regulate interstate commerce, postulating that violence against women affected their job performance and therefore had a substantial effect on interstate commerce. However, in a July 29, 1996 decision, Reagan-appointed district court judge Jackson L. Kiser invalidated the Violence Against Women Act, citing Lopez as the authority to conclude that Congress exceeded its authority in enacting the Act because violence against women bears no rational relationship to interstate commerce.[149] Imposition of a far right judicial litmus test threatens to produce many more such decisions.

Gender and Sexual Orientation Discrimination

In J.E.B. v. Alabama,[150] the Supreme Court held that intentional discrimination on the basis of gender in the use of peremptory strikes in jury selection violates the constitutional guarantee of equal protection. Like race-based exclusions in jury selections, the Court determined that gender is "an unconstitutional proxy for juror competence and impartiality."[151] But the Court's three most conservative justices dissented from this seemingly uncontroversial proposition. Chief Justice Rehnquist and Justices Scalia and Thomas charged sarcastically that "[t]oday's opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or as the Court would have it, the genders), and how sternly we disapprove the male chauvinist attitudes of our predecessors."[152]

The complaints of Justice Scalia and his colleagues about compelling a state to treat equally its women and its men are the same complaints that have been used to deny opportunities to women seeking admission to the bar, access to legal and medical educations, entrance to the federal military service academies or to police academies. Although the Supreme Court majority ruled favorably on this issue of gender discrimination, the dissent's venomous attacks on the legal basis for such conclusions illustrate the potential consequences if as few as two new justices are added using a right-wing judicial litmus test.

So, too, does the dissent in the landmark case of Romer v. Evans,[153] in which a 6-3 majority of the Supreme Court invalidated an amendment to the Colorado state constitution which attempted to forbid any component of state government from extending civil rights protections on the basis of sexual orientation. Writing for the majority, Justice Anthony Kennedy quoted the dissent in Plessy v. Ferguson, the case in which the Supreme Court articulated its infamous "separate but equal" principle of racial "equality," asserting that "the Constitution 'neither knows nor tolerates classes among citizens.'"[154] The opinion in Romer upheld the basic principle that "[a] State cannot so deem a class of persons a stranger to its laws."[155]

However basic the principle laid down in Romer may appear, however, the dissent joined by Chief Justice Rehnquist and Justices Scalia and Thomas found much with which to disagree. Eeringly noting that the majority "has mistaken a Kulturkampf for a fit of spite," Justice Scalia characterized Colorado's attempt at excluding gays and lesbians as simply a "modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[156] Justice Scalia appeared to criticize gays and lesbians for having high disposable income, political power in disproportionate measure to their numbers, and enjoying enormous influence in American media and politics. Besides the fact that these points in the dissent have little or no relevance to the equality principle at hand in the case, they are astonishing because of their conformity to the rhetoric of some of the far right's worst gay-baiters.[157]

In light of its decision in Romer, the Supreme Court ordered the U.S. Court of Appeals for the Sixth Circuit to reconsider its decision in Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati.[158] In Equality Foundation, Reagan appointee Robert Krupansky, writing for the three-judge panel, rejected an equal protection claim out of hand in circumstances closely similar to those in Romer, finding that the Constitution affords no protection to gays, lesbians, and bisexuals and that a gay person's interest in participating in the political process like any other citizen was not sufficiently "fundamental" to warrant heightened constitutional protection. Acting in part on the advice of rejected Reagan Supreme Court nominee Robert Bork, who authored a "friend of the court" brief in Equality Foundation, the Sixth Circuit relied extensively on the Supreme Court's decision in Bowers v. Hardwick,[159]

in which the Court dismissed a gay man's claim that the Georgia sodomy statute unconstitutionally infringed on his right to privacy as against arbitrary governmental intrusions. Although the Bowers Court expressly declined to consider equal protection arguments, the Equality Foundation Court nonetheless equated sodomy with sexual orientation and rejected the claim that gays deserve constitutional protection against electoral majorities which ride roughshod over rights non-gay Americans take for granted.

The federal courts have similarly used Bowers to reject the claim that the wholesale exclusion of gays from the military and the "Don't Ask, Don't Tell" exclusion of gays from the military violates the constitutional guarantee of equal protection.[160] To the extent that the far right succeeds in imposing a new judicial litmus test on future judicial appointments, these decisions merely signal the beginning of what will no doubt be a long line of cases curtailing even the most fundamental civil liberties of gay and lesbian Americans.

Disability Rights

The disabled have similarly seen their statutory and constitutional rights damaged by Reagan-Bush judges. In **Lane v. Pena**,[161] the Supreme Court rejected a plaintiff's claim that he was entitled to compensatory damages from the federal government under the Rehabilitation Act for an unlawful separation from the Merchant Marine Academy. The Court ruled that because the text of the statute does not expressly waive the federal government's routine exemption from the payment of such damages, the disabled plaintiff could not recover damages. In dissent, Justice Stevens pointed out that the Court failed to credit the clear purpose of Congress in enacting and amending the Rehabilitation Act to authorize an award of damages against a federal agency that violates the Act's provisions.

