



Report of  
People For the American Way  
In Opposition to the  
Confirmation of  
William H. Pryor, Jr.  
to the United States Court of Appeals  
for the Eleventh Circuit

"Right-wing Zealot is Unfit to Judge"

—*Atlanta Journal-Constitution*

May 6, 2003

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—*Washington Post*

Apr. 11, 2003

People For the American Way  
Ralph G. Neas, President  
June 10, 2003

**People For the American Way**

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## **Report of People For the American Way in Opposition to the Confirmation of William H. Pryor, Jr. to the United States Court of Appeals for the Eleventh Circuit**

### **“Right-wing Zealot is Unfit to Judge”**

*Atlanta Journal-Constitution* (May 6, 2003)

### **“Unfit to Judge . . . Mr. Pryor’s speeches display a disturbingly politicized view of the role of courts.”**

*Washington Post* (Apr. 11, 2003)

These editorial conclusions refer to Alabama Attorney General William H. Pryor, Jr., nominated by President Bush to a lifetime seat on the United States Court of Appeals for the Eleventh Circuit. Pryor, 41 years old, has used the power of his office in an effort to push the law in an extreme far right direction harmful to the rights and interests of ordinary Americans. Pryor has done this not only through litigation in which Alabama was a party, but also by electing to file amicus curiae briefs in cases in which Alabama was not involved and Pryor had no obligation to participate. Pryor is also a frequent public speaker whose speeches make clear that the ideological positions he has taken in these cases are his own.

As discussed in this report, many aspects of Pryor’s record are troubling, including his record on civil rights, reproductive choice, religious liberty, and the Eighth Amendment. Of particular concern are Pryor’s views on the limits on Congress’ authority to enact laws protecting individual and other rights and how he would seek to implement those views if confirmed. Over the past decade, the so-called “states’ rights” or “federalism” revolution promoted by the Federalist Society and other right-wing advocates has severely limited federal civil rights and other protections, particularly by restricting the authority of Congress to require compliance with laws it has passed.

Pryor is one of the architects of this movement and has been a leading activist in these damaging efforts. He personally has been involved in key Supreme Court cases that, by narrow 5-4 majorities, have hobbled Congress’ ability to protect Americans’ rights against discrimination and injury based on disability, race, and age. Worse, he has urged the Court to go even further than it has in the direction of restricting congressional authority.

Moreover, Pryor has advocated the view that the Constitution should not apply to some of the most critical issues pertaining to individual rights and freedoms — including reproductive choice, gay rights, and school prayer — and that these matters should be decided by the states, based on majority vote, regardless of whether constitutional rights are violated. Pryor’s ideology would effectively create a balkanized America in which individual citizens may have fewer constitutional rights depending on where they live.

In addition to advocating his harmful states' rights and majoritarian ideology, Pryor has tried to push the law far to the right in other areas as well. For example, Pryor has urged Congress to consider repealing or amending Section 5 of the Voting Rights Act, as well as pushed for other modifications of this critical civil rights law. Pryor's efforts to undermine the Voting Rights Act have prompted more than a dozen leaders of the civil rights movement, including Rev. Fred Shuttlesworth and Martin Luther King III, to oppose his confirmation.

Pryor would deny gay men and lesbians the equal protection of the laws. He believes that it is constitutional to imprison gay men and lesbians for expressing their sexuality in the privacy of their own homes and has voluntarily filed an amicus brief in the Supreme Court urging the Court to uphold a Texas law that criminalizes such private consensual activity. Pryor is also a staunch opponent of a woman's right to choose. He has called Roe v. Wade "the worst abomination of constitutional law in our history" and has supported efforts to erect unconstitutional barriers to the exercise of reproductive freedom.

Pryor has also tried to undermine the separation of church and state, urging the courts to uphold a judge's official sponsorship of sectarian prayers before juries as well as religious displays of the Ten Commandments. Most recently, Pryor has supported the efforts of Alabama Chief Justice Roy Moore to display a nearly three-ton granite monument of the Ten Commandments in the rotunda of the state Judicial Building, a display ruled unconstitutional by a federal district court. More than forty Alabama clergy and other religious leaders, including Christian clergy, have opposed Moore's monument as a violation of the separation of church and state.

Not only is Pryor's ideology extreme, but he also often expresses his views in a manner that is contemptuous of those who disagree with him and of the legal principles that protect the rights and interests of ordinary Americans. Pryor's extreme positions on so many critical aspects of Americans' individual rights seriously place in doubt his ability to maintain an open mind about these matters were he to be confirmed.

Pryor's ideology is well-documented. Indeed, in the words of one reporter writing about Pryor's possible nomination earlier this year, Pryor would not be a "stealth" nominee but "the opposite -- a B-52 candidate, if you will -- who has spent his career flying high, carpet-bombing the landscape with conservative views on federalism, abortion, church-state separation and a host of crime and punishment issues."<sup>1</sup>

As discussed below, Pryor's crusade to push the law far to the right has been partially successful in terms of his states' rights agenda. In other areas, the courts have rebuffed him. The situation would be far different, however, if Pryor were an appellate judge deciding these critical questions of constitutional and statutory interpretation. And

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<sup>1</sup> Jonathan Ringel, "Conservative AG Would Be Controversial 11<sup>th</sup> Cir. Pick," *Fulton County Daily Report* (Jan. 8, 2003).

because the Supreme Court hears so few cases, the federal courts of appeal are the courts of last resort for most Americans.

As more than 200 law professors wrote to the Senate Judiciary Committee in July 2001, no federal judicial nominee is presumptively entitled to confirmation. Because federal judicial appointments are for life and significantly affect the rights of all Americans, and because of the Senate’s co-equal role with the President in the confirmation process, nominees must demonstrate that they meet the appropriate criteria. These include not only an “exemplary record in the law,” but also a “commitment to protecting the rights of ordinary Americans,” a “record of commitment to the progress made on civil rights, women’s rights, and individual liberties,” and a “respect for the constitutional role Congress plays in promoting these rights and health and safety protections, and ensuring recourse when these rights are breached.”<sup>2</sup> Based on these criteria, as discussed below, Pryor’s confirmation to a lifetime position on the important Court of Appeals for the Eleventh Circuit should be rejected.

## I. PRYOR’S RECORD ON STATES’ RIGHTS AND FEDERALISM

- **Pryor’s states’ rights ideology and role in 5-4 Supreme Court “federalism” rulings**

Pryor is a leader of the modern states’ rights movement, and has actively sought to limit the authority of Congress to enact laws under the Commerce Clause and the Fourteenth Amendment, to the significant detriment of individual rights and freedoms as well as the environment. According to Pryor, “we have departed too much from the Framers’ vision of a national government of limited powers — particularly over the last 60 years or so. . . .”<sup>3</sup> Pryor has urged a restrictive interpretation of the Commerce Clause, asserting that Congress

should not be in the business of public education nor the control of street crimes. . . . With real federalism, Congress would . . . make free trade its main domestic concern. Congress would not be allowed to subvert the commerce clause to regulate crime, education, land use, family relations, or social policy. . . . With the New Deal, the Great Society, and the growing federal bureaucracy, we have strayed too far in the expansion of the federal government . . . .<sup>4</sup>

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<sup>2</sup> See Law Professors’ Letter of July 13, 2001. A full copy of the letter, which elaborates further on these criteria, is available from People For the American Way.

<sup>3</sup> Bill Pryor, Attorney General, Practical Reform of the Constitution of Alabama (Sept. 26, 2000) (emphasis added), <<http://www.ago.state.al.us/speeches.cfm?Item=Singel&Case=37>> (visited June 3, 2003).

<sup>4</sup> “Should Business Support Federalism?”, Remarks of Attorney General Bill Pryor, 1999 National Lawyers Convention, The Federalist Society (Nov. 12, 1999) (emphasis

As discussed below, Pryor has urged the courts in case after case to adopt his views on “federalism.” In addition, he has expounded on his ideology in numerous public speeches, many of which are available on his web site,<sup>5</sup> making clear that the states’ rights views reflected in his briefs are his own, and that in attempting to push the law in these extreme directions, he has been advancing his own ideology and has not merely been a lawyer representing a client.

Pryor’s states’ rights activism apparently began in law school, where he founded the Tulane Law School chapter of the Federalist Society.<sup>6</sup> Pryor unabashedly proclaims that federalism is “near and dear to my heart.”<sup>7</sup> The title of a speech that Pryor gave before the Atlanta Lawyers’ Chapter of the Federalist Society in 2001 — “Fighting For Federalism” — encapsulates Pryor’s ideology and agenda.<sup>8</sup>

In that speech, Pryor gave “an outline of the competitive federalism for which I have been fighting.”<sup>9</sup> He then praised “the Rehnquist Court” for “promot[ing] federalism with increasing frequency by enforcing” what he calls “constitutional limits on federal power.” In particular, Pryor spoke approvingly of a series of 5-4 Supreme Court rulings, and his own role in these cases, limiting congressional power under the Commerce Clause and the Fourteenth Amendment, calling them “steps in favor of federalism [that] represent a breakthrough in the restoration of dual sovereignty and enumerated powers.”<sup>10</sup> Although Alabama was a party in several of these cases, Pryor elected in most of them to reach out voluntarily and file amicus curiae briefs arguing for severe restrictions on federal authority to protect civil and individual right. These and subsequent 5-4 cases in which Pryor participated include:

- United States v. Morrison, 529 U.S. 598 (2000), in which the Court ruled 5-4 that the federal remedy for victims of sexual assault and violence in the Violence Against Women Act was unconstitutional. As Pryor proudly stated, Alabama was the only one of 37 states that filed briefs in the case to urge that the provision was unconstitutional; the other 36 supported the law. See “Fighting For Federalism.” Pryor co-authored a brief that derided Congress’ extensive fact findings as a basis for the constitutionality of VAWA, claiming that this would make “any legislator” or “any aide with a laptop, potentially the final dispositor of what the Constitution means.” Brief for the State of Alabama as Amicus Curiae in Support of

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added).

