AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

108TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 108–691

PLEDGE PROTECTION ACT OF 2004

SEPTEMBER 21, 2004.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2028]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2028) to amend title 28, United States Code, with respect to the jurisdiction of Federal courts inferior to the Supreme Court over certain cases and controversies involving the Pledge of Allegiance, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

CONTENTS

	Page
The Amendments	2
Purpose and Summary	2
Background and Need for the Legislation	2
Hearings	50
Committee Consideration	51
Vote of the Committee	51
Committee Oversight Findings	53
New Budget Authority and Tax Expenditures	53
Congressional Budget Office Cost Estimate	53
Performance Goals and Objectives	54
Constitutional Authority Statement	54
Section-by-Section Analysis and Discussion	54
Changes in Existing Law Made by the Bill, as Reported	55
Markup Transcript	55
Dissenting Views	91

29–006

THE AMENDMENTS

The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Pledge Protection Act of 2004".

SEC. 2. LIMITATION ON JURISDICTION.

(a) IN GENERAL.—Chapter 99 of title 28, United States Code, is amended by adding at the end the following:

"§ 1632. Limitation on jurisdiction

"No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance, as defined in section 4 of title 4, or its recitation.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 99 of title 28, United States Code, is amended by adding at the end the following new item:

"1632. Limitation on jurisdiction.".

Amend the title so as to read:

A bill to amend title 28, United States Code, with respect to the jurisdiction of Federal courts over certain cases and controversies involving the Pledge of Allegiance.

PURPOSE AND SUMMARY

The Pledge of Allegiance ("the Pledge"), reads: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." [1] When Congress passed the bill adding the words "under God," Congress stated its belief that those words in no way run contrary to the First Amendment but recognize "only the guidance of God in our national affairs." [2]

Two words—"under God"—in the Pledge help define our national heritage as the beneficiaries of a constitution sent to the states for ratification "in the Year of our Lord," [3] 1787, by a founding generation that saw itself guided by a providential God. Those two words, and their entirely proper presence in a system of government defined by our Constitution, have been repeatedly and overwhelmingly reaffirmed by the House of Representatives.

H.R. 2028 would preclude Federal court jurisdiction over cases involving the Pledge of Allegiance and its recitation. H.R. 2028 would prevent Federal courts from striking the words "under God" from the Pledge of Allegiance.

BACKGROUND AND NEED FOR THE LEGISLATION

Congress has repeatedly and overwhelmingly reaffirmed the Pledge of Allegiance. On June 27, 2002, during the 107th Congress, the House of Representatives passed H. Res. 459, expressing the sense of the House of Representatives that *Newdow* v. *United States Congress* [4] was erroneously decided, and for other purposes, by a vote of 416–3.

---

[1] This text of the Pledge is codified in 4 U.S.C. § 4.

[2] H.R. Rep. No. 83–1693.

[3] U.S. Const. ("[D]one in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven . . .) (ratification clause).

[4] 292 F.3d 597 (9th Cir. 2002), *rev'd,* 124 S.Ct. 2301 (2004).

That resolution stated:

Whereas on June 26, 2002, the Ninth Circuit Court of Appeals held that the Pledge of Allegiance is an unconstitutional endorsement of religion, stating that it "impermissibly takes a position with respect to the purely religious question of the existence and identity of God," and places children in the "untenable position of choosing between participating in an exercise with religious content or protesting.";

Whereas the Pledge of Allegiance is not a prayer or a religious practice, the recitation of the pledge is not a religious exercise;

Whereas the Pledge of Allegiance is the verbal expression of support for the United States of America, and its effect is to instill support for the United States of America;

Whereas the United States Congress recognizes the right of those who do not share the beliefs expressed in the Pledge to refrain from its recitation;

Whereas this ruling is contrary to the vast weight of Supreme Court authority recognizing that the mere mention of God in a public setting is not contrary to any reasonable reading of the First Amendment. The Pledge of Allegiance is not a religious service or a prayer, but it is a statement of historical beliefs. The Pledge of Allegiance is a recognition of the fact that many people believe in God and the value that our culture has traditionally placed on the role of religion in our founding and our culture. The Supreme Court has recognized that governmental entities may, consistent with the First Amendment, recognize the religious heritage of America;

Whereas the notion that a belief in God permeated the founding of our Nation was well recognized by Justice Brennan, who wrote in *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 304 (1963) (Brennan, J., concurring), that "[t]he reference to divinity in the revised pledge of allegiance * * * may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact."; and

Whereas this ruling treats any religious reference as inherently evil and is an attempt to remove such references from the public arena: Now, therefore, be it

Resolved, That it is the sense of the House of Representatives that——

(1) the Pledge of Allegiance, including the phrase "One Nation, under God," reflects the historical fact that a belief in God permeated the founding and development of our Nation;

(2) the Ninth Circuit's ruling is inconsistent with the United States Supreme Court's First Amendment jurisprudence that the Pledge of Allegiance and similar expressions are not unconstitutional expressions of religious belief;

(3) the phrase "One Nation, under God," should remain in the Pledge of Allegiance; and

(4) the Ninth Circuit Court of Appeals should agree to rehear this ruling en banc in order to reverse this constitutionally infirm and historically incorrect ruling.

On October 8, 2002, also during the 107th Congress, the House of Representatives passed S. 2690,[5] to reaffirm the reference to one Nation under God in the Pledge of Allegiance, by a vote of 401–5.

The findings in S. 2690 provided:

Congress finds the following:

(1) On November 11, 1620, prior to embarking for the shores of America, the Pilgrims signed the Mayflower Compact that declared: "Having undertaken, for the Glory of God and the advancement of the Christian Faith and honor of our King and country, a voyage to plant the first colony in the northern parts of Virginia."

(2) On July 4, 1776, America's Founding Fathers, after appealing to the "Laws of Nature, and of Nature's God" to justify their separation from Great Britain, then declared: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness"

(3) In 1781, Thomas Jefferson, the author of the Declaration of Independence and later the Nation's third President, in his work titled "Notes on the State of Virginia" wrote: "God who gave us life gave us liberty. And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the Gift of God. That they are not to be violated but with His wrath? Indeed, I tremble for my country when I reflect that God is just; that his justice cannot sleep forever."

(4) On May 14, 1787, George Washington, as President of the Constitutional Convention, rose to admonish and exhort the delegates and declared: "If to please the people we offer what we ourselves disapprove, how can we afterward defend our work? Let us raise a standard to which the wise and the honest can repair; the event is in the hand of God!"

(5) On July 21, 1789, on the same day that it approved the Establishment Clause concerning religion, the First Congress of the United States also passed the Northwest Ordinance, providing for a territorial government for lands northwest of the Ohio River, which declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

(6) On September 25, 1789, the First Congress unanimously approved a resolution calling on President George Washington to proclaim a National Day of Thanksgiving for the people of the United States by declaring, "a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by

[5] The purpose of S. 2690 is described in H.R. Rep. No. 107–659 (2002) at 4–13.

affording them an opportunity peaceably to establish a constitution of government for their safety and happiness."

(7) On November 19, 1863, President Abraham Lincoln delivered his Gettysburg Address on the site of the battle and declared: "It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this Nation, under God, shall have a new birth of freedom—and that Government of the people, by the people, for the people, shall not perish from the earth."

(8) On April 28, 1952, in the decision of the Supreme Court of the United States in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), in which school children were allowed to be excused from public schools for religious observances and education, Justice William O. Douglas, in writing for the Court stated: "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other. That is the common sense of the matter. Otherwise the State and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'"

(9) On June 15, 1954, Congress passed and President Eisenhower signed into law a statute that was clearly consistent with the text and intent of the Constitution of the United States, that amended the Pledge of Allegiance to read: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."

(10) On July 20, 1956, Congress proclaimed that the national motto of the United States is "In God We Trust", and that motto is inscribed above the main door of the Senate, behind the Chair of the Speaker of the House of Representatives, and on the currency of the United States.

(11) On June 17, 1963, in the decision of the Supreme Court of the United States in *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), in which compulsory school prayer was held unconstitutional, Justices Goldberg and Harlan, concurring in the decision, stated: "But untutored devotion to the concept of neutrality can lead to invocation or approval of results

which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political, and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so."

(12) On March 5, 1984, in the decision of the Supreme Court of the United States in *Lynch* v. *Donelly*, 465 U.S. 668 (1984), in which a city government's display of a nativity scene was held to be constitutional, Chief Justice Burger, writing for the Court, stated: "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789 . . . [E]xamples of reference to our religious heritage are found in the statutorily prescribed national motto 'In God We Trust' (36 U.S.C. 186), which Congress and the President mandated for our currency, see (31 U.S.C. 5112(d)(1) (1982 ed.)), and in the language 'One Nation under God', as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children—and adults—every year . . . Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages. The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with the Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation."

(13) On June 4, 1985, in the decision of the Supreme Court of the United States in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), in which a mandatory moment of silence to be used for meditation or voluntary prayer was held unconstitutional, Justice O'Connor, concurring in the judgment and addressing the contention that the Court's holding would render the Pledge of Allegiance unconstitutional because Congress amended it in 1954 to add the words "under God," stated "In my view, the words 'under God' in the Pledge, as codified at (36 U.S.C. 172), serve as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'"

(14) On November 20, 1992, the United States Court of Appeals for the 7th Circuit, in *Sherman* v. *Community Consoli-*

dated School District 21, 980 F.2d 437 (7th Cir. 1992), held that a school district's policy for voluntary recitation of the Pledge of Allegiance including the words "under God" was constitutional.

(15) The 9th Circuit Court of Appeals erroneously held, in *Newdow* v. *United States Congress* (9th Cir. June 26, 2002), that the Pledge of Allegiance's use of the express religious reference "under God" violates the First Amendment to the Constitution, and that, therefore, a school district's policy and practice of teacher-led voluntary recitations of the Pledge of Allegiance is unconstitutional.

(16) The erroneous rationale of the 9th Circuit Court of Appeals in *Newdow* would lead to the absurd result that the Constitution's use of the express religious reference "Year of our Lord" in Article VII violates the First Amendment to the Constitution, and that, therefore, a school district's policy and practice of teacher-led voluntary recitations of the Constitution itself would be unconstitutional.

S. 2690 was signed by President George W. Bush on November 13, 2002, and became Public Law No. 107–293.

During the 108th Congress, on March 20, 2003, following a February 28, 2003, decision by the Ninth Circuit Court of Appeals, en banc, amending its ruling in this case,[6] the House of Representatives passed H. Res. 132,[7] expressing the sense of the House of Representatives that the Ninth Circuit Court of Appeals ruling in *Newdow* v. *United States Congress* is inconsistent with the Supreme Court's interpretation of the first amendment and should be overturned, and for other purposes, by a vote of 400–7.

H. Res. 132 provided:

Whereas on June 26, 2002, the Ninth Circuit Court of Appeals, in *Newdow* v. *United States Congress* (292 F.3d 597; 9th Cir. 2002) (Newdow I), held that the Pledge of Allegiance to the Flag as currently written to include the phrase, "one Nation, under God", unconstitutionally endorses religion, that such phrase was added to the pledge in 1954 only to advance religion in violation of the establishment clause, and that the recitation of the pledge in public schools at the start of every school day coerces students who choose not to recite the pledge into participating in a religious exercise in violation of the establishment clause of the first amendment;

Whereas on February 28, 2003, the Ninth Circuit Court of Appeals amended its ruling in this case, and held (in Newdow II) that a California public school district's policy of opening each school day with the voluntary recitation of the Pledge of Allegiance to the Flag "impermissibly coerces a religious act" on the part of those students who choose not to recite the pledge and thus violates the establishment clause of the first amendment;

Whereas the ninth circuit's ruling in Newdow II contradicts the clear implication of the holdings in various Supreme Court cases, and the spirit of numerous other Supreme Court cases

[6] *See* 328 F.3d 466 (9th Cir. 2003).
[7] The purpose of H. Res. 132 is described in H.R. Rep No. 108–41 (2003) at 2–20.

in which members of the Court have explicitly stated, that the voluntary recitation of the Pledge of Allegiance to the Flag is consistent with the first amendment;

Whereas the phrase, "one Nation, under God," as included in the Pledge of Allegiance to the Flag, reflects the notion that the Nation's founding was largely motivated by and inspired by the Founding Fathers' religious beliefs;

Whereas the Pledge of Allegiance to the Flag is not a prayer or statement of religious faith, and its recitation is not a religious exercise, but rather, it is a patriotic exercise in which one expresses support for the United States and pledges allegiance to the flag, the principles for which the flag stands, and the Nation;

Whereas the House of Representatives recognizes the right of those who do not share the beliefs expressed in the pledge or who do not wish to pledge allegiance to the flag to refrain from its recitation;

Whereas the effect of the ninth circuit's ruling in Newdow II will prohibit the recitation of the pledge at every public school in 9 states, schooling over 9.6 million students, and could lead to the prohibition of, or severe restrictions on, other voluntary speech containing religious references in these classrooms;

Whereas rather than promoting neutrality on the question of religious belief, this decision requires public school districts to adopt a preference against speech containing religious references;

Whereas the constitutionality of the voluntary recitation by public school students of numerous historical and founding documents, such as the Declaration of Independence, the Constitution, and the Gettysburg Address, has been placed into serious doubt by the ninth circuit's decision in Newdow II;

Whereas the ninth circuit's interpretation of the first amendment in Newdow II is clearly inconsistent with the Founders' vision of the establishment clause and the free exercise clause of the first amendment, Supreme Court precedent interpreting the first amendment, and any reasonable interpretation of the first amendment;

Whereas this decision places the ninth circuit in direct conflict with the Seventh Circuit Court of Appeals which, in *Sherman* v. *Community Consolidated School District* (980 F.2d 437; 7th Cir. 1992), held that a school district's policy allowing for the voluntary recitation of the Pledge of Allegiance to the Flag in public schools does not violate the establishment clause of the first amendment;

Whereas Congress has consistently supported the Pledge of Allegiance to the Flag by starting each session with its recitation;

Whereas the House of Representatives reaffirmed support for the Pledge of Allegiance to the Flag in the 107th Congress by adopting House Resolution 459 on June 26, 2002, by a vote of 416–3; and

Whereas the Senate reaffirmed support for the Pledge of Allegiance to the Flag in the 107th Congress by adopting Senate

Resolution 292 on June 26, 2002, by a vote of 99–0: Now, therefore, be it

Resolved, That it is the sense of the House of Representatives that——

(1) the phrase "one Nation, under God," in the Pledge of Allegiance to the Flag reflects that religious faith was central to the Founding Fathers and thus to the founding of the Nation;

(2) the recitation of the Pledge of Allegiance to the Flag, including the phrase, "one Nation, under God," is a patriotic act, not an act or statement of religious faith or belief;

(3) the phrase "one Nation, under God" should remain in the Pledge of Allegiance to the Flag and the practice of voluntarily reciting the pledge in public school classrooms should not only continue but should be encouraged by the policies of Congress, the various States, municipalities, and public school officials;

(4) despite being the school district where the legal challenge to the pledge originated, the Elk Grove Unified School District in Elk Grove, California, should be recognized and commended for their continued support of the Pledge of Allegiance to the Flag;

(5) the Ninth Circuit Court of Appeals ruling in *Newdow* v. *United States Congress* has created a split among the circuit courts, and is inconsistent with the Supreme Court's interpretation of the first amendment, which indicates that the voluntary recitation of the pledge and similar patriotic expressions is consistent with the first amendment;

(6) the Attorney General should appeal the ruling in *Newdow* v. *United States Congress* , and the Supreme Court should review this ruling in order to correct this constitutionally infirm and historically incorrect holding; and

(7) the President should nominate and the Senate should confirm Federal circuit court judges who interpret the Constitution consistent with the Constitution's text.

And on July 22, 2003, the House of Representatives agreed to an amendment (H. Amdt. 288 (A003)) offered by Rep. Hostettler to H.R. 2799, by a vote of 307–119. Rep. Hostettler's amendment prohibited any funds from being used to enforce the judgment in *Newdow* v. *United States Congress*.[8]

THE FUTURE OF THE PLEDGE OF ALLEGIANCE

As the legislative history outlined above makes clear, the House of Representatives has acted to reaffirm the constitutionality of the Pledge in the face of multiple decisions by the Federal courts that the Pledge is unconstitutional. Although the United States Supreme Court reversed and remanded the Ninth Circuit's latest holding striking down the Pledge as unconstitutional, it did so on the grounds that the plaintiff lacked the legal standing to bring the case and consequently the Supreme Court did not reach the merits of the case. The Supreme Court's decision not to reach the merits of the case is apparently an effort to forestall a decision adverse to the Pledge, since the dissenting Justices concluded that the Court

[8] 292 F.3d 597 (9th Cir. 2002).

in its decision "erect[ed] a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim."[9]

In order to protect the Pledge from Federal court decisions that would have the effect of invalidating the Pledge across several states, or even nationwide,[10] H.R. 2028 would reserve to the state courts the authority to decide whether the Pledge is valid as written within each state's boundaries.

AMERICA'S GREATEST LEADERS HAVE LONG BEEN CONCERNED ABOUT LIMITING FEDERAL JUDGES' ABUSE OF THEIR AUTHORITY

Deep concern that Federal judges might abuse their power has long been noted by America's most gifted observers, including Thomas Jefferson and Abraham Lincoln.

Thomas Jefferson lamented that "the germ of dissolution of our Federal Government is in the constitution of the Federal judiciary; . . . working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped . . ."[11] In Jefferson's view, leaving the protection of individuals' rights to Federal judges employed for life was a serious error. Responding to the argument that Federal judges are the final interpreters of the Constitution, Jefferson wrote:

> You seem . . . to consider the [federal] judges as the ultimate arbiters of all constitutional questions, a very dangerous doctrine indeed and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps . . . *[T]heir power [is] the more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective control.* The constitution has erected no such single tribunal, knowing that, to whatever hands confided, with the corruptions of time and party its members would become despots.[12]

Jefferson strongly denounced the notion that the Federal judiciary should always have the final say on constitutional issues:

> If [such] opinion be sound, then indeed is our Constitution a complete felo de se [act of suicide]. For intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation . . . The

---

[9] *Elk Grove Unified School District* v. *Newdow,* 124 S.Ct. 2301, 2312 (Rehnquist, C.J., dissenting). That part of Chief Justice Rehnquist's dissenting opinion was joined by Justices O'Connor and Thomas. *Id.*

[10] Nothing in H.R. 2028 would allow deviations from existing Supreme Court precedent prohibiting the coerced recitation of the Pledge of Allegiance. In *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624 (1943), the Supreme Court held it is unconstitutional to require individuals to salute the flag. *See id.* at 643 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

[11] XV Thomas Jefferson, Writings of Thomas Jefferson, at 331–32 (Albert E. Bergh, ed. 1903) (letter from Thomas Jefferson to Charles Hammond (Aug. 18, 1821)).

[12] XV The Writings of Thomas Jefferson 277–78 (Andrew A. Lipscomb and Albert Bergh, eds. 1904) (letter from Thomas Jefferson to William C. Jarvis (September 28, 1820)) (emphasis added).

> constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.[13]

Abraham Lincoln said in his first inaugural address in 1861, "The candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers having, to that extent, practically resigned their government into the hands of that eminent tribunal."[14]

H.R. 2028 FITS NEATLY WITHIN OUR CONSTITUTIONAL SYSTEM

A remedy to abuses by Federal judges has long been understood to lie, among other places, in Congress's authority to limit Federal court jurisdiction. As eminent Federal jurisdiction scholar Herbert Wechsler has stated, "Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court's appellate jurisdiction . . . [E]ven a pending case may be excepted from appellate jurisdiction."[15] Indeed, the Supreme Court has upheld a statute removing jurisdiction from it in a pending case.[16]

Regarding the Federal courts below the Supreme Court, Article III, § 1, clause 1 of the Constitution provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts *as the Congress may from time to time ordain and establish.*"[17]

Regarding the Supreme Court, the Constitution provides that only two types of cases are within the original jurisdiction of the Supreme Court.[18] Article III, § 2, clause 2 provides that "[i]n all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases . . . the supreme Court shall have appellate Jurisdiction, both as to Law and Fact,

---

[13] XV The Writings of Thomas Jefferson (Albert Bergh, ed. 1903) at 213 (letter from Thomas Jefferson to Judge Spencer Roane (September 6, 1819)).

[14] Abraham Lincoln's First Inaugural Address (March 4, 1861) in 4 The Collected Works of Abraham Lincoln 268 (Roy P. Basler, ed. 1953).

[15] Herbert Wechsler, "The Courts and the Constitution," 65 Colum. L. Rev. 1001, 1005 (1965).

[16] *See Ex parte McCardle,* 74 U.S. (7 Wall.) 506 (1868).

[17] This provision of the Constitution makes clear that the Constitution itself vests judicial power in the manner prescribed in the Constitution, not that the Constitution mandates Congress to vest complete jurisdiction in the Federal courts. The Constitution itself "vests" in the Supreme Court only its limited, original jurisdiction "[i]n all cases affecting Ambassadors, other public Ministers and consuls, and those in which a State shall be Party . . ." U.S. Constitution, Article III, § 2, clause 2. The word "shall" in this provision is not addressed to Congress, just as the words "shall" in the constitutional clauses vesting the legislative and executive authorities are not addressed to Congress. *See* U.S. Constitution, Article I , § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); Article II, § 1 ("The executive Power shall be vested in a President of the United States of America."). Similarly, where the Constitution provides that "The judicial power shall extend" to certain cases, it can only mean that such power shall extend to such cases insofar as either the Constitution vests original jurisdiction in the Supreme Court or as the Constitution vests power in Congress to create lower Federal courts and Congress has in fact exercised that power by statute. *See also* U.S. Const. Art. I, § 8, clause 9 ("The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court."). *See also* Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (4th ed. 1996) at 348 ("Although Article III states that 'the judicial Power of the United States *shall* be vested' (emphasis added), Congress possesses significant powers to apportion jurisdiction among state and Federal courts and, in doing so, to define and limit the jurisdiction of particular courts.").

[18] The Constitution does not grant the Supreme Court exclusive original jurisdiction. *See California* v. *Arizona,* 440 U.S. 59, 65 (1979); *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 93 (1972); *Ohio ex rel. Popovici* v. *Agler,* 280 U.S. 379, 383 (1930).

with such Exceptions, and under such Regulations as the Congress shall make."[19]

Consequently, the Constitution provides that the lower Federal courts are entirely creatures of Congress, as is the appellate jurisdiction of the Supreme Court, excluding only "cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[20]

The Founders of our Nation carefully crafted a republic in the Constitution. They articulated their defense of that document to the voters in the ratifying states in a series of newspaper articles that became known as the *Federalist Papers.*

In Federalist No. 80, Alexander Hamilton made clear the broad nature of Congress's authority to amend Federal court jurisdiction to remedy perceived abuse. He wrote:

> From this review of the particular powers of the Federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, *it ought to be recollected that the national legislature will have ample authority to make such EXCEPTIONS, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.*[21]

Alexander Hamilton also wrote in Federalist No. 81 that "To avoid all inconveniencies, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction [that] shall be subject to such EXCEPTIONS and regulations as the national legislature may prescribe. *This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.*"[22]

Roger Sherman, whom eminent historian Clinton Rossiter considered one of the most influential members of the Constitutional Convention,[23] also wrote that:

---

[19] Article III, § 2, clause 2's reference to cases in which "a State shall be Party" does not include suits by citizens against states. *See United States* v. *Texas,* 143 U.S. 621, 643–44 (1892) ("The words in the constitution, 'in all cases . . . in which a state shall be party, the supreme court shall have original jurisdiction' . . . *do not refer to suits brought against a state by its own citizens or by citizens of other states, or by citizens or subjects of foreign states, even where such suits arise under the constitution, laws, and treaties of the United States,* because the judicial power of the United States does not extend to suits of individuals against states.") (emphasis added). The Eleventh Amendment provides that "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." U.S. Const. Amend. XI.

[20] By statute, the original and exclusive jurisdiction of the Supreme Court is confined to "all controversies between two or more States." 28 U.S.C. § 1251("(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States. (b) The Supreme Court shall have original but not exclusive jurisdiction of: (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; (2) All controversies between the United States and a State; (3) All actions or proceedings by a State against the citizens of another State or against aliens.").

[21] Federalist No. 80 (Hamilton) at 481 (Clinton Rossiter ed., 1961). Hamilton elaborated further in Federalist No. 81, stating that "We have seen that the original jurisdiction of the Supreme Court would be confined to two classes of causes [cases affecting ambassadors, ministers, and consuls, and cases in which a State is a party], and those of a nature rarely to occur. In all other cases of Federal cognizance, the original jurisdiction would appertain to the inferior tribunals; and the Supreme Court would have nothing more than an appellate jurisdiction, 'with such EXCEPTIONS and under such REGULATIONS as the Congress shall make.'" Federalist No. 81 (Hamilton) at 488 (Clinton Rossiter ed., 1961).

[22] Federalist No. 81 (Hamilton) at 490 (Clinton Rossiter ed., 1961).

[23] *See* Clinton Rossiter, 1787: The Grand Convention, chapter 10 (1966).

> It was thought necessary in order to carry into effect the laws of the Union, to promote justice, and preserve harmony among the states, to extend the judicial powers of the United States to the enumerated cases, under such regulations and with such exceptions as shall be provided for by law, *which will doubtless reduce them to cases of such magnitude and importance as cannot safely be trusted to the final decision of the courts of particular states . . .*[24]

FROM THE FIRST JUDICIARY ACT OF 1789 TO THE PRESENT, CONGRESS'S USE OF ITS AUTHORITY TO LIMIT FEDERAL COURT JURISDICTION HAS BEEN CONSISTENT AND BIPARTISAN

Congress has always made clear that it can limit the jurisdiction of the Federal courts, starting with the Judiciary Act of 1789.[25] As has been observed by the authors of the leading treatise on Federal court jurisdiction, "the first Judiciary Act is widely viewed as an indicator of the original understanding of Article III and, in particular, of Congress' constitutional obligations concerning the vesting of Federal jurisdiction."[26]

The first Congress made clear that Federal court jurisdiction over constitutional claims was not unlimited. As the Congressional Research Service has written:

> There is significant historical precedent . . . for the proposition that there is no requirement that all jurisdiction that could be vested in the Federal courts should be so vested. For instance, the First Judiciary Act implemented under the Constitution, the Judiciary Act of 1789, is considered to be an indicator of the original understanding of the Article III powers. That Act, however, falls short of having implemented all of the "judicial powers" which were specified under Article III. For instance, the Act did not provide jurisdiction for the inferior Federal courts to consider cases arising under Federal law or the Constitution. Although the Supreme Court's appellate jurisdiction did extend to such cases when they originated in state courts, its review was limited to where a claimed statutory or constitutional right had been denied by the court below.[27]

The Judiciary Act of 1789[28] provided that the Supreme Court, regarding constitutional challenges to Federal law, could review only those final decisions of the state courts that held "against [the] validity" of a Federal statute or treaty.[29] Consequently, under the Judiciary Act of 1789, if the highest state court held a Federal law constitutional, no appeal was allowed to any Federal court, including the Supreme Court. The Supreme Court dismissed a case early in its history under such provision.[30]

---

[24] Roger Sherman, Observations on the New Federal Constitution (A Citizen of New Haven, II) (December 25, 1788) (emphasis added), reprinted in Essays on the Constitution of the United States, at 240–41 (P. Ford, ed. 1892).

[25] 1 Stat. 85.

[26] Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (4th ed. 1996) at 28.

[27] Kenneth Thomas, Congressional Research Service, CRS Report for Congress, "Limiting Court Jurisdiction Over Federal Constitutional Issues: 'Court-Stripping'" (updated May 19, 2004) at 7.

[28] 1 Stat. 85.

[29] *See Martin* v. *Hunter's Lessee,* 14 U.S. 304, 352 (1816).

[30] *See Gordon* v. *Caldcleugh,* 7 U.S. 268 (1806).

In the Judiciary Act of 1789,[31] Congress provided no general Federal question jurisdiction in the Federal courts below the Supreme Court.[32] The Federal circuit courts were vested with jurisdiction according to the nature of the parties rather than the nature of the dispute. The Judiciary Act of 1789 provided "the circuit courts shall have original cognizance . . . of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum . . . of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State."[33]

Further, Section 25 of the Judiciary Act of 1789 restricted the Supreme Court's appellate jurisdiction over state court decisions to cases where the validity of a treaty, statute, or authority of the United States was drawn into question and the state court's decision was against their validity[34] or where a state court construed a United States constitution, treaty, statute, or commission and decided against a title, right, privilege, or exemption under any of them.[35] Consequently, under the Judiciary Act of 1789, if the highest state courts upheld a Federal law as constitutional and decided in favor of a right under such Federal statute (and there was no coincidental Federal diversity jurisdiction), no appeal claiming such Federal law was unconstitutional was allowed to any Federal court, including the Supreme Court. The Judiciary Act of 1789, therefore, denied the inferior Federal courts original jurisdiction and the Supreme Court appellate jurisdiction to review the constitutionality of literally thousands of laws of Congress in the many and various circumstances meeting the criteria just mentioned.

As scholars of Federal court jurisdiction have observed, "the 1789 Act . . . made no use of the grant of judicial power over cases arising under the Constitution or laws of the United States . . . In the category of cases arising under Federal law, Congress provided no general Federal question jurisdiction in the lower Federal courts. Nor, under section 25, did the Supreme Court's appellate jurisdiction extend to cases originating in the state courts in which the Federal claim was *upheld*."[36]

Congress did not grant a more general Federal question authority to the lower Federal courts until after the Civil War,[37] and Congress did not grant the Supreme Court the authority to review state court rulings upholding a claim of Federal right until 1914.[38] Until 1914, then, a situation existed in which the constitutionality of literally thousands of Federal laws could not be reviewed in either the inferior Federal courts, or the Supreme Court, or both.[39]

---

[31] Judiciary Act of 1789, 1 Stat. 85 (1789).

