People For the American Way Report

Opposing the Confirmation of

Michael W. McConnell to the

United States Court of Appeals for the

Tenth Circuit

September 17, 2002

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PEOPLE FOR THE AMERICAN WAY REPORT IN OPPOSITION TO THE CONFIRMATION OF MICHAEL W. McCONNELL TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

In evaluating the nomination of Michael W. McConnell, there is no question that he possesses the intellectual ability and technical legal skills to be a federal judge. People For the American Way and People For the American Way Foundation have worked closely with, and in some cases against, McConnell on religious liberty issues on several occasions, and we have great respect for his intellect and legal skills. But these important prerequisites are clearly not sufficient for an individual to be confirmed to a lifetime position on the federal appellate bench. No one can seriously question that President Bush and his advisors were influenced by McConnell's well-known legal philosophy and ideology in nominating him. By the same token, as more than 200 law professors have written to the Senate Judiciary Committee, Senators should consider whether a nominee has demonstrated an "open mind to decision-making" and a "record of commitment to the progress made on civil rights, women's rights, and individual liberties."[1]

Based on our review of McConnell's record as a law professor and as an attorney, it is clear that McConnell does not satisfy those important criteria for a powerful lifetime appointment to the Tenth Circuit Court of Appeals. To the contrary, McConnell has strongly opposed key principles and precedents that protect civil rights and liberties, including the Supreme Court's decisions in Bob Jones University v. United States and Roe v. Wade and the principle of one-person, one vote. He has promoted a significant re-interpretation of the First Amendment that would substantially weaken the separation of church and state, give preferential treatment to religion, and authorize direct government funding of religion. And he has advocated overruling or evading significant precedents with which he disagrees. McConnell's philosophy and ideology on these important matters place him well outside the mainstream on these issues and threaten to interfere with his ability to function as a neutral, effective judge. If McConnell were confirmed, his views would jeopardize the rights and freedoms of individual Americans, particularly since the federal courts of appeal are the courts of last resort in virtually all cases.

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[1] These are two of the criteria for evaluating a judicial nominee suggested by more than 200 law professors in a letter sent to the Senate Judiciary Committee in July 2001. As these professors explained, no federal judicial nominee is presumptively entitled to confirmation. Because federal judicial appointments are for life and significantly affect the rights of all Americans, and because of the Senate's co-equal role with the President in the confirmation process, nominees must demonstrate that they meet the appropriate criteria.

This report reviews McConnell's record as a law professor and an advocate in four areas: civil rights, reproductive freedom, religious liberty, and the role of precedent.[2] It focuses on law review and other articles he has written, as well as a number of his legal briefs and arguments in court. This review strongly supports the conclusion that McConnell does not meet critical criteria for a lifetime appointment to the federal court of appeals, the second highest court in the country, and that the Senate Judiciary Committee should reject his confirmation.

I. McConnell's Disturbing Views On Many Civil Rights Issues Would Threaten Key Civil Rights Protections

Among the many subjects he has pursued, McConnell has written extensively on a number of civil rights issues. Much of his writing and advocacy concerning civil rights, however, is extremely troubling. He has strongly criticized a number of landmark civil rights precedents and principles, such as one-person, one-vote and Bob Jones University v. United States. He has supported efforts to limit congressional authority to protect civil rights. And he has argued for weakening both statutory and constitutional protections against discrimination based on race, gender, and sexual orientation. McConnell's record not only fails to show a commitment to civil rights progress, but instead demonstrates active opposition to key civil rights principles.

- **McConnell has advocated permitting even blatant, intentional discrimination by some groups, contradicting important Supreme Court precedent**

A key civil rights principle is that protection against discrimination through civil rights statutes applies not only to improper actions by government, but also by non-government groups, organizations, and individuals. In a number of situations, however, McConnell has argued against this principle, even when blatant, intentional discrimination is involved.

Perhaps the most troubling example concerns Bob Jones University v. United States, 461 U.S. 574 (1983). In that case, the Supreme Court ruled that the IRS could properly revoke the charitable tax exemption of a private university that was committing racial discrimination by banning interracial dating among its students. The Bob Jones case became especially notorious as a result of the attempt by the Reagan Administration to revoke the relevant IRS rule. That rule, which was "[b]ased on the 'national policy to discourage racial discrimination in education,'" provided that "'a [private] school not having a racially nondiscriminatory policy as to students is not 'charitable' within the

[2] McConnell has been a law professor specializing in constitutional law since 1985, and currently teaches at the University of Utah College of Law. He previously worked in the Office of the Solicitor General and the Office of Management and Budget. He is affiliated with the law firm of Mayer, Brown & Platt, and primarily represents clients in selected cases involving issues of interest to him, particularly religious liberty. He is a prolific writer who has published numerous articles, and is a member of the Federalist Society, the Constitutional Law Section of the Association of American Law Schools, and other organizations.

common laws concepts'" reflected in the pertinent provisions of the Internal Revenue Code. 461 U.S. at 579 (emphasis added) (quoting IRS Revenue Ruling 71-447). All nine Justices (including then-Justice Rehnquist who dissented on other grounds) specifically rejected Bob Jones' claim that its religious beliefs could justify its blatant race discrimination while it retained tax exempt status, and the Court explained that the government had a compelling interest in combating such discrimination.[3]

More than a decade after the widely accepted ruling in Bob Jones, however, McConnell criticized it for failing to allow the university's religious claims to trump civil rights protections. In a 1997 article, McConnell specifically included the Court's decision to allow the government to "revoke tax-exempt status for fundamentalist schools that forbid interracial dating" as one of several "egregious examples" of the Court's failure to "intervene to protect religious freedom from the heavy hand of government." "The Supreme Court 1997: A Symposium," 76 First Things at 32 (Oct. 1997). Several years earlier, McConnell had similarly written that the "racial doctrines of a Bob Jones University" should have been "tolerated," even though he admitted they were "abhorrent," because they were "church teachings."[4] McConnell's description of the landmark Bob Jones ruling as "egregious" and his apparent condoning of blatant race discrimination by a group receiving a government tax exemption are extremely disturbing.[5]

Bob Jones, however, is far from the only situation in which McConnell has claimed that the preferences of a group or individual, whether based on religion or not, should be able to trump anti-bias laws. In a 2000 article, McConnell raised concerns about the Supreme Court's decision in Roberts v. United States Jaycees, 468 U.S. 609 (1984). In that case, the Court ruled that the Jaycees' policy of blatantly excluding women from regular membership was illegal under anti-discrimination laws and could not be justified as freedom of association protected by the First Amendment. McConnell conceded that the government "might" be justified in applying such laws to the Jaycees itself, because it was "essentially a business networking organization." But "most private noncommercial groups," McConnell argued, "should be allowed to constitute and govern themselves," despite anti-bias laws. McConnell, "The Problem of Singling Out Religion," 50 DePaul L. Rev. 1, 45-46 (Fall 2000)("DePaul").

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[3] Rehnquist dissented from the Court's judgment based on his belief that Congress had not taken action to deny tax exempt status to racially discriminatory schools. 461 U.S. at 612. But he specifically noted that Congress had the power to do so and that "I agree with the Court that such a requirement would not infringe on petitioners' First Amendment rights." Id. at 622, n.3.

[4] McConnell, "The Religion Clauses of the First Amendment: Where is the Supreme Court Heading?" 32 Cath. Law 187, 201 (1989)("Religion Clauses").

[5] More recently, McConnell defended then-Senator John Ashcroft's controversial commencement speech at Bob Jones University, calling it "beautiful." D. Savage, "The Presidential Transition: 'No King but Jesus,' Ashcroft Told Bob Jones," Los Angeles Times (Jan. 13, 2001).

If accepted, this argument by McConnell could have devastating consequences. The Supreme Court has recognized the government's "compelling interest in eliminating discrimination against women," and that anti-bias laws like the one in Roberts serve "compelling state interests of the highest order." Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (internal citation omitted). If anti-discrimination laws as in Roberts were limited only to groups that were "essentially business networking organizations," women and minorities could be excluded from many organizations where business is nonetheless conducted and would suffer serious harm. For example, the Senate Judiciary Committee has condemned membership by judicial nominees and Members of Congress in discriminatory country clubs where meals are served or where club members bring professional associates to the club -- actions that do not transform them into "business networking organizations" but mean that discriminatory exclusion has harmful business-related consequences. See Senate Judiciary Committee Resolution (Aug. 2, 1990). McConnell's view would allow many organizations to exempt themselves from important anti-bias laws.

Although the courts have continued to apply the Roberts and Bob Jones principles, McConnell recently achieved partial success in his efforts to undermine those principles in Boy Scouts of America v. Dale, 530 U.S. 640 (2000). By a narrow 5-4 majority, the Court held in that case that under the First Amendment, the Boy Scouts' opposition to homosexuality trumped the application to them of the provisions of a New Jersey public accommodations law prohibiting discrimination based on sexual orientation. McConnell co-authored the brief for the Boy Scouts, and argued that the Court should not even consider whether the Boy Scouts in fact had a consistent, pre-existing policy on homosexuality, because, as a private group, it could "change those beliefs when it sees fit."[6] Justice Stevens' dissent was particularly critical of this point, noting that it threatens to leave the courts with "no way to mark the proper boundary between genuine exercises of the right to associate" and "sham claims that are simply attempts to insulate nonexpressive private discrimination." 530 U.S. at 687. According to McConnell, however, it was even "frightening to contemplate the possibility" that the dissenters' view in Dale could prevail.[7]

It is clear, moreover, that McConnell believes that groups and individuals should receive even greater ability to trump civil rights and other claims than recognized by the Court in Dale. In the 2000 article in which he criticized Roberts, McConnell called Dale a "hopeful move" in the right "direction." DePaul at 46. In several articles discussing laws prohibiting employment and other discrimination based on sexual orientation, moreover, McConnell has argued for additional exemptions from laws prohibiting intentional discrimination by private individuals and groups.

