CourtZero

This book is dedicated to the charter members of the CourtZero message board.

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Court Zero

A Guide to Judicial Activism for Revolutionaries and Regular Folks

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Introduction

This book is designed to be read by regular folks and revolutionaries, who are often one and the same. I use the word revolutionary carefully, because it is not the intention of this book to suggest that anyone should take radical action to change our form of government. It is quite the opposite. Our form of representative government is at risk, and it looks like it will take bold action to preserve it.

For those reading this book who are trained in legal persuasion and in decoding court opinions, all the information you need to check things out for yourself are included in this book. For those who don't happen to spend much time reading court opinions but who happen to care about who exercises power over their lives, this book is especially for you.

This book was written to fill a hole. On March 1, 2004, a simple website was launched to spark general interest in the enormous power of American courts compared to the people's ability to govern themselves. That website is CourtZero.org, which was initially a response to a flood of court decisions that got relatively little attention in the popular press but that nonetheless threaten to overwhelm the ability of the people to process what was happening to their rights and society and culture.

As the website was constructed to chronicle what judges were up to, it added a message board. It was on that message board that your author discovered the hole that needed to be filled. Most people are not lawyers or judges, and even those who are lack the time to read thousands of pages of court opinions to decide for themselves whether or not our judicial branch of government is functioning in accordance with our laws and in our best interests. Most people do not speak legalese. Most books and commentary about the courts and judicial activism are not very easy to follow. Most reporting in the media barely scratches the surface of the background, influences, and reasoning of important court cases that affect us all.

That message board educated your author as to the approach most people take to thinking about the courts, and provided a forum to kick ideas around. This book is designed to mirror the discussions among the members of the CourtZero message board and to make a debate about our courts as natural as logging on and chatting with some friends.

Chapter One
CourtZero

If you care about the future of representative government in America, this book is for you. If you don't mind diminishing the power of your vote in favor of the rulings of those supposedly wiser than you are, than this book is for you as well. It is especially for you.

An oligarchy is, in the simplest of terms, a situation in which the majority are ruled by a very few who hold all the power. The American tradition, and indeed the highest American law, our Constitution, make it plain that of all the nations on the planet, the United States of America is designed to have a government, by, for and about the people a reality. It is meant to operate only with the consent of the governed. In short, we don't like oligarchy. But we are fast heading to being ruled by one, in the form of the black-robed priest-kings of American courts, if we aren't there already.

How have we come from being the nation bold enough to write a declaration of independence, full of grand notions of individual liberty and the rule of law, to one that is on the verge of losing all that was fought for?

As you read this book and the discussions of various court cases contained in it, you will see

illustrations of the five-step process underway to transform us from a nation where citizens have a real voice to one in which only a few will decide important issues. I do not suggest that these five steps are part of a conspiracy, nor any grand plan to transform the rule of law into a rule of men; I only suggest that for whatever reason, these things are happening, and we need to exercise the will to reverse it if we care to remain in charge of our own future.

- STEP ONE is that the average citizen will come to see the Constitution as a "living, breathing document" instead of seeing it as not only the bedrock of our freedoms, but as the only legitimate means by which the government can rule over us. If most of us believe that the Constitution should "evolve" without any of us voting for amendments, and if most of us accept the idea that the plain language of the Constitution doesn't really mean what it seems to mean unless a judge says so, then the document that protects us becomes meaningless. At the same time, people will come to see "the law" as simply being whatever a judge says it is.

- STEP TWO is to award financial incentives to lawyers and interest groups who desire to deconstruct and shape societal norms, and to make it unbearably expensive for any person or town to resist. Activist groups, like the ACLU, get paid to challenge our traditions, while other groups, like

those who wish to argue the rights of the unborn (for example) get penalized under RICO law and find themselves bankrupted by judges leveling sanctions and fees.

- STEP THREE happens when special interests in litigation are empowered, while the concerns of the actual litigants become relatively unimportant. Courts increasingly treat every conflict between two people as a constitutional question, and allow argument and briefs on behalf of every interest group under the sun, eventually forgetting about the specific disagreement that caused a lawsuit. It is simply not reasonable to expect that every time two people bring a disagreement to the courts, it ends up potentially affecting the rights of all of us.

- STEP FOUR is when judges are forced to either be politically correct activist judges or to remain silent. The ABA (American Bar Association) is hard at work making this a reality. Rule changes making it an ethical violation for a judge to participate, in his or her private life, in (for example) the Boy Scouts, are planned that will cause judges who live a private life not acceptable to activist causes to be punished.

- STEP FIVE occurs when the careers of judges who refuse to embrace activist agendas are destroyed. Exhibit one is Judge Roy Moore of Alabama. Whatever you may think about the Establishment Clause and the display of the Ten

Commandments, it is striking that the first judge in modern times to take a stand against activism was not only punished, he was removed from office with extreme prejudice.

The five steps, listed above, between freedom and representative government to the oligarchic rule of the few who reign by decree, have either already happened, are happening, or are soon to happen, as the remainder of this book illustrates. There is no way of knowing if anyone planned to go through those steps, or conspired to do so. Probably not, but which is worse, losing forever the concept of government by the consent of the governed to an organized enemy, or rather to have the great American experiment in self-government fail due to neglect or by accident? Freedom isn't free. We need to pay attention to the power of judges, just as it is wise to keep an eye on any danger.

That leads us to what CourtZero is about. How much faith will you have in the fairness and objectivity of the courts by the time you finish this book? Next to zero. How much support and resources should the courts get while they rewrite our laws without our consent? Zero. How much power should we stand by and let the judges grab? Zero. With a nod to President Lincoln, we should not lightly allow government by the people, for the people, and about the people to perish from the earth. Not without a fight. Let's get started and discuss what our courts are up to.

Chapter Two
Court decisions affect real people

In the State of Florida, a woman has lain in a hospital bed, disabled, since collapsing at her home in 1990 at the age of twenty-six. Since at least 1993, after receiving a large malpractice award, her husband, Michael Schiavo, has sought to terminate his wife's life by withholding food and water until she dies of dehydration or starvation. Championed by his attorney, George Felos, Michael Schiavo has received numerous rulings from judges sympathetic to his plan. In October of 2003, Terri's feeding tube was removed after Judge Greer granted Terri's husband permission to end her life. Between October 15 and October 22, Terri is allowed no food or water. On October 22, 2003 the legislature of the State of Florida passed a law that allowed the Governor of Florida to issue a one-time stay of death, for the purpose of appointing a guardian ad litem to advise the court on the patient's best interests, in the case that, essentially, a disabled person who has 1) no advance directive or living will, and 2) has been authorized by court order to have food and water withheld until death occurs, and 3) the next of kin objects to death by starvation. The governor issued the stay of death by executive order, and his authority to do so was challenged as unconstitutional. On August 31, 2004, the Florida Supreme Court heard argument on the challenge.

I drove up to Tallahassee to hear for myself the oral arguments at the Florida Supreme Court in the Terri Schiavo case. Having furiously taken notes of the proceedings, I stood as I should when the justices recessed.

I watched the attorneys leave first then took a good look around before I headed for the exit. Somehow, without having noticed him or trying to, I literally brushed into Michael Schiavo. I am a tall, big man, but he is taller, and bigger, and that surprised me. I was also surprised that I did not see a hissing demon crawling about his shoulder. I don't mean to be facetious. I expected to have an instinctive perception of evil about him, but did not. Instead, I saw him as dispassionate, as neutral on the spectrum of overt good or evil.

I walked out of the Florida Supreme Court building, trying to avoid the television cameras that were trained on Schiavo, who walked behind me after hesitating to let his attorney, Felos, and the ACLU attorney join him. Somehow I almost brushed up against him again. Passing the four representatives of a group called Not Dead Yet who were passing out flyers calling for checks and balances on the courts, I crossed the street to the steps of the New Capitol Building.

A podium was set up in front of the new metal dolphin sculpture in front of the Capitol so that the speaker could be filmed with the Supreme Court

building in the background. I made my way to the side, where a wall level with my elbow met the top of the stairs. I set my legal pad down to begin making notes. This would turn out to be useful, as it made me invisible; anyone who saw me assumed I was a member of the press.

To my surprise, the Schindler's attorney (Mr. and Mrs. Schindler are Terri's parents) walked to the corner of the wall and set her purse and pad down two feet away from me. She remarked that this spot was literally in the shadow of the Capitol (it was getting hot out) and then lit up a Virginia Slim.

I smiled. She and I had exchanged some email messages and had once chatted online about the case, but she doesn't - and didn't - know me. Regardless, I decided on the spot that I like her immensely. There is something tremendously honest about a person under enormous pressure who takes the time for a cigarette.

After an awkward minute (not awkward to her, but to me, because I wanted to talk to her but didn't know what to say), I introduced myself. "Ms. Anderson?," I asked. "I am," she said, smoking. "Hi," I said, offering my hand, "I'm Craig McCarthy; you and I have exchanged some emails, and I just wanted to say hello." She nodded. That was it for a while.

Michael Schiavo's attorney, Felos, had waxed demonic in front of the microphone for a while, then

Michael Schiavo stepped up to ask the press, "if the governor cares so much about this, WHERE IS HE!?" I suspected it before, but now I was convinced that he and his attorney are absolutely obsessed, for some reason, with Governor Jeb Bush, as if the governor had personally taken the time to plot and deposit all that is bad into their lives.

Pat Anderson and I talked some more. Not seeing some people I expected, I asked if any of the attorneys on the governor's side would appear at the microphone. Pat told me a great story. The day before, Ken Connor, perhaps the most articulate and persuasive of the attorneys representing the validity of Terri's Law, had been in Mississippi to pick a jury. The jury selection had, for reasons of the judge's family emergency, been unexpectedly canceled and rescheduled for the next day at 1:00 p.m. Today, that is. Connor had appeared before the Florida Supreme Court in Tallahassee to try to save Terri's life and now had three hours to be in a courtroom in Mississippi. I have admired him for years, but really like him now. Some attorneys are heroes, for all the bad ones out there. He's a warrior.

When Michael Schiavo was done at the microphone, he stood to the side for a while. I noted that two of the bioethecists from the panel discussion the night before, and one of the MDs, were standing with him, smiling and joking. One wonders how serious one can be about being an expert in ethics,

above it all, when one bonds with a particular litigant.

After a while, the Michael entourage walked down the Capitol steps with his fiancée. Ms. Anderson had been attempting to take the deposition of that woman, and she and Michael had disobeyed the subpoenas. After all these years of litigation, the Schindler's attorney didn't even know what Michael's new love looked like. I know something about the difficulties of conducting adequate discovery. It's a shame that the guardianship can't the side of the woman who is going to die a bone once in a while.

Soon Ms. Anderson took her place, at someone's prompting, at the microphones. After a couple of minutes I realized that I had somehow been appointed the de facto guardian of her purse which was still sitting on the wall next to me. Then, however, I noticed Terri's father speaking at the podium twenty feet from me, and moved close to hear what he was saying.

I had seen Mr. Schindler on television, but it was entirely different to see him in person. He wore an American flag pin on his left lapel. He struck me immediately as a man whose sole function is to hold on. He looked weary, even spent. I got the impression that no matter what would happen to his daughter, that the conclusion would be the end of him. Perhaps some of you know what it is to be beyond the end of

yourself. This conclusion, however, was based upon only a few seconds of watching and listening to him.

As I stood near the podium to listen, I saw Pat Anderson glance toward her purse on the wall, look ahead, then glance at the purse again. Then she caught my eye, and looked at her purse once again. I smiled, and I hope she saw that. I walked to my left and returned to fulfill my duty as the safeguard for her purse.

I thought that if I did that, she would be able to concentrate better on what she had to say to the cameras and microphones.

Then I realized that perhaps that was the only purpose I really had in going to Tallahassee that day, to guard a purse and make its owner more at ease before the press, and I smiled again. That would be enough. Any small task done in the service of justice is humbling.

When the interviews ended, I started to leave. On my way to the steps a young man smoking the stub of a cigarette in a t-shirt that said "freshjive" reached into a bag and handed me a CD-ROM, upon which he had hand-written with a marker "Terri Schiavo - the AHCA coverup." AHCA stands for the Agency for Health Care Administration, a state agency who would have some oversight over Terri's case. I thanked him and he nodded conspiratorially.

Just when I was going to start again to leave, I found myself within two paces of Mr. and Mrs. Schindler, Terri's parents. I was self-conscious, but I stepped forward and extended my hand. I said, "Sir, I want you to know that you have the prayers of me and my family."

He gripped my hand. It wasn't just "firm". It was what I can only describe as a bear hug, if a handshake can be a bear hug. He looked me in the eye and said that it meant a lot to him. Mrs. Schindler nodded. She had a crucifix about her neck, and she seemed pleasant and pretty, in the way of a middle-aged mother, to me. The overwhelming handshake lingered for a moment, and I realized I was absolutely wrong about him from my earlier assessment. He may seem weary on the outside, but there is a rock like no other inside the man that completely surprised and humbled me.

Terri's case is a polarizing one, to say the least. Most news presentations about the case are inaccurate in one way or another, and none tells the whole story. It is easy for us digesting the news to think about high concepts like the right to die, and privacy, and morality, but the fact is that to these people with whom I shared some moments that day, this case is everything. It is the whole universe to them, and their fates are all in the hands of judges. We, as citizens, ought to be at least as tuned to the reasoning and decisions of judges as we are to what

our congressman, or the president, does. What judges do is not academic, it is not abstract; instead what judges do affect real people in profound ways.

Chapter Three
Ed, Larry, and Jerry
Why separation of powers is important

Three boys, Ed, Larry, and Jerry, are all the same age. They like to get together to play a game that they made up just for them. In some ways it is like the game of basketball, but their version is modified so that all three can play at the same time. Over time, the three have come up with their own special rules for their special game so that it remains fun and fair.

Ed is obviously the strongest and fastest of the three. All of them are aware of that fact, and while the strongest boy takes care not to hurt his friends, the other two respect his unique abilities.

Larry is not as physically able as the Ed, but everyone knows that Larry is the smartest of the three of them. He is able to keep in the game because he is the most observant, and is best able to respond to weaknesses in the others. Sometimes he is able to develop a brand new strategy or style of play that leaves Ed just shaking his head in amazement. Since Ed and Jerry respect his ability to think through a problem, they have agreed that Larry gets the job of inventing and modifying the rules of the game, when it is needed.

The third boy, Jerry, is not quite as big and strong as the others, but he is the most resilient. No

matter how long they play, and no matter how tired the other two boys become, Jerry just doesn't quit. He has a long memory of all the games they have ever played, and remembers every detail of the rules that Larry came up with. He is so indisputably honest that Ed and Larry let Jerry act as the referee, even though he is in the game as a player. Jerry is willing to apply the rules to himself, even when it means he gets a penalty, and they all know it; by the agreement of all three, Jerry makes the close calls. Usually the rules operate on their own, and it is obvious when a foul has occurred, but when there is doubt, they look to Jerry. He is essential to the game, even though he doesn't often score the most points.

On the rare occasions when Ed loses his cool and bullies the other two, both Larry and Jerry have every right, on their own or together, to tell Ed, "Back off, you're out of line." And they do, because they want to keep playing the game and having fun.

When Larry makes a rule that is so ridiculous and unfair that it would ruin the whole game, both Ed and Jerry have every right, alone or together, to tell Larry, "no way man, you've lost your mind." And they do, because they want to keep playing and to remain friends.

