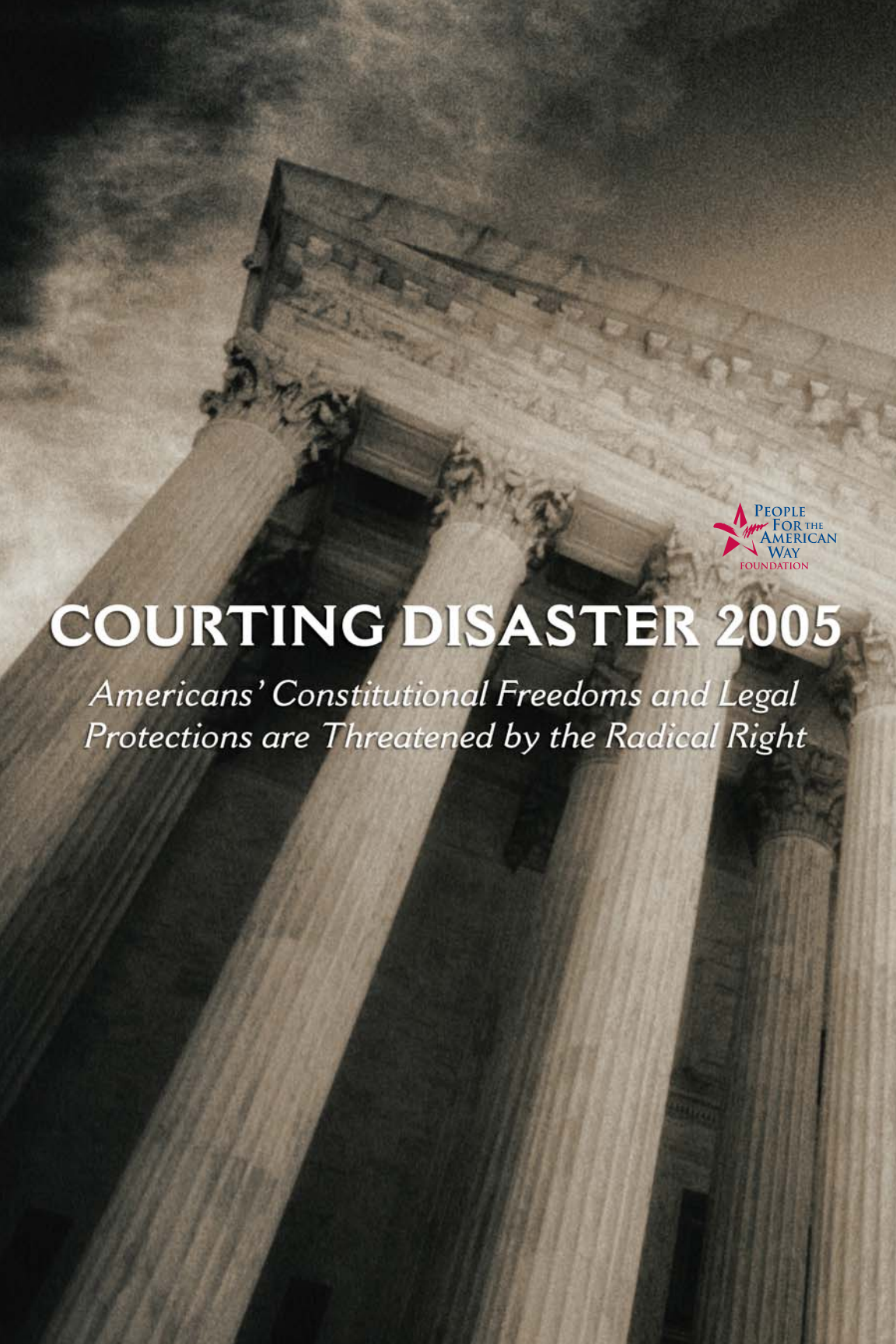
People For the American Way Foundation
COURTING DISASTER 2005
Americans' Constitutional Freedoms and Legal Protections are Threatened by the Radical Right

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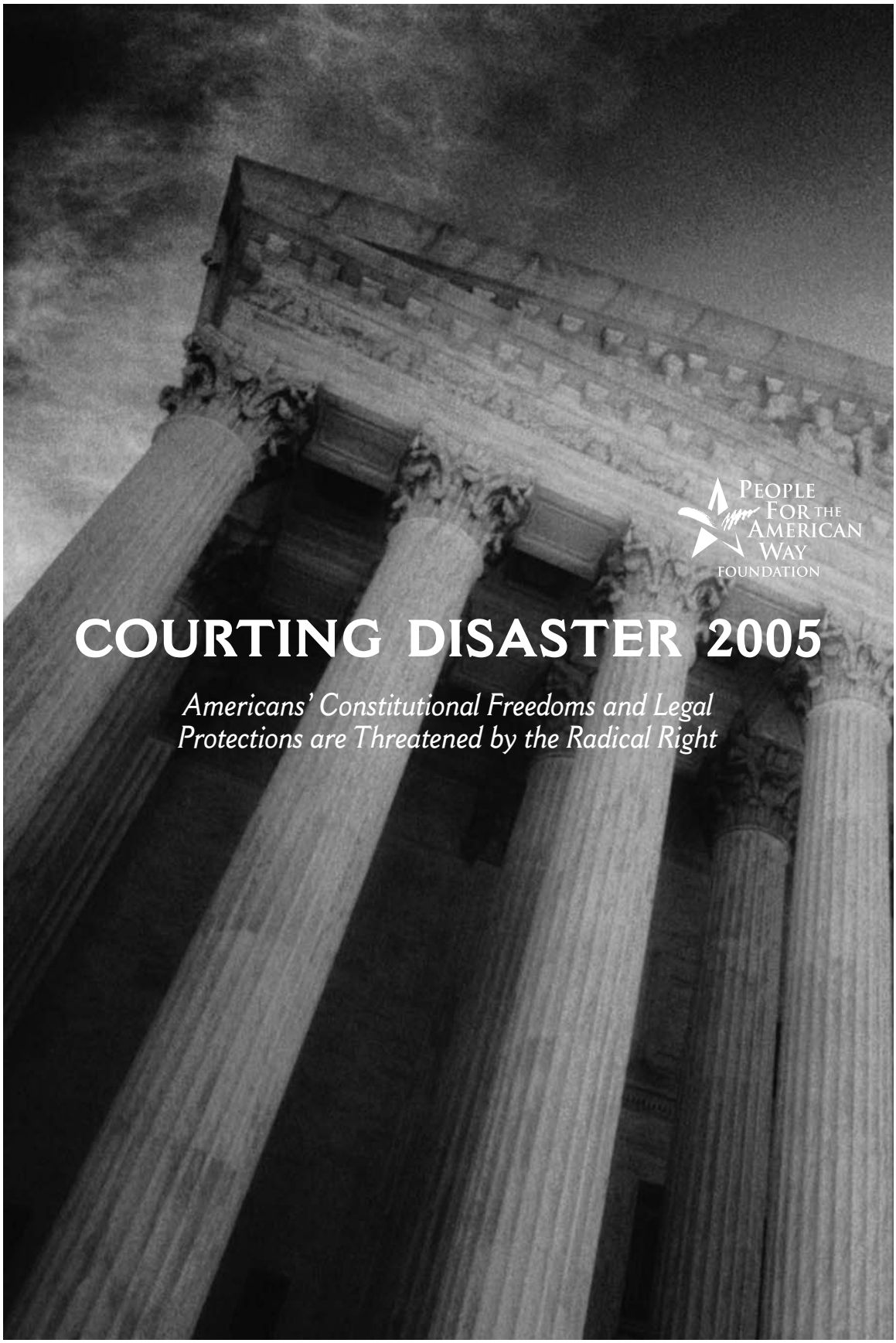
This material is for educational purposes, is nonpartisan, and is in no way intended to influence the outcome of any election or to reflect any endorsement of, or opposition to, any candidate, political party, political action committee, or any specific judicial nominee. We urge all federal officeholders and candidates not to support ultra-conservative Justices for the Supreme Court.



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COURTING DISASTER 2005

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Message from
President Ralph G. Neas

Americans deserve judges who are fair to all sides, guarding against abuses of power by the executive and legislative branches and protecting our rights and liberties. But today, thanks to an emboldened radical right and the allies in government they helped elect, the freedoms Americans hold dear are at severe risk. Unless progressives mobilize against this threat, we face a real danger of ending up with a court system whose independence has been sacrificed to politicians' ambitions, and whose judges are chosen for their willingness to advance a political agenda that undermines constitutional protections for ordinary Americans.

The radical right's campaign to take control of our courts has been building for years. Their top priority is gaining dominance on the U.S. Supreme Court, and that goal is more within reach than at any point in the last two decades. A Court with additional far-right justices could overturn more than 100 Supreme Court precedents protecting civil rights, privacy and reproductive choice, environmental protection, worker rights, consumer protections, religious liberty, and much more.

At the same time they get closer to controlling a majority on the court, right-wing political leaders have intensified their attacks on the federal judiciary and efforts to intimidate judges whose rulings they don't like. Recently, Tom DeLay and other congressional leaders made it clear that judges either rule as the politicians see fit – the Terry Schiavo case being the most recent example – or face impeachment from the bench.

The recent bruising Senate battle over Senate Majority Leader Bill Frist's "nuclear option" – his destructive plan to break Senate rules and do away with more than 200 years of Senate checks and balances – was the clearest evidence yet about the high priority that the radical right places on achieving domination of the entire federal judiciary, including the Supreme Court. Their willingness to break the rules and upset the entire balance of power in our constitutional system in order to weaken potential opposition to radical right Court nominees shows how much is riding on the people who are named to fill the multiple vacancies expected in the coming years.

... a Court with a Scalia-Thomas majority could overturn more than 100 Supreme Court precedents going back decades.

Some far-right leaders have indicated that the nomination of ultra-conservatives to the Supreme Court should be their reward for helping to turn out Bush voters in the election. Indeed, James Dobson, the reigning power broker of the Religious Right political movement, has already threatened members of the Senate slated for re-election in 2006 that he will use the resources at his disposal to defeat them if they do not support all of President Bush judicial nominees.

It's not supposed to be like this. Our founding fathers created a system, grounded in our Constitution and Bill of Rights, with checks and balances to prevent any politician or party from having too much power. They knew that American democracy would work best if no one party had absolute power.

But absolute power is what the far right wants. And the Supreme Court is how they plan to get it. This book tells you just what could happen if they get their way.

The Supreme Court

The Supreme Court has a huge influence on Americans' lives, and on our democracy, because it interprets our Constitution and laws. For most of the past 70 years, the Supreme Court has played an important role in moving the nation toward its stated ideals of equality and opportunity for all. Supreme Court rulings have struck down legally enforced racial segregation, upheld laws that protect workers and consumers from irresponsible employers and corporations, recognized and protected the right to privacy and reproductive choice, acknowledged the importance of national policies to protect our air and drinking water from dangerous pollution, and strengthened religious liberty by protecting students from religious coercion and maintaining separation between church and state.

But over the past few decades, powerful corporate interests have built alliances with ultraconservative religious and political leaders who want to turn back much of the economic and social justice progress of the past 70 years. They want to reverse Supreme Court rulings that recognize Americans' right to privacy, that protect Americans whose civil rights are abused by corporations or governments, and that uphold the principle of equality under the law for all Americans.

Many of these rights and legal protections are already hanging by a thread on the nine-member U.S. Supreme Court, which is closely divided between justices (the term for Supreme Court judges) who support the constitutional framework under which the country has moved forward, and between those who want to dismantle that framework. In fact, some of our rights have already been eroded by narrow 5-4 decisions by the Court. And, over the past two decades, many of the most important rulings preserving our rights have been decided by just one or two votes.

Here's why this is so important right now. Due to the age and health of the current justices, President Bush began his second term with the almost certain knowledge that he will have a chance to nominate at least one, most likely two or three, and possibly even four new justices to the Supreme Court before he leaves office. Those justices will determine the future of our rights and freedoms.

The goal should be consensus. When President Ronald Reagan had his first opportunity to nominate a Supreme Court justice, he ignored the demands of the far right and chose a consensus nominee who is now one of the most widely respected members of the Court, Sandra Day O'Connor. President Clinton consulted with Republican Senator Orrin Hatch in finding Supreme Court nominees who could win bipartisan support.

But even before President Bush's first election, groups on the far right made it clear that their top priority was the nomination of justices who would use their powerful lifetime positions to reverse legal and social justice precedents and impose a view of our Constitution and laws that would dramatically limit Americans' freedom and legal protections. And since his re-election, the clamor has grown in pitch and fervor.

Dozens of rights and legal protections Americans count on are just one or two Supreme Court justices away from being dismantled.

When he was running for president, President Bush said that he would use Justices Antonin Scalia and Clarence Thomas, the two most aggressively and ideologically extreme activist justices on the Supreme Court, as his models for future appointees. Far-right leaders like Jerry Falwell, Pat Robertson, James Dobson and others are making it clear that they will settle for nothing less. Indeed, the justices now being attacked most viciously by right-wing activists are not the moderate to liberal justices, but two conservative justices appointed by Republican presidents – Sandra Day O'Connor and Anthony Kennedy.

Unfortunately, some of President Bush's nominees to the federal appeals courts – one level below the Supreme Court – have been exactly the kind of judges the far right wants for the higher courts. That's not encouraging for those of us who have been calling on President Bush to engage in bipartisan consultation to find consensus nominees that people from both parties could support.

Courting Disaster: What if the Radical Right Wins?

This carefully researched report documents what it would mean to Americans if the coming vacancies on the Court are filled with people who share the radical right's dangerous approach to the law and the Constitution.

The short answer is that a Court with more justices who share the radical legal philosophy of the far right's favorites – Scalia and Thomas – would reverse decades of legal and social justice accomplishments by turning back the clock on civil rights, privacy and reproductive choice, environmental protection, separation of church and state, worker and consumer rights, and more.

Courting Disaster 2005 illuminates the judicial philosophy of Justices Scalia and Thomas by examining their dissenting and concurring opinions through April 15, 2005, updating a report originally produced in 2000. Over the past several years, Scalia and Thomas have continued to push the Court to the extremes, and to dissent angrily from important decisions that have upheld privacy, equal opportunity, and other hard-won civil rights.

Supreme Court nominees who would wreak havoc on Americans' lives and liberties must be opposed with every appropriate means at senators' disposal.

Because most cases that raise basic constitutional questions before the Supreme Court are now decided by slim majorities, it would take just one or two more appointments to give Scalia and Thomas the power to reshape the Constitution and restrict the federal government's ability to protect individual rights and pursue the common good – a philosophy that could rule the Court for decades to come.

Looking back — A 19th Century Constitution for a 21st Century America?

In his nominations to the appeals courts, President Bush has drawn heavily from the ranks of lawyers and judges at the forefront of a legal movement to impose a pre-New Deal approach to the U.S. Constitution. This movement seeks to take America back to an earlier era, when property rights and states' rights were given far greater weight than protecting individuals' rights, and the courts prohibited Congress from taking action to address issues of urgent importance, such as poverty among the elderly and lack of access to health care. Scalia and Thomas, like many Bush administration officials and judicial nominees, reflect the views of the Federalist Society, which has held seminars on returning the nation's constitutional framework to a pre-New Deal era. (You can learn more at www.pfaw.org/go/federalist_society.)

Justices Scalia and Thomas have led the destructive revival of this discredited approach to the Constitution. A series of 5-4 decisions have weakened federal civil rights protections and declared other urgent issues off limits to action by the U.S. Congress. They have struck down, for example, a federal law banning guns from public schools and restricted laws to protect women from domestic abuse. But even more important, Scalia and Thomas have staked

out in their written opinions a burning desire to have the Court move much more aggressively to overturn decades of Supreme Court precedent than the current conservative majority has been willing to do.

A radical right Supreme Court would not only bring about the reversal of more than half a century of legal and social justice accomplishments, but could also return us to a situation America faced in the early 1900s, when progressive legislation, like child labor laws, was adopted by Congress and signed by the President, but repeatedly rejected on constitutional grounds by the Supreme Court.

The Senate's Advice and Consent Role

In our system of checks and balances, the Senate has a co-equal role with the president in appointing federal judges. The Constitution calls for the president to nominate judges, like ambassadors and some other executive branch nominees, with the "advice and consent" of the Senate. This is one of the protective checks and balances built into our system of government.

Judicial nominees – who are confirmed for lifetime appointments – must be subject to the highest standard of scrutiny. Federal judges' decisions – especially the rulings of Supreme Court justices – last long after the presidents who appointed them are no longer in office. Chief Justice Rehnquist, for example, has served on the Court for more than 30 years under seven different presidents.

Given the immense and long-lasting power that rests with the Supreme Court, confirmation of nominees is not an entitlement. Instead, a nominee bears the burden of demonstrating that he or she meets the appropriate qualifications, which must include a clear commitment to civil rights and individual liberties, and a clear respect for Congress' constitutional role in protecting constitutional and civil rights and the health and safety of all Americans.

In light of the serious concerns that the far right will seek the nomination of Supreme Court justices who do not share these commitments, it is particularly important for senators to exercise their responsibility to stand up for the Constitution. Senators must not be bullied into approving a nominee; they must carefully review any nominee's record and judicial philosophy, and come to their own conclusions about the nominee's fitness to serve. Supreme Court nominees who would wreak havoc on Americans' lives and liberties must be opposed with every appropriate means at senators' disposal.

A Turning Point

It has been nearly 11 years since the last vacancy on the Supreme Court, the longest period without a vacancy since 1823, when James Monroe was president. A vacancy could occur at any moment, and it is considered very likely that at least one justice will step down when the current Supreme Court term ends in June.

This next four years, with the probability of multiple vacancies and appointments to the Supreme Court, will set the course for the Court, for the meaning of the Constitution and for the direction of the nation for the first half of the 21st Century. Right-wing leaders and their allies in the White House and Congress are intensifying their focus on judicial nomi-

nations. They are prepared to go to extreme measures – including fundamentally changing the nature and role of the Senate in our constitutional system –to try to guarantee confirmation of nominees willing to use the power of the Supreme Court to reverse decades of legal precedents and bipartisan social justice accomplishments.