For example, in an article in a 1998 book on sexual orientation and human rights, McConnell acknowledged that the law should protect against governmental

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[6] Brief for Petitioners in Dale, 2000 WL 228616 at *27 (Feb. 28, 2000).

[7] "The Supreme Court 2000: A Symposium," 106 First Things at 37 (Oct. 2000) ("First Things (Oct. 2000)").

discrimination in the enforcement of criminal and other laws based on sexual orientation, but expressed significant doubt about laws prohibiting private discrimination in employment, housing, and other areas. McConnell, "What Would It Mean to Have a 'First Amendment' for Sexual Orientation?" in Sexual Orientation and Human Rights in American Religious Discourse (Olyan & Nussbaum ed. 1998)("Olyan") at 240-1, 252-3.[8] In any event, McConnell insisted that there should be a "respectable exception" from any such anti-bias laws "for those who wish to refuse to contract or associate on the basis of a conscientious (religious or non-religious) belief in the immorality of homosexuality." Id. at 254. This exception should apply, McConnell argued, to at least some corporations and businesses as well as individuals. Id. at 254-55. In other words, any such persons or companies could simply exempt themselves from anti-discrimination laws.

McConnell made a similar argument in criticizing the decision in Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown University, 536 A.2d 1 (D.C. 1987). In that case, the court ruled that under District of Columbia law prohibiting an educational institution from discriminating on the basis of sexual orientation, Georgetown University was required to grant equal access to campus facilities and services to a gay rights group. The court made clear that the university did not have to grant official recognition to the group, that the university had been voluntarily providing such access anyway, and that the university did not contend that providing access amounted to a forced subsidy of speech. Id. at 77, n.21, 118. Nevertheless, McConnell criticized the decision because it allegedly "forced" on the university the "acceptance of homosexuality as an alternative lifestyle." "Religion Clauses" at 201. According to McConnell, this was the equivalent of forcing Jim Crow laws on Berea College in 1908. Id. This was despite the fact that McConnell has agreed that public high schools should provide equal access to their facilities to gay rights groups. Olyan at 247-48. In other words, a non-government organization's preferences should once again trump anti-discrimination laws.

McConnell's views in this area are eerily reminiscent of much of the opposition in the 1950s and 1960s to civil rights laws. Integration was morally wrong, argued opponents, and those moral objections should prevail over court rulings and anti-bias laws. Based on the strong preferences of their customers, argued other opponents, businesses should be exempt from civil rights statutes. According to McConnell, the 21st Century equivalent of those claims should allow private individuals and groups to trump laws banning even blatant discrimination based on race, sex, and sexual orientation. McConnell's criticism of Bob Jones and Roberts and his advocacy of this position are extremely troubling.

- **McConnell has opposed key Supreme Court precedents protecting against sex discrimination while supporting decisions that harm women's rights**

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[8] See also McConnell, "Salt Lake City Deserves Credit for Wrestling with Gay Rights Ordinance," Salt Lake Tribune (Nov. 22, 1998) at AA6 (claiming that "'anti-discrimination' formula" actually "imposes on everyone a particular perspective on the morality of homosexual conduct").

In addition to Roberts, McConnell has criticized other important Supreme Court decisions that have helped combat sex discrimination and harassment. In 1998, the Court issued 7-2 rulings in two cases to help clarify that employers can be liable for sexual harassment by supervisors. See Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998). As McConnell acknowledged, even some groups representing employers praised the rulings for helping clarify the law. McConnell nonetheless criticized those rulings as losses for the "conservatives on the Court" that would result in "unleashing plaintiffs' lawyers on the nation's workplaces to enforce codes of civil behavior" and "fear and resentment" in the workplace.[9] This criticism by McConnell raises serious concerns about how McConnell as a judge would interpret and apply crucial legal provisions and precedents on sexual harassment.

McConnell has also attacked an important Court precedent upholding voluntary affirmative action to help combat sex discrimination. In Johnson v. Transportation Agency, Santa Clara County, Ca., 480 U.S. 616 (1987), the Court ruled 6-3 that a voluntary affirmative action plan taking gender into account in filling positions in "traditionally segregated" job categories where women had been "egregiously underrepresented" complied with Title VII of the 1964 Civil Rights Act. Id. at 631, 638 (interal citation omitted). The Court carefully noted that the plan was consistent with Title VII and past decisions approving voluntary affirmative action, did not involve quotas, and did not improperly harm male employees. Id. at 628-638. Nevertheless, McConnell criticized the decision as an example of "[j]udicial disregard for legislative intent" and as signifying "the Court's approval of employment quotas on the basis of race and sex."[10] McConnell's clear misreading and criticism of Johnson are extremely troubling.

On the other hand, McConnell has praised several narrow, 5-4 Court decisions that have seriously harmed women's rights. He commended as a "sensible decision" the Court's 5-4 holding in Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998), which severely limited the ability of students victimized by sexual harassment by a teacher to recover damages from the school district. As Justice Stevens' dissent pointed out, however, the majority's holding was "not faithful either to our precedents or to our duty to interpret, rather than to revise, congressional commands," id. at 293 (Stevens, J., dissenting) -- criteria that should have led a believer in original intent like McConnell to disagree with the decision.

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[9] McConnell, "The Supreme Court in 1998," 87 First Things (November 1998)("First Things 1998") at 37, 38.

[10] McConnell, "The Counter-Revolution in Legal Thought," Policy Review 18, 21 (Summer 1987). McConnell has similarly criticized the Supreme Court's decision upholding voluntary affirmative action with respect to minority employees in United Steelworkers v. Weber, 443 U.S. 193 (1979), claiming that it sanctioned "affirmative discrimination programs in favor of black workers." McConnell, "Affirmative Action after Teal," AEI Journal on Government and Society 38 (March/April, 1983), at 42 ("AEI").

In addition, McConnell has strongly praised the Court's 5-4 decision in United States v. Morrison, 529 U.S. 598 (2000), which struck down key parts of the federal Violence Against Women Act, while severely criticizing the law's enactment. Even before the Supreme Court's ruling, McConnell commended the appellate court decision invalidating the law as "unassailable," and suggested that the "hard question was why such a statute would ever be enacted" in the first place.[11] After the high Court's ruling, McConnell wrote an article praising it entitled "Lies, Damned Lies, and the 'Evidence' for the Violence Against Women Act," Salt Lake Tribune (June 4, 2000) at AA4. Notwithstanding the serious criticism of the 5-4 decision in Morrison, McConnell asserted that a contrary ruling would "twist the Commerce Clause beyond all recognition." He also attacked Congress' passage of the law itself, calling it a "redundant and symbolic statute, which only complicates the problem of crime." McConnell went so far as to claim that "much of the 'evidence'" accumulated by Congress in support of the act "is so false and distorted that it could serve as an update to How to Lie With Statistics." Id. Even if true, he asserted, Congress' evidence "does not prove anything of legal consequence" since "[m]ountains of nothing equal nothing." Id. Even beyond McConnell's disregard for women's rights, this apparent contempt of Congress and praise for rulings limiting its authority raise extremely disturbing concerns about McConnell's nomination, as discussed further below.

- **McConnell has severely criticized landmark Court rulings recognizing the "one-person, one-vote" principle and protecting against employment discrimination**

One of the most important civil rights principles recognized by the Supreme Court under the Fourteenth Amendment is the principle of "one person, one vote." This principle, which calls for election districts to be nearly equal in population in order to protect the equality of all voters in our democracy, has been called one of the most important guarantees of equality in our Constitution. See Wesberry v. Sanders, 376 U.S. 1, 8, 17-18 (1964)(majority opinion by Justice Black).

In an article prepared for a Federalist Society conference in 2000, however, McConnell lambasted this fundamental principle. The Court's "theory" in such cases, McConnell wrote, "was wrong in principle and mischievous in its consequences."[12] Although McConnell asserted that the Court could have achieved many of the benefits of its reapportionment decisions by basing them on the Constitution's Republican Form of Government Clause, he specifically attacked the Court's well-recognized decisions striking down malapportioned districts under the Equal Protection Clause. According to McConnell, it is "clear" that the Equal Protection Clause "was not originally understood

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[11] McConnell, "Rule of Law: Let the States Do It, Not Washington," The Wall Street Journal (March 29, 1999).

[12] McConnell, "The Redistricting Cases: Original Mistakes and Current Consequences," 24 Harv. J. L. & Pub. Pol'y 103, 104 (2000) ("Redistricting").

by its framers to encompass voting rights" at all, no matter what the circumstances. Id. at 110. He maintained that the Court's rulings have "twisted" the Fourteenth Amendment "out of its intended meaning" and produced "pernicious practical results." Id. at 117, 111.