<sup>5</sup> <<http://www.ago.state.al.us/>>

<sup>6</sup> See, e.g., Bill Rankin, “Judicial Nominee a Conservative True Believer,” *Atlanta Journal-Constitution* (May 25, 2003).

<sup>7</sup> “Fighting For Federalism,” Remarks by Attorney General Bill Pryor, Atlanta Lawyers’ Chapter, Federalist Society (Mar. 28, 2001) (hereafter “Fighting For Federalism”), <<http://www.ago.state.al.us/issue/fed032801.htm>> (visited June 3, 2003).

<sup>8</sup> Id.

<sup>9</sup> Id. (emphasis added).

<sup>10</sup> Id.

Respondents, United States v. Morrison, 1999 U.S. Briefs 5 at \*1, \*15 (Dec. 13, 1999).<sup>11</sup>

- Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), in which the 5-4 Court ruled that state employees who are the victims of age discrimination on the job cannot sue for damages under the Age Discrimination in Employment Act.
- University of Alabama v. Garrett, 531 U.S. 356 (2001), in which the Court ruled 5-4 that it was unconstitutional for Congress under Title I of the Americans with Disabilities Act to permit state employees to bring lawsuits for damages to protect their rights against discrimination. Pryor specifically stated that he was “proud” of his role in “protecting the hard-earned dollars of Alabama taxpayers when Congress imposes illegal mandates on our state” in this case. Bill Pryor, Attorney General of Alabama, “ADA Case is About Protecting Alabama Taxpayers,” *Birmingham News* (Nov. 12, 2000).
- Alden v. Maine, 527 U.S. 706 (1999), in which the Court ruled 5-4 that just as state employees cannot sue for damages in federal court for violations of the Fair Labor Standards Act, they similarly may not seek such remedies in state court either. As Justice Souter explained in his dissenting opinion, the net result was to deprive state employees of any remedy for the violation of a clear federally created right. *Id.* at 811-12.
- Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999), in which the 5-4 Court ruled that a federal law authorizing states to be sued for patent infringement was unconstitutional, despite Congress’ plenary power over patents and copyrights under the Constitution.
- Alexander v. Sandoval, 532 U.S. 275 (2001), in which the Court ruled 5-4 that victims of discrimination based on race or national origin cannot file lawsuits to enforce Title VI regulations that prohibit actions with discriminatory effects in federally funded programs. As Justice Stevens explained in dissent, the decision was “unfounded in [the Court’s] precedent and hostile to decades of settled expectations.” *Id.* at 294.
- Federal Maritime Commission v. South Carolina Ports Authority, 535 U.S. 743 (2002), in which the 5-4 Court held that federal administrative agencies cannot grant relief to a private individual or party against a state agency. As Justice Breyer stated in dissent, no provision of the Constitution purports to grant such

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<sup>11</sup> In a speech given in 2000, Pryor described Morrison as “[t]he most important decision of this term [1999-2000] regarding federalism.” “The Supreme Court as Guardian of Federalism,” Bill Pryor, Attorney General of Alabama, before the Federalist Society and Heritage Foundation (July 11, 2000), <<http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=8>> (visited June 5, 2003).

immunity, and the decision threatens to “undermine enforcement against state employers of many laws designed to protect worker health and safety.” *Id.* at 786, 777.<sup>12</sup>

- **Pryor’s efforts to push “states’ rights” and “federalism” further, despite rejection by the Supreme Court**

Although Pryor has praised the Court for these and other decisions, he has expressed very clear concern about the narrow 5-4 margin of many of the rulings, and linked the future of “federalism” to future Supreme Court appointments: “Most of the important federalism decisions of the last decade were reached by a 5 to 4 vote. A single appointment to the Court by the Bush administration could decide the fate of federalism. If all goes well, that future will be bright.”<sup>13</sup>

In fact, in July 2000, looking ahead toward the presidential election, Pryor gave a speech in which he offered similar praise for the Court’s recent states’ rights rulings, and linked his hope for further limitation of congressional power by the Court to the election of George W. Bush and Bush’s likely Supreme Court nominees. In that speech, Pryor said, “this term of the Supreme Court convinced me that the Court has become the last best hope for federalism. So I come today to praise three major federalism decisions of the last term of the Supreme Court and to explain my observation that the Rehnquist Court is our last best hope for federalism.”<sup>14</sup>

Pryor ended his speech with

a warning that all is not well with the Court. Each of the decisions I praised today was reached by a five to four majority. We are one vote away from the demise of federalism. And in this term the Rehnquist Court issued two awful rulings that preserved the worst examples of judicial activism: Miranda v. Arizona and Roe v. Wade. The proponents of

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<sup>12</sup> Notwithstanding Pryor’s strong support for state authority and sovereignty, he has filed several amicus briefs arguing against the authority and sovereignty of Indian tribes. See Brief Amicus Curiae of the States of Montana, Alabama, et al. in Support of Petitioners, Nevada v. Hicks, 1999 U.S. Briefs 1994 (Nov. 30, 2000); Brief of Amicus Curiae States of California, Alabama, et al. Supporting Reversal, Inyo County v. Paiute-Shoshone Indians, 2002 U.S. Briefs 281 (Jan. 23, 2003).

<sup>13</sup> “Fighting for Federalism” (emphasis added). Reviewing the Court’s early states’ rights decisions in 1997, Pryor said “let’s come back in a few years and see if it is time for the party to begin.” Alabama Attorney General Bill Pryor, “Federalism and the Court: Do Not Uncork the Champagne Yet,” Remarks Before the National Federalist Society (Oct. 16, 1997), <<http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=11>> (visited June 3, 2003).

<sup>14</sup> “The Supreme Court as Guardian of Federalism,” Bill Pryor, Attorney General of Alabama, before the Federalist Society and Heritage Foundation (July 11, 2000), <<http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=8>> (visited June 3, 2003).

federal power realize, however, that these results can be changed in our favor with a few appointments to the Supreme Court. Perhaps that means that our real last hope for federalism is the election of Governor George W. Bush as President of the United States who has said his favorite justices are Antonin Scalia and Clarence Thomas. . . I will end with my prayer for the next administration: Please God, no more Souters.<sup>15</sup>

Leaving no room for doubt as to where he stands and his own role in the movement to curtail the power of Congress, Pryor in a 2001 speech about “federalism” concluded by stating, “If history is any guide, the next frontier of federalism cases will . . . involve spending clause legislation and the constitutional issues of sovereign immunity and enforceability in section 1983 suits. . . The groundwork for significant decisions has been laid in cases of statutory construction starting with Pennhurst and leading to Alexander v. Sandoval. I only hope I can participate in this next phase . . .”<sup>16</sup>

In fact, in a number of the cases discussed above, Pryor has specifically urged restrictions on federal authority with respect to individual and other rights that were much more severe than the Court’s final rulings. In Kimel, Pryor suggested that Congress had no power to legislate under the Fourteenth Amendment with respect to age discrimination because it was not concerned with a “suspect” classification like race and national origin, a radical theory that would further limit Congress’ ability to protect individual rights.<sup>17</sup> In Sandoval, Pryor did more than argue that there is no private right of action to enforce Title VI regulations that prohibit actions with a discriminatory impact. He suggested that

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<sup>15</sup> Id. (emphasis added). The day after the Supreme Court’s ruling in Bush v. Gore Pryor said, “I’m probably the only one who wanted it 5-4. I wanted Governor Bush to have a full appreciation of the judiciary and judicial selection so we can have no more appointments like Justice Souter.” Phillip Rawls, “Bush’s Co-chairmen Say No Interest in Federal Jobs,” Associated Press (Dec. 13, 2000) (emphasis added).

Pryor has been harshly critical of Congress itself for passing such laws as the Gun Free School Zones Act and the Violence Against Women Act, which were struck down by the Court in whole or in part in Lopez and Morrison. According to Pryor, “[t]hese blockbuster decisions are fundamentally the result of Congress abdicating its responsibility to concentrate on truly national concerns and instead gauging its priorities based on the politics of the moment.” Madison’s Double Security: In Defense of Federalism, Presentation of Attorney General Bill Pryor before the Louisiana Lawyers Chapter of the Federalist Society (Mar. 1, 2002).

<sup>16</sup> “The Demand for Clarity: Federalism, Statutory Construction, and the 2000 Term,” William H. Pryor, Jr., the Federalism Project of the American Enterprise Institute (July 11, 2001), <<http://www.federalismproject.org/masterpages/supremecourt/pryor.html>> (visited June 3, 2003). And a year later, Pryor called the Spending Clause “my new hobby.” Transcript, NPR “Justice Talking,” Religious Liberties: Moment of Silence Debate, as published in Engage, Vol. 3 (Aug. 2002).