The next Supreme Court justices may well decide fundamental questions that could shape for generations how America works and how Americans live: Will the Supreme Court further undermine the federal government's ability to safeguard the air we breathe and the water we drink? Will the courts abandon their role in preserving Americans' right to privacy and strip women of the constitutional right to make their own family planning and reproductive choices? Will Congress lose the power to protect Americans' civil rights from abuses by state governments and others? Will the Voting Rights Act be applied so narrowly that it fails to protect citizens' most fundamental rights?

It is urgently important for Americans to understand and consider the impact that a far-right dominated Supreme Court will have on their lives and liberties. And it is critical to communicate the magnitude of what is at stake ***before*** the next Supreme Court vacancy. This President's term will last fewer than four more years, but the judges he nominates to the Supreme Court could sit for forty years or more. Their impact on the lives of everyday Americans will be profound, deep and lasting. It is time to engage an active and informed citizenry in this debate. The stakes could not be higher.

Courting Disaster 2005 is published with the hope that it will focus and inform that public debate.

Ralph G. Neas
People For the American Way Foundation
March 2005

Introduction

JUSTICE IN THE BALANCE

The next appointments to the Supreme Court could well decide whether the Court will facilitate greater equality or turn back the clock on the social justice gains of the past 50 years.

At key times in American history, the U.S. Supreme Court has played a critical role in advancing social justice. *Brown v. Board of Education* prohibited racially segregated public schools. Other civil rights rulings meant victory for the students sitting in at segregated lunch counters and defeat for jurisdictions using the poll tax and other devices to keep minorities away from the ballot box. *Griswold v. Connecticut* and *Roe v. Wade* recognized a constitutional right to privacy and protected a woman's right to make reproductive decisions based on her own life, health and conscience. The 2003 decision in *Lawrence v. Texas* recognized that the government should not be prying into individuals' bedrooms or policing the private sexual behavior of consenting adults. In 2003, the Court also confirmed in *Grutter v. Bollinger* that narrowly tailored affirmative action is permissible to promote educational diversity in our nation's colleges and universities.

At other times, the Supreme Court has impeded the cause of justice. The infamous *Dred Scott* decision denied the humanity of African Americans. From the 1890s through the 1930s, the Court erected barriers to efforts to end child labor and protect workers' rights.

The next appointments to the Supreme Court could well decide whether the Court will facilitate greater equality or turn back the clock on the social justice gains of the past 70 years. The current U.S. Supreme Court has already produced troubling results. Among the most disturbing is the Court majority's embrace of a new "states' rights" theory that is

undermining the federal government's ability to protect all citizens' fundamental constitutional and other rights against abuses by the states. Yet, the Court's majority has not fully embraced the legal theories of Justices Antonin Scalia and Clarence Thomas, who represent the views of the far-right wing on the Court.

That is why leaders of the Radical Right political movement and their allies remain so focused on the Supreme Court. Their goal is to ensure that the President nominates and the Senate confirms Supreme Court justices who share their view of the Constitution. If they are successful, they could redefine American law for a generation or more. Hanging in the balance are the right to privacy, reproductive choice, civil rights, separation of church and state, environmental protection, and worker and consumer rights. The far right hopes to push the Court further to the right and to take ideological control of the federal courts, particularly the Supreme Court.[1]

Given the age and health of the current justices, President Bush is likely have the chance to nominate two or three, and maybe even four justices. With the Court so closely divided on important constitutional issues, even one new far-right justice would be very damaging. Three or four more justices who share Scalia's and Thomas' extreme views would spell disaster.

During the past half-century, the Supreme Court protected individual rights and liberties in many critical areas: it held that a woman has a fundamental right to a safe, legal abortion;[2] it struck down many practices related to elections and the political process that denied minorities the right to full, equal participation in our democracy;[3] it struck down the pernicious *de jure* racial segregation in our nation's public schools;[4] it protected government employees from being fired or demoted for their political party affiliation;[5] and it ruled that poor parents cannot be denied the same opportunity to appeal as rich parents in cases to terminate their parental rights.[6]

Yet Justices Scalia and Thomas have used their written opinions to criticize these landmark rulings and to argue that most of these and many other decisions should be reversed, in whole or in part. If a majority of the Court came to share these views, it would overturn much of our nation's progress toward full equality and would place many injustices beyond remedy by any courts or Congress for decades to come.

What would the actual impact be on Americans' rights and freedoms if the views of Antonin Scalia and Clarence Thomas become the majority views on the Court? To answer that question, this report examines Scalia's and Thomas' opinions, focusing on cases in which they have been in the minority on the Court. The answer is nothing short of chilling.

A shift of one or two votes would transform the current narrow majority for reproductive rights protected by *Roe v. Wade* into a majority eliminating a woman's constitutional right to choose. And that would just be the beginning.

A newly constituted Scalia-Thomas Court would have far more on its agenda than *Roe v. Wade*. The addition of just *one or two* more Justices who agree with Scalia and Thomas would imperil many other fundamental rights. The body of this report details dozens of cases in which Scalia and Thomas, sometimes joined by Chief Justice Rehnquist or other justices, have writ-

ten or joined opinions that recommend curtailing of rights. Among those rights that could be drastically redefined if just one or two hard-line right Justices join the Court are the following:

Privacy

In addition to overturning *Roe v. Wade*, a Scalia-Thomas majority could threaten Americans' privacy rights by reversing other important rulings.

- Reversal of *Ferguson v. Charleston* (2001) would allow hospitals to test pregnant women without their knowledge or consent for suspected drug use and give the results to police.
- Reversal of *Hill v. Colorado* (2000) would prevent states from enacting specific laws to protect people approaching health care facilities from harassment.
- Reversal of *City of Indianapolis v. Edmond* (2000) would authorize police to set up highway roadblocks and randomly stop motorists, without suspicion, to look for drugs.
- Reversal of *Lawrence v. Texas* (2003) would authorize criminal prosecution of private sexual conduct by consenting adults.

Civil Rights and Discrimination

Scalia's and Thomas' opinions in many areas of long-settled civil rights law would make many continuing inequalities based on race, gender, and other factors wrongs without any remedy. Thomas' and Scalia's position on the meaning of the Voting Rights Act of 1965 was assailed by Justices Stevens, Blackmun, Souter, and Ginsburg as so "radical" that it would overturn at least 28 Supreme Court decisions. For example:

- Reversal of *Chisom v. Roemer* (1991) would exempt elections for state judges from all provisions of the Voting Rights Act.
- Reversal of *Hunt v. Cromartie* (2001) would ban state legislators from ever taking race into account to help promote minority voting rights in redistricting.
- Reversal of *Davis v. Bandemer* (1986) would allow even blatant partisan gerrymandering in redistricting.
- Reversal of *Grutter v. Bollinger* (2003) would forbid affirmative action in higher education.
- Reversal of *Jackson v. Birmingham Bd. of Educ.* (2005) would allow retaliation against those who complain about illegal sex discrimination in education under federal law.
- Reversal of *Johnson v. Transportation Agency* (1987) would eliminate affirmative action for women under Title VII of the 1964 Civil Rights Act.
- Reversal of *Nevada Dept. of Human Resources v. Hibbs* (2003) would make it impossible for state employees to obtain effective relief for violations of their rights under the Family and Medical Leave Act.
- Reversal of *Tennessee v. Lane* (2004) would declare unconstitutional Title II of the Americans with Disabilities Act and allow states to deny physical access to the courts to the disabled.

- Reversal of *J.E.B. v. Alabama* (1994) would allow sex discrimination in jury selection.
- Reversal of *Lawrence v. Texas* (2003) and *Romer v. Evans* (1996) would authorize even blatant discrimination and deprivation of fundamental rights by government against gay men and lesbians, such as forbidding enactment of local anti-discrimination protections and allowing criminal prosecution for private, consensual, intimate conduct.
- Reversal of *Olmstead v. L.C.* (1999) would mean that improper and unnecessary institutionalization of disabled persons would no longer be considered a violation of the Americans with Disabilities Act ("ADA").
- Reversal of *EEOC v. Waffle House, Inc.* (2002) would prevent the EEOC from suing an employer for violating the ADA and seeking damages for victimized employees who have signed employment arbitration agreements.
- Reversal of *Hibbs v. Winn* (2004) would forbid federal courts from deciding challenges to discriminatory and unconstitutional state tax laws.
- Reversal of *Zadvydas v. Davis* (2001) would allow the government to keep an immigrant who is under a final order of removal in jail indefinitely even though no other country will accept that person.
- Reversal of *Rasul v. Bush* (2004) would make it impossible to challenge the indefinite imprisonment of foreign nationals on U.S. territory in Guantanamo, even if they contend they have been tortured or are not combatants.
- Reversal of *Chavez v. Martinez* (2003) and *Hope v. Pelzer* (2002) would severely limit the ability to sue law enforcement officials for violating constitutional rights.
- Reversal of *Brentwood Academy v. Tennessee Secondary School Athletic Association* (2001) would limit the coverage of federal civil rights laws with respect to associations regulating interscholastic sports.

Religious Coercion and Liberty

A key priority of the far right that would be achieved under a Scalia-Thomas Court would be the dismantling of the wall between church and state, so carefully and deliberately erected by the Founders to protect religious liberty for all Americans.

- Reversal of *Lee v. Weisman* (1992) and *Santa Fe Independent School Dist. v. Doe* (2000) would eliminate true government neutrality toward religion and authorize government-sponsored prayer at graduation and other public school events.
- Reversal of *Board of Education of Kiryas Joel Village School District v. Grumet* (1994) would authorize drawing of school district lines to permit one religious sect to predominate.
- Extension of *Mitchell v. Helms* (2000) would permit virtually any government aid given to public schools and social service programs to be granted directly to pervasively religious schools, churches, and other religious institutions.

Thomas stakes out a particularly extreme position in the religious liberty arena, arguing that the establishment cause of the First Amendment does not apply to state and local govern-

ments at all. In other words, Thomas sees no constitutional barrier to a state declaring an official religion and treating people differently under state law based on their religious beliefs. We certainly do not need any more justices who share this interpretation of the Constitution.

Thomas sees no constitutional barrier to a state declaring an official religion and treating people differently under state law based on their religious beliefs.

Workers' Rights and Consumer Protection

Working people and consumers would find their rights in the workplace and the marketplace curtailed by a Scalia-Thomas majority.

- Reversal of *Rutan v. Republican Party of Illinois* (1990) would allow government employees to be fired for belonging to the wrong political party.
- Reversal of *Rush Prudential HMO, Inc. v. Moran* (2002) would invalidate important state laws protecting HMO patients' rights in more than 40 states.
- Reversal of *Barnhart v. Peabody Coal Co.* (2003) could jeopardize the retirement benefits of up to 10,000 coal industry retirees.

Environmental Protection

Protecting our nation's treasured natural heritage would become much more difficult, and in some cases impossible, if Scalia's and Thomas' views were to prevail.

- Reversal of *Babbitt v. Sweet Home Chapter of Communities for Greater Oregon* (1995) would prevent the federal government from stopping the destruction of endangered species on private land.
- Reversal of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) would severely limit even temporary government rules seeking to protect the environment in the name of private "property rights."
- Reversal of *Alaska Department of Conservation v. EPA* (2004) would strip the EPA of the authority to prevent damaging air pollution by industries when state agencies improperly fail to do so.

Access To Justice

A court with just one or two more justices like Scalia and Thomas would severely limit access to justice, especially for the poor.

- Reversal of *Brown v. Legal Foundation of Washington* (2003) would eliminate a key source of funding for legal assistance for the poor.
- Reversal of *Legal Services Corp v. Velazquez* (2001) would allow legal services lawyers who represent poor clients to be forbidden from even raising challenges to welfare laws, and would also greatly increase government's ability to censor any speech that it helps to fund.

Money, Politics, and Government Accountability

Under a Scalia-Thomas Court, efforts to guard against corruption and to make elected officials more accountable to the people they represent through campaign finance reform would become all but impossible, and what reforms have already been won would be put in danger.

- Reversal of the part of the 1976 *Buckley v. Valeo* ruling that the far right opposes would invalidate limits on individual campaign contributions.
- Reversal of *Morse v. Republican Party of Virginia* (1996) would exempt political conventions that choose party candidates from key anti-discrimination provisions of the Voting Rights Act.
- Reversal of *Federal Election Commission v. Colorado Republican Federal Campaign Committee* (2001) would invalidate laws that limit political party expenditures that are coordinated with a candidate and seek to evade campaign contribution limits.
- Reversal of *McConnell v. Federal Election Commission* (2003) would invalidate most of the landmark McCain-Feingold campaign finance law, including its ban on political parties' use of unlimited soft money contributions.

A Goal Within Reach

The far right has had the courts – especially the Supreme Court – in its sights for many years, a goal that looks increasingly within reach. Statistically, several vacancies are overdue. Over the past half century, one Supreme Court vacancy has occurred on the average about once every two years, but the current Court has not had a vacancy since 1994. Chief Justice William Rehnquist and Justice John Paul Stevens are in their 80s. Two other Justices — Sandra Day O'Connor and Ruth Bader Ginsburg – are in their 70s. The Chief Justice's health struggles have been widely publicized. Replacing as few as one or two of these justices with ultra-right ideologues could shift the Court's direction on many issues of fundamental rights and liberties; three or four would truly alter our constitutional system for generations. It should be noted that even replacing the quite conservative Rehnquist with a younger Scalia-Thomas acolyte could move the court further to the right and keep it there for decades.

Such a shift would radically redefine the Court's role as a defender of individual rights and freedoms. Right-wing leaders have expressed increasingly bitter dissatisfaction with Republican-appointed conservative Justices Anthony Kennedy and Sandra Day O'Connor, and have long attacked Justice David Souter, a moderate appointed by the first President Bush. Televangelist and Christian Coalition founder Pat Robertson has railed that Souter was a "stealth candidate" who "pulled the wool over the eyes of the White House Chief of Staff."[7]

The far right's rallying cry, "no more Souters," is a not-so-subtle signal that what its advocates expect from the President are not just conservative nominees, but activists for the ideological far right. They want more justices like Scalia and Thomas, who they believe can be depended on to advance their far-reaching agenda.[8]

The importance of the Court to right-wing activist leaders has not been lost on the White House. President George W. Bush has said he will seek to appoint more judges and justices like Scalia and Thomas to the Supreme Court and other lower federal courts.[9] Thus far, all too many of the president's nominees to the federal courts, particularly the courts of appeals, have been in the Scalia-Thomas mold.[10]

Much of the stage has already been set for a dramatic shift to the far right on the Supreme Court. Many of the far right's potential nominees for Supreme Court vacancies are warming up in the bullpen — the federal courts, where many of them were appointed by President Reagan and both Presidents Bush. The potential short list might include such right-wing judges as Michael Luttig (4th Circuit Court of Appeals), J. Harvie Wilkinson (4th Circuit), Emilio Garza (5th Circuit) and Edith Jones (5th Circuit), as well as such Bush nominees as Michael McConnell (10th Circuit) and Jeffrey Sutton (6th Circuit), all of whom are thought to be very much in tune with Scalia and Thomas.

The current Supreme Court's conservative bent has already produced an especially troubling and growing brand of activism: the judicial veto. While the Court properly has the power to strike down acts of Congress that are unconstitutional, this Court is marked by a trend toward 5-4 decisions that take aim at Congress' powers to legislate to protect civil rights, the environment, and public safety. Court scholars have observed that the Court has not used its powers in this way since the period leading up to the constitutional crisis of 1937, when the Court invalidated New Deal legislation.

This report documents that a Supreme Court with a majority sharing the views of Scalia and Thomas would seriously reduce — or even eliminate — some fundamental freedoms. It would drastically weaken protections for rights such as privacy and reproductive freedom, voting, equal opportunity and other civil rights, religious liberty and church-state separation, freedom of speech and expression, consumer and worker protections, access to justice, environmental protection, campaign finance reform and government accountability. It would also further limit Congress' ability to enact new legislation aimed at protecting Americans' rights and safety through such measures as gun control, environmental protection and civil rights.[11]

It is no exaggeration to say that in all these areas, a Scalia-Thomas Supreme Court would radically rewrite our nation's fundamental definition of justice. It is this disturbing truth that should drive our public debate over the courts, not false charges of "obstructionism" by a White House that considers the constitutional principle of checks and balances just one more roadblock to be steamrolled – or "nuked" – so that the president and his allies can impose their will on the nation and the courts.

One

JUSTICE IS AS THE JUSTICES DO:

Judicial Activism of Scalia and Thomas

Supporters of Justices Scalia and Thomas praise them as "strict constructionists," "originalists," "traditionalists," and advocates of the "rule of law." These labels are misleading because they obscure the two Justices' ultra-conservative activism. The terms suggest that Thomas and Scalia are committed only to an interpretation of the law that is true to its actual wording, or in the case of the Constitution, true to the intent of the Framers. This legal approach, its adherents say, ensures that they are not activists who use their position to shape the law in their own political image. Actually, the opposite is true. A Supreme Court modeled after Scalia's and Thomas' judicial philosophy would be an activist Court that would produce dramatic changes in the law as we know it. And virtually every change would move our laws in the direction advocated by right-wing conservatives.

In fact, some of their writings reveal that Justices Scalia and Thomas are far more loyal to right-wing ideology than to any judicial philosophy. For example, both Justices are said to be strict constructionists who do not look beyond the plain meaning of the words in the laws they interpret. The truth is that they often do not adhere to this philosophy. It would be fair to say that, for Scalia and Thomas, "strict constructionism" often has much more to do with construction than with strictness. For instance, in a 1992 case in

which a parent challenged the constitutionality of a public school's policy imposing public prayer on all graduation attendees, Justices Scalia and Thomas (joined by Chief Justice Rehnquist and Justice White) dissented from the majority, ignoring much evidence on the clear meaning of the Establishment Clause of the First Amendment — which forbids government endorsement of religion. (*Lee v. Weisman*)[12] The text is quite clear on its face: "Congress shall make no law regarding an establishment of religion." Yet instead of examining the actual text of the clause and the amendment process that produced it, Justices Scalia and Thomas reached far beyond to focus their opinion on what they characterized as an early American tradition of public prayer by government officials. Thus they argued that the state-imposed prayer was constitutional — but they did so only by ignoring the plain meaning and history of the words of the First Amendment. Justices Souter's, O'Connor's and Stevens' concurring opinion[13] included a painstakingly detailed discussion of the origins of the Establishment Clause history ignored by Scalia and Thomas — and so revealed the weaknesses in the Scalia-Thomas dissent.