Even McConnell has recognized that his views on "one person, one vote" are out of the mainstream. "There are no dissenters from that proposition on the Supreme Court, and there have been none for decades," he acknowledged. "Legislatures, litigants, judges, and academics all accept the proposition." Id. at 103. This recognition makes McConnell's attack on this fundamental principle all the more troubling.

McConnell has also suggested that the Constitution does not impose equal protection requirements on the federal government, contradicting Bolling v. Sharpe, 347 U.S. 497 (1954). In Bolling, the Court ruled that racial segregation in public schools in the District of Columbia was unconstitutional, explaining that the Due Process Clause of the Fifth Amendment imposes an equal protection requirement on the federal government similar to that imposed on the states by the Fourteenth Amendment. In a chapter in a recent book entitled What Brown v. Board of Education Should Have Said (Balkin ed. 2001), McConnell suggested that school segregation in D.C. should have been outlawed on non-constitutional grounds, but that the equal protection mandate was imposed by the Constitution through the Fourteenth Amendment "only on the states" and should not be required via the Fifth Amendment. Id., part II, chapter 7, at 164, 163. In that article and elsewhere, McConnell also makes the case that the "original intent" of the Fourteenth Amendment was consistent with the result, but not the rationale, of Brown v. Board of Education, 347 U.S. 483 (1954).

McConnell has also severely criticized yet another Supreme Court precedent crucial to the protection of civil rights. In its unanimous decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court recognized that employment practices that have a disparate impact in excluding minorities or women are illegal under Title VII, unless they are justified as promoting a business necessity. The importance of the Griggs principle in combating employment discrimination has been widely recognized on a bipartisan basis, including by Congress in reaffirming Griggs in enacting the Civil Rights Act of 1991.

Yet according to McConnell, the disparate impact standard is the "underlying problem" in employment discrimination law. AEI at 43. In this area, McConnell has written, Griggs was inconsistent with Congress' intent in Title VII and was "the first decision to abandon fairness of process." He claims that it "left employers to choose between two unpalatable alternatives –- either to engage in race-conscious hiring, or to lose their discretion over the establishment of job qualifications." Id. at 43-44. The experience of thousands of employers, as well as Congress' judgment, conclusively refute these extreme claims by McConnell.

- **McConnell has supported judicial efforts to limit Congress' authority to protect civil rights**

As discussed above, McConnell has vigorously supported the Court's decision striking down the Violence Against Women Act in Morrison and has criticized the congressional enactment of the law. But McConnell's praise for judicial limits on Congress' power to protect civil rights under the rubric of "federalism" goes well beyond Morrison itself. In 1998, McConnell wrote that the Court's "recent federalism decisions", although "controversial politically," are jurisprudentially "unexceptional," because they serve "constitutional principles that can be traced to the constitutional text and history."[13] This was despite significant criticism from both legal scholars and the dissenting justices in these 5-4 decisions that the majority's mandates, particularly with respect to the so-called sovereign immunity of state agencies, cannot properly be justified by the text and history of the Constitution.

In fact, McConnell has appeared to be critical of the dissenters for vigorously raising these concerns. He recently wrote that the 1999-2000 Term of the Supreme Court was "cause for celebration" because "[f]ederalism was strengthened."[14] The Court's 5-4 federalism decisions that term included not only Morrison, but also the holding in Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), that victims of age discrimination could not sue state agencies for damages under federal law. McConnell expressed concern about Justice Stevens' statement in dissent in Kimel that the Court's federalism and sovereign immunity rulings are "so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of our constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court."[15] One conclusion drawn by McConnell on this subject is clearly correct: "[w]hoever appoints the next few Justices will determine the meaning of the Constitution in dozens of important areas."[16] A similar conclusion applies to appellate court nominations like McConnell's.

Interestingly, McConnell has criticized one of the Court's recent federalism decisions. He has vigorously argued that the Court was wrong in striking down the Religious Freedom Restoration Act ("RFRA") in City of Boerne v. Flores, 521 U.S. 507 (1997). That federal law was an effort to counteract the Court's 1990 decision in Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)(discussed further below) and provide more protection against government practices that substantially burden the free exercise of religion. The statute was based on Congress' power under Section Five of the Fourteenth Amendment to enforce the provisions of that Amendment, including the protection of religious liberty incorporated from the First Amendment. McConnell maintained that in Boerne, the Court improperly failed to defer to Congress' findings and conclusions on the scope of the problem and the

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13 McConnell, "The Asymmetricality of Constitutional Discourse," XL NOMOS 300, 304 (1998).

14 First Things (Oct. 2000) at 36.

15 First Things (Oct. 2000) at 37 (quoting Justice Stevens).

16 Id.

appropriateness of the remedy, and that Congress should have been able to rely on its authority to interpret and enforce the Fourteenth Amendment in enacting RFRA.[17]

In our view, McConnell's critique of Boerne has much validity. What is troubling is that he has not applied similar critical analysis to the Court's refusal to defer to Congressional action in other "federalism" cases where the rights of women, the elderly, and minorities, as opposed to the exercise of religion, are at stake. The best example is Morrison, where he has highly praised the Court's decision not to defer to Congress but instead to overrule the Violence Against Women Act, and where he has severely criticized Congress (unlike with respect to RFRA). McConnell's praise of Morrison has neglected the fact, however, that the Violence Against Women Act was also based on Section Five of the Fourteenth Amendment, just like RFRA. As Justice Breyer explained in his dissent in Morrison, Congress made specific findings that the law was needed to remedy
"the actions of state actors, namely, those States which, through discriminatory design or the discriminatory conduct of their officials, failed to provide adequate (or any) state remedies for women injured by gender-motivated violence" (emphasis in original).[18]

Rather than argue that the Court should have deferred to such findings and to Congress' decision to act in Morrison, McConnell blithely asserted in an editorial that "the statistics are silent –- or contradictory –- on the key points."[19] McConnell's support for decisions like Morrison limiting Congress' authority to protect civil rights, even as he criticizes Boerne, raises serious concerns about his commitment to the progress we have made on civil rights and to the willingness he would have as a judge to protect those rights.

II. McConnell's Extreme Views On The First Amendment Would Undermine Genuine Religious Liberty

McConnell has spent much of his career advocating a re-interpretation of the First Amendment that would seriously undermine true religious liberty. His interpretation would authorize direct government funding of religion and would provide special exemptions for religious organizations from important laws, such as anti-discrimination statutes, the Fair Labor Standards Act, and state sales and use taxes. The special rights and preferential treatment that he would give to religious organizations under such laws are so extreme that his views have been unanimously rejected by the Supreme Court in a number of cases. He has criticized numerous cases on religion by the Supreme Court and

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[17] See McConnell, "Institutions and Interpretation: A Critique of City of Boerne v. Flores," 111 Harv.L.Rev. 153 (1997).

[18] Morrison, 529 U.S. at 664 (Breyer, J., dissenting). Justice Breyer and the other dissenting justices did not formally reach the Section Five issue because they believed the law should have been upheld under the Commerce Clause.

[19] McConnell, "Lies, Damned Lies, and the 'Evidence' for the Violence Against Women Act," Salt Lake Tribune (June 4, 2000).

other federal courts as wrongly decided, including precedents that protect the rights of religious minorities.

McConnell has advanced his well-known views in this area through his prolific writings as well as through congressional testimony and selection of cases to advocate before the courts. Appointing him to the federal bench would put him in a position in which he could actually impose his harmful views on individual Americans and our constitutional system. The future of religious liberty in America should not be entrusted to Michael McConnell.

- **McConnell advocates special rights for religious organizations that would exempt them from important laws protecting Americans**

McConnell has often maintained that the Free Exercise and Establishment Clauses of the Constitution should be guided by what he calls "the ideals of neutrality and accommodation."[20] McConnell's view of "neutrality," however, is anything but neutral. He advocates an unbalanced and harmful view of the Religion Clauses that would in fact give special treatment and special rights to religious organizations beyond anything accepted even by the most conservative justices on the Supreme Court.

As discussed above, McConnell has criticized the Supreme Court's decision in Bob Jones University v. United States, 461 U.S. 574 (1983), in which the Court held that the IRS had properly revoked the tax exempt status of a private university that practiced race discrimination which it claimed was in accordance with its religious principles. In rejecting Bob Jones' claim that denial of the tax exemption violated the free exercise rights of religious schools, the Court noted that this action would "not prevent those schools from observing their religious tenets," and thus not burden religious free exercise. 461 U.S. at 603-04 (emphasis added). Yet McConnell has nonetheless criticized the decision as an "egregious" example of the Court's failing to "protect religious freedom from the heavy hand of government" –- a hand that has sought to protect university students from race discrimination, and that McConnell would remove.[21]

McConnell has also sought other special exemptions for religious groups from important laws, even where the courts have ruled that the laws do not burden religion. For example, representing Jimmy Swaggart Ministries in what he has called one of his ten most significant cases,[22] McConnell argued before the Supreme Court that a religious organization should be exempt from general state sales and use tax regulations with respect to its sales of religious merchandise. The Supreme Court, including Chief Justice Rehnquist and Justices Scalia and O'Connor, unanimously rejected this argument.