<sup>17</sup> See Brief For Respondents, Kimel v. Florida Board of Regents, 1998 U.S. Briefs 791 at \*13 (Aug. 17, 1999) (claiming that the Court had never “upheld a prophylactic exercise of section 5 power in the context of non-suspect classifications”).



implying such a right would violate state sovereignty and that Title VI “does not authorize federal agencies to create rules barring disparate effects” caused by a statewide program, regardless of the means of enforcement. Brief for Petitioners, Alexander v. Sandoval, 1999 U.S. Briefs 1908, at \*4, \*26 (Nov. 13, 2000). The brief criticized the discriminatory effects standard, noting derisively that “every law has a disparate impact on someone” and that “efforts to regulate disproportionate impacts wherever federal dollars appear” would have “far-reaching” and negative effects, a view that could significantly undermine federal discrimination protections even beyond the results in Sandoval. Id. at \*39, \*26.

Pryor also urged the Court to go further than even the 5-4 majority would go in restricting Congress’ authority to protect the environment in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) (“SWANCC”). The Court ruled 5-4 in SWANCC that Congress had not specifically authorized the Army Corps of Engineers to regulate disposal of solid waste into wetlands, within a state, that serve as important habitats for migratory birds, a result supported in Pryor’s amicus brief. But Pryor, who proudly proclaimed that he was the “only” state attorney general to file a brief in SWANCC “in support of federalism,”<sup>18</sup> went a significant step further. He claimed (along with SWANCC) that Congress did not have the authority under the Commerce Clause to grant such ability to the Corps, asserting that this would give Congress a “general police power” over “local zoning and land use matters” and “eminently local activity.” Brief for the State of Alabama as Amicus Curiae in Support of Petitioner, SWANCC v. United States Army Corps of Engineers, 1999 U.S. Briefs 1178 at \*9, \*14 (July 27, 2000).

As four justices explained in SWANCC, however, this theory had “no merit” and could have devastating results. 531 U.S. at 197 (Stevens, J., dissenting). The matter was clearly not truly “local,” since “the protection of migratory birds is a textbook example of a national problem.” Id. at 195 (emphasis in original). Moreover, accepting Pryor’s theory could make Congress powerless to deal effectively with many water pollution and other problems that originate “locally” in one state that produce significant harmful effects across state lines.<sup>19</sup>

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<sup>18</sup> “Fighting For Federalism.”

<sup>19</sup> In another recent case concerning environmental issues, Pryor filed an amicus brief arguing that in deference to states’ rights, the Army Corps of Engineers should not have the authority under the Clean Water Act to regulate “deep ripping” activity that can harm wetlands. Without reaching Pryor’s arguments, the Court affirmed the court of appeals’ decision that interpreted the law to grant the Corps such authority, contrary to Pryor’s position. See Borden Ranch Partnership v. United States Army Corps of Engineers, 261 F.3d 810 (9<sup>th</sup> Cir. 2001), aff’d by equally divided court, 537 U.S. 99 (2002); Brief for the States of Alabama, et al. as Amici Curiae in Support of Petitioners, Borden Ranch Partnership v. United States Army Corps of Engineers, 2001 U.S. Briefs 1243 (Aug. 26, 2002).

On behalf of the state of Alabama alone, Pryor also urged the Court to review and reverse an important ruling upholding Congress’ power under the Commerce Clause to authorize a regulation protecting the endangered species of red wolves on private land.

In another case, recently dismissed voluntarily by the petitioner, Pryor filed a brief arguing that it violates sovereign immunity to hold a state agency liable for violating Title II of the Americans with Disabilities Act, which specifically prohibits discrimination on the basis of disability by any public entity. In his amicus brief in Medical Board of California v. Hason, Pryor took even further his troubling arguments in Morrison with respect to congressional findings, claiming that hearings and other legislative history should not even be considered in determining whether there is a proper basis for congressional action. Brief of the Commonwealth of Virginia, the States of Alabama, et al., as Amici Curiae in Support of Petitioner, Medical Board of California v. Hason, 2002 U.S. Briefs 479, \*6-\*9 (Jan. 10, 2003). Although the Court will not be called upon to rule on Pryor's radical theory since Hason was dismissed, it is important that it be explored fully by the Senate Judiciary Committee.<sup>20</sup>

In fact, views advanced by Pryor on states' rights and federalism are so extreme that they have been rejected on several occasions by this Supreme Court, including three decisions unanimously rejecting Pryor's arguments. Specifically:

- In Reno v. Condon, 528 U.S. 141 (2000), Pryor filed an amicus brief urging the Court to strike down the Driver's Privacy Protection Act, which limits states' ability to sell personal information from driver's license files without the driver's consent. The Court unanimously disagreed and upheld the law.
- In Jinks v. Richland County, 123 S. Ct. 1667 (2003), Pryor filed a brief urging the Court to rule that a federal law preserving a claimant's ability to file a state lawsuit when federal and state claims are involved in the same case should be ruled inapplicable to counties, because counties are created by states and should enjoy similar sovereign immunity. The Court rejected this dangerous effort to expand

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The Court denied review. See Gibbs v. Babbitt, 214 F. 3d 483 (4<sup>th</sup> Cir. 2000), cert. denied, 2001 U.S. Lexis 1130 (2001); Brief for Amicus Curiae the State of Alabama in Support of Petition for a Writ of Certiorari, Gibbs v. Babbitt (Jan. 26, 2001). Pryor has expressed disappointment that the Court did not hear this case, as he had urged, so that it could "address the limits of the Commerce Clause." Pryor, "Competitive Federalism and Environmental Enforcement," 10th Annual Beach and Bar Symposium, Alabama State Bar Environmental Section (June 8, 2001), at 21-25.

<sup>20</sup> In sharp contrast, when it has suited Pryor's purpose, he has urged the Court to pay great deference to congressional fact findings. An amicus brief that Pryor joined in Ashcroft v. The Free Speech Coalition urged the Court to uphold a federal ban on "virtual" child pornography, arguing that "deference must be accorded to [Congress'] findings. . ." Brief of the States of New Jersey, Alabama, et al. as Amici Curiae in Support of Petitioner, Ashcroft v. The Free Speech Coalition, 2000 U.S. Briefs 795, \*8 (Apr. 23, 2001). The Court rejected Pryor's position and struck down the law as a violation of the First Amendment. Ashcroft v. The Free Speech Coalition, 535 U.S. 234 (2002).

“sovereign immunity” to municipalities, and unanimously ruled that the application of the law to counties is constitutional.

- In Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998), Pryor joined a brief urging the Court to find that the Americans with Disabilities Act does not apply to state prisons. The Court unanimously disagreed.
- In Nevada Dept. of Human Resources v. Hibbs, 2003 U.S. LEXIS 4272 (May 27, 2003), Pryor joined an amicus brief on behalf of Alabama and several other states, arguing that it is unconstitutional for state employees to be able to sue for damages under the Family and Medical Leave Act (FMLA). Briefs filed by Solicitor General Olson on behalf of the United States and by New York and several other states documented the danger and flaws in Pryor’s claims, explaining that the FMLA provides an important remedy against gender discrimination for state as well as private employees. In a 6-3 decision written by Chief Justice Rehnquist, the Court rejected Pryor’s claim and upheld the law as applied to state employees.<sup>21</sup>

Overall, it is clear that Pryor has advocated an extreme “states’ rights” legal philosophy that has already seriously harmed the ability of Congress to protect the rights and interests of Americans and that would, if fully implemented, even further undermine that authority in the future. This aspect of Pryor’s record alone raises serious concerns about his nomination to a powerful lifetime position on the federal court of appeals.<sup>22</sup>

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<sup>21</sup> See Brief of Amici Curiae the States of Alabama, et al. in Support of the Respondents, Reno v. Condon, 1998 U.S. Briefs 1464 (Sept. 3, 1999); Brief of the States of Alabama, et al. as Amici Curiae in Support of Respondent, Jinks v. Richland County, 2002 U.S. Briefs 258 (Jan. 15, 2003); Brief of Amici Curiae States of Nevada, Ohio, Alabama, et al. in Support of Petitioners, Commonwealth of Pennsylvania v. Yeskey, 1997 U.S. Briefs 634 (March 4, 1998); Brief for the States of Alabama, et al. as Amici Curiae in Support of Petitioners, Nevada Department of Human Resources v. Hibbs, 2001 U.S. Briefs 1368 (Aug. 22, 2002). In Condon, Jinks, and Hibbs, Pryor was the lead state Attorney General on the briefs.

<sup>22</sup> Particularly given Pryor’s states’ rights ideology, it is interesting to note that Pryor -- the Alabama co-chair of the Bush/Cheney campaign -- filed an amicus brief in the Supreme Court against the states’ rights position in Bush v. Gore. Pryor’s brief, which was not joined by any other state, urged the Court to overturn the ruling of the Florida Supreme Court concerning the recount of presidential election ballots. Moreover, Pryor’s otherwise disturbingly narrow view of the Equal Protection Clause when the rights of individuals are at stake — as discussed in the civil rights section below -- suddenly became expansive when it came to protecting the Bush campaign and its supporters. See Brief for the State of Alabama as Amicus Curiae Supporting Reversal, Bush v Gore, 2000 U.S. Briefs 949 (Dec. 10, 2000).

## II. PRYOR'S "MAJORITY RULES" PHILOSOPHY ON KEY CONSTITUTIONAL RIGHTS AND FREEDOMS

Despite Supreme Court rulings to the contrary, Pryor has expressed the view that the Constitution should not apply to certain critical issues pertaining to the rights and freedoms of individual Americans, such as reproductive choice, the civil rights of gay men and lesbians, and religious liberty issues. Instead, Pryor has urged that these rights be determined by majority vote within each state, with the result that these rights could be diluted or eliminated in particular states.

The effective and devastating result of this ideology would be that the fundamental guarantees of the Constitution would not apply equally across the country. Pryor's "majoritarian" views would create an America in which a person's individual rights under the Constitution as the Supreme Court has articulated them would be fewer or greater depending on where that person lives.