[32] *See* Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (4th ed. 1996) at 33 (stating that in the Judiciary Act of 1789, "Congress provided no general Federal question jurisdiction in the lower Federal courts").

[33] Judiciary Act of 1789, 1 Stat. 73, § 11 (1789).

[34] Judiciary Act of 1789, 1 Stat. 73, § 25 (1789).

[35] *Id.*

[36] *See* Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (4th ed. 1996) at 29 (emphasis in original).

[37] *See* Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (1875).

[38] *See* Judiciary Act of 1914, Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (1914).

[39] The Congressional Research Service, on July 22, 2004, issued a memorandum stating its staff was unaware of any precedent for a law that would deny the inferior Federal courts original jurisdiction or the Supreme Court appellate jurisdiction to review the constitutionality of a law of Congress. See Memorandum from Mr. Johnny H. Killian, Senior Specialist, American

As one commentator has written, "Under the Judiciary Act of 1789, cases could arise that clearly fall within the judicial power of the United States but that were excluded from the combined appellate and original jurisdiction of the Federal courts," including cases in which a state court erroneously voided a state statute for violating the Federal constitution.[40] In sum, "the first Congress's allocation of jurisdiction in the Judiciary Act is *inconsistent* with the thesis that the Constitution requires the entire judicial power of the United States to be vested in the aggregate in the Supreme Court and lower Federal courts."[41]

In the first Congress, fifty-four members had been delegates to the Constitutional Convention or their state ratification conventions.[42] That same Congress overwhelmingly voted to place significant restrictions on Federal court jurisdiction that prevented many constitutional and other claims from ever being heard in a Federal court. James Madison, for example, spoke in favor of the Judiciary Act of 1789 during House debate on the legislation,[43] and at the conclusion of the debate he gave the legislation his endorsement.[44] Although there is no rollcall vote on passage of the Judiciary Act of 1789 in the House recorded in the Congressional Record,[45] the Judiciary Act of 1789 passed the Senate by a vote of 14–6, with eight of the ten former delegates to the Constitutional Convention voting for it.[46]

Shortly after the Judiciary Act of 1789 became law, Congress asked Edmund Randolph, the first Attorney General of the United States, to submit a report and recommendation on "matters relative to the administration of justice under the authority of the United States."[47] In that report, Attorney General Randolph recommended that the Judiciary Act of 1789 be amended such that even more cases within the judicial power of the United States be prohibited from being filed in Federal court and from being appealed to a Federal court, citing the broad authority the Constitution granted Congress to limit Federal court jurisdiction.[48]

Indeed, as a leading treatise has pointed out, "Beginning with the first Judiciary Act in 1789, Congress has never vested the Fed-

---

Constitutional Law to House Committee on the Judiciary re: "Precedent for Congressional Bill." However, on August 16, 2004, in response to a letter from the Committee, the Congressional Research Service admitted its error. *See* Memorandum to House Committee on the Judiciary from Johnny H. Killian, Senior Specialist, American Constitutional Law, American Law Division re: Congressional Control of Jurisdiction of Federal Courts (August 16, 2004) ("This memorandum responds to your request that we reassess an earlier memorandum of ours . . . [§ 25 of the Judiciary Act of 1789] did operate to preclude any Federal court from deciding the validity of a Federal statute from 1789 to 1875. Accordingly, our earlier memorandum was incorrect."). This correspondence is reprinted at 150 Cong. Rec. E1604–05 (September 13, 2004).

[40] William R. Casto, "The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction," 26 B.C.L. Rev. 1101, 1118 (1985).

[41] William R. Casto, "The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction," 26 B.C.L. Rev. 1101, 1120 (1985) (emphasis added).

[42] Encyclopedia of American History 145 (R. Morris 6th ed. 1982).

[43] *See* 1 Annals of Congress 812–13 (J. Gales ed. 1789).

[44] *See* Gazette of the United States (September 19, 1789) at 3, col. 2.

[45] *See* I Debates and Proceedings in the Congress of the United States at 928–29 (Thursday, September 17, 1789) ("The bill for establishing the Judicial Courts of the United States was read the third time and passed.").

[46] *See* I Debates and Proceedings in the Congress of the United States at 52 (Friday, July 17, 1789) (Bassett, Ellsworth, Few, Johnson, Morris, Paterson, Read, and Strong voting for, Butler and Langdon voting against). While one cannot know from such votes whether those voting against it did so because they believed it was unconstitutional, surely no one who voted for it did so believing it was unconstitutional.

[47] 2 Annals of Congress 1719 (1790).

[48] *See* William R. Casto, "The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction," 26 B.C.L. Rev. 1101, 1122 (1985).

eral courts with the entire 'judicial Power' that would be permitted by Article III."[49]

On both sides of the political spectrum, calls have been made to limit the jurisdiction of Federal courts to avoid abuses. Senate Minority Leader Daschle has supported provisions that would deny all Federal courts jurisdiction over the procedures governing timber projects in order to expedite forest clearing and save forests from destruction.[50] Those provisions became part of Public Law 107–206.[51] If Congress can deny all Federal courts the authority to hear a class of cases to protect trees, certainly it should do so to protect a state's policy regarding the Pledge of Allegiance.[52]

Democratic Senator Robert Byrd also introduced an amendment, Amendment SU 70, to S. 450 during the 96th Congress. The amendment, which was adopted by a Senate controlled by Democrats with large bipartisan support,[53] provided that neither the lower Federal courts nor the Supreme Court would have jurisdiction to review any case arising out of state laws relating to voluntary prayers in public schools and public buildings.

And on July 22, 2004, the House passed, by a vote of 233–194, H.R. 3313, the Marriage Protection Act, which would prevent Federal courts from striking down the provision of the Defense of Marriage Act[54] that provides that no state shall be required to accept same-sex marriage licenses granted in other states.

---

[49] Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (4th ed. 1996) at 349. Such less-than-full vesting includes statutes that preclude Federal review of diversity cases in which the amounts in controversy are below statutorily defined minimums. *Id.* Further, the law has generally developed in a variety of additional ways that make clear there are many types of cases in which not only are Federal courts precluded from conducting constitutional review, but all constitutional review is precluded. For example, the Supreme Court has found constitutional claims to be beyond judicial review because they involve "political questions." *See Coleman* v. *Miller,* 307 U.S. 433, 443–46 (1939); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District,* 281 U.S. 74, 79–80 (1930). And the doctrine of sovereign immunity provides that additional constitutional claims can go unheard. *See* Black's Law Dictionary (8th ed. 2004) ("A government's immunity from being sued in its own courts without its consent").

[50] *See* Audrey Hudson, "Daschle Seeks to Exempt His State; Wants Logging to Prevent Fires," *The Washington Times* (July 24, 2002) at A1 ("'As we have seen in the last several weeks, the fire danger in the Black Hills is high and we need to get crews on the ground as soon as possible to reduce this risk and protect property and lives,' Mr. Daschle said in a statement late Monday night after a House-Senate conference committee agreed on the language . . . The provision says that 'due to extraordinary circumstances,' timber activities will be exempt from the National Forest Management Act and National Environmental Policy Act, is not subject to notice, comment or appeal requirements under the Appeals Reform Act, and is not subject to judicial review by any U.S. court."); Michelle Munn, "Plan to Curb Forest Fires Wins Support," *The Los Angeles Times* (August 2, 2002) at A16 ("Daschle's amendment authorizes a forest management program in Black Hills National Forest without resort to a typically lengthy judicial review and appeals process.").

[51] *See* P.L. 107–206, § 706(j) ("Any action authorized by this section shall not be subject to judicial review by any court of the United States."). This provision was addressed by the Tenth Circuit Court of Appeals in *Biodiversity Associates* v. *Cables,* 357 F.3d 1152 (10th Cir. 2004), but only to determine whether that provision conflicted with a settlement agreement between the Clinton Administration and plaintiffs in the case under which it agreed not to allow any tree cutting in the Beaver Park Roadless Area. *Id.* at 1158, 1160 ("In the waning days of the Clinton Administration, in September of 2000, the Forest Service signed a settlement agreement with the plaintiff groups, under which it agreed not to allow any tree cutting in the Beaver Park Roadless Area, at least until the Service approved a new land and resource management plan remedying the defects of the 1997 plan . . . The question before us is simply whether the settlement agreement has continuing validity in the face of Congress's intervening act.").

[52] Congress has often acted to preclude judicial review in Federal courts in selected cases. For example, the Terrorism Risk Insurance Act (P.L. 107–297) precludes judicial review of "certifications" by the Secretary of the Treasury that terrorist events have occurred, and the Small Business Liability Relief and Brownfields Revitalization Act (P.L. 107–118) precludes judicial review of hazardous waste cleanup programs.

[53] *See* Congressional Quarterly, Congressional rollcall 1979, at 10–S ("R 25–12; D 26–28").

[54] *See* 28 U.S.C. § 1738C.

SUPREME COURT PRECEDENTS ARE CONSISTENT WITH CONGRESS'S AUTHORITY TO LIMIT FEDERAL COURT JURISDICTION

Supreme Court precedents upholding a variety of statutes limiting Federal court jurisdiction make clear that Congress has the authority to remove jurisdiction over legal issues from Federal courts below the Supreme Court, and from the Supreme Court as well.

In *Wiscart* v. *D'Auchy,*[55] Chief Justice Ellsworth, who has been a delegate to the Constitutional Convention, upheld a denial of Supreme Court jurisdiction, stating broadly that the Supreme Court's

> appellate jurisdiction is, likewise, qualified; inasmuch as it is given "with such exceptions, and under such regulations, as the Congress shall make." Here then, is the ground, and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of an appellate jurisdiction, is simply, whether Congress has established any rule for regulating its exercise?[56]

In *Turner* v. *Bank of North America,*[57] the Supreme Court upheld the provision of the Judiciary Act[58] which provided that no district or circuit court "shall have cognisance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." As counsel pointed out, Congress had passed the statute to prevent contracts between citizens of the same state from, through collusion, being made Federal issues under the Federal courts' diversity jurisdiction simply because one party assigned the benefits of a promissory note to a citizen of another state, or to an alien.[59] Chief Justice Ellsworth, during oral argument, asked the counsel asserting jurisdiction incredulously, "How far is it meant to carry the argument? Will it be affirmed, that in every case, to which the judicial power of the United States extends, the Federal courts may exercise a jurisdiction, without the intervention of the legislature, to distribute, and regulate, the power?"[60] Justice Chase agreed, stating:

> The notion has frequently been entertained, that the Federal courts derive their judicial power immediately from the constitution; but the political truth is that the disposal of the judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps,

[55] 3 U.S. (3 Dall.) 321 (1796).
[56] *Id.* at 328.
[57] 4 U.S. 8 (1799).
[58] 1 Stat. 79.
[59] 4 U.S. at 8 ("Congress knew, that the English courts have amplified their jurisdiction, through the medium of legal fictions; and it was readily foreseen, that by the means of a colorable assignment to an alien, or to the citizen of another state, every controversy arising upon negotiable paper might be drawn into the Federal courts.") (citing argument of counsel). *See also* 10 Annals of Congress, at 897–99 (1801) (discussing purpose of assignee provision).
[60] *Id.* at 10, n.a. (citing statement of Chief Justice Ellsworth).

> be inexpedient, to enlarge the jurisdiction of the Federal courts, to every subject, in every form, which the constitution might warrant.[61]

In *Cary* v. *Curtis,*[62] the Supreme Court upheld the application of a statute that placed jurisdiction for *all claims* of illegally charged customs duties with the Secretary of the Treasury. The Court stated that, under the statute, "it is the Secretary of the Treasury alone in whom the rights of the government and of the claimant are to be tested."[63] In a broad decision, the Court upheld a Federal statute that removed jurisdiction over all such claims from both the state and Federal courts and dismissed the case for lack of jurisdiction:

> It is contended, however, that the language and the purposes of Congress, if really what we hold them to be declared in the statute of 1839, cannot be sustained, because they would be repugnant to the Constitution, inasmuch as they would debar the citizen of his right to resort to the courts of justice . . . [I]n the doctrines so often ruled in this court that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. *To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely.* It follows, then, that the courts created by statute must look to the statute as the warrant for their authority, certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them. This argument is in no wise impaired by admitting that the judicial power shall extend to all cases arising under the Constitution and laws of the United States. Perfectly consistent with such an admission is the truth, that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the Federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature. The existence of the Judicial Act itself, with its several supplements, furnishes proof unanswerable on this point. The courts of the United States are all limited in their

[61] *Id.* at 9, n.a. (citing statement of Justice Case).

[62] 44 U.S. 236 (1845).

[63] *Id.* at 241 ("To permit the receipts at the customs to depend on constructions as numerous as are the agents employed, as various as might be the designs of those who are interested; or to require that those receipts shall await a settlement of every dispute or objection that might spring from so many conflicting views, would be greatly to disturb, if not to prevent, the uniformity prescribed by the Constitution, and by the same means to withhold from the government the means of fulfilling its important engagements . . . We have no doubts of the objects or the import of that act; we cannot doubt that it . . . has made the head of the Treasury Department the tribunal for the examination of claims for duties said to have been improperly paid.").

> nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.[64]

In *Barry* v. *Mercein,*[65] the Supreme Court stated that "[b]y the Constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress, nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes."[66]

In *Sheldon* v. *Sill,*[67] the Supreme Court stated:

> It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result—either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all . . . Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has been either directly advanced or tacitly assumed would be tedious and unnecessary.[68]

In *Mayor* v. *Cooper,*[69] the Supreme Court held that:

> How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, are not prescribed. The Constitution is silent upon those subjects. They are remitted without check or limitation to the wisdom of the legislature . . . As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it . . . It is the right and the duty of the national government to have its Constitution and laws interpreted and applied by its own judicial tribunals. In cases arising under them, *properly brought before it,* this court is the final arbiter.[70]

---

[64] *Id.* at 244–46 (emphasis added).
[65] 46 U.S. (5 How.) 103 (1847).
[66] *Id.* at 119.
[67] 29 U.S. 441 (1850).
[68] *Id.* at 448–49.
[69] 73 U.S. (6 Wall.) 247 (1868).
[70] *Id.* at 251–52.

In *United States* v. *Klein,*[71] the Supreme Court struck down a statute that purported to deny the lower U.S. Court of Claims and the Supreme Court, on appeal, the authority to hear claims for property brought by those who were pardoned by President Lincoln following the Civil War. The Supreme Court held the statute unconstitutional for two reasons. First, because the statute made having received a pardon proof of disloyalty that effectively denied the right to Federal judicial review, it found that in forbidding the Court "to give the effect to evidence which, in its own judgment, such evidence should have" and directing the court "to give it an affect precisely contrary," Congress had "inadvertently passed the limit which separates the legislative from the judicial power."[72] Second, the statute unconstitutionally "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive."[73]

In the opinion, however, the Supreme Court made clear that "[i]t seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."[74] Further, the Court stated that *"If [the challenged statute] simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient.* But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have."[75] In other words, the denial of Federal court jurisdiction would have been *upheld* if it had not effectively acted to limit the President's constitutional pardon power. H.R. 2028 would not conflict with any other constitutional authority granted by the Constitution.

In *The Francis Wright,*[76] the Supreme Court stated:

> [W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not.[77]

In *Stevenson* v. *Fain,*[78] the Supreme Court stated that "The Supreme Court alone possesses [original] jurisdiction derived immediately from the Constitution, and of which the legislative power

[71] 80 U.S. 128 (1871).
[72] *Id.* at 147.
[73] *Id.*
[74] *Id.* at 146.
[75] *Id.* at 145 (emphasis added).
[76] 105 U.S. 381 (1881).
[77] *The Francis Wright,* 105 U.S. 381, 385–86 (1881).
[78] 195 U.S. 165 (1904).

cannot deprive it, but the jurisdiction of the circuit courts depends upon some act of Congress."[79]

In *Kline* v. *Burke Construction Co.,*[80] the Supreme Court states that:

> Only the [original] jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution . . . The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part . . . A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right.[81]

In *Lauf* v. *E.G. Shinner & Co.,*[82] the Supreme Court again upheld a statute that placed limits on the jurisdiction of the lower Federal courts, stating "the power of the court to grant the relief prayed depends upon the jurisdiction conferred upon it by the statutes of the United States . . . Section 7 [of the Act] declares that 'no court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined,' [with certain exceptions] . . . There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."

In *Lockerty* v. *Phillips,*[83] the Supreme Court similarly held, in upholding a statute limiting lower courts' jurisdiction over challenges to price controls, that

> [b]y this statute Congress has seen fit to confer on the Emergency Court (and on the Supreme Court upon review of decisions of the Emergency Court) equity jurisdiction to restrain the enforcement of price orders under the Emergency Price Control Act. At the same time it has withdrawn that jurisdiction from every other Federal and state court. There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior Federal court. All Federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to "ordain and establish" inferior courts, conferred on Congress by Article III, § 1, of the Constitution. *Article III left Congress free to establish inferior Federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe.* The Congressional power to ordain and establish inferior courts includes the

[79] *Id.* at 167 (quotations and citations omitted).
[80] 260 U.S. 226 (1922).
[81] *Id.* at 234.
[82] 303 U.S. 323 (1938).
[83] 319 U.S. 182 (1943).

> power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. In the light of the explicit language of the Constitution and our decisions, it is plain that Congress has power to provide that the equity jurisdiction to restrain enforcement of the Act, or of regulations promulgated under it, be restricted to the Emergency Court, and, upon review of its decisions, to this Court.[84]

While some have argued that Federal court jurisdiction is necessary to ensure a Federal court exists to decide at least *constitutional* questions, as eminent Federal jurisdiction scholar Martin Redish has observed, "there is no logical way to limit the need for an article III court to police the states to cases involving assertions of constitutional rights. If the state courts are not to be allowed to undermine the establishment of national supremacy, surely these courts must also be policed on their interpretation and enforcement of any Federal law. The supremacy clause, it should be recalled, is not limited in its dictates to matters of constitutional law, much less of constitutional right."[85]

Further, H.R. 2028 is entirely consistent with *Marbury* v. *Madison*. *Marbury* v. *Madison*[86] established the principle of judicial review and stands for the proposition that the Supreme Court has the final say on the issues it decides provided either the issues it decides are within its original jurisdiction or Congress, by statute, has granted the Supreme Court the authority to hear the issue. If a case does not fall within the jurisdiction of the Federal courts because Congress has not granted the required jurisdiction, Federal courts simply cannot hear the case.

The author of *Marbury* v. *Madison* was Chief Justice John Marshall, and Chief Justice Marshall himself, after he decided *Marbury* v. *Madison,* dismissed cases when the Federal courts had not been granted jurisdiction by Congress to hear them under the Judiciary Act of 1789.[87]

---

[84] *Id.* at 187–88 (quotations and citations omitted) (emphasis added).

[85] Martin H. Redish, "Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager," 77 N.W.U.L.Rev. 143, 148 (1982).

[86] 5 U.S. 137 (1803). In *Marbury* v. *Madison,* the Supreme Court found that under Article III of the Constitution, a party within the Supreme Court's original jurisdiction must be a State or an ambassador and that neither Marbury nor Madison was a state or an ambassador. Consequently, the Supreme Court held that the original jurisdiction of the Supreme Court is fixed by the Constitution and it dismissed the case because Congress had exceeded its constitutional authority when it granted the Supreme Court original jurisdiction to hear Marbury's case in the Judiciary Act of 1789. *Id.*

[87] *See Gordon* v. *Caldcleugh,* 7 U.S. 268 (1806) (dismissing case for lack of jurisdiction under the Judiciary Act of 1789) ("This court has no jurisdiction, under the 25th section of the judiciary act of 1789, but in a case where a final judgment or decree has been rendered in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question, the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity, &c. or where is drawn in question, the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption, specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission. In the present case, such of the defendants as were aliens, filed a petition to remove the cause to the Federal circuit court, under the 12th section of the same act. The state court granted the prayer of the petition, and ordered the cause to be removed; the decision, therefore, was not against the privilege claimed under the statute; and, therefore, this court has no jurisdiction in the case. The writ of error must be dismissed.").

STATE COURTS ARE NOT SECOND-CLASS COURTS, AND THEY ARE EQUALLY CAPABLE OF DECIDING FEDERAL CONSTITUTIONAL QUESTIONS

Federal legislation that precludes Federal court jurisdiction over certain constitutional claims to remedy perceived abuses by Federal judges, and to preserve for the states and their courts the authority to determine constitutional issues, rests comfortably within our constitutional system.[88]

The Supreme Court has clearly rejected claims that state courts are less competent to decide Federal constitutional issues than Federal courts.[89] Even famously liberal Justice William Brennan wrote, in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.,*[90] that "virtually all matters that might be heard in Art. III courts could also be left by Congress to state courts."[91] Justice Brennan was joined in that decision by Justices Marshall, Blackmun, and Stevens.

And the leading scholars have long noted the constitutional alternative of state court resolutions of Federal constitutional claims. As Martin Redish has observed, "The state courts have, since the nation's beginning, been deemed both fully capable of and obligated (under the supremacy clause) to enforce Federal law, including the Constitution . . . *Congress has complete authority to have constitutional rights enforced exclusively in the state courts* . . ."[92]

Article VI of the Constitution states that "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ." U.S. Constitution, Art. VI, Section 2. As Martin Redish has pointed out, "It is all but inconceivable that the framers who had vested total discretion in Congress over substantive lawmaking, with the possibility that a Congress 'biased' towards the states could choose to pass no substantive Federal law at all and instead defer completely to state control, would have fretted significantly over the possibility that Congress would

---

[88] As Martin Redish has observed, the Founders did not intend to guarantee a Federal judiciary to ensure uniformity of Federal policy, but rather they intended to allow Congress the *option* of creating and granting jurisdiction to Federal courts *if* Congress thought such was necessary to police actions by state courts:

> [The Founders'] fear seems to have been that, absent policing by some branch of the Federal Government, state courts might undermine Federal supremacy. Ultimately, the framers chose the judicial branch to perform this policing function. But if the policy-making branches of the Federal Government—Congress and the executive—conclude in a particular instance that there is no need to worry about state court interference, there is, by definition, no possibility of interference with Federal supremacy; the Federal Government has chosen to deem acceptable whatever constructions of Federal law the state courts develop.

Martin H. Redish, "Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager," 77 N.W.U.L.Rev. 143, 146–47 (1982). See also Martin H. Redish, "Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination," 27 Villanova L. Rev. 900, 909 (1982) ("[I]f the policy-making branches of the Federal Government—Congress and the Executive—conclude that whatever interpretations of Federal law given by state courts are acceptable, there will be no need for Supreme Court policing of the state courts to assure compliance with Federal supremacy . . . What is important for purposes of federalism is that Congress have the *power* to check the states, not that such a check be *required* of Congress.").

[89] *See Stone* v. *Rice,* 428 U.S. 465, 492 (1976) ("[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like Federal courts, have a constitutional obligation to safeguard personal liberties and to uphold Federal law.").

[90] 458 U.S. 50 (1982).

[91] *Id.* at 64 n.15.

[92] Martin H. Redish, "Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager," 77 N.W.U.L.Rev. 143, 155, 157 (1982) (emphasis added).

take the lesser step of enacting substantive Federal law but leaving to the state courts the final authority to interpret it."[93]

As leading Harvard Law School Federal jurisdiction scholar Paul Bator has written, "If the Constitution means what it says, it means that Congress can make the state courts—or, indeed, the lower Federal courts—the ultimate authority for the decision of any category of case to which the Federal judicial power extends . . . Indeed, a powerful case can be made that such a plenary power may be essential to making the institution of judicial review tolerable in a democratic society."[94]

H.R. 2028 IS A PROPER EXERCISE OF CHECKS AND BALANCES

Far from violating the "separation of powers," legislation that reserves to state courts jurisdiction to hear and decide certain classes of cases is an exercise of one of the very "checks and balances" provided for in the Constitution.

As Lord Acton stated, "Power tends to corrupt and absolute power corrupts absolutely." No branch of the Federal Government can be entrusted with absolute power, certainly not a handful of tenured Federal judges appointed for life. The Constitution allows the Supreme Court to exercise "judicial power," but it does not grant the Supreme Court unchecked power to define the limits of its own power. Integral to the American constitutional system is each branch of government's responsibility to use all its powers to prevent perceived instances of overreaching by the other branches.

Congress's exercise of its authority to remove classes of cases from Federal court jurisdiction does not transfer power from the Federal judiciary to Congress. Rather, it transfers power from the Federal judiciary to the state judiciary. Congress's exercise of its authority to remove classes of cases from Federal court jurisdiction also does not give Congress the power to decide the outcome of cases: that decisional authority would rest with the state courts.

H.R. 2028 does not dictate results: it only places final authority over a state's Pledge policy in the hands of the states themselves.

THE FOUNDERS CONSIDERED THE PEOPLE TO BE THE ULTIMATE INTERPRETERS OF THE CONSTITUTION

While there is of course a place for judicial review, too often it is forgotten that the Founders considered the People, and the People through their duly elected representatives, to be the ultimate arbiters of the Constitution.

George Washington complained to his nephew Bushrod (a future Justice of the Supreme Court) about the stubborn unwillingness of Anti-Federalists to face this fundamental point. Washington wrote, "The power under the Constitution will always be in the People. It

[93] Martin H. Redish, "Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager," 77 N.W.U.L.Rev. 143, 148 (1982).

[94] Constitutional Restraints Upon the Judiciary, 97th Cong. 51, 55 (1981) (statement of Paul M. Bator, Professor, Harvard Law School). *See also* Paul Bator, "The State Courts and Federal Constitutional Litigation," 22 Wm. & Mary L.Rev. 605, 627 (1981) ("We must never forget that under our constitutional structure it is the state . . . courts that constitute our ultimate guarantee that a usurping legislature and executive cannot strip us of our constitutional rights.").

is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own chusing . . ."[95]

Thomas Jefferson, too, urged that "[w]hen the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity," adding that "[t]he exemption of the judges from that is quite dangerous enough. I know of no safe depository of the ultimate powers of the society but the people themselves . . ."[96]

James Madison wrote that constitutional disputes could not ultimately be resolved "without an appeal to the people themselves, who, as grantors of the commission, can alone declare its true meaning and enforce its observance."[97] Madison also wrote in *The Federalist* No. 51 that "[a] dependence on the people is no doubt the primary controul on the government."[98] Madison responded to the question "what is to controul Congress" when it exceeds its constitutional authority with the following answer: "Nothing within the pale of the Constitution but sound argument & conciliatory expostulations addressed both to Congress & to their Constituents."[99] And Madison observed that among the most important devices for securing the sovereignty of the People, matched only by "a circulation of newspapers through the entire body of the people," was "Representatives going from, and returning among every part of them."[100]

Speaker of the House Nathanial Macon, in 1802, responding to those who claimed that without judicial review there would be civil war, said:

> Whenever we supposed the Constitution violated, did we talk of civil war? No, sir; we depended on elections as the main corner-stone of our safety; and supposed, whatever injury the State machine might receive from a violation of the Constitution, that at the next election the people would elect those that would repair the injury and set it right again; and this in my opinion ought to be the doctrine of us all; and when we differ about Constitutional points, and the question shall be decided against us, we ought to consider it a temporary evil, remembering that the people possess the means of rectifying any error that may be committed by us.[101]

As the Dean of Stanford Law School, Larry H. Kramer, has written, the Supreme Court was never intended to be the ultimate authority on constitutional issues, and only in recent decades has the notion that the Supreme Court is the final authority on constitutional issues taken hold in popular opinion. As Dean Kramer describes it, the Founders'

---

[95] Letter from George Washington to Bushrod Washington (November 10, 1787), in 8 The Documentary History of the Ratification of the Constitution 154 (John P. Kaminski and Gaspare J. Saladino eds. 1981).

[96] Letter from Thomas Jefferson to William Charles Jarvis (September 28, 1820) in 10 The Writings of Thomas Jefferson (Paul Leicester Ford ed. 1898) at 179–80.

[97] *The Federalist* No. 49, at 314 (James Madison), *The Federalist Papers* (Clinton Rossiter ed., 1961).

[98] *The Federalist* No. 51, at 290 (James Madison), *The Federalist Papers* (Clinton Rossiter ed., 1961).

[99] Letter from James Madison to Spencer Roane (May 6, 1821), in *Madison: Writings* 772, 774 (Jack N. Rakove, ed., 1999).

[100] James Madison, "Public Opinion," in 14 Papers of James Madison (Robert A. Rutland et al., eds. 1975) at 179.

[101] II Annals of Congress 717 (January 1802).

> Constitution remained, fundamentally, an act of popular will: the people's charter, made by the people . . . [I]t was "the people themselves"—working through and responding to their agents in the government—who were responsible for seeing that it was properly interpreted and implemented. The idea of turning this responsibility over to judges was simply unthinkable . . . This modern understanding [of judicial review] is . . . of surprisingly recent vintage. It reflects neither the original conception of constitutionalism nor its course over most of American history. Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution . . . [It was the original understanding that] [n]o one of the branches [of government] was meant to be superior to any other, unless it were the legislature, and when it came to constitutional law, all were meant to be subordinate to the people . . . [I]n a regime of popular constitutionalism it was not the judiciary's responsibility to enforce the constitution against the legislature. It was the people's responsibility: a responsibility they discharged mainly through elections . . . It was the legislature's delegated responsibility to decide whether a proposed law was constitutionally authorized, subject to oversight by the people.[102]

Dean Kramer explains why there is not any mention of judicial review in the Constitution:

> Judicial review was not the question before the [Constitutional] Convention. The question was how best to prevent the enactment of unwise and unconstitutional Federal legislative measures. The answer was an executive veto. (And not just a veto, either. Additional checks on the risk of bad legislation included federalism, bicameralism, and the likelihood that "the best men in the Community would be comprised in the two branches of [Congress].") Some delegates were afraid that the executive might be too weak, but a solid majority felt otherwise and were concerned not to involve judges in the lawmaking process. That settled, there was simply no need to say or do anything more . . . This is why courts and judicial review were so rarely featured during ratification: members of the Founding generation had a different paradigm in mind. The idea of depending on judges to stop a legislature that abused its power never even occurred to the vast majority of participants in the debates.[103]

According to noted historian Gordon Woods, "Most Americans, even those deeply concerned with the legislative abuses of the 1780's, were too fully aware of the modern positivist conception of law (made famous by Blackstone in his *Commentaries of the Laws of England*), too deeply committed to consent as the basis of law, and from their colonial experience too apprehensive of the possible arbitrariness and uncertainties of judicial discretion to permit

[102] Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (Oxford University Press 2004) at 7–8, 58.