Even in their analysis of "tradition," Justices Scalia and Thomas seem willing to pursue ultra-conservative results at the expense of objective inquiry. Since our Constitution was first drafted, each succeeding Supreme Court has interpreted its meaning and applied its concepts in the context of its own present day. The Justices have often reached beyond the literal meaning of the document's words to give life to its fundamental meaning, in accordance with the intent and purpose of our Constitution's Framers. The Court has studied the words, writings, and historical times of the men who drafted the Constitution for insight concerning the purpose behind the text. Most Justices have undertaken these inquiries, and Justices Thomas and Scalia are no exception. The difference, perhaps, lies in which words and history the various Justices choose to consider and which they choose to ignore.

Again, *Lee v. Weisman* provides an excellent example. Justices Scalia and Thomas (joined by Chief Justice Rehnquist and Justice White) attempt to argue that prayer at official public events — in this case, a high school graduation — is an intrinsic and settled component of our nation's fundamental traditions, is grounded in the beliefs and practices of our Founders, and is, therefore, constitutional. Their opinion stresses as "proof" that several early presidents included religious words in their inaugural addresses.[14] They ignore the contrary fact, however, that such public religious pronouncements were very controversial in the early days of our nation. They also failed to acknowledge that some presidents, notably Thomas Jefferson and James Madison, two of our Constitution's most prominent Founders, were deeply troubled that public religious expressions would be interpreted as government endorsement of religion. These men refused to issue religious proclamations in many situations because they believed that such statements violated the Constitution.[15] Clearly, Justices Scalia and Thomas are selective about which of our nation's traditions and Founders' beliefs they cite. Not surprisingly, they most often invoke traditions and beliefs that support their own ultra-conservative political beliefs. This allows them to claim that they are only trying to remain true to "original intent" and preserve "tradition" while they pursue an activist course of overturning settled law.

For Scalia and Thomas, the pursuit of "original intent" is a sometime thing. Both give great importance to early legislators' intent, as they see it. Yet neither Justice believes in examining the words or intent of today's legislators in order to gain insight into laws drafted in modern times. For example, in a concurring opinion dealing with the application of the Voting Rights Act of 1965, Justices Thomas and Scalia refused to consider either the ample historical record of congressional actions and debates or the 30 years of Supreme Court precedent, both of which make clear the law's "broad remedial purpose of rid[ding] the country of racial discrimination in voting."[16] Instead, they argue that all of this history should be ignored and the Voting Rights Act should not be applied to voting-related activities such as candidate residency and filing date rules — rules frequently used to disadvantage minority voters.[17] Ignoring Congress' intent enables Thomas and Scalia to support the ultra-conservative goal of limiting legal remedies for racial discrimination in voting and to narrowly interpret the Voting Rights Act.

The combination of giving great weight to their version of the Framers' words while ignoring modern legislative history infuses the two Justices' decisions with 18th century customs and morality and seeks to make the first word on constitutional issues also the last word. This double standard of textual interpretation refuses to acknowledge that there are many issues — especially race, gender, and other questions of individual rights — about which the nation has changed its mind over time. Scalia's and Thomas' approach loads the debate in favor of right-wing political arguments, making them much more likely to win the day. The rest of this analysis demonstrates just how dramatic the changes would be in our laws and the principles that underlie and define our freedoms if the minority views of Justices Scalia and Thomas were to come to dominate a majority of the Supreme Court.

Two
PRIVACY AND REPRODUCTIVE FREEDOM

A Supreme Court majority modeled after Justices Scalia and Thomas would have a revolutionary impact on the protection of privacy, reproductive freedom, and abortion rights. There is no question that a Scalia-Thomas majority would overturn the landmark 1973 decision *Roe v. Wade*[18] at the earliest opportunity, ending any constitutional protection for a woman's right to reproductive choice. In 1989, before Justice Thomas joined the Court, Justice Scalia explicitly stated that *Roe v. Wade* should be overturned. (*Webster v. Reproductive Health Services*, 1989)[19] Scalia voted to do just that in 1992, this time with Thomas and Chief Justice Rehnquist joining him. (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 1992)[20]

Scalia's strongly worded dissents and concurrences in abortion cases, regularly joined by Justice Thomas, illustrate not just personal opposition to abortion but even disdain for women who make the difficult choice to have an abortion. Before Justice Thomas joined the Court, Justice Scalia often wrote separately in abortion cases to express his view that the Constitution does not protect any right to reproductive freedom and that the states should be free to ban all abortions. (*See Hodgson v. Minnesota*, 1990[21] and *Ohio v. Akron Center for Reproductive Health*, 1990)[22] In his *Webster* opinion, Justice Scalia seemed even more dismissive of this right when he suggested that one good reason to overturn *Roe v. Wade* is to decrease the volume of mail and demonstrations targeted at the Supreme Court due to its involvement in the issue.[23]

Finally, in their *Casey* opinion, both Justices took an even more outrageous step by likening abortion to polygamy, sodomy, incest and suicide.[24]

Televangelist Pat Robertson has often reminded his Christian Coalition supporters that it would take only two more votes on the Court (in addition to Scalia, Thomas and Chief Justice Rehnquist) to eliminate federal protection for the right to choose. In fact, it would take only one more such vote to seriously limit, if not overrule *Roe*, by reversing the Courts decision in *Stenberg v. Carhart* (2000),[25] which overturned a ban on so-called partial birth abortion. Such action by the Supreme Court could turn back the clock to the period prior to 1973 and authorize states to ban all safe, legal abortions without exception — including cases of rape or incest and even at the cost of the life or health of the woman.

If some states tried to protect abortion rights, a Scalia-Thomas Court could create problems that would make this difficult, if not impossible. Several times the Court has considered appeals of lower court rulings that protected women's right to have access to abortion clinics without physical harassment. In these cases, moderates and conservatives on the Court majority sought to preserve both the right to protest and the right of access to health clinics by such steps as upholding a rule requiring protesters to remain at least 15 feet away from clinic entrances. Yet Scalia and Thomas dissented from these rulings, even where protesters had a history of harassing clinic patients and doctors. (*Schenck v. Pro-Choice Network*, 1997[26] and *Madsen v. Women's Health Center*, 1994)[27] It would take only two more justices in the Scalia-Thomas mold to overrule the Court's decision in *Hill v. Colorado* (2000),[28] upholding a Colorado law preventing individuals from approaching any nearer than eight feet from people within 100 feet of a health care facility without their consent. Scalia and Thomas have even reached beyond the cases that are before the Court for review, in separate opinions on cases that the Court has declined to hear, in order to express their views on reproductive health clinic protests. In these opinions, the two show their unmistakable preference for the rights of the protesters over the rights of women seeking to use health clinic services. (See, e.g., *Lawson v. Murray*, 1998,[29] *Williams v. Planned Parenthood Shasta-Diablo, Inc.*, 1997,[30] *Lawson v. Murray*, 1995,[31] and *Winfield v. Kaplan*, 1994.)[32] A Scalia-Thomas Court would thus impede local attempts to protect women seeking abortion services and their doctors, further harming privacy and abortion rights.

On the broader constitutional issue of privacy, Scalia's and Thomas' views are so extreme that their rulings would also do widespread damage by reaching beyond the specific issue of abortion to threaten access to contraception and reproductive health services. In opinions such as *Casey* and Scalia's concurring 1990 opinion in *Cruzan v. Missouri Department of Health*,[33] they contend that the Constitution does not protect any right of privacy concerning reproduction or bodily integrity whatsoever. If this view comes to command a majority of the Supreme Court, it would threaten landmark decisions like the 1965 ruling in *Griswold v. Connecticut*, 1965 [34] and could permit state laws banning the sale or use of contraceptives or similar steps to violate privacy rights long taken for granted by all Americans. Such an outcome may seem highly unlikely, but the ongoing controversy over approval of RU-486, for example, is a reminder that laws are sometimes more responsive to pressure groups than to broad public opinion.

… a Supreme Court led by Justices Scalia and Thomas would radically undermine privacy rights, including rights protecting some of the most deeply personal decisions people make.

A Supreme Court majority that agreed with Scalia and Thomas on privacy would have a dramatic impact far beyond the realm of reproductive freedom to include even broader privacy-related health care rights and other rights. In *Cruzan*, Scalia disagreed with Justice O'Connor and a majority of the Court and claimed that even a fully competent adult has absolutely no constitutional right to refuse unwanted medical treatment. Under Scalia's view, the Constitution would no longer protect people from forced submission to unwanted, intrusive and expensive medical treatment, and they could be prohibited from using "living wills" to carry out their wishes. It would require only two more votes like Scalia and Thomas to overturn Court rulings and allow hospitals to test pregnant women for suspected drug use without their knowledge and give the results to police (*Ferguson v. Charleston*, 2001)[35] and to permit the police to set up highway checkpoints to conduct suspicionless stops of random motorists to look for drugs (*City of Indianapolis v. Edmond*, 2000).[36] It is no exaggeration to say that a Supreme Court led by Justices Scalia and Thomas would radically undermine privacy rights, including rights protecting some of the most deeply personal decisions people make.

Three

CIVIL RIGHTS AND DISCRIMINATION

The current Supreme Court has already weakened legal safeguards for the civil rights of the Americans most threatened by discrimination – racial minorities, religious minorities, older Americans, people with disabilities and women. A Scalia-Thomas Court, however, would be far worse. It would eliminate the remaining protections that many vulnerable Americans depend on for fair treatment and justice, and make progress in these areas even more difficult. A Scalia-Thomas Court would also reverse important progress made under the current Court, including the overturning of state laws that defined gay men and lesbians as criminals and intruded on all adults' private consensual sexual activity.

Voting Rights

There is no more fundamental democratic right than the right to vote. Much of the most important civil rights litigation in the past half-century has been undertaken to guarantee this right for every American. Yet, a Court controlled by Justices Scalia and Thomas would turn back the clock on the past 50 years by undoing many victories that have ensured that Americans may not be denied the right to vote based on their race.

In 1994, Justices Thomas and Scalia advocated a radically activist position in a concurring opinion that, had it been the majority opinion, would have done great damage to the nation's progress toward ensuring all Americans an equal opportunity to participate and be heard in our democratic system.

(*Holder v. Hall* 1994)[37] Not only would Thomas' and Scalia's position in *Holder* sharply diminish the protections provided by the Voting Rights Act of 1965 (VRA), it would also overturn 30 years of Supreme Court precedent and at least three congressional reauthorizations of the Act. The Thomas-Scalia opinion in *Holder* would virtually nullify Sections 2 and 5 of the Act, which were specifically created to end racial gerrymandering and other practices that deny voting rights to minorities. The Thomas-Scalia position ignores the legislative history that shows Congress intended the Voting Rights Act to be interpreted broadly as a powerful tool to root out discriminatory election practices. Justices Stevens, Blackmun, Souter and Ginsburg criticized the Thomas-Scalia opinion, calling their position "radical" and estimating that it would have required the overturning or reconsideration of at least 28 previous Supreme Court decisions holding that the Voting Rights Act of 1965 should be interpreted broadly to prohibit racial discrimination in all aspects of voting.[38]

A Scalia-Thomas majority would overturn some of the Supreme Court's most important voting rights cases.

A Scalia-Thomas majority would overturn some of the Supreme Court's most important voting rights cases. For instance, the Thomas-Scalia opinion in *Holder* would have overruled a 1969 decision in *Allen v. State Board of Elections*[39] dealing with the Voting Rights Act's Section 5, which is targeted to states with an especially egregious record of voting rights violations. The Court ruled that the Act applies to voting procedure changes that alter the "election law of a covered State in even a minor way"[40] and that the Act should be given the "broadest possible scope."[41] A Thomas-Scalia majority would also overturn a 1986 opinion dealing with Section 2 of the Act, which covers election law changes in the whole country, not just the Section 5 states. (*Thornburg v. Gingles*)[42] In this case, the Court had ruled that the Act prohibited at-large voting districts that operated to dilute (and often nullify) the voting power of large minority communities.

A Thomas-Scalia majority would also overturn other important Supreme Court voting rights rulings. For example:

- *Whitley v. Williams* (1969)[43] invalidated candidate eligibility rules that have a negative impact on racial minorities;
- *Perkins v. Matthews* (1971)[44] dealt with how minorities' voting rights were affected by the annexation of land to enlarge city boundaries;
- *Georgia v. United States* (1973)[45] and *United Jewish Organizations of Williamsburgh, Inc. v. Carey* (1977)[46] addressed reapportionment and redistricting plans that dilute the voting strength of racial minorities; and
- *Chisom v. Roemer* (1991)[47] and *Houston Lawyers' Association v. Texas Attorney General* (1991)[48] ruled that the Voting Rights Act's prohibitions on race discrimination apply to state elections for judges.

- *Hunt v. Cromartie* (2001)[49] rejected by a 5-4 margin the view that race can never be taken into account in redistricting decisions.

It would be hard to overstate how catastrophic a Scalia-Thomas majority would be for our nation's hard-fought efforts to guarantee all Americans an equal opportunity to participate in our democratic system. It is especially foreboding that other justices have joined the Scalia-Thomas position, as in *Morse v. Republican Party of Virginia* (1996).[50] Justice Thomas was joined in dissent in this case not only by Justice Scalia, but also by Chief Justice Rehnquist and, in part, by Justice Kennedy. These four Justices took the extreme position that the anti-discrimination requirements of Section 5 of the Voting Rights Act do not apply at all to party conventions that select the party's nominees for office.[51] Justice Stevens, writing for the Court majority, took strong issue with this aspect of the Justices' dissent, stating, "[t]he radicalism of this position should not be underestimated. ... On this view, even if a political party flagrantly discriminated in the selection of candidates whose names would appear on the primary election ballot or in the registration of voters in a primary election it would not fall within the coverage of section 5."[52]

A Scalia-Thomas Supreme Court would also make resolving complex redistricting issues with both constitutional and VRA implications more difficult. For example, Scalia and Thomas would have struck down a Florida redistricting plan developed and agreed to by all but one of the parties to the original lawsuit, including: the Florida Attorney General, counsel to both houses of the state legislature, the Florida Secretary of State, the state senator whose district was under challenge, a group of African-American and Hispanic voters who lived in the challenged district and five of the six individuals who had originally challenged the state's previous redistricting plan. (*C. Martin Lawyer III v. Department of Justice*, 1997)[53] Scalia and Thomas would have imposed a costly, adversarial and time-consuming process solely because one individual objected to the redistricting plan and sued to block it on the grounds that the plan was too concerned with its potential impact on minority voters. While Scalia and Thomas have frequently claimed that they want to avoid unnecessary litigation, here they would have *required* litigation by negating a nearly unanimous solution to a complex political problem and forcing the various constituencies back into court. Fortunately the majority in this case was more farsighted. However, because Scalia and Thomas were joined by both Justices O'Connor and Kennedy, one more Justice in the Scalia-Thomas mold would have led to a different result. One more vote for the Scalia-Thomas position would lead to a decision overturning prior precedent and authorizing even blatant partisan gerrymandering in state redistricting decisions. In *Vieth v. Jubelirer* (2004)[54], the Court ruled that Pennsylvania Democrats had failed to prove that a 2002 congressional redistricting plan was so biased in favor of Republicans that it was unconstitutional. In an opinion by Justice Scalia, however, he and Justice Thomas, Chief Justice Rehnquist and Justice O'Connor would have gone even further. They would have overruled the decision in *Davis v. Bandemer* (1986)[55] and ruled that redrawing district lines based on partisan politics is always constitutional, no matter how blatant and no matter how much it harms voters' rights to fair and effective representation. Five justices narrowly rejected this effort, which is particularly significant in light of continuing claims of blatantly partisan gerrymandering in Texas and elsewhere.

Gender Discrimination

Constitutional and statutory protections against sex discrimination and harassment would likely fall victim to a Scalia-Thomas Supreme Court majority, even beyond the harm that would be caused in the area of states' rights and federalism. Under such a Court, for example, a state like Virginia could discriminate against women through single-sex educational institutions like the Virginia Military Institute (VMI), as Justice Scalia's lone dissent in 1996 shows. (*United States v. Virginia*)[56] (Justice Thomas did not participate in the VMI case because his son attended that school.) Similarly, a Scalia-Thomas court would reverse course by authorizing sex discrimination in jury selection, a practice ruled unconstitutional by the Court in 1994. (*J.E.B. v. Alabama*)[57] The Scalia-Thomas-Rehnquist dissent in that case ridicules the majority's concern about the history of discrimination against women in the practice and administration of law. It also signals that a Scalia-Thomas Supreme Court would allow the jury selection process to be tainted by invalid and patronizing assumptions that individuals, just because of their gender, would be biased as jurors.[58] If this view were shared by a majority of the Supreme Court, it would produce an incalculable setback to women's progress towards equal treatment. And only one more vote with Scalia and Thomas would have reversed the Court's 2005 decision in *Jackson v. Birmingham Bd. of Educ.* 125 S. Ct. 1497 (2005) that federal law protects against retaliation towards those who complain about illegal sex discrimination in federally-assisted education programs.