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[20] McConnell, "Why 'Separation' is Not the Key to Church-State Relations," The Christian Century (Jan. 18, 1989), at 46, 47.

[21] "The Supreme Court 1997: A Symposium," 76 First Things, at 32 (Oct. 1997).

[22] See McConnell's Answers to Senate Judiciary Committee questionnaire, Ques. and Ans. No. 18.

Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378 (1990). As the Court explained, the tax did not truly burden religious free exercise because it applied to "all retail sales," even by sellers that are "charitable, religious, nonprofit, or state or local government in nature." Id. at 389. Nevertheless, McConnell argued that religious organizations should have a special right to an exemption.

McConnell has also suggested that religious organizations, even when engaged in ordinary commercial activities, should be exempt from the requirements of the Fair Labor Standards Act ("FLSA"), an important federal labor law that protects workers by regulating hours and minimum wages. In Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985), the Supreme Court (including then-Justice Rehnquist and Justice O'Connor) unanimously held that the minimum wage, overtime, and record keeping requirements of the FLSA were applicable to the "ordinary commercial activities" of a nonprofit religious foundation. Id. at 293. In this case, those activities included the operation of "service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy." 471 U.S. at 292. These commercial enterprises were "staffed" by "associates" of the Foundation who received no cash wages but did receive "food, clothing, shelter, and other benefits." Id.

The Court explained that compliance with the law was required only with respect to "commercial activities undertaken with a 'business purpose,'" that the law did not burden the free exercise of religion, and that the opposite ruling would have given the Foundation an unfair advantage over its competitors and resulted in workers receiving "substandard wages." Id. at 299, 303, 305. Nevertheless, McConnell has criticized the Court's opinion. In an article discussing the role of the Solicitor General, McConnell recounted that when he worked in the Solicitor General's office, he participated in the briefing of this case on behalf of the Secretary of Labor, who prevailed. But according to McConnell, that brief "was wrong on the merits" and the Court's decision was "singularly insensitive" to the religious claimant.[23]

McConnell's strong belief that religious organizations should receive preferential and financially beneficial exemptions from the operation of important laws that do not genuinely burden the exercise of religion is so extreme that it does not find support even among the most conservative justices on the Court. However, confirming McConnell to a lifetime appointment on a federal Court of Appeals, the court of last resort in virtually all cases, would give McConnell the power to impose his extreme interpretation in new cases and in the development of federal constitutional law.

In fact, McConnell would even extend governmental powers to a religious group, as evidenced by his opinion that the Supreme Court wrongly decided Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994). In this case, the Court struck down a special statute enacted by New York that had created a school

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[23] McConnell, "The Rule of Law and the Role of the Solicitor General," 21 Loy. L. A. L. Rev. 1105, 1109 (June 1988).

district for a religious community of Satmar Hasidim. The statute had been passed in order to allow the Satmar to provide special education services within their community to their own children, rather than have those children attend public schools within the school district to which the community belonged. The Court majority held that the statute had violated the neutrality that the Constitution requires of the government when it comes to religion, delegating governmental power to a community "defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism." 512 U.S. at 710.

McConnell criticized the Court for failing to accommodate the Satmar. McConnell, "A Basic Right Turned Into A Wrong," Chicago Tribune, July 6, 1994. See also, McConnell, "The Church-State Game: A Symposium on Kiryas Joel," 47 First Things 40 (Nov. 1994).[24] The Court majority**,** however, had plainly recognized that "the Constitution allows the State to accommodate religious needs by alleviating special burdens." 512 U.S. at 705. As the Court explained, "accommodation is not a principle without limits . . . [and] we have never hinted that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation." Id. at 706. Yet McConnell would have sanctioned just such a special delegation of governmental power to a religious group.

It is also worth noting another Supreme Court case that McConnell believes was "wrongly decided": Reynolds v. United States, 98 U.S. 145 (1878), in which the Court upheld the conviction of a Mormon for polygamy.[25] While McConnell asserts that the man "asked only that the government leave him and his wives alone,"[26] in fact he was asking for a religious-based exemption from criminal laws applicable to any man who desired to have more than one wife.

- **McConnell supports direct government funding of religious organizations**

In addition to the special rights that McConnell would give to religious organizations, McConnell's non-neutral interpretation of the Religion Clauses would create a constitutional double standard under which a facially neutral law that burdens religion should be struck down, but a facially neutral law that benefits religion should be upheld, even one that provides direct financial aid or other government support. Indeed, McConnell views the exclusion of religious organizations from neutral government aid programs as discriminatory,[27] yet finds nothing problematic about discriminating in favor

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[24] McConnell had also filed an amicus curiae brief in the case on behalf of several organizations urging the Court to uphold the special statute. See Brief Amicus Curiae of the Christian Legal Society, et al., Board of Education of the Kiryas Joel Village School District v. Grumet, 1993 U.S. Briefs 517.

[25] McConnell, "What Would it Mean to Have a 'First Amendment' for Sexual Orientation?," in S. Olyan & M. Nussbaum, Sexual Orientation & Human Rights in American Religious Discourse (1998), 234, 249.

[26] Id.

[27] See, e.g., McConnell, "Religious Freedom at a Crossroads," 59 U. Chi. L. Rev. 115, 186 (Winter

of religion to exempt it from the requirements of a neutral law that has the effect of burdening religion.

McConnell would provide strong protection for the free exercise of religion, but would undermine the Establishment Clause, particularly when it comes to direct government aid to religious organizations. His inconsistent position on neutrality is illustrated by his views of two Supreme Court cases, Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) and Mitchell v. Helms, 530 U.S. 793 (2000). Smith concerned two Native American employees of a drug rehabilitation organization who had been fired from their jobs for having ingested peyote for sacramental purposes as part of a religious ceremony at their church. They were denied unemployment compensation because they were deemed to have engaged in work-related "misconduct," since the use of peyote violated the state's criminal law. In Smith, which McConnell believes was wrongly decided,[28] the Court departed from prior precedent to hold that a facially neutral law that has the effect of burdening the exercise of religious beliefs need not be justified by a compelling governmental interest. Thus, the Court held, the workers who had been fired for having exercised their religious beliefs could be denied unemployment compensation benefits.

People For the American Way and many other organizations agree with McConnell that Smith was wrongly decided and has the potential for needless governmental interference with an individual's free exercise of religious beliefs. However, McConnell inconsistently maintains that while it is impermissible for religion to be burdened by neutral laws absent a compelling governmental interest, religion can and should reap the benefits, including the financial benefits, of such laws. Thus, as he has shown in published articles and congressional testimony and made clear in his brief in Mitchell v. Helms, discussed below, he is a fervent advocate of including religious organizations in governmental aid programs, so long as such programs are purportedly "neutral." According to McConnell, "[w]hen the government is giving money to private organizations, it must do so without regard to whether the particular institution has a religious commitment and without regard to whether that organization engages in specifically religious activities as part of its program."[29]

Not only does McConnell support direct government aid to religious organizations, it appears that he would oppose the imposition on such organizations of neutral rules governing receipt of such aid, such as rules requiring recipients not to discriminate. According to McConnell:

> [I]f religious organizations have a constitutional right to equal access to public programs, the government may not condition their access on rules which burden

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1992).

[28] See, e.g., McConnell, "Religious Freedom at a Crossroads," 59 U. Chi. L. Rev. 115, 138 (Winter 1992); McConnell, "Free Exercise Revisionism and the Smith Decision," 57 U. Chi. L. Rev. 1109 (Fall 1990).

[29] McConnell, "Freedom From Religion?," The American Enterprise, at 40 (Jan./Feb. 1993).

their practice of religion, unless the rules are closely related to the purposes of the program.

McConnell, "Religious Freedom at a Crossroads," 59 U. Chi. L. Rev. 115, 186 (Winter 1992) (emphasis added). This interpretation of the Constitution has significant ramifications, particularly for so-called "charitable choice" programs in which government funds are provided to religious organizations, many of which may seek to incorporate religious practices into their programs or claim the right to engage in discrimination in the provision of their services or in their employment practices. According to McConnell, such organizations should have their cake and eat it too — receive government funds yet be able to violate anti-discrimination statutes and other important laws.

McConnell recently advanced his support for direct aid to religious institutions through his advocacy in Mitchell v. Helms, which concerned a challenge to the constitutionality of a federal school aid program as applied to parochial schools in a local Louisiana school district. Under that program, the government lent educational materials, such as computers and computer software, to public and private schools, including religious schools. McConnell argued before the Supreme Court that the program should be found constitutional.

In his brief, McConnell urged the Court to adopt a rule of neutrality, asserting that "the evenhanded provision of secular, neutral, and nonideological instructional resources to all public and private schoolchildren does not violate the Establishment Clause."[30] According to McConnell, religious schools may not be denied government aid when "the government extends aid to a broad category of beneficiaries on the basis of neutral and secular criteria."[31]

The facial "neutrality" of a law, however, while important, "is not alone sufficient" to determine its constitutionality under the Establishment Clause.[32] And while the Court in Mitchell ruled in favor of McConnell's clients and upheld the program, a 5-4 majority rejected McConnell's version of neutrality. Through a concurring opinion written by Justice O'Connor (joined by Justice Breyer) and a dissenting opinion by Justice Souter (joined by Justices Stevens and Ginsburg), a majority of the Court pointed out that making a law's facial neutrality determinative of its constitutionality would be a radical departure from First Amendment jurisprudence. As Justice Souter explained, such a rule "would permit practically any government aid to religion so long as it could be supplied on terms ostensibly comparable to the terms under which it was provided to nonreligious recipients." 530 U.S. at 901, n.19 (emphasis added).