In Heller v. Doe,[162] the Supreme Court decided against the rights of mentally retarded citizens, upholding a Kentucky statute which set forth a dubious distinction between mentally ill individuals and mentally retarded individuals. In Heller, the Court approved the statute's scheme by which a mentally retarded individual could be involuntarily committed to a state facility upon a showing of "convincing" evidence that such citizen presented a danger to himself or others but a mentally ill individual could be involuntarily committed to a state facility only upon a much higher standard of showing evidence "beyond a reasonable

doubt" that such citizen presented a danger to himself or others. The Court further approved the statute's scheme by which the family and guardians of a mentally retarded individual could team up with the state as a "second prosecutor" in prosecuting an involuntary commitment motion but the family and guardians of a mentally ill individual could not. Essentially, the Court refused to entertain the notion that a mentally retarded individual's interest in avoiding involuntary commitment did not rise to the level of a "fundamental right" subject to heightened constitutional protection.

In dissent, Justice Souter contended that no rational justification supported the distinction between mentally ill and mentally retarded individuals. He argued that a statute's allocation of burdens of proof reflected not the ease with which some fact may be proved (a contention Kentucky used to support the distinction at issue), but that a statute's allocation of burdens of proof reflected the relative importance of the interests asserted in different cases. Justice Souter referred to the "more likely than not" burden of proof in civil cases to the "beyond a reasonable doubt" burden of proof in criminal cases. He explained that our legal system assigns the much more stringent "beyond a reasonable doubt" standard to criminal cases because a criminal case is relatively harder to prove than a civil case. Rather, our legal system does not assign the much more stringent "beyond a reasonable doubt" standard to criminal cases because an erroneous criminal case verdict routinely results in the deprivation of liberty to the convicted defendant. In civil cases, on the other hand, an erroneous verdict routinely results merely in the payment of damages. Justice Souter convincingly argued that because there existed no distinction between the involuntary commitment of a mentally ill individual and the involuntary commitment of a mentally retarded individual, the burdens of proof should likewise reflect no distinction.

Civil Rights and Diversity On the Federal Courts

Another important consequence of the Reagan-Bush judicial litmus test was that Reagan-Bush nominees were overwhelmingly white and male, with women and minorities largely excluded from nomination. The statistics are striking. Out of more than 600 judges nominated by Presidents Reagan and Bush, less than one in every twenty was African-American and less than one in every eight was a woman. In fact, after twelve years of Reagan-Bush appointments, there were actually less

African-American judges on the federal courts of appeals than in 1981. As then-Senior Judge Leon Higginbotham wrote in July, 1992:

> I am forced to conclude that the record of appointments of African-Americans to the Courts of Appeals during the past 12 years demonstrates that, by intentional Presidential action, African-American judges have been turned into an endangered species, soon to become extinct.[163]

This dire prediction did not come true, however, because of the significant increase in diversity on the federal bench under President Clinton. In his first year in office, President Clinton nominated more African-American judges than President Reagan did in eight years. Overall, as of July, 1996, Clinton had made 231 judicial nominations, of whom more than one in four were minorities and more than three in ten were women. At the same time, more than 65% of Clinton's nominees were rated "well qualified" by the ABA, a higher rating than under Presidents Bush, Reagan, or Carter.[164] Neutral observers such as Professor Sheldon Goldman have praised Clinton's efforts.[165]

Yet proponents of a new far right judicial litmus test have specifically criticized Clinton's nominations because of the increased number of women and minorities. JSMP's Tom Jipping has actually accused President Clinton of "race and sex discrimination," and conservative activists are urging that efforts to promote diversity on the federal bench should be ended.[166]

As Judge Higginbotham has written, diversity in the federal judiciary is important to ensure that litigants "benefit from the experience of those whose backgrounds reflect the breadth of the American experience" and to help build a judiciary "that is both substantively excellent and respected by the general population."[167] Both the Reagan-Bush record and the rhetoric of right-wing activists indicate, however, that imposition of a new far right judicial litmus test threatens to re-transform America's courts into an overwhelmingly white male province, with minorities again becoming, in Judge Higginbotham's words, an endangered species.

ABORTION AND REPRODUCTIVE FREEDOM

The issue of reproductive privacy and freedom of choice has been a central one for right-wing activists seeking to influence the Supreme Court. Although judicial nominations efforts during the Reagan-Bush

administrations did not succeed in actually overturning Roe v. Wade, freedom of reproductive choice has been severely cut back as a result of Reagan-Bush appointments to the Court, and further erosion of reproductive freedom is threatened in the future. In addition, right-wing activists have made clear that Roe v. Wade remains high on their judicial hit list, and if they are able to succeed in implementing a new far right judicial litmus test, constitutional protection for reproductive privacy is likely to disappear altogether.