A Scalia-Thomas Court would also make it much harder for victims of sexual harassment to win justice in the courts. In such a case in 1993 (*Harris v. Forklift Systems, Inc.*),[59] Justice Scalia wrote that laws protecting employees against "abusive" or "hostile" work environments were too vague and might lead to more litigation and damage awards by "unguided" juries.[60] In fact, Scalia's concurrence in *Harris* reflects greater concern about more lawsuits and bigger damages awards for sexual harassment victims than about the problem of sexual harassment itself. As other Scalia and Thomas opinions since the Harris case show, if their views became the majority, sexual harassment victims would face a much harder struggle to win justice. Two 1998 opinions show that a Scalia-Thomas Court would drastically narrow the circumstances under which an employer may be held responsible for harassing conduct by supervisors and would require an employee who is harassed by a supervisor to show job-related, as opposed to personal, injury to prevail against an employer. (*Faragher v. City of Boca Raton*[61] and *Burlington Industries v. Ellerth*[62]) Justice Thomas' lone dissent in *Pennsylvania State Police v. Suders*[63] would have made it harder for victims of sexual harassment to bring claims of constructive discharge. Finally, as Scalia and Thomas made clear when they joined Justice Kennedy and Chief Justice Rehnquist in a 1999 dissent, a Scalia-Thomas Supreme Court would provide virtually no protection for public school students against sexual harassment by other students. (*Davis v. Monroe*)[64]

Racial Discrimination

A Court majority that agreed with Justices Scalia and Thomas would make it much harder for victims to prove discrimination based on race. For instance, their dissenting views that only blacks should be able to challenge exclusion of blacks from juries would make discrimination in jury selection much harder to establish. (See, e.g., *Powers v. Ohio*, 1991[65] and *Campbell v.*

Louisiana, 1998.[66]) Similarly, a Scalia-Thomas majority would make it impossible to challenge exclusion of jurors because of race in civil cases. (*Edmonson v. Leesville Concrete Co.*, 1991)[67]

Although racial segregation of public schools continues to be a serious problem, a Scalia-Thomas majority would severely limit government's ability to end that segregation. In 1992, Scalia wrote that the courts should stop overseeing the desegregation of schools previously subject to *de jure* segregation, even for schools that remain significantly segregated. (*Freeman v. Pitts*)[68] His concurrence in that ruling argues that school segregation cannot be remedied because it is impossible to identify its actual causes. Although he quotes a previous case acknowledging that discrimination may be partly caused by "discriminatory school assignments,"[69] he still insists that it is unreasonable for the courts to keep overseeing these schools until such segregation is ended. Later in 1992, Scalia was the sole dissenter from an 8-1 ruling that Mississippi had failed to remedy the effects of discrimination in higher education. (*United States v. Fordice*)[70] Scalia's solitary dissent in *Fordice* illustrates how extreme his views on race are. Three more appointments would not be enough to give Scalia's views expressed in *Fordice* a majority of votes. Nevertheless, increasing the number of Justices who shared this extreme position could have the effect of lending legitimacy to this view. One thing is clear: A Supreme Court controlled by Justice Scalia would ignore the appalling history of racism in this country and fail to adequately address the lingering effects of past discrimination.

Justice Thomas' views on racial discrimination are almost as extreme. Justice Thomas joined with the majority in *Fordice* in requiring states to remedy the effects of past *de jure* segregation of institutions of higher education with a concurrence that makes an admirable case on behalf of the unique role of historically black colleges. Unfortunately, however, his concurring opinion also foreshadows his willingness to accept incomplete remedies for school segregation. Justice Thomas' position would create a huge loophole that would make it much harder to end segregation. He would allow some discriminatory policies to continue, even those that began during the *de jure* segregation era and produced adverse impacts, if they are rooted in "sound educational practices" and cannot be specifically proved to have been motivated by discriminatory intent. Justice Thomas fails to specify what educational practices he would consider sound enough to justify continuing harmful *de jure* era policies.[71] In the Supreme Court's 1995 decision in *Missouri v. Jenkins*, Justice Thomas makes the radical argument that the Court erred in *Brown v. Board of Education* (1954)[72] when it considered evidence of the social and psychological harm suffered by black schoolchildren as a result of segregation.[73] And he goes on to ignore the significant role that housing discrimination and other types of illegal bias play in continuing public school segregation. Joined by Justice Scalia, Justice Thomas also strongly dissented from the Court's ruling that a government policy that racially segregates prisoners cannot be upheld unless it is justified under strict equal protection scrutiny. *Johnson v. California* (2005).[74]

Justice Scalia dealt a sharp blow to civil rights in his 5-4 decision in *Alexander v. Sandoval* (2001).[75] In that ruling, joined by Justice Thomas, the Court severely limited the reach of Title VI of the Civil Rights Act of 1964 by holding that individuals may not sue federally funded state agencies to remedy policies that are alleged to have a discriminatory effect

based on race or national origin, even though governing federal regulations under Title VI specifically prohibit such policies. Under the Court's ruling, individuals may sue only when the discrimination is alleged to have been intentional. A strongly worded dissent by Justice Stevens, joined by Souter, Ginsburg, and Breyer, called the majority's decision "unfounded in our precedent and hostile to decades of settled expectations,"[76]and concerns have been raised about whether justices like Scalia and Thomas are prepared to go even further in restricting the effectiveness of Title VI.

Discrimination Against Gays And Lesbians

As the landmark decision in *Lawrence v. Texas* [77] made clear, even conservative Justices like Anthony Kennedy agree that the Constitution prohibits blatant discrimination against gays and lesbians and protects their fundamental rights. Justice Kennedy wrote the majority opinion in 2003 in *Lawrence*, which declared unconstitutional a Texas law that criminalized private consensual sex between adults of the same gender, and also overturned the Court's 5-4 decision in *Bowers v. Hardwick*[78] that upheld a Georgia sodomy law. In 1996, Kennedy wrote the majority opinion in *Romer v. Evans*,[79] striking down a provision in Colorado's constitution that barred local governments from enacting laws to protect Coloradans from discrimination based on sexual orientation. But Justices Scalia and Thomas dissented from both decisions, along with Chief Justice Rehnquist. In *Lawrence*, they claimed that intrusive sodomy laws were justified to promote "majoritarian sexual morality."[80] In *Romer*, they argued that even laws clearly designed to disadvantage gay men and lesbians and to authorize blatant discrimination against them are perfectly constitutional.[81] The bottom line is this: under a Scalia-Thomas Supreme Court, gay men and lesbians could be criminally prosecuted for their private, consensual sexual behavior and local governments could make it illegal to provide even the most basic anti-discrimination protections to gay men and lesbians. (See also *Equality Foundation of Greater Cincinnati Inc. v. City of Cincinnati*, 1996)[82] Just two more appointees to the Supreme Court in the Scalia-Thomas mold would make this minority view a legal reality. One more such vote could restore the infamous decision in *Bowers v. Hardwick*.

... under a Scalia-Thomas Supreme Court, gay men and lesbians could be criminally prosecuted for their private, consensual sexual behavior ...

If the Supreme Court majority agreed with Justice Scalia, gay people who face discrimination by government would find it much harder even to have their claims heard in court. In 1988, Chief Justice Rehnquist wrote a majority opinion that found that an employee fired by the CIA after he revealed he was gay should at least be able to have a court consider his constitutional claims against the government. But Scalia would have denied the man his day in court altogether. (*Webster v. Doe*)[83]

Discrimination Against People with Disabilities

Despite the enactment of the Americans with Disabilities Act thirteen years ago, a Scalia-Thomas majority would make it far more difficult for people with disabilities to prove and remedy discrimination, even beyond the limits already imposed by a narrow 5-4 Court majority on the ADA in the name of "federalism" in *Board of Trustees of Univ. of Alabama v. Garrett* (2001). In fact, one more vote with Scalia and Thomas would have extended the harmful decision in *Garrett* and would have declared unconstitutional Title II of the ADA in *Tennessee v. Lane*, as discussed along with *Garrett* in section 10 below.

In addition, Scalia and Thomas joined Chief Justice Rehnquist's partial dissent from an important 1998 decision in which the Court majority ruled that the Americans with Disabilities Act (ADA) prevents discrimination against asymptomatic persons infected with the AIDS virus. (*Bragdon v. Abbott*)[84] Two more votes on the Scalia-Thomas-Rehnquist side would wipe out this critical protection. Thomas and Scalia, joined again by Chief Justice Rehnquist, also dissented from the 1999 Court opinion finding that it was a violation of the ADA to require the improper institutionalization of two women with mental disabilities. (*Olmstead v. L.C.*)[85] The three argue that, despite clear congressionally enacted findings to the contrary, keeping people with disabilities in an institutionalized setting does not constitute discrimination, even where institutionalization is unjustified and unnecessary.

Another example is *U.S. Airways, Inc. v. Barnett* (2002),[86] where the Court limited ADA protections by ruling, 5-4, that in most circumstances, a company need not alter its seniority system to accommodate an employee with a disability. Writing for the Court majority, Justice Breyer explained that a disabled worker could sometimes overcome the presumption in favor of a seniority system if he or she could demonstrate "special circumstances." Justices Souter and Ginsburg dissented in favor of an interpretation of the ADA that would have required an employer in the circumstances of this case to demonstrate that disregarding its seniority system in order to accommodate a disabled employee would have worked an undue hardship. But Justices Scalia and Thomas dissented in the other direction, arguing that under no circumstances should a company be required to disregard a seniority system to accommodate a disabled worker. This would have weakened even further the protections accorded to disabled Americans.

In addition, Scalia and Thomas joined Chief Justice Rehnquist's dissent in *Equal Employment Opportunity Commission v. Waffle House, Inc.*, (2002),[87] where the Court held that the statutory authority of the Equal Employment Opportunity Commission to sue an employer for violating the ADA and seek monetary and other relief for a victimized employee includes the situation in which the employee has signed an agreement with the employer requiring arbitration of all employment disputes. The dissent would have denied the EEOC this important means of combating discrimination against Americans with disabilities in such circumstances. Since many employers require employees to sign mandatory arbitration agreements as a condition of employment, adding more Justices to the Court like Scalia and Thomas would threaten this important means of enforcing the ADA, and potentially other discrimination laws as well.

Scalia's and Thomas' disregard for the rights of the disabled is not limited to cases arising under the ADA. In 1995, the Court considered whether the federal Fair Housing Act's prohibition of discrimination against people with disabilities could be trumped by a local city ordinance. (*City of Edmonds v. Oxford House, Inc.*)[88] The majority ruled that it could not and remanded the case for further proceedings. But Justices Thomas, Scalia and Kennedy dissented, arguing that a city should have the authority to exclude a group home for recovering alcoholics and substance abusers from the very kind of neighborhood that promises the greatest chance of success for the patients.[89] If it were the majority opinion, this narrow view of the Fair Housing Act could severely limit protections for people with disabilities.

In 1988, Scalia signaled in another dissent that he would make it easier to deny a young person with disabilities the right to public education. The majority ruled that the plaintiff should be able to have his day in court, even though he had temporarily dropped out of school. But Justice Scalia disagreed, preferring instead to throw the lawsuit out and make it impossible for the young disabled man to receive the education that federal law promised him. (*Honig v. Doe*)[90] And finally, in 1999, Justice Thomas wrote a dissent arguing that a school district could deny nursing services to enable a young boy with disabilities to attend school. The child, a quadriplegic, required a nurse to assist him with certain activities so that he could attend school and benefit from special education. The majority found that the services the boy needed were required under the Individuals with Disabilities Education Act (IDEA), but Thomas would have denied the accommodation for the child.[91] (*Cedar Rapids Community School District v. Garret F.*)[92]

Discrimination Against Older Americans and Other Vulnerable Groups

A Scalia-Thomas majority on the Supreme Court would make it harder for other disadvantaged and vulnerable people to seek redress for discrimination in the courts, even beyond restrictions on federal law in the name of "federalism." For instance, they would make it harder for seniors to prove age discrimination in employment. Thomas joined a 1993 concurring opinion suggesting that victims of age discrimination should not be able to prove their cases by showing the "disparate impact" of employment practices, which would deprive older workers of a key legal tool used in race and sex discrimination cases. (*Hazen Paper Co. v. Biggins*)[93] Justices Thomas and Scalia joined in the decision that says older Americans may not sue state agencies for damages over violations of federal age discrimination law. (*Kimel v. Florida Board of Regents*, 2000)[94] In a separate opinion, Justice Thomas indicated that he would make it even harder for Congress to apply such anti-discrimination laws to the states. In *General Dynamics Land System v. Cline*,[95] Scalia and Thomas (joined by Justice Kennedy) argued in dissent that federal law should prohibit an employer from giving more favorable treatment to older workers. And in 1989, Scalia dissented from the majority's ruling that victims of age discrimination who sue may use the discovery process in the lawsuit to identify other victims. If the views Scalia expressed in his dissent had represented the Court majority's view, it would be extremely difficult, if not impossible, to make sure that all the potential victims of age discrimination could have their claims heard and receive just compensation. (*Hoffmann-La Roche Inc. v. Sperling*)[96]

Other vulnerable groups would also face more discrimination and mistreatment under a Thomas-Scalia Court. For example, in a 1999 dissent joined by Chief Justice Rehnquist, Justice Thomas blatantly disregarded the Fourteenth Amendment's Privileges and Immunities Clause and argued that states should be able to discriminate among state residents by basing welfare benefits on when a person moved to the state. (*Saenz v. Roe*)[97] In what is certainly a strong candidate for their most heartless opinion of all, Scalia and Thomas demonstrated their disregard for the rights of institutionalized persons in 1992 in dissenting from a majority holding joined by conservatives and moderates alike that the pummeling of a helpless handcuffed prisoner constituted "cruel and unusual punishment." (*Hudson v. McMillian*)[98]

A more recent example is *Hope v. Pelzer* (2002),[99] where the Court ruled that an Alabama prison inmate could sue state prison guards for violating his Eighth Amendment right not to be subjected to cruel and unusual punishment. The guards had twice handcuffed him to a "hitching post," including once for a seven-hour period in which he was "given water only once or twice and was given no bathroom breaks." The majority held that, under the facts alleged, "the Eighth Amendment violation is obvious… [T]he [guards] knowingly subjected [the prisoner] to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation." The majority rejected the guards' claim that they were entitled to summary judgment on the ground that they had qualified immunity, holding that, at the time of the incidents in question and under the facts alleged, "the state of the law … gave [the guards] fair warning that their alleged treatment of [the prisoner] was unconstitutional." But Justice Thomas wrote a dissent, joined by Rehnquist and Scalia. Two more votes would have reversed the Court's ruling.

Similarly, two more votes would have made a majority view out of the dissents of Thomas, Scalia and Rehnquist in *Chavez v. Martinez* (2003)[100] that a person interrogated by police but never charged should not even be able to file a civil suit claiming that coercive police questioning violates his constitutional due process rights. And one more vote in accord with Thomas and Scalia would have reversed the decision in *United States v. White Mountain Tribe* (2003),[101] where the Court ruled that the tribe could sue the government in the court of claims for breach of fiduciary duty to manage land held in trust for the tribe.

All Americans protected by civil rights laws could be harmed by reversal of the Court's 5-4 decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association* (2001).[102] The question in that case was whether action by a not-for-profit athletic association that regulates interscholastic sports among public and private high schools in Tennessee, includes mostly public schools, and has public school officials pervasively entwined in its structure, constitutes "state action" for purposes of federal civil rights laws. The majority ruled that such an association's action was, indeed, state action. The dissent, written by Justice Thomas and joined by Rehnquist, Scalia, and Kennedy, would have construed the doctrine of state action much more narrowly and would have severely limited the reach of federal civil rights laws.

Immigrants' Rights

The Supreme Court has often issued rulings limiting the rights of immigrants, such as the 5-4 ruling (joined by Scalia and Thomas) that the National Labor Relations Board could not award back pay to a worker who had been unlawfully fired for participating in union organizing because the worker was an undocumented immigrant not authorized to work in this country. (*Hoffman Plastics Compounds v. NLRB*, 2002).[103] A Supreme Court with additional justices like Scalia and Thomas, however, would make the situation even worse.

For example, in a 5-4 ruling in *Immigration and Naturalization Service v. St. Cyr* (2001),[104] the Court rejected the government's argument that it could automatically deport lawfully admitted immigrants who had pleaded guilty to certain crimes before strict new provisions of federal immigration laws took effect in 1997. These provisions made legal aliens who have been convicted of certain crimes ineligible to seek a discretionary waiver of deportation. In *St. Cyr*, the narrow Court majority held that these new rules could not be applied retroactively. An important part of the Court's opinion also rejected the government's claim that the new immigration laws had stripped the federal courts of jurisdiction to decide whether legal immigrants were eligible for discretionary relief from deportation in these circumstances. Justice Scalia dissented in an opinion joined by Thomas and Rehnquist, and in part by O'Connor. All of the dissenters would have held that the new laws deprived the courts of the jurisdiction to hear the case, and lamented what Scalia called the "opportunities for delay-inducing judicial review." Just one additional vote in accord with Scalia and Thomas would make it much more difficult for immigrants to challenge in court other deportation policies adopted by the government.

In another 5-4 ruling, the Court held in *Zadvydas v. Davis* (2001) [105] that federal immigration law does not permit the government to keep an alien who is under a final order of removal from this country in jail indefinitely, even though no other country will accept that person. Justice Kennedy dissented in an opinion joined by Scalia, Thomas, and Rehnquist, claiming that federal law places no limit on the length of time for which the government can incarcerate removable aliens. Scalia and Thomas, however, would go even further, disagreeing with Kennedy and Rehnquist that the Constitution might require the release of removable aliens from custody in certain circumstances (*e.g.*, because the person is not a flight risk or presents no danger to the community). Scalia and Thomas issued a separate dissent, maintaining that an incarcerated alien subject to a final order of removal has no constitutional right to be released from custody under any circumstance, and that there are no situations in which a court could order that person's release from custody. More justices on the Court like Scalia and Thomas could authorize the government to incarcerate deportable aliens forever if no other country would agree to admit them. Two more justices agreeing with their position could mean that an immigrant who is removable from this country could not even file a petition for habeas corpus to raise constitutional challenges to certain laws authorizing lengthy detentions, an issue that could become even more significant in the future in the aftermath of 9/11. See *Demore v. Kim* (2003).[106]

Justices Scalia and Thomas would have further restricted the rights of immigrant children in *Tuan Anh Nguyen v. Immigration and Naturalization Service* (2001).[107] In a 5-4 ruling, the

Court in that case upheld rules that make citizenship automatic for children born abroad to American mothers (as long as the mothers have resided in the United States for a continuous period of one year), but imposed additional burdens in the case of children born abroad to American fathers. Justice O'Connor's dissent took the majority to task, not only for condoning stereotypical notions about mothers and fathers but also for deviating from past precedent in which the Court has applied heightened scrutiny to sex-based classifications in determining whether a constitutional violation has occurred. Scalia and Thomas, on the other hand, indicated in their concurrence that they would have gone even further than the other justices in the majority, stating that the Court lacked the power to provide the requested American citizenship for such children under any circumstances.