[103] *Id.* at 77, 91 (quoting comments of Federal convention delegate Elbridge Gerry, in 2 The Record of the Federal Convention 98 (Max Farrand ed. 1966)).

judges to set aside laws made by the elected representatives of the people."[104]

Even early supporters of something akin to the modern notion of judicial review conceded that when the courts, including the Supreme Court, were to decide constitutional issues, "In all doubtful cases . . . the Act ought to be supported" and that "it should be unconstitutional beyond dispute before it is pronounced such."[105] As Dean Kramer describes it, "[t]his limiting principle instantly became an article of faith among the supporters of judicial review, accompanying virtually every statement of the doctrine."[106]

James Iredell recorded Justice Wilson and Judge Peters agreeing on circuit in *United States* v. *Ravara* that "tho an Act of Congress plainly contrary to the Constitution was void, yet no such construction should be given in a doubtful case."[107] Justice Chase similarly announced in *Calder* v. *Bull* that "if I ever exercise the jurisdiction [to review legislation,] I will not decide any law to be void, but in a very clear case,"[108] reiterating a point he had made previously in *Hylton* v. *United States.*[109] Bushrod Washington said much the same thing in *Cooper* v. *Telfair,* noting that "[t]he presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated."[110] William Paterson agreed, observing that "to authorise this Court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative application."[111] The early Supreme Court acted accordingly, upholding a Federal tax law in *Hylton* v. *United States,*[112] and generally showing great reluctance to find even state laws unconstitutional. The only antebellum case in which the Court held a state law unconstitutional was *Ware* v. *Hylton.*[113] The "doubtful case" rule also explains why judges invariably illustrated their understanding of judicial review with blatantly unconstitutional laws, the most common example being a law denying the right to trial by jury altogether.[114] The were, literally, the only kinds of laws they could imagine declaring void. The closely divided 5–4 decisions of the modern Supreme Court striking down legislation enacted by duly elected representatives of the People would be anathema to the Founders' generation.

As Dean Kramer has written, for most of American history, "[j]udges did not typically intervene unless the unconstitutionality of a law was clear beyond doubt, which as a practical matter left questions of policy and expediency to politics. They also shied away from divisive social conflicts—at least in their constitutional juris-

---

[104] Gordon S. Wood, "Judicial Review in the Era of the Founding," in Is the Supreme Court the Guardian of the Constitution? 153, 158 (Robert A. Licht, ed. 1993).

[105] Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), in Griffith J. McRee, 2 Life and Correspondence of James Iredell (1857), at 172, 175.

[106] Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (Oxford University Press 2004) at 65.

[107] Recollections of James Iredell, quoted in William R. Casto, The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth, at 223 (1995). *United States* v. *Ravara* is found at 2 U.S. (2 Dall.) 297 (C.C.D. Pa. 1793).

[108] 3 U.S. (3 Dall.) 386, 395 (1798).

[109] 3 U.S. (3 Dall.) 171, 173, 175 (1796).

[110] 4 U.S. (4 Dall.) 14, 18 (1800).

[111] *Id.* at 19.

[112] 3 U.S. (3 Dall.) 171 (1796).

[113] 3 U.S. (3 Dall.) 199 (1796).

[114] *See, e.g., Kamper* v. *Hawkins,* 3 Va. (I Va. Cases), at 39 (opinion of Judge Roane); *Vanhorne's Lessee* v. *Dorrance,* 2 U.S. (2 Dall.) 304, 309 (1795); *Marbury* v. *Madison,* 5 U.S. (I Cranch) 137, 179 (1803).

prudence, and in sharp contrast to their handling of private law—striking laws down only in the situations where judicial intervention was least likely to be controversial. Courts were generally respectful of political outcomes, acting in a manner that remained consistent with long-standing practices of popular constitutionalism."[115] According to William Nelson's study of judicial review in the early nineteenth century, "[o]nce a legislature had resolved a conflict in a manner having widespread public support, judges would in practice view the resolution as that of the people at large . . . at least so long as a finding of inconsistency with the constitution was not plain and unavoidable."[116] As Dean Kramer has written of the antebellum period, "[a]t the Federal level, the Supreme Court systematically deferred to Congress."[117]

The reason judges were so reluctant to hold Federal statutes unconstitutional unless they were indisputably so was because, as Dean Kramer has written, it was widely understood that "judges were no more authoritative on these [constitutional] matters than any other public official, and their judgments about the meaning of the Constitution, like those of everyone else, were still subject to oversight and ultimate resolution by the people themselves. This, in fact, is all that *Marbury* v. *Madison* actually says or does."[118] During the entire antebellum period, the Supreme Court struck down only two Federal statutes, one in the notorious *Dred Scott*[119] decision, and only later did the Court aggressively exercise judicial review. As Dean Kramer has written:

> *Dred Scott* stuck out like a sore thumb partly because it was so unprecedented for the Supreme Court to assert its will over and against Congress . . . Having found only two Federal laws unconstitutional during the entire antebellum period (in *Marbury* and *Dred Scott*), the Court [then] struck down four Federal statutes in the 1860's alone, followed by seven in the 1870's, four more in the 1880's, and five in the 1890's. While these numbers seem small by comparison to today (the Court struck down thirty Federal laws between 1990 and 2000, for example, the most in its history), the change was striking enough to convince some commentators that it was only in this period that judicial review "really" became established.[120]

As Dean Kramer has described modern history, "as Warren Court activism crested in the mid-1960s, a new generation of liberal scholars discarded opposition to courts and turned the liberal tradition on its head by embracing a philosophy of broad judicial authority . . . [T]he main body of liberal intellectuals put aside misgivings about electoral accountability, frankly conceding that judicial review might be in tension with democracy while justifying

---

[115] Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (Oxford University Press 2004) at 150.

[116] William E. Nelson, "Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790–1860," 120 U.Pa. L. Rev. 1166, 1176 (1972).

[117] Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (Oxford University Press 2004) at 150–51.

[118] *Id.* at 114.

[119] *Dred Scott* v. *Sanford,* 60 U.S. 393 (1856).

[120] Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (Oxford University Press 2004) at 213 (citing Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation* (1998)).

any trade-off on the ground that courts could advance the more important cause of social justice."[121]

As Dean Kramer has written:

> Whatever else one might think, [such a view] plainly represents a profound change from what . . . was historically the case. Neither the Founding generation nor their children nor their children's children, right on down to our grandparents' generation, were so passive about their role as republican citizens. They would not have accepted—did not accept—being told that a lawyerly elite had charge of the Constitution, and they would have been incredulous if told (as we are often told today) that the main reason to worry about who becomes president is that the winner will control judicial appointments. Something would have gone terribly wrong, they believed, if an unelected judiciary were being given that kind of importance and deference. Perhaps such a country could still be called democratic, but it would no longer be the kind of democracy Americans had fought and died and struggled to create . . . We see this in the excessive celebration of *Marbury* v. *Madison,* whose bloated significance seems immune to historical correction . . . *Marbury* and *Brown* loom large in these histories. The judicially inspired prosecutions for sedition, *Dred Scott,* the dismantling of Reconstruction, the fifty years of opposition to social welfare legislation, *Korematsu,* complicity in the Red scares, and the current hobbling of Federal power to remedy discrimination all somehow shrink into insignificance.[122]

THE DEMOCRATIC PARTY, THE PROGRESSIVE PARTY, AND THE PRESIDENCIES OF BOTH THEODORE AND FRANKLIN DELANO ROOSEVELT HAVE FOLLOWED THE FOUNDERS' UNDERSTANDING THAT THE PEOPLE, NOT THE SUPREME COURT, ARE THE ULTIMATE ARBITERS OF THE CONSTITUTION

The Democratic Party, the Progressive Party, and the presidencies of both Theodore and Franklin Delano Roosevelt have followed the Founders' understanding that the people, and not the Supreme Court, are the ultimate arbiters of the Constitution.

Martin Van Buren, one of the founders of the Democratic Party, reported the following comments of Senator Hugh Lawson White during a Senate debate:

> The honorable Senator [Webster] argues that the Constitution has constituted the Supreme Court a tribunal to decide great constitutional questions . . . and that when they have done so, the question is put at rest, and every other department of the government must acquiesce. This doctrine I deny . . . If different interpretations are put upon the Constitution by the different departments, the people is the tribunal to settle the dispute. Each of the departments is the agent of the people, doing their business according to the powers conferred; and where

[121] *Id.* at 223.

[122] Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (Oxford University Press 2004) at 228–29.

> there is a disagreement as to the extent of these powers, the people themselves, through the ballot-boxes, must settle it.[123]

"This," Van Buren concluded, "is the true view of the Constitution"—taken not only by "those who framed and adopted it," but also "by the founders of the Democratic party."[124]

Even the 1912 Progressive Party Platform declared that "We hold with Thomas Jefferson and Abraham Lincoln that the people are the masters of their Constitution," and that "[i]n accordance with the needs of each generation the people must use their sovereign power to establish and maintain" the ends of republican government.[125] It was in accordance with this declaration that Progressives demanded "such restriction of the courts as shall leave to the people the ultimate authority to determine fundamental questions of social welfare and public policy."[126]

Theodore Roosevelt in 1912 argued the American people must be made "the masters and not the servants of even the highest court in the land" and "the final interpreters of the Constitution," for "if the people are not to be allowed finally to interpret the fundamental law, ours is not a popular government."[127] Theodore Roosevelt stated "I do not say that the people are infallible. But I do say that our whole history shows that the American people are more often sound in their decisions than is the case with any of the governmental bodies to whom, for their convenience, they have delegated portions of their power. If this is not so, then there is no justification for the existence of our government; and if it is so, then there is no justification for refusing to give the people the real, and not merely the nominal, ultimate decision on questions of constitutional law."[128]

And President Franklin Roosevelt said "lay rank and file can take cheer from the historic fact that every effort to construe the Constitution as a lawyer's contract rather than a layman's charter has ultimately failed. Whenever legalistic interpretation has clashed with contemporary sense on great questions of broad national policy, ultimately the people and the Congress have had their way."[129]

As Maryland Representative David J. Lewis explained to the House of Representatives in 1935:

> The Constitution has made ample protective provision [for preventing unconstitutional laws]. A bill may be vetoed by a majority in the House or Senate, where it is first proposed; if not vetoed by either House, then by the President. If vetoed by none of these, the people at the next election can elect a new Congress to repeal the act. Here are three successive occasions when responsible officials, sworn to uphold the Constitution, elected by and responsible to the people, may, as they often do,

---

[123] Martin Van Buren, Inquiry into the Origins and Courts of Political Parties in the United States at 329–30 (1867).

[124] *Id.* at 330.

[125] Platform of the Progressive Party (August 7, 1912).

[126] *Id.*

[127] Theodore Roosevelt, A Charter of Democracy—Address before the Ohio Constitutional Convention at Columbus, Ohio, Feb. 21, 1912, in *Social Justice and Popular Rule: Essays, Addresses, and Public Statements Relating to the Progressive Movement* 119, 141–42 (1926).

[128] *Id.* at 142.

[129] Franklin D. Roosevelt, Address on Constitution Day, Washington, D.C., Sept. 17, 1937, in 6 *The Public Papers and Addresses of Franklin D. Roosevelt* 359, 362–63, 365 (Samuel I. Rosenman ed. 1941).

> exercise a preventive veto. The unwise or unconstitutional bill is thus stopped before the obligations are fixed on the citizen. From 1789 to 1857—68 years—this kind of veto alone obtained. It surely sufficed the Republic through its period of greatest development, a chapter of changes and progress, I venture to affirm, without parallel in the history of nations.[130]

As Dean Kramer has written:

> Simply put, supporters of judicial supremacy are today's aristocrats. One can say this without being disparaging, meaning only to connect modern apologists for judicial authority with that strand in American thought that has always been concerned first and foremost with "the excess of democracy" . . . Today's democrats, in the meantime, are no less concerned about individual rights than were their intellectual forebears: Jefferson, Madison, and Van Buren. But like these predecessors, those with a democratic sensibility have greater faith in the capacity of their fellow citizens to govern responsibly. They see risk, but are not persuaded that the risks justify circumscribing popular control by overtly undemocratic means. In earlier periods, aristocrats and democrats found themselves on opposite sides of such issues as executive power or federalism. Today, the point of conflict is judicial review, as it was for much of the twentieth century . . . The question Americans must ask themselves is whether they are comfortable handing their Constitution over to the forces of aristocracy: whether they share this lack of faith in themselves and their fellow citizens, or whether they are prepared to assume once again the full responsibility of self-government. And make no mistake: The choice is ours to make, necessarily and unavoidably. The Constitution does not make it for us. Neither does history or tradition or law."[131]

As Dean Kramer has summarized:

> The point, finally, is this: to control the Supreme Court, we must first lay claim to the Constitution ourselves. That means publicly repudiating Justices who say that they, not we, possess ultimate authority to say what the Constitution means. It means publicly reprimanding politicians who insist that "as Americans" we should submissively yield to whatever the Supreme Court decides . . . What did earlier generations of American do? What did Jefferson, Jackson, Lincoln, the Reconstruction Congress, and Roosevelt do? The Constitution leaves room for countless political responses to an overly assertive Court: Justices can be impeached, the court's budget can be slashed, the President can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members or give it burdensome new responsibilities or revise its procedures. The means are available, and they have been used to great effect when necessary—used, we should note, not

---

[130] Franklin D. Roosevelt, Address on Constitution Day, Washington, D.C., Sept. 17, 1937, in 6 *The Public Papers and Addresses of Franklin D. Roosevelt* 359, 362–63, 365 (Samuel I. Rosenman ed. 1941).

[131] Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (Oxford University Press 2004) at 247.

by disreputable or failed leaders, but by some of the most admired Presidents and Congresses in American history.[132]

"UNDER GOD" IN THE PLEDGE IS ONE OF INNUMERABLE HISTORICAL REFERENCES TO AND ACKNOWLEDGMENTS OF AMERICA'S RELIGIOUS HERITAGE

Striking down the words "under God" in the Pledge—and thereby precluding acknowledgment of the religious ideas that inspired momentous events in our Nation's history—would preclude public recognition of America's most significant historical landmarks. What follows is only a partial list of religious references in places and events that have defined American history.

Christopher Columbus set sail "by the Grace of God" with the "hope[] that by God's assistance some of the continents and islands in the oceans will be discovered." *Rector* v. *Holy Trinity Church,* 143 U.S. 457, 465–66 (1892).

Virginia's first charter granted by King James I commenced with the words: "We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true knowledge and Worship of God, and may in time bring . . . a settled and quiet Government. . . ." *Rector* v. *Holy Trinity Church,* 143 U.S. 457, 466 (1892).

On November 11, 1620, prior to embarking for the shores of America, the Pilgrims signed the Mayflower Compact that declared: "Having undertaken, for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of Virginia; Do by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid." *Rector* v. *Holy Trinity Church,* 143 U.S. 457, 466 (1892).

The Massachusetts 1629 charter declared, "[O]ur said people . . . be so religiously, peaceably, and civilly governed as their good life and orderly conversation may win and incite the natives . . . to the knowledge and obedience of the only true God and Savior of mankind, and the Christian faith, which . . . is the principal end of this plantation." Documents of American History 18 (Henry Steele Commager ed., Meredith Publishing Co. 7th ed. 1963).

In the charter of privileges granted William Penn to Pennsylvania in 1701, it is recited, "Because no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship; And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine Knowledge, Faith, and Worship, who only doth enlighten the Minds, and persuade and convince the Understandings of People, I do hereby grant and declare. . . ." *Rector* v. *Holy Trinity Church,* 143 U.S. 457, 467 (1892).

[132] *Id.* at 247–49.

The Fundamental Orders of Connecticut explained that the document had been created, "[W]ell knowing where a people are gathered together the word of God requires that to maintain the peace and union of such a people, there should be an orderly and decent government established according to God." *Rector* v. *Holy Trinity Church,* 143 U.S. 457, 467 (1892); John Fiske, The Beginnings of New England 127–28 (Boston, Houghton, Mifflin & Co., 1898).

Alexander Hamilton stated, "No human laws are of any validity if contrary to [the law dictated by God Himself]." Alexander Hamilton, Signer of the Constitution, Papers of Alexander Hamilton, Vol. I, at 87 (Harold C. Syrett ed., Columbia Univ. Press 1961) (quoting William Blackstone, Commentaries on the Laws of England, Vol I, at 41).

Alexander Hamilton also explained, "Natural liberty is a gift of the beneficent Creator to the whole human race, and that civil liberty is founded in that, and cannot be wrested from any people without the most manifest violation of justice." Alexander Hamilton, The Farmer Refuted (February 23, 1775), in 1 The Papers of Alexander Hamilton 104 (H. Syrett ed. 1961).

In our Declaration of Independence, the Founders based their right to "dissolve the Political Bands which have connected them with another" on the "Laws of Nature and of Nature's God." They then declared, "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." They ended, "We, therefore, the Representatives of the United States of America, . . . appealing to the Supreme Judge of the World . . . do, . . . with a firm Reliance on the Protection of divine Providence, . . . pledge to each other our Lives, our Fortunes, and our sacred Honor." The Declaration of Independence (1776).

John Witherspoon, who signed the Declaration of Independence, stated, "God grant that in America true religion and civil liberty may be inseparable and that the unjust attempts to destroy the one may in the issue tend to the support and establishment of both." John Witherspoon, Signer of the Declaration, The Works of John Witherspoon, Vol. IX, at 231 (Edinburgh, J. Ogle) (1815).

The Manifesto of the Continental Congress appealed, "to the God who searcheth the hearts of men for the rectitude of our intentions; and in His holy presence declare that, as we are not moved by any light or hasty suggestions of anger or revenge . . . adhere to this our determination." 4 Samuel Adams, The Writings of Samuel Adams 86 (Harry Alonzo Cushing ed., G.P. Putnam's Sons 1904).

George Washington used the phrase "under God" in several of his orders to the Continental Army. On one occasion he wrote that "The fate of unborn millions will now depend, under God, on the courage and conduct of this army." *See* American Center Law and Justice Position Paper on the Pledge of Allegiance, available at http://www.aclj.org/resources/pledge/pledge—postition—paper.pdf. On another occasion, Washington encouraged his army, declaring that "the peace and safety of this country depends, under God, solely on the success of our arms." 3 The Writings of George Washington 301 (John C. Fitzpatrick ed., 1931–1944).

In 1781, Thomas Jefferson, the author of the Declaration of Independence and later the Nation's third President, in his work titled

"Notes on the State of Virginia" wrote, "God who gave us life gave us liberty. And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the Gift of God. That they are not to be violated but with His wrath? Indeed, I tremble for my country when I reflect that God is just; that his justice cannot sleep forever." Thomas Jefferson, Notes on the State of Virginia, Query XVIII 169 (Penguin Books 1999) (1785).

The formal peace treaty with Great Britain, signed by John Adams, Benjamin Franklin, and John Jay on September 3, 1783, in its opening line invoked God with the words, "In the Name of the most Holy and undivided Trinity." 2 Treaties and Other International Acts of the United States of America 151 (Hunter Miller ed., Gov't Printing Office 1931).

James Madison's Memorial and Remonstrance Against Religious Assessments: "It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe[.]" James Madison, Memorial and Remonstrance Against Religious Assessments § 1 (1785).

On May 14, 1787, George Washington, as President of the Constitutional Convention, rose to admonish and exhort the delegates and declared, "If to please the people we offer what we ourselves disapprove, how can we afterward defend our work? Let us raise a standard to which the wise and the honest can repair; the event is in the hand of God!" 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes). Five weeks later, on June 28, with Convention delegates "groping . . . in the dark to find political truth," Benjamin Franklin pondered "applying to the Father of lights to illuminate our understandings," famously recalling that, during the Revolutionary War, God had "heard, and . . . graciously answered" the "daily prayer in this room for the divine protection." 1 Max Farrand, The Records of the Federal Convention of 1787, at 451 (rev. ed. 1966).

Benjamin Rush said at the ratifying convention, "Where there is no religion, there will be no morals." Benjamin Rush, Speech in Pennsylvania Ratifying Convention (Dec. 12, 1787), reprinted in Merrill Jensen, ed., 2 Documentary History of the Ratification of the Constitution 595 (1976).

Benjamin Franklin wrote, "Freedom is not a gift bestowed upon us by other men, but a right that belongs to us by the laws of God." Benjamin Franklin, Maxims and Morals (1789).

Rufus King, who signed the Constitution, stated, "The . . . law established by the Creator, which has existed from the beginning, extends over the whole globe, is everywhere and at all times binding upon mankind . . . [This] law is the law of God by which he makes his way known to man and is paramount to all human control." Rufus King, Signer of the Constitution, The Life and Correspondence of Rufus King, Vol. VI, at 276 (Charles King ed., G.P. Putnam's Sons 1900).

James Wilson, another signer of the Constitution, stated "God . . . is the promulgator as well as the author of natural law." James Wilson, signer of the Constitution, U.S. Supreme Court Justice, The Works of the Honourable James Wilson, Vol I, at 64 (Bird

Wilson ed., Philadelphia, Lorenzo Press 1804). He also stated "All [laws], however, may be arranged in two different classes: (1) Divine. (2) Human . . . But it should always be remembered that this law, natural and revealed, made for men or for nations, flows from the same Divine source: it is the law of God . . . Human law must rest its authority ultimately upon the authority of that law which is Divine." *Id.* at 103–05.

And Gouvernor Morris stated, "I believe that religion is the only solid base of morals and that morals are the only possible support of free governments." Gouvernor Morris, Penman and Signer of the Constitution, A Diary of the French Revolution, Vol II, at 452 (Boston, Houghton Mifflin 1939).

Article VII in the U.S. Constitution refers to "the Year of Our Lord," 1787. U.S. Const. art. VII.

On July 21, 1789, on the same day that it approved the Establishment Clause concerning religion, the First Congress of the United States also passed the Northwest Ordinance, providing for a territorial government for lands northwest of the Ohio River, which declared, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." The Northwest Ordinance, 1 Stat. 51 (1789).

The Father of the Country, George Washington, acknowledged on many occasions the role of Divine Providence in the Nation's affairs. His first inaugural address is replete with references to God, including thanksgivings and supplications: "Such being the impressions under which I have, in obedience to the public summons, repaired to the present station, it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a government instituted by themselves for these essential purposes, and may enable every instrument employed in its administration to execute with success the functions allotted to his charge. In tendering this homage to the Great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own, nor those of my fellow-citizens at large less than either. No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States." Speeches of the American Presidents 3 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

President Washington noted in his Farewell Address that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." Speeches of the American Presidents 18 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

John Jay, the first Chief Justice of the Supreme Court, stated, "The . . . natural law was given by the Sovereign of the Universe to all mankind." John Jay, First Chief Justice, The Life of John Jay, Vol II, at 385, William Jay, editor (New York., J & J Harper, 1833).

The Virginia Act for Religious Freedom provides "Whereas, Almighty God hath created the mind free." Va. Code Ann. § 57–1

(West 2003). The Act continues by stating that any attempt by the government to influence the mind through coercion is "a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do . . ." Va. Code Ann. § 57–1 (West 2003).

Supreme Court Justice Joseph Story stated, "The promulgation of the great doctrines of religion; the being and attributes and providence of one Almighty God; the responsibility to Him for all actions; founded upon moral freedom and accountability; a future state of rewards and punishments; the cultivation of personal, social, and benevolent virtues;—these can never be a matter of indifference in any well-ordered community. It is, indeed, difficult to conceive how any civilized society can well exist without them." Joseph Story, U.S. Supreme Court Justice, Commentaries on the Constitution of the United States, Vol. III, at 722–23 (Boston, Hillard, Gray & Co.) (1833). "It yet remains a problem to be solved in human affairs whether any free government can be permanent where no public worship of God and the support of religion constitute no part of the policy or duty of the state in any assignable shape." *Id.* at 727.

As John Quincy Adams, the fifth President of the United States, explained in his famous oration, "The Jubilee of the Constitution": "[T]he virtue which had been infused into the Constitution of the United States . . . was no other than the concretion of those abstract principles which had been first proclaimed in the Declaration of Independence—namely, the self-evident truths of the natural and unalienable rights of man . . . always subordinate to the rule of right and wrong, and always responsible to the Supreme Ruler of the universe for the rightful exercise of that . . . power . . . This was the platform upon which the Constitution of the United States had been erected." John Quincy Adams, The Jubilee of the Constitution 54. He continued that ''The laws of nature and of nature's God' . . . of course presupposes the existence of God, the moral ruler of the universe, and a rule of right and wrong, of just and unjust, binding upon man, preceding all institutions of human society and of government." *Id.* at 3–14.

Robert Winthrop, U.S. Speaker of the House in 1849, stated: "All societies of men must be governed in some way or other . . . Men, in a word, must necessarily be controlled, either by a power within them, or a power without them; either by the word of God, or by the strong arm of man; either by the Bible, or by the bayonet." Gary North & Gary DeMar, Christian Reconstruction: What It Is, What It Isn't 188 (1991).

On November 19, 1863, President Abraham Lincoln delivered his Gettysburg Address on the site of the battle and declared, "It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this Nation, under God, shall have a new birth of freedom—and that Government of the people, by the people, for the people, shall not perish from the earth." Speeches of the American Presidents 193 (Steven Anzovin & Janet Podell eds., The H.W.

Wilson Co. 1988). (There are 14 references to God in the 669 words comprising the Gettysburg Address.)

President Franklin D. Roosevelt said, "In teaching this democratic faith to American children, we need the sustaining, buttressing aid of those great ethical religious teachings which are the heritage of our modern civilization. For 'not upon strength nor upon power, but upon the spirit of God' shall our democracy be founded." Public Papers of the Presidents, F.D. Roosevelt, 1940, Item 149, Office of Fed. Reg. (2003).

On April 28, 1952, in the decision of the Supreme Court of the United States in *Zorach* v. *Clauson,* 343 U.S. 306 (1952), in which school children were allowed to be excused from public schools for religious observances and education, Justice William O. Douglas, in writing for the Court, stated:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."
>
> *Zorach* v. *Clauson,* 343 U.S. 306, 312–13 (1952).

President Kennedy exhorted, "The world is very different now . . . And yet the same revolutionary beliefs for which our forebears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state but from the hand of God. With good conscience as our only sure reward, with history the final judge of our deeds, let us go forth to lead the land we love, asking His blessing and His help, but knowing that here on earth God's work must truly be our own." *Engel* v. *Vitale,* 370 U.S. 421, 448 (1962) (dissenting opinion) (discussing quotes from Presidents Washington, Adams, Jefferson, Madison, Lincoln, Cleveland, Wilson, Roosevelt, Eisenhower and Kennedy).

In the decision of the Supreme Court of the United States in *Abington School District* v. *Schempp,* 374 U.S. 203 (1963), in which compulsory school prayer was held unconstitutional, Justices Goldberg and Harlan, concurring in the decision, stated:

> But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active,

> hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political, and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so.

Abington School District v. *Schempp,* 374 U.S. 203, 306 (1963) (Goldberg, J.,
concurring).

Justice Brennan, in *Abington School District* v. *Schempp,* 374 U.S. 203, 304 (1963), offered, "The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact."

On March 5, 1984, in the decision of the Supreme Court of the United States in *Lynch* v. *Donnelly,* 465 U.S. 668, 674–77 (1984), in which a city government's display of a nativity scene was held to be constitutional, Chief Justice Burger, writing for the Court, stated:

> There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789 . . . [E]xamples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust," which Congress and the President mandated for our currency, [see 31 U.S.C. § 5112(d)(1) (1982),] and in the language "One Nation under God," as part of the Pledge of Allegiance to the American flag. That pledge is recited by thousands of public school children—and adults—every year . . . Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages. The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation.

On June 4, 1985, in the decision of the Supreme Court of the United States in *Wallace* v. *Jaffree,* 472 U.S. 38 (1985), in which a mandatory moment of silence to be used for meditation or voluntary prayer was held unconstitutional, Justice O'Connor, concurring in the judgment and addressing the contention that the Court's holding would render the Pledge of Allegiance unconstitutional because Congress amended it in 1954 to add the words "under God," stated, "In my view, the words 'under God' in the

Pledge, as codified at 36 U.S.C. § 172, serve as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'" *Wallace* v. *Jaffree,* 472 U.S. 38, 78 n.5 (1985) (O'Connor, J., concurring).

On November 20, 1992, the United States Court of Appeals for the 7th Circuit, in *Sherman* v. *Community Consolidated School District 21,* 980 F.2d 437 (7th Cir. 1992), held that a school district's policy for voluntary recitation of the Pledge of Allegiance including the words "under God" was constitutional.

In President Bush's 2003 State of the Union address, he ended with these words: "Americans are a free people, who know that freedom is the right of every person and the future of every nation. The liberty we prize is not America's gift to the world; it is God's gift to humanity. We Americans have faith in ourselves, but not in ourselves alone. . . . We do not claim to know all the ways of Providence, yet we can trust in them, placing our confidence in the loving God behind all of life and all of history. May He guide us now, and may God continue to bless the United States of America." Weekly Compilation of Presidential Documents, Vol. 39, No. 5, at 116 (Office of the Federal Register, February 3, 2003).