When Jerry makes a call that is unjust, or just wrong, or worse, when he tries to tell his two friends that the rules aren't what they said anymore, both Ed and Larry have every right, on their own or together,

to tell Jerry, "you can't do that!" And they do, because they want to keep their little system working. If they have to say it too many times, the whole game is going to fall apart, because Jerry only has his role in the game because the others believe him to be honest and fair.

It isn't exactly perfect; they argue sometimes, but overall none of the three, not the strongest and fastest, not the smartest and most cunning, and not the fairest and most resilient can act alone or arbitrarily. The other two are always watching, and quick to enforce the rules when one of them messes up. They play their game, they have fun, and for them, the system has purpose.

Now imagine that one day they have a particularly close game. They're sweating; emotions are high, and tempers sometimes flare. Halfway into the game they make a bet: the winner gets to take home the pet frog that the three found the day before and put in a shoebox. There is disagreement among them whether they should rotate care of the frog, set it free, or let one of them have it for himself. These are high stakes, as all three really want the frog in their own home.

The boys have all held their own in the game, even though they each have different abilities, until this one day when control of the coveted frog is on the line and it all goes wrong. With the score at a three-way tie, Larry is driving for the basket. Jerry

bats the ball away from Larry, but Ed catches it on the bounce. At the edge of "out of bounds", Ed jumps and gets it in the basket. The hard-fought game is over; Ed has won the day.

"I don't like losing," Larry says.

"Wait a minute," Jerry says. "When Ed came down one of his feet was out of bounds. The point doesn't count, and the penalty is that I get your point. And the frog."

Puzzled, Ed says, "Hey!" and looks to Larry.

Larry says, "That's not the rule. As long as his foot was in-bounds when he jumped for the shot, it counts." He muttered something under his breath, realizing he'd admitted that Ed should win both the game and the frog, under the rules.

Jerry isn't done, though. "You don't like losing, Larry, and when somebody complains, I get to say. Your rule is no good, and besides that's not the way they play it in the next town over. It's better if he can't land out of bounds. That's the better rule, and I have no way to enforce it unless I take his point away and give it to somebody else."

Ed and Larry now have a choice. They can dog pile Jerry and make sure nothing like this ever happens again. It would be unpleasant for a minute, but they would enforce what they know to be the

rules, save the friendship, and preserve the system that has worked so well.

Or they can just give in, despite their knowledge that Jerry has distorted the rules. In fact, Jerry had just made up a new rule on his own. If they allow that, the game – and their friendship – will never be quite the same. From now on, if they let Jerry get away with it, they will never be able to play without a sense of wariness and distrust. Not only is the fun gone, but the whole system has changed.

If you think of the game that the three boys play as our country, and think of the rules of the game as the Constitution, then Ed would be the executive branch, Larry the legislative, and Jerry the judicial branch. They are equals, though each has his own unique abilities. Each has the ability to check and balance the actions and decisions of the others. As long as each respects and loves the game more than he wants to be in charge of the others, everything is fine. It is the same with our three branches of government. The Constitution gave each branch a unique job, and allows each to enforce the rules – the Constitution – against violations of the rules by either of the others. If one of the boys (or the branches of government) comes to believe that he (or it) always has the final say over what the rules mean, then you have a kind of anarchy dressed up as a system of government. What on earth are the executive and legislative branches even there for if

anything and everything they do can be overturned, with finality, by the judicial branch, no matter? What if the judicial branch's reasoning doesn't even make sense? As long the judges' words are treated as final, the quality and logic of the judges' decisions isn't even relevant anymore. Does it make sense to even bother to vote, or to pay the salaries of our lawmakers, when the laws they mare are rendered meaningless at the whim of the courts?

Now consider another situation. Imagine that Ed and Larry are brothers, and that Jerry is their father. The dad might let the boys play, but if he sees something he doesn't like, he will say so. And his word is final; it is supreme. Jerry is their father. He can make any rule he likes, no matter what the boys say about it. He can end the game entirely and send them to their rooms. That works in a family, as long as Dad is not just plain mean and uncaring, but it doesn't work so well for a nation of free men and women. What kind of player is our national Jerry, the judges and the courts?

Chapter Four
The courts have ruled us, now let them enforce it

Maybe you care about something. Pick something, anything. Maybe something horrible happened to a child you know and you got busy reforming how and when some criminals can be released from prison. Maybe you are an urban parent, sick in your heart at how complacent the community is about the substandard performance of the school your child has to attend. In my city, a local school that earned an "F" grade, after standardized testing, for its ability to educate young, mostly black kids, responded by putting up signs and wearing t-shirts that said "F is for fantastic!"

That response to your child's failed education would probably get you fired up. There might be something else you care about. Maybe your grown child got denied the chance at higher education for no reason other than the color of his or her skin. Maybe you just see some injustice and think, "There ought to be a law!"

But let's assume you are a citizen who is committed to making things better. You believe that ours is a free country; you believe that your voice counts! You write letters to the editor of your local newspaper, you get a petition started, and you talk with your legislators. Against all odds, you get the

attention of your elected representatives. You get a bill passed, maybe to deal with serial pedophiles, or to allow you to use a portion of the school taxes you pay to get a voucher to put your kid in a decent school, or just to let you buy a license plate that expresses that life is a good thing. You do all those things, and through your efforts you learn that the system works! You are always hearing about how politicians are in the pocket of big special interests, but this time you know that the people have persuaded them to do a good thing. The people have acted, through the representatives they have elected.

Imagine now that you are in your car, listening to the news on the radio, beaming from ear to ear, marveling at how wonderful and amazing it is that your fight is finally over, after all these years. What a great country, you think. This is amazing; you really accomplished something. You made a difference. Then, just as your spirit soars and you are ready to salute the nearest flag, the voice on the radio tells you that the new law that you fought to get passed has been declared unconstitutional by one judge that you have never heard of.

What just happened? The new law will not take effect until lawyers argue over it in various courts, probably not for years, and probably not ever, since a judge has already made a decision. Ultimately, the matter will be decided by other judges, as if the elected representatives of the people in the legislature had nothing to do with it. What

significance does that give to your voice as a citizen? Did you vote for that judge? Will you ever be able to vote for – or against − that judge?

Later, you read the text of court's decision. It is hard to understand. The sentences are interrupted constantly by case cites and footnotes, and the language is unfamiliar. What does it all mean? You hear a quote from your governor that "we must follow the law", meaning that we must do as the judge instructs. Didn't you just have a law passed, though? What then is "law"? Are you confident that the courts will rule properly?

There are answers to those questions, and as we explore the workings of the courts in this book, we will try to answer them. We will also learn more about the unbalanced amount of power the courts have assumed for themselves, and what we can do about it.

There is a famous quote attributed to Andrew Jackson, former President and father of the modern Democratic Party. He said, in response to a particular Supreme Court decision, "(Chief Justice) John Marshall has made his decision, now let him enforce it!"

Scholars disagree on whether or not Jackson really said that, and whether or not President Jackson was on the right side of that particular case is certainly debatable. It is true, though, that Jackson

seemed capable by virtue of his personality of saying such a thing, and it is a provocative idea. If the courts go too far, if they exercise enormous power without caution or restraint, should we not then challenge them to enforce their own rulings? In other words, when courts clearly go out of bounds, can't we the people dare them to "make me!"? The courts have no money of their own, and have no army. They are only effective as long as we have faith in them. I, for one, have lost the faith. How about you?

The author of this book is not a noted legal scholar, nor a college professor or a professional pundit. The author of this book is an average Joe, and as an American is a member of a unique society with a specific culture that happens to have a both a Constitution and a system of representative government that is worth protecting and defending. And the author of this book loves the law, just like Michael Douglas' character in "The Star Chamber."

Your author, although an average Joe, does possess two secret and mysterious powers, at least one of which is available to everyone. The first is the secret power of having actually read the Constitution of the United States. They keep the thing in a glass case at the National Archives and you can't see what's on the back of it! Maybe half of the Constitution is hidden from us, one might think, and then break the glass and discover the doodles of the founders on the back, along with the previously undiscovered secret "right to free beer" clause. Or

free health care clause, or abortion-on-demand clause.

The absurdity of that aside, anyone can read the US Constitution. It is easily understandable to the average person, yet scholars and reporters are constantly giving us the feeling that the whole thing is a giant question mark. It isn't. It's a simple (though ingenious) set of rules that form a government then turns right around and limits the power of that same government. The most important revelation one should get when reading the Constitution is this: the government's power has no legitimacy at all unless we, the people, continue to consent to that power even existing in the first place. So, in reading the Constitution many times, one eventually moves beyond simply yelling "that's unconstitutional!" to a better understanding of what those words mean.

Your author's second secret and mysterious power is that he speaks the language of the judges. Having graduated law school and practiced law for several years, he has the ability to penetrate the odd and mystifying way in which judges warp the meanings of normally simple concepts. Court opinions, unlike the Constitution, are truly written in a way that is difficult for most people to follow. Good lawyers are supposed to be able to translate for the rest of us. The author of this book, unlike most media pundits, does speak the language. You, another average Jane or Joe like the author, also has

these secret powers, if you want them. Everyone should read the Constitution, twice. Then you should take the time to decode the court opinions that rule your life, society, and future. Hopefully, after reading this book, you will possess that power as well. Once you do, you may realize that the courts don't really have the power they claim. The courts have ruled us, now let them enforce it!

Chapter Five
You deserve more than one-third of a government

The courts get to decide whether or not laws passed by Congress, and signed by the President, are constitutional. That means that the courts have the power to decide that what the other two branches of government say is the law, isn't really the law. Also, the courts have, more and more, taken it upon themselves and asserted the power to instruct the other two branches of government what the law is, even if Congress hasn't even passed a law on whatever the subject happens to be.

By the way, when I use the terms "Congress" and "President", I am also often referring to state legislatures and state governors. Court misconduct in the federal (United States) courts is mirrored in state courts.

This is bad, first of all, because Congress is supposed to pass laws, but if a court decides that it does not approve of that law, Congress (made up of our elected representatives) is supposed to do nothing but say "Thank you sir! May I have another?"

Think about that, please. No matter what laws the Congress might pass, they are meaningless unless they get over the hurdle of court approval. That approval might come simply because no one

has sued over a law, and the courts make no decision, but the fact remains that the courts can undo anything that Congress decides. Congress, therefore, is nothing more than the legislative staff for the courts. While you and I think that our representatives are making laws, the fact is that they are doing nothing more than suggesting ideas for laws, since the courts can either say "no" to the law, or simply write one of their own instead. I wonder how many congressmen and congresswomen are truly aware that they are nothing more than glorified staff members for judges, feeding the courts ideas to be either rejected or accepted.

I wonder how many presidents have really considered that his signature on a law doesn't mean a thing if a court has the notion to say otherwise. Congressmen represent districts, or states, and the president represents everyone. The courts, on the other hand, represent the law. That puts them in a different and unique situation. It makes perfect sense, unless they are also the ones to decide what the law is in the first place. When that happens, the courts represent nothing and no one, except for their own whims. When I can say (and get away with it) that "My job is to uphold the law! And my job is also to say what the law is!"…well, that is a problem in a free society, don't you think? For one thing, it makes no logical sense to have the power to both create the law and to interpret the law. That is exactly what modern courts are doing, however, with increasing frequency and boldness. If the courts were truly

meant to be able to create law, and have at the same time the power to validate that law, then by definition they could never be incorrect, and checks and balances are simply a myth. That should give pause to everyone, for even if you may like the decisions the judges are making today, how do you know you will like them in five or ten years, or in your child's generation? In short, if we acquiesce to the courts holding the ultimate power over every action of government, what can you do when they rule against your interests?

That is not how it is supposed to work. The way our government was set up, the courts are given the task of resolving disputes. In other words, judges are supposed to hear a set of facts, figure out which facts are true, and then ask the question, "What does the law say about this set of facts?" The law, the Constitution presumed, would be what elected representatives said the law was. This is really a pretty nifty notion. In that world where things work the way they are supposed to work, lawyers have to be virtuous and honest and do their very, very best job at presenting the facts of a case. In the real world of activist courts, however, lawyers have no real duty but to present judges excuses for how the judges want to rule anyway, giving the judges something to "hang their hats on." And all the while the real world people with real world disputes often fall by the wayside as the courts use them to advance their own agendas.

So why do the other branches allow that? It is a good question, and the answer is probably somewhere between a lack of understanding and a lack of will. For examples of how poorly even our elected representatives perceive what the law is, and their own roles in creating and enforcing it, one need go no further than the recent controversy over same-sex marriage.

When the Massachusetts Supreme Court recently ordered the Massachusetts legislature to pass a new law to legalize state-recognized marriage between same-sex partners, Governor Mitt Romney sent out a spokesperson to say, "Gov. Romney understands and respects that people have very strong personal views both for or against same-gender marriage…*But on this point, the law is clear*." The Governor of Massachusetts also released the statement that, "We obviously have to *follow the law as provided by the Supreme Judicial Court*, even if we don't agree with it." The statement continued that the people of Massachusetts, in order to obey the judicial command to change the law, will have to figure out "what kind of statute we can fashion which is consistent with the law."

Does that make any sense at all? How does a governor, an office-holder sworn to uphold the law, take the position that the law is "provided" by the courts? Does he believe that he actually swore to uphold and defend the Justices of the Supreme Judicial Court?

Not to pick on Governor Romney too much, the Attorney General of New York, Elliot Spitzer, said about the same topic that the controversy of same-sex marriage "*must and will be decided by the courts*."

How does that make you feel about the power of your vote or the stability of the law under which you live? If those charged with defending the law, as passed by elected representatives, take the position that all law comes from judges, and that those judges must be obeyed, then where do we who don't have black robes hanging in the closet stand?

Let me be clear. There is such a thing as a bad law and sometimes our elected representatives do pass unconstitutional laws. The courts do have a role to play in balancing the other branches, but have no doubt about this: when our governors and attorneys general can't even identify the law as anything other than what judges say, then there are no checks and balances, and suddenly the least powerful branch of government becomes the most powerful branch of government by virtue of the lack of courage and intellectual neglect of those leaders who are not held to account by we the voting folks.

Chapter Six
Let's define the terms

We need to agree on what some words mean. Let us define the phrases "judicial activism" and "independence of the judiciary", so that we can get on with our discussion of the courts and how they affect us.

What, then, is "judicial activism"? Those who want judges to overturn the will of the people will tell you that judicial activism is any court decision with which you don't agree. Surely there's more to it than that. Most of us want judges to be like a good Jerry from the basketball game, with a long memory and a sense of honor and fairness. Most of us understand that in a representative system of government there will sometimes be laws that we do not like or with which we do not agree, and most of us accept that.

Those who want judges to be more predictable and to uphold established law will tell you that judicial activism is when judges either ignore or change the law in order to make the outcome what they want it to be, whether what they want is motivated by personal opinion or outside influence.

When courts rule in ways that go outside of the will of the people, and the nation allows it, the courts are granted the power of black-robed priest-

kings, to decide how each of us is to behave. When we allow it, the courts decide what expression and beliefs it approves of or disapproves of, and begins to control our lives and our ability to govern ourselves through our elected representatives. It certainly seems that there is nothing that citizens, voters, governors, presidents, senators, congressmen or soldiers can do about the power that the courts claim for themselves. And if the United States Supreme Court gets an issue wrong, we're just stuck with it. It's not enough to be comforted by the fact that we can amend our state and federal constitutions, for reasons we will soon see.