McConnell's view that religious organizations cannot be denied government aid provided on a "neutral" basis would appear to have no limits. Indeed, members of the

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30 Brief for Petitioners, Mitchell v. Helms, 1999 WL 639126, *17.

31 1999 WL 639126, *43.

32 Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring).

Court seemed to recognize this in questioning him during oral argument in Mitchell. See Transcript of Oral Argument, Mitchell v. Helms, 1999 WL 1134744 (Dec. 1, 1999). As suggested by some of the Justices' questions (id.), McConnell's interpretation of the First Amendment, taken to its logical conclusion, would permit the government to build religious schools under a "neutral" school construction program in which it also built public and non-religious private schools. While McConnell carefully side-stepped the Justices' efforts to elicit any limiting principle on his view of "neutral" aid programs (id.), McConnell should not be permitted to avoid such critical questions at his confirmation hearing.[33]

McConnell's support for direct government aid to religious organizations gives short shrift to the rights of individuals compelled to support religious organizations in violation of their own beliefs –- an interest that Justice O'Connor and the Court majority have written is an important aspect of the Establishment Clause. Yet McConnell has stated "[w]e must . . . reject the central animating idea of modern Establishment Clause analysis: that taxpayers have a constitutional right to insist that none of their taxes be used for religious purposes."[34]

McConnell's support for government funding of religion and the threat that his confirmation would pose to church-state separation and religious liberty is also reflected in his apparent hostility to state constitutional provisions expressly prohibiting the use of public funds to support sectarian institutions or religious instruction. In states that have chosen to adopt them, these important provisions give specific effect to the fundamental doctrine that taxpayers should not be compelled by the government to support religious institutions, and that the government should not fund religion. McConnell has a very different view. Referring to such state constitutional provisions in testimony before Congress, McConnell stated that "the erroneous separationist understanding of the First Amendment has extended to many state constitutions as well as the federal."[35] McConnell urged Congress, if it decided to "take[] action to defend against anti-religious

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[33] It is also worth noting that McConnell has strongly criticized the Court's landmark precedent of Lemon v. Kurtzman, 403 U.S. 602 (1971), in which the Court adopted a three-part test for determining the constitutionality of a law or government practice under the Establishment Clause. See, e.g., McConnell, "Stuck With a Lemon," 83-Feb. A.B.A. J. 46 (Feb. 1997). In particular, McConnell disagrees with the Court's requirement, which the Court has upheld in recent decisions, that in order to be constitutional a law must have been passed for a secular purpose. See, e.g., McConnell, "Religious Freedom at a Crossroads," 59 U. Chi. L. Rev. 115, 128 (Winter 1992).

[34] McConnell, "Religious Freedom at a Crossroads," 59 U. Chi. L. Rev. 115, 185 (1992). Indeed, McConnell has even criticized the entire metaphor of the "wall of separation" between church and state, calling it "misleading." McConnell, "Freedom From Religion?," The American Enterprise (Jan/Feb. 1993), at 36. According to McConnell, the separation of church and state "is not, and cannot be, the central guiding principle." McConnell, "Why 'Separation' is Not the Key to Church-State Relations," The Christian Century 43, 47 (Jan. 18, 1989).

[35] "Religious Liberty and the Bill of Rights," Hearings Before the Subcomm. on the Constitution of the House Committee on the Judiciary, 104th Cong., 1st Sess. (1995) (hereafter "1995 House Testimony"), at 130.

discrimination," to "affirmatively extend the protection of federal law to those whose rights are violated under color of state interpretations of church-state separation. . . ."[36]

With the U.S. Supreme Court's recent holding that school voucher programs in which public funds are used to pay for students to attend religious schools do not violate the federal Constitution,[37] state constitutional provisions prohibiting public funding of religious organizations have assumed added importance in preserving church-state separation. Many if not all of the states within the jurisdiction of the Tenth Circuit have such provisions in their own constitutions. Confirming McConnell to a lifetime seat on the Tenth Circuit would clearly place those constitutional provisions in jeopardy.

- **McConnell's view of the First Amendment would threaten the right of religious minorities to avoid being made "captive audiences" to religious worship and promotion of religion**

McConnell's confirmation would also jeopardize the right of religious minorities and others who object to being made captive audiences to prayer and religious worship by the government, particularly students in public schools. This is apparent from McConnell's support for the "student-initiated" school prayer policy at issue in Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000). In that case, the Supreme Court struck down a public school district policy authorizing students to conduct so-called "student-led, student-initiated" prayers over the public address system prior to high school football games. The policy in question allowed students to vote each year on whether to have "a brief invocation and/or message" prior to the football games. 530 U.S. at 298, n.6.

McConnell, representing the Christian Legal Society, filed an amicus curiae brief in the case urging the Court to uphold the school district's policy on the ground that the prayers were private speech, an argument also advanced by the school district.[38] The Court, in a 6-3 ruling, squarely rejected this contention, noting that "[t]hese invocations are authorized by a government policy and take place on government property at government-sponsored school-related events." 530 U.S. at 302. As the Court recognized, the delivery of a religious message "over the school's public address system,

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[36] Id. In this same testimony, McConnell criticized the decision of the Washington State Supreme Court in Witters v. State of Wash. Commission for the Blind, 771 P.2d 1119 (Wash.), cert. denied, 493 U.S. 850 (1989), in which the court held that it would violate the state constitution for public funds to be used to pay for a vocational student to attend a private Bible college in order to become a pastor, missionary, or church youth director. 1995 House Testimony at 129-30. Significantly, although the U.S. Supreme Court had previously ruled in the same case that such funding did not offend the federal Constitution, the Court explained that, on remand of the case to the state Supreme Court, that court was "of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution." Witters v. Wash. Dept. of Services for the Blind, 474 U.S. 481, 489 (1986) (emphasis added).

[37] Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002).

[38] McConnell's brief is available at 1999 WL 1272948.

by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer –- is not properly characterized as 'private' speech." Id. at 310.

Apparently viewing the "student-initiation" of the prayers with dispositive effect under the Constitution, McConnell's brief also discounted concerns about those in the football game audience who might have come to see a sporting event without desiring to participate in religious worship. According to McConnell, who characterized the prayers as "privately initiated" speech, it would be "untenable to suggest" that they "may be censored because they might be offensive to those in attendance." 1999 WL 1272948, *14. The Court, however, recognized the impermissibly coercive nature of subjecting students at a school-sponsored event to prayers broadcast over the school district's public address system, noting that "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." 530 U.S. at 312. The Court explained that the Constitution prohibits a public school from forcing students to choose between attending a school-sponsored event or "risk facing a personally offensive religious ritual." Id.

McConnell's troubling view of what should be considered "private" religious expression under the Establishment Clause, and his failure to give appropriate consideration to the rights of religious minority students in class or at other school-sponsored events who may not want to participate in such religious expression, is also reflected in his criticism of both Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990), cert. denied, 505 U.S. 1218 (1992) and Bishop v. Aronov, 926 F.2d 1066, (11th Cir. 1991), cert. denied, Bishop v. Delchamps, 502 U.S. 1218 (1992). In testimony before Congress, McConnell criticized both cases as involving "anti-religious discrimination" and the "denial of equal rights of expression."[39] The facts reveal otherwise.

In Bishop, the Eleventh Circuit upheld a public university's decision, following complaints by students, to prohibit a professor from injecting his religious beliefs into his classes and from conducting "optional" after-class meetings on campus (which the professor had held shortly before final exams) at which the professor brought his religious perspective to bear on his academic topics. The court rejected the professor's claim that the prohibition violated his free speech rights, noting that a teacher's speech, particular his in-class speech, "can be taken as directly and deliberately representative of the school." 926 F.2d at 1073. The court recognized the university's authority reasonably to control "the content of its curriculum." Id. at 1074.

In particular, the court noted that the context of the speech led it to "consider the coercive effect upon students that a professor's speech inherently possesses, and that the University may wish to avoid. The University's interest is most obvious when student complaints suggest apparent coercion -- even when not intended by the professor." Id. at 1074 (emphasis added). Moreover, as the court stated, "an Islamic or Jewish student will not savor the Christian bias that Dr. Bishop professes." Id. at 1072. The court summarily

[39] 1995 House Testimony at 122-24.

rejected the professor's claim that his free exercise rights had been violated, explaining that "[w]e are not persuaded that, even in the remotest sense, Dr. Bishop's rights of free exercise or worship as those concepts are comprehended in constitutional parlance are implicated." Id. at 1077.

In Roberts, the Tenth Circuit — the same court to which McConnell has been nominated — upheld a trial court judgment that a public school district had not violated the First Amendment rights of a fifth grade teacher by prohibiting him from displaying his personal Bible on his desk throughout the school day, reading the Bible during the students' "silent reading period," and keeping two of his personal religious books in the classroom library (The Life of Jesus and The Bible in Pictures). In affirming the district court's ruling, the court of appeals emphasized that it was made in the entire context and totality of the teacher's actions, including the fact that he displayed a poster in his classroom proclaiming "You have only to open your eyes to see the hand of God." 921 F.2d at 1049-51, 1056-58.