God is Recognized in Our Highest Federal Offices and National Monuments

The First Congress not only acknowledged a proper role for religion in public life, but it did so at the very time it drafted the Establishment Clause. Just 3 days before Congress sent the text of the First Amendment to the states for ratification, it authorized the appointment of legislative chaplains. *Marsh* v. *Chambers,* 463 U.S. 783, 788 (1983).

Both Houses of Congress open their daily sessions with prayer and, in recent years, recitation of the Pledge. See Senate Rule IV.1, Standing Rules of the Senate, S. Doc. No. 107–1, at 4 (2002); House Rule XIV.1, Constitution, Jefferson's Manual, and Rules of the House of Representatives, H.R. Doc. No. 106–320, at 620 (2001).

Manifestations of the religious faith of our forebears appear throughout the Nation's Capital. The Senate Chamber is inscribed with the words "In God We Trust" and the Latin phrase "Annuit Coeptis" or "God has favored our undertakings." S. Doc. No. 82–20, at 27 (1951); 4 U.S.C.A. § 4 (West Supp. 2003) (historical notes). The Main Reading Room of the Library of Congress prominently displays the Biblical quotation: "The heavens declare the Glory of God, and the firmament showeth His handiwork" (Psalms 19:1). John Y. Cole, On These Walls 35 (1995). Friezes on the North and South walls of the Supreme Court chamber depict a procession of historical lawgivers including Moses and Confucius. *See County of Allegheny* v. *ACLU,* 492 U.S. 573, 652–53 (1989) (Stevens, J., concurring in part and dissenting in part).

In the Rotunda of the Capitol Building, there are paintings with religious themes, such as the Apotheosis of Washington, depicting the ascent of George Washington into Heaven, and the Baptism of Pocahontas, portraying Pocahontas being baptized by an Anglican minister. A wall in the Cox Corridor of the Capitol is inscribed with this line from Katharyn Lee Bates's Hymn, America the Beautiful, "America! God shed his grace on Thee, and crown thy good with brotherhood from sea to shining sea." In the prayer room of the

House chamber, is inscribed the following prayer "preserve me, O God—for in thee do I put my trust."

On July 20, 1956, Congress proclaimed that the national motto of the United States is "In God We Trust," and that motto is inscribed above the main door of the Senate, behind the Chair of the Speaker of the House of Representatives, and on the currency of the United St ates. 4 U.S.C. § 4 (1998) (historical notes) (Congressional finding (10)).

Virtually every President in the past thirty years has closed his speeches to the nation with the words "God bless America."

The Supreme Court opens each session with "God save the United States and this Honorable Court." *See Zorach* v. *Clauson,* 343 U.S. 306, 313 (1952).

The very chamber in which oral arguments are heard before the Supreme Court "is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with Ten Commandments." *Lynch* v. *Donnelly,* 465 U.S. 668, 677 (1984).

Our courtrooms include the oath, "so help me God." *Zorach* v. *Clauson,* 343 U.S. 306, 313 (1952).

The Tomb of the Unknown Soldier is engraved with the words: "Here rests in honored glory an American soldier known but to God." See Lieutenant Colonel H. Wayne Elliott, *The Third Priority: The Battlefield Dead,* 1996 Army Law. 3, 20.

Arlington National Cemetery maintains thousands of religious inscriptions on state-owned property.

Our National holidays ("holy days") include Christmas (Christ Mass), Thanksgiving and the National Day of Prayer. *Lynch* v. *Donnelly,* 465 U.S. 668, 676 (1952). Our children celebrate St. Valentine's Day and St. Patrick's Day in school. St. Valentine was a Christian martyr. St. Patrick was a Catholic bishop. St. Patrick, Encarta Encyclopedia (2003). The three leaf clover represents the Holy Trinity. *Id.* "Santa Claus" is derived from St. Nicholas ("Santa" means "saint" and "Claus" is short for "Nicolaus"), the archbishop of Myra, known for distributing his inherited wealth to the needy by anonymously throwing bags of gold coins through windows. Santa Claus, Encarta Encyclopedia (2003).

Our cities bear religious names, such as St. Petersburg, San Francisco, Los Angeles, St. Paul, St. Augustine, Santa Barbara, Santa Clara, San Diego, Santa Fe ("Holy Faith").

Some of our most patriotic songs, such as "God Bless America" affirm a belief in God. The fourth stanza of the statutorily prescribed National Anthem includes in part the following, "Blest with victory and peace, may the heaven-rescued land, Praise the Power that hath made and preserved us a nation. Then conquer we must, when our cause is just, And this be our motto: 'in God is our trust.'" *See* 36 U.S.C. § 301(a).

Art galleries subsidized by public revenues display religious paintings. *Lynch* v. *Donnelly,* 465 U.S. 668, 676 (1952).

Our churches and clergymen enjoy tax exemptions. *Walz* v. *Tax Comm'n of the City of New York,* 397 U.S. 664, 679–80 (1970).

RECOGNITION OF GOD IN STATE CONSTITUTIONS

In addition, several of the States explicitly provided for religious education in their State constitutions.

The Pennsylvania Constitution of 1776, for example, provided that "all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning . . . shall be encouraged and protected." Pa. Const. of 1776, § 45.

The Vermont Constitution provides that "all religious societies or bodies of men that have or may be hereafter united and incorporated, for the advancement of religion and learning, shall be encouraged and protected." Vt. Const. of 1777, Ch. II § XLI.

The Massachusetts Constitution provides: "The people of this Commonwealth have the right to invest their legislature with power to authorize and require . . . the several towns . . . or religious societies to make suitable provision at their own expense . . . for the support and maintenance of public protestant teachers of piety, religion and morality." Mass. Const. of 1780, Pt. I § 3.

New Hampshire's Constitution authorized the legislature to "make adequate provision at their own expense for the support and maintenance of public protestant teachers of piety, religion and morality" because "morality and piety . . . will give the best and security to government . . ." N.H. Const. of 1784, Pt. I § 5.

The Nebraska Constitution provides that "Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature . . . to encourage schools and the means of instruction." Nebr. Const. Art. 1, § 4.

Further, every one of the original States, and nearly every one of the current fifty, continues to acknowledge God in its constitution.

The preamble to California's constitution is typical: "We, the people of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution." Cal. Const. of 1879, Preamble, reprinted in Francis Newton Thorpe, 1 The Federal and State Constitutions 412 (William S. Hein & Co. 1993) (1909).

The Massachusetts Constitution of 1780 provided for "public instructions in piety, religion and morality" because "the happiness of a people, and the good order and preservation of civil government, essentially depend upon . . . the public worship of God." Mass. Const. of 1780, Pt. 1, Art. 3, reprinted in 1 Thorpe 1888, 1889–90. Although Massachusetts eliminated its established church in 1833, its constitution continues to recognize that "the public worship of GOD and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government." Mass. Const., Amend. XI (ratified Nov. 11, 1833), reprinted in 3 Thorpe 1888, 1914, 1922.

Many of the state constitutions recognize that the public worship of God is a duty of mankind, even while they expressly protect against formal sectarian establishments and provide for the free exercise of religion. *See, e.g.,* Del. Const. of 1897, Art. I, Sec. 1, reprinted in 1 Thorpe 600, 601 ("Although it is the duty of all men frequently to assemble together for the public worship of Almighty God; . . . yet no man shall or ought to be compelled to attend any religious worship") (Virtually identical language first appeared in the Delaware Constitution of 1792, Art. 1, Sec. 1, reprinted in 1 Thorpe 568.); Md. Const. of 1970, Art. 36 ("That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in

their religious liberty"); Mass. Const. of 1780, Pt. I, Art. II, reprinted in 3 Thorpe 1888, 1889 ("It is the right as well as the Duty of all men in society, publickly, and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe.").

Because of the mechanism by which new states are added to the national union, see U.S. Const., Art. IV, sec. 3, we can assess whether Congress viewed state constitutional provisions that invoked God or encouraged public worship as contrary to the First Amendment.

The first Congress, comprised of the same elected officials who drafted the First Amendment, admitted Vermont as a new State, with a constitution that provided: "every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God." Vt. Const. of 1786, Ch. 1, Art. 3, reprinted in 6 Thorpe 3749, 3752.

If one looks instead to the time period of the adoption of the 14th Amendment (which is the more relevant time period, given that the 14th Amendment, via the Incorporation Doctrine, is the means by which the Supreme Court made the Establishment Clause applicable to the states), the same holds true.

Nebraska's Constitution of 1866 contains the following preamble: "We, the people of Nebraska, grateful to Almighty God for our freedom, do establish this constitution." Nebr. Const. of 1866, Preamble, reprinted in 4 Thorpe 2349. Even more significantly, the Nebraska Bill of Rights, after recognizing freedom of conscience, contains the following passage, modeled after the Northwest Ordinance: "Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship and to encourage schools and the means of instruction." Nebr. Const. of 1866, Art. I, sec. 16, reprinted in 4 Thorpe 2350. The language was repeated verbatim in the 1875 constitution, after adoption of the Fourteenth Amendment. See Nebr. Const. of 1875, Art. 1, sec. 4, reprinted in 4 Thorpe 2361, 2362. These passages are particularly significant because the enabling act for Nebraska specifically required that the state's constitution "shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence," and "that perfect toleration of religious sentiment shall be secured." Enabling Act for Nebraska, 38th Cong., 1st Sess., sec. 4, reprinted in 4 Thorpe 2343, 2344.

Explicit religious invocations are also found in the "reconstruction" constitutions of the southern states, adopted after passage of the Fourteenth Amendment by Congress as those states were petitioning the same Congress for readmission to the Union. Georgia's 1868 Constitution, for example, "acknowledg[es] and invok[es] the guidance of Almighty God, the author of all good government," in its preamble, even while protecting "perfect freedom of religious sentiment." Ga. Const. of 1868, Preamble; Art. I, sec. 6, reprinted in 2 Thorpe 822. The preamble to North Carolina's 1868 Constitution reads like a prayer: "[G]rateful to Almighty God, the sovereign ruler of nations, for the preservation of the American Union and the existence of our civil, political, and religious liberties, and ac-

knowledging our dependence upon Him for the continuance of those blessings to us and our posterity." N.C. Const. of 1868, Preamble, reprinted in 5 Thorpe 2800. *See also, e.g.,* Va. Const. of 1870, Preamble, reprinted in 7 Thorpe 3871, 3873 ("invoking the favor and guidance of Almighty God"); Ala. Const. of 1867, Preamble, reprinted in 1 Thorpe 132 (same).

Thus Congress—the very Congress that adopted the Fourteenth Amendment—saw no Establishment Clause problem with state constitutions that acknowledged God, gave thanks to God, and even encouraged the public worship of God, nor did it see such acknowledgments as inconsistent with the Free Exercise and Establishment clauses of the U.S. Constitution or with comparable clauses in the states' own constitutions. Nor have subsequent Congresses or Presidents.

All of the states created out of the Dakota Territory in 1889 were admitted with constitutions containing similar acknowledgments of God and similar prohibitions of establishment. The people of Idaho, for example, announced in their first constitution that they were "grateful to Almighty God for [their] freedom," even though the constitution also provided that "no person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent." Const. of 1889, Preamble; Art. 1, sec. 4, reprinted in 2 Thorpe 913, 918. Congress admitted Idaho to statehood on July 3, 1990, after finding that the proposed constitution was "republican in form and . . . in conformity with the Constitution of the United States"—a constitution that had included the Fourteenth Amendment for more than twenty years. See An Act to provide for the admission of the State of Idaho into the Union (July 3, 1890), reprinted in 2 Thorpe 913, 918. Wyoming's constitution announced that its people were "grateful to God" for their "civil, political, and religious liberties," even while it declared that "the free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this State." Wy. Const. of 1889, Preamble; Art. 1, sec. 18, reprinted in 7 Thorpe 4118. Congress admitted Wyoming to statehood after finding that its constitution was "in conformity with the Constitution of the United States." Act of July 10, 1890, reprinted in 7 Thorpe 4111, 4112. Montana, South Dakota, and Washington were all admitted to statehood in 1889 by Presidential proclamation rather than directly by act of Congress. Before the President was authorized to issue the proclamation of statehood, however, he had to find that their constitutions were "not repugnant to the Constitution of the United States and the principles of the Declaration of Independence." See Act of Feb. 22, 1889, 25 Stat. 676. Montana's preamble expressed gratitude "to Almighty God for the blessings of liberty" even while the constitution elsewhere barred "preference . . . to any religious denomination or mode of worship." Mt. Const. of 1889, Preamble; Art. III, sec. 4, reprinted in 4 Thorpe 2300, 2301. President Benjamin Harrison found the constitution consistent with the United States Constitution and proclaimed Montana a state on November 8, 1889. See Proclamation of Nov. 8, 1889, reprinted in 4 Thorpe 2299–2300. Similar provisions are found in the first constitutions of South Dakota and Washington. S.D. Const. of 1889, Preamble and Art. VI, sec. 3, reprinted in 6 Thorpe 3357, 3370; Wash. Const. of 1889, Pre-

amble and Art. I, sec. 11, reprinted in 7 Thorpe 3973, 3974. Both received Presidential approval. Proclamation of Nov. 2, 1889, reprinted in 6 Thorpe 3355–57 (admitting South Dakota to statehood); Proclamation of Nov. 11, 1889, reprinted in 7 Thorpe 3971–73 (admitting Washington to statehood).

The Utah Constitution of 1895 contained one of the most strongly-worded anti-establishment provisions: "The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, . . . There shall be no union of church and state, nor shall any church dominate the State or interfere with its functions." Utah Const. of 1895, Art. I, sec. 4, reprinted in 6 Thorpe 3702. Despite this strong anti-establishment language, the preamble of the same constitution acknowledges that the people of Utah were "grateful to Almighty God for life and liberty." Utah Const. of 1895, Preamble, reprinted in 6 Thorpe 3702. President Grover Cleveland accepted Utah to statehood after finding that "said constitution is not repugnant to the Constitution of the United States and the Declaration of Independence." Proclamation of January 4, 1896, reprinted in 6 Thorpe 3700. Neither the President nor Congress found such public acknowledgments of God to be contrary to the Establishment Clause, well after adoption of the Fourteenth Amendment.

THANKSGIVING PROCLAMATIONS HAVE RECOGNIZED GOD

On September 25, 1789, the First Congress unanimously approved a resolution calling on President George Washington to proclaim a National Day of Thanksgiving for the people of the United States by declaring, "a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many favors of Almighty God, especially by affording them an opportunity peaceably to establish a constitution of government for their safety and happiness." *See Wallace* v. *Jaffree,* 472 U.S. 38, 101 (1985) (Rehnquist, J., dissenting).

In Washington's Proclamation of a Day of National Thanksgiving, he wrote that it is the "duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor. . . ." 30 The Writings of George Washington from the Original Manuscript Sources 1745–1799, at 427 (John C. Fitzpatrick ed., Gov't Printing Office 1939). His proclamation of a day of thanksgiving, which we still celebrate, is an elegant national prayer, requested by the very Congress that drafted the Establishment Clause of the First Amendment:

> Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor, and Whereas both Houses of Congress have by their joint Committee requested me "to recommend to the People of the United States a day of public thanks-giving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God, especially by affording them an opportunity peaceable to establish a form of government for their safety and happiness." Now therefore I do recommend and assign Thursday the 26th day of November next to be devoted by

> the People of these States to the service of that great and glorious Being, who is the beneficent Author of all the good that was, that is, or that will be. That we may then all unite in rendering unto him our sincere and humble thanks, for his kind care and protection of the People of this country previous to their becoming a Nation, for the signal and manifold mercies, and the favorable interpositions of his providence, which we experienced in the course and conclusion of the late ware, for the great degree of tranquility, union, and plenty, which we have since enjoyed, for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national One now lately instituted, for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge and in general for all the great and various favors which he hath been pleased to confer upon us. And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations and beseech him to pardon our national and other transgressions, to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually, to render our national government a blessing to all the People, by constantly being a government of wise, just and constitutional laws, discreetly and faithfully executed and obeyed, to protect and guide all Sovereigns and Nations (especially such as have shown kindness unto us) and to bless them with good government, peace, and concord. To promote the knowledge and practice of true religion and virtue, and the encrease of science among them and us, and generally to grant unto all Mankind such a degree of temporal prosperity as he alone knows to be best.
>
> 30 The Writings of George Washington from the Original Manuscript Sources 1745–1799, at 427–28 (John C. Fitzpatrick ed., Gov't Printing Office 1939).

John Adams declared in 1799, "As no truth is more clearly taught in the Volume of Inspiration, nor any more fully demonstrated by the experience of all ages, than that a deep sense and due acknowledgment of the governing providence of a Supreme Being and of the Accountableness of men to Him as the searcher of heart and righteous distributor of rewards and punishments are conducive equally to the happiness and rectitude of individuals and to the well-being of communities . . . I do hereby recommend . . . to be observed throughout the United States as a day of solemn humiliation, fasting, and prayer. . . ." 9 The Works of John Adams 172 (Charles F. Adams ed., 1850–56) (reprint by Books for Librarians Press, 1969).

President James Madison, on July 9, 1812, proclaimed that the third Thursday in August "be set apart for the devout purposes of rendering the Sovereign of the Universe and the Benefactor of Mankind the public homage due to His holy attributes . . ." 2 James D. Richardson, A Compilation of the Messages and Papers of the Presidents 498 (Bureau of National Literature, Inc.).

President James Madison, on March 4, 1815 declared "a day of thanksgiving and of devout acknowledgments to Almighty God for

His great goodness manifested in restoring to them the blessing of peace. No people ought to feel greater obligations to celebrate the goodness of the Great Disposer of Events and of the Destiny of Nations than the people of the United States." 2 James D. Richardson, A Compilation of the Messages and Papers of the Presidents 546 (Bureau of National Literature, Inc.).

Andrew Johnson proclaimed "on the occasion of the obsequies of Abraham Lincoln, late President of the United States" that "a special period be assigned for again humbling ourselves before Almighty God. . . ." 8 James D. Richardson, A Compilation of the Messages and Papers of the Presidents 3504 (Bureau of National Literature, Inc.) (Proclamation of April 25, 1865).

President Woodrow Wilson, on October 19, 1917, proclaimed that "Whereas, the Congress of the United States, . . . requested me to set apart by official proclamation a day upon which our people should be called upon to offer concerted prayer to Almighty God for His divine aid . . . And, Whereas, it behooves a great free people, nurtured as we have been in eternal principles of justice and of right, a nation which has sought from the earliest days of its existence to be obedient to the divine teachings which have inspired it in the exercise of its liberties, to turn always to the supreme Master and cast themselves in faith at His feet, praying for His aid and succor . . ." 17 James D. Richardson, A Compilation of the Messages and Papers of the Presidents 8377 (Bureau of National Literature, Inc.) (Proclamation of Oct. 19, 1917).

President Roosevelt's 1944 Thanksgiving Proclamation declared: "[I]t is fitting that we give thanks with special fervor to our Heavenly Father for the mercies we have received individually and as a nation and for the blessings He has restored, through the victories of our arms and those of our Allies, to His children in other land . . . To the end that we may bear more earnest witness to our gratitude to Almighty God, I suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving to Christmas." *Lynch* v. *Donnelly,* 465 U.S. 668, 675 n.3 (1984) (citing Proclamation No. 2629, 9 Fed. Reg. 13,099 (1944)).

Official announcements proclaiming Christmas, Thanksgiving, and other national holidays are, to this day, made in religious terms. President Bush, in his 2002 Thanksgiving Day Proclamation, stated, "We also thank God for the blessings of freedom and prosperity; and, with gratitude and humility, we acknowledge the importance of faith in our lives." Weekly Compilation of Presidential Papers, Vol. 38, No. 47, at 2072 (November 25, 2002).

Recognition of God in the Presidential Oath of Office and Inaugural Addresses

Every President of the United States, since Washington, has taken the Oath of Office with his hand placed upon the Bible. *See Engel* v. *Vitale,* 370 U.S. 421, 436 (1962). Every President has ended his Oath with, "So help me, God." *Id.* at 436.

Every President, without exception, has acknowledged God upon entering office:

George Washington, 1st, "that Almighty Being who rules over the universe . . ." Speeches of the American Presidents 3 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

John Adams, 2nd, "that Being who is supreme over all, the Patron of Order, the Fountain of Justice . . ." Speeches of the Amer-

ican Presidents 28 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

Thomas Jefferson, 3rd, "And may that Infinite Power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue for your peace and prosperity." Speeches of the American Presidents 40 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

James Madison, 4th, "that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future." Speeches of the American Presidents 51 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

James Monroe, 5th, "with a firm reliance on the protection of Almighty God . . ." Speeches of the American Presidents 69 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

John Quincy Adams, 6th, "knowing that 'except the Lord keep the city the watchman waketh but in vain' with fervent supplications for His favor. . . ." Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, at 60 (1989).

Andrew Jackson, 7th, "my most fervent prayer to that Almighty Being before whom I now stand . . ." Speeches of the American Presidents 95 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

Martin Van Buren, 8th, "the Divine Being whose strengthening support I humbly solicit, and whom I fervently pray to look down upon us all." Speeches of the American Presidents 108 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

William Henry Harrison, 9th, "the Beneficent Creator has made no distinction amongst men . . ." Speeches of the American Presidents 116 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

John Tyler, 10th, "the all-wise and all-powerful Being who made me . . ." 4 James D. Richardson, A Compilation of the Messages and Papers of the Presidents 1890 (Bureau of National Literature, Inc.).

James Polk, 11th, "I fervently invoke the aid of that Almighty Ruler of the Universe in whose hands are the destinies of nations and of men . . ." Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, at 100 (1989).

Zachary Taylor, 12th, "to which the goodness of Divine Providence has conducted our common country." Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, at 114 (1989).

Millard Fillmore, 13th, "I have to perform the melancholy duty of announcing to you that it has pleased Almighty God to remove from this life Zachary Taylor . . ." Philip Kunhardt, Jr., The American President 218–223 (Riverhead Books 1999); "I rely upon Him who holds in His hands the destinies of nations . . ." 6 James D. Richardson, A Compilation of the Messages and Papers of the Presidents 2600 (Bureau of National Literature, Inc.) (Special Message, July 10, 1850).

Franklin Pierce, 14th, "there is no national security but in the nation's humble, acknowledged dependence upon God and His over-

ruling providence . . ." Speeches of the American Presidents 153 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

James Buchanan, 15th, "In entering upon this great office I must humbly invoke the God of our fathers . . ." Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, at 125 (1989).

Abraham Lincoln, 16th, "Intelligence, patriotism, Christianity, and a firm reliance on Him who has never yet forsaken this favored land, are still competent to adjust in the best way all our present difficulty." Speeches of the American Presidents 181 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

Andrew Johnson, 17th, "Duties have been mine; consequences are God's." 8 James D. Richardson, A Compilation of the Messages and Papers of the Presidents 3504 (Bureau of National Literature, Inc.).

Ulysses S. Grant, 18th, "I ask the prayers of the nation to Almighty God in behalf of this consummation." Speeches of the American Presidents 225 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

Rutherford B. Hayes, 19th, "Looking for the guidance of that Divine Hand by which the destinies of nations and individuals are shaped . . ." Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, at 159 (1989).

James Garfield, 20th, "They will surely bless their fathers and their fathers' God that the Union was preserved, that slavery was overthrown . . ." Speeches of the American Presidents 251 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

Chester Arthur, 21st, "I assume the trust imposed by the Constitution, relying for aid on divine guidance . . ." 10 James D. Richardson, A Compilation of the Messages and Papers of the Presidents 4621 (Bureau of National Literature, Inc.).

Grover Cleveland, 22nd, "And let us not trust to human effort alone, but humbly acknowledging the power and goodness of Almighty God, who presides over the destiny of nations. . . .." Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, at 173 (1989).

Benjamin Harrison, 23rd, "invoke and confidently expect the favor and help of Almighty God, that He will give to me wisdom . . ." Speeches of the American Presidents 277 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

Grover Cleveland, 24th, "I know there is a Supreme Being who rules the affairs of men and whose goodness and mercy have always followed the American people, and I know He will not turn from us now if we humbly and reverently seek His powerful aid." Speeches of the American Presidents 274 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

William McKinley, 25th, "Our faith teaches that there is no safer reliance than upon the God of our fathers . . ." Speeches of the American Presidents 291 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

Theodore Roosevelt, 26th, "with gratitude to the Giver of Good who has blessed us with the conditions which have enabled us . . ." Speeches of the American Presidents 324 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

Howard Taft, 27th, ". . . support of my fellow citizens and the aid of the Almighty God in the discharge of my responsible duties." Speeches of the American Presidents 362 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

Woodrow Wilson, 28th, "I summon all honest men, all patriotic, all forward-looking men, to my side. God helping me, I will not fail them, if they will but counsel and sustain me!" Speeches of the American Presidents 380 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

Warren G. Harding, 29th, "that passage of Holy Writ wherein it is asked: 'What doth the Lord require of thee . . .'" Speeches of the American Presidents 420 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

Calvin Coolidge, 30th, "[America] cherishes no purpose save to merit the favor of Almighty God . . ." Speeches of the American Presidents 433 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988). Calvin Coolidge also stated, "Our government rests upon religion. It is from that source that we derive our reverence for truth and justice, for equality and liberty, and for the rights of mankind. Unless the people believe in these principles, they cannot believe in our Government." "Coolidge Declares Religion Our Basis," N.Y. Times, Oct. 16, 1924 (October 15, 1924, address in connection with the unveiling of an equestrian statue of Francis Asbury.)

Herbert Hoover, 31st, "I ask the help of Almighty God in this service to my country to which you have called me." Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, at 267 (1989). Also according to President Hoover, "Our Founding Fathers did not invent the priceless boon of individual freedom and respect for the dignity of men. That great gift to mankind sprang from the Creator and not from governments." "The Protection of Freedom," Address by Herbert Hoover, West Branch, Iowa, Aug. 10, 1954.

Franklin D. Roosevelt, 32nd, "In this dedication of a nation we humbly ask the blessing of God." Speeches of the American Presidents 489 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

Harry S. Truman, 33rd, "all men are created equal because they are created in the image of God." Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, at 286 (1989).

Dwight D. Eisenhower, 34th, "At such a time in history, we, who are free, must proclaim anew our faith. This faith is the abiding creed of our fathers. It is our faith in the deathless dignity of man, governed by eternal moral and natural laws. This faith defines our full view of life. It establishes, beyond debate, those gifts of the Creator that are man's inalienable rights, and that make all men equal in His sight! . . . The enemies of this faith know no god but force, no devotion but its use. . . . Whatever defies them, they torture, especially the truth. Here, then, is joined no pallid argument between slightly differing philosophies. This conflict strikes directly at the faith of our fathers and the lives of our sons. . . . This is the work that awaits us all, to be done with bravery, with charity—and with prayer to Almighty God." Speeches of the American Presidents 566, 568 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

John F. Kennedy, 35th, "the rights of man come not from the generosity of the state but from the hand of God." Speeches of the American Presidents 604 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

Lyndon B. Johnson, 36th, "We have been allowed by Him to seek greatness with the sweat of our hands and the strength of our spirit. . . . [W]e learned in hardship . . . that the judgment of God is harshest on those who are most favored." Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, at 313 (1989).

Richard M. Nixon, 37th, "as all are born equal in dignity before God, all are born equal in dignity before man." Speeches of the American Presidents 662 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

Gerald Ford, 38th, "to uphold the Constitution, to do what is right as God gives me to see the right . . ." Speeches of the American Presidents 698 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).

Jimmy Carter, 39th, "what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God." Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, at 328 (1989).

Ronald Reagan, 40th, "We are a nation under God, and I believe God intended for us to be free." Speeches of the American Presidents 749 (Steven Anzovin & Janet Podell eds., The H.W. Wilson Co. 1988).[133]

George Bush, 41st, "Heavenly Father, we bow our heads and thank You for Your love." Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, at 346 (1989).

Bill Clinton, 42nd, "with God's help, we must answer the call." Public Papers of the Presidents of the United States, William J. Clinton, 1993, Book 1, at 3 (Gov't Printing Office 1994).

George W. Bush, 43rd, "We are not this story's Author, who fills time and eternity with his purpose. . . . God bless you all, and God bless America." Public Papers of the Presidents of the United States, George W. Bush, 2001, Book 1, at 3 (Gov't Printing Office 2003).

HEARINGS

The Committee's Subcommittee on the Constitution held a hearing on "Limiting Federal Court Jurisdiction to Protect Marriage for the States" on June 24, 2004, which focused on Congress's constitutional authority to limit the jurisdiction of the Federal courts. Testimony was received from Phyllis Schlafly, President, Eagle Forum; Martin H. Redish, Professor, Northwestern University School of Law; Michael Gerhardt, Professor, William & Mary Law School; William E. Dannemeyer, former U.S. Representative, with additional material submitted by individuals and organizations.

[133] When awarded the Presidential Medal of Freedom, President Reagan stated, "History comes and goes, but principles endure and ensure future generations to defend liberty—not a gift of government, but a blessing from our Creator." "For the Record," *The Washington Post* (January 15, 1993) at A22.

COMMITTEE CONSIDERATION

On September 15, 2004, the Committee met in open session and ordered favorably reported the bill H.R. 2028 with amendments by a recorded vote of 17 to 10, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that the following rollcall votes occurred during the Committee's consideration of H.R. 2028.