In reality, the other two branches of government, Ed and Larry, are supposed to keep catastrophic court decisions in check. The problem is that Ed and Larry aren't doing their jobs properly. They seem to lack the will. The other two branches of government have simply surrendered to the courts.

The counter-argument is that courts should be independent, and that they ought to be able to dispense justice no matter what political winds might blow at the moment. That is a good argument, as long as the courts have a track record of adhering to the Constitution – and actually dispensing justice – while they maintain their independence. They all too often do not, while those who favor court interference in social issues will throw the words

"independence of the judiciary" at the rest of us like a weapon.

The phrase, or notion, of "independence of the judiciary" really means that judges and courts should be free to make good, reasonable, and lawful decisions without bowing to pressure from political concerns, special interests, bribery, financial interests, the results of drinking binges, or because one side in a lawsuit has incriminating photographs. All of that makes sense. Courts ought to issue decisions calmly, deliberately, and with only one thought: that they are keepers and defenders of "the law." Given that we are a free people, who are largely literate and educated, it stands to reason that not many court decisions ought to surprise or distress us. We would expect that nearly every court case would simply apply the law to the particular litigants who are before the court, and be at least a little predictable, and not a coin toss depending on what judges are on the panel.

The whole point is that the courts have to maintain an image of independence, or else the people will lose confidence in the courts. That also makes sense. Since the courts have no money and no army, they need our confidence or else our system of government begins to break down. So tell me, how confident are you in the courts?

How a person defines these phrases, and how one thinks about the role of the courts, should not

have anything to do with that person's politics. Liberal and conservative alike should be concerned about activist judges. History, as we will see, teaches that lesson. Republicans, Democrats, Independents and Libertarians all should want the courts to be independent, but reality says otherwise. It simply is not so. The independent judiciary is a myth, and that is not good for citizens of any political point of view.

Chapter Seven
A living, breathing Constitution

You may recall the five steps, mentioned earlier, between representative government and oligarchy. The myth of the living, breathing Constitution is step one. Many politicians have spoken favorably about our Constitution being both living and breathing. What could they possibly mean by that? Usually their answer is that we live in a complex and changing society, and so the very foundation of our law should be able to change with the times. That, of course, completely changes the purpose and meaning of having a constitution in the first place. The word constitution comes from the Latin word *constitutio,* which means fundamental principles. Fundamental principles are meant to endure, and by definition not to change easily, and certainly not change without the knowledge and consent of those who have agreed upon and are subject to those principles.

Perhaps we can agree that the United States Constitution does not, in fact, live and breathe. It is a set of rules written down on paper. It doesn't think nor does it do anything, in the sense of a sentient being taking action. It simply is. And the Constitution is important to us, isn't it? It is our reliable record of the things that protect us all from tyranny. It isn't supposed to change while we're not looking.

But, you may say, it is the courts that protect us from tyranny! We'll get to that shortly, and let you hear from Mr. Dred Scott and some others. In the meantime, let's assume, for the sake of argument, that the Constitution is, indeed, alive.

Since that parchment that appears in the national archives and is copied in law and history books is *alive,* how do we describe its motives? Is it smart? Is it fair and just? When it changes its mind, does it do so for the right reasons?

Those questions are nonsensical, of course, because the Constitution does not, in fact, live and breathe. But many in power want to behave as if it does. Since the document does not have a brain (or a soul) of its own, then the will and thinking of activists become the steering mechanism for changing the meaning of our fundamental legal principles. How can it be otherwise? Most people have neither the power nor the inclination to "evolve" that allegedly living, breathing document, and the ones who do have the power to steer and shape the meaning of the Constitution in ways that may not be very friendly to you.

It comes down to this: if we believe in a Constitution that does not change in meaning without the knowledge and will of the people, through the process of amendments, then everyone can understand the rules and know that protections against tyranny will not disappear just because

someone is powerful enough to change things. If we believe, however, in a living, breathing Constitution, then only those who already have power have any real voice in defining the rules.

If you do not accept the truth of that last sentence, try this experiment. Change the United States Constitution. Go ahead, right now. Get up, and change the meaning of the law, on your own, or perhaps with the help of a close friend. You can't, you say? Well, then, if it is living and breathing, and meant to change with the times, and you can't do it….well, then, who can? Are they friends of yours? Can you trust them with your life and freedoms? When you hear someone talk about a living, breathing Constitution, know this: they are aware that you are powerless to do it, but you can give them permission to do what they wish with our laws. When you hear someone talk about a living Constitution, it's about power, usually their own.

Chapter Eight
So why should I care about judicial activism, anyway?

Do you vote? It's not polite to generalize, but if you are reading this book, you probably vote, at least in presidential elections. As this book is being written, we are just about to either re-elect the current president, or elect a new person for the job of chief executive. There is a lot of interest in this election; passions are high. People really, really care about the outcome. So will your vote matter? Let's talk about that.

When presidents are sworn in, they take the oath that is required of them by Article II, Section One of the Constitution. It says:

> "**I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."**

Our first president, George Washington, added the words "so help me, God" to the oath, and that has become traditional.

So your vote, about which you were so passionate, and about which you worried and hoped

your candidate will win, gets you a leader who has sworn only one specific thing: to preserve and protect the Constitution. If the Constitution, however, is living and breathing, changing and morphing, than what has the president sworn to do on your behalf? Nothing! The president has only sworn to preserve and protect fundamental principles that could change entirely tomorrow, and again the day after that. The president would love to uphold the oath, but it is impossible, because it is judges who change the law, and the president is powerless to do anything about it, in modern reality. If the president's oath is therefore meaningless under a Constitution that evolves without public input, your vote is, likewise, meaningless. Sorry about that.

The same analysis applies to your other elected representatives, your members of the House of Representatives and the US Senate. With a solid constitution, you could hold them to account, and you would have a simple standard by which to judge their performance on your behalf. With a living, breathing constitution watched over and shaped almost exclusively by judges, your legislatures are powerless to do anything to protect your rights and our fundamental principles, making your vote meaningless with regard to them as well.

What about soldiers? Men and women commissioned as officers in the United States military also take an oath to preserve and defend the Constitution. Some become generals, but most are

lieutenants and captains; they are people from your town and people you know. So upon what have they staked their honor? What have they sworn to do?

They have agreed to risk their lives, to risk dying, becoming a prisoner of war, and even more worse, risking the possibility that they may need to kill enemies, all to preserve and defend the Constitution of the United States of America. If the Constitution is a living, breathing document, then they are left with the idea that they may die in defense of nothing in particular, as it may change dramatically the next time a judge decides to make that document evolve. That's not an acceptable system. It is not in keeping with our shared principles of trust and honor.

Oh come now, you say, military officers know how things work, and aren't really doing what they do to defend the Constitution. Smile when you say that to me. If men and women stake their lives knowing that they will be remembered for protecting something enduring, they will go to their tasks with a sense of duty and honor. If they have no solid and predictable fundamental principles to defend, they are reduced to people who get paid to preserve the peace or go to war under a meaningless oath and simply because someone happens to be powerful enough to issue the order. Which picture is more attractive to you, and to those who are thinking of enlisting?

What about the rest of us? Maybe we have never taken any oaths about the Constitution. Why should we care what judges do to our fundamental principles? The answer is because they get it wrong, a lot. Because they, the judges, aren't smarter than you are, and because we need not cede them so much power over our lives unless we choose to do so, and, not least of all, because we expect our votes to mean something. If judges can change even the fundamentals at will, without public input, then we do not truly live under a representative government. We are beginning to live, instead, at the pleasure of an oligarchy. You can accept that arrangement if you wish, but you accept it at your own peril.

"To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy". -- Thomas Jefferson, 1820

Chapter Nine
What activist courts have given us

Not all judges are bad judges, and not all courts are destructive to our freedoms and civilization. Judges perform a number of critical functions. They resolve disputes between individual people with real problems that they wish to settle peaceably. They keep the criminal justice system running, and that is certainly needed.

Some courts even once in a while do things that are widely regarded as simply good for everyone. Brown v. Board of Education is the primary example of such a case, in the minds of most people. That decision outlawed the segregation of public schools. People dispute the validity and constitutionality of that decision, but that is not my point. I mention Brown v. Board because to omit it would leave a glaring hole in this book. I get it: people think the Supreme Court did a good thing when it decided Brown v. Board. Having noted it, I'll add that the nation was already heading in the right direction, toward desegregation, and it was our Congress and not the courts that gave us (with our knowledge and consent) the Civil Rights Act of 1964.

And it is arguable that it was the courts that made Brown v. Board necessary in the first place (we will discuss how in the next case study). In other words, as much as people love to point to Brown v. Board as a shining moment for "good" judicial

activism, it is nothing more than the court attempting to stumble through tortured reasoning to clean up one of its own mistakes.

Plessy

That mistake is called Plessy v. Ferguson, given to us by the Supreme Court justices in 1896. After the Civil War and the passage of the 14th Amendment, which requires "equal protection under the law", Homer Plessy, who was one-eighth black, was arrested for refusing to leave a railroad car that was reserved only for white people. The Court decided that this treatment was not unconstitutional, despite the post-war amendments, and declared that the doctrine they made up, "separate but equal", was the law of the land. Our elected representatives, even in that time of relative bigotry, didn't come up with "separate but equal". Judges came up with that.

Some might be sympathetic to the court because of the climate of the times, but that sympathy would ignore the fact that the post-war amendments specifically addressed how the law was to treat racial differences. The Plessy court simply ignored the Constitution, saying that "a statute which implies merely a legal distinction between the white and colored races…has no tendency to destroy the legal equality of the two races." That is not profound reasoning in the face of the 14th Amendment. The 14th says, in section one:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

That last bit is important. Equal protection of the laws, it says, not separate but equal protection of the laws. The intent of the people when they amended the Constitution is pretty clear to the average reader, isn't it? To you and me, maybe, but it certainly wasn't clear to the United States Supreme Court.

The Court's separate but equal doctrine gave legitimacy to every bigoted attitude held by unjust public officials. It gave legitimacy to Jim Crow laws, and allowed segregation to expand into every possible setting until it was set in concrete. We don't have a crystal ball, though. We cannot tell if the Jim Crow laws would have died in time of their own obsolescence, but we do know for sure that the Court guaranteed that bigots could find legitimacy from the

highest court in the land until our elected representatives began to fix the problem.

The dissenting opinion noted that the law should be color-blind. What pain might the nation had avoided if the law truly had been color-blind as early as 1896? Would affirmative action even be necessary today if the Plessy Court had not been an activist, anti-constitutional court?

Dred Scott

In the Civil War, over 600,000 Americans died in uniform. Sure, we can't know for sure whether or not Congress and the states would have resolved their differences and abolished slavery without a civil war, but the Supreme Court in 1857 guaranteed that war when it decided Dred Scott, taking the issue away from the voters and the states.

Mr. Scott was a slave. He moved (or rather, his owner moved with him) to Illinois, a free state. After that they moved to Missouri, a slave state. Missouri's law, however, declared that once a man was free, he was always free. Mr. Scott sued to be once again free, as he had been under the law in Illinois. His courage is astounding, especially when one remembers that he had complained in his lawsuit of being physically beaten, and in the end he lost and was returned to the hands of the abuser.

The Supreme Court was not content just to decide against Mr. Dred Scott and to uphold his slavery and that of his wife. It wasn't enough to condemn that man and his wife to the most frightening resolution of a lawsuit that I can think of, nor could the Court stop itself at deciding that the Illinois law should not be honored.

Instead, the Supreme Court went on to declare that the requirement for most new western states to be admitted to the Union as free states, under the compromise reached by the nation's elected representatives, was unconstitutional. This was an incorrect and activist view of the Constitution, and made it impossible for any solution to the slavery problem to be found other than a war that killed two percent of the country's population.

In 1857, the United States Supreme Court had only once before declared a law to be unconstitutional. The Constitution had been around for quite a while when this court went out of its way to make new states into slave states despite the will of the people. Judicial activism in American courts has tended toward the immoral and destructive from the beginning. And as in both the case above and in the case below, judicial activism has been at the expense of the most vulnerable and powerless among us.

Roe v. Wade

Roe v. Wade hardly needs an introduction. Everyone knows that it means that abortion-on-demand is legal in the United States. Every American, whether pro-choice or pro-life, should take the time to read the opinion.

The Court used the 14th Amendment (which was designed to protect African-Americans from unfair laws and which had been disregarded in the Plessy case) to say that a woman has a right to terminate the life of her unborn child. We know that Roe v. Wade is a lightning rod, and that people hold passionate and genuine points-of-view on both sides of the issue.

That does not mean that Roe is a good court decision. First, the justices do not do a poor job of explaining how it found a new right in the Constitution that doesn't actually appear in the text. Second, although the decision does say that its reasoning would be out the window, if you will, when an unborn child reached viability, it does not tell us how the law should treat viable fetuses or how courts should deal with advances in medical technology making fetuses viable earlier and earlier in pregnancy.

Third, and most important, the court simply did not consider whether or not the unborn had any

rights. Given that this decision was such a landmark case, and such a departure from law up until that point, one would think that they would have taken the time to give us good reasoning for the notion that an unborn child is not a person, therefore possesses no rights. The Court didn't bother with an explanation for that at all, but instead began with the conclusion and worked backward. In their reasoning, the existence of the developing human to be aborted was not even considered.

We still don't have a crystal ball. We cannot tell what states might have laws allowing or prohibiting abortion today if not for Roe v. Wade. We do know that those who are passionate about the protection of the unborn have been bound and gagged, both legally and socially, by Roe. We do know that the court forced a radical social change upon the nation before it was ready for it. If you have an opinion, on either side, about abortion, parental notification, partial-birth abortion, or "choose life" license plates, I have a message for you: Shut up. The courts have ruled, and we have no say in this debate, so you might as well lay down your signs and forget your chants and go home. Keep government out of our bodies, you say? Well, the Supreme Court is the government. It has its hands on your reproductive rights. It decides. And it has its hands around the throat of the unborn. If it helps, one can say to the unborn, "hey, we know you don't have any say in this medical procedure, but neither do the rest of us…"

Chapter Ten
The year in jurisprudence
What have the judges done for us lately?

We need to be bolder as citizens about examining the reasoning and intelligence of our judges. They are not as smart or as capable of coherent reasoning as you might believe, in the sense of living in a real world with the rest of us, yet what they actually say is of vital importance. America's courts are forcing radical changes on our society at an increasing pace. The past year or two in jurisprudence have been busy indeed. It is important to watch the trends in court decisions, every bit as much as one would take an interest in what the President says to us over time.

Just hearing a segment on the news about an important court decision isn't enough – if you are lucky enough to be notified at all about what the third branch of your government is doing. No, we need to take the time to learn how and why the judges reach their decisions, so that we can reach an informed conclusion about how that very powerful branch of our government is functioning.

In this chapter you will find a partial list of some of the significant cases that the judges have handed us in the very recent past, roughly since late 2003. All of the cited cases have implications for all of us, and deserve to be scrutinized line-by-line. The cases chosen are just a sampling of what the courts

are up to, and are summarized here because each concerns timely topics and each got some attention in the news.