Pryor has articulated these troubling views in speeches and in litigation. According to Pryor, America is in the midst of a "moral and spiritual crisis" caused, in part, by the "erosion of self-government," for which he blames the Supreme Court:

The second and closely related crisis created by our Supreme Court involves the erosion of self-government. On January 22, 1973, seven members of that court swept aside the laws of the fifty states and created — out of thin air — a constitutional right to murder an unborn child. Last year, the Court swept aside the vote of a majority of the people of Colorado to end any preferences or special privileges for homosexuals in their state. Recently, lower federal courts struck down laws that prohibit assisted suicide.

The most important decisions of our time and our country are not being made by the people or their elected representatives. The Supreme Court has restructured our political community without the consent of our people

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Commencement Speech by Attorney General Bill Pryor to the 1997 McGill-Toolen Graduating Class (emphasis added),  
<<http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=31>>.<sup>23</sup>

Pryor has denominated as "political problems" certain aspects of individual rights guaranteed by the courts under the Constitution — rights that Pryor does not recognize — and has made it clear that he believes these matters should be determined not by the courts applying the Constitution but by "the people." For example, in 1997 Pryor wrote that:

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<sup>23</sup> Pryor expressed the same beliefs in his Baccalaureate Speech to the 1997 Independent Methodist School Graduating Class (unpublished speech identified in his response to the Senate Judiciary Committee questionnaire).

For more than 30 years, the liberal agenda has been pushed through the courts, without a vote of either the people or their representatives. The courts have imposed results on a wide range of issues, including racial quotas, school prayer, abortion, and homosexual rights.

Bill Pryor, “Litigators’ Smoke Screen,” *The Wall Street Journal* (Apr. 7, 1997) (emphasis added). Similarly, Pryor has called important decisions by the Supreme Court applying the Constitution to protect the equal rights of women (the Virginia Military Institute case) and of gay men and lesbians (Romer v. Evans) “antidemocratic.” Alabama Attorney General Bill Pryor, “Federalism and the Court: Do Not Uncork the Champagne Yet,” Remarks Before the National Federalist Society (Oct. 16, 1997) (hereafter “Do Not Uncork the Champagne Yet”).

In his speech before the Federalist Society, Pryor criticized the Court’s decision in Romer, 517 U.S. 620 (1996), for “overturn[ing] the vote of the people of Colorado who amended their state constitution to prohibit special privileges or rights for homosexuals.”<sup>24</sup> As the Supreme Court explained, however, the vote on Amendment 2 had amended Colorado’s Constitution to make it virtually impossible for gay men and lesbians to secure legal protections against discrimination. The amendment also invalidated existing civil rights laws in the state prohibiting discrimination on the basis of sexual orientation. The Court held that Amendment 2 classified gay people “not to further a proper legislative end but to make them unequal to everyone else,” and ruled that the measure violated the Equal Protection Clause. 517 U.S. at 635. Pryor would nonetheless consign the rights of gay men and lesbians, and of other minorities, to majority votes.<sup>25</sup>

Under Pryor’s majoritarian philosophy, constitutional issues such as these would be determined by majority vote, with the result that these rights could be trampled or extinguished in particular states. For example, Pryor has specifically stated that “[i]n conservative states like Alabama, the regulation of abortion would be different from the regulation of abortion in more liberal states like California.” Improving the Image of the Legal Profession by Restoring the Rule of Law, Address by Bill Pryor, Attorney General of Alabama, Montgomery County Bar Association (May 3, 2000). In another speech, Pryor stated that “I submit that a government that does not allow its people, by a majority vote, to restrict the murder of innocent life or the assisted suicide of some of our most

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<sup>24</sup> “Do Not Uncork the Champagne Yet.”

<sup>25</sup> Alabama and six other states had in fact filed an amicus curiae brief in Romer urging the Court to uphold Amendment 2. The brief bears only the names of the respective state attorneys general. See Brief of Amici Curiae States of Alabama, et al., Romer v. Evans, 1994 U.S. Briefs 1039 (Apr. 21, 1995). At the time, Pryor was Alabama’s Deputy Attorney General, where, by his own account, he was “lead counsel for the State of Alabama in all major civil and constitutional litigation.” (Response to Senate Judiciary Committee questionnaire, at 18.)

vulnerable citizens is not a rightly ordered political community . . .” McGill-Toolen Commencement Speech (emphasis added). Accord, Baccalaureate Speech to Independent Methodist School Graduating Class.

Pryor calls the courts’ application of the Constitution to such rights and liberties that he opposes the politicization of the legal system, and has made it clear he would like to put an end to it: “The greatest threat to the American principle of liberty in law is the politicization of our legal system. In the last few decades, our courts have created constitutional rights that do not appear in the Constitution. . . One of the tasks of the next century will be to restore lawmaking and policymaking to the democratic process, not the legal process.” Commencement Speech by Alabama Attorney General Bill Pryor for Spring Graduation at Northeast Louisiana University (May 15, 1999) (emphasis added).

One of Pryor’s most recent articulations of this ideology is set forth in the amicus curiae brief he has filed in the pending Supreme Court case of Lawrence v. Texas, in which the Court has been asked to decide the constitutionality of the Texas “Homosexual Conduct Law,” which criminalizes private consensual sex between same-sex partners. As discussed in more detail below in the section addressing Pryor’s record on civil rights, Pryor has specifically urged the Court to reject the argument that a statute that criminalizes so-called “sodomy” by gay men and lesbians but not by heterosexuals violates the Equal Protection Clause. But when it comes to the rights of gay men and lesbians, Pryor would go even further, and would take this issue out of the hands of the courts altogether. First, in defending the right of Texas and any other state to maintain anti-gay sodomy laws, Pryor has asserted that “[t]he fact that some States, like amici, have not gone along with the trend [toward decriminalizing same-sex “sodomy”] is simply an example of how this country’s federalist system works.”<sup>26</sup>

Moreover, consistent with his belief that the courts should not decide what he considers to be “political” questions, Pryor in fact does not even believe the Supreme Court should decide the Texas case, or other cases raising important issues of individual freedom. According to Pryor’s brief,

[a]ccepting petitioners’ invitation will take this Court perilously down the path toward permanently ensconcing itself as the final arbiter of the kulturkampf that is currently being waged over such sensitive and divisive social issues as abortion, sexual freedom, gender identity, the definition of the family, adoption of children, euthanasia, stem cell research, human cloning, and so forth. If Roe v. Wade and its progeny have taught one lesson, it is that judicial attempts to resolve social disputes of this nature do not have a calming and stabilizing effect on our society.

Pryor’s Lawrence Brief, at 22. Pryor argues that the state legislatures, not the courts, should decide issues such as those presented by this case:

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<sup>26</sup> Brief of the States of Alabama, South Carolina, and Utah as Amici Curiae in Support of Respondent, Lawrence v. Texas, No. 02-102 (Feb. 18, 2003) (hereafter “Pryor’s Lawrence Brief”), at 21.

The proper loci for change of the nature that petitioners and their amici advocate are the legislatures of the 50 States. . . [T]he States should remain free to protect the moral standards of their communities through legislation that prohibits homosexual sodomy.

Id. at 2-3 (emphasis added).

Pryor’s “majority rules” ideology is far out of the mainstream of legal thought and constitutional doctrine and would stand the Constitution on its head. The use of phrases like “social disputes” or “political problems,” two of Pryor’s catch phrases, cannot prevent the Constitution from being applied in cases implicating equal protection, liberty, due process, or other rights that the Constitution protects. Worse, Pryor would allow the fundamental rights of minorities or persons holding minority views in a particular community to be determined by majority vote, completely ignoring the fact that a primary function of the Bill of Rights and of the Fourteenth Amendment is to protect the rights of minorities even from political majorities. Indeed, as the Supreme Court has made clear, “[t]he very purpose of a 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, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.” West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added).

The United States Court of Appeals for the Eleventh Circuit is often called on to decide cases involving the sorts of “social disputes” that Pryor believes should not be resolved by the courts. Pryor’s extremist “majority rules” ideology would pose a significant threat to the rights and interests of all Americans were he to be given a lifetime position on a federal appellate court.

### **III. PRYOR’S RECORD ON CIVIL RIGHTS**

As discussed above, Pryor’s efforts on states’ rights and federalism have sought to severely undermine federal statutory and other protections against discrimination based on race, gender, age, sexual orientation and disability. In several of these areas, Pryor’s record reflects that he has sought to damage such vital protections through other avenues as well.