1. A second degree amendment to the Sensenbrenner amendment in the nature of a substitute was offered by Mr. Watt that would have stricken the provision eliminating the Supreme Court's jurisdiction over cases involving the Pledge of Allegiance. By a rollcall vote of 9 yeas to 16 nays, the amendment was defeated.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Jenkins		X	
Mr. Cannon			
Mr. Bachus			
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Ms. Hart		X	
Mr. Flake			
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Carter		X	
Mr. Feeney		X	
Mrs. Blackburn		X	
Mr. Conyers			
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Sensenbrenner, Chairman		X	
Total	9	16	

2. A second degree amendment to the Sensenbrenner amendment in the nature of a substitute was offered by Ms. Jackson Lee that would have precluded application of the bill to cases in which

a "claim alleges religious coercion." By a rollcall vote of 7 yeas to 17 nays, the amendment was defeated.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Jenkins		X	
Mr. Cannon			
Mr. Bachus			
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Ms. Hart		X	
Mr. Flake			
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Carter		X	
Mr. Feeney		X	
Mrs. Blackburn		X	
Mr. Conyers			
Mr. Berman			
Mr. Boucher			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren		X	
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Schiff			Pass
Ms. Sánchez	X		
Mr. Sensenbrenner, Chairman		X	
Total	7	17	1 Pass

3. Final Passage. The motion to report favorably the bill H.R. 2028, with an amendment in the nature of a substitute was agreed to by a rollcall vote of 17 yeas to 10 nays.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly			
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Jenkins	X		
Mr. Cannon			
Mr. Bachus	X		
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Ms. Hart	X		
Mr. Flake			
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Carter	X		
Mr. Feeney	X		
Mrs. Blackburn	X		
Mr. Conyers			
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler			
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Mr. Sensenbrenner, Chairman	X		
Total	17	10	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2028, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 17, 2004.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2028, the Pledge Protection of Privacy Act of 2004.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford, who can be reached at 226–2860.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 2028—Pledge Protection Act of 2004.

H.R. 2028 would amend federal law to eliminate the federal court jurisdiction and Supreme Court appellate jurisdiction on questions relating to the interpretation and constitutionality of the Pledge of Allegiance. CBO estimates that implementing H.R. 2028 would not have a significant effect on the federal budget.

The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford, who can be reached at 226–2860. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2028 would prevent Federal courts from considering cases involving the constitutionality of the Pledge of Allegiance.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, § 8; article III, § 1, clause 1; and article III, § 2, clause 2.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

This discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 provides that this Act may be cited as the "Pledge Protection Act of 2004."

Sec. 2. Limitation on Jurisdiction. Section 2 provides that no court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance, as defined in section 4 of title 4, or its recitation.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

CHAPTER 99 OF TITLE 28, UNITED STATES CODE

CHAPTER 99—GENERAL PROVISIONS

Sec.
1631. Transfer to cure want of juridiction.
1632. Limitation on jurisdiction.

* * * * * * *

§ 1632. Limitation on jurisdiction

No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance, as defined in section 4 of title 4, or its recitation.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, SEPTEMBER 15, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:10 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

[Intervening business.]

Chairman SENSENBRENNER. Pursuant to notice, I now call up the bill H.R. 2028, the "Pledge Protection Act of 2003," for purposes of markup, and move its favorable recommendation to the House.

Without objection, the bill will be considered as read and open for amendment at any point.

[The bill, H.R. 2028, follows:]

I

108TH CONGRESS
1ST SESSION

H. R. 2028

To amend title 28, United States Code, with respect to the jurisdiction of Federal courts inferior to the Supreme Court over certain cases and controversies involving the Pledge of Allegiance.

IN THE HOUSE OF REPRESENTATIVES

MAY 8, 2003

Mr. AKIN (for himself, Mr. MCINTYRE, Mr. DELAY, Mr. BLUNT, Mr. CANTOR, Ms. PRYCE of Ohio, Mr. ADERHOLT, Mr. BACHUS, Mr. BAKER, Mr. BARRETT of South Carolina, Mr. BARTLETT of Maryland, Mr. BARTON of Texas, Mr. BASS, Mrs. BLACKBURN, Mr. BEAUPREZ, Mr. BEREUTER, Mr. BISHOP of Utah, Mr. BOEHNER, Mr. BONILLA, Mrs. BONO, Mr. BONNER, Mr. BOOZMAN, Ms. BORDALLO, Mr. BRADY of Texas, Mr. BROWN of South Carolina, Ms. GINNY BROWN-WAITE of Florida, Mr. BURGESS, Mr. BURNS, Mr. BURR, Mr. BURTON of Indiana, Mr. CALVERT, Mr. CAMP, Mr. CHOCOLA, Mr. COLE, Mr. COLLINS, Mr. CRANE, Mr. CULBERSON, Mr. CUNNINGHAM, Mrs. JO ANN DAVIS of Virginia, Mr. DAVIS of Tennessee, Mr. TOM DAVIS of Virginia, Mr. DEAL of Georgia, Mr. DEMINT, Mr. LINCOLN DIAZ-BALART of Florida, Mr. MARIO DIAZ-BALART of Florida, Mr. DOOLITTLE, Mr. DUNCAN, Ms. DUNN, Mrs. EMERSON, Mr. FEENEY, Mr. FLAKE, Mr. FOLEY, Mr. FORBES, Mr. FOSSELLA, Mr. FRANKS of Arizona, Mr. FRELINGHUYSEN, Mr. GALLEGLY, Mr. GARRETT of New Jersey, Mr. GIBBONS, Mr. GILLMOR, Mr. GINGREY, Mr. GOODE, Mr. GOODLATTE, Mr. GRAVES, Mr. GREEN of Texas, Mr. GUTKNECHT, Ms. HARRIS, Mr. HAYES, Mr. HAYWORTH, Mr. HEFLEY, Mr. HERGER, Mr. HOBSON, Mr. HOEKSTRA, Mr. HOSTETTLER, Mr. HOUGHTON, Mr. HULSHOF, Mr. HUNTER, Mr. ISSA, Mr. ISTOOK, Mr. JANKLOW, Mr. JENKINS, Mr. SAM JOHNSON of Texas, Mr. JONES of North Carolina, Mr. KELLER, Mr. KENNEDY of Minnesota, Mr. KING of Iowa, Mr. KINGSTON, Mr. KLINE, Mr. LAHOOD, Mr. LATOURETTE, Mr. LEWIS of Kentucky, Mr. LUCAS of Oklahoma, Mr. MANZULLO, Mr. MCCRERY, Mr. MCHUGH, Mr. MCINNIS, Mr. MICA, Mrs. MILLER of Michigan, Mr. GARY G. MILLER of California, Mr. MILLER of Florida, Mrs. MUSGRAVE, Mrs. MYRICK, Mr. NEY, Mrs. NORTHUP, Mr. NUNES, Mr. OSBORNE, Mr. OSE, Mr. OTTER, Mr. PEARCE, Mr. PENCE, Mr. PETERSON of Pennsylvania, Mr. PITTS, Mr. PORTER, Mr. PLATTS, Mr. POMBO, Mr. PUTNAM, Mr. REGULA, Mr. REHBERG, Mr. RENZI, Mr. REYNOLDS, Mr. ROGERS of Kentucky, Mr. ROGERS of Michigan, Mr. ROHRABACHER, Ms. ROS-LEHTINEN, Mr. RYAN of Wisconsin,

Mr. RYUN of Kansas, Mr. SAXTON, Mr. SCHROCK, Mr. SESSIONS, Mr. SHADEGG, Mr. SHERWOOD, Mr. SHIMKUS, Mr. SHUSTER, Mr. SIMPSON, Mr. SMITH of New Jersey, Mr. SMITH of Texas, Mr. SMITH of Michigan, Mr. SOUDER, Mr. STEARNS, Mr. SULLIVAN, Mr. TANCREDO, Mr. TAUZIN, Mr. TAYLOR of North Carolina, Mr. TERRY, Mr. TIAHRT, Mr. TIBERI, Mr. TOOMEY, Mr. WALSH, Mr. WAMP, Mr. WELDON of Pennsylvania, Mr. WELDON of Florida, Mr. WELLER, Mr. WHITFIELD, Mr. WILSON of South Carolina, Mr. WOLF, Mr. YOUNG of Florida, and Mr. YOUNG of Alaska) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 28, United States Code, with respect to the jurisdiction of Federal courts inferior to the Supreme Court over certain cases and controversies involving the Pledge of Allegiance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Pledge Protection Act of 2003''.

SEC. 2. JURISDICTION LIMITATION.

(a) IN GENERAL.—Chapter 99 of title 28, United States Code, is amended by adding at the end the following:

''§ 1632. Jurisdiction limitation

''No court established by Act of Congress shall have jurisdiction to hear or determine any claim that the recitation of the Pledge of Allegiance, as set forth in section

4 of title 4, violates the first article of amendment to the Constitution of the United States.''.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 99 of title 28, United States Code, is amended by adding at the end the following new item:

''1632. Jurisdiction Limitation.''.

○

Chairman SENSENBRENNER. The Chair recognizes himself for 5 minutes to explain the bill.

The Pledge of Allegiance reads, "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."

Two words in the pledge, "under God," help define our national heritage as beneficiaries of a Constitution sent to the States for ratification, as the Constitution itself states, "In the year of our Lord, 1787," by a founding generation that saw itself guided by a providential God.

These two words and their entirely proper presence in the system of Government defined by our Constitution have been repeatedly and overwhelmingly reaffirmed by the House of Representatives, most recently twice in the 107th Congress by votes of 416 to 3 and 401 to 5, and in this Congress by a vote of 400 to 7.

On July 4, 1776, our forbearers justified to the world our separation from Great Britain, declaring, "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain Unalienable Rights."

The First Congress not only acknowledged a proper role for religion in public life, but it did so at the very time it drafted the establishment clause in the first amendment. Just 3 days before Congress sent the text of the first amendment to the States for ratification, it authorized the appointment of legislative chaplains.

And on November 19, 1863, President Abraham Lincoln delivered the Gettysburg Address and declared in the words now inscribed in one of our most beloved national monuments, "We here highly resolve that these dead shall not have died in vain, that this Nation, under God, shall have a new birth of freedom."

Although the United States Supreme Court recently reversed and remanded the ninth circuit's latest holding striking down the Pledge as unconstitutional, the Court did so on the questionable grounds that the plaintiff lacked legal standing to bring the case. The Court's decision did not reach to the merits of the case is apparently an effort to forestall a decision adverse to the Pledge, since the dissenting Justices concluded the Court in its decision "erected a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim."

In order to protect the Pledge from Federal Court decisions that would have the effect of invalidating the Pledge across several States, H.R. 2028 was introduced by Representative Todd Akin. As introduced, it would have precluded the lower Federal courts from hearing cases involving the Pledge. However, in light of the Newdow decision, the bill's sponsor and I agree that the bill should be expanded to also include the Supreme Court.

The amendment in the nature of a substitute to H.R. 2028 that I will offer would reserve to the State courts the authority to decide whether the Pledge is valid within each State's boundaries. It would place final authority over a State's Pledge policy in the hands of the States themselves.

The amendment in the nature of a substitute is identical to H.R. 3318, the Marriage Protection Act, which the House passed just prior to the August recess, except that it addresses the Pledge rather than DOMA. If different States come to different decisions re-

garding the constitutionality of the Pledge, the effects of such decisions will be felt only within those States, and a few Federal judges sitting hundreds of miles away from your State or mine will not be able to rewrite your State and my State's Pledge policy.

A remedy to abuses by Federal judges has long been understood to lie, among other places, in Congress' authority to limit Federal court jurisdiction. The Constitution clearly provides the lower Federal courts are entirely creatures of Congress, as is the appellate jurisdiction of the Supreme Court, excluding only its very limited original jurisdiction over cases involving ambassadors and cases in which States have legal claims against each other.

As the leading treatise on Federal court jurisdiction has pointed out, "Beginning with the first Judiciary Act in 1789, Congress has never vested the Federal courts with the entire judicial power that would be permitted by Article III of the Constitution."

Justice Brennan, writing for the Supreme Court, said, "Virtually all matters that might be heard in Article III courts could also be left by Congress to State courts."

Far from violating the separation of powers, legislation that leaves State courts with jurisdiction to decide certain classes of cases would be an exercise of one of the very checks and balances provided for in the Constitution. Therefore, I would urge Members to support this legislation.

Who wishes to be recognized?

The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Mr. Chairman, thank you.

Mr. Chairman, I really hate to be an "I told you so." actually, I don't hate it. But when this Committee started on its first effort to strip the Federal courts of jurisdiction—legislation to strip Federal courts of the jurisdiction to hear cases challenging the Defense of Marriage Act, I warned there would be no end to it.

Our former colleague Bob Barr, whose legislation Congress is purporting to protect, said no thanks. He wrote, "This bill will needlessly set a dangerous precedent for future Congresses that might want to protect unconstitutional legislation from judicial review. During my time in Congress, I saw many bills introduced that would violate the takings clause, the second amendment, the 10th amendment and many other constitutional protections. The fundamental protections afforded by the Constitution would be rendered meaningless if others followed the paths set by H.R. 3313."

Bob Barr was right, and you can quote me.

Today it is the turn of the religious minorities. Remember, before I get into that, remember the Soviet Constitution of 1936; freedom of speech, freedom of the press, freedom of assembly, freedom to petition government, freedom of religious and antireligious propaganda, as they quaintly put it, all right there. Of course, you couldn't enforce it because there were no courts to enforce it. It wasn't worth the paper it was written on.

Bills like this will make the Bill of Rights as worthless as the Soviet Constitution, and this bill is intended to do just that. Today it is the turn of the religious minorities.

Remember how we got here. Once upon a time a student could be expelled from school for refusing to recite the Pledge. In 1943, the Supreme Court in *West Virginia Board of Education* v. *Barnett*

held that the children had a first amendment right not to be compelled to swear an oath against their beliefs, in this case Jehovah's Witnesses who objected on religious grounds.

There is a reason for these provisions of the Constitution. Remember the "testos" that King Henry used to enforce. Remember St. Thomas More, who went to his death because he wouldn't take the proper oath. Under this bill, we could do that again.

Justice Jackson wrote, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can describe what should be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

This legislation, of course, would strip the parents of those children of the right to go to court and defend their children's religious liberty, their right not to recite a religious statement "under God" with which they disagree. Schools could expel children for acting according to the dictates of their faith, and Congress will have slammed the courthouse doors in their faces.

As despicable as this legislation is, even for an election season, it is part of a more general attack on our system of Government. You don't need a law degree to understand this. You should have learned about this in elementary school.

Just to recap, we have an independent judiciary whose job it is to interpret the Constitution, even if those decisions are really unpopular. It is right there in Article III of the Constitution.

Sometimes we don't like what the Court says. I don't like the decisions that struck down parts of the Violence Against Women Act or the Gun-Free Safe School Zones Act. I don't like the fact of misapplying the commerce clause in the 11th amendment to gut our civil rights law. I really don't like it that they stole an election and put someone in the White House that got more than half a million votes less than its other candidate. I especially don't like the Supreme Court's decision in *Employment Division* v. *Smith*, in which Justice Scalia wrote, "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in, but that is an inevitable consequence of democratic Government."

As wrong-headed as I find the current Court on many issues, I understand that we cannot maintain our system of Government and we cannot enforce or give any meaning whatsoever to the Bill of Rights if the independent judiciary cannot enforce those rights, even if the majority doesn't like it.

To return to Justice Jackson in the flag salute case, "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech and free press, freedom of worship and assembly and other fundamental rights may not be submitted to a vote. They depend on the outcome of no elections."

Does any of this ring a bell with anyone? High school civics, maybe?

As to the complaints about unelected judges, I would refer my colleagues back to their high school civics textbooks. We have an independent judiciary precisely to rule against the wishes of the

majority, especially when it comes to the rights of unpopular minorities, even atheist minorities. That is our system of Government, and it is a good one.

As Alexander Hamilton said in Federalist 78, "The complete independence of the courts of justice is peculiarly essential—"

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. NADLER. Mr. Speaker, I ask—Mr. Speaker—Mr. Chairman, I ask for an additional 2 minutes.

Chairman SENSENBRENNER. Thanks for the promotion, and without objection.

Mr. NADLER. Thank you. You are welcome.

"the complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority, such, for instance, as it shall pass no bills of attainment and no ex post facto laws and the like. Limitations of this kind can be preserved and practiced no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations and particular rights and privileges would amount to nothing."

I would point out that the Chairman says that the Judiciary Act of 1789 limited the jurisdiction of the courts. It is true. But the Judiciary Act of 1789 predated the Bill of Rights, which guarantees everyone in the fifth amendment, in the 14th amendment, the right to due process of law, the right to equal protection, those rights which cannot be enforced if the Legislature, if the Congress, can strip the courts of the right to enforce those.

We are playing with fire here. Is demagoging a case that you won really worth it? Do you really hate the Bill of Rights so much that you are willing to destroy it?

I urge my conservative colleagues to shape up and act like conservatives for once. We live in a free society that protects unpopular minorities, even if a majority hates them. Feel free to hate if you must, but leave our Constitution alone. Destroy this bill, not the Constitution.

Thank you. I yield back.

Chairman SENSENBRENNER. The gentleman's time has expired.

Without objection, all Members may insert opening statements in the record at this time.

Are there amendments?

The Chair recognizes himself for purposes of offering an amendment in the nature of a substitute, which the clerk will report.

The CLERK. Amendment in the nature of a substitute to H.R. 2028 offered by Mr. Sensenbrenner.

[The amendment follows:]

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 2028 OFFERED BY MR. SENSENBRENNER

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Pledge Protection Act of 2004''.

SEC. 2. LIMITATION ON JURISDICTION.

(a) IN GENERAL.—Chapter 99 of title 28, United States Code, is amended by adding at the end the following:

''§ 1632. Limitation on jurisdiction

''No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance, as defined in section 4 of title 4, or its recitation.''.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 99 of title 28, United States

1 Code, is amended by adding at the end the following new
2 item:

"1632. Limitation on Jurisdiction.".

Amend the title so as to read: "A bill to amend title 28, United States Code, with respect to the jurisdiction of Federal courts over certain cases and controversies involving the Pledge of Allegiance.".

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

The Chair recognizes himself for 5 minutes.

Because I have already described the substance of this amendment in the nature of a substitute in my opening statement, I will not consume further Committee time by repeating myself. I simply ask the Members support its adoption, and yield back the balance of my time.

Are there any second degree amendments to the amendment in a nature of a substitute offered by the Chair?

The gentleman from California.

Mr. SCHIFF. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCHIFF. Mr. Chairman and Members, last month we had legislation to strip the Federal courts of the jurisdiction over DOMA. This we took up and passed out of this Committee, notwithstanding the fact that all of the witnesses who were invited to testify on the constitutionality of DOMA believed that DOMA was constitutional and DOMA would be upheld by the Court.

So we stripped the jurisdiction of the courts to decide a question that the experts told us they believed the Federal courts would decide the way the Committee believed it should be decided.

Not content with that, last week we removed jurisdiction of State courts to determine issues of venue in their own courthouses. Now we move the assault on the judiciary further this week by moving to strip the Federal courts from the district court to the Supreme Court of jurisdiction over the Pledge of Allegiance in an area, in a case, on an issue where the courts have already done what this Committee would like them to do, and that is thrown out a challenge to the inclusion of "under God" in the Pledge of Allegiance.

Now, I think "under God" belongs in the Pledge of Allegiance, and I think the ninth circuit court was wrongly decided. But the courts remedied the error of the ninth circuit when the Supreme Court threw out the case.

Interestingly, it is not enough, I guess, for the Committee or for this body that the Supreme Court threw out this challenge to the inclusion of "under God" in the Pledge of Allegiance. It is not enough that they prevailed in the case, because they did not prevail on the merits, they prevailed on an issue of procedure, of standing.

But when you look at why we prevailed on the issue of standing, we that believe "under God" should be in the Pledge of Allegiance, it is interesting that we attacked the Court on this, because what the Supreme Court found in the Newdow case was that the mother had full legal custody of the child who was at issue in the Pledge of Allegiance case. The father, the Court found, did not have the standing to raise this issue of the religious education of his daughter. The mother had sole custody.

As the mother evidently intervened and the Court made clear, the daughter is a Christian who believes in God and has no objection either to reciting or hearing others recite the Pledge of Allegiance or its reference to God. So the mother wanted the daughter exposed to the Pledge of Allegiance with "under God," and the Supreme Court found that the father, who lacked any legal custody,

didn't have the right to challenge the mother's view of her daughter's religious education.

And we are critical of that decision. We are not only critical of it, but we wanted to strip the Court of any jurisdiction over the entire issue, because they held a mother with legal custody had the right to allow her daughter to recite the Pledge of Allegiance, including "under God."

This seems an extraordinary result for this Committee, implicitly disapproving of a decision upholding the mother's right, the sole legal custodian's right, to have her daughter recite "under God" in the Pledge of allegiance. That is effectively what we are doing. We are chastising the Court that threw out a case that we thought should be thrown out because they didn't throw it out on the basis we would have liked, but nonetheless a very legally supportable basis.

The question is, I guess, is, what next? Where do we go after we have stripped the courts of jurisdiction over a law, DOMA, that we thought they were going to decide the right way. We have stripped the Court's jurisdiction over an issue where they have already decided it the right way. What is next?

Again, I think the peril is one that my colleague pointed out and that our former colleague Mr. Barr pointed out, and that is there is no limit to what we are undertaking, and while it may seem advantageous from a certain political point of view to press it now, what will prevent those who are arguing for Court-stripping now if later others make the argument that we should strip the Federal courts of the ability to resolve cases involving not the first amendment, as here, but the second amendment; or maybe not the second amendment, but the fourth amendment right to be free of unreasonable searches and freedoms, or the ninth amendment's protection of the right of privacy? What will prevent us from undertaking those Court-stripping measures that may lead to results very different than the majority wants at this moment?

Mr. Chairman, I urge the Committee to reject this bill.

I yield back the balance of my time.

Chairman SENSENBRENNER. The time of the gentleman has expired.

Are there any second degree amendments?

The gentlewoman from California.

Ms. LOFGREN. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. LOFGREN. I likely will not consume the entire 5 minutes, because I think the constitutional issues were very ably outlined by our Ranking Member Mr. Nadler. I will say, however, it is clear to me that this bill is unconstitutional. It would reverse *Marbury* v. *Madison*, a case which has led our country to a separation of powers and freedom for over 200 years.

I would also like to just observe that I think it is unlikely that this bill will ever become law. If it were to become law, it would be overturned by the courts, which would prompt an unnecessary constitutional conflict.

So the question is really why are we going through this exercise? I think it is very much about the election season. I am one, as Mr. Schiff mentioned, who believes that "under God" belongs in the

Pledge of Allegiance, and my votes on the floor of the House reflect that opinion. I believe that the courts will ultimately, if they are squarely faced with the decision, reach the same conclusion.

I question why, other than politics, the majority would be bringing up this issue 50 days before the election, and I think it shows that really radicals have taken over the Congress, people who are willing to essentially toss the system of checks and balances that protects our freedom in America for a temporary political gain. I think that is sad and also dangerous, and I notice that we have not tremendous press attention here today, but I think we could ask them to let them know that radicals have taken over the Congress. The public has a right to know.

I yield back.

Mr. CHABOT. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CHABOT. First of all, I will be brief in my comments, but I think it is interesting to look at some of the terms that we have heard thrown around this morning already. For example, "radicals" having taken over the Congress, and that old favorite, "stole the election." We have heard that we "hate the Bill of Rights," "assault on the judiciary," all this kind of terminology. I think it is kind of interesting.

If we get back to the issue of what we are really talking about here, I want to express my support for this particular Pledge Protection Act.

When the issue of limiting Federal court jurisdiction was raised during the discussions of the Marriage Protection Act, our Subcommittee held a hearing examining Congress' authority to do just what we are doing here today. Although there was mixed opinion on whether Congress should exercise its authority, there was consensus that Congress did and does, in fact, have the authority under Article III of the Constitution to determine which issues were heard by the Supreme Court under its appellate jurisdiction and by the lower Federal courts.

So saying this is unconstitutional, all the experts indicated that Congress does have this power. Obviously, there may be a difference as to whether we should do this or not, just like whether we should have passed the legislation we talked about a month ago relative to DOMA. But whether we can do it or whether we are authorized under the Constitution, really there is not much argument about that.

The Pledge of Allegiance, as our Chairman said, deserves protection. It not only defines our national heritage, but also unites our society each time that it is recited in schools around the country and public events, and we cannot let a few rogue Federal judges redefine our country's history and the basis from which our Founding Fathers found guidance when constructing our country's Government.

So, I think we all ought to be very careful in the terms that we use here this morning, because I think oftentimes we throw these phrases around much too loosely. Let us talk about the merits rather than talking about stealing elections and that sort of thing.

I yield back my time.

Chairman SENSENBRENNER. Are there any second degree amendments to the amendment in the nature of a substitute?

The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. I am trying to strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. Some Members do have to get out of town. That is why I am trying to move this along.

The gentlewoman from Texas is recognized for 5 minutes.

Ms. JACKSON LEE. Mr. Chairman, thank you.

I just wanted to clear the air, because my good friend from Ohio was citing words that he thought might not have been descriptive of what we are doing today. Let me just briefly say nor do I believe the description of the Federal judiciary as "rogue judges" can in any way do any justice or add any contributory aspect to this debate.

Let me just say that I am sure that the Congress has many powers. It might be even said that we have the power to abolish ourselves, to abolish the Government. But there is a question of wisdom in using one's power. There is a question of abuse in using one's power.

Frankly, I believe that the previous legislation passed on DOMA was reckless, and I believe that this legislation is equally so.

I would only offer to my colleagues to say that when a Judiciary Committee or an oversight Committee of the United States Congress begins to take the Constitution and eliminate rights, then I think we are on dangerous ground. When we begin to close the door of the courthouse, the appellate court, the Supreme Court, then frankly I am frightened.

I will not throw words around recklessly. I will not suggest without some basis in fact that we are nearing the terrible times of the 1950's and McCarthysim when no one could speak, when everyone had to be silenced. That is not the role of this Congress.

The courts have not in any way rendered decisions that should suggest they are rogue or runaway courts. Our justice system works. What we are doing today does not work, and I rise to oppose both the legislation and the substitute, and I would argue that we are misusing the Congress' time unwisely.

I will have an amendment in short order, but I rise to oppose the substitute.

Mr. HOSTETTLER. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. HOSTETTLER. Mr. Chairman, I listened with great interest to the statement by Mr. Nadler, and I heard that he began by suggesting that the notion of a independent judiciary is found in Article III, right there. We can look at it and read it. Then he ended his comments by admonishing us to leave the Constitution alone.

I think that seeming contradiction is very important for the case that the other side is making, because if they tell us that the notion of an independent judiciary is found in Article III, then they are going to have to require us to leave the Constitution alone, including not actually read the Constitution, because if you actually read Article III, you will find that the notion of an independent judiciary is a flawed notion, at best.

Article III, section 1, "The judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time establish. The judges, both of the Supreme Court and inferior courts, shall hold their offices during good behavior," and who determines good behavior, and what process determines good or bad behavior? It is the impeachment and removal from office process that is solely the prerogative of the legislative branch.

It also talks about, "Shall at stated times receive for their service a compensation." set by whom? The Congress.

It goes on to say it will not be diminished during their continuance in office. So there is that form of independence in the judiciary.

But if you go on and read section 2 where it talks about the types of judicial power and the cases that may be considered, we come to the point that it says, "In all the other cases before mentioned, the Supreme Court," and it is saying all the other courts except for the two cases that the Chairman mentioned, "with such exceptions and under such regulations as" who? "the Congress shall make." that doesn't sound very independent to me.

The next paragraph says, "The trial of all crimes, except in cases of impeachment, shall be by jury, and such trials shall be held in the State where the said crimes shall have been committed, but when not committed within the State, the trial shall be at such place or places as" who says? "the Congress may by law have directed." not the court, but the Congress shall direct where the trial is in that particular case.

Then it goes on in Article III, section 3 to say that "the Congress shall have power to declare the punishment of treason." not the court, but the Congress.

So, the notion of an independent judiciary, and I listened to Mr. Nadler's dissertation very closely and found the term "independent" or a derivative of the word "independent" several times, it just does not bear out actually in the Constitution.

But it does prove the adage that is long-time established that there is nothing so absurd, but if repeated often enough, people will believe it. And people have asserted the notion of an independent judiciary for so long and asked us as a country and as a citizenry to leave the Constitution alone, including don't read it, that many folks have begun to believe this absurd notion of an independent judiciary, when, if you actually read the Constitution, you will find out that they are not an independent judiciary, that, in fact, Congress at every turn has the authority, according to the Constitution, according to the document that many claim they are trying to preserve, that the Constitution itself gives the Congress the authority to curb the influence of the courts, because, as we know, the courts are unelected and, therefore, unaccountable to the people.

You know, if what we are doing today is so outlandish, according to the will of the people, do you know who gets to finally be the arbiter of the actions of a radical Congress? I think I heard that word? The people themselves.

But those are exactly the people that folks on the other side don't want to have make the final decision in these questions, because they know that these people want to actually allow their children

in public schools to recite the Pledge of Allegiance and have the authority and have the ability to do that.

That is what they don't want. They don't want the people to make this decision. They would much rather have five people, unelected, unaccountable, life-tenured, to make these decisions, and ask the rest of us to please leave the Constitution alone, and, by all means, don't read it. If you read it, then you may feel that you have some power or some authority through your elected officials to make a change.

Chairman SENSENBRENNER. The gentleman's time has expired.

Are there any second degree amendments to the amendment in the nature of a substitute?

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, to save a little time, I would like to incorporate by reference the debate we had on the DOMA amendment, just to save a little time. I would want to comment, however, on a different recollection I have on the hearing that we had.

I thought the question was whether we actually had the constitutional authority, and they seemed to be a little ambivalent about whether we had the authority or not, but I thought there was a consensus we should not exercise it.