Affirmative Action

It is clear that a Scalia-Thomas Court would make it far more difficult for Americans who have suffered discrimination to win relief in court for their injuries, but it would not stop there. It would also sharply limit the government's ability to level the playing field, prevent discrimination and foster equal opportunity. A Scalia-Thomas Court would abolish affirmative action and other efforts to remedy the effects of discrimination. Since his earliest days on the Supreme Court, Justice Scalia has signaled his hostility to affirmative action. In a 1987 case dealing with affirmative action for women, Justice Scalia dissented from a decision upholding the validity of affirmative action under Title VII of the Civil Rights Act of 1964.[108] Although the current Court majority has restricted this important remedy, it has made clear that carefully designed affirmative action is an appropriate response to race discrimination.[109] In a landmark ruling, the Court ruled 5-4 in *Grutter v. Bollinger* (2003)[110] that narrowly tailored affirmative action is permissible to promote educational diversity in higher education. Nevertheless, Scalia and Thomas would prohibit the use of affirmative action regardless of the circumstances and even where it is shown to be carefully constructed to remedy past discrimination.[111]

... a Scalia-Thomas Court would sharply limit the government's ability to level the playing field, prevent discrimination and foster equal opportunity.

Although Justice Scalia stated that he would never allow affirmative action under any circumstances in his concurrences in both the *Adarand* and *Croson* cases.[112] The extreme nature of Justice Scalia's views are most evident in his 1989 concurrence in *Croson*. In *Croson*, the city of Richmond had instituted affirmative action in city contracting because discrimination was so blatant and entrenched that even though racial minorities made up half the city's population, the firms they owned received only two-thirds of 1 percent of the city's prime contracts.[113] Justice Scalia equated modern affirmative efforts by the city of Richmond with centuries of discrimination against African Americans with the caustic and insulting comment that "turnabout is not fair play."[114] Justice Scalia's views on race have not mellowed

with time. Six years after *Croson*, in a brief and dismissive concurrence in *Adarand*, Scalia ignored our nation's shameful history of racial discrimination by equating the "way of thinking" that resulted in slavery and racial hatred with the sincere efforts to right historic wrongs and achieve equality through affirmative action.[115]

Justice Thomas' views on race and affirmative action are equally extreme. Justice Thomas had not yet joined the Supreme Court when *Croson* was decided, but his concurrence in *Adarand* and his dissent in *Grutter* are revealing. In *Grutter*, Thomas asserted that the University of Michigan Law School must effectively choose between its goals of diversity and academic excellence and "cannot have it both ways."[116] In *Croson*, Thomas called affirmative action "noxious" and labeled it "government-sponsored racial discrimination."[117] He did not even acknowledge the dramatic inequalities between whites and racial minorities and our nation's long history of legal and illegal racial discrimination. Instead, his *Adarand* concurrence quoted the Declaration of Independence as authority for the "principle of inherent equality that underlies and infuses our Constitution."[118] While it is true that the language of the Declaration of Independence suggests that equality was highly valued by the men who framed the document, it is equally true that many of them owned slaves and all of them lived at a time when slavery constituted a significant component of the economy in some regions of the nation. It is revealing that Justice Thomas cited the words of an important historical document without undertaking any historical analysis to examine the customs and traditions of the Framers of the Declaration of Independence. If he were to undertake this analysis, he would be hard pressed to conclude that the Framers had racial equality in mind when they drafted the Declaration of Independence. Fortunately, the clear words of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution do extend equal protection of the laws to all races, and Thomas' selective historical analyses do nothing to undermine that. Nevertheless, Justice Thomas' inconsistent application of theories emphasizing the importance of the Framers' intent undermines his credibility on such issues. One more vote in accordance with Thomas and Scalia, moreover, would effectively turn their views into the law of the land and abolish affirmative action.

Constitutional and Civil Rights and the "War on Terror"

A number of the closely divided decisions discussed above implicate civil and constitutional liberties issues relevant to the "war on terror." But Justices Scalia and Thomas, as well as the entire Court, have addressed these issues specifically. In a 2003 speech, Justice Scalia commented that most of our rights "go way beyond what the Constitution requires," and chillingly suggested that in wartime, it can be expected that rights will be "ratcheted down to the constitutional minimum."[119] With more justices like Thomas and Scalia on the Court, that "ratcheting" could well drop below the "constitutional minimum" and threaten basic rights.

In *Rasul v. Bush* (2004),[120] Justice Scalia wrote a strong dissent, joined by Justice Thomas and Chief Justice Rehnquist, from the Court's 6-3 holding that foreign citizens captured abroad during the Afghanistan war can challenge the legality of their indefinite detention at Guantanamo Bay in the U.S. courts. Scalia harshly charged that the majority was improp-

erly creating a "monstrous scheme in time of war."[121] As the majority and Justice Kennedy's concurring opinion explained, however, Guantanamo is effectively a U.S. territory over which the U.S. exercises exclusive jurisdiction, and the detainees contend that they are being held in violation of U.S. law. Some have contended that they have been mistreated or tortured. Adopting the Scalia-Thomas-Rehnquist view would mean that the executive branch could unilaterally and indefinitely imprison any foreign citizen on U.S. territory at Guantanamo, even if they contend they are noncombatants and have been tortured, with no review whatsoever by any U.S. court.

Justice Scalia joined the strong rebuke of the Administration's indefinite detention policy when it came to U.S. citizens in *Hamdi v. Rumsfeld* (2004).[122] Eight justices rejected the Administration's claim that it could indefinitely imprison incommunicado a U.S. citizen apprehended abroad in connection with the war on terror. Justices Scalia and Stevens maintained that the Administration was required either to prosecute the alleged combatant for treason or some other offense, convince Congress to suspend the writ of habeas corpus, or let him go.[123] The plurality of justices ruled that while the alleged combatant could be detained, he must receive a meaningful opportunity to contest the factual and other basis for his detention before a neutral decision maker with access to counsel. Justice Thomas was the sole dissenter who defended the Administration's policy. His troubling view, in the words of the plurality, would transform a state of war into a "blank check for the President" even when it "comes to the rights of the Nation's citizens."[124]

Four
RELIGIOUS COERCION AND LIBERTY

[Scalia and Thomas argue that] the First Amendment does not require government neutrality towards religion.

For decades, both conservative and progressive Supreme Court Justices have recognized that one of the most important ways in which our Constitution protects religious liberty is by requiring government to stay truly neutral toward religion. A Scalia-Thomas Supreme Court, however, would eradicate that protection. In a 1992 dissent joined by Justices Thomas, White, and Chief Justice Rehnquist, Scalia wrote that the First Amendment does not require government neutrality towards religion. (*Lee v. Weisman*)[125] They argued, instead, that the government may promote prayer and religion, as long as it stops short of specifically favoring a particular sect or legally coercing participation in or payment for religious activity.[126] On the current Court, only two more votes are needed to make this radical view a reality.

The consequences of turning this Scalia-Thomas view into the law of the land would be devastating. Schools could mandate "captive audience" prayer at graduations, in classrooms and at any other school activity, as long as they did not favor only one sectarian point of view, as Scalia, Thomas, and Rehnquist argued in dissenting from the Court's ruling that school-sponsored "student-led" prayer at high school football games was unconstitutional in *Santa Fe Independent School Dist. v. Doe* (2000).[127] Young students could be told to bow their heads in vocal or silent prayer and, if they disagree, they could be told that they are not good citizens. States could require the teaching of religious cre-

ationism along with evolution, as Scalia urged in his dissent in *Edwards v. Aguillard* (1987),[128] or could mandate anti-evolution disclaimers in textbooks, as suggested by Scalia, Thomas, and Rehnquist in dissenting from the denial of review in *Tangipahoa Parish Board of Educ. v. Freiler* (2000).[129] Police officers, judges, drill sergeants and others in positions of authority over adults could also foist their own religious views on captive audiences of adults. The familiar principle that government cannot take action that is intended to, or does in fact, promote religion would be eliminated, as Scalia and Thomas suggested in a 1993 concurring opinion. (*Lamb's Chapel v. Center Moriches Union Free School Dist.*)[130]

Justices Scalia's and Thomas' writings about government involvement in religion evidence complete disrespect for the legitimate rights and interests of people who are not religious or are members of minority faiths. In *Lee v. Weisman*, they scoffed at the harm to religious liberty and freedom of conscience that resulted from imposing captive audience graduation prayer.[131] Indeed, they noted that attendance was not required at the graduation ceremony at issue in *Weisman* and that therefore there was no "penalty" involved in forgoing the ceremony altogether.[132] The cavalier suggestion that children and families who oppose government-imposed prayer could simply skip graduation utterly fails to recognize the fundamental importance to the overwhelming majority of students and their families of this time-honored rite of passage.

Both *Edwards v. Aguillard* and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993)[133] reveal an additional threat that a Scalia-Thomas majority would pose to religious liberty. Scalia's writings in these cases demonstrate a radical view toward many religion cases and argue that an analysis of legislative intent should play absolutely no role in the adjudication of First Amendment cases.[134] This Scalia position would pave the way for laws that, while neutral in their wording, are blatantly motivated by intent to promote religion. Justice Thomas has taken an even more radical view, asserting that the Establishment Clause does not apply to state and local governments at all, and that individuals have no right whatsoever to religious neutrality other than concerning the federal government, contradicting decades of Supreme Court precedent.[135]

Ironically, despite their rejection of true neutrality towards religion in cases like *Weisman* in order to permit government promotion of religion, Scalia and Thomas have embraced a different version of neutrality in arguing that government should be able to fund even pervasively religious institutions with compelled taxpayer dollars. Although a narrow 5-4 majority including Scalia and Thomas permitted the use of taxpayer-funded school vouchers in religious schools in *Zelman v. Simmons-Harris* (2002)[136] where genuine and independent parental choice is found to occur, Scalia and Thomas would go even further. In a plurality opinion with two other justices in *Mitchell v. Helms* (2000),[137] Scalia and Thomas suggested that virtually any government aid to religious schools is permissible, as long as the material provided is not religious and it is provided equally to non-religious schools. Although this view has been rejected by five justices, Scalia and Thomas clearly adhere to it. For example, as the dissenting voice from a denial of *certiorari* in a 1999 case, Justice Thomas wrote in favor of abolishing the prohibition against supporting pervasively sectari-

an organizations with public funds. (*Columbia Union College v. Clark*)[138] One more Justice like Scalia and Thomas would likely authorize direct government funding of sectarian religious social services and schools, and authorize spending public dollars on activities with an explicitly religious purpose or content. Indeed, a Scalia-Thomas Court would force a state to subsidize those training for the clergy because the state offers college scholarships for secular subjects (*Locke v. Davey*).[139] A Scalia-Thomas Court would even allow school district or municipal lines to be drawn so as to permit one religious sect to predominate (*Board of Education of Kiryas Joel Village School Dist. v. Grumet*, 1994).[140]

Finally, Justice Scalia would even allow tax exemptions for religious books and periodicals — even if non-religious publications were denied the same benefit. In 1989, Scalia dissented from a majority holding that it was unconstitutional for the government to provide a tax exemption for religious periodicals where similar exemptions were not allowed for non-sectarian publications and the exemption served no secular purpose. Even though the Texas law in question explicitly discriminated in favor of religious publications and effectively increased taxes on secular publishers by exempting religious ones, Scalia claimed that the law did not improperly favor religion. (*Texas Monthly, Inc. v. Bullock*)[141] In short, a Scalia-Thomas Supreme Court would abolish religious liberty and church-state separation as we know it.

Five
FREE SPEECH AND CENSORSHIP

One important result of a Scalia-Thomas majority would be a significant increase in the government's power to regulate and suppress political, artistic, journalistic and commercial expression. Although Justice Scalia has agreed to protect free expression in some instances, he and Justice Thomas have voted in a number of important cases to restrict First Amendment rights.

Scalia's and Thomas' dissents from Court rulings protecting free speech would allow more direct government restrictions on political expression. For example, Scalia and Thomas joined a 1992 dissent by Chief Justice Rehnquist that would allow municipalities to significantly limit free speech by charging controversial speakers large permit and police protection fees. (See *Forsyth County v. The Nationalist Movement*)[142] Scalia and Thomas would allow prosecution of cross-burning without proof of an intent to intimidate, with Thomas suggesting that the First Amendment should not apply at all. (*Virginia v. Black*, 2003)[143] A 1995 Scalia dissent would allow the government to prohibit anonymous leaflets on policy issues. (*McIntyre v. Ohio Election Comm.*)[144] If this position had been applied at the time of our Founders, as Justice Thomas recognized, it would have banned Thomas Paine's "Common Sense" and other important political speech in that tradition. In a 1992 concurrence with a plurality opinion Justice Scalia even argued that the areas within 100 feet of polling places, including the sidewalks and streets within that zone, do not constitute traditional "public fora" — public gathering places where public dis-

course traditionally takes place. Therefore, in Scalia's view, speech in those areas should not receive full-fledged constitutional protection. (*Burson v. Freeman*)[145] Justice Scalia based this conclusion on his finding that activities near polling places have "traditionally" been regulated by the government. But, as Justices Stevens, O'Connor and Souter point out in their dissent, such deference to "tradition" would justify the reversal of landmark Court precedents protecting constitutional rights in the voting process, such as rulings that have struck down poll taxes and required "one person-one vote" reapportionment.[146]

Scalia and Thomas would permit increased government limits on artistic speech and press-related freedoms. In 1996, both voted to uphold federal restrictions on so-called "offensive" or "indecent" cable television programming, which includes valuable programming in such areas as health, literature, and art. (*Denver Area Educational Telecommunications Consortium v. FCC*)[147] Their dissent would essentially subordinate the First Amendment rights of independent programmers and audiences to the property rights of broadcast owners.[148] In 1990, Scalia voted to remove First Amendment protection altogether from "an entire category of speech-related businesses" related to sex, (*FW/PBS, Inc. v. City of Dallas*),[149] and adhered to that view in his concurring opinion in *City of Los Angeles v. Alameda Books* (2002).[150] In 1993, Thomas joined a Rehnquist dissent that would have permitted the banning of newspaper vending machines containing advertising brochures. (*Cincinnati v. Discovery Network*)[151] Both Scalia and Thomas voted to make it easier to prosecute disclosure of an illegally intercepted cell phone conversation on a matter of public importance by someone who did not participate in the interception (*Bartnicki v. Vopper*, 2000),[152] and to prosecute computer-generated sexually explicit images that "appear" to show minors (*Ashcroft v. Free Speech Coalition*, 2002).[153] Justice Scalia (but not Justice Thomas) dissented from the Court's 2004 opinion upholding a preliminary injunction against the Child Online Protection Act, which criminalizes placing "harmful to minors" material on the Internet. (*Ashcroft v. ACLU*, 2004)[154] And in a 1987 dissent, Justice Scalia argued that the government should be allowed to deny tax exemptions to publications based on their content even though there was no evidence that such denials were necessary to achieve the legislation's purpose of raising revenue while encouraging public communication. (*Arkansas Writers' Project, Inc. v. Ragland*)[155]

Scalia and Thomas would permit increased government limits on artistic speech and press-related freedoms.

A Scalia-Thomas Court majority would support government use of its funding power to impose new restrictions on the arts and other activities. In 1998, Scalia and Thomas issued a troubling concurring opinion that stated unequivocally that the First Amendment should not apply at all to government grant programs like the National Endowment for the Arts, and that it is perfectly constitutional for such government agencies to engage in viewpoint discrimination in awarding grants. (*Finley v. NEA*)[156] They assert explicitly that when funding the arts, government may explicitly discriminate against art with an unpopular mes-

sage.[157] If this became the majority view, it would permit blatant government censorship and viewpoint discrimination not only by the NEA, but by other government agencies that fund museums, libraries, public broadcasting and other arts, educational and cultural activities.[158]

In fact, one more vote would have turned a Scalia-Thomas dissent into the majority opinion in *Legal Services Corporation v. Velazquez* (2001),[159] where the Court ruled unconstitutional the legislative restrictions that had prohibited Legal Services Corporation funding of any organization that represents clients in challenges to welfare laws. These restrictions effectively prevented Legal Services attorneys from representing indigent clients in cases involving the validity of welfare laws or from raising legal arguments they otherwise would have raised on behalf of welfare clients. The Court held that these restrictions constituted an impermissible restraint on private speech. Justice Scalia's dissent claimed the restrictions were permissible because Congress was funding the program. If, as Scalia suggested, upholding the restrictions would mean that "fewer statutory challenges to welfare laws will be presented to the courts because of the unavailability of free legal services for that purpose," Scalia and those who joined his dissent answered "So what?" One more justice on the Court voting like Scalia and Thomas would not only severely harm legal services clients, but would also vastly increase government's ability to censor any speech that it helps to fund.

Perhaps the most far-reaching change in free speech law by a Scalia-Thomas Court would concern indirect assaults on expression. For decades, the Court has followed *United States v. O'Brien*,[160] a 1968 ruling in a draft card burning case. It said that if laws are applied in a way that restricts expression, the government must show that it is promoting an important interest and that the law's purpose is not to suppress free speech. This opinion requires neither striking down all laws that inhibit speech nor setting free people convicted of breaking laws to freely express themselves. In fact, the O'Brien opinion itself upheld the conviction of a man found guilty of burning his draft card.