In criticizing both of these cases as involving the "denial of equal rights of expression," McConnell has ignored the critical fact that a public school teacher, when acting in that capacity, is acting as a representative of the government and not as a private citizen. In that capacity, a teacher has no "equal rights of expression," but is obligated, as is the government itself, not to endorse or promote religion. Any other rule would allow government representatives, including teachers during class time, affirmatively to endorse or advance religion. The coercive aspects of this are readily apparent, as the Eleventh Circuit expressly noted in Bishop. McConnell's characterization of these cases failed to view the teachers' actions from the perspective of the captive audience of students in these classes who may not have shared their teacher's religious beliefs and were made to feel like outsiders by their own teachers.[40]

McConnell has further revealed how little value he places on protecting students and others in captive audience situations from government sponsored religious expression in an article entitled "Freedom From Religion?," The American Enterprise, (Jan./Feb. 1993), at 36. In that article, McConnell criticized the Supreme Court for hearing cases such as Lee v. Weisman, 505 U.S. 577 (1992), yet refusing to hear cases such as Roberts v. Madigan and Bishop v. Aronov. In Lee v. Weisman, the Court held that it was unconstitutional for a public school to sponsor graduation prayers, particularly noting the coercive nature of this practice upon students who desire to attend their graduation ceremony but not a religious service.

Astonishingly, McConnell claims that Weisman was an "inconsequential" case that had "nothing to do with freedom of religion."[41] Rather, claims McConnell, it is about "freedom from religion,"[42] a misleading and pejorative term that fails to view the problems raised by government sponsorship of religious worship from the perspective of

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[40] See also McConnell, "'God is Dead and We Have Killed Him!': Freedom of Religion in the Post-modern Age," 1993 B.Y.U.L. Rev. 163, 175, 188 (1993) (criticizing Roberts).

[41] McConnell, "Freedom From Religion?," The American Enterprise, (Jan./Feb. 1993), at 37, 36.

[42] Id. at 36.

those in the captive audience who do not share the particular religious beliefs being promoted by the government. Though he did not disagree with the holding in Weisman, McConnell chastised the Supreme Court for hearing the case yet refusing to hear what he considered to be far more important cases allegedly involving "vastly more serious claims of interference with religious liberty," specifically including Roberts v. Madigan and Bishop v. Aronov.[43]

This juxtaposition of cases reveals a great deal about McConnell and whose interests he considers to be important: he discounts the right of the students in Weisman not to be made a captive audience to religious worship by their own school, and finds it an offense of constitutional dimension that the public school teachers in Roberts and Bishop were unable to promote religion in the classroom. The fact that McConnell views the latter two cases as a greater threat to religious liberty than the former speaks volumes about his disturbing perspective on the First Amendment.[44]

III. McConnell's Views Would Eliminate The Right of Reproductive Choice and Endanger the Right to Privacy

McConnell has an extensive record of virulent opposition to a woman's fundamental constitutional right of reproductive choice and privacy, as well as legal advocacy to restrict these rights wherever possible, with the goal of banning abortion outright. While such one-sided legal advocacy may be appropriate for an avowed leading activist and scholar of the anti-choice movement,[45] it is not appropriate for a judge on the federal appellate bench. McConnell's record in this area strongly suggests that he would be unable to put aside his strong, already developed legal opinions in order to uphold and enforce the law protecting women's reproductive rights.[46]

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[43] Id. at 36-37. Again ignoring the fact that the teachers in Roberts and Bishop were not acting in their private capacities but as representatives of the government, McConnell listed those cases among a number of cases not heard by the Court in which, he contends, "government power has been brought to bear" to prevent an individual from "trying to live his life . . . according to the tenets of [his] faith."

[44] McConnell's arguments in this respect are reminiscent of his assertion that Judge Robert Bork, whose nomination to the Supreme Court he supported in Senate testimony, was "moderate" and "liberal -- in the sense of honoring individual liberties." See The Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 1355 (1987). McConnell "liberally" seeks to protect what he regards as the "individual liberties" of teachers without regard for the true religious liberty interests of captive audiences of students.

[45] See, e.g., "The America We Seek: A Statement of Pro-Life Principle and Concern," 63 First Things *Reprint* 1, 3 (May 1966) ("Statement of Pro-Life Action") (". . . as pro-life leaders and scholars, we want to propose a program of action. . . ."). McConnell has authored extensive legal opinions published in legal journals and The Wall Street Journal, provided testimony on legislation, and taken other actions together with other leading anti-choice activists seeking to restrict or ban abortion in the United States.

[46] The lower federal courts have played an increasingly important role in this area. Particularly since the U.S. Supreme Court's 1992 decision in Casey, 505 U.S. 833, there has been a concerted strategy by anti-choice activists to enact more and more legislative restrictions and burdens on women's right to choose, and to challenge laws protecting women from serious physical threats and violence at family

- **McConnell Strongly Opposes Roe v. Wade and Legal Protection for Reproductive Rights**

McConnell's numerous legal writings and statements evince a strident opposition to the 1973 Roe v. Wade decision establishing a woman's right to privacy and reproductive choice. 410 U.S. 113. Describing the Roe decision as conferring a "private 'right' to use lethal violence to 'solve' personal. . . . problems,"[47] McConnell has consistently stated that the decision was wrongly decided and illegitimate. He has called Roe "a gross misinterpretation of the Constitution,"[48] an "embarrassment to those who take constitutional law seriously,"[49] and a "grave legal error[] in the service of an extreme vision of abortion rights that the vast majority of Americans rightly consider unjust and immoral."[50] Equating Roe v. Wade with the infamous Dred Scott and Plessy v. Ferguson decisions which upheld slavery and the segregation of African Americans, McConnell has openly called on the Supreme Court to reverse and overturn Roe as "it did [with Plessy] in Brown v. Board of Education."[51]

In addition, McConnell has advocated a constitutional amendment that would reverse "the doctrines of Roe v. Wade and [Planned Parenthood of Southeastern Pa. v.] Casey, and establishing that the right to life protected by the Fifth and Fourteenth Amendments extends to the unborn child."[52] Whether achieved by court decision or constitutional amendment, such action could justify federal or state legislatures banning abortion in all cases, except perhaps to save the life of the mother, including cases of rape and incest, and impose criminal sanctions against women who have abortions and the doctors who perform them.[53] In fact, McConnell's argument that the Equal Protection Clause should protect fetuses suggests that government not only would be permitted to ban abortion but actually would be constitutionally required to do so in most cases.[54] Finally, McConnell

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planning clinics. These cases are being decided by federal courts of appeals or in some cases are being decided first by these courts before Supreme Court review.

47 Statement of Pro-Life Action at 2.

48 Id. at 4.

49 Michael W. McConnell, "Roe v. Wade at 25: Still Illegitimate," The Wall Street Journal, Jan. 22, 1998, at A18, 1998 WL-WSJ 3479901.

50 Id.

51 See Statement of Pro-Life Action at 4.

52 Id. In Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846, 876-79 (1992), the Supreme Court specifically reaffirmed the constitutionality of Roe and reviewed restrictions as to whether they placed an "undue burden" on a woman's right to choose.

53 McConnell has stated a preference for targeting criminal penalties against "abortionists" rather than "women in crisis." Id. Statement of Pro-Life Action at 4. "Women in crisis" seeking an abortion would be forced to return to the tragic back alleys of the pre-Roe period.

54 McConnell has written: ". . .the more natural implication of the Equal Protection Clause is that it stands against abortion rights. The Equal Protection Clause is designed to protect members of vulnerable and politically unrepresented minorities from the oppressive measures of the dominant majority. Abortion laws are designed to protect fetuses or unborn children, surely a vulnerable and unrepresented group, from

has expressed the view that a "right of privacy" and of "personal autonomy" does not exist under the Constitution, which could threaten the right of women even to have access to birth control in some cases, new emergency contraceptives, and early "medical abortions" such as use of RU-486.[55]

Significantly, McConnell is already on record supporting broad, new legal restrictions on a woman's right to choose even under Roe v. Wade and its progeny. While his ultimate goal is to reverse Roe and provide constitutional protection to embryos as persons, McConnell has endorsed and provided legal support for a "broad-based legal and political strategy" to "regulate the abortion industry in a number of ways."[56]

In particular, McConnell has written that he would consider it a reasonable restriction to move back the "cut-off" date for regulating legal abortion from fetal viability to "implantation" of the fertilized egg in the uterus, "about 14 days" after conception.[57] In order to uphold such an extreme restriction on a woman's right to choose, one would have to reject the concept of viability established in Roe and reaffirmed by the Supreme Court over a quarter century later in Stenberg v. Carhart, 530 U.S. 914 (2000). That appears to be McConnell's goal. He goes on to provide legal justification for evading or overturning this central framework underlying the Roe decision.[58] It is precisely the ease with which McConnell legally defends such an extreme and clear violation of women's established constitutionally protected rights as reasonable that would make him so dangerous to women's rights if he is confirmed.