- **Pryor has urged Congress to consider repealing or modifying provisions of the Voting Rights Act**

In testimony before a subcommittee of the Senate Judiciary Committee in July 1997 entitled “Judicial Activism: Assessing the Impact,” Pryor was harshly critical of the implementation by the federal courts and the Department of Justice of the Voting Rights Act of 1965, a federal law that has been crucial in enabling minorities to effectively

exercise their right to vote. Pryor characterized “the use of the judiciary” under the Voting Rights Act as one aspect of “judicial activism that burden[s] our state government and our citizens everyday.”<sup>27</sup> Pryor went even further and told the subcommittee,

I encourage you to consider seriously, for example, the repeal or amendment of section 5 of the Voting Rights Act, which is an affront to federalism and an expensive burden that has far outlived its usefulness, and consider modifying other provisions of the Act that have led to extraordinary abuses of judicial power.<sup>28</sup>

Pryor’s push to weaken the Voting Rights Act is disturbing. Section 5, for example, is an important part of the Act that requires any changes in voting-related procedures in jurisdictions like Alabama with a specific history of voting discrimination as determined by Congress to be pre-cleared by the Justice Department or the federal district court in Washington D.C. to ensure that they have no discriminatory purpose or effect.<sup>29</sup>

The continuing importance of the Voting Rights Act, including Section 5, prompted more than a dozen leading veterans of the civil rights movement, who had recently gathered for a commemoration of the movement, to denounce Pryor’s 1997 testimony and oppose his confirmation to the Eleventh Circuit. See Statement of Civil Rights Movement Veterans (May 2003). These civil rights leaders, including Rev. Fred Shuttlesworth, Rev. Jim Lawson, Rev. James Bevel, and Martin Luther King III, stated:

We view the Voting Rights Act as the most important single piece of legislation laid down in our time, for it has transformed our society and signaled the liberation of African Americans. . . Far from outliving its usefulness, the Voting Rights Act has not yet fulfilled its promise. If we are to achieve a truly just and democratic society, the full panoply of protections guaranteed by the Voting Rights Act must remain inviolate. Pryor’s expressed disdain for and extreme position concerning the Voting Rights Act cause us to conclude he is unsuited for the federal bench. If he cannot comprehend the continuing need for voting rights protections for African Americans in the Deep South, then he is unlikely to fairly evaluate

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<sup>27</sup> Testimony of Alabama Attorney General Bill Pryor before the U.S. Senate Judiciary Committee, Subcommittee on the Constitution, Federalism & Property Rights (July 15, 1997), <<http://www.ago.state.al.us/issue/testimony.htm>> (visited June 5, 2003).

<sup>28</sup> Id. (emphasis added).

<sup>29</sup> Ironically, in one of his efforts to limit another civil rights law, Pryor has praised the Voting Rights Act precisely because at least parts of it do “not apply to all States” but only to those “which have been identified by Congress as having violated voting rights.” Brief of the Commonwealth of Virginia, the States of Alabama, et al., as Amici Curiae in Support of Petitioner, Medical Board of California v. Hason, 2002 U.S. Briefs 479, \*12 (Jan. 10, 2003) (concerning Title II of the ADA).



and firmly enforce the provisions of the Voting Rights Act in cases that come before him.

Statement of Civil Rights Movement Veterans (May 2003) (emphasis added).

In an effort to mitigate concerns about Pryor's views on civil rights, Pryor and some of his proponents have pointed to Pryor's support several years ago for repealing the provision of Alabama's Constitution prohibiting interracial marriage. That provision, however, has been null, void, and unenforceable since 1967, when the Supreme Court declared that state bans on interracial marriage violated the U.S. Constitution. See Loving v. Virginia, 388 U.S. 1 (1967). In 2000, Alabama was the only state in the country with such a provision remaining on its books.<sup>30</sup> Pryor's support for removing this unenforceable, repugnant vestige of Alabama's discriminatory past, while commendable, hardly negates the serious concerns posed by such matters as his support for weakening the Voting Rights Act, one of the most important civil rights protections in our country's history.

- **Pryor would deny gay men and lesbians the equal protection of the laws, including upholding the imprisonment of gay men and lesbians for expressing their human sexuality in the privacy of their own homes**

Earlier this year, on behalf of Alabama, South Carolina, and Utah, Pryor filed an amicus curiae brief in the Supreme Court urging the Court to uphold the Texas "Homosexual Conduct Law," which prohibits so-called "sodomy" between people of the same sex but not between heterosexual couples.<sup>31</sup> The case began when sheriff's officers in Harris County, Texas, burst into the home of John Lawrence one evening in response to what turned out to be a false report about a "weapons disturbance."<sup>32</sup> They found Mr. Lawrence in his own home having sex with Tyron Garner, arrested both men, and hauled them off to jail; the men were not released until the next day. The men were later convicted of violating the Texas "Homosexual Conduct Law," and have challenged the constitutionality of that law both on the ground that it violates their liberty and privacy rights under the Due Process Clause to engage as adults in consensual sexual intimacy in the home, and on the ground that the law — which applies only to gay men and lesbians — violates their right to the equal protection of the laws.

Pre-dating the very similar and much criticized remarks of Rep. Rick Santorum, Pryor's brief equates, for purposes of legal analysis, private consensual sex between

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<sup>30</sup> See, e.g., Phillip Rawls, "Siegelman Urges Passage of Amendment Two," Associated Press (Oct. 31, 2000).

<sup>31</sup> Brief of the States of Alabama, South Carolina, and Utah as Amici Curiae in Support of Respondent, Lawrence v. Texas, No. 02-102 (Feb. 18, 2003) ("Pryor's Lawrence Brief").

<sup>32</sup> The facts of the case are as stated in the Brief of Petitioners, Lawrence v. Texas, No. 02-102 (Jan 16, 2003).

same-sex couples — criminalized by the Texas statute — with “activities like prostitution, adultery, necrophilia, bestiality, possession of child pornography, and even incest and pedophilia (if the child should credibly claim to be ‘willing’).” Pryor’s Lawrence Brief, at 25 (emphasis added). This brief prompted even the *Tuscaloosa News*, which has “cautiously supported Pryor’s nomination,” not only to call Pryor’s opinions “incendiary” and “beyond mainstream,” but also to state: “It is a long step from sanctioning, or even tolerating, consensual private activity between two adults to permitting abusive crimes such as pedophilia. The law is perfectly capable of drawing such distinctions in theory and in practice.”<sup>33</sup> It is most disturbing that Pryor is either unable or unwilling to recognize these distinctions.

And while Alabama is one of only 13 states with “sodomy” laws still on the books,<sup>34</sup> it is also significant to note that Pryor’s amicus brief in the Texas case goes well beyond any legal argument pertinent to protecting whatever interest Alabama may have in maintaining that law.<sup>35</sup> Unlike the Texas law, Alabama’s sodomy statute prohibits sodomy by heterosexual as well as same-sex couples. Because the Texas law applies only to gay men and lesbians, the Court could invalidate that statute on equal protection grounds, which would not affect the facial validity of the Alabama sodomy law. However, Pryor’s brief specifically addresses the petitioners’ equal protection argument, and urges the Court to reject it. Pryor’s Lawrence Brief, at 16-20.<sup>36</sup>

Pryor also urges the Court not to engage in any form of heightened scrutiny of the Texas law for equal protection purposes, claiming that “[t]he choice to engage in homosexual sodomy (as opposed to the inclination) is not a suspect classification under the Equal Protection Clause of the Fourteenth Amendment.” Id. at 16. According to Pryor, “Texas’s anti-sodomy statute does not classify on the basis of status or orientation but rather on the basis of behavior that is chosen.” Id. at 19 (emphasis added). Pryor’s assertion that gay men and lesbians, as a class, can be — and for purposes of legal analysis, should be — separated from their human sexuality, is appalling and not a legal rule imposed on heterosexuals in this country.<sup>37</sup>

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<sup>33</sup> Editorial, “Pryor’s Opinion Goes Beyond Mainstream,” *Tuscaloosa News* (May 4, 2003).

<sup>34</sup> Brief of Petitioners, Lawrence v. Texas, No. 02-102 (Jan 16, 2003), at 6-7.

<sup>35</sup> To be clear, we do not believe that such laws, which invade the privacy of adults in the most intimate aspects of their lives, should be considered constitutional.

<sup>36</sup> According to Pryor, “Texas is hardly alone in concluding that homosexual sodomy may have severe physical, emotional, psychological, and spiritual consequences, which do not necessarily attend heterosexual sodomy, and from which Texas’s citizens need to be protected.” Pryor’s Lawrence Brief, at 17 (emphasis added).

<sup>37</sup> Even a conservative like Charles Fried, Solicitor General during the Reagan Administration, has written of sodomy laws directed at gay people: “[u]nless one takes the implausible line that people generally choose their sexual orientation, then to criminalize any enjoyment of their sexual powers by a whole category of persons is either an imposition of very great cruelty or an exercise in hypocrisy inviting arbitrary and abusive applications of the criminal law.” Charles Fried, Order and Law: Arguing the Reagan Revolution – A Firsthand Account, at 82-83 (1991).

Pryor asserts that there is value in laws such as that of Texas even if they are not enforced, because they send a message of societal condemnation of homosexuality:

Even legislation that is largely symbolic and infrequently enforced . . . has significant pedagogic value. Laws teach people what they should and should not do, based on the experiences of their elders. The States should not be required to accept, as a matter of constitutional doctrine, that homosexual activity is harmless and does not expose both the individual and the public to deleterious spiritual and physical consequences.