Restrictions on Reproductive Choice

When the Supreme Court decided Planned Parenthood v. Casey in 1992, headlines proclaimed that despite Reagan-Bush appointments, the Court did not overturn Roe v. Wade. While these headlines were correct, they told only half the story. Although declining to overturn Roe, the majority in Casey approved severe restrictions on reproductive choice, overturning a previous Supreme Court ruling as recent as 1986.[168] As a result of Casey, as well as several other Court rulings before and since that decision, the High Court has specifically approved a number of significant restrictions on reproductive freedom, including laws and regulations which:

- Ban all abortions at public facilities, including even at private hospitals or clinics which lease space from public agencies, foreclosing the availability of abortions to many women;[169]
- Impose requirements on abortion providers which, according to a federal district court, would likely produce increased harassment of providers, unjustifiably interfere with the exercise of proper medical judgment, and make it more difficult for poor women to obtain abortions;[170]
- Require that doctors performing abortions effectively try to discourage them by informing patients about details of fetal development, alternatives to abortion, and entitlement to public aid and child support if a pregnancy is carried to term, despite a federal judge's finding that such a practice may mislead or confuse patients and is generally inappropriate;[171]
- Prohibit abortions after 20 weeks even in cases of rape or incest, or for any reason other than significant threats to maternal life or health and grave fetal abnormalities.[172]

Perhaps the most serious damage done by the majority in Casey was its proclamation that government restrictions on a woman's right of choice

are permissible, even during the first trimester of pregnancy, as long as no "undue burden" is imposed upon her. As a result of Casey, restrictions on the availability of abortions are no longer subject to strict scrutiny as originally prescribed by Roe, and thus no longer need to be "narrowly drawn" to promote a "compelling state interest."[173] Based on this standard, the lower courts have upheld a variety of abortion restrictions, such as:

- State regulation of abortions for the purpose of persuading women not to have them;[174]
- A requirement that a woman be counseled at least 24 hours in advance of her abortion to allow for the state's expression of its preference for childbirth, despite the fact that plaintiffs complained that the result was "demeaning and patronizing" and was "at best useless" given evidence that no patient has ever canceled her plans or changed her decision because of the mandated information.[175]
- Informed consent and waiting period provisions that provide no exceptions for cases of rape or for women upon whom the requirement would have serious adverse effects,[176] such as women battered by their husbands.

Another way in which reproductive freedom is threatened concerns action by abortion opponents to block access to medical facilities, threaten or injure patients and staff, far beyond legitimate First Amendment protest activities. In one of the most extreme cases to date, antiabortionist Paul Jennings Hill shot a physician and his two escorts outside a Florida clinic. Hill tried to raise the legal defense of necessity, involving necessary action to prevent imminent harm to another. Although Reagan-appointed Judge Roger Vinson rejected the defense in Hill itself, he specifically ruled that Hill or any other such defendant could raise a necessity defense to a charge of shooting clinic personnel, and potentially be acquitted of all charges, if he could prove that he had exhausted all available legal alternatives to preventing abortions over a long period and that abortions were about to be performed by his victims.[177] Particularly if followed by other judges, this decision threatens not only reproductive freedom, but also the very health and lives of doctors, nurses, and other clinic personnel.

Even if Roe v. Wade is not overruled, therefore, Reagan-Bush judges and justices have already severely restricted reproductive freedom, and are likely to continue to do so in the future. This trend can only be

accelerated if additional judges are added to the federal courts based on a far right litmus test.

Overturning Roe v. Wade

Beyond simply restricting reproductive choice, right-wing activists seeking to impose a new far-right judicial litmus test have made clear that Roe v. Wade is a primary target of their efforts. A key reason for their praise of Reagan-Bush Supreme Court nominees like Clarence Thomas, as well as their criticism of justices such as David Souter, has been the justices' voting records on abortion. In advocating that the Republican Party platform plank on abortion remain precisely as is for 1996, right-wing advocates have specifically pointed to the plank's call for the "appointment of judges at all levels who respect traditional family values and the sanctity of innocent human life."[178] Earlier this summer, religious right leader Pat Robertson specifically urged "Christian voters" to get involved in the presidential election because "we have a chance right now in this coming election to see three Supreme Court [justices], conservative Supreme Court judges put on the Court, which could indeed reverse Roe v. Wade...."[179]

In fact, only two additional conservative Supreme Court justices like those on the current Court right wing would result in overturning Roe v. Wade, since Chief Justice Rehnquist and Justices Scalia and Thomas have already voted for that result in Casey. The consequences of such a decision would be devastating to women and families. Women could literally be considered criminals by state legislatures for deciding to have an abortion, even in the case of rape or incest. A doctor could be put in jail for performing an abortion, even if necessary to preserve a woman's health. Imposition of a far-right judicial litmus test clearly risks such results in the area of reproductive freedom.