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private violence." Michael W. McConnell, "How Not to Promote Serious Deliberation About Abortion," 58 U. Chi. L. Rev. 1181, 1189 (1991).

[55] McConnell, "Roe v. Wade at 25: Still Illegitimate," The Wall Street Journal, Jan. 22, 1998, at A 18; Statement of Pro-Life Action at 2. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court struck down as a violation of the constitutional right to privacy a Connecticut criminal statute which, among other things, prohibited doctors from prescribing contraceptives and had been used to convict a Planned Parenthood doctor who had provided birth control information and a prescription to a married couple. In a 1997 law review article, McConnell rejected a constitutional right to privacy but argued that the Court could determine on an ad-hoc, case-by-case basis whether very specific practices might be protected if, among other things, a "substantial consensus of the states" had recognized the "right" over a period of time. Michael W. McConnell, "The Right to Die and the Jurisprudence of Tradition," 1997 Utah L. Rev. 665, 691-701. On this basis, McConnell may be willing to accept Griswold if limited to its facts, i.e. "the precise question of the right of married couples to use contraceptives within the privacy of the marital bedroom." Id. at 700. However, it is unclear whether McConnell would consider other uses of birth control protected and he very well could find laws or regulations relating to new emergency contraceptives and early "medical abortions," which have been vigorously opposed by anti-choice activists, not constitutionally protected unless and until adopted by a "substantial consensus" of states over a period of time. As recognized in Roe, the Supreme Court also has found that the right to privacy extends "to activities relating to marriage. . . . procreation. . . family relationships. . . and child rearing and education . . . ." 410 U.S. 113, 152-53 (1973) (citation omitted).

[56] Statement of Pro-Life Action at 3-4.

[57] McConnell, "How Not to Promote Serious Deliberation About Abortion," at 1197-1198.

[58] McConnell, "How Not to Promote Serious Deliberation About Abortion," at 1199.

In addition, McConnell is on record supporting various other restrictions on what he terms "the abortion industry," such as, for example, "bans on certain methods of abortion" and on "late term abortions" and requirements and waiting periods for women before an abortion.[59] It is clear from his record that as an appellate judge unable to directly overrule Roe, McConnell would likely find legal justification to uphold just about any restrictions on a woman's right to choose, chipping away at women's fundamental rights if he is confirmed.

For example, in Stenberg v. Carhart, the Supreme Court struck down a ban on a certain method of abortion, a restriction envisioned by McConnell, ruling that, among other things, the statute was deficient because it lacked an exception to preserve the health of the mother.[60] However, McConnell stated in 1998 that he considers the "health" exception so broadly defined by the Supreme Court under Roe and its progeny as to be "meaningless."[61] With respect to bans on "late term abortions," they already exist and are permitted after viability under the Roe decision. McConnell mischaracterizes the law and factual reality of abortion, however, to argue that under Roe the "constitutional right to get an abortion. . . effectively applie[s] at any time during the nine months of pregnancy."[62] Finally, McConnell argues for increased "counseling" requirements by maligning vulnerable, dedicated doctors as "profit-making abortionists" rushing women to make "a quick decision."[63] As a federal judge, without overruling Roe, he could severely harm reproductive rights.

- **McConnell Opposes Clearly Permissible Laws Protecting Against Clinic Blockades and Violence, Jeopardizing the Health and Safety of Women and Clinic Workers, as well as the Right to Choose**

McConnell's strong anti-choice passions have also led him to oppose and question the constitutionality of federal legislation to protect against clinic violence, despite changes in the final law that addressed legitimate First Amendment concerns. Even after these changes, McConnell has continued to criticize the Freedom of Access to Clinic Entrances Act (FACE) as an "unjust" law, despite judicial opinions affirming the law's constitutionality and First Amendment safeguards. Moreover, he has stated his admiration for a federal judge who intentionally refused to enforce the FACE law. McConnell's record raises serious concerns about whether he could set aside his own

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[59] Statement of Pro-Life Action at 4.

[60] 530 U.S. 914 (2000).

[61] McConnell, "Roe v. Wade at 25: Still Illegitimate," The Wall Street Journal, Jan. 22, 1998, at A18.

[62] Id. As the Supreme Court found in Stenberg, "[a]bout 90%" of abortions occur in the first trimester of pregnancy and "[a]pproximately 10%" during the second trimester. 530 U.S. at 923-24.

[63] McConnell, "How Not to Promote Serious Deliberation About Abortion," at 1195-96. McConnell further distorts factual reality to support his legal justification for increased counseling requirements by defending so-called "voluntary crisis pregnancy centers" which often masquerade as family planning clinics and provide false health information and scare tactics to deter women from freely exercising their right to choose. See NARAL Foundation, Unmasking Fake Clinics (Dec. 2000).

biases in reviewing cases that would come before him as a judge relating to the constitutionality and propriety of laws protecting clinic access.

Congress enacted the FACE law in 1994 in response to a "systematic and nationwide assault that [was] being waged against health care providers and patients,"[64] which included "blockades and invasions of medical facilities, arson and other destruction of property, assaults, death threats, attempted murder and murder . . . ."[65] Congress further found that federal legislation was necessary because "state and local authorities had proved inadequate, and sometimes unwilling, to curb the violence"[66]

Despite the documented need for federal legislation to address this national campaign of violence, threats and obstruction directed at medical clinics, staff and patients, McConnell maintains that "there was no need for legislation against violence" because violence "was already illegal."[67] While eschewing and condemning anti-choice violence himself, McConnell's strong anti-choice passions raise serious concerns about his ability to honestly confront the extent and nature of the organized national campaign of anti-choice violence, threats and force. This in turn might well cloud his ability as a judge to provide unbiased analysis and judgment with respect to legal efforts to restrain such activity.

This concern is demonstrated by McConnell's continued opposition to FACE even after the Senate amended the legislation to address First Amendment concerns and make crystal clear that the statute only applies to illegal conduct and not to lawful speech and protest. For example, at the Senate Labor and Human Resources committee hearing in 1993, McConnell stated his view that the law was unconstitutionally vague and overbroad because the terms "obstruction," "intimidates" and "interferes with" were not defined in the bill at the time and "could be construed to include much entirely lawful conduct."[68] The Senate appropriately addressed these First Amendment concerns by defining each of these terms to make clear that the statute prohibits only illegal conduct and not lawful speech, and these changes became part of the final law.[69]

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64 United States v. Gregg, 226 F.3d 253, 259 (3d Cir. 2000), cert. denied, 532 U.S. 971 (2001) (quoting from House Report No. 103-306, at 6, 10).

65 House Conference Report on Freedom of Access to Clinic Entrances Act of 1994, H.R. Conf. Rep. No. 488, 103rd Cong., 2d Sess. (1994), 1994 U.S.C.C.A.N. 724, 1994 WL 168882 at *7 (hereinafter "FACE Conference Report").

66 United States v. Gregg, 226 F.3d at 259 (citing Senate Report No. 103-117; House Report No. 103-306).

67 McConnell, "Breaking the Law, Bending the Law," 74 First Things *Reprint* 1 (June/July 1997), at 2.

68 See Michael Stokes Paulson and Michael W. McConnell, "The Doubtful Constitutionality of the Clinic Access Bill," 1 Va. J. Soc. Pol'y & L. 261, 267-279 (Spring 1994). The law journal article published in 1994 includes a slightly edited version of McConnell's testimony as well as McConnell's views of the relevant Senate amendments that became part of the final legislation enacted in 1994.

69 For example, the amended legislation that was enacted in the final law used the same definition for "intimidate" as the commonly used element in the crime and tort of assault. See 18 U.S.C. § 248 (e)(3).

In commenting on the Senate changes, McConnell nevertheless stated that "[t]he definitions are still constitutionally problematic."[70] In 1997, after FACE had been enacted and federal courts had upheld and construed the statute as not applying to any protected First Amendment conduct,[71] McConnell continued to maintain that the statute's terms were "so vague, and the coverage so sweeping" as to hinder lawful protest.[72] Moreover, McConnell's distorted analysis flies in the face of the provision in the final enacted version of FACE that explicitly states that the statute does not "prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution."[73]

McConnell's view that FACE unconstitutionally targets only anti-choice expression also has been soundly rejected by the federal courts reviewing FACE as well as by the Supreme Court in cases relating to protection of clinic access.[74] As one federal appeals court stated in flatly rejecting this argument, FACE's prohibitions "apply to anyone who blockades a clinic to prevent a woman from getting an abortion, regardless of the message expressed by the blockade."[75] McConnell even stated that the Senate's adoption of a "religious liberty amendment" proposed by Senator Hatch, which imposed the same prohibitions and punishments on illegal conduct directed at religious institutions as at clinics, did not "cure" his perceived constitutional problem but "arguably broaden[ed] it."[76] Thus, despite Senate changes that addressed any legitimate First Amendment concerns about FACE, McConnell concluded in his article that the law still was "of

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[70] Paulson and McConnell, "The Doubtful Constitutionality of the Clinic Access Bill," at 286-87.

[71] For example, the Eighth Circuit Court of Appeals flatly rejected such a vagueness and overbreadth challenge, holding that "[t]he meaning of these terms is quite clear" and that indeed the meanings of "interfere with" and "physical obstruction" are "even clearer in FACE" than as used in Supreme Court caselaw because of FACE's specific, "narrow definitions of these terms." United States v. Dinwiddie, 76 F.3d 913, 924 (8th Cir.), cert. denied, 519 U.S. 1043 (1996).