I've broken these cases down into six categories. Those categories are: freedom of speech, freedom to associate, marriage and the mandatory moral code, church and state, the rights of the disabled, and the right to privacy.

Chapter Eleven
Freedom of Speech
Case: Campaign Finance Reform

Before we dive into these cases, let's recite the First Amendment to the United States Constitution. It is remarkably simple. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." To the courts, however, it's not simple at all. Let's first visit what we all call the Campaign Finance Reform Law.

In the case of McConnel v. Federal Election Commission, decided by the United States Supreme Court in December, 2003, the Court tells us some interesting things about the limits the judges will place on free speech. Many who criticized the Congress for passing the Campaign Finance Reform law assumed that the Supreme Court would strike it down. What we learned is that it is very dangerous to rely upon the courts to protect our fundamental rights. The fact that it did not exposes the myth of an independent judiciary needed to protect against the excesses of political whim. The courts do no such thing. Here are some quotes from the case:

"*Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits*"

"Of 'almost equal' importance has been the Government's interest in combating the appearance or perception of corruption engendered by large campaign contributions"

So far, here's what we've got: if those in power say that they are corrupt, or appear to be corrupt, they can stop the people from trying to influence them. Are we allowed to participate in government if they are not corrupt?

"…the First Amendment would render Congress powerless to address more subtle but equally dispiriting forms of corruption."

By all means, let's not let the First Amendment get in the way of empowering dispirited congressmen.

"if…restrictions on solicitations are otherwise valid, they are not rendered unconstitutional by the mere fact that Congress chose not to regulate the activities of another group as stringently as it might have"

What? Court approval to enforce the law differently depending on what group you belong to? Did the court really mean to say that?

Chapter Twelve
Freedom of association
Case One: Boy Scouts
You don't have to go home, but you can't camp here

In the case of Barnes-Wallace v. Boy Scouts of America, decided by a federal court in California in July of 2003, the government voided a lease that the Boy Scouts had held since 1957 to use a campground on public land, because punishing little boys is a great way for the courts to declare their disapproval of anyone with traditional religious beliefs. Here are some quotes from the opinion:

"the reasonable observer would naturally perceive the leases as an endorsement of the entire regional program of Scouting itself… [which] has, as its fundamental and pervasive purpose, the inculcation of religious belief and observance."

"As an initial matter, the Boy Scouts is a religious organization with a "religious purpose"

"Belief in God is and always has been central to BSA's principles and purposes"

"The overwhelming and uncontradicted evidence shows that the BSA's purpose and practices are religious"

Those are some damning accusations, don't you think? We sure are lucky to have the judges protecting us from such things.

"Specifically at issue is whether the City intended to discriminate against Plaintiffs and those similarly situated, and whether there has been actual discrimination. The Court finds that there is a dispute of material fact concerning each issue…"

What that means is that the court cannot find, as a matter of fact, that leasing a campground to the Boy Scouts has resulted in "actual discrimination" toward anyone. In fact, the court noted that no other party even wanted the Boy Scout's lease, but that does not matter. The Boy Scouts may not camp on public land simply because its leadership, if not its members, attest to some basic religious beliefs.

This case is truly heartbreaking. Imagine a single mother who gets her perhaps fatherless son involved with Boy Scouts because she thinks her son might benefit from the principles of the Boy Scouts, only to learn that it is exactly those principles that get her son thrown off public land. We're talking about 9, 10, and 11-year-old boys who are bearing the brunt of this judicial hissy-fit. Separate-but-equal is too good for the Boy Scouts in California, they must be excluded from the public square entirely. Contrast that with the next case.

Case Two: Are Catholics still permitted to stand in the corner and pray?

Here's another California case, decided March 1, 2004. In Catholic Charities of Sacramento v. the Superior Court of Sacramento County, the California Supreme Court has fired a shot, not across the bow, but right at the waterline of religious freedom and the 1st Amendment. Every religious person should be very afraid of this decision. The rest of you should be afraid too; you just don't realize it yet.

The case is noteworthy, firstly for the aggressive stance the court takes on how much they can limit First Amendment protections, and secondly for the long list of groups and attorneys that lined up to put Catholics in their place. Simply reading the list of those filing briefs against Catholic Charities is eye-opening.

Here is the situation: there is a California law, known as WCEA (Women's Contraception Equity Act) that presupposes that women bear an unfair burden in paying for contraception, and requires employers to fix that outrage by providing contraception to their employees in their health insurance plans. The lawmakers, that is, the state legislature, did however make exceptions for "contraceptive methods that are contrary to the religious employer's religious tenets". It seems as if the lawmakers respected church positions like those

held by Catholic Charities. What did the court do with the law that the legislature made? Read on.

Catholic Charities provides social services. They help to feed, clothe and otherwise aid the down-and-out. Catholic Charities has employees. Someone has to answer the phones and spoon out the soup, after all. The Catholic Church also happens to have a long-standing and genuine religious policy against contraception.

So someone sued Catholic Charities for not providing free contraception to their own employees. It was not a random event; Catholic Charities were targeted by a multitude of advocacy groups, including the AFL-CIO, the California Medical Association, the Progressive Jewish Alliance, the Anti-Defamation League, the Attorney General of California, and so on. Something like thirty-one different organizations were allowed to file briefs and make argument in the case against Catholic Charities, including ones you wouldn't expect to care about what a soup kitchen in California is doing, like The Education Fund of Family Planning Advocates of New York State, Inc., and Vermont Catholics for a Free Conscience, and the Women's Ordination Conference. If you do not yet see a pattern in how and why these court cases come about, this case might bring the point home.

Here are some quotes from the court's ruling:

"The [statute] permits a 'religious employer' to offer prescription drug insurance without coverage for contraceptives that violate the employer's religious tenets"

"The…purpose of Catholic Charities is….to offer social services to the general public that promote a just, compassionate society that supports the dignity of individuals and families, to reduce the causes and results of poverty, and to build healthy communities through social service programs…"

"…Catholic Charities serves people of all faith backgrounds, a significant majority of [whom] do not share [its] Roman Catholic faith."

To make a long and tortured story short, the court decided that providing social services is a "secular" activity, thus the Catholic Church cannot, as long as it is trying to help people, claim that the government cannot interfere with their free exercise of religion. Holy cow. Unholy cow, even. Because feeding the hungry is deemed "secular" by the court, the Catholic Church must either stop feeding the hungry or turn its back on its religious beliefs. That's a great choice, and that helps out everyone, right?

So what religious beliefs and practices of the Catholic Church might be protected, then, by the United States Constitution? If you read this opinion carefully, the answer is: none. Do not reach out to your community, do not provide social services; you

may however stand in the corner and finger your rosary. Otherwise, do as we say.

Boy Scouts part two: Haven't you brats taken the hint?

The Boy Scouts of America are also having a bad time in the courts. Really, in the age of the Global War on Terrorism, it blows me away that people are so threatened by boy scouts. What kind of a nation of scoutophobes do we have to be to spend so much time suing the scouts? In case after case, in state after state, the scouts are chased like they were terrorists, and your den dues are increasingly spent on legal defense instead of s'mores and new tents.

On July 9, 2003, the federal 2nd Circuit decided the case of Boy Scouts of America v. Wyman. In March of 2004, the United States Supreme Court made the decision not to hear the case, which means that the Supreme Court has decided that the 2nd Circuit decision is the law of the land.

It comes down to this: in Boy Scouts of America v. Dale, decided by the Supreme Court in the year 2000, the Court came up with the startling conclusion that people are allowed to hang out with whomever they want to hang out with. The scouts happen to want to hang out with others who share their values. In particular, they don't want homosexual scout leaders to mentor young boys. You may find that offensive, and that is fine if you do. The point is that the scouts are free to be offensive to gays if they want to be, and vice versa.

Please remember that the point of this book is specifically not about using the courts to change social or personal values. The result of the common-sense decision of the court in the Dale case resulted in a firestorm blitzkrieg jihad upon the boy scouts. In Connecticut, and in countless other towns, counties and states, the scouts have been removed from "workplace charitable contribution" campaigns. Most of you know what those are: your supervisor tells you to contribute at least a dollar a month to something on the charities lists, or else…well; you're just not a team player if you don't.

In Connecticut, as in other places, the government took the boy scouts off of the list of charities to which its government employees may contribute because the State of Connecticut finds the boy scouts offensive for not allowing openly homosexual men to be scoutmasters.

The Court in Wyman found a way around the Supreme Court's Dale decision by coming to the conclusion that the State of Connecticut's decision to exclude the scouts from the charities list was not a decision based on the viewpoint of the scouts. It is baffling reasoning, and it doesn't fool any of us into thinking that the Wyman court ever had any intention to follow the law.

Chapter Thirteen
Marriage and court-ordered morality
Case one: we were all wrong about marriage since the beginning of time

The Massachusetts Supreme Court decision to order the Massachusetts legislature to change the law to allow same-sex marriage is a watershed moment in American jurisprudence. Whether you personally like the decision or not, it is worth at least a few moments to take a look at the Court's reasoning.

The highest court in the Commonwealth of Massachusetts, in the case of Goodridge, declared a couple of interesting things. First, that the state treating marriage as, well, what it has always been, was "arbitrary and irrational." It is significant when a court declares that all law and tradition that has existed in history up until that point is "arbitrary". What then is not arbitrary?

The Massachusetts court defined marriage as "exclusive and permanent commitment of marriage partners to each other." So marriage is now defined as marriage partners committing to marriage. By golly, these judges are geniuses! Confused? So was the Massachusetts Senate, which asked for and received a clarification from the court. Some quotes from February of 2004:

"[We acknowledge that] many people hold deep-seated religious, moral, and ethical convictions that

marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. [We] reaffirm that the State may not interfere with these convictions."

It should be obvious that even as it said those words, the court chose one of those deep-seated views over the other, and thus "interfered with these convictions." Without doubt, the Court legislated morality, whether or not you agree with their view of what is moral. What one really ought to take away from these cases is not just that the word "marriage" now has no particular meaning in Massachusetts, but that individual courts feel perfectly free to ignore governors, legislatures, and even the historic body of law issued by other judges.

Marriage Case Two:
So you think your vote counts, Louisiana?

In the aftermath of the Massachusetts Supreme Court decision ordering the legislature to change the law, Louisiana, among other states, considered changing their State Constitution to make it clear that the law defines marriage as a union between one man and one woman.

Louisiana, with a population of 4,468,976 according to the 2000 census, voted on an amendment that was designed for one purpose, to resolve the question of whether same-sex unions in any form would be given the legal status of traditional marriage. Recently 78% of people voting passed an amendment that defined all legally recognized unions as between one man and one woman.

One man, a judge named Morvant overturned the will of the people, saying that the ban is unconstitutional. Why? Because it banned both same-sex marriage and civil unions. According to the judge, voters had to choose a ban on only one.

Article XIII, Section 1(b) of the Louisiana Constitution says that constitutional amendments must embrace only one topic, and Judge Morvant said that since the amendment had the effect of banning both same-sex marriages and civil unions, the amendment voted in by 78% is unconstitutional.

Is that so, Judge Morvant? Do you mean to suggest that defining marriage to mean one thing is not one topic? Do you expect the voters to respect your reasoning? Did the voters need to have separate amendments to address same-sex marriage, civil unions, bestiality unions, polygamy, bigamy, sex-slavery and the legal effect of giving a promise ring in the eighth grade in order to embrace the one topic of what the definition of marriage is?

Of course not. The judge has an agenda, and points out in a startling manner that in the 21st century, even our ability as citizens to amend our constitutions has been taken over by lone judges who believe that they alone can rule us all. The bottom line is that the votes representing the proportionate will of 3,485,801 people lose. The opinion of one man wins. If that is the governmental structure you want, no matter where the judges' whims might lead them next year, then you should put down this book now and go about your life. No, I didn't really mean that. You, most of all, should read on.

Chapter Fourteen
The Establishment Clause of the First Amendment (that's separation of church and state to you and me)

This chapter really ought to be called the separation of people from faith, by force of law. Are the courts hostile to religion, even in your private life? Has the Establishment Clause been beaten to death for decades now, with reasonable people no closer to knowing what is protected by the First Amendment than when the courts first began their holy war against religion? Let's see. Before we get started, let's consult the author of the phrase "wall of separation between church and state", President Thomas Jefferson. Hey, Mr. Jefferson, Mr. Separation of Church and State, what do you think of this Establishment Clause business?

"In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies." Thomas Jefferson, 2nd inaugural address, March 4, 1805.

For those sticklers out there, I know that after the Civil War the Bill of Rights was decided by the

courts to be applicable to the states, so don't sue me over citing an archaic quote. Still, it doesn't really seem like the father of the concept of separation was saying that states can't allow religious displays, now does it? With that question hanging in the air, let's look at what courts are doing right now with Mr. Jefferson's concepts and the First Amendment.

Case one: One Nation, Under Nothing

In several cases, named Newdow I and Newdow II, and Elk Grove United School District v. Newdow, the federal court decided that including the words "under God" in the pledge of allegiance, as recited in public schools, is unconstitutional. It is interesting for two reasons, first that the courts really have no idea what reasoning to apply when finding the word "God" abhorrent. Any reasoning will do:

"We are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them. Because we conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional, we need not consider whether the policy fails the endorsement test or the Lemon test as well."

Why do the courts have a wide range of options for invalidating religious expression? Can't the courts just pick one so we know how to defend ourselves? Second, the Court declares that words that suggest a belief in no god are also unconstitutional:

"A profession that we are a nation under God is identical, for Establishment Clause purposes, to a profession that we are a nation under Jesus, a nation under Vishnu, a nation under Zeus, or a nation under no god,

because none of these professions can be neutral with respect to religion."

Understand what that means. Even professing no belief at all is not "neutral" with respect to religion. The men and women in the black robes, in all of their wisdom and learning, have done us the favor of imparting the revelation that believing in no god is the same thing as believing in some god, and that none of that is permissible in school. What real societal or governmental interest are they serving with this opinion?

The Supreme Court recently overturned these rulings, on what the news calls a technicality. In fact, the Court reversed the Pledge ban on a very unique interpretation of the rule of standing, saying that the man who brought the lawsuit, Reverend Newdow (yes, he is a reverend of what he calls the First Amendmist Church who later sued to be named Chaplain of the Congress) could not do so because he does not have full custody of his child. That decision is troubling. While some are pleased that the Pledge is allowed once more in the 9th Circuit, none are satisfied as to how we got there. We should fully expect the issue to come right back, either in the 9th Circuit or in another, since the Supreme Court declined to tell us if they believe the words under God to be constitutional.

Case Two: Can I Study Auto Repair If there is a Fish on the Bumper?

If you need further proof that establishment clause (church and state) cases have been beaten to death, with no reason or logic or end in sight to the bickering that the courts refuse to settle once and for all, consider this:

In the case of Locke v. Davey, decided by the U.S. Supreme Court in February of 2004, the court decided that a college student, an adult, coerced by no one, was not permitted to use the scholarship he had earned to study theology. He could study anything else, (use your imagination), but not theology. His motivations for his studies do not matter, only that learning about belief systems is horrible and dangerous. The young man fulfilled the requirements for the scholarship, working hard, graduating in the top 15% of his class, and getting at least a 1200 on his SAT. His family was near or below the median income for families in Washington. He had a dual-major, in theology and business management and administration. The Supreme Court of the United States decides: theology bad, business bad too if mixed with theology. Note that the college the young man attended was eligible under state rules to receive scholarship money. Some quotes:

"Washington State established its Promise Scholarship Program to assist academically gifted students

with postsecondary education expenses. In accordance with the State Constitution, students may not use such a scholarship to pursue a devotional theology degree. Respondent Davey was awarded a Promise Scholarship and chose to attend Northwest College, a private, church-affiliated institution that is eligible under the program. When he enrolled, Davey chose a double major in pastoral ministries and business management/administration."