End Notes

[1] "Excerpts From Speech: On the Judiciary," *New York Times,* April 20, 1996, at 10.
[2] See, e.g., Ted Gest, "Disorder in the courts?", U.S. News & World Report, February 12, 1996, at 40; Eric Schmitt, "Senator Renews Attack on Clinton's Judges," New York Times, March 26, 1996, at 9.
[3] John McGinnis, "Original Thomas, Conventional Souter," *Policy Review*, Fall, 1995, at 28.
[4] Glen Elsasser, "Wanted: Judges With 'Restraint'; Meese: No Ideological 'Litmus Test' for

Candidates," *Chicago Tribune*, February 11, 1986, at 14.
[5] Transcript of "All Things Considered" broadcast, National Public Radio report, August 28, 1985.
[6] Id.
[7] Sheldon Goldman, "The Age of Judges: Reagan's Second Term Appointees," *ABA Journal*, October 1, 1987, at 94.
[8] Philip Lacovara, "The Wrong Way to Pick Judges," *New York Times*, October 3, 1986, at 31.
[9] Id.
[10] Tony Mauro, "Conservative Tilt Marks Remade Court," *USA Today*, January 24, 1989, at 1A.
[11] Paul Gigot, "Supreme Court: An Emerging Case of Poetic Justice," *Wall Street Journal*, January 27, 1989, at 14.
[12] W. John Moore, "Righting the Courts," *The National Journal*, January 25, 1992, at 200.
[13] "Bush Boosts Bench Strength of Conservative Judges," *Congressional Quarterly*, January 19, 1991.
[14] See People For the American Way, Assault on Liberty: The Record of the Reagan-Bush Courts (1992).
[15] Payne v. Tennessee, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting).
[16] "Justice Anthony Kennedy: Surely Reagan's Biggest Disappointment," *Human Events*, May 31 & June 7, 1996, at 3.
[17] Id. at 3-4.
[18] "Family News in Focus" (radio program), May 21, 1996.
[19] "Justice Anthony Kennedy: Surely Reagan's Biggest Disappointment," supra note 16, at 4.
[20] McGinnis, supra note 3, at 24.
[21] Id. at 28.
[22] Id. at 28-29.
[23] Id. at 24.
[24] Id. at 29.
[25] Don Feder, "Assault on Ethics," *Washington Times,* May 30, 1996.
[26] Gary Bauer, "A Message from Gary L. Bauer" (letter), December 8, 1995.
[27] "Abortion: Dole Tries to Get It Right," *The Hotline,* July 15, 1996.
[28] Gary Bauer, "Focus on the Family" (radio program), May 30, 1996.
[29] Gest, supra note 2, at 40.
[30] Guy Kelly, "Dole Attacks Clinton's 'Liberal Philosophy' Against Crime," *Rocky Mountain News,* May 29, 1996, at 5.
[31] Clint Bolick, "Control of Federal Courts Key Issue in Election," *USA Today,* January, 9, 1996, at 11A.
[32] See, e.g., Daniel Troy, "Reconsidering the ABA's Formal Involvement in Judicial Selection Will Enhance the Cause of Federalism," *Federalist Paper,* May, 1996; Thomas Sowell, "Tilted Judicial Endorsements," *Washington Times,* May 9, 1996.
[33] See Sen. Bob Dole (R-KS), speech to American Society of Newspaper Editors, April 19, 1996.
[34] See JSMP fund-raising letter (June, 1995) (available in PFAW files).
[35] Bob Dole, "Dole Tells How He Would Pick Judges," *Insight,* April 29, 1996, at 11.
[36] "Molinari: Dole Reaches Out to Women, Pro-Choicers," *The Hotline,* July 16, 1996 (Larry King Live, July 15, 1996).
[37] Michael J. Sniffen, "Reno Chides Senate on Judges," *Associated Press,* June 27, 1996.
[38] See, e.g., Thomas Jipping, "Dole's Record on Judicial Nominations," *Legal Notebook* (online), June 10, 1996.
[39] "Logjam Broken - At Least Long Enough to Confirm Two Judges," *CQ's Congressional Monitor,* July 11, 1996, at 5-6.
[40] Thomas Jipping, "Why Were These Judges Approved?" *Washington Times,* August 1, 1996.
[41] See draft Republican Party platform, August 5, 1996, at 5.
[42] Id. at 6. See also Pat Buchanan, "Ending Judicial Dictatorship," Heritage Lecture No. 553, January 29, 1996, at 4; Guy Gugliotta, "Congress Has the Constitution for Amendments," *Washington Post,* April 23, 1996, at A15.
[43] Linda Greenhouse, "Rehnquist Joins Fray on Rulings, Defending Judicial Independence," *New York Times,* April 10, 1996.
[44] Pat Robertson, "The 700 Club," Christian Broadcasting Network, June 21, 1996.