Some people believe that the O'Brien Court allowed too much suppression of speech. But a Scalia-Thomas Supreme Court would limit free speech even further. Scalia argued in 1991 for effectively eliminating the O'Brien doctrine and applying the First Amendment only if a law's specific purpose or sole application is to suppress free speech. (*Barnes v. Glen Theatre, Inc.*)[161] Thomas joined a similar opinion by Scalia in a case this year. (*City of Erie v. Pap's* A.M., 2000)[162]

The narrowing of First Amendment rights that this Scalia-Thomas view would cause would be compounded by Scalia's extremely restrictive views on how to determine the actual intent of legislation. As a result, restrictions on artistic, political or commercial expression due to many kinds of general laws would be exempt from any First Amendment scrutiny. For instance, a local ordinance outlawing public nudity could be used to ban a performance of the play "Equus" or the rock musical "Hair." Similarly, an apparently neutral trespassing statute could be used to target civil rights protesters, as Southern officials sought to do in the 1950s and '60s.

A Scalia-Thomas majority would limit not only free speech, but freedom of association as well. In 1999 Scalia, Thomas, and Chief Justice Rehnquist would have upheld a Chicago anti-loitering statute that other conservatives and moderates on the Court found unconsti-

tutionally vague. (*City of Chicago v. Morales*)[163] The majority pointed out that the law did not give either fair notice of what types of activity were prohibited or even minimal guidelines for police enforcement. In fact, the majority warned that the statute would cover "a substantial amount of innocent conduct"[164] on city sidewalks and gathering places. Even so, a Scalia-Thomas Supreme Court would have upheld it.

Six
CONSUMER AND WORKER PROTECTION

Scalia and Thomas would significantly retreat from key Court decisions that are important in protecting the rights of consumers and workers.

For example, in 1997 the Court ruled that the Securities and Exchange Commission was properly protecting consumers in prohibiting unfair "insider" stock trading, even when the violator is not formally connected to the company whose stock is being traded. (*United States v. O'Hagan*)[165] Scalia and Thomas dissented, and would instead have seriously limited the SEC's ability to protect consumers. In addition, a Scalia-Thomas Supreme Court would limit individuals' and the government's ability to stop anti-competitive business behavior. For instance, Justice Scalia's 1991 dissent in *Summit Health Ltd. v. Pinhas*[166] would make it harder to sue under the Sherman Antitrust Act. Likewise, both Justices would narrowly interpret key provisions of the antitrust laws, making it harder to enforce laws created to promote competition and prevent monopolies. (*Eastman Kodak Co. v. Image Technical Services, Inc.*, 1992)[167] Both of these holdings would hamper antitrust enforcement and lead to higher consumer prices for many products and services. Scalia and Thomas have also been critical of the "negative Commerce Clause" doctrine used to prevent states from discriminating against interstate commerce in order to promote in-state commerce. (*Pharmaceutical Research and Manufacturers of America v. Walsh*, 2003)[168]

Thomas and Scalia would also reverse an important Court decision involving patients' rights. In *Rush Prudential HMO, Inc. v. Moran* (2002),[169] the Court upheld a state law providing that recipients of health care coverage by a Health Maintenance Organization under an employee benefit plan have the right to an independent medical review of the denial of a covered service when there is a dispute between the patient's primary care provider and the HMO regarding the "medical necessity" of that service. In a 5-4 ruling, the Court rejected an HMO's claim that the state law was preempted by ERISA, a federal statute. Although Justices Scalia and Thomas have been part of the 5-4 Court majority in a number of recent decisions upholding states' rights and blocking the enforcement of federal laws protecting the rights of individual Americans, Thomas in this case wrote the dissent, joined by Scalia, Rehnquist, and Kennedy, which would have invalidated the state law on the ground of federal preemption. As of 2002, forty-two states and the District of Columbia reportedly have patients' rights laws similar to the one in *Moran*. Adding just one more Justice like Scalia or Thomas to the Court would have a significant impact on the ability of states to protect the rights of ordinary Americans when it comes to health care decisions by HMOs.

Scalia and Thomas have voted to authorize the firing of even lower-level government workers and contractors for supporting or criticizing the "wrong" political party or office-holder.

Recent consumer lawsuits have held huge tobacco companies responsible for the harm caused by their products. But, in a Scalia-Thomas Court, many of the claims brought in the important anti-smoking case of *Cipollone v. Liggett Group, Inc.* (1992)[170] would never have been allowed to proceed and later anti-smoking cases might not even have been filed. Scalia and Thomas would have made cigarette companies virtually immune from most lawsuits by completely forbidding any suits accusing the companies of intentional fraud and deliberate concealment of cigarette dangers. In addition, efforts to strengthen curbs on tobacco and cigarette companies could fall victim to Justice Thomas' views on commercial speech, if those views came to command a majority on the Supreme Court. In a 1996 decision concerning a law limiting the advertising of liquor prices, Thomas advocated sharply limiting the government's existing power to regulate advertising by businesses in their efforts to sell their products. (*44 Liquormart, Inc. v. Rhode Island*).[171] Thomas has continued to advocate that view, as in a 2001 concurring opinion in a narrow 5-4 decision that he and Scalia joined, which invalidated a Massachusetts law that limited cigarette ads near schools and playgrounds. (*Lorillard Tobacco Co. v. Reilly*)[172]

Working men and women would have more than the increased employment discrimination described above to fear from a Scalia-Thomas majority. Such a Court would also dramatically increase the number of situations in which employees could be fired, demoted or disciplined simply for expressing political opinions. In a series of cases, Scalia and Thomas

have voted to authorize the firing of even lower-level government workers and contractors for supporting or criticizing the "wrong" political party or office-holder. For instance, a Scalia opinion in 1990 would allow any government employee to be dismissed or denied a promotion or transfer because of membership in a disfavored political party. (*Rutan v. Republican Party of Illinois*)[173] The plaintiffs in this case were a rehabilitation counselor, a road equipment operator and a prison guard — jobs that involve no duties, loyalties or skills involving political affiliation. Yet, a Scalia-led Supreme Court would have allowed their employer to deny them employment benefits merely because they did not support the same political party as the governor of Illinois. Likewise, in 1996 a Scalia-Thomas Supreme Court would have allowed a mayor to remove a tow truck company from the police department's rotation list because the company's owner had refused to support the mayor's re-election campaign. (*O'Hare Truck Service v. Northlake*)[174] And in a similar 1996 dissent, Scalia and Thomas would have allowed the termination of a trash hauling company's county contract because the company's owner spoke out critically about the Board of County Commissioners. (*Board of County Commissioners v. Umbehr*)[175]

Justices Scalia and Thomas would make it difficult or impossible for a government employee to sue government officials for retaliatory actions, even where the government's action was proved to be a pretext for punishing speech it found objectionable. (*Crawford-El v. Britton*, 1998)[176] A Scalia-Thomas Court would also authorize government to ban even low-level employees from speaking or writing for pay on any subject, even if totally unrelated to their government duties. (*United States v. National Treasury Employees Union*, 1995)[177] A 1987 Scalia dissent indicates that a worker could even be fired for a private comment to a co-worker. (*Rankin v. McPherson*)[178] In this case, Scalia would have allowed a clerical worker in a county constable's office to be fired for her private comment suggesting she approved of the assassination attempt on President Reagan. Although the comment was indisputably insensitive, the record also demonstrated that it was motivated by a political disagreement with President Reagan's policies, and nothing in the record suggested that the worker actually posed a threat to President Reagan — or anyone else for that matter. Nevertheless, under a Supreme Court that shared Justice Scalia's views, this employee would have lost her job.

A Scalia Supreme Court would be hostile to workers' right to work through their unions to protect their rights on the job. A Scalia-dominated Court would weaken employees' right to strike and bargain collectively by expanding employers' ability to refuse to bargain with employees' duly elected union representatives. (*NLRB v. Curtin Matheson Scientific, Inc.*, 1990)[179] The following year, Scalia voted to reduce unions' financial resources by sharply restricting their use of service fees paid by individuals who benefit from the union's collective bargaining activities, even though they are not union members. (*Lehnert v. Ferris Faculty Ass'n*, 1991)[180]

Finally, a Scalia-Thomas Supreme Court majority would also have a negative impact on workers in the area of their retirement benefits. The Employee Retirement Income Security Act (ERISA) was enacted by Congress to protect employees by setting minimum standards of fiscal responsibility for benefit and pension plans. In a number of cases, however, Justices Scalia and Thomas have interpreted ERISA in favor of employers or plan adminis-

trators and against workers. For instance, in 1996 Thomas and Scalia were joined by Justice O'Connor in a dissent that would have denied the employee beneficiaries of an insolvent retirement plan the right to sue for inclusion in another (solvent) employee benefit plan maintained by their employer. (*Varity Corp. v. Howe*)[181] Moreover, they disagreed with the majority's holding that ERISA prohibited the employer from deceiving employees about the solvency of the benefit plan even though the deliberate deception was intended to save the employer money at the expense of the employee-beneficiaries. Similarly, in 1989, Justice Scalia would have interpreted ERISA more narrowly than the majority with regard to an employer's or plan's obligation to disclose information about the plan to plan participants. (*Firestone Tire & Rubber Co. v. Bruch*)[182] In addition, two more votes with Scalia and Thomas would have penalized retired coal workers for a federal agency's lateness in assigning their claims to individual companies under federal law, potentially jeopardizing the retirement benefits of up to 10,000 coal industry retirees. (*Barnhart v. Peabody Coal Co.*, 2003)[183]

Seven
ENVIRONMENTAL PROTECTION

Justices Scalia and Thomas have already used their positions as part of narrow majorities on the Court to do very significant damage to federal, state and local efforts to protect the environment.[184] They have also helped lead majority opinions that have undermined the ability of citizen groups to bring lawsuits in their efforts to enforce environmental protections.[185] An environmental case decided in 2000 demonstrates how a Court that adopted the minority views of Scalia and Thomas would further deny access to the courts and weaken or nullify some important environmental laws. (*Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*)[186] In this case, a waste disposal company (Laidlaw) repeatedly released toxic pollutants, including mercury, into the North Tyger River in South Carolina, a direct violation of the company's permit to operate a wastewater treatment plant.[187] The majority opinion authorized citizen lawsuits to enforce the anti-pollution law that the company was charged with violating. But in their dissent, Scalia and Thomas first argued that there was no proof that the illegal release of mercury and other pollutants into the waterway actually harmed the environment.[188] Perhaps anticipating that this argument might not stand up, in the face of the District Court's finding that Laidlaw had violated the mercury limits on 489 occasions between 1987 and 1995,[189] Scalia and Thomas then argued that citizen suits should not be allowed at all where the harm could be said to injure all citizens in the vicinity of the treatment facility.[190] Apparently, in the Scalia-Thomas view, if only one or a few peo-

ple are injured by a violation of law, they may bring suit. But if most or all of us are injured, no one of us may initiate a lawsuit to redress that harm. The effect of the Scalia-Thomas opinion in *Friends of the Earth* is the classic double-whammy: They would make it harder for citizen groups to gain access to the courts and make it harder to protect the environment, especially in cases of massive or widespread pollution. In this regard, the opinion would represent a double win for far right activists who stand in firm opposition to many of the nation's environmental protection laws.

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A Scalia-Thomas Court would also make it much harder for both individuals and the govern-ment to protect and preserve our nation's natural resources, endangered species and unspoiled land. As stated above, a Scalia-Thomas majority would reverse the Court's important ruling in 2000 that private individuals can bring citizens' suits under federal law to stop air and water pollution. Yet, while Scalia and Thomas are hostile to private citizens' attempts to force polluting corporations to clean up damage they caused, they appear far more sympathetic to the concerns of the polluters themselves. For instance, a Scalia-Thomas majority would make it easier for polluters to recover the costs incurred during their cleanup activities. In 1994, Scalia wrote and Thomas joined a dissent that would have allowed a private company to collect attorneys' fees related to its litigation to force other responsible polluters (in this case, the United States Air Force) to share the cleanup costs. (*Key Tronic Corp. v. United States*)[191] Justice Scalia took this position despite his usual assertions that the courts should not go beyond the explicit text of statutes and the fact that the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) did not authorize the recovery of attorneys' fees for the type of action at issue.[192]

Scalia and Thomas are also hostile to governmental efforts to enforce the nation's environmental laws and regulations. One more vote for the Scalia-Thomas view in a 2004 case would have stripped the EPA of the authority to prevent damaging air pollution by industry when state agencies improperly fail to do so, even where available technology could triple the reduction in harmful pollution (*Alaska Department of Environment Conservation v EPA*).[193] A 1994 Thomas-Scalia dissent would have reduced the states' ability to enforce strong measures, including minimum water flows, to protect fisheries under the Clean Water Act. (*PUD No. 1 of Jefferson County et al. v. Washington Department of Ecology*)[194] In a 1995 dissent, the two made clear that they would prevent the government from stopping the destruction of endangered species and wildlife habitats on private land. (*Babbitt v. Sweet Home Chapter of Communities for Greater Oregon*)[195] And, in a 1995 dissent from a denial of *certiorari*, Justice Thomas made clear that he would sharply limit the ability of the Army

Corps of Engineers to protect migratory bird habitats under the Clean Water Act. (*Cargill, Incorporated v. United States*)[196]

Finally, a Supreme Court controlled by Justice Scalia and Thomas would be supportive of polluters and developers but extremely hostile to efforts by state and local governments to utilize regulatory permits to protect the environment. (See, e.g., *California Coastal Commission v. Granite Rock Company*, 1987;[197] *Stevens v. City of Cannon Beach*, 1994;[198] and *Suitum v. Tahoe Regional Planning Agency*, 1997.)[199] In fact, it would have taken only two more votes in accord with the Scalia-Thomas position to have provided a major boost to the "property rights" movement and held that even a temporary moratorium on development in the Lake Tahoe Basin was a "taking" requiring compensation of property owners in *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency (2002)*.[200] There can be no doubt: a Scalia-Thomas tilt on the Supreme Court would make protecting and preserving the environment much more of an uphill battle.

Eight
ACCESS TO JUSTICE

Americans seeking the courts' help under a Scalia-Thomas majority are much more likely to find the courthouse doors barred.

Americans' definition of justice rests on a simple, yet powerful idea: if someone wrongs you, you can get your "day in court" to set things right. Whether citizens are seeking remedies for injury due to the illegal, negligent or reckless actions of other people, corporations or the government, access to the courts is essential to achieving a just result. However, Americans seeking the courts' help under a Scalia-Thomas majority are much more likely to find the courthouse doors barred. As discussed above, Justices Scalia and Thomas demonstrate extraordinary hostility to claims brought before the Court for the redress of grievances in legal arenas such as civil rights and environmental law. Given this hostility, it is not surprising that they also tend to argue that claims in these areas of the law should not even be heard by the courts, a view that would have the effect of making some laws or parts of laws unenforceable. For instance, a 1994 Scalia-Thomas concurrence made clear that they would not allow retroactive claims under the Civil Rights Act of 1991, even though the legislative history showed that Congress intended for such claims to be covered. (Landgraf v. USI Film Products)[201]

Who has the right to initiate a lawsuit — or "standing" — is very important in the American legal system. In order to have standing to sue, people must demonstrate three things: that they have suffered some sort of harm, that the harm is linked to actions or inaction of the defendant, and that a favorable decision in the lawsuit is likely to remedy or redress the harm. Justices Scalia and Thomas take a very narrow view of the standing requirements and therefore would reduce

people's ability to bring suits in a number of situations. They show special animosity, for example, toward the "citizen suit" in which a private citizen brings a lawsuit to force the government to enforce the law. Thomas joined a 1998 Scalia dissent arguing that a private person should not be allowed to bring a citizen lawsuit to force the government to enforce the laws regarding registration and reporting requirements for political committees that make or receive contributions for the purpose of influencing elections. (*FEC v. Akins*)[202] The laws requiring such groups to release information to the public are important for ensuring government integrity and accountability, and yet Justices Scalia and Thomas would not permit citizen suits to make certain the laws are properly enforced. Ironically, Scalia and Thomas disagree with citizen suits in this context because all citizens (not just the few who might bring such suits) are harmed by the challenged behavior.[203]

Justices Scalia and Thomas also have a very narrow view of when citizens should be able to sue directly under the Constitution to vindicate their rights. They joined a 5-4 decision in *Correctional Services Corp. v. Malesko,* (2001),[204] where the Court held that private entities acting under federal authority to carry out a government function, in this case operating a halfway house for the Bureau of Prisons, cannot be held liable for monetary damages for constitutional violations. Justices Scalia and Thomas joined in the Court's opinion, but also wrote a separate concurring opinion to express an even more restrictive view. Their concurrence argued that the Court's seminal rulings implying a private right of action under the Constitution against federal officers for monetary damages should be narrowly limited to the "precise circumstances" of those cases. In fact, two more votes in accord with the Thomas-Scalia position in *Chavez v. Martinez* (2003)[205] would have precluded victims of coercive police investigation from suing to vindicate their constitutional rights. And one more vote in accord with their position in *Groh v. Raminez* (2004) would have prevented the victims of an intrusive, unlawful search without a valid warrant from being able to vindicate their rights against the ATF agent who led the search.[206]

Scalia's and Thomas' desire to restrict the public's access to the courts goes even further. In 1996, Thomas and Scalia, joined by Chief Justice Rehnquist, indicated they would even permit states to prevent poor parents from appealing the termination of their parental rights by imposing high appeal and other fees, contrary to the majority's ruling. (*M.L.B. v. S.L.J.*)[207] A portion of the dissent that not even Chief Justice Rehnquist would join showed that a Scalia-Thomas Court might overturn 40 years of Supreme Court cases, beginning with the 1956 ruling, *Griffin v. Illinois*,[208] that stand for the "proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."[209] If *Griffin* were overruled, high fees would even be allowed to prevent appeals by indigent criminal defendants facing the possibility of long prison sentences. Under a Supreme Court controlled by Justices Scalia and Thomas, there would be the very real possibility that appeals in cases involving parental rights, the right to liberty, and other fundamental rights could be reserved only for those wealthy enough to pay high court fees. One more vote in accord with Scalia and Thomas would also have reversed the Supreme Court's recent ruling upholding the use of Interest on Lawyers' Trust Accounts (IOLTA) programs to help pay for legal services for the poor. *Brown v. Legal Foundation of Washington*

(2003)[210] And two more votes with Scalia and Thomas would completely forbid foreign citizens from ever suing in American courts to redress serious and clear international human rights abuses abroad. (*Sosa v. Alvarez-Machain* 2004).[211]

Scalia and Thomas would thwart citizens' ability to demand government accountability with a new loophole for private contractors hired to perform government functions. By extending government immunity from lawsuits to include these private firms, they would make it more difficult for private citizens to hold them accountable for how they spend tax dollars. In a 1997 dissent, Scalia and Thomas would have extended the traditional government immunity available to prison guards to a private contractor — and in so doing they would have made it much harder for prisoners to sue for injuries sustained at the hands of privately employed prison guards. (*Richardson v. McKnight*)[212] This case provides yet another example of Justice Scalia's selective examination of historical "traditions." In *Richardson*, Scalia claimed that extending government immunity to private contractors performing government functions was "our settled practice."[213] Yet, the majority opinion included a careful historical examination of lawsuits that makes clear that prisoners have traditionally been permitted to sue their private guards for injuries. In fact, this historical review found not a single case in which private prison guards were granted immunity in a suit similar to the one brought by Mr. Richardson.[214]

Nine

MONEY, POLITICS AND GOVERNMENT ACCOUNTABILITY

A Scalia-Thomas majority would significantly impede efforts to enact and enforce laws to reform campaign finance and to make candidates and campaigns accountable to the public. Both conservatives and moderates on the Supreme Court have recognized that the First Amendment permits some limitations on campaign financing in order to prevent corruption and enhance accountability. A Scalia-Thomas majority, however, would reverse these rulings and invalidate significant efforts to reform campaign financing.