"This case involves the 'play in the joints' between the Establishment and Free Exercise Clauses. That is, it concerns state action that is permitted by [the 1st amendment] but not required by the [1st amendment]."

What are they saying? What standard are they giving us? The Lemon test, establishment test, coercion test, "play in the joints" test? I guess that means that if it is the individual against the state, the state wins, period.

"Here, the State's disfavor of religion (if it can be called that) is of a far milder kind than in [another case], where the ordinance criminalized the ritualistic animal sacrifices of the Santeria religion."

The U.S. Supreme Court just told us that disallowing the study of theology is trivial next to the far worse discrimination of prohibiting ritual animal slaughter. The Court also just told us that a government can "disfavor" religion, as long as it wants to disfavor other religions more. Look, folks, the people in robes are simply not as smart as they

claim to be. Even if you love the notion of "separation of church and state", you have to recognize that the Supremes are choosing sides between religions here.

"Washington's program [does not] require students to choose between their religious beliefs and receiving a government benefit"

Then why are they deciding that this student must choose between his religious belief and receiving a government benefit? What other possible effect could their decision have?

"The State's interest in not funding the pursuit of devotional degrees is substantial, and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here."

Don't forget that the state's interest in regulating animal slaughter is not "substantial" compared to its interest in keeping students from studying theology on the scholarships they've earned. Also, does it not seem cavalier to any of you that having to give up the means to pay for a college education, which you have earned, because you happen to want to study religion, is deemed by the court to be "a minor burden"?

"Davey had planned for many years to attend a Bible college and to prepare [himself] through that college

training for a lifetime of ministry, specifically as a church pastor."

What is your point, Supreme Court? The point they make is that the student's intentions to learn to minister to others is damning. Of course, he may have gotten turned off and turned from the ministry and taken up other pursuits in the course of his education and life, but even the possibility that he might become a pastor is worthy of the United States Supreme Court citing that fact as part of its reasoning. Does that frighten you at all?

"Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders"

This quote is included because it is hilarious. What are we to take from this? That popular uprisings can be cited as authority for Supreme Court decisions? That there is no difference in thinking between the judges and fleeting historical mobs? That seems to fly in the face of that independence of the judiciary thing they keep talking about. This case leaves one wondering from whom or what the Supreme Court thinks it is protecting us.

Case Three:
We'll tell you if you're ugly

The Catholics really are having a bad time in the courts lately, just like the Boy Scouts. One wonders what an outcast a Catholic boy scout must be in the mind of a judge. From the case of O'Connor v. Washburn University, decided February 26, 2004, we learn that the government may pay for, display, and endorse a statue in public that Catholics find to be a statement of hostility toward Catholics.

Here is the background. The Washburn University in Kansas has a campus beautification project, in which they use public money on public land to display art, to make the campus beautiful. A statue called "Holier Than Thou" was placed in a central place on campus in September of 2003. The statue is a bust of a Catholic Church official. The artist engraved the words "The Cardinal" on the statute. I've seen a photograph of the statue, and it is just plain ugly. The case is not about the quality of art, of course, and I am no expert in such things, but it is an ugly piece. The face is distorted and, yes, as you may have heard, the hat (miter) does look like a phallus, and not in a good way. The sculptor included a statement, which is displayed with the statue, that says:

"I was brought up Catholic. I remember being 7 and going into the dark confessional booth for the first time. I knelt down, and my face was only

inches from the thin screen that separated me and the one who had the power to condemn me for my evil ways. I was scared to death, for on the other side of that screen was the persona you see before you."

Before we go further, I need to make some things clear. First, your author is not Catholic. Second, I think the court in this case made exactly the right decision in allowing the statue. Bear with me, please. For those who believe in the First Amendment, the test is this: (1) does this statue create a state religion; (2) does this statue restrict the free exercise of religion? The statue, though ugly and offensive, does neither of those things; therefore its display is not prohibited by the Constitution. The problem, however, is that the court did not apply *that* test at all (no court ever does), and that this case is inconsistent with (some would say unfair compared to) other cases involving, for instance, the Ten Commandments, prayer by students, the Pledge of Allegiance, and Christmas Nativity scenes.

The Court said:

"[The] requirement of government neutrality toward religion does not mandate a 'complete absence of religious expression in public institutions….[The Establishment Clause] prohibits hostility toward any [religion]."

Cool! That sounds remotely like what the First Amendment is supposed to mean! Can we

display the Ten Commandments again? No? Can we put out a Nativity Scene at Christmas? No? Can Santa ride on the fire engine again next year? No?

"Plaintiffs claim that mocking the religious beliefs of Catholics…can never be a legitimate government purpose" However "[the] University's Campus Beautification Committee organized the outdoor sculpture exhibition to advance its primary goal of enhancing the beauty of the campus…We find that [the statue] functions to aesthetically enhance Washburn's campus…"

I am so glad that the courts decide First Amendment cases based on whether or not a display is aesthetically pleasing. We should all be glad to be told by the robed ones what art is pretty and uplifting. Here's the kicker:

"[T]he court cannot conclude that Holier Than Thou's presence on Washburn's campus would cause a reasonable observer to believe that [the government] endorsed hostility toward the Catholic religion."

That's the primary basis on which the court decided that the statue is not prohibited. It makes sense, but stands out for the fact that the reasoning is never used to allow displays that are favorable to religious Americans. The court simply declares that the majority of people wouldn't see the statue, as ugly and (despite the fact that it is clearly anti-Catholic) as anti-Catholic. Why, oh why can't the courts decide that the words "under God" in the

Pledge of Allegiance are not threatening because any reasonable observer would know that the schools were not really trying to force any particular religion on students. Why, oh why can't the courts decide that football players joining to say a prayer before a game would not be seen by a reasonable observer to be anything other than young fellows getting psyched for the game?

Once again, I believe that this court made the right decision, but for the wrong reasons. It is a shame that the acknowledgement and reasoning that the law does not (and never did) "mandate complete absence of religious expressions in public institutions" can not be applied to other things besides permitting a public religious expressions that ostracizes the Catholics on Washburn's campus. The reason that it is not is simple. The courts are hostile to traditional beliefs and to Christians in particular.

Case Four: Old enough to die, but not old enough to pray (or, can my squad leader pray for me in the foxhole?)

In the case of Mellen and Knick v. the Superintendent of the Virginia Military Academy (VMI), two cadets, Neil Mellen and Paul Knick along with the ACLU (and with, regrettably, the Jewish Anti-Defamation League), sued VMI. In April of 2004, the United States Supreme Court decided that it would not hear the case, meaning that the 4th Circuit Court of Appeals decision, banning prayer at VMI, would stand. VMI was established in 1839. Cadets Mellen and Knick, who have since graduated, were subjected to the following horror: freshman at VMI have to attend the beginning of the evening meal. Upperclassmen do not. If a cadet finds himself in the mess hall at the start of dinner, he will hear a prayer before the meal. The court explains:

"Depending on the day, the prayer begins with 'Almighty God', "O God', 'Father God', or 'Sovereign God.'….Each day's prayer is dedicated to giving thanks or asking God's blessing…A prayer may thank God for [VMI], ask for God's blessing on the Corps, or give thanks for the love and support of family and friends…[Each prayer] ends with…'Now O God, we receive this food and share this meal together with thanksgiving. Amen."

Standing at attention, bending to the whim of upperclassmen, undergoing tough, uncompromising

military training, etc., didn't bother the plaintiffs enough to seek out the ACLU. But just hearing someone thank the Almighty (not a specific god, mind you, but a generic one) for the evening meal was way too much for them, and lawyers had to get involved.

One should note that it is not easy to get into VMI. Know one ends up there by accident or against his will. A potential cadet has to show him or herself physically, mentally, and emotionally capable of dealing with the strict traditions of the school and to accept the possibility that he or she will join the military and perhaps see combat. In short, he has to bust his tail to get admitted to VMI and he has to be well above average in the area of dealing with stress and conflict. Thus this "school prayer" case is a very different thing indeed than those regarding a random 3rd-grader in a public elementary school.

In this case the court first ignored the fact that the cadets had graduated and no longer needed the court to address their concerns. In fact, this court specifically noted that under these circumstances they would normally send the case back to trial court with orders to dismiss it. But we're talking about prayer here, and the court decides to go to extraordinary lengths to combat the evil of prayer.

"Where a case has become moot on appeal, the established practice is to reverse or vacate the judgment below and remand with directions to dismiss."

The court in this case says several times that the graduated cadets' claims are moot (that is, there isn't anything the court can do to help them now). The court says that the cadets' claims for injunctive and declaratory relief must now be moot, but that their claims for monetary damages can survive. At the same time, the court says that there are no ways to grant monetary damages, as the one they sued (VMI's Superintendent) is immune from suit. Therefore there should be no surviving cause of action. The court says all this, which means the whole thing should end right here, and then just sort of goes on. That alone makes this a bad decision that the Supreme Court should have reviewed.

The court continues to state that the prayer would have been constitutional if it had a "unique history", saying only that (in effect) the last constitutionally permissible prayer occurred in 1789, when the First Amendment was submitted at the same time that the Founders appointed and paid chaplains for the Houses of Congress. By their logic, the Founders passed the First Amendment and forbade prayer by any government entity at exactly the same time that the founders appointed and paid chaplains with public money. This court decided that since the school was founded after 1789, its practices cannot, as a matter of law, have a unique history.

The court also decided that VMI cadets fall into the same category of 3rd graders when

evaluating whether or not they are coerced into hearing a prayer, completely ignoring the fact that applicants to the military academies have to work very hard, with eyes wide open, to be able to attend them in the first place.

It's a horrible decision, and the Supreme Court's decision not to review it is a dereliction of duty, no matter what they might ultimately have decided.

As an aside, when I was a cadet at West Point I never would have considered suing the institution I had worked so hard to attend. Something about looking a gift horse in the mouth comes to mind.

Former Cadet Mellen, having succeeded in banning prayer at an institution dedicated to nurturing military combat leaders, is now a member of the Peace Corps. This story isn't over, either. The ACLU is planning to apply this decision to West Point and Annapolis, if they can.

If you read this decision literally, and take into account that the Supreme Court has approved of it, it is now illegal for a combat commander to say a prayer for his soldiers while under enemy fire. That is not really a stretch. After all, military officers are employees and agents of the federal government, just as the superintendent of VMI is an employee of the State of Virginia. No judge has the right to take that

away from our soldiers. Let these judges jump into the foxholes and turrets and enforce it themselves.

Chapter Fifteen
Euthanasia and the rights of the disabled
Case One: The Florida Supreme Court And Terri Schiavo

In Chapter Two of this book I shared some observations surrounding the Florida Supreme Court's consideration of the life of Terri Schindler-Schiavo. We turn now to what that court ultimately decided.

Allow me to restate this much in the way of background. Terri Schindler-Schiavo, a disabled woman who is conscious and is not terminally ill, was ordered by the guardianship court empowered to look after her interests to have food and water withheld from her, the expectation being that this would cause her death by dehydration or starvation some several days later. The tubes providing food and water were removed on October 15, 2003. After being without hydration for six days, the elected Florida Legislature passed what became known as Terri's Law on October 21. The Governor of Florida acted under the authority granted to him by Terri's Law and issued a one-time stay of death for the purpose of having a guardian ad litem appointed for Terri to inform the court, which would retain jurisdiction over Terri's very life, of what was in Terri's best interests. Terri's Law was challenged by her husband, and the case eventually made its way to the Florida Supreme Court.

On August 30, 2004, I attended a panel discussion about the ethical considerations of Terri's case in Tallahassee, and on the 31st, I sat in the gallery of the Florida Supreme Court during oral arguments. The members of the CourtZero message board got a play-by-play account of those events.

As for the Florida Supreme Court's decision, handed down September 23, 2004, there is so much wrong with it that the task of analyzing the quality of the decision from a legal perspective causes one to alternately laugh and cry, and then to contemplate turning in one's bar membership. The decision is worthless as a piece of jurisprudence, a true mess, but does have great value to the devotees of the global death cult known as the Right to Die Movement.

In analyzing the court's reasoning, please allow me to begin at the end. On page 26 of the 30 page decision, the opinion, authored by Chief Justice Pariente, devotes two sentences to the heart of the matter, and simply states a conclusion. There is a principle in the law known as parens patriae. That Latin term means that the state has the power to act in the role of the parent of a child, or an incapacitated person who is in need of protection. It is not a difficult concept, and is the reason we have laws empowering state government to take and care for children abused by their parents, for instance. It also applies to the disabled, for reasons that ought to be obvious. The longstanding doctrine of parens patriae

means that any branch of the government, by itself, has the obligation to protect citizens who cannot protect themselves. No branch of government needs permission of another to act within its abilities to prevent exploitation and abuse. The rest of the opinion ignores the concept, but for those two sentences I mentioned. Justice Pariente's reasoning goes like this: the legislature certainly has the authority to pass a law to protect such citizens, but it may not do so in an unconstitutional fashion. And Terri's law, in turn, is unconstitutional because, well, because the legislature, the Court says, doesn't have the authority to pass that law to protect such a citizen. That is essentially the bottom line of the 30-page opinion. It is circular and self-contradictory, and not worthy of a first year law student.

The decision is split in two parts. In the first, the Court declares the law allowing Terri a reprieve from her death by dehydration violates the doctrine of separation of powers, and in the second, that Terri's Law is an unlawful delegation of legislative authority. Those two sets of reasoning contradict each other.

On page 5, Justice Pariente writes that after Terri was first condemned by the guardianship court, "the litigation continued because the Schindlers [Terri's family] began an attack on the final order." Most people would just call it taking an appeal of a disputed order. The Court's choice of the word attack is juvenile, quite frankly, and betray an

attitude that was on display during oral arguments when the Justice could be seen to frown and grow frustrated when the attorney for Terri's husband didn't do a good enough job of giving the Court the answers it appeared to want to hear.

On page 8, the Court cites with approval the earlier opinion of the 2nd District Court of Appeal in Terri's case, which said, "it may be unfortunate that when families cannot agree, the best forum we can offer…is a public courtroom…but the law currently provides no better solution that adequately protects the interests of promoting the value of life." Given the Supreme Court's contempt for the legislature's attempts, in passing Terri's Law, to adequately protect the interests of promoting the value of life, the fact that they cite this passage is dripping with irony, and is once again self-contradictory.

On pages 10 and 11, the Court recites the brief act of Florida's elected representatives known as Terri's Law. One portion of it says "upon issuance of a stay, the chief judge of the circuit court shall appoint a guardian ad litem for the patient to make recommendations to the Governor and the court." This clearly means that even under Terri's Law, the final decision would revert to the court, yet the Supreme Court is so offended by anyone questioning any aspect of their power that they are blind to this fact.