[45] Bolick, supra note 31, at 11A.
[46] Thomas Jipping, "The Case Against Stack," Legal Notebook (online), April 22, 1996.
[47] Dole, supra note 33.
[48] See JSMP fund-raising letter, supra note 34.
[49] Alan Elsner, "Dole Hits Clinton on Judges," *Reuters,* April 19, 1996.
[50] "Partisan Hatchet Job Victimized N.C. Judge," *News & Record,* March 1, 1996, at A12.
[51] Jack Quinn, "GOP Playing Politics on Clinton Judicial Choices," *USA Today,* April 23, 1996, at 11A.
[52] See Department of Law Enforcement v. Real Property, 588 So.2d 957 (1991).
[53] See Sen. Connie Mack (R-FL), testimony before the Senate Judiciary Committee, Hearings on the Nomination of Rosemary Barkett, *Federal Document Clearing House Congressional Testimony,* February 3, 1994 ("I believe Justice Barkett will bring to the Eleventh Circuit a demonstrated capacity for intellectual curiosity, for fair-minded and robust debate, and for honesty, all of which will serve our federal judiciary well. Chief justice Barkett deserves to be confirmed.")
[54] See Neil MacFarquhar, "Federal Judge to Resign, Citing Political Attacks," New York Times, June 5, 1996, at B4.
[55] See Congressional Record, October 4, 1994, at S. 14022 (statement of Sen. Alan Simpson) ("I believe Judge Sarokin has the education and the judicial experience to be a very capable appellate judge.").
[56] See Quartararo v. Fogg, 679 F. Supp. 212 (E.D. N.Y. 1988); Quartararo v. Mantello, 715 F. Supp. 449 (E.D. N.Y. 1989).
[57] See Joubert v. Hopkins, District of Nebraska Dist. No. 8: CV 91-00350.
[58] See Joubert v. Hopkins, 75 F.3d 1232 (8th Cir. 1996).
[59] See Reeves v. Hopkins, 871 F. Supp. 1182 (D. Neb. 1994), rev'd. 76 F.3d 1424 (8th Cir. 1996).
[60] See United States v. Chen, Northern District of California D.C. No. CR-91-00296-VRW, rev'd., 979 F.2d 714 (9th Cir. 1992).
[61] See Hitchcock v. Dugger, 481 U.S. 393 (1987).
[62] *Congressional Record,* April 19, 1996, at S. 3725 (statement of Sen. Patrick Leahy).
[63] Tony Mauro, "Experts Warn that Ranking Jurists is Risky," *USA Today,* May 7, 1996, at 1A.
[64] Neil Lewis, "In Selecting Federal Judges, Clinton Has Not Tried to Be the Anti-Reagan," *New York Times*, August 1, 1996, at 1.
[65] Id.; See also Robert Carp, Donald Songer, and Ronald Stidham, The Voting Behavior of Judges Appointed By President Clinton, March 21, 1996.
[66] Mauro, supra note 63.
[67] "Senator Dole and the Judges," *Washington Post,* April 23, 1996, at A16.
[68] See, e.g., City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) (Scalia, J.) (rejecting any application of the Sherman Antitrust Act to anticompetitive restraints imposed by the states, even where those restraints are imposed as part of a conspiracy with a private corporation); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 311 (1981) (Rehnquist, J. concurring) ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."); Morrison v. Olson, 108 S. Ct. 2597, 2622 (1988) (Scalia, J., dissenting) (arguing that Congress does not have the authority to appoint a special prosecutor); Clarence Thomas, speech to the Pacific Research Institute, August 4, 1988, at 13 (praising Scalia's dissent in Morrison); Clarence Thomas, speech to University of Virginia Federalist Society, March 5, 1988, at 13 (referring to Congress as "out of control").
[69] 115 S. Ct. 1624 (1995).
[70] 18 U.S.C. § 922(q)(2)(A) (1990).
[71] Lopez, supra note 69, at 1630.
[72] Id. at 1662-63 (Breyer, J., dissenting).
[73] Id. at 1664.
[74] Id.
[75] See U.S. v. Denalli, 73 F.3d 328 (11th Cir. 1996); U.S. v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995).
[76] Three of the opinions ruling the Act unconstitutional under Lopez were by Reagan appointee