In 2000, the Court ruled that Missouri could enact limits on campaign contributions similar to the limits then in federal law. (*Nixon v. Shrink Missouri Government PAC*)[215] But Justices Scalia, Thomas, and Kennedy dissented, claiming that such limits, presumably under federal as well as state law, were unconstitutional. The dissent, which was written by Justice Thomas, stated directly that "...our decision in [the 1976 campaign finance case, *Buckley v. Valeo*][216] was in error, and I would overrule it."[217] Scalia and Thomas also made clear their disagreement with *Buckley* in a 1996 case dealing with a state Republican Party's use of negative advertising against a likely Democratic candidate for the U.S. Senate. As that opinion shows, a Scalia-Thomas majority would not permit any limits on political parties' campaign spending on behalf of their candidates, a result that would seriously undermine the minimal existing campaign finance reform laws. (*Colorado Republican Federal Campaign Committee v. FEC*)[218] Again

arguing that Buckley should be overturned, Thomas and Scalia dissented from the Court's ruling that upheld a federal law limiting a political party's expenditures that are coordinated with a candidate, a decision that could be overturned with just one more vote in accord with their position. (*Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 2001)[219]

Justices Thomas and Scalia object to the very portion of the *Buckley* decision that leaves the door partly open to campaign finance reform. *Buckley* holds that while political campaign expenditures by individuals may not constitutionally be limited, contributions by individuals may be. Some believe the *Buckley* decision should be overruled because it places too many restrictions on campaign finance reform efforts, but a Scalia-Thomas court would overrule *Buckley* because they believe it allows too much campaign finance regulation. Under the Scalia-Thomas view, neither limits on campaign contributions nor restrictions on campaign expenditures would be permitted. It is no exaggeration to say that a Scalia-Thomas Supreme Court majority would make meaningful campaign finance reform impossible. For example, Scalia and Thomas dissented from a recent decision upholding federal laws banning direct contributions to candidates by non-profit organizations (*Federal Election Commission v. Beaumont*, 2003).[220]

Scalia also dissented from a 1990 6-3 decision that upheld a Michigan law prohibiting corporate spending to promote or oppose political candidates. (*Austin v. Michigan Chamber of Commerce*)[221] The majority ruled in *Austin* that the law restricting the speech involved in corporate spending of money to support or oppose a political campaign was constitutional because it was enacted for a compelling reason: to reduce corruption and the appearance of corruption in the state's electoral process by restricting the ability of wealthy and powerful business interests to overwhelm the electoral process. They also held that the Michigan law was carefully crafted to address the state's compelling concerns, since the law made clear that corporations could not make electoral expenditures from their general funds, but they could make such expenditures through a separate fund established expressly for raising and expending funds for political purposes. Despite these findings, Justice Scalia would have struck down the state's law. (In his 2003 dissent in *McConnell v. FEC*, Justice Thomas also stated that he "would overturn" the *Austin* decision.[222]

In 2003, by a narrow 5-4 margin, the Supreme Court upheld virtually all the key provisions in the landmark McCain-Feingold law in its decision in *McConnell v. FEC*.[223] Both liberals and conservatives have raised concerns about some aspects of the law, particularly its ban on "issue ads" mentioning federal candidates within 60 days of an election. But one more vote for the dissenting views of Scalia, Thomas, Rehnquist, and Kennedy would go much further and invalidate many of the key parts of the McCain-Feingold law, such as its limits on the use of "soft money" by political parties and its requirement that broadcasters disclose information on candidate requests for broadcast time. Scalia and Thomas would have gone even further in McConnell. Both would have invalidated restrictions on the use of "soft money" by federal officeholders and on electioneering communications improperly "coordinated" with political candidates, even though Justices Kennedy and Rehnquist voted

to uphold these specific provisions.[224] Thomas would have gone even further and invalidated provisions designed to prevent "anonymous" attack ads by requiring disclosure of the sponsor of electioneering communications.[225]

Scalia and Thomas would also turn back the clock on other kinds of political accountability. Scalia was the lone dissenter in 1988 when the Court upheld the constitutionality of federal special prosecutor laws. (*Morrison v. Olson*)[226] While many have questioned the wisdom of the most recent special prosecutor law, a Scalia majority would absolutely forbid any federal special prosecutor who could not be fired by the president, seriously limiting the ability to protect against presidential and other high-level misconduct in the future. In addition, Scalia and Thomas dissented from a 1995 ruling that, while states can set term limits for state elected officials, they cannot do so with respect to federal officials, who are governed by the Constitution. (*U.S. Term Limits v. Thornton*)[227] With one more vote, Scalia and Thomas' dissent would become law and the nation's most experienced and seasoned elected officials could be barred from office. In 1992 Justice Scalia dissented from a ruling that protected citizens' right to form new political parties and invalidated a signature requirement that would violate voters' right of access to a county ballot. (*Norman v. Reed*)[228] And finally, a 1986 dissent by Justice Scalia supported a state's closed-primary law. This view would not only make it much harder for insurgent candidates to win their party's nomination by courting crossover independent and minority party votes, but it would also restrict opportunities for voters who are not members of the two dominant parties to participate fully in the electoral process. (*Tashjian v. Republican Party of Connecticut*)[229]

Ten
FEDERALISM AND "STATES' RIGHTS"

In recent years, a 5-4 conservative majority on the Supreme Court that includes Scalia and Thomas has issued more and more decisions overturning acts of Congress meant to protect Americans' rights and safety, especially as applied to state employees, in the name of federalism or "states' rights." The laws struck down deal with issues ranging from the disposal of radioactive wastes to gun control to protection for women and for religious minorities. From 1995 to 2000 alone, the Court invalidated in whole or in part more than 22 laws passed by Congress, in contrast to the 128 struck down during the first 200 years of the Constitution.[230] Using what amounts to a judicial veto, the Court has been overturning acts of Congress at an accelerated rate 6.5 times faster than during the first 200 years. Between 1987, when Rehnquist became Chief Justice, and 2002, the Court has struck down in whole or in part some 33 federal laws.[231] This assertion of judicial power has been called "one of the most important constitutional shifts in decades."[232] One Supreme Court expert has stated that "[n]ot since before the 1937 constitutional crisis over the court's invalidation of progressive New Deal legislation has a bare majority been so bent on reining in Congress."[233]

If Justices who share the views of Scalia and Thomas controlled the Supreme Court, however, this problem would become even worse. Congressional legislation concerning gun control provides a key example. In 1995, a 5-4 majority (including Scalia and Thomas) struck down the Gun Free School Zones Act, which prohibited the possession of firearms

within 1,000 feet of schools. (*United States v. Lopez*)[234] To reach this result, the majority dramatically reinterpreted and limited Congress' power under the Constitution's Commerce Clause, ruling that Congress had no authority to pass the law. As Justice Breyer's dissent pointed out, the majority's ruling not only overturned a particular law aimed at combating violence in our nation's schools, but it also called into question at least 25 other long-standing criminal statutes, including a federal law forbidding possession of machine guns.[235] Justice Thomas' separate concurrence contended that the Court should go even further in restricting Congress' ability to pass such laws.[236]

In 1997, Scalia and Thomas joined another 5-4 decision, this one striking down the part of the Brady Act that called on state officials to conduct background checks on handgun purchasers until a national system was in place. (*Printz v. United States*)[237] Justice Thomas' concurring opinion suggested that the entire Brady Act and all other gun control legislation was beyond Congress' power, and that the Court should consider that question in the future.[238] A Thomas-Scalia majority would further restrict Congress' authority and could stop any and all federal gun control legislation. Certainly this is what the NRA (National Rifle Association) believes. Prior to the 2000 election, the first vice president of the NRA, Kayne Robinson, said that the election of George W. Bush would ensure "a Supreme Court that will back us to the hilt."[239]

Civil rights provides another example of the Court's use of a bare 5-4 majority to overrule Congress and the further dangers of a Scalia-Thomas Court. As discussed above, Justice Thomas' concurring opinion in *Kimel v. Florida Board of Regents* (2002)[240] shows that he favors making it even harder than the majority did for Congress to apply laws like the Age Discrimination in Employment Act to the states. Similarly, a 1999 Thomas-Scalia-Rehnquist dissent contended "federalism" should limit Congress' ability to protect people with disabilities against discrimination or mistreatment by state governments. (*Olmstead v. L.C.*)[241] In fact, a narrow 5-4 decision in *Board of Trustees at Univ. of Alabama v. Garrett* (2001)[242] ruled unconstitutional the part of the ADA that authorized disabled state employees to recover damages for illegal discrimination by state agencies. One more vote with Scalia and Thomas would have extended *Garrett* even further and ruled unconstitutional the part of the ADA authorizing damages against states that deny disabled persons access to state courts in *Tennessee v. Lane* (2004).[243]

A 2000 Court decision overturning congressional legislation offers yet another example. A 5-4 majority struck down the portion of the Violence Against Women Act that provides a federal remedy for victims of sexual assault and violence. (*United States v. Morrison*, 2000)[244] The Court ruled that Congress could not pass the law under its power to regulate activity that substantially affects interstate commerce, despite what Justice Souter characterized as a "mountain of data assembled by Congress ... showing the effects of violence against women on interstate commerce."[245] Justice Thomas indicated that he would go even further than the majority and would forbid such laws even where such substantial effects clearly exist.[246]

Two more votes in accordance with the Scalia-Thomas decision would have declared unconstitutional the provision of the Family and Medical Leave Act (FMLA) authorizing

state employees to recover damages for violations of their rights under FMLA, reversing the decision in *Nevada Department of Human Resources v. Hibbs* (2003).[247] Not even Chief Justice Rehnquist joined the dissent in that case. Justice Scalia wrote a separate dissent in *Hibbs*, arguing that Congress must provide evidence of improper conduct by *each individual state* as to which federal laws are to apply, a requirement that would further hobble congressional efforts to protect Americans' rights.

Scalia and Thomas have expressed negative views of Congress even off the bench. Scalia suggested, in a 2000 speech, that even though the Court has usually presumed that acts of Congress comply with the Constitution, "perhaps that presumption is unwarranted."[248] This statement came in response to Congress' recent adoption of provisions directing expedited review of statutes that Congress suspected might be struck down by the high Court, and Congress can rightly be criticized for sometimes failing to consider thoroughly the constitutionality of its laws. Even so, particularly for a Justice who otherwise talks about the importance of judicial restraint, these statements by Scalia suggest a frightening willingness to go even further than the current Court majority in overturning congressional enactments. Even before his nomination to the Court, Justice Thomas labeled Congress as "out of control."[249] Such statements leave little doubt that a Scalia-Thomas Supreme Court would act to further restrict Congress' power to enact additional laws to protect our rights, liberties, health, and safety.

Just one more in accord with the position of Scalia and Thomas would have forbidden federal courts from deciding challenges to discriminatory and unconstitutional state tax laws. In *Hibbs v. Winn* (2004),[250] the Court ruled 5-4 that the federal Tax Injunction Act does not prohibit federal courts from deciding challenges to the constitutionality of state tax laws and ordering injunctions or other relief, explaining that the law only forbids challenges where state taxpayers try to get federal court orders allowing them to avoid paying taxes. Justices Scalia and Thomas joined a dissent by Justice Kennedy arguing that the statute forbids all federal court challenges to state tax laws, even if those laws violate the Constitution by discriminating on the basis of race or promoting religion.

Ironically, Justices Scalia and Thomas have sometimes strikingly departed from the deference otherwise shown to "states' rights." The most notable example has been *Bush v. Gore*, (2000),[251] where the 5-4 "states' rights" majority, including Scalia and Thomas, overturned a Florida Supreme Court decision that had construed state election laws to permit the manual recount of presidential election ballots under the circumstances and procedures set out in the state court's decision. The ruling in *Bush v. Gore* prompted Justice Stevens to write in one of the four dissents issued: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as the impartial guardian in the rule of law."[252] In an earlier 5-4 ruling in the case, the Court stopped Florida's recount until a decision could be reached on the merits. Scalia not only joined the majority but also issued a separate concurrence stating that counting the votes threatened "irreparable harm" to George W. Bush "by casting a cloud upon what he claims to be the legitimacy of his election." In dissent, Justice Stevens, joined by Souter, Ginsburg, and Breyer, responded that "[p]reventing the recount from being completed will inevitably cast a cloud on the legitimacy of the election."[253]

NOTES

[1] *See, e.g.,* R. Acosta, "In 2000 the Supreme Court is at Stake Too," *The Wall Street Journal* (Aug. 23, 1999) at A15; G. Rees, "Bush, McCain and the Judges," *Washington Times* (March 7, 2000); D. Polman, "In Campaign, Both Sides See Hot Issue in High Court," *Philadelphia Inquirer* (Nov. 28, 1999); R. Kennedy, "The Bush Court," *American Prospect* (Nov. 23, 1999).

[2] *Roe v. Wade*, 410 U.S. 113 (1973).

[3] *See, e.g., Allen v. State Board of Elections*, 393 U.S. 544 (1969); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977).

[4] *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954).

[5] *See, e.g., Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

[6] *See, e.g.,* M.L.B. *v.* S.L.J., 519 U.S. 102 (1996).

[7] *Quoted in* P. Gigot, "Meet the Real Right-Wing Conspiracy," *The Wall Street Journal* (July 16, 1999).

[8] *See, e.g.*, Kennedy, *supra*; "Chief Justice Souter?" *The Wall Street Journal* (February 29, 2000); P. Gigot, "Meet the Real Right-wing Conspiracy," *The Wall Street Journal* (July 16, 1999); J. McGinnis, "Original Thomas, Conventional Souter," *Policy Review* (Fall, 1995) at 28.

[9] *See* F. Barnes, "Bush Loves Scalia," *Weekly Standard* (July 5/July 12, 1999) at 16; *Christian Science Monitor* (February 1, 2000) at 13. Bush also noted his esteem for Scalia and Thomas during interviews on NBC's "Meet the Press" (Nov. 21, 1999), CBS' "Face the Nation" (Jan. 30, 2000) and ABC's "This Week" (Jan. 23, 2000). *See also* Patty Reinert, "Defection Could Derail Efforts to Push Judiciary Further Right," *The Houston Chronicle*, (May 27, 2001) at 16.

[10] People For the American Way Foundation, "The Approaching Armageddon on Judicial Nominations," January 6, 2003. *See also* People For the American Way Foundation, "President Bush, the Senate and the Federal Judiciary: Unprecedented Situation Calls for Unprecedented Solution," October 17, 2001.

[11] The methodology used to prepare this report was straightforward. We performed an initial review of every dissent and concurrence authored by Justices Scalia and Thomas during their tenure on the Supreme Court. Cases were excluded that dealt with criminal law and procedural issues, as well as cases that dealt primarily with technical procedural cases or legal issues with extremely narrow or limited application and cases in which the dissent or concurrence did not differ from the majority holding in any appreciable way. The remaining cases were then carefully reviewed to determine the impact that the view expressed in the dissent or concurrence would have, were it to become the majority opinion of the Court. Significant cases concerning environmental law issues were reviewed separately. The results of these reviews constitute the bulk of this report. In a few cases, including cases decided since 2000, we have augmented our discussion of a particular subject matter by including mention of cases in which Scalia or Thomas joined another Justice in dissent or concurrence, but we did not conduct a comprehensive review of these types of decisions. Our exclusion of criminal cases from this report should in no way be interpreted as a sign that a Scalia-Thomas Court would preserve constitutional protections in this important area of the law — in fact such a majority would dramatically diminish important constitutional principles and protections.

[12] 505 U.S. 577 (1992).

[13] 505 U.S. at 609-631.

[14] 505 U.S. at 632-636.

[15] 505 U.S. at 622-626.

[16] *Holder v. Hall*, 512 U.S. 874 (1994) at 948 (Blackmun, J., joined by Souter, Stevens and Ginsburg,

JJ., dissenting.), *quoting South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

[17] The specifics of the potential impact of the Thomas-Scalia opinion in *Holder v. Hall*, were it to become a majority holding of the Court, are discussed in more detail in Section 3.

[18] 410 U.S. 113 (1973).

[19] 492 U.S. 490, 532 (1989).

[20] 505 U.S. 833 (1992) at 979-1002.

[21] 497 U.S. 417, 479 (1990).

[22] 497 U.S. 502, 520 (1990).

[23] 492 U.S. at 535.

[24] 505 U.S. at 984.

[25] 530 U.S. 914 (2000).

[26] 519 U.S. 357, 385 (1997).

[27] 512 U.S.753, 784 (1994).

[28] 530 U.S. 703 (2000)

[29] 119 S.Ct. 387 (1998) (*Scalia, J. concurring in denial of petition for writ of certiorari*).

[30] 520 U.S. 1133 (1997) (*Scalia, J. joined by Kennedy, and Thomas, J.J., dissenting from denial of petition for writ of certiorari*).