Pryor's Lawrence Brief, at 27.<sup>38</sup>

As the excerpts such as those quoted above reflect, Pryor's brief is disturbing in the harshness of its language and views about gay men and lesbians. In fact, Pryor's brief contemptuously trivializes the very real issues at stake when the government drags two adults out of their home for having engaged in private consensual sex. For example, Pryor asserts that Messrs. Lawrence and Garner have "invite[d] this Court to exalt will above reason and political correctness above the text and history of the United States Constitution. . . This Court should not bend the text and history of the Constitution to facilitate perceived changes in social mores that may turn out to be illusory or misguided." Pryor's Lawrence Brief, at 2. According to Pryor, "[f]or all intents and purposes, petitioners seek to enshrine as the defining tenet of modern constitutional jurisprudence the sophomoric libertarian mantra from the musical 'Hair': 'be free, be whatever you are, do whatever you want to do, just as long as you don't hurt anybody.'" Id. at 25-26.<sup>39</sup>

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<sup>38</sup> Pryor is currently defending his own state's sodomy law in a lawsuit brought by four gay and lesbian plaintiffs who have asserted that the law violates their constitutional rights. Doe v. Pryor, No. 02-14899-BB (11th Cir.). One of the plaintiffs, a lesbian, had custody of her child taken away by the Alabama Supreme Court, which cited the state's sodomy law in support of its holding that she had exposed her daughter "to an illegal lifestyle," and that the law was written "to make all homosexual conduct criminal." Id., Brief of Appellants, at 3-4 (Oct. 21, 2002). Nonetheless, Pryor, whose own brief calls the plaintiffs "practicing homosexuals," Brief of Appellee, at 2 (Dec. 2, 2002), successfully moved the District Court to dismiss the Complaint on the ground that the plaintiffs lacked standing, either because they had suffered no injury or the court could not redress any injury. See Brief of Appellants. The case is currently on appeal before the Eleventh Circuit, and Pryor has urged that court to uphold the dismissal of the case, allowing the sodomy law to stand. Brief of Appellee. Oral argument was held on June 6, 2003.

<sup>39</sup> In his zeal to defend the Texas law, Pryor not only filed an amicus brief in the case, but with the consent of Texas actually filed a motion asking the Court to take the unusual step of allowing Alabama to present oral argument as an amicus. Motion of Respondent and Amicus Curiae Alabama for Divided Argument and For Leave of Amicus Curiae Alabama to Participate in Oral Argument, Lawrence v. Texas, No. 02-102 (Mar. 5, 2003). The Court denied Pryor's motion. Lawrence v. Texas, No. 02-102 (Mar. 21, 2003).

In addition, in April 2000, while Vermont was still considering legislation that it later passed to allow same-sex couples to enter into “civil unions,” Pryor issued an Attorney General’s opinion that Alabama, its subdivisions, and businesses doing business in the state would not have to recognize civil unions entered into in Vermont. See Attorney General Opinion 2000-129 (Apr. 20, 2000). According to Pryor, despite the Full Faith and Credit Clause of the Constitution, which requires each state to give “full faith and credit” to the “public acts, records, and judicial proceedings of every other state,” Alabama could deny such recognition to these legally established relationships on the ground that they conflict with he called the state’s “legitimate public policy” expressed in its “Marriage Protection Act.” That Alabama law limits marriage to opposite-sex couples and invalidates marriages entered into between same-sex couples. According to Pryor, passage of that law as well as the so-called federal Defense of Marriage Act, “were intended to preserve the traditional moral concept of marriage” and “were not acts of bigotry or animus toward homosexuals.” Attorney General Opinion 2000-129, at 13.<sup>40</sup>

The failure by one state to give legal recognition to families legally recognized in another state would wreak havoc on those relationships. The fact that Pryor reached the conclusion that he did, as well as the fact that he considers this particular opinion to be noteworthy, further evidences his disturbing view that gay men and lesbians should not to be given equal treatment under the law.<sup>41</sup>

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<sup>40</sup> Pryor considers his opinion that the rights of lesbian and gay couples joined in civil unions in Vermont would be extinguished in Alabama to be particularly “noteworthy” according to his response to the Senate Judiciary Committee’s question asking him to “[d]escribe the most significant legal activities you have pursued.” Answers to Senate Judiciary Committee Questionnaire, at 42-44.

<sup>41</sup> The Judiciary Committee should also ask Pryor about another matter pertaining to discrimination against gay people. In Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997), the Alabama Attorney General’s office defended against a Free Speech challenge a blatantly unconstitutional, anti-gay state statute that prohibited any university from using public funds to “directly or indirectly, sanction, recognize, or support the activities or existence of any organization or group that fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws . . .” 110 F.3d at 1545. As a result of this law, the University of South Alabama, which provided funding to more than 100 registered student organizations, denied funding to one of those officially recognized groups, the Gay Lesbian Bisexual Alliance (“GLBA”).

The GLBA sued the Attorney General and University officials, charging that the statute constituted impermissible viewpoint discrimination in violation of the First Amendment. The district court agreed and declared the law to be unconstitutional. GLBA v. Sessions, 917 F. Supp. 1548 (N.D. Ala. 1996). Only the Attorney General appealed. 110 F.3d at 1546. A unanimous Eleventh Circuit affirmed the district court’s ruling. Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997). Pryor was the Deputy Attorney General when this case was decided by the district court. In that capacity, by his own description, Pryor was “lead counsel for the State of Alabama in

Pryor’s extreme anti-gay views, particularly as expressed in his brief in the Texas case, prompted the *New York Times* to single him out in a recent editorial criticizing the Bush administration for nominating so many individuals to the federal bench who are “hostile to equal rights for gay men and lesbians.” “Judicial Nominees and Gay Rights,” *New York Times* (May 19, 2003). The *Times* expressly noted that Pryor had no “legal duty” to file a brief in the Texas case, and that “other states with such laws did not do so.” *Id.* The *Times* concluded that “Senators of both parties should speak out against Mr. Pryor.” *Id.* (emphasis added).<sup>42</sup>

- **Pryor’s support for sex discrimination in education**

In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court held, 7-1 (with Justice Thomas not participating) that the denial of admission to women by the Virginia Military Institute, a public, state-supported university, violated the Equal Protection Clause. Disparaging the constitutional rights of women at stake, Pryor criticized this decision:

the Court ruled that the people of Virginia were somehow prohibited by the fourteenth amendment from maintaining an all male military academy. Even the Chief Justice concurred. Never mind that for more than a century after the fourteenth amendment was enacted both the federal government and many state governments maintained all male military academies. Never mind that the people of the United States did not ratify the Equal Rights Amendment. We now have new rules of political correctness for decisionmaking in the equal protection area.

Alabama Attorney General Bill Pryor, “Federalism and the Court: Do Not Uncork the Champagne Yet,” Remarks Before the National Federalist Society (Oct. 16, 1997) (emphasis added). Along with *Romer v. Evans*, discussed above, Pryor cited the VMI case as an example of the Court’s having been “both antidemocratic and insensitive to federalism.” *Id.* Again, Pryor would allow rights guaranteed by the federal Constitution — particularly the fundamental right to the equal protection of the laws — to be taken away in an individual state by majority vote, an ideology completely at odds with our Constitution.

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all major civil and constitutional litigation.” (Response to Senate Judiciary Committee questionnaire, at 18.)

<sup>42</sup> Pryor’s view of gay men and lesbians as second-class citizens is such that he even re-scheduled a family vacation so that it would not coincide with the annual “Gay Day” at Disney World in Florida. “Pryor Rearranges Vacation Over Homosexuals at Disney World,” Associated Press (June 6, 1997). According to AP, “Pryor’s family left for Orlando three days early so the six-day trip would end before the homosexuals arrived for the unsanctioned assembly this weekend.” *Id.*

#### IV. PRYOR'S RECORD ON PRIVACY AND REPRODUCTIVE FREEDOM

Pryor is a staunch opponent of a woman's right to reproductive choice and has repeatedly and harshly condemned the Supreme Court's decision in Roe v. Wade. For example, in a 1997 speech before the Federalist Society, Pryor stated that "[i]n the 1992 case of Planned Parenthood v. Casey, the Court preserved the worst abomination of constitutional law in our history: Roe v. Wade." Alabama Attorney General Bill Pryor, "Federalism and the Court: Do Not Uncork the Champagne Yet," Remarks Before the National Federalist Society (Oct. 16, 1997). Pryor has said of the day Roe was decided: "I will never forget Jan. 22, 1973, the day seven members of our highest court ripped the Constitution and ripped out the life of millions of unborn children." Kelly Greene, "Bill Pryor Hopes to Ride Court Crusade to the Top," *Wall Street Journal* (May. 21, 1997).

In July 2000, Pryor criticized the Supreme Court for issuing "two awful rulings that preserved the worst examples of judicial activism: Miranda v. Arizona and Roe v. Wade." Bill Pryor, "The Supreme Court as Guardian of Federalism," Federalist Society and Heritage Foundation Speech (July 11, 2000). According to Pryor, Roe was "a political decision, with no basis in the plain language of the Constitution." Bill Pryor, "Improving the Image of the Legal Profession by Restoring the Rule of Law," Address before the Montgomery County Bar Ass'n (May 3, 2000).<sup>43</sup>

Responding in 2002 to a survey of state attorneys general by NARAL Pro-Choice America, Pryor stated, "[a]bortion is murder, and Roe v. Wade is an abominable decision."<sup>44</sup> NARAL has reported that, based on Pryor's response to its survey of state attorneys general, "Pryor opposes abortion even in cases of rape or incest, and would only support a narrow exception for instances in which a woman's life is endangered."<sup>45</sup>

Pryor has not just spoken about his opposition to reproductive freedom, he has also acted on it. For example, in 1999, Pryor endorsed proposed state legislation "[a]uthored by abortion opponents" that would have required the courts in Alabama to appoint a lawyer representing the state whenever a female under age 18 sought to have an abortion without her parents' consent.<sup>46</sup> Alabama law requires minors to have the written

<sup>43</sup> In an amicus brief in Dickerson v. United States, Pryor urged the Court to hold that Miranda was not a constitutional rule. See Brief for the States of South Carolina, et al., as Amici Curiae Urging Affirmance, 1999 U.S. Briefs 5525 (Mar. 9, 2000). In a 7-2 ruling, with Chief Justice Rehnquist writing the majority opinion, the Court rejected this argument and held that Miranda was a constitutional decision of the Court and therefore could not be overruled by an act of Congress. Dickerson v. United States, 530 U.S. 428 (2000).