By incorporating by reference, I remind you that most of us thought that *Marbury* v. *Madison* had been correctly decided, but we found out that apparently there are a lot of people who think it was wrongly decided. Now we have found that the idea of an independent judiciary is a flawed concept.

Mr. Chairman, the gentleman from New York pointed out under "I told you so" that this kind of idea would become boilerplate language, and here we have it on another bill.

Lastly, Mr. Chairman, by incorporating by reference, we are reminded how happy we are that nobody thought of this scheme back in the 1960's when rogue, unelected, lifetime-appointed Federal judges required Virginia, against the will of the people, to recognize marriages of people of different races. Had someone come up with a scheme and had some kind of DOMA legislation, if it had been found constitutional, those rogue, unelected, lifetime Federal judges would not have been able to do that in Virginia. Also if they decided in the 1950's, they could have had a barrier to judges reviewing pupil placement plans before *Brown* v. *Board of Education.*

But, Mr. Chairman, speaking about this bill, this bill is not limited to just "under God." there are a lot of constitutional issues involving the Pledge of Allegiance. The gentleman from New York and others have mentioned the West Virginia case, where we could not coerce students against their religion to recite a pledge. It has free speech, freedom of association implications. This legislation would prevent all of those cases from being considered.

Present law prohibits a coerced recitation of the Pledge of Allegiance against one's religious views. I don't know what implication this bill would have on even enforcing that present state of the law.

Finally, but not finally, one other comment, we have several letters here I would like unanimous consent to introduce, one from Americans United for Separation of Church and State, and the other from a long list of civil rights organizations which I would ask unanimous consent to introduce for the record.

Chairman SENSENBRENNER. Without objection.

[The information referred to follows:]

AMERICANS UNITED
for Separation of Church and State

National Office

518 C St., N.E.

Washington, D.C. 20002

(202) 466-3234

(202) 466-2587 fax

americansunited@au.org

www.au.org

Reject Efforts to Slam Federal Courthouse Doors on Religious Minorities and Oppose H.R. 2028

September 15, 2004

Dear Chairman Sensenbrenner and Ranking Member Conyers:

Americans United for Separation of Church and State urges you to oppose committee passage of H.R. 2028, the "Pledge Protection Act of 2003." Americans United represents more than 70,000 individual members throughout the fifty states and in the District of Columbia, as well as cooperating houses of worship and other religious bodies committed to the preservation of religious liberty. H.R. 2028 is an extreme and unwise proposal that would undermine the crucial separation of powers at the heart of our government and deny religious minorities from seeking enforcement of their longstanding constitutional rights in the federal courts.

H.R. 2028 would deprive lower federal courts of their ability to hear cases involving the Pledge of Allegiance. Americans United firmly believes that the text, history and structure of the Constitution, together with important policy considerations, should lead the Committee and the House of Representatives to soundly defeat this dangerous and misguided bill, as well as any other court-stripping proposal.

The Pledge Protection Act is Unconstitutional

Article III, Section 1 of the United States Constitution creates the Supreme Court and provides the Congress with the power to establish "such inferior Courts as the Congress may from time to time establish." Section 2 of Article III delineates sets of cases that the federal courts may hear, provides for areas of original jurisdiction of the U.S. Supreme Court, and also provides for the appellate jurisdiction of the Supreme Court in other areas "with such Exceptions, and under such Regulations as the Congress shall make."

Under Section 2, Congress may have limited authority to limit the types of cases over which the Supreme Court may exercise its appellate jurisdiction. Although the extent of this authority is in dispute and has been the subject of academic commentary over the years, there are clear limits to the authority of Congress to limit the jurisdiction of the federal courts based on other applicable provisions of the Constitution. The Pledge Protection Act would do just that, in that it would not only impose restrictions on a particular subject, but would entirely deprive the lower federal courts from hearing any constitutional challenge under the First Amendment to the mandatory recitation of the Pledge of Allegiance, in violation of due process and separation of powers principles.

The Pledge Protection Act Would Violate Due Process Rights and Undermine the Separation of Powers

Basic due process demands an independent judicial forum capable of determining federal constitutional rights. This legislation deprives the lower federal courts of the ability to hear cases involving fundamental free exercise and free speech rights of students, parents, and other individuals. Congress' denial of a federal forum to plaintiffs in a specified class of cases would force plaintiffs out of federal courts, which are specially suited for the vindication of federal interests, and into state courts, which may be hostile or unsympathetic to federal claims, and which may lack expertise and independent safeguards provided to federal judges under Article III of the Constitution. It is in apparent recognition of this concern that no federal bill withdrawing federal jurisdiction over cases involving fundamental constitutional rights with respect to a particular substantive area has become law in decades.

Political frustration with controversial court decisions during the second half of the twentieth century provoked Congress to propose a number of court-stripping measures designed to overturn court decisions touching on a wide variety of issues, including: anti-subversive statutes, apportionment in state legislatures, "Miranda" warnings, busing, school prayer, abortion, racial integration, and composition of the armed services. All of these measures failed to pass Congress. In each instance, bipartisan concerns over threats to the American system of government and constitutional order gave way to a recognition of these court-stripping measures for what they truly were: attempts to circumvent the careful process required for amendments to the U.S. Constitution. As Professor Michael J. Gerhardt stated in his testimony regarding the "Constitution Restoration Act of 2004" before the Subcommittee on Courts on September 13, 2004: "Efforts, taken in response to or retaliation against judicial decisions, to withdraw all federal jurisdiction or even jurisdiction of inferior federal courts on questions of constitutional law are transparent attempts to influence, or displace, substantive judicial outcomes. For several decades, the Congress, for good reason, has refrained from enacting such laws." (emphasis added) Like so many failed court-stripping measures that have come before it, the Pledge Protection Act represents yet another illegitimate short cut to amending the Constitution, is against the weight of history, and must fail.

The Pledge Protection Act is Extreme, Unwise, and Represents Misguided Policy

As drafted, the bill would slam the courthouse doors to religious minorities trying to gain protection for their fundamental constitutional religious and free speech rights. Over sixty years ago, the Supreme Court decided the case of West Virginia State Board of Education v. Barnett, 319 U.S. 624 (1943). In Barnett, the Supreme Court struck down a West Virginia law that mandated schoolchildren to recite the Pledge of Allegiance. Under the West Virginia law, religious minorities faced expulsion from school and could be subject to prosecution and fined, if convicted of violating the statute's provisions. In striking down that statute, the Court reasoned: "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds . . . If there is any fixed star in our constitutional constellation, it is

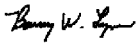
that no official, high, or petty can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." 319 U.S. at 639-40.

Moreover, just recently, a panel of the U.S. Court of Appeals for the Third Circuit held that a Pennsylvania law mandating recitation of the Pledge, even when it provided a religious exception, violated the Constitution because it violated the free speech of the students. Circle School v. Pappert, No. 03-3285 (3rd Cir. Aug. 19, 2004). In Pappert, the court found that: "It may be useful to note our belief that most citizens of the United States willingly recite the Pledge of Allegiance and proudly sing the national anthem. But the rights embodied in the Constitution, particularly the First Amendment, protect the minority - those persons who march to their own drummers. It is they who need the protection afforded by the Constitution and it is the responsibility of federal judges to ensure that protection." Pappert, Slip Op. at 14.

The Pledge Protection Act is an attack on our very system of government. Americans United strongly urges you to leave the independence of the federal judiciary in tact, protect longstanding constitutional rights of religious minorities to seek redress in the federal courts, and respect free speech rights of countless individuals by rejecting this misguided legislation.

If you have any questions regarding this legislation or would like further information on any other issues of importance to Americans United, please do not hesitate to contact Aaron D. Schuham, Legislative Director, at (202) 466-3234, extension 240.

Sincerely,



Rev. Barry W. Lynn
Executive Director

cc: Members of the House Committee on the Judiciary

PROTECT SEPARATION OF POWERS AND RELIGIOUS MINORITIES' LONGSTANDING CONSTITUTIONAL RIGHTS; OPPOSE COMMITTEE PASSAGE OF H.R.2028

September 14, 2004

Dear Chairman Sensenbrenner and Ranking Member Conyers:

We, the undersigned religious, civil rights, and civil liberties organizations, urge you to oppose committee passage of H.R.2028, the "Pledge Protection Act of 2003," misguided legislation that would strip all federal courts established by Congress from hearing First Amendment challenges to the Pledge of Allegiance.

The signatories to this letter include organizations that supported the recent court challenge to the constitutionality of including "under God" in the Pledge of Allegiance, organizations that opposed that challenge, and organizations that took no position on the matter. We are united, however, in believing that H.R.2028 threatens the separation of powers that is a fundamental aspect of our constitutional structure. Beyond this, while the legislation ostensibly responds to the controversy surrounding "under God" in the Pledge of Allegiance, this legislation sweeps far more broadly, with potentially severe constitutional implications for religious minorities who are adversely affected by government-mandated recitation of the Pledge.

First and foremost, we are opposed to H.R. 2028 because this legislation, by entirely stripping all lower federal courts of jurisdiction over a particular class of cases, threatens the separation of powers established by the Constitution, and undermines the unique function of the federal courts to interpret constitutional law. This legislation deprives the federal courts of the ability to hear cases involving religious and free speech rights of students, parents, and other individuals. The denial of a federal forum to plaintiffs to vindicate their constitutional rights would force plaintiffs out of federal courts, which are specifically suited for the vindication of federal interests, and into state courts, which may be hostile or unsympathetic to these federal claims, and which may lack expertise and independent safeguards provided to federal judges under Article III of the Constitution. It is in apparent recognition of this concern that no federal bill withdrawing federal jurisdiction in cases involving fundamental constitutional rights has become law since the Reconstruction period.

In addition, as drafted, the bill would deny access to the federal courts in cases to enforce existing constitutional rights for religious minorities. Over sixty years ago, the Supreme Court decided the case of West Virginia State Board of Education v. Barnett, 319 U.S. 624 (1943). In Barnett, the Supreme Court struck down a West Virginia law that mandated schoolchildren to recite the Pledge of Allegiance. Under the West Virginia law, religious minorities faced expulsion from school and could be subject to prosecution and fined, if convicted of violating the statute's provisions. In striking down that statute, the Court reasoned: "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering

estimate of the appeal of our institutions to free minds . . . If there is any fixed star in our constitutional constellation, it is that no official, high, or petty can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." 319 U.S. at 639-40.

Moreover, just recently, a panel of the U.S. Court of Appeals for the Third Circuit held that a Pennsylvania law mandating recitation of the Pledge, even when it provided a religious exception, violated the Constitution because it violated the free speech of the students. Circle School v. Pappert, No. 03-3285 (3rd Cir. Aug. 19, 2004). In Pappert, the court found that: "It may be useful to note our belief that most citizens of the United States willingly recite the Pledge of Allegiance and proudly sing the national anthem. But the rights embodied in the Constitution, particularly the First Amendment, protect the minority - those persons who march to their own drummers. It is they who need the protection afforded by the Constitution and it is the responsibility of federal judges to ensure that protection." Pappert, Slip Op. at 14.

H.R. 2028 would undermine the longstanding constitutional rights of religious minorities to seek redress in the federal courts in cases involving mandatory recitation of the Pledge. As a result, this legislation will seriously harm religious minorities and the constitutional free speech rights of countless individuals.

H.R. 2028 also raises serious legal concerns about the violation of the principles of separation of powers, equal protection and due process. The bill undermines public confidence in the federal courts by expressing outright hostility toward them, threatens the legitimacy of future congressional action by removing the federal courts as a neutral arbiter, and rejects the unifying function of the federal judiciary by denying federal courts the opportunity to interpret the law. We strongly believe that this legislation as drafted will have broad, negative implications on the ability of individuals to seek enforcement of previously constitutionally protected rights concerning mandatory recitation of the Pledge. We therefore urge, in the strongest terms, your rejection of this misguided and unwise legislation.

Sincerely,

American Civil Liberties Union
American Humanist Association
American Jewish Committee
Americans for Democratic Action
Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League
Baptist Joint Committee
Central Conference of American Rabbis
Committee for Judicial Independence
Human Rights Campaign
Jewish Reconstructionist Federation

Leadership Conference on Civil Rights
National Council of Jewish Women
National Senior Citizen Law Center
Northwest Religious Liberty Association
People for the American Way
Sikh Mediawatch and Resource Task Force (SMART)
The Interfaith Alliance
U.S. Action
Union for Reform Judaism
Unitarian Universalist Association of Congregations

Mr. SCOTT. Both opposed to the bill. But Barry Lynn, the president and leader of the Americans United for Separation of Church and State, has said, "Far from protecting the Pledge, this bill insults the very democratic principles embodied in that affirmation."

Finally, Mr. Chairman, the way I read the bill, there is an additional gratuitous insult for the residents of Washington, D.C., in that apparently they will be totally left out without any court to file in.

Yesterday we helped foreign corporations escape liability from American courts by developing a scheme whereby there may be no court that someone may file in within the United States. This bill, I think, does the same for Washington, D.C., residents, because apparently my reading of it is there is no court in D.C. that you could bring the case in.

For those reasons, Mr. Chairman, I would hope that we would defeat the legislation.

Chairman SENSENBRENNER. The gentleman's time has expired.

Are there second degree amendments? Does the gentleman from North Carolina have a second degree amendment?

Mr. WATT. The Chairman will be happy to know that I have an amendment at the desk.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 2028 offered by Mr. Watt of North Carolina. Page 1, line 10 to 11, strike the following: ", and the Supreme Court shall have no appellate jurisdiction,".

[The amendment follows:]

AMENDMENT TO THE AMENDMENT
IN THE NATURE OF A SUBSTITUTE TO H.R. 2028

OFFERED BY MR. WATT (NC)

Page 1, line 10-11, strike the following:

", and the Supreme Court shall have no appellate jurisdiction,"

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

Let me start by tamping down some of the rhetoric and actually complimenting the Chairman. As I read the Chairman's amendment in the nature of a substitute, it is substantially better at accomplishing the avowed purpose of what some people would like to accomplish than the original version of the bill and does address some of the concerns expressed by Mr. Nadler in his opening statement. For that, I think the Chairman should be applauded, and I want to publicly applaud him.

On the other hand, nothing I say to applaud either the original bill or the amendment in the nature of a substitute should be taken by any Member of this Committee or the public as an endorsement of the undertaking.

But for the fact that I was going to introduce this amendment, I probably would have struck the last word for about 30 seconds, only long enough to say that the only way I could constructively debate the bill or the amendment in the nature of a substitute would be to mock, mock, my colleagues, and I refuse to do that, or to just take it so lightly and dismiss it that the only comment would be laughter into the record, or to get so emotional about this that it would run up my blood pressure, which I am not inclined to do today either.

I think if you are going to do this, you should limit it to what you have the capacity to do, which is I think we would concede constitutionally you could strip the jurisdiction of courts that you have created. I am not sure that you can constitutionally strip the jurisdiction of the Supreme Court to hear appeals. And even if you can, I certainly don't believe that would be advisable, because the result of that would be to leave each State and its highest courts with the final word on this and leave an absolute hodgepodge of final opinions, which I just think would be a terrible public policy result.

So, my amendment would restore or remove the part of the amendment in the nature of a substitute that strikes the jurisdiction of the Supreme Court to hear these cases on review. I think—well, maybe I am naive, but it seems to me that we need a final arbiter in the court system and hierarchy, and while I have not always agreed throughout history, throughout the 22 years I practiced law or the 12 years I have been in Congress, with a lot of decisions of the United States Supreme Court, I think it is an integral part of our system of justice, and we need a final arbiter, and the Supreme Court is that.

So I would ask my colleagues to join me in trying to make this bill constitutional if you really believe in it. If you just want the political issue, then vote against my amendment.

I will yield back the balance of my time.

[11:05 a.m.]

Chairman SENSENBRENNER. Gentleman from Ohio Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman. Move to strike the last word.

Chairman SENSENBRENNER. Gentleman is recognized for 5 minutes.

Mr. CHABOT. And I will be brief.

Just two points. Does Congress have the authority to do that under the Constitution? The answer to that is yes. Under Article III, section 1, it states that the judicial power of the United States shall be vested in one Supreme Court, and then goes on to say, and the lower courts we established. Article III, section 2, clause 2 further provides, in all cases affecting ambassadors, other public ministers and consuls and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases, the Supreme Court shall have appellate jurisdiction both as to law and fact with exceptions and under such regulations as the Congress shall make.

So we clearly have the authority to do this. The second question is should we. Consistent with the Marriage Protection Act, we want to make sure that the Supreme Court essentially can't rewrite the 50 States' policies on the Pledge of Allegiance. Our goal here was to allow the States to determine their own Pledge policy within their own State and not to be undercut by any other court. For that reason, I would urge my colleagues to oppose this amendment.

Chairman SENSENBRENNER. The gentleman from New York Mr. Nadler.

Mr. NADLER. I would simply point out that what the gentleman from Ohio just said and what the distinguished Chairman said earlier about the States determining their own policy is one reason why this entire bill should be defeated. By stripping the Supreme Court of power of jurisdiction, what you are saying is that the 50 State courts are the final authorities in their States as to what is constitutional and what is not in Federal law. That means the Federal law will have 50 different versions in each State, and what is constitutional in one State will not be constitutional in another.

One of the reasons we have a Supreme Court is we have a uniform interpretation of the Constitution, and then your constitutional rights don't depend on what State you are in; they are guaranteed by the Bill of Rights, by the Constitution, and they are the same wherever you are.

Your rights under the Federal Constitution should not depend on what State you are in. This would essentially reverse the Civil War. What you are saying is you would have 50 different countries, not one country. The case of *Martin* v. *Sumter* back in 1819 which the Supreme Court was given the right to declare or establish the right to declare State laws unconstitutional is so that we didn't have 50 different States having different interpretations of what they could do under the Federal Constitution essentially would be undone. And if we want one country and not 50 countries, you have to have a uniform interpretation of the law and a uniform interpretation of the Federal Constitution and not 50 different interpretations.

Mr. CHABOT. We are only saying that with respect to one thing, and that is Pledge of Allegiance.

Mr. NADLER. Reclaiming my time. With all due respect, if this bill passes, you will be saying with respect to two things so far, since this is the second bill——

Mr. CHABOT. So far.

Mr. NADLER. Exactly. That is the point. So far. What we are really saying here, what this bill is, what the previous bill is, what the next bill will be is that whenever there is a law that the majority likes that it fears may be declared unconstitutional by the Supreme Court will have a court-stripping bill, and we will end up over course of years—and the majority may not always be a right-wing majority or a left-wing majority or a Republican majority. It will change from time to time. And we will do this on all sorts of issues and all sides of the viewpoint and will end up where you have no uniform Constitution and no uniform Federal law, and the 50 States start going their separate ways. And it is not what we wanted to do since—that is why we have the Constitution and not the Articles of Confederation. This bill, the approach of this bill, future

bills like it, will ultimately destroy the national unity of the American people.

Mr. WEINER. Would the gentleman yield? If I am correct, though, in the argument the gentleman from Indiana makes and the gentleman from Ohio makes, that if the majority of a legislature believes something to be constitutional, then it de facto is. It becomes constitutional.

Mr. NADLER. Reclaiming my time. That is exactly what they are saying, because they are saying that if they think it is constitutional, the majority of the legislature and the majority of Congress, they will strip the courts of the ability to decide that question, and, therefore, the final decisionmaker is the Congress.

It is essentially what Mr. Hostettler said. That is why he denies that there is an independent judiciary, because who needs it, because the Congress, being a coordinated branch of Government, by stripping the courts of the ability to make that decision will make the final decision on constitutionality for itself. And with all due respect, what that means is that constitutionality and individual rights depend on who wins the elections. That is exactly why we have courts and why we have a Bill of Rights, because your freedom of religion and your freedom of speech should not depend on your popularity or your ability to win an election.

Mr. HOSTETTLER. Mr. Chairman——

Chairman SENSENBRENNER. The question is on agreeing to the amendment to the amendment in the nature of a substitute offered by the gentleman from North Carolina Mr. Watt. Those in favor will say aye.

Opposed, no.

The noes appear to have it.

Ms. JACKSON LEE. Mr. Chairman——

Chairman SENSENBRENNER. rollcall will be ordered. The question is on agreeing to the amendment by the gentleman from North Carolina Mr. Watt to the amendment in the nature of a substitute offered by the Chair. Those in favor will, as your names are called, answer aye; those opposed, no. And the clerk will call the roll.

The CLERK. Mr. Hyde.

[No response.]

The CLERK. Mr. Coble.

Mr. COBLE. No.

The CLERK. Mr. Coble, no.

Mr. Smith.

Mr. SMITH. No.

The CLERK. Mr. Smith, no.

Mr. Gallegly.

[No response.]

The CLERK. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no.

Mr. Jenkins.

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no.

Mr. Cannon?

[No response.]

The CLERK. Mr. Bachus?
[No response.]
The CLERK. Mr. Hostettler.
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no.
Mr. Green.
Mr. GREEN. No.
The CLERK. Mr. Green, no.
Mr. Keller.
Mr. KELLER. No.
The CLERK. Mr. Keller, no.
Ms. Hart.
Ms. HART. No.
The CLERK. Ms. Hart, no.
Mr. Flake?
[No response.]
The CLERK. Mr. Pence.
Mr. PENCE. No.
The CLERK. Mr. Pence, no.
Mr. Forbes.
Mr. FORBES. No.
The CLERK. Mr. Forbes, no.
Mr. King.
Mr. KING. No.
The CLERK. Mr. King, no.
Mr. Carter.
Mr. CARTER. No.
The CLERK. Mr. Carter, no.
Mr. Feeney.
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no.
Mrs. Blackburn.
Mrs. BLACKBURN. No.
The CLERK. Mrs. Blackburn, no.
Mr. Conyers?
[No response.]
The CLERK. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler.
Mr. NADLER. Yes.
The CLERK. Mr. Nadler, aye.
Mr. Scott.
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt.
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren.
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye.
Ms. Jackson Lee.
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye.

Ms. Waters.
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye.
Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin.
[No response.]
The CLERK. Mr. Wiener.
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye.
Mr. Schiff.
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye.
Ms. Sánchez.
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye.
Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members in the Chamber who wish to cast or change their vote.
Gentleman from Virginia Mr. Goodlatte.
Mr. GOODLATTE. No.
The CLERK. Mr. Goodlatte, no.
Chairman SENSENBRENNER. Further Members in the Chamber who wish to cast or change their vote? If there are none, the clerk will report.
The CLERK. Mr. Chairman, there are 9 ayes and 16 noes.
Chairman SENSENBRENNER. And the amendment is not agreed to.
Are there further amendments?
Ms. JACKSON LEE. I have an amendment at the desk.
Chairman SENSENBRENNER. The clerk will report the amendment by the gentlewoman from Texas.
Ms. JACKSON LEE. It is handwritten with, in the amendment in the nature of a substitute.
The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 2028 offered by Ms. Jackson Lee. Page 1——
[The amendment follows:]

to the Amendment in nature of a substitute

AMENDMENT TO H.R. 2028 #2

OFFERED BY Ms. Jackson Lee

Page 1, line 14, after "~~United States~~" "recitation", insert the following:

", except where such claim alleges religious coercion in violation of the first amendment."

Chairman SENSENBRENNER. Without objection, the amendment will be considered as read.

The gentlewoman from Texas will be recognized for 5 minutes.

Ms. JACKSON LEE. This amendment was amended to conform to the amendment in the nature of a substitute. Thank you very much, Mr. Chairman. I think my colleagues have very eloquently cast the light of this particular legislative initiative in the framework of the Constitution that we are here to protect.

I think one of the most dangerous aspects of this legislation is the fact that it has now begun to set precedent and seems as if from day to day and month to month, we will have these kinds of initiatives that simply attempt to shut the courthouse door.

I say to those who are listening to us, beware multinational corporations, beware school districts, beware State and local governments, beware those of you who would believe that your issues are untouchable, for it seems that these kinds of legislative initiatives which are closing the courthouse door may be subject to the whims of those who are in the majority.

My legislation clearly speaks to the personalness of this idea of closing the courthouse doors. Like my colleague, I voted to leave "under God" in the Pledge of Allegiance, and I think we should be reminded that that language was only put into the Pledge of Allegiance in the 1950's. The original authors of the Pledge did not have "under God." but I do believe that you have a first amendment right to recite the Pledge of Allegiance, and if you desire not to recite it because of your religious beliefs, and you have the right not to recite as I have the right to recite it.

My amendment says if you are in a position that you are being coerced against your religious beliefs, such as the Jehovah Witnesses, you should be allowed to go into the courthouse and petition and protest that coercion.

Let me tell you about a little girl who sat next to me in my elementary school class. I will call her Hazel. And I wondered as a child why Hazel never stood up to say the Pledge of Allegiance. I am glad at that time that, one, we were wise enough in our school to leave Hazel alone, or the school district understood or the teacher understood that Hazel had the right under the first amendment to express her religious belief. Hazel was a Jehovah Witness.

This amendment speaks to that diversity of religious belief. This amendment suggests that if you are coerced, there is no reason why you should not be able to go into the courthouse. In the 1943 case of *West Virginia Board of Education* v. *Barnett*, the Supreme Court held that children had a first amendment right not to be compelled to swear on an oath against their beliefs. In that case there was a group of Jehovah Witnesses who objected on religious grounds. Justice Jackson wrote, if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.

That is the protection of the first amendment, and are you going to tell me that this legislation then would prohibit these individuals from going into the courthouse and going to the Supreme Court? There is no question that this legislation would strip the parents of those children of their right to go to court and defend their children's religious liberty.

Mr. Chairman, we must not slam the courthouse doors shut to victims of religious persecution, but I would hope that as this debate concludes, that those who are listening to this would really have a sense that the House is on fire, that the Judiciary Committee of the United States Congress is now passing legislation again to close the courthouse doors. It is both a travesty and a tragedy, and, I might add, an extra outrage that we sit here in this Committee room closing the courthouse doors. I would hope that we would not close it on those who would be coerced into saying the Pledge of Allegiance and have no reprieve and nowhere to go and be barred from going into the courthouse on their grievance. I ask my colleagues to support my amendment, and I yield back.

Chairman SENSENBRENNER. The Chair recognizes himself for 5 minutes in opposition to the amendment. This amendment should be defeated because it would gut the bill. First, nothing in H.R. 2028 would allow State courts to deviate from Supreme Court precedent prohibiting the coerced recitation of the Pledge of Allegiance. Even when Federal courts are denied jurisdiction to hear certain classes of cases and those classes of cases are thereby reserved to the State courts, the previously existing Supreme Court precedent still governs State court determinations. This is required by the supremacy clause of the Constitution.

And in *West Virginia Board of Education* v. *Barnett*, the Supreme Court held it is unconstitutional to require individuals to salute the flag. In that case, the Supreme Court held, quote, if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what should be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act or faith therein, unquote. Under H.R. 2028 as written, that decision will preclude State courts from allowing coerced recitations of the Pledge of Allegiance.

Even if it weren't required by the supremacy clause, State courts are not second-class courts, and they are equally capable of deciding Federal constitutional questions. The Supreme Court has clearly rejected claims that State courts are less competent to decide Federal constitutional issues than the Federal courts. Justice William Brennan wrote in the *Northern Pipeline Construction Com-*

pany v. *Marathon Pipeline Company* that, quote, virtually all matters that might be heard in Article III courts could also be left by Congress to the State courts. Justice Brennan was joined in that decision by Justices Marshall, Blackmun and Stevens, a hardly right wing contingent of judges in office at the time, I might add.

Now, what, then would be the harm of adopting this amendment? Plenty. If we carve out an exception for cases in which coercion is involved, we will open the floodgates to expansive interpretation by the Federal courts that will gut the purpose of the bill. Carving out a coercion exemption will invite the Federal courts, including the liberal Ninth Circuit Court of Appeals, to hold that excessive coercion exists to pressure a student to recite the Pledge simply when a majority of the schoolchildren choose to recite it, but one or a few students do not want to. The inevitable claim will be that in the school environment, there is no such thing as free will whenever the majority of students are reciting the pledge, because those who don't want to recite it will feel pressure to recite it simply because other students are reciting it.

Yet again the courts will strike another blow to the concept of free will and personal responsibility if we let them. We must not let them, so this amendment must be defeated, and I yield back the balance of my time.

Gentleman from Virginia Mr. Scott.

Mr. SCOTT. Move to strike the last word.

Chairman SENSENBRENNER. Gentleman is recognized for 5 minutes.

Mr. SCOTT. I can't understand how a child could possibly vindicate their rights to not to say the Pledge under the coercion of religion if this amendment is not adopted. I mean, any court can kind of distinguish a new fact situation and say this kind of coercion doesn't apply. You don't have any appeal to the Federal courts. You don't have an appeal to the Supreme Court because we just rejected the Watt amendment. To suggest that a State court is going to follow the exact precedent set by the Supreme Court, maybe in that exact same case, but they will distinguish it, and you will have 50 different rulings as to what children will have the freedom of religion and which ones won't.

I would hope that we would at least allow this amendment to come forth so you can at least maintain present law in the Federal court system under the *Barnett* decision. I yield back.

Chairman SENSENBRENNER. The question is on agreeing to the amendment by the gentlewoman from Texas Ms. Jackson Lee to the amendment in the nature of a substitute offered by the Chair. Those in favor will say aye.

Opposed, no.

Noes appear to have it.

Ms. JACKSON LEE. rollcall.

Chairman SENSENBRENNER. rollcall will be ordered. Those in favor of the amendment by the gentlewoman from Texas Ms. Jackson Lee to the amendment in the nature of a substitute offered by the Chair will, as your names are called, answer aye; those opposed, no. And the clerk will call the roll.

The CLERK. Mr. Hyde.

[No response.]

The CLERK. Mr. Coble.