[31] 515 U.S. 1110 (1995) (*Scalia, J. concurring in denial of petition for writ of certiorari*).

[32] 512 U.S. 1253 (1994) (*Scalia, J. joined by Kennedy, and Thomas, J.J., dissenting from denial of petition for writ of certiorari*).

[33] 497 U.S. 261, 292-301 (1990).

[34] 381 U.S. 479 (1965).

[35] 532 U.S. 67 (2001).

[36] 531 U.S. 32 (2000).

[37] *Holder v. Hall*, 512 U.S. 874, 891 (1994). *See also Johnson v. De Grandy*, 512 U.S. 997 (1994) (decided the same day).

[38] *Holder*, 512 U.S. at 963-965.

[39] 393 U.S. 544 (1969).

[40] 393 U.S. at 566.

[41] 393 U.S. at 567.

[42] 478 U.S. 30 (1986).

[43] *Decided with Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

[44] 400 U.S. 379 (1971).

[45] 411 U.S. 526 (1973).

[46] 430 U.S. 144 (1977).

[47] 501 U.S. 380 (1991).

[48] 501 U.S. 419 (1991).

[49] 532 U.S. 234 (2001).

[50] 517 U.S. 186, 253 (1996).

[51] *See* 517 U.S. at 247-266.

[52] 517 U.S. at 220.

[53] 521 U.S. 567, 583 (1997).

[54] 124 S.Ct. 1769 (2004)

[55] 478 U.S. 109.

[56] 518 U.S. 515, 566 (1996).
[57] 511 U.S. 127 (1994).
[58] 511 U.S. at 157-162.
[59] 510 U.S. 17 (1993).
[60] 510 U.S. at 24.
[61] 524 U.S. 775, 810 (1998).
[62] 524 U.S. 742, 766 (1998).
[63] 124 S. Ct. 2342, 2357 (2004).
[64] 526 U.S. 629, 654 (1999).
[65] 499 U.S. 400, 417 (1991).
[66] 523 U.S. 392, 403 (1998).
[67] 500 U.S. 614, 644 (1991).
[68] 500 U.S. 467 (1992).
[69] 503 U.S. at 502.
[70] 505 U.S. 717, 757-8 (1992).
[71] 505 U.S. at 745-749.
[72] 347 U.S. 483 (1954).
[73] 515 U.S. 70, 121-123.
[74] 125 S.Ct. 1141 (2005)
[75] 532 U.S. 275 (2001).
[76] 532 U.S. at 294.
[77] 2003 U.S. LEXIS 5013 (2003). Justice O'Connor concurred in the result in *Lawrence* on equal protection grounds and voted not to overturn *Bowers*.
[78] 478 U.S. 186 (1986).
[79] 517 U.S. 620 (1996).
[80] 2003 U.S. LEXIS 5013 (2003) at 72.
[81] 517 U.S. at 644-51.
[82] 518 U.S. 1001 (1996) (*opinion by Scalia, J. joined by Thomas, J. and Rehnquist, C.J., dissenting from grant of petition for writ of certiorari*).
[83] 486 U.S. 592 (1988).
[84] 524 U.S. 624, 657 (1998).
[85] 119 S.Ct. 2176, 2194 (1999).
[86] 535 U.S. 391 (2002).
[87]534 U.S. 279 (2002).
[88] 514 U.S. 725 (1995).
[89] 514 U.S. at 739.
[90] 484 U.S. 305, 333 (1988).
[91] *See* 526 U.S. 66, 79-84 (1999).
[92] 526 U.S. 66 (1999).
[93] 507 U.S. 604, 617 (1993). Thomas joined in a similar concurring opinion in *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005)
[94] 528 U.S. 62 (2000).
[95] 540 U.S. 581 (2004).
[96] 493 U.S. 165, 174 (1989).

[97] 526 U.S. 489, 521-28 (1999).
[98] 503 U.S. 1, 17 (1992).
[99] 536 U.S. 730, 734-35, 738, 741 (2002).
[100] 71 U.S.L.W. 4387 (2003).
[101] 537 U.S. 465 (2003).
[102] 531 U.S. 288 (2001).
[103] 535 U.S. 137 (2002).
[104] 533 U.S. 289 (2001).
[105] 533 U.S. 678 (2001).
[106] 123 S.Ct. 1708 (2003).
[107] 533 U.S. 53 (2001).
[108] *Johnson v. Transportation Agency*, 480 U.S. 616, 657 (1987).
[109] In fact, in a recent majority opinion Justice O'Connor, wrote, "Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' (citations omitted) The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995).
[110] 2003 U.S. LEXIS 4800 (2003).
[111] *See Adarand Constructors*, 515 U.S. at 239-241; *Croson*, 488 U.S. 469, 520-521 (1989).
[112] 515 U.S. at 239; 488 U.S. at 520.
[113] 488 U.S. at 499.
[114] 488 U.S. at 524.
[115] 515 U.S. at 239.
[116] 2003 U.S. LEXIS 4800 (2003) at 123-24.
[117] 515 U.S. at 241.
[118] 515 U.S. at 240.
[119] Justice Scalia Says War Justifies Rights' Recess, *Associated Press*, March 18, 2003.
[120] 124 S.Ct. 2686 (2004)
[121] Id. at 2711
[122] 124 S.Ct. 2633 (2004)
[123] Id. at 2671 (Opinion of Justices Scalia and Stevens)
[124] Id. at 2650. Scalia and Thomas were part of a narrow 5-4 majority that avoided a ruling on the merits of a claim by another indefinitely detained U.S. citizen and alleged enemy combatant, who was apprehended at O'Hare Airport in Chicago, but who the Court ruled had brought his claim in the wrong court. *Rumsfeld v. Padilla*, 2004 U.S. Lexis 4759 (2004)
[125] 505 U.S. at 631-647.
[126] 505 U.S. at 641-646.
[127] 530 U.S. 290 (2000).
[128] 482 U.S. 578, 610-40 (1987).
[129] 530 U.S. 1251 (2000). The same three Justices suggested they would authorize municipal displays of the Ten Commandments despite the decision in *Stone v. Graham* 449 U.S. 39 (1980), in dissenting from the denial of review in *City of Elkhart v. Books*, 532 U.S. 1058 (2001).
[130] 508 U.S. 385, 397-401 (1993).
[131] 505 U.S. at 636.
[132] 505 U.S. at 637-40.

[133] 508 US. 520 (1993).
[134] *Church*, 508 U.S. at 558; *Edwards*, 482 U.S. at 636-39.
[135] See Thomas' opinion in *Elk Grove Unified School Dist. v. Newdow* , 124 S. Ct. 2301, 2330-33 (2004).
[136] 536 U.S. 639 (2002).
[137] 530 U.S. 793 (2000).
[138] 119 S.Ct. 2357 (1999) at 2357-58.
[139] 124 S.Ct 1307 (2004)
[140] 512 U.S. 687 (1994) at 732-51.
[141] 489 U.S. 1 (1989) at 29-45.
[142] 505 U.S. 123 (1992) at 138-43.
[143] 123 S.Ct. 1536 (2003).
[144] 514 U.S. 334 (1995). *See* 514 U.S. at 358-69 *(Thomas, J., concurring)* and at 371-85 *(Scalia, J., joined by Rehnquist, C.J., dissenting)*.
[145] 504 U.S. 191, 214-15 (1992).
[146] 504 U.S. at 217, 228.
[147] 518 U.S. 727, 812 (1996).
[148] 518 U.S. at 816-817.
[149] 493 U.S. 215, 243, n.1 (*Brennan, J., concurring*); and at 250-65 (*Scalia, J., concurring and dissenting*).
[150] 535 U.S. 425 (2002).
[151] 507 U.S. 410, 438 (1993).
[152] 532 U.S. 514 (2000).
[153] 535 U.S. 234 (2002).
[154] 124 S. Ct. 2783 (2004)
[155] 481 U.S. 221 (1987) at 235-38.
[156] 524 U.S. 569 (1998).
[157] 524 U.S. at 599-600.
[158] Scalia and Thomas joined the plurality opinion in *United States v. American Library Association*, 2003 U.S. LEXIS 4799 (2003), which suggested that restrictions on Internet access at public libraries should not be subjected to heightened scrutiny under the First Amendment.
[159] 531 U.S. 533, 556 (2001).
[160] 391 U.S. 367 (1968).
[161] 501 U.S. 560 (1991) at 572-81.
[162] 120 S.Ct. 1382 (2000) at 1400-01.
[163] 119 S.Ct. 1849 (1999).
[164] 119 S.Ct. at 1861.
[165] 521 U.S. 642 (1997).
[166] 500 U.S. 322 (1991) at 333-43.
[167] 504 U.S. 451 (1992) at 486-504.
[168] 123 S.Ct. 1855 (2003).
[169] 536 U.S. 355 (2002).
[170] 505 U.S. 504 (1992).
[171] 517 U.S. 484-518 (1996).
[172] 533 U.S. 525 (2001).
[173] 497 U.S. 62 (1990) at 92-115.

[174] 518 U.S. 712 (1996).
[175] 518 U.S. 686 (1996).
[176] 523 U.S. 574 (1998) at 611-12.
[177] 513 U.S. 454, 489 (1995) (*Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting.*)
[178] 483 U.S. 378 (1987) at 394-401.
[179] 494 U.S. 775 (1990) at 800-19.
[180] 500 U.S. 507 (1991) at 550-62.
[181] 516 U.S. 489, 516 (1996).
[182] 489 U.S. 101 (1989) at 119-20.
[183] 537 U.S. 149 (2003).
[184] *See, e.g., Nollan v. California Coastal Commission* 483 U.S. 825 (1987) *Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Solid Waste Agency of Northern Cook County v. United States Army Corps. Of Engineers*, 531 U.S. 159 (2001).
[185] *See, e.g., Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992) and *Steel Co. v. Citizens for a Better Environment* 523 U.S. 83 (1998).
[186] 120 S.Ct. 693 (2000).
[187] 120 S.Ct. at 701-702.
[188] 120 S.Ct. at 713-714.
[189] 120 S.Ct. at 701-702.
[190] 120 S.Ct. at 713-15.
[191] 511 U.S. 809 (1994).
[192] 511 U.S. at 817-819, 821-24.
[193] 124 S.Ct. 983
[194] 511 U.S. 700, 724 (1994).
[195] 515 U.S. 687, 714 (1995).
[196] 516 U.S. 955 (1995) (*Thomas, J., dissenting from the denial of petition for writ of certiorari*).
[197] 480 U.S. 572 (1987) at 607-14.
[198] 510 U.S. 1207 (1994) (*Scalia, J., joined by O'Connor, J., dissenting from denial of petition for writ of certiorari*).
[199] 529 U.S. 725 (1997).
[200] 535 U.S. 302 (2002).
[201] 511 U.S. 244 (1994) at 286-8.
[202] 524 U.S. 11 (1998).
[203] 524 U.S. at 32-37.
[204] 534 U.S. 61 (2001).
[205] 71 U.S.L.W. 4387 (2003).
[206] 124 S. Ct. 1284 (2004)
[207] 519 U.S. 102 (1996).
[208] 351 U.S. 12 (1956).
[209] 519 U.S. at 111 (*quoting Ross v. Moffit*, 417 U.S. 600, 607 (1974).
[210] 123 S.Ct. 1406 (2003).
[211] 124 S.Ct. 2739 (2004)
[212] 521 U.S. 399 (1997).
[213] 521 U.S. at 414.
[214] 521 U.S. at 405-406.

[215] 120 S.Ct. 897 (2000).
[216] 424 U.S. 1 (1976).
[217] 120 S.Ct. at 916.
[218] 518 U.S. 604, 631 (1996).
[219] 533 U.S. 431 (2001).
[220] 2003 U.S. LEXIS 4595 (2003).
[221] 494 U.S. 652 (1990).
[222] 2003 U.S. LEXIS 9195 (2003) at 34; *Opinion of Justice Thomas*.
[223] 2003 U.S. LEXIS 9195 (2003)
[224] 2003 U.S. LEXIS 9195 (2003); *Opinion of Justice Scalia at 297-98; Opinion of Justice Thomas at 326; Opinion of Justice Kennedy at 363*.
[225] 2003 U.S. LEXIS 9195 (2003); *Opinion of Justice Thomas at 346-349*.
[226] 487 U.S. 654, 697 (1988).
[227] 514 U.S. 779 (1995).
[228] 502 U.S. 279, 296 (1992).
[229] 479 U.S. 208, 234 (1986).
[230] *See* S. Waxman, "Defending Congress in the Courts," Keynote Address at 7th Circuit Judicial Conference (May 1, 2000) at 1-2. Since Solicitor General Waxman's speech, the Court also struck down parts of the Violence Against Women Act, as discussed in the text of this report.
[231] J. Raskin, *Overruling Democracy* (2003) at 5
[232] E. Palmer, "Supreme Court Favors States in Age Bias, Gender Cases," *Congressional Quarterly* (Jan. 15, 2000) at 80 (*quoting* A.E. Dick Howard, professor of law at University of Virginia).
[233] D. O'Brien, "Justice: Supreme Court Can No Longer Duck the Big Issues," *Los Angeles Times* (Oct. 3, 1999).
[234] 514 U.S. 549 (1995).
[235] 514 U.S. at 630.
[236] 514 U.S. at 584-602.
[237] 521 U.S. 898 (1997).
[238] 521 U.S. at 936-39.
[239] John Mintz, "In Bush, NRA Sees White House Access," *The Washington Post*, May 4, 2000, at A1.
[240] 120 S.Ct. 631, 654 (2000).
[241] 119 S.Ct. 2176, 2198-99 (1999).
[242] 531 U.S. 356 (2001).
[243] 124 S.Ct. 1978 (2004).
[244] 529 U.S. 598 (2000).
[245] 529 U.S. at 628-29.
[246] 529 U.S. at 627.
[247] 123 S.Ct. 1972 (2003).
[248] "Scalia Criticizes Congress," *Los Angeles Times*, April 18, 2000.
[249] C. Thomas, Speech to University of Virginia Federalist Society (March 5, 1988) at 13.
[250] 124 S.Ct. 2276 (2004)
[251] 531 U.S. 98, 128-29 (2000).
[252] 531 U.S. 1046, 1047 (2000).
[253] 531 U.S. at 1048.

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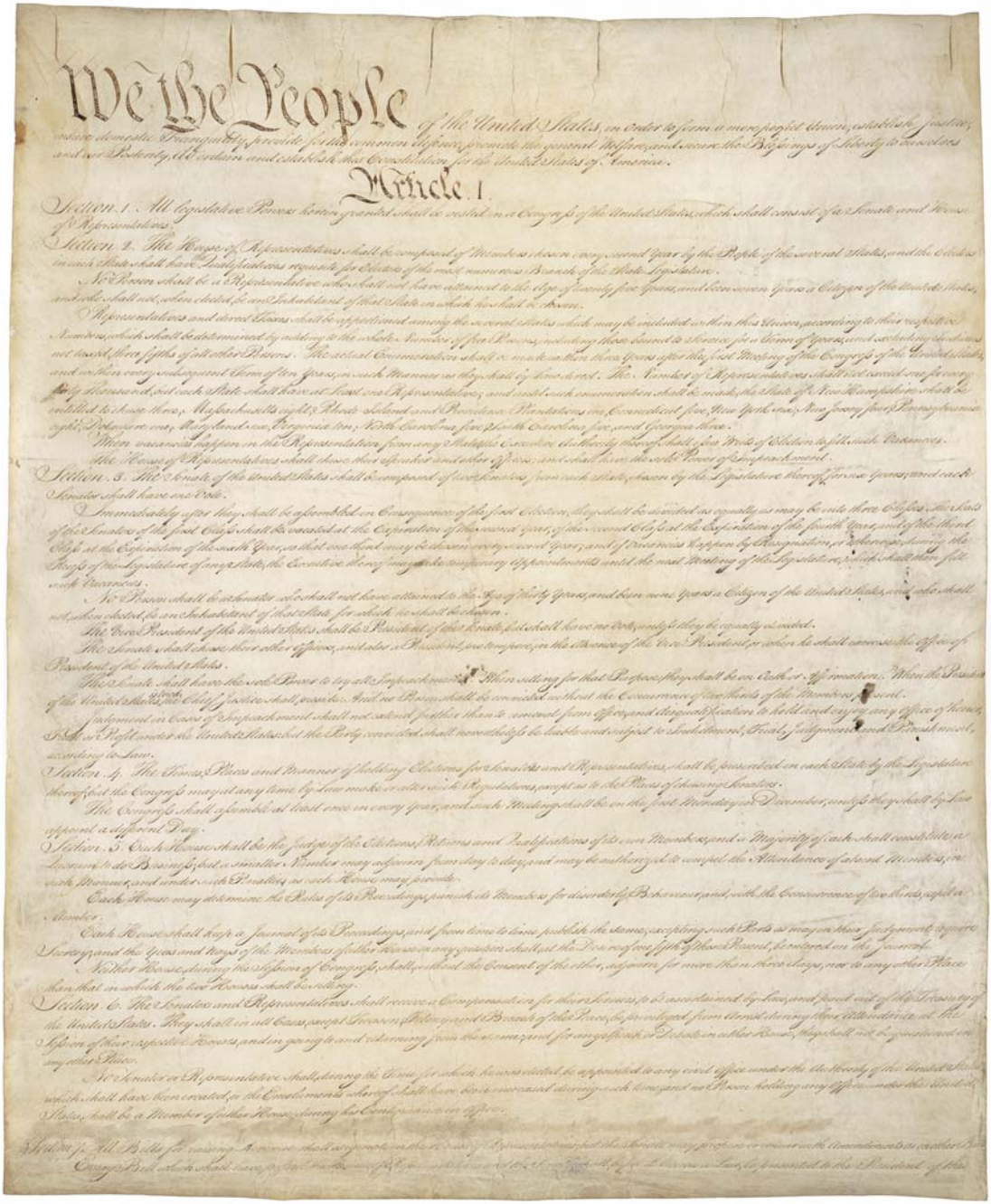
We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the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

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at least one Representative; and until such Enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during the Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the

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