<sup>44</sup> <[http://www.naral.org/mediaresources/fact/pdfs/pryor\\_facts.pdf](http://www.naral.org/mediaresources/fact/pdfs/pryor_facts.pdf)> (visited May 19, 2003).

<sup>45</sup> <[http://www.naral.org/mediaresources/fact/pdfs/pryor\\_facts.pdf](http://www.naral.org/mediaresources/fact/pdfs/pryor_facts.pdf)> (visited May 19, 2003).

<sup>46</sup> Jay Reeves, "Pryor Backing Bill to Involve State Attorneys in Juvenile Abortion Cases," Associated Press (Feb. 24, 1999). Accord, Amy Bach, "No Choice for Teens (Abortion)," *The Nation* (Oct. 11, 1999).

consent of a parent in order to obtain an abortion, but, consistent with constitutional requirements, authorizes a judge to grant an exception in specified circumstances, including when the female is mature and informed enough to make the decision on her own. Ala. Code §§26-21-1 to 8. The measure that Pryor endorsed would have turned the bypass process into an adversarial proceeding by requiring that an attorney representing the state be involved in all instances when a minor seeks a judicial bypass of the parental consent requirement.<sup>47</sup> According to the press, “Pryor said an attorney representing the government should be involved to protect the state’s interest in preserving life.”<sup>48</sup> Pryor apparently intended for such attorneys to pose an obstacle to a minor’s exercise of her right to reproductive freedom: “Pryor said he envisioned attorneys with networks like Alabama Lawyers for Life, of which he used to be a member, agreeing to represent the state for free and ‘potentially’ taking an adversarial stand against abortions.”<sup>49</sup> The *Birmingham Post-Herald* criticized the bill and Pryor’s support for turning the bypass process into an adversarial proceeding: “The state does not have a legitimate role in that determination. The legislation recommended by Pryor is a bad idea deserving a quick burial.”<sup>50</sup> The bill “died in committee.”<sup>51</sup>

In addition, Pryor defended an Alabama statute prohibiting so-called “partial birth” abortions even though the law was plainly unconstitutional because it lacked an exception for the preservation of the health of the pregnant woman, as required by Roe v. Wade, 410 U.S. 113, 164-65 (1973) and reaffirmed by Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 879 (1992). A federal court in Alabama declared the law to be unconstitutional, following the Supreme Court’s ruling in Stenberg v. Carhart, 530 U.S. 915 (2000), striking down a similar Nebraska law. See Summit Medical Associates, P.C. v. Siegelman, 130 F. Supp.2d 1307 (M.D. Ala. 2001).<sup>52</sup>

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<sup>47</sup> Jay Reeves, “Pryor Backing Bill to Involve State Attorneys in Juvenile Abortion Cases,” Associated Press (Feb. 24, 1999).

<sup>48</sup> Id.

<sup>49</sup> Id.

<sup>50</sup> Alabama Editorial Roundup, Associated Press (Feb. 26, 1999), quoting “The *Birmingham Post-Herald* on Bill Pryor and Alabama Lawyers for Life: A bad idea.”

<sup>51</sup> Helena Silverstein, “Article: In the Matter of Anonymous, A Minor,” 11 Cornell Journal of Law and Public Policy 69, 90 (Fall 2001).

<sup>52</sup> Pryor had filed an amicus curiae brief in the Supreme Court in Stenberg along with a number of other state attorneys general urging the Court to uphold the Nebraska law. Brief Amicus Curiae of Virginia, Alabama, et al. in Support of Petitioners, Stenberg v. Carhart, 1999 U.S. Briefs 830 (Feb. 28, 2000). This brief argued that, consistent with principles of “federalism,” the Court should accept the narrowing interpretation of the Nebraska law given by that state’s attorney general and uphold the law. The Court rejected this argument, noting that the attorney general’s interpretation of a statute did not bind the state courts. Stenberg, 530 U.S. at 940-41.

Pryor also supported the position of those opposed to reproductive choice by filing an amicus brief in Scheidler v. NOW, 123 S. Ct. 1057 (2003). In his brief, Pryor went beyond the Court’s holding that the federal RICO law could not be used against anti-abortion advocates because they did not “obtain” property of an abortion clinic under

Some of Pryor's supporters have asserted that, despite Pryor's unquestionable opposition to women's reproductive freedom, he would uphold the law in this regard, pointing to a letter that he issued to district attorneys the day the Alabama ban on "partial birth" abortions took effect in which he directed that the law was to be enforced only post-viability, though no such limit was contained in the law. See Summit Medical Associates, P.C. v. Siegelman, 130 F. Supp.2d at 1313, n.6. However, Pryor issued this letter after the lawsuit challenging the law had been filed and under the threat that an injunction would be sought; in other words, as his own representatives confirmed at the time, Pryor was attempting to save the statute.<sup>53</sup> Moreover, as noted above, Pryor ignored the fact that the statute lacked the constitutionally required exception to preserve the pregnant woman's health.

Most important, however, this conduct by Pryor does not resolve the serious concerns that, as a lifetime federal judge, Pryor would be influenced by his personal ideology when he is in a position to interpret what the Constitution requires and what the law is. Most cases are not factual or legal clones of prior precedent. In fact, judging often requires subtle and nuanced interpretations of precedent, statutes, and the Constitution. For example, if confirmed to the Eleventh Circuit, Pryor might well hear a case involving a law that attempts to chip away incrementally at the right to reproductive freedom by placing particular burdens on the exercise of that right, a case in which Roe v. Wade provides guidance but not the final answer. In such a case, no one can seriously doubt that Pryor's view of Roe as "the worst abomination of constitutional law in our history" would influence his ruling.<sup>54</sup>

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the federal Hobbs Act, arguing that the RICO law should never be interpreted to permit a clinic or other private party to seek injunctive relief. See Brief for the States of Alabama et al. as Amici Curiae in Support of Petitioners, Scheidler v. NOW, 2001 U.S. Briefs 1118 (July 12, 2002).

<sup>53</sup> See Mike Cason, "Activist Says Pryor Killed Abortion Bill," *Montgomery Advertiser* (Dec. 3, 1997) ("Pryor's attorneys defend his move as an effort to keep a federal judge from striking down the law. Abortion clinics have filed a federal lawsuit against the partial-birth ban . . . .")

<sup>54</sup> In addition to his record with respect to reproductive choice and "sodomy" laws, Pryor also defended an Alabama statute that prohibited the sale of devices "designed or marketed as useful primarily for the stimulation of human genital organs." Kimberly Mills, "Alabama Legislature's Ban on Sex Devices Violates Civil Rights," *Seattle Post-Intelligencer* (Feb. 24, 1999). When a number of individuals who used such devices filed suit in federal court challenging this law as a violation of their right to privacy and to personal autonomy, Pryor contended that the legislators were within their rights "to address what they perceived to be a problem." Id. The court struck down the law, holding that it "impose[d] a significant burden on the right of married and unmarried persons to sexual privacy. . . ." Williams v. Pryor, 220 F. Supp. 2d 1257, 1298 (N.D. Ala. 2002). The court also noted that "the Attorney General has failed to offer even one state interest for the challenged statute, much less a compelling state interest. Further, the Attorney General has not attempted to prove that the statute is narrowly tailored to meet those phantom interests." Id. at 1300. An appeal by the state is pending.



## V. PRYOR'S RECORD ON THE SEPARATION OF CHURCH AND STATE

- **Pryor opposes the genuine separation of church and state and has used his office to promote religion**

Pryor is contemptuous of what he calls “the so-called wall of separation between church and state,” asserting that this doctrine — so essential to the preservation of freedom of conscience in this country — was created by the Supreme Court’s “errors of . . . case law.”<sup>55</sup> According to Pryor, America is in a “time of moral and spiritual crisis,” a crisis that he blames in part on what he calls “the increasing secularization of our Country,” and for which he considers “[t]he primary catalyst” to be “the Supreme Court of the United States.”<sup>56</sup> Pryor lambasted the Court: “In 1962, with its decision prohibiting prayer in public schools, the Supreme Court began building a wall that has increasingly excluded God and religion from our public life . . . In the years following the school prayer decision, it seems our government has lost God.”<sup>57</sup>

Pryor’s criticism of the Court reflects the mythology of the Religious Right. The Court’s 1962 decision to which Pryor referred, Engel v. Vitale, 370 U.S. 421, did not, as Pryor claimed, prohibit prayer in schools, but rather state-sponsored prayer. The right of students to engage in truly voluntary prayer in schools was not affected by that or any other decision of the Court.

The language of Pryor’s speeches indicates a disturbing lack of concern for religious minorities. For example, in 1997 he stated, “[t]he American experiment is not a theocracy and does not establish an official religion, but the Declaration of Independence and the Constitution of the United States are rooted in a Christian perspective of the nature of government and the nature of man. The challenge of the next millennium will be to preserve the American experiment by restoring its Christian perspective.” McGill-Toolen Speech (emphasis added). Accord, Baccalaureate Speech of Attorney General Bill Pryor to the 1997 Independent Methodist School Graduating Class.

Pryor concluded the remarks that he gave upon his official investiture as Attorney General in 1997 by stating: “With trust in God, and His Son, Jesus Christ, we will continue the American experiment of liberty in law.” Investiture of Bill Pryor as Attorney General (Jan. 2, 1997).

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<sup>55</sup> “Do Not Uncork the Champagne Yet.”