On page 11, the Court states simply that "this Court…has traditionally applied a strict separation of powers doctrine." That is a staggering statement, with the Bush v. Gore, 2000, case still fresh in the minds of many, in which the Florida Supreme Court ordered the rest of Florida's government to ignore settled statutes and do things precisely as they said. That was the ultimate in a court ignoring separation of powers, and is rightfully well-known to most Americans. As another example of the Florida Supreme Court's activism and disregard for the separation of powers, the Court recently passed a supposedly procedural rule that required the executive branch to perform certain tasks before a mentally ill child who is a ward of the state may get mental health treatment, required the legislature to fund free attorneys for those children that the other two branches had determined to be unnecessary, and more or less meddled in and mucked up the whole process. The list could go on. The Florida Supreme Court does not hesitate to order the other branches around and interfere outside its responsibility, and to state otherwise is simply a lie. We're on to you. We're watching.

The Terri Schiavo decision continued with quotes from James Madison, the Federalist Papers, and Thomas Jefferson, all to suggest that the legislature, while attempting to buy some time for a condemned disabled woman, is just plain dangerous! How quaint, as if the Founders fought the Revolution so that husbands could have their

disabled wives killed by withholding food and water. The Court failed to quote more relevant statements by those men that might be inconvenient for them, like when Thomas Jefferson said, "…those who gain positions of power tend always to extend the bounds of it…that whatever power in any government is independent, is absolute also", and, as quoted earlier in this book, "to consider the judges as the ultimate arbiters of all constitutional questions is a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy."

On page 14 the Court cites what it apparently believes to be persuasive precedent for the notion that a court's final decision is the last, supreme and irrefutable word in any matter before it. The Court mentions other cases that say things like "having achieved finality…a judicial decision becomes the last word of the *judicial department* with regard to a particular case…" The italics are added because this Court does not seem to have noticed those words. They are repeated elsewhere in the opinion, but seem to have no meaning to the justices. The best precedent the Florida Supreme Court can come up with to support their decision does not say that judges get the last word, as the justices suggest. It only says that a court, when delivering a final judgment, has the last word within its own branch of government.

That is entirely different from authority to suggest that a judge's decision is supreme over the

other two branches of government. They cite authority that is legally meaningless to the conclusion they are drawing.

On page 15, the Court notes that "appellate review for the benefit of litigants aggrieved by the decisions of the lower court…is the exclusive remedy." The Supreme Court is simply stomping its foot here, declaring "you're not the boss of us; we're the boss of *you*!" The reasoning is nonsensical, untrue, and hypocritical. Consider the following hypothetical situation: Let's say you apply for a fishing license from an agent of the executive branch, and you are turned down. Let's say the agent just doesn't like how you look. No where in the fishing license statutes does it mention judicial review of that agent's decision. Not one word. "That's unfettered discretion granted to the executive branch!" these judges would say. But then again, they wouldn't say that. There is no activist agenda involved in the role of courts in granting fishing licenses. The rights of the disabled are another story.

We know that all citizens have access to courts for redress of grievances both under the common law and as an enumerated constitutional right. The fishing license statute, therefore, doesn't have to say that it is reviewable in order for it to be reviewable. It is the same for Terri's Law.

As a matter of fact, not only does the fishing license statute not mention review by a court, but the

Administrative Procedure Act would require you to argue things out with the agents of the governor before a court is allowed take up your case.

Terri's Law respected the role of the guardianship court and did not invoke any necessary administrative procedure to stand in the way of further court action, thus posing less of an obstacle to judicial review than most laws do. This makes the Court's complaint that the Governor's decision to stay the death of Terri is not reviewable seem alarmist, if not just silly.

On page 16, the Court explains how important judges are because they decide weighty matters like child abuse cases, forgetting that they only do so pursuant to the authority granted to the courts by the elected legislature to do so. This whole case is about the Court explaining that the peoples' representatives are not authorized to change their own laws, and they cite the legislature's laws to prove it. These contradictions would be funny if the effect of the decision was not so tragic.

On page 17 and for the rest of the opinion, the Court explains how Terri's Law is invalid because the legislature gave too much of its authority to the Governor. But the first 16 pages were all about how the legislature never had the authority to give away in the first place. I cannot figure out why the Court bothered to argue a point of law that would only be

true if everything they had said up that point was not true, other than to make the opinion longer.

To objective and honest legal scholars, this is a particularly bad decision. It doesn't even seem to try to be a reasoned and useful example of jurisprudence. It seems, instead, that the Court is willing to sacrifice the life of an innocent woman if the alternative is to abide any affront at all to the Court's view of its own supremacy over all things that occur in the State of Florida.

Case Two:
The Schiavo effect in infant form

There is a case pending in Ohio. A child named Aiden Stein is, as I write this, an infant. He is, according to news reports, comatose, but I know from the diagnosis that that word can have broad meaning. There is no doubt that the child has a very low level of functioning.

Before I talk about the case itself, let me mention the infant's diagnosis. Doctors say that the child is the victim of Shaken Baby Syndrome. Those cases are perhaps the most heartbreaking of child abuse cases, because there is simply no recovery for those kids. They remain alive, but really have had their whole lives taken from them when they are just babies. Shaken Baby Syndrome is a description of massive brain damage. Miraculously, adoptive parents are often found to care for these kids. They have to care for them in every way possible, because their bodies will grow but they will remain infants in their functioning for the rest of their lives. As awful as their injuries are, many do live, and grow, and are often loved.

Now, you should know that in order to inflict shaken baby injuries on a child, one must do more than merely shake a baby. I have seen the physical act demonstrated by medical professionals who have a sense of mechanical engineering, and the amount of violence needed to inflict such injuries is truly

shocking. The best analogy I can think of is if you could imagine being placed in one of those home-improvement store's paint shakers, the kind they use to mix shades of paint. Only imagine that the paint shaking machine that has you in its grip is 30 to 40 feet tall, as big as a 4-story building, and its power and speed is increased proportionately with its larger size. It has to be that violent.

I've said all of that so that you know that I do not dismiss the seriousness of the child's condition, and because I do not wish to simply gloss over the fact that the child's quality of life will not be something that any of us would choose for ourselves.

Little Aiden's father is accused of causing the injuries, but has not yet been charged. The father proclaims his innocence, as does the mother. I do not know if either the mother or father is guilty or innocent, and have now way of knowing. I do know that the authorities are unable at this time to conclusively determine what happened to injure Aiden.

A guardian ad litem (GAL) has been appointed by the court, to advise the court on what is in the child's best interests. The GAL has pushed for removing the baby from child support and causing his death. The court agreed, and now the matter is on appeal.

The parents wish to keep their child alive. The

GAL was appointed in the first place because the court found that the father has a conflict of interest. You see, if the child dies, he may be charged with manslaughter or murder. If the child lives, he only potentially faces aggravated child abuse/battery. If there were no conflict of interest, we are told, there would be no GAL and no one who is party to the case would be pushing to terminate the child's life.

Assuming that it is reasonable to find that the father has a conflict of interest, why isn't the mother's desire to keep her child alive under medical care sufficient? Does it have to be unanimous between both parents in order to keep a disabled child alive? It makes no sense to say that a parent presumed innocent cannot act to save her child's life as long as the other parent may be guilty of harming the child.

In this case there is a disabled infant. One parent may be guilty of causing the disability. Both parents want the child to live. One stranger, appointed by the court, wants the child to die. The court decided that the child should die.

I don't like that. The parents are, at this point, innocent until proven guilty, yet their desire to preserve their child's life is discounted in favor of a stranger who believes, probably sincerely, that death is best. The GAL actually argued "death with dignity" as if even a healthy infant would have any concept of dignity. I'm coming to believe that the

words death with dignity do not mean what one might expect.

Something is missing here. In the Terri Schiavo case, Terri is an adult, and all the legal arguments are that she has a right to privacy, i.e., she has a right to have her wishes about life and death carried out. How does that apply to an infant? It does not, so where do we get off ignoring the wishes of the infant's parents, when we know that at least one of them is innocent of wrongdoing?

This is only an issue because a judge is enabling it. If the case were not before the court, anyone who deliberately caused the disabled child to die would be guilty of murder. But since a judge is involved, it doesn't even make people blink to execute a little child, someone who embodies the very definition of innocence.

Chapter Sixteen
What privacy really means

If you think that the right to privacy means anything to activist judges other than the right to kill your unborn baby, you're wrong. Despite various state and federal laws regarding the privacy of your personal medical information, what weight do you think a court will really give to your supposed right to privacy when that court wants to see you hurt?

You may hate Rush Limbaugh, famous radio talk show host. If you have gotten this far in this book, odds are you at least tolerate his existence. Clearly, Florida courts do not tolerate his existence, and what they have to say about his right to privacy will affect everyone in Florida.

The Florida 4th District Court of Appeal released its decision about Limbaugh's personal medical records on October 6, 2004.

It goes like this: the Florida Constitution has a right of privacy clause that you'd think would preclude evidentiary fishing expeditions in your personal papers and such. But, says the court, the right to privacy cannot be considered when the government seizes your property, because the Florida Constitution also says that our 4th amendment search and seizure laws shall conform to federal rulings on the matter.

Those judges do like to paint a muddy picture, don't they? The reasoning doesn't make a whole lot of sense to me. We have a right to privacy in all contexts except for when personal items are seized...in which case we have a separate right to be free from unlawful search and seizure...therefore there is no right to privacy. I wish I was making that up.

The opinion continues on to note that Florida statutes do not allow disclosure of medical records by subpoena without prior notice to the patient (something Limbaugh was not given). The court assumes that the legislature didn't mean for that to apply to search warrants. No reason given, the court just kind of doesn't think so. In the next sentence the court notes that those laws were meant to stop abuses by (among others) governmental lawyers in criminal cases.

Like the ones who got Rush's records? No, not them, the court says, because they used a warrant and not a subpoena.

I don't see it, but hey, you know what they say! Without the courts being activist we wouldn't have any rights protected, right? Like the right to privacy, right?

What a colossal lie.

The court wraps up by noting that the search warrant statutes do not list any kind of limits as to the kind of property that can be seized by a search warrant. This is a new one! A Florida court says, in effect, that "the statute doesn't limit its own power; therefore the government can do anything it wants." That isn't very comforting.

So why is all this tortured and scary logic employed? One can't help but conclude that the judges are willing to throw away the right to privacy attached to personal medical records of Florida's 16 million residents in order to hunt down and harm one Florida resident, Rush Limbaugh.

The conclusory sentence is "...we hold that the constitutional right of privacy in medical records is not implicated by the State's seizure and review of medical records under a valid search warrant without prior notice or hearing."

Without exaggeration, this is the same thing as, for instance, issuing a search warrant for my records of advice given to you as my client in an attorney-client relationship. It's exactly the same. They seem to say, "Well, the warrants statute doesn't say that it can't seize an attorney's thoughts and advice, therefore there are no privacy implications."

There is no mention of HIPPA, the federal law

regulating the disclosure of medical information, anywhere in the main opinion. Not one word.

Justice is blind, right? It doesn't matter who the person before the court is, as we are all equal under the law, right? The courts stand for nothing if they don't protect our rights, right? Sure. Right.

Chapter Seventeen
Do the courts do more harm than good?

As the last several chapters illustrate, the courts often choose sides in what we think of as the culture war, and are the prime movers eroding the rights and traditions of we the people. The examples you've just read show us that our courts are hostile to Boy Scouts and to charities run by people of faith. They show us that historically, the courts enabled bigotry and segregation and Jim Crow laws tied the hands of our elected leaders to debate and try to solve those problems. They show us that when a question of life and death involves someone who cannot express his or her own wishes, the courts will nearly always choose death as their default position.

That's not all though. The courts have stood up for the ability of police to seize assets without warrant and without charges brought, in the name of the war on drugs. The results might mostly be just, and the cops are just trying to do a difficult job, but if you think the court is there to protect your rights, you are mistaken. The courts have stood up for who can say what and how about powerful politicians before an election, in the Campaign Finance Reform decision. The courts have enabled greedy city politicians to take property away simply because giving that property to another owner would result in higher property tax receipts, under the notion of eminent domain. Free speech doesn't protect taking out ads against a powerful politician, but it certainly

protects internet pornography, despite repeated efforts of the Congress to make the Supreme Court happy. The Supreme Court has stood for the right of police to seize property even when a part-owner is innocent of any crime. The list goes on. How many of you truly believe, deep in your heart, that if you were persecuted, if the thing that mattered to you most was being attacked, that a judge would make it all better?

So what are the good things that the courts bring to us in the here and now? Well, the criminal justice system has to keep moving forward. The same folks, however, who are most likely to want a progressive judiciary in cultural issues, are usually the first to point out that there is a lot of injustice in the criminal justice system. So which is it? Are the courts the one and only place in which to put your trust, believing them to be the only ones to protect the rights of the vulnerable, or aren't they?

For those who reflexively disagree with the premises of this book, and want their judges socially conscious and activist, I'd suggest this: for all of your faith in the courts, you have traded free speech, property rights, and several of the foundations of the nation's culture for four things, which you have received in spades from the courts. Those four things are as follows. The courts are very diligent in elevating abortion to a sacred, almost religious, rite, in waging war against all other religious expression, embracing any lifestyle or practice that threatens our

already drowning families, and to preserving and prolonging antagonism between the races through affirmative action decisions. If those are the things you desire for yourself and your family and legacy, and don't mind what you are trading for it, then so be it.

That's an important question for all of us to answer, because reigning in the courts will no doubt cause some pain. Confronting the courts will surely cause some good judges to be lumped in with all the bad ones, and any adjustment of the status quo can be frightening. The question then, is whether it is worth it to challenge the massive power of the courts. I suggest we would gain far more than we would lose if we root out the activist judges and cause the courts to return to representing and protecting, instead of making, the law.

Chapter Eighteen
The special interest menace

When one reads an appellate court's opinion, the people, or interest groups, who have either been allowed to argue their point of view before the court, or to submit a written brief arguing for their desires, are listed near the beginning. It is remarkable how many interests get involved in cases that really ought to be between one petitioner and one respondent. Do you remember back in the beginning of this book, when we talked about the five steps between representative government and oligarchy? This chapter will illustrate steps two and three.

For example, in the Catholic Charities case we discussed in an earlier chapter, it seems like a special interest free-for-all. Catholic Charities were targeted by a multitude of advocacy groups, including several who could not in any way be affected by the ultimate decision because they were either not from California, or not subject to California's medical insurance laws.

The reason these groups pile on in these lawsuits is fairly transparent. They have much more influence over judges than they do over the average voter and the general population.

Here's another example, from the first case I ever studied in law school, State of Florida v. Powell. In a nutshell, the case was about this: as of 1983 in

Florida, medical examiners were to remove the corneas (a part of the eye) while they were performing autopsies in cases of unexplained death. The law only allowed the taking of corneas if no objection by the next of kin is known to the medical examiner. Two Jewish families who had family members killed by drowning and a car accident, respectively, brought suit because their religious beliefs required that their loved ones be buried whole.

To make a long story short, the Florida Supreme Court decided that the government may harvest a body part from you after you are dead if the economic interests are strong enough. I don't think it's a stretch to say that what ultimately swayed the Court, which never even mentioned the heart of the lawsuit (the families' pleas for respect for their religious beliefs), was the powerful interests lined up to make a profit from getting those body parts. With regard to the whole reason for the case before them, they only said, inexplicably, that "[t]he record contains no evidence that the [families'] objections to the removal of corneal tissues for human transplants are based on any 'fundamental tenets of their religious beliefs'".