[72] McConnell, "Breaking the Law, Bending the Law," at 2.

[73] 18 U.S.C. § 248(d)(1).

[74] See infra at n.78 (FACE cases rejecting McConnell's First Amendment argument); Hill v. Colorado, 530 U.S. 703 (2000); Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994).

[75] United States v. Dinwiddie, 76 F.3d at 923. Thus, the Court stated that FACE "would prohibit striking employees from obstructing access to a clinic in order to stop women from getting abortions, even if the workers were carrying signs that said, 'We are underpaid!' rather than 'Abortion is wrong!'" Id.

[76] Paulson and McConnell, "The Doubtful Constitutionality of the Clinic Access Bill," at 287-89. McConnell also mischaracterized the religious liberty amendment in order to try to continue his objections to FACE, stating that the amendment singled out "gay rights protests that unlawfully interfere with worship services" as another "category of unpopular protest." Id. at 287. Yet, the plain text of the religious liberty amendment, like its clinic access counterpart, singles out no group or speech, and its prohibitions could easily be applied to protests against any number of religious groups or viewpoints that may or may not be popular with the majority of Americans. Given his professed allegiance to institutional restraint in judicial analysis, it is troubling that McConnell appears to ignore the plain text of FACE in order to help attack the law's constitutionality.

highly doubtful constitutionality."[77] Every federal court of appeals that has reviewed FACE has uniformly upheld its constitutionality and rejected the First Amendment challenges suggested by McConnell, and the U.S. Supreme Court has refused to hear constitutional challenges to the law.[78] Significantly, the Tenth Circuit to which McConnell has been nominated has not yet ruled on the constitutionality of FACE.

Finally, it is troubling that McConnell stated his admiration for a federal judge who intentionally refused to enforce an injunction against two men who admitted blocking the driveway to a family planning clinic, as they had done on several occasions during the prior seven years.[79] While their protest was non-violent, the conduct of the two men was clearly illegal as they physically obstructed cars from entering the clinic area. Although McConnell conceded that Judge Sprizzo's acquittal of the two men was improper, he stated that he could not "help but admir[e] the judge's act" calling it "courage in defense of conscience."[80] He concluded by recommending that the judge should have imposed a fifty-dollar fine or a suspended sentence as a slap on the wrist, [81] thus evading the intent of the law and sending the message that repeated obstruction of medical services at the clinic would not be a problem and could continue presumably without real consequences.

McConnell's record clearly raises significant concerns about his ability to uphold and enforce laws protecting women from violence, threats and obstruction in receiving medical services at family planning clinics.

IV. McConnell's Strong Opposition to Significant Precedent Would Threaten Critical Principles Protecting Civil Rights and Liberties

As discussed above, McConnell's record includes harsh criticism of numerous Supreme Court and other federal court precedents and principles crucial to the protection of civil and constitutional rights and liberties, such as reproductive rights and one-person, one-vote. Previous nominees have asserted to the Judiciary Committee that their pre-judicial records were irrelevant, because they would simply follow the law and court precedent and would not be influenced by their own prior opinions and actions.

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77 Id. at 289.

78 Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996), cert. denied, 520 U.S. 1264 (1997); United States v. Weslin, 156 F.3d 292 (2d Cir. 1998), cert. denied, 525 U.S. 1071 (1999); United States v. Gregg, 226 F.3d 253 (3d Cir. 2000), cert. denied, 532 U.S. 971 (2001); Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997), cert. denied, 523 U.S. 1136 (1998); American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir.), cert. denied, 516 U.S. 809 (1995); United States v. Bird, 124 F.3d 667 (5th Cir.), amended by 1997 U.S. App. Lexis 33988 (5th Cir. 1997), cert. denied, 523 U.S. 1006 (1998); United States v. Soderna, 82 F.3d 1370 (7th Cir.), cert. denied, Hatch v. U.S., 519 U.S. 1006 (1996); United States v. Dinwiddie, 76 F.3d 913 (8th Cir.), cert. denied, 519 U.S. 1043 (1996); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995).

79 See McConnell, "Breaking the Law, Bending the Law," 74 First Things *Reprint* 1 (June/July 1997); United States v. Lynch, 162 F.3d 732, 734-35 (2d Cir. 1998).

80 McConnell, "Breaking the Law, Bending the Law," at 1.

81 Id. at 1, 3.

Experience (as well as common sense) has belied these claims. In McConnell's case, however, there is direct evidence in his own record that his view of precedent and the judicial role would endanger key protections for civil rights and liberties if he had the power to interpret and enforce them.

McConnell has recognized that the prior experience and views of judges and justices will influence how they decide cases and interpret constitutional and statutory provisions. In 1988, McConnell publicly urged presidential contenders Dukakis and Bush to consider appointing Supreme Court justices who would not be likely to be "hostile" to free enterprise and business interests based on their prior records and experience.[82] A decade later, he lamented that "[s]even appointments by Republican Presidents have left astonishingly little mark" on the Court.[83] More recently, he has explained that the "meaning of the Constitution in dozens of important areas" will literally be determined by who "appoints the next few Justices" on the Court, clearly suggesting that the attitudes and views of such appointees will be extremely important in their future decisions.[84] The same would undoubtedly be true for McConnell.

In addition, McConnell as a legal advocate has proven extremely facile at seeking to distinguish and limit prior precedent he opposes, and has argued vigorously for overruling prior precedent even when not absolutely necessary to the result he seeks. For example, as discussed above, McConnell represented parents seeking to sustain the provision of computers and other equipment to parochial schools in Mitchell v. Helms. His brief spent three pages explaining that the case was distinguishable from several previous Supreme Court rulings.[85] He then went on for thirteen pages to strongly maintain that the Court should overrule these prior cases in any event to "spare governments, litigants, and the courts the expense and confusion of trying cases" under these precedents.[86] In Agostini v. Felton, 521 U.S. 203 (1997), McConnell filed an amicus curiae brief for the Christian Legal Society and other groups in which he argued that the Court should not only overrule the precedent directly on point (Aguilar v. Felton, 473 U.S. 402 (1985)), but should also overturn or repudiate an entire line of cases beginning with Lemon v. Kurtzman, 403 U.S. 602 (1971).[87] As a judge, McConnell would have much more power to implement such views.

In fact, McConnell has specifically stated that when faced with what he considers "questionable precedents" it is "usually better to rethink the precedents than to contrive a way to evade them." Redistricting at 117. Narrowing, extending, reinterpreting, and overruling are all "common and legitimate" ways of "dealing with precedent" by judges, he has explained.[88] Where a judge's view of text, original understanding, presumption of

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82 McConnell, "We Need Justices Who Mean Business," Wall Street Journal (July 27, 1988)

83 McConnell, "The Supreme Court 1998," First Things (Nov. 1998) at 37.

84 First Things (Oct. 2000) at 37.

85 Brief for Petitioners in Mitchell v. Helms, 1999 WL 639126 (Aug. 19, 1999) at *30-33.

86 Id. at *33-46.

87 See Brief for Christian Legal Society, et al., in Agostini. 1996 U.S. Briefs 552 (Feb. 28, 1997).

88 McConnell, "The Importance of Humility in Judicial Review," 65 Fordham L. Rev. 1269, 1288

constitutionality, tradition, and precedent conflict in "hard cases," he has acknowledged that "judges may have no choice but to allow their own convictions and moral intuitions to guide the selection of which course to follow." Id. at 1292. As a judge, McConnell's convictions about precedents and principles that protect civil rights and liberties would threaten disaster for safeguarding those freedoms.

As a federal appellate judge, McConnell would not be able to formally overrule Supreme Court precedents like Roe v. Wade. But as his own writings make clear, the ability to "evade" or narrow them could have similar results. As discussed above, in the articles, "Breaking the Law, Bending the Law," McConnell expressed admiration for a judge who had acquitted abortion opponents who had violated a court injunction protecting an family planning clinic. McConnell recognized that the judge did not have the power to disobey the law, but suggested that the judge could have effectively accomplished the same thing by handing down a lenient – or suspended – sentence or a minor fine.[89]

Given McConnell's strong views on the critical matters that we have discussed above, there is serious doubt that McConnell would have an open mind in cases involving these issues. Particularly coupled with McConnell's own writings concerning precedent and the role of judges, it is clear that McConnell as a federal appellate judge would seriously jeopardize principles and precedents that preserve the civil and constitutional rights of all Americans.

CONCLUSION

The courts of appeal play a critical role in our federal judicial system, second in importance only to the Supreme Court. Particularly because the Supreme Court hears so few cases, the protection of civil and constitutional rights by the judiciary depends in large measure on the appellate courts. Michael McConnell's record as discussed above does not support his confirmation to the Tenth Circuit. Far from meeting the burden to demonstrate a record of commitment to the progress made on civil rights, women's rights, and individual liberties, McConnell's record shows hostility and opposition toward key principles and precedents that protect those rights and liberties, and his extreme views on the First Amendment would threaten religious freedom. We strongly urge that McConnell's confirmation be rejected.

(1997).

[89] McConnell, "Breaking the Law, Bending the Law," at 1, 3.