[No response.]
The CLERK. Mr. Smith.
Mr. SMITH. No.
The CLERK. Mr. Smith, no.
Mr. Gallegly.
[No response.]
The CLERK. Mr. Goodlatte.
Mr. GOODLATTE. No.
The CLERK. Mr. Goodlatte, no.
Mr. Chabot.
Mr. CHABOT. No.
The CLERK. Mr. Chabot, no.
Mr. Jenkins.
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no.
Mr. Cannon?
[No response.]
The CLERK. Mr. Bachus?
[No response.]
The CLERK. Mr. Hostettler.
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no.
Mr. Green.
Mr. GREEN. No.
The CLERK. Mr. Green, no.
Mr. Keller.
Mr. KELLER. No.
The CLERK. Mr. Keller, no.
Ms. Hart.
Ms. HART. No.
The CLERK. Ms. Hart, no.
Mr. Flake?
[No response.]
The CLERK. Mr. Pence.
Mr. PENCE. No.
The CLERK. Mr. Pence, no.
Mr. Forbes.
Mr. FORBES. No.
The CLERK. Mr. Forbes, no.
Mr. King.
Mr. KING. No.
The CLERK. Mr. King, no.
Mr. Carter.
Mr. CARTER. No.
The CLERK. Mr. Carter, no.
Mr. Feeney?
[No response.]
The CLERK. Mrs. Blackburn.
Mrs. BLACKBURN. No.
The CLERK. Mrs. Blackburn, no.
Mr. Conyers?
[No response.]
The CLERK. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?

[No response.]
The CLERK. Mr. Nadler?
[No response.]
The CLERK. Mr. Scott.
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren.
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no.
Ms. Jackson Lee.
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye.
Ms. Waters.
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye.
Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin.
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin, aye.
Mr. Wiener.
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye.
Mr. Schiff.
Mr. SCHIFF. Pass.
The CLERK. Mr. Schiff, pass.
Ms. Sánchez.
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye.
Mr. Chairman.
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.

Chairman SENSENBRENNER. Members in the Chamber wish to cast or change their vote?

Gentleman from North Carolina Mr. Coble.

Mr. COBLE. No.

Chairman SENSENBRENNER. Gentleman from Florida Mr. Feeney?

Mr. FEENEY. No.

Chairman SENSENBRENNER. Further Members in the Chamber who wish to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 7 ayes, 17 noes and 1 pass.

Chairman SENSENBRENNER. And the amendment to the amendment in the nature of a substitute is not agreed to.

Are there further second degree amendments to the amendment in the nature of a substitute? If not, the question occurs on the amendment in the nature of a substitute. All in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it. The amendment in the nature of a substitute is agreed to.

A reporting quorum is present. The question occurs on the motion to report the bill, H.R. 2028, favorably as amended. All in favor will say aye.

Opposed, no.

The ayes appear to have it.

rollcall will be ordered. The question is on ordering the bill reported favorably as amended. Those in favor will, as your names are called, answer aye; those opposed, no. And the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble.

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye.

Mr. Smith.

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye.

Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte.

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye.

Mr. Chabot.

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye.

Mr. Jenkins.

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye.

Mr. Cannon?

[No response.]

The CLERK. Mr. Bachus?

[No response.]

The CLERK. Mr. Hostettler.

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler, aye.

Mr. Green.

Mr. GREEN. Aye.

The CLERK. Mr. Green, aye.

Mr. Keller.

Mr. KELLER. Aye.

The CLERK. Mr. Keller, aye.

Ms. Hart.

Ms. HART. Aye.

The CLERK. Ms. Hart, aye.

Mr. Flake?

[No response.]

The CLERK. Mr. Pence.

Mr. PENCE. Aye.

The CLERK. Mr. Pence, aye.

Mr. Forbes.

Mr. FORBES. Aye.

The CLERK. Mr. Forbes, aye.

Mr. King.

Mr. KING. Aye.
The CLERK. Mr. King, aye.
Mr. Carter.
Mr. CARTER. Aye.
The CLERK. Mr. Carter, aye.
Mr. Feeney.
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney, aye.
Mrs. Blackburn.
Mrs. BLACKBURN. Aye.
The CLERK. Mrs. Blackburn, aye.
Mr. Conyers?
[No response.]
The CLERK. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
[No response.]
The CLERK. Mr. Scott.
Mr. SCOTT. No.
The CLERK. Mr. Scott, no.
Mr. Watt.
Mr. WATT. No.
The CLERK. Mr. Watt, no.
Ms. Lofgren.
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no.
Ms. Jackson Lee.
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee, no.
Ms. Waters.
Ms. WATERS. No.
The CLERK. Ms. Waters, no.
Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin.
Ms. BALDWIN. No.
The CLERK. Ms. Baldwin, no.
Mr. Wiener.
Mr. WEINER. Pass.
The CLERK. Mr. Weiner, pass.
Mr. Schiff?
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no.
Ms. Sánchez.
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez, no.
Mr. Chairman.
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.

Chairman SENSENBRENNER. Members in the Chamber who wish to cast or change their vote?

Gentleman from Alabama Mr. Bachus.

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus, aye.

Chairman SENSENBRENNER. Gentleman from California Mr. Berman.

Mr. BERMAN. No.

The CLERK. Mr. Berman, no.

Chairman SENSENBRENNER. Gentleman from New York Mr. Wiener.

Mr. WEINER. No.

The CLERK. Mr. Weiner, no.

Chairman SENSENBRENNER. Further Members in the Chamber who wish to cast or change their votes? If not, the clerk will report.

The CLERK. There are 17 ayes and 10 noes.

Chairman SENSENBRENNER. And the motion to report the bill favorably as amended is agreed to. Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute incorporating the amendments adopted here today.

Without objection, the Chairman is authorized to move to go to conference pursuant to House rules.

Without objection, the staff is directed to make any technical and conforming changes. And all Members will be given 2 days as provided by the House rules in which to submit additional dissenting supplemental or minority views.

The Chair also would like to announce the meeting of the Constitution Subcommittee relative to issuing a subpoena directed at the Civil Rights Commission has been postponed until next week. The Chair thanks the Members for their patience today, and the Committee stands adjourned.

[Whereupon, at 11:30 a.m., the Committee was adjourned.]

DISSENTING VIEWS

We strongly dissent from H.R. 2028, the so-called "Pledge Protection Act of 2003." The legislation is unconstitutional, unnecessary, and undermines our judiciary.

We do not oppose the legislation because we believe that voluntary recitation of the Pledge of Allegiance is unconstitutional. As a matter of fact, the House overwhelmingly passed a resolution stating that voluntary recitation of the Pledge of Allegiance is constitutional.[1] However, we do not believe that the appropriate reaction to the issue of the constitutionality of the Pledge of Allegiance is to undermine the whole of the federal judiciary, as the present bill does.

Ironically, the very idea of balkanizing our judiciary and eliminating the possibility of operating under a single uniform Supreme Court, as H.R. 2028 would do, is inconsistent with the very words of the Pledge of Allegiance, namely that we are "one Nation under God, indivisible, with liberty and justice for all." Dividing our nation into 50 different legal regimes, where the Pledge is permitted in some jurisdictions and not in others, is the very antithesis of this sacred principle. Enactment of such legislation would constitute a very undesirable precedent and would no doubt lead to further assaults on the judiciary.

The Pledge Protection Act, along with the Marriage Protection Act taken up by the House two months ago,[2] represents yet another effort by the Majority to use wedge social issues to divide our nation for political gain. Why else would the Majority schedule this legislation for floor action without the benefit of a single legislative hearing or subcommittee markup? Why else would the Majority bring up legislation deep in an election year when it has no chance of passage by the Senate?

If H.R. 2028 is passed into law, it would constitute the first and only time Congress has enacted legislation totally eliminating any federal court from considering the constitutionality of federal legislation—in this case, the Pledge of Allegiance. At a time when the highest court in our land has not issued a single opinion undermining the constitutionality of the Pledge, we believe it is inexcusable for Congress to attack the federal judiciary in an effort to score political points.

The operative language of H.R. 2028 consists of a single sentence. It amends the Federal judicial code to provide:

---

[1] H. Res. 132, 108th Cong., 2d Sess. (2004). The resolution passed by a vote of 400–7, with 15 members voting "Present."

[2] H.R. 3313, the "Marriage Protection Act," precluded any federal judicial review, either by a lower federal court or the Supreme Court, of any constitutional challenge to DOMA's validity or the legislation itself. H.R. 3313, 108th Cong., 2d Sess. (2004). H.R. 3313 passed the House on July 22, 2004, by a vote of 233–194.

> [n]o court created by an Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance, as defined in section 4 of title 4, or its recitation.[3]

As such, the legislation effectively precludes any federal judicial review, either by a lower federal court or the Supreme Court, of any constitutional challenge to the Pledge of Allegiance, including challenges relating to religious and other forms of coercion. Instead, the bill relegates state courts to review any challenges to the Pledge, creating the very real possibility of having differing legal constructions across the 50 states. Even worse, the legislation precludes any and all residents of our Nation's capital and territories of the United States from bringing any claim concerning the Pledge of Allegiance.

It is ironic that in the very same year that Congress celebrated Justice John Marshall by authorizing a commemorative coin in his honor,[4] the Judiciary Committee would disparage him by passing legislation such as the Pledge Protection Act and the Marriage Protection Act that are totally inconsistent with Marshall's seminal legal opinion, *Marbury* v. *Madison*.[5] We should not use the issue of the constitutionality of the Pledge of Allegiance to permanently damage our courts, our constitution, and Congress. At a time when it is more important than ever that our nation stand out as a beacon of freedom, we cannot countenance a bill which undermines the very protector of those freedoms—our independent federal judiciary.

H.R. 2028 appears to be a response to the 9th Circuit's decision in *Newdow* v. *U.S. Congress*.[6] In that case, the 9th Circuit held that daily voluntary[7] recitation of the pledge violated the Establishment Clause of the Constitution.[8] In *Elk Grove Unified School*

---

[3] 4 U.S.C. § 4 speaks to the manner and delivery of the Pledge of Allegiance. It reads: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all", should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove any non-religious headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.

[4] John Marshall Commemorative Coin Act, H.R. 2768, 108th Cong. (2004). In support of the legislation, the bill's sponsor, Representative Spencer Bachus (R-AL), said, "John Marshall served as Chief Justice of the United States Supreme Court from 1801 to 1835, much of that time spent in this very building, holding the longest tenure of any Chief Justice in the Nation's history. He authored more than 500 opinions, including virtually all of the most important cases that the Court decided during his tenure. Under his leadership, the Supreme Court gave shape to the fundamental principles of the Constitution." 150 Cong. Rec. H5781 (July 14, 2004).

[5] *Marbury* v. *Madison*, 5 U.S. (1 Cr.) 137 (1803).

[6] 328 F. 3d 466 (CA9 2003).

[7] Mandatory recitation of the Pledge was struck down by the Supreme Court in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

[8] The Court wrote, "[t]he Pledge, as currently codified, is an impermissible government endorsement of religion because it sends a message to unbelievers 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Newdow* at 469. The 9th Circuit, relying on the Supreme Court's voluntary school prayer jurisprudence stated, "the phrase 'one nation under God' in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism. The text of the official Pledge, codified in federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of God. A profession that we are a nation 'under God' is identical, for Establishment Clause purposes, to a profession that we are a nation 'under

Dist. v. *Newdow*, the Supreme Court, led by a 5–3 majority, reversed the decision in the 9th Circuit case, holding that Mr. Newdow lacked the proper standing to file his lawsuit on behalf of his elementary school aged daughter.[9] The only other Circuit to have considered the question, the 7th Circuit, has upheld the language of the Pledge, including the 1954 amendment.[10]

This unnecessary and dangerous legislation is strongly opposed by a variety of organizations, including the Leadership Conference on Civil Rights; the American Civil Liberties Union; People for the American Way; the Human Rights Campaign; Americans United for Separation of Church and State; American Jewish Committee; Anti-Defamation League; Baptist Joint Committee; National Council of Jewish Women; Union for Reform Judaism; U.S. Action; Human Rights Watch; the Unitarian Universalist Association; the Anti-Defamation League; the Interfaith Alliance; and the Constitution Project; among numerous others.[11]

For these and the other reasons set forth herein, we dissent from H.R. 2028.

I. H.R. 2028 IS UNCONSTITUTIONAL

H.R. 2028 is an unconstitutional and unnecessary court stripping bill that would eliminate access to the federal judiciary for a specific group of claims. For over 200 years, the federal courts have played an indispensable role in the interpretation and enforcement of the rights guaranteed under our constitution.

While it is clear that Congress has the authority to regulate federal court jurisdiction,[12] it is also clear that such power is not plenary. Rather, the power is subject to other overarching constitutional rights, such as freedom of speech, freedom of religion, equal protection and due process and separation of powers. In this regard, one of the preeminent treatises on Constitutional Law concludes:

> There is little doubt that other constitutional provisions, like the equal protection clause, limit Congress's power under the Exceptions Clause. For example, Congress could not constitutionally provide that Republicans, but no one else, may have access to the Supreme Court. Such a provi-

---

Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no god,' because none of these professions can be neutral with respect to religion." Id. at 470.

[9] *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. XXX (2004).

[10] *Sherman* v. *Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992).

[11] See Letter to Representative F. James Sensenbrenner and Representative John Conyers, Jr. from Rev. Barry W. Lynn, Executive Director, Americans United for Separation of Church and State (September 14, 2004); Letter to Members of the Judiciary Committee from Kathryn A. Monroe, Director, The Constitution Project (September 15, 2004); Letter to Representative F. James Sensenbrenner and Representative John Conyers, Jr. from American Civil Liberties Union, American Humanist Association, American Jewish Committee, Americans for Religious Liberty, Americans United for Separation of Church and State, Anti-Defamation League, Baptist Joint Committee, Central Conference of American Rabbis, Committee for Judicial Independence, Human Rights Campaign, The Interfaith Alliance, Jewish Reconstructionist Federation, Leadership Conference on Civil Rights, National Council of Jewish Women, National Senior Citizen Law Center, People for the American Way, Union for Reform Judaism, Unitarian Universalist Association of Congregations, U.S. Action (September 14, 2004) [hereinafter Group Sign-On Letter].

[12] Article III of the Constitution authorizes Congress to establish judicial power in lower federal courts, and to regulate the Supreme Court's appellate jurisdiction.

> sion would violate the first amendment and thus would be *independently* unconstitutional.[13]

At the Committee's prior hearing on court stripping legislation concerning the Defense of Marriage Act, both of the constitutional scholars that testified agreed with this conclusion. The Minority witness, Professor Michael J. Gerhardt of William & Mary Law School, testified that "Congress cannot exercise any of its powers under the Constitution—not the power to regulate interstate commerce, not the Spending power, and not the authority to define federal jurisdiction—in a manner that violates the Constitution."[14] Similarly, the Majority's witness, Prof. Martin H. Redish of Northwestern University School of Law, acknowledged that there were limits on Congress' Article III powers:

> To be sure, several other guarantees contained in the Constitution—due process, separation of powers, and equal protection—may well impose limitations on the scope of congressional power. The Due Process Clause of the Fifth Amendment requires that a neutral, independent and competent judicial forum remain available in cases in which the liberty or property interests of an individual or entity are at stake. . . . The constitutional directive of equal protection restricts congressional power to employ its power to restrict jurisdiction in an unconstitutionally discriminatory manner.[15]

A. Separation of powers

The legislation intrudes upon the long-standing principle of separation of powers between the branches of government. By denying the Supreme Court its historical role as the final authority on the constitutionality of federal laws, H.R. 2028 unnecessarily and unconstitutionally usurps the Court's power. As a practical matter, to the extent that H.R. 2028 strips federal courts of jurisdiction to adjudicate claims that acts of Congress are unconstitutional, the legislation unnecessarily provokes an inter-branch confrontation. This is destructive of comity between branches and places undue tensions on the separation of powers framework of government.

Since the Supreme Court's historic ruling in *Marbury* v. *Madison,* the separation of powers doctrine has been well established. *Marbury* concerned the validity of a judicial commission that was signed, but not delivered prior to the end of John Adams' presidency. Justice Marshall agreed with President Jefferson that the commission should not be given effect, but he did so only by declaring unconstitutional the provision of the Judiciary Act of 1789 granting courts mandamus powers over these commissions. In so doing, the Court enunciated the principle of federal judicial review of federal laws. Marshall's opinion included the now famous dec-

[13] Stone, Seidman, et al., Constitutional Law 85 (3d ed.) (emphasis added).

[14] Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearing Before the Subcomm. on the Const. of the House Comm. on the Judiciary, 108th Cong., 2d Sess. (June 24, 2004) (testimony of Professor Michael Gerhardt) [hereinafter Federal Court Jurisdiction Hearing].

[15] Federal Court Jurisdiction Hearing (statement of Professor Martin Redish at 3–4).

laration that "it is emphatically the province and duty of the judicial department to say what the law is." [16]

In the more than 200 years that have passed since this legal decision was issued, judicial review has served as the very touchstone of our constitutional system and our democracy. As the Congressional Research Service's chief authority on separation of powers stated, "*Marbury* v. *Madison* is famous for the proposition that the [Supreme] Court is supreme on constitutional questions." [17]

Unfortunately, the concept of separation of powers and the independence of the judiciary are both being challenged by H.R. 2028. At the Committee's markup of this legislation, Rep. John N. Hostettler (R–IN) admitted that he disagreed with Marbury's long established principle of federal judicial review and explained that ". . . the notion of an independent judiciary is a flawed notion, at best" [18]

> Mr. HOSTETTLER: The notion of an independent judiciary . . . just does not bear out actually in the Constitution. But it does prove the adage that is long-time established that there is nothing so absurd, but if repeated often enough, people will believe it. And people have asserted the notion of an independent judiciary for so long and asked us as a country and as a citizenry to leave the Constitution alone . . . that many folks have begun to believe this absurd notion of an independent judiciary. . . .[19]

Historical precedent, the very bedrock and cornerstone of our judicial system, proves that it is in fact Representative Hostettler's argument that is flawed, at best. The failure of Congress to enact legislation totally eliminating federal judicial jurisdiction to review the constitutionality of federal statutes is evidence of the long deference and respect maintained by Congress for the principle of federal judicial review. In addition, several of the Supreme Court's own subsequent decisions reaffirm that Congress may not contravene the doctrine of judicial review.

Not too long after *Marbury,* the need for some federal judicial review in all cases was further confirmed by Justice Story in *Martin* v. *Hunter's Lessee,* when he wrote, "the whole judicial power of the United States should be, at all times, vested in an original or appellate form, in some courts created under its authority.[20] That is to say, a federal court ought to be empowered to exercise judicial power on behalf of the United States.

H.R. 2028 also contradicts existing precedent on Congress' ability to restrict the power of the judiciary. For example, in *United States* v. *Klein,*[21] the only case in which the Supreme Court addressed directly the question whether the Congress could impose a legislative restriction on court power if framed in jurisdictional terms, the Court made clear that "the language [of the challenged law] shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. . . . We believe that Congress has inad-

[16] *Marbury* v. *Madison,* 5 U.S. (1 Cr.) at 178 (emphasis added).
[17] Louis Fisher, American Constitutional Law 42 (5th ed. 2003).
[18] H.R. 2028 Markup (Statement of Representative John Hostettler).
[19] Id.
[20] 14 U.S. (1Wheat.) 304 (1816).
[21] 80 U.S. 128, 178 (1872).

vertently passed the limit which separates the legislative from the judicial power."[22]

In an analogous vein, in *City of Boerne* v. *Flores,* the Court held that it is improper and unconstitutional for Congress to attempt to legislate its view of the free exercise clause of the First Amendment.[23] Also, in *Dickerson* v. *United States,* the Court struck down a federal statute narrowing the scope of statements held inadmissable under *Miranda* v. *Arizona,* 384 U.S. 436 (1966).[24] It is telling that as recently as this term, the Supreme Court rebuffed an attempt by the Executive Branch unilaterally to withdraw certain habeas corpus cases from the jurisdiction of the federal courts.[25]

Numerous esteemed legal scholars have emphasized that it would be a constitutional violation of separation of powers principles for Congress to completely strip federal courts of jurisdiction over constitutional claims. The most noted of these views was put forth by Stanford Law Professor Henry Hart when he concluded that under *Marbury,* restrictions on federal jurisdiction are unconstitutional when "they destroy the essential role of the Supreme Court in the constitutional system."[26] More recently, Yale Law Professor Akhil Amar concluded that article III requires that "all" cases arising under federal law must be vested, either as an original or appellate matter, in a federal court.[27]

The views of these legal scholars concerning complete federal court stripping are consistent with the findings of the Task Force of the Courts Initiative of the Constitution Project, a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues. The Constitution Project concluded "legislation precluding court jurisdiction that prevents the judiciary from invalidating unconstitutional laws is impermissible. Neither Congress nor state legislatures may use their powers to prevent courts from performing their essential functions of upholding the Constitution."[28]

Other independent and respected legal experts have reached the same conclusion. For example, the Washington, D.C. law firm of Covington & Burling found that, "H.R. 2028 would violate the Constitution, place congress above the Federal judiciary, and set a dangerous precedent."[29] Specifically, they found that not only will this bill violate the First Amendment by closing the federal courts to claims that the Pledge is unconstitutional,[30] thereby abridging the

---

[22] 80 U.S. at 145.

[23] 521 U.S. 507 (1997).

[24] 530 U.S. 428, 432 (2000) ("Congress enacted 18 U.S.C. 3501, which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda,* being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves.").

[25] *Rasu* v. *Bush,* 542 U.S. _____ (2004); *Hamdi* v. *Rumsfeld,* 542 U.S. _____ (2004); *Rumsfeld* v. *Padilla,* 542 U.S. _____ (2004).

[26] Henry Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv L. Rev. 1362 (1953).

[27] Akhil Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 Boston Univ. L. Rev. 205 (1985).

[28] Report of the Citizens for Independent Courts Task Force on the Role of the Legislature in Setting the Power and Jurisdiction of the Courts, reprinted in: The Century Foundation, Uncertain Justice: Politics in America's Courts 206, 217 (2002).

[29] Memorandum from David H. Remes, Partner, Covington & Burling, prepared at the request of People for the American Way (September 17, 2004).

[30] Id. at 3.

right to petition, but the bill will also repudiate the principle of separation of powers by placing an action by Congress beyond federal court review.[31]

B. Freedom of speech and establishment

If H.R. 2028 is passed into law, it would totally eliminate any federal court from considering any claim that any aspect of any governmental entity's use or application—whether coerced or otherwise—of the Pledge of Allegiance violates the First Amendment or any other constitutional limitation.

Given the importance of developing a single national standard on constitutional questions it seems particularly odd that the Majority would seek to strip federal courts of their power in the context of the Pledge. As Americans United for the Separation of Church and State and other non-profit advocacy groups noted in their letter to members of the Judiciary Committee:

> H.R. 2028 would undermine the longstanding constitutional rights of religious minorities to seek redress in the federal courts in cases involving mandatory recitation of the Pledge. As a result, this legislation will seriously harm religious minorities and the constitutional free speech rights of countless individuals. . . . Americans United strongly urges [Congress] to protect longstanding constitutional rights of religious minorities to seek redress in the federal courts, and respect free speech rights of countless individuals by rejecting this misguided legislation.[32]

An additional concern is that the legislation operates to deny federal court review involving religious coercion in violation of the First Amendment. Such a case was present over sixty years ago in *West Virginia State Board of Education* v. *Barnett*[33] when the Supreme Court struck down a West Virginia law that mandated schoolchildren to recite the Pledge of Allegiance. Under the West Virginia law, religious minorities faced expulsion from school and could be subject to prosecution and fined, if convicted of violating the statute's provisions. In striking down that statute, Justice Jackson wrote for the Court:

> To believe patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds . . . If there is any fixed star in our constitutional constellation, it is that no official, high, or petty can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[34]

---

[31] Id. at 5.

[32] Group Sign-On Letter. It is particularly puzzling that the Majority is so intent on undermining federal judicial power with respect to constitutional law interpretations, while in other contexts it seeks to expand federal judicial power at the expense of state courts over matters such as state class action claims, state drug laws, and state abortion laws.

[33] 319 U.S. 624, 638 (1943).

[34] Id. at 639–640.

Had H.R. 2028 been law, the Supreme Court would have never been able to issue this landmark ruling protecting religious liberty.

Moreover, just recently, a panel of the U.S. Court of Appeals for the Third Circuit held that a Pennsylvania law mandating recitation of the Pledge, even when it provided a religious exception, violated the Constitution because it violated the free speech of the students.[35] In *Circle School* v. *Pappert,* the court found that:

> It may be useful to note our belief that most citizens of the United States willingly recite the Pledge of Allegiance and proudly sing the national anthem. But the rights embodied in the Constitution, particularly the First Amendment, protect the minority—those persons who march to their own drummers. It is they who need the protection afforded by the Constitution and it is the responsibility of federal judges to ensure that protection.[36]

Again, under H.R. 2028, such a coercive speech case could never reach the federal courts.

It is also important to note that as H.R. 2028 is drafted, it insulates the Pledge of Allegiance as set forth in section 4 of title 4 of the United States Code from constitutional challenge in the federal courts. However, the statute and the Pledge are subject to change by future legislative bodies. This means that were some future Congress to insert in the pledge some objectionable language, concerning overt discrimination or favoring one specific religious text, that would be immune to constitutional challenge in the federal courts.

C. Equal protection and due process

H.R. 2028 would also violate the Fifth Amendment's guarantee of equal protection under the law,[37] in that it imposes an undue burden on a specific class of individuals without a rational basis. The critical case in this regard is *Roemer* v. *Evans,* a 1996 Supreme Court decision invalidating a Colorado law preventing the state or any political subdivision from enacting legislation to protect gay and lesbian citizens from discrimination.[38]

Roemer held in a 6 to 3 decision by Justice Kennedy that it was unacceptable for the state of Colorado to exclude a class of individuals from legal protections:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.[39]

---

[35] *Circle School* v. *Pappert,* No. 03–3285 (3rd Cir., Aug. 19, 2004).

[36] Id. Slip Op. at 14.

[37] The Fifth Amendment Due Process has long been interpreted to include a requirement of equal protection parallel to the requirement of the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *Adarand Contractors, Inc.* v. *Pena,* 515 U.S. 200 (1995).

[38] 517 U.S. 620 (1996).

[39] *Id.* at 633.

Absent a rational basis, the *Roemer* Court found that laws of this nature cannot stand. It found that such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[40] In *Roemer,* the general provision "that gays and lesbians shall not have any particular protection from the law, inflicts on them immediate, continuing and real injuries that outrun and belie any legitimate justifications that may be claimed for it."[41] Specifically, the Court found the principal motivation for the legislation was animus towards gays and lesbians, which had no rational relationship to a legitimate governmental purpose; it concluded, "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[42]

These same concerns could well invalidate H.R. 2028 on Equal Protection grounds, since it could be seen as specifically affecting religious minority groups and atheists. Even if courts were to apply the more deferential rational basis standard of review to the legislative proposal, it could be struck down. Though, generally, courts will not look into the motive of the legislature to determine the constitutionality of a statute, animus towards a particular class will be considered as improper and discriminatory, and the statute will not withstand scrutiny.[43] As Professor Gerhardt observed that, "distrust of 'unelected judges' does not qualify as a legitimate basis, much less a compelling justification, for congressional action."[44]

It is also possible that the courts will find that H.R. 2028 violates the Fifth Amendment's Due Process clause. As Professor Gerhardt noted in a Committee hearing on the Marriage Protection Act, "a proposal excluding all federal jurisdiction may violate the Fifth Amendment's Due Process Clause's guarantee of procedural fairness."[45] This is because on its face the law denies federal courts the opportunity to review a federal law. Given the traditional expertise the federal courts have in reviewing the constitutionality of federal laws, relegating such claims to state court can hardly be considered a fair or rationale process.

D. Particular problem with regard to District of Columbia and U.S. territories

Another problem with the legislation is that it denies any access to any courts concerning Pledge of Allegiance cases in the District of Columbia and U.S. territories. The only possible rationale the Majority can assert for the legislation's constitutionality is that it does not totally preclude judicial review by state courts. While we do not believe the text or history of the Constitution, or subsequent action by the courts or Congress support the validity of such a contention, even that thin rationale does not apply with respect to cases involving the Pledge of Allegiance brought in the District of Columbia or U.S. territories.

As Representative Robert C. Scott (D–VA) observed at the Committee's markup:

---

[40] *Id.*
[41] *Id.*
[42] *Id.* (citing *Dep't of Agric.* v. *Moreno,* 143 U.S. 528, 534 (1973)).
[43] See *Romer* v. *Evans,* 517 U.S. 620 (1996).
[44] *Federal Court Jurisdiction Hearing* (statement of Professor Gerhardt at 2).
[45] *Id.* at 10.

> Mr. SCOTT. Mr. Chairman, the way I read the bill, there is an additional gratuitous insult for the residents of Washington, DC, in that apparently they will be totally left out without any court to file in. Yesterday we helped foreign corporations escape liability from American courts by developing a scheme whereby there may be no court that someone may file in within the United States. This bill, I think, does the same for Washington, DC residents, because . . . there is no court in D.C. that you could bring the case in.[46]

Mr. Scott's concern stems from the fact that the local courts in the District of Columbia,[47] the U.S. Virgin Islands,[48] the Northern Mariana Islands,[49] and Guam,[50] were all created by acts of Congress, not the local legislatures. Since the legislation provides that "[n]o court created by an Act of Congress" shall have any jurisdiction to hear cases concerning the constitutionality of the Pledge of Allegiance, the net result is that under H.R. 2028, no judicial review would be available for Pledge of Allegiance cases for the nearly 600,000 residents of the District, not to mention the residents of these other territories. As the Majority's own witness, Martin Redish, asserted at the Committee's hearing on court stripping in the context of the Defense of Marriage Act:

> . . . as long as the state courts remain available and adequate forums to adjudicate federal law and protect federal rights, it is difficult to see how the Due Process Clause would restrict congressional power to exclude federal judicial authority to adjudicate a category of cases, even one that is substantively based.[51]

Clearly, such a state court review is not possible in the District of Columbia and U.S. territories as H.R. 2028 is drafted, so the bill would be unconstitutional under the interpretation of the Majority's own witness.