Paul Rosenblatt. See U.S. v. Schroeder, 894 F. Supp. 360, 364 (D. Ariz. 1995); U.S. v. Mussari, 894 F. Supp. 1360, 1368 (D. Ariz. 1995); U.S. v. Schroeder (II), 912 F. Supp. 1240, 1244 (D. Ariz. 1995). See also U.S. v. Parker, 911 F. Supp. 830, 835 (E.D. Pa. 1995); U.S. v. Bailey, 902 F. Supp. 727, 730 (W.D. Tex. 1995). Despite these holdings, several courts have nevertheless found the Child Support Recovery Act constitutional under Lopez. See, e.g., U.S. v. Hampshire, 892 F. Supp. 1327 (D. Kan. 1995); U.S. v. Murphy, 893 F. Supp. 614 (W.D. Va. 1995); U.S. v. Hopper, 899 F. Supp. 389 (S.D. Ind. 1995).

[77] U.S. v. Gambill, 912 F.Supp. 287, 290 n. 4 (S.D. Ohio 1996).

[78] U.S. v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 499 (9th Cir. 1995).

[79] Civ. A. No. 95-1358-R (W.D. Va. July 29, 1996).

[80] See 42 U.S.C. § 13981(c) (1994).

[81] Brzonkala, supra note 79.

[82] Id.

[83] Id. (quoting S. Rep. 138, 103d Cong., 1st Sess. 54 (1993)).

[84] Id. Judge Kiser's decision runs directly contrary to an earlier decision by Judge Janet Arterton of the U.S. District Court for the District of Connecticut, which held VAWA constitutional under the Commerce Clause. Doe v. Doe, 1996 U.S. Dist. LEXIS 8601 (D. Conn. 1996). Judge Kiser also rejected VAWA's constitutionality under the enforcement clause of the Fourteenth Amendment. The validity of this conclusion is equally suspect given the Supreme Court's holding in Katzenbach v. Morgan, 384 U.S. 641 (1966) (declaring constitutional under the enforcement clause Section 4(e) of the Voting Rights Act of 1965).

[85] Virginia v. United States, 766 F. Supp. 1407 (W.D. Va. 1991), rev'd. 64 U.S.L.W. 4638 (1996).

[86] John Farrell, "Clinton's Record: A Reality Check," Boston Globe, March 10, 1996, at 1.

[87] See, e.g., Jeffrey Snyder, "A Nation of Cowards," *American Civilization*, April, 1995.

[88] 854 F. Supp. 1503, 1519 (D. Mont. 1994), rev'd. 66 F.3d 1025 (9th Cir. 1995).

[89] 856 F. Supp. 1372, 1381-82 (D. Ariz. 1994), rev'd. 66 F.3d 1025 (9th Cir. 1995).

[90] 66 F.3d 1025, 1034 (9th Cir. 1995).

[91] Id. at 1029-31.

[92] 863 F. Supp. 321, 327 (S.D. Miss. 1994), aff'd. 79 F.3d 452 (5th Cir. 1996).

[93] 883 F. Supp. 1076, 1082-83 (W.D. La. 1994).

[94] 860 F. Supp. 1030, 1042 (D. Vt. 1994), rev'd. 78 F.3d 815 (2nd Cir. 1996).

[95] Frank v. U.S., 78 F.3d 815, 827 (2nd Cir. 1996).

[96] Koog v. U.S., 79 F.3d 452, 461 (5th Cir. 1996).

[97] The Establishment and Free Exercise Clauses state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

[98] 374 U.S. 398 (1963).

[99] 494 U.S. 872 (1990).

[100] Id. at 903 (O'Connor, J., concurring) ("The Court's holding today not only misreads settled First Amendment precedent; it appears to be unnecessary to this case.").

[101] See Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mich. 1990), aff'd, 940 F.2d 661 (6th Cir. 1991); Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990).

[102] See Intercommunity Center for Justice and Peace v. I.N.S., 910 F.2d 42 (2d Cir. 1990); American Friends Serv. Comm. v. Thornburgh, 951 F.2d 957 (9th Cir. 1991).

[103] See Salvation Army v. Department of Community Affairs, 919 F.2d 183 (3d Cir. 1990).

[104] See Kissinger v. Board of Trustees of the Ohio State University, College of Veterinary Medicine, 5 F.3d 177 (6th Cir. 1993).

[105] RFRA is codified at 42 U.S.C. § 2000bb et seq. (1993).

[106] See, e.g., Flores v. City of Boerne, Texas, 73 F.3d 1352 (5th Cir. 1996) (RFRA constitutional); Abordo v. State of Hawaii, 902 F. Supp 1220, 1229-34 (D. Hawaii 1995); Sasnett v. Department of Corrections, 891 F. Supp. 1305, 1315-21 (W.D. Wis. 1995) (same); Belgard v. Hawaii, 883 F. Supp. 510, 512-17 (D. Hawaii 1995) (same). But see Keeler v. Mayor & City Council of Cumberland, Civ. A. No. S-96-167, 1996 WL 311701 (D. Md. June 10, 1996) (decision by Reagan appointee Frederic Smalkin finding RFRA unconstitutional).