When you look at the attorneys who either appeared on the case or submitted briefs, you find several of them representing eye banks, ophthalmologists, and the Florida Medical Association. Why is that? The answer is money.

Performing the transplant surgeries makes money, and there is no other place to obtain the raw materials needed than from the dead, so the ones who would make the money send lawyers to argue for it, and the Court finds those interests compelling.

Those are just two examples, separated by a couple decades in modern judicial history. In nearly every important case that affects your rights and the function of your government, you'll often find the same interest groups on board, again and again. There is, however, one top banana of social engineering, one 900-pound gorilla of court manipulation, the American Civil Liberties Union, or ACLU.

The ACLU makes money from suing. That is to say, the ACLU profits from the very act of litigating. For that matter, they often make money simply from issuing threats and forcing settlements. The attorneys working for the ACLU get to make a comfortable living by never, ever, ceasing to search out some town, village, or city somewhere that might have something reminiscent of a religious symbol somewhere on its property. A Christian religious symbol, that is.

Why do they do that? One might presume that it is to preserve your supposed right to never see anything that you don't want to see, but if that was so one would think that they could find something more disturbing than a cross honoring fallen soldiers

at the Mojave Desert Veterans' Memorial, for instance. One might more easily and honestly identify the purpose of the ACLU simply by listening to and believing the words of its founder, Roger Baldwin, who said, "I am for socialism, disarmament, and, ultimately, for abolishing the state itself…I seek the social ownership of property, the abolition of the propertied class, and the sole control of those who produce wealth. Communism is the goal."

Oh. Well, it's a free country, and you are entitled to dream and scheme. So how does the ACLU do what it does? In straightforward and elegant fashion, they get you to pay them to sue you and to threaten to sue you.

Federal law, specifically the portion of the United States Code (USC) found at 42 USC 1988, allows judges to award attorney's fees paid by taxpayers to those who sue to enforce federal civil rights law. That sounds pretty noble on its face, but in practice has become something far from noble.

When the ACLU forced Alabama Justice Roy Moore into a showdown over the display of the Ten Commandments (which by the way is displayed in both the US Capitol and the US Supreme Court building), the ACLU pocketed $540,000 in taxpayer money. When the ACLU forced the Boy Scouts off the land they had camped upon for decades in California, they got paid $790,000 for beating up on

little boys because the ACLU doesn't approve of their beliefs.

Similar awards of fees and costs follow everywhere the ACLU threatens a town or a group of people. That is why, for instance, the leaders of Orange County, California, decided not to even bother to fight a threat issued by the ACLU over a tiny cross on the county seal, even though several law firms had offered to represent the county for free. That is why every single town and organization is a potential target. Does your town have a manger scene in a warehouse somewhere? You are a target, and your money is at risk. Do the members of your city council say a prayer asking for guidance before a meeting, with the full knowledge that every single member of the council has the same religion and sincerely wants guidance to do a good job? No dice; you will pay.

A million here and there in fees may not seem like much in the grand scheme of things, but to the individual lawyers and chapters of the ACLU, that is the lifeblood; it pays their salaries, and there are tens of thousands of towns still to be milked. Left unchecked, the ACLU will not stop in our lifetimes or that of our children; there is money to be made as far as the eye can see.

So how about the other side? What happens when those who want to uphold traditional values or to fight judicial activism go to court? Well, they tend

to get destroyed in short order. Conservative law firms have been hit with RICO claims and punitive awards of attorney fees. The deck is stacked. There is no provision under 42 USC 1988 to correspond to those defending constitutional rights of people and towns and cities. All of the financial incentive is on the side of those challenging us.

Chapter Nineteen
The big myths about judges and courts

Myth Number One: Judges are removed from social pressures and don't make decisions based on special interests like other politicians. If you've read the cases cited in this book, you may have come to the conclusion that this not true. Judges often make decisions based, not upon the law, but upon the economic interests at stake or upon the judges' own personal beliefs. Sure, members of congress do that as well, as do presidents. Here's the difference: your member of congress has an office with a staff you can contact and discuss your thoughts and complaints, while judges do not. You can vote for members of congress and presidents, but you cannot vote for federal judges.

Myth Number Two: Judges are smarter than you are. Again, if you have read the cases in this book, you may realize that this is not true either. Judges all have law degrees, and all have received what we call higher education. Once lawyers become judges they enter a bubble in which they learn mostly from those who share the same profession, and hear little from regular folks. That doesn't mean that they are smarter than the average bear, however, when it takes 50 or 80 pages of opinion to decide whether or not the Pledge of Allegiance is a clear and present threat to liberty. Verbosity equals neither intelligence nor insight.

Myth Number Three: Judges are inherently more just and fair than our elected officials, and are the best and only ones to turn to when our rights are in jeopardy. Remember Dred Scott, and Plessy? Do you remember the heartbreaking case of Terri Schiavo? When cases truly deal with life and death situations, judges become sterile, not compassionate; they become heartless, not wise, and history shows us that they do far more harm than good when they interfere.

Chapter Twenty
Letters from the editor of the CourtZero message board

Each of the following essays was first posted on the CourtZero message board and sparked conversation and comment by regular folks who live and work outside of the world of the courts.

On local courts and personal injury lawsuits

I've had a bit of an epiphany about the courts. I'm not just talking about the big, appellate federal courts where they decide all those social and moral issues we talk about. I'm also talking about the court in your hometown that decides who gets the kids if you get divorced, or takes up your case if you are wrongfully fired from your job. It's not as easy for me to criticize the local courts, because that's where I make my living and I like to think that what I do is ultimately good for people.

What I've realized, with a sudden smacking of my forehead with my hand, like in the old V8 juice commercials, is that even the "good" parts of the system don't work very well. For instance, you hear from time to time about someone who burned him or herself with fast-food coffee or some-such getting a big payout from a lawsuit.

Have those cases made the world safer, after all these years and all those lawsuits? Have those

lawsuits opened eyes and caused people to behave with more caution? The answer is no, to both questions. Businesses and industries factor litigation costs into their business plans and carry on as they would otherwise, by making economic decisions they believe to be sound (Shall we stop selling hot coffee? The answer is no.) These cases only really result in four things: a plaintiff gets a lot of money he or she did not earn; lawyers continue to make a living in the litigation industry; we have an ever-increasing number of warning labels instructing us not to shove shards of broken glass in our eyes, or to not drive in reverse at over 80 miles per hour; and lastly, everything is more expensive.

Speaking of driving, think of automobile manufacturers. If they could have created an injury-proof car by now, they would have. It's simply not possible. They make the safest cars they can, but a Kia is not a Volvo is not an M-1 tank, because there are other economic considerations that simply cannot be ignored. So we go on, perhaps forever, with car makers creating the best products they can, and always being sued because they are theoretically not as indestructible as they might have been when someone skids on ice into a bridge abutment. Plaintiffs get rich, lawyers make a living, and car makers carry on, into perpetuity. If the court system were as good as it is supposed to be at handling personal injury, would not such a problem ever find a final solution?

Think of cigarette manufacturers. They are not going anywhere. Neither are smokers. Instead, from now until kingdom-come, people will choose to smoke, get sick, sue, make their lawyer rich, and the cycle simply continues. The lawyers and the cigarette companies have learned to co-exist. The lawyers will never shut down the cigarette companies because the lawyers need them to keep making their product. And some people, even educated people in the 21st century, will continue to smoke.

Have you ever heard of someone filing suit because they were wrongfully fired from a job, because of being a whistleblower or because of a bona fide illegal discrimination? Those things happen, and sometimes there are cases that get a lot of attention. Yet, I'll bet you know a bunch of people who have been treated unfairly, who could have sued, but did not. All these lawsuits don't actually function to make things better out there; to be honest judges cannot change human nature or foibles, but they can make attorneys wealthy. Shouldn't decade after decade of court decisions be more effective at causing employers to understand and respect the law better? I can tell you that is not the case.

My conclusion is that the court system, despite some sincere and intelligent judges, does little to solve society's problems, despite endless litigation. I do not suggest that those who are wronged should not be able to seek remedies for

their grievances; I just call into question the ability of the court system to do anything to change human behavior in the long run. If that is a legitimate question, than we ought to start to tally up the societal costs of enormous jury awards and weight them against societal gains.

You can't vote for foreign judges

There is a disturbing trend in the Supreme Court. If you are concerned that judges in America make decisions that voters cannot do anything about, then what happens when it is a decision of a foreign courts that directs our law?

Since 1977 and especially in the last five years, U.S. Supreme Court Justices have cited foreign decisions to support their views: Justice Breyer, in a death penalty case, cited judicial decisions from Jamaica, India, Zimbabwe, and the European Court of Human Rights, and said, "A growing number of courts outside the United States…have held that lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading, or unusually cruel." Now, whether or not delays in execution are unconstitutional may be a legitimate question, but one wonders why it matters, under our Constitution, what other countries do. Of course, there are countries with whom we share values, but many with whom we do not, so what business does a US Supreme Court Justice have in picking the opinions of some foreign judges, and not all the others, and applying them to American law?

In a case that ruled that people of low IQ who are convicted of murder could not be given a death sentence, Justice Stevens said that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is

overwhelmingly disapproved" and mentioned a legal brief from the European Union to back up the notion.

That may be compassionate, and you may like the decision, but be aware that our system of criminal justice already recognizes that those not competent to understand their crimes (the legally insane) are not convicted in the first place. Justice Stevens simply used a European decision to go around our own laws.

In the Lawrence v. Texas decision that struck down the state's sodomy statute and led to the Massachusetts same-sex marriage decision, Justice Kennedy said that "The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries." Choosing among the conflicting views of countries around the world, Justice Kennedy cites the British Parliament, the European Convention on Human Rights, and a 1981 European Court of Human Rights case.

It's not about the 14th Amendment or American civil rights, after all. The incredibly destructive Lawrence case is about what they do and approve of in Europe. We can't vote in European elections, however. Apparently they can shape our laws, however.

Justice Ginsburg explains her philosophy by saying, "Our island or lone ranger mentality is

beginning to change. [Judges] are becoming more open to comparative and international law perspectives."

Ginsburg cited an international treaty in her vote in June to uphold the use of race in college admissions. Ginsburg said that the internet is making decisions of courts in other countries more readily available in America, and they should not be ignored.

Here's one last example. In Oklahoma, a Mexican national was convicted of murder and sentenced to death. His conviction and sentence were upheld by Oklahoma courts. Then the matter went to the World Court. There is a treaty under which the United States has agreed to let Mexican defendants contact the Mexican consulate before trial. That, of course, is a right that American defendants do not have. The World Court decided that the man, a Mexican citizen, could not be put to death, because he had not contacted the Mexican consulate before trial. It does not matter that contacting the consulate would not have changed the outcome of the trial in the least. The State of Oklahoma decided to obey the World Court and changed the man's sentence.

Now, you might agree that the better thing to do was to let the murderer contact his consulate. I won't argue that. The problem is that the decision of the Word Court in no way changed the fact that the man was convicted by a jury of a brutal murder. The

bigger problem is that the State of Oklahoma chose to obey court orders from foreign judges. That is not a good precedent, because we have no input into what people like to call international law and no recourse from it.

SCOTUS ON PORNOGRAPHY, AGAIN

Ashcroft v. ACLU (man, I love those guys!) is the second case in the last few years to deal with restrictions on obscene material broadcast on the internet. The first case was Reno v. ACLU, in which the Court struck down Congress' attempt to make the internet safer for children. Congress responded to the Reno ruling by changing the law to comply with the Court's instructions (the new law was called COPA, the Child Online Protection Act).

COPA made it a crime to knowingly post on the web [without certain safeguards], for commercial purposes, material that is harmful to minors. What is harmful is defined in COPA as what one would normally thinks of when one thinks of pornography.

COPA makes it clear that the law only applies to American websites selling pornography for profit. Here is the important part: the law provides that the things covered by the law are not a crime as long as the website "has restricted access by minors to material that is harmful to minors:

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age, or

(C) by any other reasonable measures that are feasible under available technology"

In other words, in plain language, this is no different than requiring an adult video store to check ID. We all recognize that in the real world, retailers can be held criminally liable for selling minors alcohol, cigarettes, or pornography. There's nothing new there. COPA simply extended that policy to US-based internet sites, and provided several options by which the porn-sellers could verify age and avoid committing the crime of selling pornography to children.

The lower courts held COPA to be unconstitutional, and the Supreme Court upheld those decisions. The heart of the reasoning is essentially the following:

1. When restricting speech, the government must achieve its goal (protecting kids) by the least restrictive means available. The Justice Department argued that requiring identification to view porn sites *is* the least restrictive method, as opposed to simply banning commercial porn sites. The Court disagreed.

2. The Court found that filtering software, operated by adults in individual homes, was the magical less restrictive method, and selected that method of protecting children over Congress'

method of requiring identification to buy internet pornography. It is inarguable that in this sense, the Court is indeed writing law, not interpreting it. It is not in the Court's job description to pick or suggest their preferred method of implementing the goal of Congress.

3. The Court notes that Congress cannot, in a practical sense, pass any kind of law that requires the use of filters, but that Congress can encourage the use of filters in libraries and schools.

Therefore, since the Court concludes that software filters are available to parents, then requiring pornography retailers to check ID before selling porn is unconstitutional, even though, as the Court says, the Congress has no authority to mandate the use of those software filters.

That is no different, logically, than saying that since parents can accompany children to the store to prevent them buying alcohol, tobacco, and pornography, then any law requiring brick and mortar stores (as opposed to internet stores) to check ID is unconstitutional. The Supreme Court does not explain this logical contradiction, as it seems to have (as it so often does) started with a conclusion and worked backwards.

Compare this decision with the Campaign Finance Reform decision, in which the Court had no problem restricting the free speech of everyone

except for politicians and the established media, and did not require a less restrictive means of achieving the goal of reducing corruption in politics.

Justice Scalia, in his dissent (meaning that he did not agree with the decision of the majority of the judges) notes that the activities described in the law could constitutionally be banned outright; therefore the Court had no business deciding if lesser restrictions are constitutional. He cites a Supreme Court decision from 2000 that does, indeed, say that such things could be banned.

Justice Breyer, in his own dissent, says that "There is no serious, practically available less restrictive way to further this compelling interest. Hence the Act is constitutional." He goes on to ask "what has happened to the constructive discourse between our courts and our legislatures that is an integral and admirable part of the constitutional design? After eight years of legislative effort, two statutes, and three Supreme Court cases the Court sends this case back to the District Court for further proceedings. What proceedings?" Now that is a great quote. Breyer is saying that the Court is doing nothing less than jerking Congress around. He goes on to say, basically, that if the Court is going to reject any efforts by Congress to regulate commercial pornography, the Court ought to just say so. "If this statute does not pass the Court's less restrictive alternative test, what does? If nothing does, then the Court should say so clearly."

Then, of course, the Congress will have no options available to them but to have no regulation at all or to simply ban commercial porn sites and reap the whirlwind.

We are all big fans of the First Amendment and recognize that with it comes some objectionable speech. That is why we are supposed to have a Supreme Court that takes the limits of restrictions on speech seriously, but it does seem as if the Court gave much serious thought to the issue of internet pornography. It reads as if the decision was phoned-in.