II. H.R. 2028 UNDERMINES THE INDEPENDENCE OF THE FEDERAL JUDICIARY

Aside from the obvious constitutional flaws inherent in H.R. 2028, the idea of Congress unilaterally cutting off federal constitutional review constitutes both a poor and dangerous legal precedent. The legislation not only degrades the independence of the federal judiciary, but eliminates any possibility of developing a single uniform policy with regard to the recitation of the Pledge from the 50 state supreme courts.

Since H.R. 2028 strips the federal courts of the ability to review state court decisions, including those involving federal questions, a lack of uniformity in the law is an imminent threat. One's federal rights would depend on the vagaries of location. Ultimately, coerc-

---

[46] *Markup of H.R. 2028* (statement of Representative Robert Scott).
[47] Pub. L. No. 93–198, § 431(a), 87 Stat. 774, 792–93 (1973).
[48] 48 U.S.C. § 1611.
[49] 48 U.S.C. § 1821.
[50] 48 U.S.C. § 1424.
[51] See *supra* note 15.

ing children to recite the Pledge may be permitted in one state and not in another.

This will create the sort of problem that the seminal decision in *Martin* v. *Hunter's Lessee* anticipated and sought to avoid.[52] (In *Martin,* the Court held a state law unconstitutional for the first time, noting that it would be undesirable for the U.S. Constitution to mean one thing in one state and something altogether different in another state.) Were states the final arbiters of federal constitutional questions, the country would be rendered a patchwork of inconsistent interpretations. Constitutional protections could be strong in one state, and weak or nonexistent in another. Minorities in one state could be disenfranchised from the federal protections and benefits afforded citizens of another state, prompting class holders of rights to cluster upon jurisdictional lines.

Both of the legal scholars who testified earlier this year at the Committee's hearings on Congressional power to control federal court jurisdiction with respect to the Defense of Marriage Act agreed that such legislation in general was inadvisable from a policy perspective. Professor Gerhardt testified that "a proposal excluding all federal jurisdiction regarding a particular federal question undermines the Supreme Court's ability to ensure the uniformity of federal law. . . . This allows for the possibility that different state courts will construe the law differently, and no review in a higher tribunal is possible."[53]

The Majority's witness, Professor Martin Redish, was even more blunt in criticizing the legislation:

> as a matter of policy . . . I . . . firmly believe that were Congress to [strip federal courts of jurisdiction in DOMA cases, it] would risk undermining public faith in both Congress and the federal courts. Due to their constitutionally granted independence and insulation from the majoritarian branches of the federal government, the judiciary possesses a unique ability to provide legitimacy to governmental action in the eyes of the populace. Congressional manipulation of federal judicial authority therefore threatens the legitimacy of federal political actions.[54]

Such a complete, unprecedented, and unnecessary stripping of federal court jurisdiction would be totally at odds with the policy of checks and balances envisioned by the Nation's founders. This legislation would bring us far closer to the balkanized scenario envisioned by the Articles of Confederation, than the unified nation brought forth by the Constitution. Contemporaneous writings by two of the Nation's most important founding fathers—the principal drafter of the Constitution and Bill of Rights, James Madison, as well as the author of the Federalist Papers, Alexander Hamilton—indicate the importance they placed on a strong and independent federal judiciary.

---

[52] See *supra*, note 14. Affirming the Supreme Court's ability to review matters of state common law, statutory law, and constitutional law to effectuate national uniformity of law under the Federal Constitution.

[53] See supra, note 15.

[54] Id. (written statement of Martin Redish).

Thus, when there was disagreement at the constitutional convention regarding the need for lower federal courts, Madison insisted on provisions permitting their creation. He argued, confidence "cannot be put in the state tribunals as guardians of the national authority and interests."[55] Similarly, when he introduced the Bill of Rights in the First Congress, Madison again emphasized the importance of federal courts:

> [I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[56]

Alexander Hamilton also wrote about the importance of federal court jurisdiction. In Federalist Number 78, Hamilton emphasized the importance of an independent federal judiciary: "In a monarchy it is an excellent barrier to the despotism of the prince; in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body."[57] In Federalist Number 81, Hamilton expressed further support for federal courts being the appropriate venue for federal issues, writing:

> But ought not a more direct and explicit provision to have been made in favor of the State courts? There are, in my opinion, substantial reasons against such a provision: the most discerning cannot foresee how far the prevalency [sic] of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union.[58]

The legal precedent that will be set if Congress is permitted to simply "end run" the Bill of Rights by circumventing the federal courts could be far-reaching and is adopted here. If this bill passes, we must ask, as we did with the Marriage Protection Act, what other rights will next be placed at risk? The right to vote? The right to privacy? Indeed, many of these proposals are already introduced in statutory form.[59] If H.R. 2028 passes into law, it truly could be open season on our precious rights and liberties.

This was our prediction when the Majority was contemplating the Marriage Protection Act, and here we are again. In fact, in his letter to Members of the U.S. House of Representatives, Representative John Dingell (D–MI) warned of the potential slippery slope that Congress may end up on as a result of passing such problematic legislation:

---

[55] 2 Max Farrand, the Records of the Federal Convention of 1787 27 (1937).
[56] 1 Annals of Cong. 458 (Gales & Seaton ed.) (June 8, 1789).
[57] The Federalist No. 78 (Alexander Hamilton).
[58] Id. No. 81 (Alexander Hamilton).
[59] See, e.g., H.R. 3893 (regarding government exercise of religion, sexual orientation, and the right to marry); H.R. 3190 (regarding government exercise of religion); H.R. 3799 (regarding official acknowledgments of religious authority); and H.R. 2045 (regarding government recognition of the Ten Commandments).

> Once Congress goes down the path of making any statute immune from constitutional challenge in the Supreme Court, there will be no turning back. If the Marriage Protection Act is not rejected, we should expect to see this dangerous approach repeated on a wide range of other legislation including bills infringing upon the right to bear arms.[60]

In a similar vein, Bob Barr, a former Republican congressman, noted that this type of bill sets a dangerous precedent because court stripping provisions could be added to legislation limiting the right to bear arms under the Second Amendment, an idea many conservatives would oppose.[61]

Astoundingly, during the Committee markup of the Pledge Protection Act, Rep. Steve Chabot (R–OH) conceded that there is no telling where the Majority will stop in its quest to strip us of our rights and liberties:

> Mr. NADLER. One of the reasons we have a Supreme Court is we have a uniform interpretation of the Constitution, and then your constitutional rights don't depend on what State you are in; they are guaranteed by the Bill of Rights, by the Constitution, and they are the same wherever you are. Your rights under the Federal Constitution should not depend on what State you are in. This would essentially reverse the Civil War. What you are saying is you would have 50 different countries, not one country.
>
> Mr. CHABOT. We are only saying that with respect to one thing, and that is the Pledge of Allegiance.
>
> Mr. NADLER. With all due respect, if this bill passes, you will be saying that with respect to two things so far, since this is the second bill——
>
> Mr. CHABOT. So far.
>
> Mr. NADLER. Exactly. That is the point. So far. What are we really saying here . . . is that whenever there is a law that the majority likes that it fears may be declared unconstitutional by the Supreme Court we will have a court-stripping bill . . . and we will end up where you have no uniform Constitution and no uniform Federal law, and the 50 States start going their separate ways.[62]

Moreover, if court stripping had been used in the past, the Court might never have overturned laws prohibiting inter-racial marriage[63] or permitting segregated education.[64]

The views of many legal scholars concerning complete federal court stripping are consistent with the findings of the Task Force of the Courts Initiative of the Constitution Project, which concluded, "legislation precluding court jurisdiction that prevents the judiciary from invalidating unconstitutional laws is impermissible. Neither Congress nor state legislatures may use their powers to

---

[60] Letter from John D. Dingell to U.S. Representatives (July 22, 2004).
[61] Letter from Bob Barr to U.S. Representatives (July 19, 2004).
[62] Markup of H.R. 2028.
[63] *Loving* v. *Virginia,* 388 U.S. 1 (1967).
[64] *Brown* v. *Board of Educ.,* 347 U.S. 483 (1954).

prevent courts from performing their essential functions of upholding the Constitution."[65]

When court stripping legislation was proposed in the 1970's concerning school prayer, abortion, and busing, it is no wonder that principled conservatives such as former Senator Barry Goldwater, former Yale Law professor Robert Bork, and former Attorney General William French Smith, among many others, found court stripping legislation to be so repugnant.

Senator Goldwater opposed the proposed court-stripping measures, warning that the "frontal assault on the independence of the Federal courts is a dangerous blow to the foundations of a free society."[66] Then, in 1985, Sen. Goldwater expressed his concern over legislation that would have stripped the Supreme Court of jurisdiction on school prayer cases:

I am a little surprised that the Senator from North Carolina decided to outlaw the Supreme Court from our life. I think it is unconstitutional. The Senator is beginning to get into areas now that are frankly none of our business . . . I am really kind of surprised that he would write this bill. If I wrote it, I would have been ashamed of it.[67]

Robert Bork, a former Yale Law professor and Reagan appointee for the D.C. Circuit Court of Appeals, also expressed his concern over such court-stripping measures, arguing, "[y]ou'd have 50 different constitutions running around out there, and I'm not sure even the conservatives would like the results."[68]

Moreover, in his letter to Senate Judiciary Chairman Strom Thurmond regarding S. 1742, a bill that would have stripped the Supreme Court and lower federal courts of jurisdiction over school prayer cases, then Attorney General William French Smith argued that, "[c]ongress may not . . . consistent with the Constitution, make 'exceptions' to Supreme Court Jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers."[69]

Efforts by the Majority to discredit our judiciary by painting it with the broad brush of "judicial activism" are both disingenuous and demeaning. Once we parse through the thick rhetorical fog surrounding this issue, it becomes clear that the Majority's real gripe is with the results, not the activist nature, of judicial decisions. As Roger Pilon, a Cato Institute Director, acknowledged, "examples of 'judicial activism' that are cited, turn out, when examined more closely, not to be cases in which the judge failed to apply the law but applied the law differently, or applied different law, to reach a result different than the result thought correct by the person charging activism."[70]

---

[65] Report of the Citizens for Independent Courts Task Force on the Role of the Legislature in Setting the Power and Jurisdiction of the Courts, reprinted in: The Century Foundation, Uncertain Justice: Politics in America's Courts 206, 217 (2002).

[66] See Linda Greenhouse, The Nation: How Congress Curtailed the Courts' Jurisdiction, N.Y. TIMES, Oct. 27, 1996, 4 at 5.

[67] Cong. Rec., Sept. 10, 1985.

[68] Quoted in Frank Trippet, Trying to Trim the Courts, Time, September 28, 1981.

[69] Letter from William French Smith, Attorney General of the United States, to the Honorable Strom Thurmond, Chairman, U.S. Senate Comm. on the Judiciary (May 6, 1982), reprinted in 128 Cong. Rec. 9093, 9097 (May 6, 1982).

[70] Hearing on H.R. 1252, The Judicial Reform Act of 1997 and Federal Judicial Term Limits Before the Subcomm. on Courts and Intellectual Property of the House Comm. On the Judiciary,

So-called "conservatives" are prone to assert that Supreme Court decisions protecting a woman's right to choose (*Roe* v. *Wade*[71]) and a child's right to attend school without being subject to compulsory prayer (*Engel* v. *Vitale*[72]) constitute judicial activism. They herald, however, as landmark examples of the Court restraining excessive legislative power those decisions that limit Congress's ability to provide affirmative action as a remedy to respond to racial discrimination (*Adarand* v. *Pena*[73]), ban guns in schools (*United States* v. *Lopez*[74]), require background checks before felons can purchase handguns (*Printz* v. *United States*[75]), and limit campaign expenditures (*Buckley* v. *Valeo*[76]).

Similarly, when a Bush I-appointed district judge enjoins an Oregon ballot initiative allowing for assisted suicide,[77] or a Reagan-appointed district judge dismisses a contempt order for violating the Freedom of Access to Clinic Entrances Act because the defendants lack the requisite "wilfulness" on account of their religious convictions,[78] we hear scant criticism from the right wing. But when federal courts in California have the temerity to suggest that referenda that deny alien children the right to an education[79] or prevent minorities subject to discrimination from benefitting from affirmative action may be illegal or inappropriate,[80] we hear storms of protest from the same conservatives.

III. H.R. 2028 IS UNPRECEDENTED

The fact that no other Congress has passed a law that totally eliminates the federal courts' ability to review the constitutionality of a federal law should give all of the Members pause when considering this legislation.

This empirical assessment was most recently reviewed and confirmed by Georgetown University Law Center Professor Mark Tushnet, who explained that:

> [T]he very fact that *Congress has never attempted to bar access to all federal courts when a person claims that a federal statute violates the Constitution* is itself a matter of more than minor significance.[81]

The Majority attempts in vain to find precedent for court-stripping bills such as H.R. 2028 and H.R. 3313, but at the end of the day, they are left with the reality that no bill as far reaching and

---

105th Cong. (1997) (written statement of Roger Pilon, Director, Center for Constitutional Studies, Cato Institute).

[71] 410 U.S. 113 (1973).

[72] 370 U.S. 421 (1962).

[73] 515 U.S. 200 (1995).

[74] 514 U.S. 549 (1995).

[75] 521 U.S. 898 (1997).

[76] 424 U.S. 1 (1976).

[77] *Lee* v. *Oregon*, Civil No. 94–6467–HO, 2 (D. Or. 1994).

[78] *United States* v. *Moscinski*, 952 F. Supp. 167, 170 (S.D.N.Y. 1997).

[79] *League of United Latin Americans Citizens* v. *Wilson*, 908 F. Supp. 755 (C.D. CA, 1995), remanded 131 F.3d 1297 (1997), aff'd 1998 U.S. Dist. Lexis 3418 (March 13, 1998) (holding California Proposition 187 unconstitutional).

[80] *Coalition for Economic Equity* v. *Wilson*, 946 F. Supp. 1480, rev'd 122 F.3d 718 (1997) (holding California Proposition 209).

[81] Letter from Mark Tushnet, Professor, Georgetown University Law Center, to the Honorable John Conyers, Jr., 2 (July 19, 2004) (some emphasis in original and emphasis added) [hereinafter Tushnet Letter].

degrading to the federal judiciary as these, has never been enacted into law.

The Majority attempts to justify such legislation through several short-sighted appeals. First, it asserts that total court stripping laws are supported by precedent enacted by the Congress. Second, they argue that such court stripping laws were envisioned by the founders. Neither of these assertions is correct.

The Majority then points to several laws they believe to be precedents for H.R. 3313 and H.R. 2028. As the following review indicates, in addition to being largely outdated, all of the precedents they cite are either misstated, constitute only partial restrictions on federal judicial review, or do not involve issues of constitutional review:

Judiciary Act of 1789:[82] The Majority cites as precedent the fact that the Judiciary Act of 1789 did not permit the Supreme Court (or any other federal court) to review state supreme court decisions upholding constitutional challenges to federal laws.[83] In relying on information given to them by the Congressional Research Service, the Majority argues that the interrelated effects of two sections of that Act, "operate to deny under some circumstances the authority of any federal court to review the constitutionality of some federal laws."[84] (It is notable that this is the only single law that CRS found even remotely close to serving as a precedent for the Marriage Protection Act and the Pledge Protection Act—a more than 210 year old law, whose applicable provision had since been long repealed).

However, as Professor Tushnet points out, this does not prove the Majority's contention that federal judicial review can be ignored: "The underlying thought [at that time] was that the national interest was in ensuring that federal rights were adequately protected, and that interest was not impaired when a state court mistakenly over-protected federal rights. After a controversial decision in the early decades of the twentieth century, Congress came to the view that there was indeed a national interest in ensuring the uniformity in the interpretation of national law, and amended the statute regarding the Supreme Court's jurisdiction accordingly."[85]

The fact that the only precedent in the history of the law of this country that the Majority is able to cite in support of their argument is both questionable and obscure, at best, speaks for itself. In any event, it is a far different thing to prevent individuals from having access to the federal courts in order to redeem their constitutional rights than it is to prevent states from appealing legal judgments that they lose against the federal government in their own state courts.

Cary v. *Curtis:*[86] The Majority also attempts to argue that a 19th century federal statute placing jurisdiction for all claims of illegally charged customs duties with the Secretary of the Treasury rep-

---

[82] Act of Sept. 24, 1789, ch. 20, §§ 11, 12, 1 Stat. 73 (1789).

[83] H.R. 2028 Markup (statement of Representative Sensenbrenner).

[84] Memorandum from Johnny H. Killian, Senior Specialist, Congressional Research Serv., to Perry Apelbaum, Minority Chief Counsel, U.S. House Comm. on the Judiciary (August 16, 2004).

[85] Tushnet Letter at 1 n.2 (referring to *Ives* v. *South Buffalo Railway Co.,* 94 N.E. 431 (N.Y. 1911) and *New York Cent. R. Co.* v. *White,* 243 U.S. 188 (1917)).

[86] *Cary* v. *Curtis*, 44 U.S. 236 (1845) (reviewing Act of 1839, ch. 82, 2).

resents a precedent for federal court stripping. In upholding the statute, the Court stated that, under the statute, "it is the Secretary of the Treasury alone in whom the rights of the government and of the claimant are to be tested."[87] The Majority, however, misstates the decision.

In fact, the Court decided the case on the basis of sovereign immunity, not court stripping. The plaintiff was suing the government to recover allegedly improperly charged customs fees. The Court stated that: "the government, as a general rule, claims an exemption from being sued in its own courts. That although, as being charged with the administration of the laws, it will resort to those courts as means of securing this great end, it will not permit itself to be impleaded therein, save in instances forming conceded and express exceptions."[88] Thus, the language alluded to by the Majority regarding jurisdiction is mere dicta, and is not controlling. Additionally, *Cary* is distinguishable as a suit against the government for money, not a suit asserting that the law at issue violates an individual constitutional right.

Ex parte *McCardle:* The *McCardle*[89] case is often cited for authority that the Congress may upset a pending Supreme Court appeal by limiting the Court's appellate jurisdiction. The case involved a habeas corpus petition by an individual who had been convicted by a military commission for acts obstructing the Reconstruction. In an effort to forestall an anticipated adverse ruling, Congress eliminated the Supreme Court's appellate jurisdiction to hear the case. The Court held "[w]e are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."[90] However, all that is clear from this case is that Congressional power under the exceptions clause is not without some limits.

The scope of the *McCardle* decision was narrowed when, in *Ex Parte Yerger*,[91] which was also a challenge to the Reconstruction Act, the Court affirmed its jurisdiction to review habeas corpus decisions from lower federal courts when the petitions were originally brought under earlier legislation.[92] In light of *Yerger*, one commentator notes that the Court's concession of appellate jurisdiction in *McCardle* was, as a practical matter, quite minimal:

> The statute [involved in *McCardle* did] not deprive the Court of jurisdiction to decide McCardle's case; he could still petition the Supreme Court for [an original] writ of habeas corpus. [The] legislation did no more than eliminate one procedure for Supreme Court review of the decisions denying habeas corpus while leaving another equally efficacious one available.[93]

---

[87] Id. at 241.
[88] Id. at 245.
[89] 74 U.S. (7 Wall.) 506 (1869).
[90] Id. at 514.
[91] 75 U.S. (7 Wall.) 85 (1869).
[92] Id.
[93] Leonard Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U.Pa.L.Rev., 157, 180 (1981).

The Court's decision in *Yerger* shows that the Justices are protective of the Court's jurisdiction and will not readily concede its appellate jurisdiction. In *McCardle*, the Court surrendered only a single procedural avenue for appellate review, not the ability to hear an entire class of cases. Moreover, *McCardle*, as a war powers case, must be considered within the Civil War context from which it arose.

The Francis Wright:[94] the Majority also points to another 19th century federal law restricting Supreme Court jurisdiction in admiralty cases to questions of law arising on the record.[95] The Court upheld the statute in *The Francis Wright* decision.

This case, however, in no way indicates that Congress may take a particular class of cases out of the Jurisdiction of all federal courts.[96] It merely deals with the uncontroversial claim that in cases involving admiralty jurisdiction, Congress may limit the appellate jurisdiction of the Supreme Court.[97]

Marathon Pipe Line:[98] the Majority also points to dicta from Justice Brennan's opinion in the Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.* to the effect that matters that could be heard in Article III courts could also be heard in state courts.[99]

In point of fact, the actual holding in *Marathon Pipe Line* was that Congress, had invested unconstitutionally broad powers in the untenured judges who served in the newly created bankruptcy courts. The Supreme Court invalidated the entire statutory grant of jurisdiction to the new bankruptcy court system set up by the 1978 Act, holding that untenured judges could not, consistent with Article III, exercise the judicial power of the United States. Even in the dicta cited by the Majority, Justice Brennan was endorsing the possible constitutionality of partial restrictions on judicial review, rather than a complete bar on such review.[100] If anything, the *Marathon Pipe Line* decision stands for the sanctity of the federal judiciary, and the fact that Congress cannot easily give federal matters to judges who are not actual Article III judges appointed by the president and confirmed by the Senate.

The Johnson Act:[101] This act "deprived federal district courts of jurisdiction to enjoin enforcement of certain state administrative orders affecting public utility rates where 'A plain, speedy and efficient remedy may be had in the courts of such State,'"[102] and "the jurisdiction of the federal court was based solely on diversity."[103] "The legislative history of the Johnson Act . . . makes clear that its purpose was to prevent public utilities from going to federal district court to challenge state administrative orders or avoid state administrative and judicial proceedings."[104]

---

[94] The Francis Wright, 105 U.S. 381 (1881) (analyzing Act of Feb. 16, 1875, ch. 77).
[95] See Federal Court Jurisdiction Hearing (statement of Phyllis Schlafly).
[96] The Francis Wright, 105 U.S. at 381.
[97] Id.
[98] *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).
[99] See Federal Court Jurisdiction Hearing (statement of Phyllis Schlafly).
[100] *Marathon Pipe Line Co.*, 458 U.S. at 50.
[101] 28 U.S.C. § 1342.
[102] *Ala. Pub. Serv. Comm'n* v. *Southern Ry. Co.*, 341 U.S. 341, 350 (1951).
[103] *Rosewell* v. *LaSalle Nat'l Bank*, 450 U.S. 503, 534 (1981).
[104] *California* v. *Grace Brethren Church*, 457 U.S. 393, 410 (1982).

The Act did not purport to prevent the Supreme Court from reviewing state-court rate order decisions, or to preclude a challenge to the constitutionality of the Act itself.

Daschle Brush Clearing Rider:[105] Most notably, the Majority claims that a rider to the 2002 Supplemental Appropriations Act authored by Senator Tom Daschle (D–SD) approving logging and clearance measures by the Forest Service in the Black Hills of South Dakota serves as a precedent for the enactment of these types of court-stripping measures.[106]

The problem with this argument is that, while the rider restricted "judicial review" of "any [logging or clearance] action"[107] by the Forest Service, it did not restrict federal judicial review of the rider itself or its constitutionality. Indeed, the federal courts did review the validity of the rider,[108] and explicitly found that the "challenged legislation's jurisdictional bar did not apply to preclude Court of Appeals' review as to the legislation's validity."[109]

Other federal statutes cited by the Majority involve only partial limitations on federal court jurisdiction or do not implicate constitutional issues as H.R. 2028 does. These include the Norris-LaGuardia Act of 1932 (federal court actually found to have jurisdiction);[110] the Emergency Price Control Act of 1942 (appeals permitted to Supreme Court);[111] the Portal-to-Portal Pay Act of 1947 (deals with a restriction on liability, not a constitutional claim);[112] the 1965 Medicare Act (court stripping limited to administrative determination regarding fee schedule, not constitutional issues);[113]

---

[105] Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Acts on the United States, Pub. L. No. 107–206, § 706, 116 Stat. 820, 864 (2002) [hereinafter 706 Rider].

[106] See H.R. 3313 Markup (statement of Representative Sensenbrenner).

[107] 706 Rider § 706(j). It must be noted that the express language of this bill is far broader than the language in the Daschle amendment. While the Daschle amendment precluded "judicial review" of any logging or clearance action, this bill would strip the federal courts of "jurisdiction" or "appellate jurisdiction . . . to hear or determine any question pertaining to" DOMA.

[108] *Biodiversity Associates* v. *Cables*, 357 F.3d 1152 (10th Cir. 2004).

[109] Id. at 1152. Furthermore, in that case, the Tenth Circuit Court of Appeals explicitly held that the legislation's restriction on judicial review was not absolute because it did not apply to the review of the "congressional act," but rather to review of "the Forest Service's acts authorized by the Rider." Id. at 1160. Notably, the court also held that Congress, in this instance, was acting pursuant to an express authorization under Article IV, § 3, cl. 2, to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Id. at 1156.

[110] Although characterized in Ms. Schlafly's testimony as having "removed from federal courts the jurisdiction [in cases involving labor strikes] from the federal courts, and the Supreme Court had no difficulty in upholding it," Federal Court Jurisdiction Hearing (statement of Ms. Schlafly), the Norris-LaGuardia Act did nothing of the sort. As the Supreme Court observed in *Lauf* v. *E.G. Shinner*, 303 U.S. 323 (1938), the District Court had jurisdiction to hear the case "by the findings as to diversity of citizenship and the amount in controversy."

[111] This legislation also did not strip the federal courts, or the Supreme Court, of equity jurisdiction to hear cases involving price orders. Section 204(a) of the Act allowed an individual whose protest against a price control ruling had been denied at the administrative level, to take an appeal to an Emergency Court of Appeals set up by subsection (c), and take a direct appeal to the U.S. Supreme Court under subsections (b) and (d).

[112] The section in question states only that "No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding . . . to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section." It is, at best, tautological to state that a court does not have jurisdiction to impose liability on an employer with respect to an activity that is not compensable.

[113] The section Ms. Schlafly cites, 42 U.S.C. § 1395w–4(i)(1), does not permit judicial or administrative review of certain factors to be taken into account in the setting of a fee schedule for the payment of physicians under the Supplementary Medical Insurance Benefits for Aged and

Continued

the Voting Rights Act of 1965 (funnels cases into the district court for the District of Columbia);[114] and the 1996 Immigration Amendments (eliminates review of narrow set of discretionary actions by Attorney General, not constitutional issues).[115]

Second, the Majority asserts the founders would have expressed support for court stripping legislation.[116] In this regard, the Majority notes that authority such as Hamilton's Federalist No. 80 make clear that Congress has broad authority to rein in the federal courts. Properly read, Federalist No. 80 merely restates the Constitution's grant of authority with regard to the federal courts generally. It does not sanction efforts to eviscerate and degrade the federal courts themselves as H.R. 2028 does. In reality, as noted above, Hamilton was one of the principal supporters of a strong and independent federal judiciary of broad jurisdiction.

CONCLUSION

Just as we opposed the ill-considered Marriage Protection Act, we oppose this court stripping bill. These efforts to deny our citizens access to the federal courts constitutes nothing more than a modern day version of "court packing." Just as President Franklin Roosevelt's efforts to control the outcome of the Supreme Court by packing it with loyalists was rejected by Congress in the 1930s, thereby preserving the independence of the federal judiciary, so too must this modern day effort to show the courts "who is boss" fail as well.

We agree with then-President George Washington's warning concerning efforts to undermine the judiciary, when he stated:

> Let there be no change [in court powers] by usurpation; for it is through this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil, any partial or transient benefit which the use can at any time yield.[117]

Justice Jackson echoed these warnings over sixty years ago in *Barnett*, a decision now under attack by this very legislation:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and official and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be sub-

---

Disabled. It is only with respect to those particular factors that go into the calculation of the fee schedule, that the restriction applies. The restriction does not apply to the fee schedules themselves, much less to, as Ms. Schlafly put it, "administrative decisions about many aspects of the Medicare payment system."

[114] 442 U.S.C. 1973c places jurisdiction in the U.S. District Court for the District of Columbia, with a direct appeal to the Supreme Court. This was upheld by the Supreme Court in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331 (1966).

[115] The limitation of jurisdiction in the 1996 immigration law is quite specific and circumscribed. It only bars judicial review of three discrete and discretionary actions—the Attorney General's decisions (1) to "commence proceedings," (2) to "adjudicate cases," or (3) to "execute removal orders." See *Hatami* v. *Ridge,* 270 F. Supp. 2d 763 (E.D. Va. 2003).

[116] H.R. 2028 Markup (statement of Representative F. James Sensenbrenner).

[117] President George Washington, Farewell Address to the Nation (1796).

> mitted to vote; they depend on the outcome of no elections.[118]

It is unfortunate that the Judiciary Committee would disparage these eloquent statements by passing legislation such as the Pledge Protection Act and the Marriage Protection Act that are so totally inconsistent with judicial independence. With the passage of this legislation, parents will be stripped of their right to go to court and defend their children's religious liberty, schools could expel children for acting according to the dictates of their faith, and Congress will have slammed the courthouse doors shut in their faces. We urge the Members to put principle above politics and reject this ill-advised and unconstitutional legislation.

JOHN CONYERS, Jr.
HOWARD L. BERMAN.
JERROLD NADLER.
BOBBY SCOTT.
MELVIN L. WATT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
MAXINE WATERS.
ROBERT WEXLER.
TAMMY BALDWIN.
ANTHONY D. WEINER.
LINDA T. SÁNCHEZ.

○

[118] 319 U.S. 624, 638 (1943).