[107] Flores v. City of Boerne, Texas, 73 F.3d 1352 (5th Cir. 1996), petition for cert. filed, __ U.S.L.W. __ (June 25, 1996).

[108] See, e.g., "Court Protects 'Religious' Marijuana Use," *Human Events,* February 23, 1996, at 5.

[109] James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 3, reprinted in Everson v. Board of Ed. of Ewing, 330 U.S. 1, 65-66 (appendix to dissent of Rutledge, J.).
[110] Jefferson, A Bill for Establishing Religious Freedom, reprinted in 5 The Founder's Constitution, 84-85 (P. Kurland & R. Lerner, eds. 1987). See generally Everson, 330 U.S. at 13.
[111] See Rosenberger v. Rector & Visitors of the University of Virginia, 115 S. Ct. 2510, 2543-44 (1995) (Souter, J., dissenting).
[112] 413 U.S. 756, 780 (1973).
[113] See Stanley Elam, "Phi Delta Kappa's Young Leaders of 1980 Tackle Today's Issues," *Phi Delta Kappan,* May, 1996, at 610 (poll result showing 65% of the public opposes allowing students and parents to choose a private school to attend at public expense).
[114] 113 S. Ct. 2462 (1993).
[115] Zobrest is another example of conservative judicial activism because the Court did not need to reach the Establishment Clause issue at all. As an alternative to the Establishment Clause rationale, the State argued that the federal law at issue, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., did not even require it to provide an interpreter at any private school if special education services were available at the local public school. If true, this contention would have eliminated the Establishment Clause problem. Although the State had neglected to raise this argument in the lower courts, the Supreme Court could have adhered to the general rule against deciding constitutional issues except where absolutely necessary by remanding the case for a determination of the statutory question. Instead, the Court reached out to decide a constitutional question that could have been avoided entirely. Existing federal precedent uniformly holds that the IDEA does not requires a state to provide an interpreter under such circumstances. See K.R. v. Anderson Community Sch. Corp., 81 F.3d 673 (7th Cir. 1996); Goodall v. Stafford County Sch. Bd., 930 F.2d 363 (4th Cir.), cert. denied, 112 S. Ct. 188 (1991); McNair v. Cardimone, 676 F. Supp. 1361 (S.D. Ohio 1987), aff'd on other grounds, 872 F.2d 153 (6th Cir. 1989); Work v. McKenzie, 661 F. Supp. 225 (D.D.C. 1987). Justice O'Connor criticized the majority for reaching the constitutional issue and refused to reach it herself. 113 S. Ct. at 2475 (O'Connor, J. dissenting).
[116]The Court's reliance on "private" choice ignores the fact that such "choice" is made possible only through public financial assistance provided by the government and so is not truly private.
[117] 46 F.3d 1449 (9th Cir. 1995).
[118] Id. at 1464-65.
[119] In their dissent from the Ninth Circuit's refusal to rehear the case, three judges recited the controlling Supreme Court precedent and stated that "the Court has squarely held that the state may not do what it is doing here. We are simply not free to ignore that ruling." Walker v. San Francisco Unified School District, 62 F.3d 300, 302 (9th Cir. 1995) (Reinhardt, J., dissenting from denial of petition for rehearing en banc, joined by Pregerson, C.J., and Hawkins, J.).
[120] Rosenberger, supra note 111.
[121] Id. at 2534 (Souter, J., dissenting).
[122] See, e.g., Id. at 2525-26 (O'Connor, J., concurring).
[123] See Gatton v. Goff, No. 96CVH-01-193 (Ct. of Common Pleas, Franklin Co. Ohio) (July 31, 1996), app. pending (upholding Ohio state voucher program in Cleveland). See also Jackson v. Benson, No. 95cv1982 (Cir. Ct. Dane County, Wis.) (Wisconsin State voucher program in Milwaukee).
[124] 403 U.S. 602 (1971).
[125] Id. at 612-13 (1971).
[126] See, e.g., Wallace v Jaffree, 472 U.S. 38, 69 (O'Connor, J., concurring).
[127] 112 S. Ct. 2649, 2684 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., Thomas, J., and White, J.).
[128] This section was drafted by David M. Pierce, Esq. The views expressed herein are solely those of the author and People For the American Way, and do not necessarily reflect the views of his firm or other attorneys with the firm. People For the American Way also gratefully acknowledges the work of attorney Daniel Simon and law students Gregory Ostfeld and Melissa Kopff on this report.
[129] For a discussion of pre-1992 decisions in the area of civil rights, see People for the American Way, Assault on Liberty: The Record of the Reagan-Bush Courts (1992).