Here's where we are on current free speech law from the Supreme Court: You can be fined for advertising cigarettes involving cartoon characters, you can be jailed for advertising against a political candidate within 30 days of an election, but you cannot be required to check ID before you stream all manner of hardcore porn to an eight-year-old.

The sacrament of partial-birth abortion

Earlier, the Congress passed a ban on partial-birth abortion, what the pro-choice lobby calls "intact dilation and evacuation." On June 1, 2004, Federal Judge Phyllis Hamilton declared the ban on killing partially-born babies to be unconstitutional. I will attempt to distill 117 pages of the court's decision into something understandable.

First, the court gave the plaintiffs something they never even asked for. The lawsuit against the partial-birth abortion ban was brought under 5th amendment claims (you can't be deprived of life, liberty, or property without due process of law), yet the court never even mentioned whether the ban deprived the plaintiffs of life, liberty, or property. The lawsuit should have died right there.

That they brought it under a 5th amendment claim, instead of a 14th amendment claim (by which Roe v. Wade was decided) is not a surprise. It's done that way on purpose, to set in cement the notion that "health" is the same as "life" and that you have a constitutional right to health.

Some interesting things about the court decision: It admits that a fetus is viable at 24 weeks gestation and perhaps 23 weeks. The decision goes on at length about whether or not crushing baby heads or other graphically described (although in medical terms) methods are more safe or less safe.

Safe, that is, for the mother, not for the partially born child. What the courts have done to the meaning of the word motherhood is amazing.

Whether or not a viable fetus feels pain gets one sentence, on page 59. "Finally, the government presented testimony on the issue of fetal pain, in support of congressional findings that fetuses do feel pain. There is no consensus of medical opinion on the issue." In other words, if the court finds no consensus, it feels free to disregard one branch of government and simply presume the opposite conclusion, still with no consensus.

The court threw out the testimony of all testifying doctors that it did not consider experts. The court defined an expert as one who has actually performed partial-birth abortions. Think about that.

Judge Hamilton's declared the Partial-Birth Abortion Ban unconstitutional for three reasons, discussed one at a time:

1. The ban poses an undue burden on a woman's ability to choose a second trimester abortion.

It may surprise some of you that the ban did not outlaw the killing of viable babies, only the killing of babies that are alive and already partially outside of the womb. Any doctor could get around the law simply by crushing, dissecting, or dissolving

the baby inside the uterus, and then getting it out. The ban, therefore, doesn't really stop anyone from aborting even in the last day of pregnancy, despite Roe v. Wade declaring that the government may have an interest in protecting the life of viable fetuses. Nonetheless, this court makes it clear that the right to abortion extends to the right to choose any possible method of abortion. That's what the pro-choice people won today, the right to a method. That is truly nonsensical when you consider that this is supposed to be based on the Constitution.

2. The court declares that the ban is vague.

The ban defines partial-birth abortion as follows: "an abortion in which a physician deliberately and intentionally vaginally delivers a living, unborn child until either the entire baby's head is outside the body of the mother, or any part of the baby's trunk past the navel is outside the body of the mother and only the head remains inside the womb, for the purpose of performing an overt act, usually the puncturing of the back of the child's skull and removing the baby's brains, that the person knows will kill the partially delivered infant, performs his act, and then completes delivery of the dead infant."

The court states that since Congress did not use medical terminology (Intact Dilation and Evacuation), then the words used by Congress are so vague as to offend the Constitution. Congress

defined the terms at use in the law, so slightly different terms that mean the same thing as corresponding medical terms should not be a problem, constitutionally speaking. This judge has enormous difficulty grasping the meanings of the words child, baby, living, and infant, and can only declare the law vague. Perhaps judges don't have to be smarter than the rest of us, but they ought to at least be literate.

3. The court found the act unconstitutional because it failed to allow exceptions for the health of the mother.

Please understand that there were no findings or conclusions about conditions that would make continued pregnancy or childbirth hazardous to a woman if a woman were to forego a partial-birth abortion. Instead, "health" is defined by this court as being able to choose the method of abortion that is most safe for the mother. Once again, actual health of the mother has nothing to do with what carrying the baby will do to her; it only means the right to choose the most convenient method of abortion.

The Safety Valve

Free Speech is the safety valve for disagreements in a free society. When there is bad speech, such as racial slurs, political distortions, or junk science, the best cure is more speech.

In the past few decades, we've seen a lot of changes in our society's views of free speech. We've come to accept political correctness, prohibition of broadly defined hate speech, and the empowering of anyone who is offended by anything.

A lot of people who ought to know better (like newspaper editors and county school boards) often have bizarre views about what sort of speech is protected by the First Amendment.

So what is free speech, and why is it important? Does it mean that Girls Gone Wild videos are protected speech? Yes, it does, but that is not the real point and reason for the First Amendment, now is it?

In the case of Whitney v. California, decided back in 1927, the U.S. Supreme Court decided that it was unconstitutional to restrict or criminalize the speech of a communist party organizer.

Justice Brandeis, in an oft-cited and brilliant concurring opinion, said the following:

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties...They valued liberty both as and end and as a means...They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth..."

"Fear of serious injury [from bad speech] cannot alone justify suppression of free speech...It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the evil to be prevented is a serious one."

And here is the conclusion, the really good part: "[when one encounters bad speech] the remedy to be applied *is more speech, not enforced silence. Only an emergency can justify repression.* Moreover, even imminent danger cannot justify resort to prohibition...unless the evil apprehended is relatively serious."

What a wonderful all-American idea. Suppressed speech leads to desperation, and open exchange leads to freedom and resolution of disputes. Where have the principles the Supreme Court talked about gone since 1927?

When high school football players saying a prayer before a game, is that a serious and imminent evil? Is the Pledge of Allegiance a serious and imminent evil? Is it a serious and imminent evil when a student wears a pro-life t-shirt to school? Of course not, and I'm sure you can come up with your own ironic examples. We have, as a nation, turned our back on the notion of free speech as the safety valve of society and instead embraced the principle of protecting, above all and at all costs, the rights of anyone who might be offended to not even run the risk of being offended. Argue that if you will; I submit to you that *not offending* has effectively replaced the notion of free speech, and that the First Amendment is dying from neglect.

So what is the cost of turning off the safety valve? In America, so far, the cost has not been as great as it is in some other societies. With notable exceptions, the suppression of the views of many at the hands of political correctness and the courts have not yet led to catastrophic violence borne of desperation and alienation, but the ultimate price of being gagged as a people remains to be counted.

Chapter Twenty-One
Impeachment and endless amendments Are not the answer

If we are going to take what we've learned about the courts and work to fix the system, let's first discuss what is not likely to be effective. Impeachment of federal judges who are harming us, for instance, will not solve the problem. Why not? Because the history of judicial impeachment and the collective will of our elected representatives aren't up to the task.

The Constitutional standard for impeachment is simple on paper, but apparently not in practice. According to Article III, section 1 of the United States Constitution, "…The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour…"

You see, it is not up to the judges themselves to decide if they meet the standards of good behavior. It is up to the People, speaking through their elected representatives. But what has really happened in the course of our history?

Impeachment of a judge is no easy thing to do. In all the years since adoption of the Constitution we have had 43 presidents. Two of those presidents have been impeached, Presidents Andrew Johnson and William Clinton. That's an impeachment rate of 4.7% of all presidents. If you count President Richard

Nixon, who resigned before facing impeachment, the rate of impeachment of presidents would be roughly 7%.

Since 1789, thirteen federal judges have been impeached, of which only seven were convicted and removed from office. By our best count, there have been a total of 3,027 federal judges. That makes an impeachment rate of .4%, or four-tenths of one per cent, of all federal district, appellate, and Supreme Court judges who have ever been on the bench, compared to 4.7% of all presidents.

The following is a list of all the federal judges in our entire national history to be impeached, whether they were convicted or not:

1. John Pickering, U.S. District Court for the District of New Hampshire. Impeached in 1803, on charges of mental instability and intoxication on the bench and *removed from office*.

2. Samuel Chase, Associate Justice, Supreme Court of the United States. Impeached in 1804, on charges of arbitrary and oppressive conduct of trials; acquitted and *remained in office*.

3. James H. Peck, U.S. District Court for the District of Missouri. Impeached in 1830, on charges of abuse of the contempt power; acquitted and *remained in office*.

4. West H. Humphreys, U.S. District Court for the Middle, Eastern, and Western Districts of Tennessee. Impeached in 1862, on charges of refusing to hold court and waging war against the U.S. government and *removed from office*.

5. Mark H. Delahay, U.S. District Court for the District of Kansas. Impeached in 1873, on charges of intoxication on the bench; *Resigned* from office before opening of trial in the U.S. Senate.

6. Charles Swayne, U.S. District Court for the Northern District of Florida. Impeached in 1904, on charges of abuse of contempt power and other misuses of office; acquitted and *remained in office*.

7. Robert W. Archbald, U.S. Commerce Court. Impeached in 1912, on charges of improper business relationship with litigants and *removed from office*.

8. George W. English, U.S. District Court for the Eastern District of Illinois. Impeached in 1926, on charges of abuse of power; *resigned* from office before trial.

9. Harold Louderback, U.S. District Court for the Northern District of California. Impeached in 1933, on charges of favoritism in the appointment of bankruptcy receivers; acquitted and *remained in office*.

10. Halsted L. Ritter, U.S. District Court for the

Southern District of Florida. Impeached in 1936, on charges of favoritism in the appointment of bankruptcy receivers and practicing law while sitting as a judge and *removed from office*.

11. Harry E. Claiborne, U.S. District Court for the District of Nevada. Impeached in 1986, on charges of income tax evasion and of remaining on the bench following criminal conviction and *removed from office*.

12. Alcee L. Hastings, U.S. District Court for the Southern District of Florida. Impeached in 1988, on charges of perjury and conspiring to solicit a bribe and *removed from office*.

13. Walter L. Nixon, U.S. District Court for the Southern District of Mississippi. Impeached in 1989, on charges of perjury before a federal grand jury and *removed from office*.

It seems that hanging our hopes on impeachment simply won't work, because the historical record tells us that impeaching a judge is very unlikely and actual removal from the bench is so rare as to be statistically insignificant. Only seven judges out of over 3,000 have ever been held to account for bad behavior.

What about constitutional amendments? First of all, people are rightly reluctant to tamper with our foundational document, in inverse proportion to judges' enthusiasm for tampering with it.

What does it take for the people to amend the United States Constitution? First, the people must convince their elected representatives to consider an amendment. The members of Congress must draft an amendment. The two Houses of Congress must agree on one version. Two-thirds of all Representatives and separately two-thirds of all Senators must vote for the amendment. Each State must then decide to vote on the amendment, and three-fourths of all the States must vote for the amendment.

In contrast, what does it take for a judge to amend the Constitution? He or she says so.

Thus the enormous task of amending the Constitution, which many are contemplating in the face of same-sex marriage and threats to any public mention of a religious belief, is not likely to work either. That is because judges, like the judge in Louisiana who slapped down the voters over a marriage amendment to their state constitution, can say and rule whatever they choose to. As absurd as it sounds, we are on the verge of the age in which judges declare the Constitution itself to be unconstitutional. They can do it. They write lengthy opinions that can say anything they want them to say.

Answer this question: how would you amend the Constitution to make the First Amendment any more clear than it all ready is?

What words would you use to write an amendment to ensure that Congress may make no law restricting the free exercise of religion, for instance? Those words are already in the Constitution and have lost their effect because the judges say so. So what good would it do, in the face of activist courts, to find another way to restate the original concepts in the Constitution that are already ignored?

Chapter Twenty-Two
The CourtZero
Plan to confront the courts

As we've seen by now, it only takes four or five steps for the courts, with our acquiescence, to kill off the great American experiment in representative government and replace it with the rule of a few who will always believe themselves wiser and better than those over which they rule.

It should only take a few steps to stop them, but we have got to stop debating courses of action that will not work, like impeachment and amending the Constitution. We have to think like revolutionaries, but not in the sense of actual armed rebellion. American courts have, over a long period, have so twisted the meaning of the law, and have become so powerful over both the people and the other branches of government, that evolutionary, incremental steps will never catch up to or slow down the activist judges. Bold, revolutionary steps are needed, not to change the form of our government or to damage it, but instead to restore it. Fortunately our system of government all ready has the tools of peaceful reform built-in.

CourtZero.org firmly believes that there is great reason for hope in the fight against judicial activism. If there is one thing that most Americans of all persuasions and beliefs value and hold dear, it is self-government. The more that judges issue

decisions that go around the will of the people and the laws passed by our elected representatives, the less free we are. What was once considered "the least dangerous branch of government" has become the most dangerous. That is a message that can resonate, and the first step is to share that message.

Activists are filing lawsuits every day, all over the country, in efforts to get judges to change society against its will, and most Americans are usually unaware of these efforts until a ruling is reported through the media and it is seems like it is too late to do anything about it. The second step is to take the time to learn more about court decisions and to talk to other about them.

Then we can do something about it. If activists are going to fight against society in the courts, we can take on the courts themselves. We don't want to throw out the baby with the bathwater; we don't want to get rid of the good things that courts do, but we do need to reign in the raw power wielded by those judges who are too isolated and too arrogant to even realize the damage they do.

Our guide is Article III of the United States Constitution. The Constitution is the law, and Article III is the part that both establishes and constrains the federal courts.

So what should we do? We know that Article III allows the Congress to restrict the jurisdiction of

federal courts, and it is well past time for Congress to do so. If courts are making a mess of the Establishment Clause (and they are), Congress should inform the courts that they are no longer authorized to decide those issues. If a state court is pushing a pro-death agenda on vulnerable wards of the state (as some are), then the state legislatures should change their guardianship statutes to take away the authority for judges to decide the life or death of a disabled person. They have demonstrated that they cannot be trusted with that authority.

State legislatures and the Federal Congress should reduce the budgets of the courts. According to the Federal Constitution and in many state constitutions, the salaries of judges may not be reduced. That's fine, but the courts should not get so much of the taxpayers' money as to enable them to legislate personal preferences from the bench and engage in judicial activism. Let them keep their salaries, but they should pay their staffs and expenses out of their own pockets if they insist on giving more attention to thwarting the will of the people than they give to their actual jobs. We're talking about turning out the lights and locking the door on some courthouses if it comes to that. With respect to judicial budgets, we should stop fully funding destructive activism and put our courts on probation until they collectively decide to be objective and respect the law once again.

Write to your members of congress, and while you're at it, write to your state judges. Why not? There is no law against that. If we, the voters and taxpayers, don't send a signal that we no longer consent to the manner in which we are governed by those in the black robes, nothing will change.

Get passionate about our national future. Visit www.CourtZero.org and join the discussion and suggest an online petition to take action in your own jurisdiction. Together, we can reform the most powerful branch of the most powerful government in the history of the world. We can correct the judicial branch, not because we hate it, but we because we love what it is meant to be.

Appendix

The Bill of Rights

The Preamble to the Bill of Rights

Congress of the United States begun and held at the City of New-York, on Wednesday the fourth of March, one thousand seven hundred and eighty nine.

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz.

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

Ratified December 15, 1791

Amendment I
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II
A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III
No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized.

Amendment V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of

trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Preamble to the Constitution of the United States of America and Article III of the Constitution establishing the courts

Preamble:
We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article III.
(underlined portions have been changed by Amendment)

Section. 1.
The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2.
The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which

shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;-- between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3.
Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony

of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.