[130] 114 S. Ct. 2581 (1994).
[131] See, e.g., Reynolds v. Sims, 84 S. Ct. 1362 (1964).
[132] See, e.g., Gomillion v. Lightfoot, 81 S. Ct. 125 (1960).
[133] 113 S. Ct. 2816 (1993).
[134] 115 S. Ct. 2475 (1995).
[135] 1996 U.S. LEXIS 3882, 64 U.S.L.W. 4452 (1996).
[136] 1996 U.S. LEXIS 3880, 64 U.S.L.W. 4437 (1996).
[137] Id. at *89 (Stevens, J., dissenting).
[138] 115 S. Ct. 1769 (1995).
[139] 106 S. Ct. 1712 (1986).
[140] 115 S. Ct. at 1771.
[141] 116 S. Ct. 1480 (1996).
[142] Id. at 1493.
[143] 115 S. Ct. 2038 (1995).
[144] 113 S. Ct. 2742 (1993).
[145] Id. at 2762 (Souter, J., dissenting).
[146] Supra note 69.
[147] 379 U.S. 241 (1964).
[148] 379 U.S. 294 (1964).
[149] See notes 79-85 and accompanying text for a more complete discussion of this case.
[150] 114 S. Ct. 1419 (1994).
[151] Id. at 1421.
[152] Id. at 1436 (Scalia, J., dissenting).
[153] 116 S. Ct. 1620 (1996).
[154] Id. at 1623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896)).
[155] Id. at 1629.
[156] Id. (Scalia, J., dissenting).
[157] See, e.g., St. George Crosse, "Perspective: A Disaster for American People; Homosexuals Aren't Disadvantaged; The Supreme Court and Gay Rights," *Baltimore Sun*, June 2, 1996, at 6F.
[158] 54 F.3d 261 (6th Cir. 1995).
[159] 106 S. Ct. 2841 (1986).
[160] See, e.g., Steffan v. Perry, 41 F.3d 677, 684 n. 3 (D.C. Cir. 1994) (en banc) (following Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) ("It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.")).
[161] 135 L.Ed.2d 486 (1996).
[162] 113 S. Ct. 2637 (1993).
[163] A. Leon Higginbotham, "The Case of the Missing Black Judges," New York Times, July 29, 1992, at A21. See also PFAW Action Fund, Federal Judicial Nominees in the 102d Congress and the Bush Administration (October, 1992), at 1-2; PFAW, The First Year of Federal Judicial Nominees by President Clinton (December, 1993), at 1-2.
[164] Id. See also White House, Clinton Administration Judicial Record (July 25, 1996).
[165] See, e.g., Sheldon Goldman, "Judicial Selection Under Clinton," *Judicature,* May-June, 1995.
[166] Thomas Jipping, "The Case Against Stack," supra note 46. See also Thomas Jipping, The Clinton Judicial Legacy (July, 1996), at 7; James Kilpatrick, "Clinton Busy Trying to Remake Courts," *Human Events,* September 22, 1995, at 10.
[167] Higginbotham, supra note 163.
[160] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 882 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ., with the Chief Justice and three Justices concurring in the judgment) (discussing the overturning of Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 762 (1986) and Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 450 (1983) in which the Court had found rigid informational requirements and a 24-hour waiting period to be unconstitutional).
[169] Webster v. Reproductive Health Services, 492 U.S. 490, 508-511, 539-540 (1989).
[170] Casey, 505 U.S. at 886-887. See also Casey, 744 F. Supp. at 1367-68, 1370-72, 1392.
[171] See Casey, 505 U.S. at 883; 947 F.2d 682; 744 F. Supp. at 1350, 1353-55.

[172] Leavitt v. Jane L., 1996 U.S. LEXIS 3885, 64 U.S.L.W. 3834 (1996). As the four non Reagan-Bush justices who dissented in Leavitt explained, the majority's decision reversed a lower court ruling on state law severability in a manner which violated a Supreme Court practice of judicial restraint on such issues followed consistently for almost fifty years. 64 U.S.L.W. at 3836.
[173] Roe v. Wade, 410 U.S. 113, 155 (1973).
[174] A Woman's Choice - East Side Women's Clinic v. Newman, 904 F. Supp. 1434 (S.D. Ind. 1995).
[175] Id. at 1450.
[176] Planned Parenthood, Sioux Falls Clinic v. Miller, 860 F. Supp. 1409 (D.S.D. 1994).
[177] United States v. Hill, 893 F. Supp. 1044, 1047-48 (N.D. Fla. 1994).
[178] "Party Stresses Family Values, Decentralized Authority," *Congressional Quarterly,* August 22, 1992, at 2567.
[179] "The 700 Club," Christian Broadcasting Network, June 21, 1996.