<sup>56</sup> Commencement Speech by Attorney General Bill Pryor to the 1997 McGill-Toolen Graduating Class, <<http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=31>> (visited June 5, 2003) (hereafter “McGill-Toolen Speech”). Pryor expressed the same sentiments in another 1997 speech, Baccalaureate Speech of Attorney General Bill Pryor to the 1997 Independent Methodist School Graduating Class.

<sup>57</sup> McGill-Toolen Speech.

- **Pryor has sought to promote government-sponsored sectarian prayer**

Pryor’s extreme views about church-state separation are particularly evident in his steadfast support — inside the courtroom and out — for the unconstitutional practices of Alabama Judge (now Chief Justice) Roy Moore. Moore is most famous for his efforts to use his judicial office to display the Ten Commandments in his courtroom when he was a trial judge and now in the rotunda of the state’s Judicial Building. When he was a trial court judge, Moore also “routinely invited Christian clergy to offer prayer at [the opening of jury] sessions; those prayers have routinely been Christian prayers.” Order, Alabama v. ACLU, No. CV-95-919-PR (Circuit Court of Montgomery County, Nov. 22, 1996), at 2.

A lawsuit was filed against Moore in federal court by several local taxpayers and residents, challenging both his sponsorship of sectarian prayers and his display of the Ten Commandments as violative of the Establishment Clause. That suit was ultimately dismissed on the ground that the plaintiffs lacked standing. Alabama Freethought Association v. Moore, 893 F. Supp. 1522 (N.D. Ala. 1995). While that suit was pending, however, Pryor, then the Deputy Attorney General, filed a lawsuit in the name of Alabama in state court asking the court to declare that Moore’s practices, including the prayer practice, were constitutional, a lawsuit that the state was under no obligation to file. Complaint for Declaratory Judgment, Alabama v. ACLU, No. CV-95-919-PR (Circuit Court of Montgomery County, Apr. 21, 1995). Pryor personally signed the Complaint. Id. at 7.

The state court rejected Pryor’s arguments, and held that a judge’s practice of officially sponsoring sectarian prayers before jury assemblies was unconstitutional. As the court explained, “[p]rayers conducted or arranged by a judge or officer of an Alabama court delivered to jurors summoned to perform their legal duty in an Alabama court constitute state-sponsored prayer. State-sponsored prayers that demonstrate a denominational preference are proscribed by the Establishment Clause of the United States Constitution.” Order, Alabama v. ACLU, No. CV-95-919-PR (Circuit Court of Montgomery County, Nov. 22, 1996), at 2.

Pryor appealed. The brief that he filed with the Alabama Supreme Court urging the court to overturn the trial court’s ruling not only illuminates the sectarian nature of Judge Moore’s prayer practice that Pryor voluntarily defended, but is another example of Pryor’s trying to push the law in an extreme direction. As Pryor’s own brief recounts, Judge Moore would typically open jury assemblies by stating that “we’re going to begin as we always do, with prayer;” he would then introduce the clergy member whom “I have with us today,” give the name of that person’s church, and ask the jurors to “please stand;” the prayer followed. Brief of the State of Alabama, Alabama v. ACLU, Consolidated Case Nos. 1960927 et al., at 4 (Ala. Sup. Ct., Apr. 10, 1997). Pryor’s brief itself admits that “[t]o Judge Moore’s knowledge, each of the clergy who had delivered a prayer in his presence was a Christian. Some of the prayers had ended in Jesus’ or Christ’s name. . . . Moore did not recall having invited any Jewish, Muslim, or Jehovah’s Witness clergy, but explained, ‘[T]hese jurors are summoned from Etowah County are

ninety-five percent Christians or persons who believe in God if they are not Christians.” *Id.* at 8 (record citations omitted).<sup>58</sup>

That Pryor urged a court to uphold this practice as constitutional raises serious concerns about his view of the First Amendment. The very notion that a judge could lawfully sponsor prayers of a particular religious group because most of his audience was of the same faith has absolutely no basis in the Constitution and would in fact allow government officials to ignore the Establishment Clause by promoting a particular religion as long as their actions took place in front of a majority of co-religionists.

The Alabama Supreme Court did not rule on the merits of the case but instead dismissed the case as lacking any controversy because Pryor had named Judge Moore as a defendant, and Pryor and Moore were plainly in agreement as to the constitutionality of Moore’s practices. *Alabama v. ACLU*, 711 So.2d 952 (Ala. Sup. Ct. 1998). The court was extremely critical that the case had been brought: “We are convinced . . . that ‘the Office of the Attorney General [has] . . . sought to ‘use’ this Court in order to get an advisory ruling.’ . . . We will not, however, allow the judiciary of this state to become a political foil, or a sounding board for topics of contemporary interest.” *Id.* at 962. Even after being so castigated, and even though the result of the court’s dismissal of the case was to allow Moore to continue his practices, Pryor was so bent on having a court declare them constitutional that he asked the state Supreme Court to rehear the case and uphold Moore’s practices. The court refused.<sup>59</sup>

Pryor has tried to gain court approval of government-sponsored, captive audience prayer in other settings as well. In the case of *Santa Fe Independent School District v. Doe*, 520 U.S. 290 (2000), Pryor joined several other state attorneys general in filing an *amicus curiae* brief in the U.S. Supreme Court urging the Court to uphold a Texas school district’s policy of turning over the public address system to students before high school football games in order to allow a prayer to be delivered. Pryor’s brief asserted that the prayer practice should be upheld because there was no impermissible state action. *See* Brief on the Merits of *Amici Curiae* State of Texas, *et al.*, *Santa Fe Independent School District v. Doe*, 1999 U.S. Briefs 62, \*5 (Dec. 30, 1999). The Court rejected this argument and struck down the policy, explaining that “[t]hese invocations are authorized by government policy and take place on government property at government-sponsored school-related events. . . The delivery of [a religious] message — over the school’s public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer — is not properly characterized as ‘private’ speech.” 520 U.S. at 302, 310.

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<sup>58</sup> Moore’s explanation as to why he did not invite non-Christians to offer the prayers was: “‘We are not a nation founded upon the Hindu god or Buddha.’” “Rally Backs Judge’s Display of Ten Commandments,” *Dallas Morning News* (Apr. 13, 1997).

<sup>59</sup> “Court Refuses to Rehear Commandments Case,” Associated Press (Apr. 10, 1998).

Pryor’s brief gives disturbingly short shrift to the rights of students and others in the audience who are attending a school-sponsored event and who do not desire to participate in prayer as the price of admission. In fact, casting the student-led prayers as free speech, Pryor’s brief contends that “[t]he First Amendment focuses on the rights of the speaker, not of the listener.” Brief on the Merits of Amici Curiae State of Texas, et al., Santa Fe Independent School District v. Doe, 1999 U.S. Briefs 62, \*14, n.9. Such an argument is contrary to Supreme Court precedent. Indeed, citing its ruling in Lee v. Weisman, 505 U.S. 577 (1992), the Court reaffirmed that school officials may not put students and other citizens in the position of having to choose whether to attend a school-sponsored event or “risk facing a personally offensive religious ritual. . . The Constitution . . . demands that the school may not force this difficult choice upon these students for ‘it is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.’” Santa Fe Independent School District v. Doe, 530 U.S. at 312 (citation omitted).

- **Supporting religious displays of the Ten Commandments**

In Stone v. Graham, 449 U.S. 39 (1980), the Supreme Court struck down a Kentucky law that required the Ten Commandments to be posted in all public school classrooms. In so ruling, the Court distinguished between displays of the Ten Commandments, such as these, that have the purpose or effect of promoting religion, and government use of the Ten Commandments in a secular, historic context. Despite this ruling, Pryor has been on a crusade to have the courts authorize government displays of the Ten Commandments in circumstances that clearly do not constitute a secular or historic display, but that plainly advance religion and are intended to do so. In his efforts, Pryor has disregarded the Court’s recognition that

[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one’s parents, killing or murder, adultery, stealing, false witness, and covetousness . . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord’s name in vain, and observing the Sabbath day.

Stone v. Graham, 449 U.S. at 41-42 (emphasis added).

Pryor has been critical of the Court’s ruling in Stone v. Graham, saying “personally I think it’s pretty hard and disingenuous to defend the court’s decision . . . unless you’re recognizing that children are this special group of citizens who have to be kept away from the dangerous message of religion.” Transcript, NPR “Justice Talking,” Religious Liberties: Moment of Silence Debate, as published in Engage, Vol. 3 (Aug. 2002).

In each of the cases discussed below in which Pryor has urged the courts to uphold government displays of the Ten Commandments, the courts have found that the particular displays promote religion. Nonetheless, Pryor has urged higher courts to approve them. In none of these cases did Alabama have any legal obligation to take a position, underscoring Pryor's use of his office to promote his ideology. In fact, in one case, clergy in Alabama, including Christian clergy, have opposed the state's position.

Pryor's most publicized Ten Commandments effort has been in the context of his unwavering support for Judge Roy Moore. In addition to inviting Christian clergy to deliver prayers to jury assemblies when he was a state trial court judge, Moore also displayed alone on the wall of his courtroom behind his bench a hand-carved plaque of the Ten Commandments. This display was also challenged in the federal lawsuit discussed above, which was dismissed for lack of standing. In the lawsuit that Pryor filed in state court asking the court to declare Moore's practice of sponsoring sectarian prayers in courtrooms before jurors to be constitutional — a lawsuit that Alabama was under no obligation to file — Pryor also asked the court to uphold Judge Moore's display of the Ten Commandments. See Complaint for Declaratory Judgment, Alabama v. ACLU, No. CV-95-919-PR (Circuit Court of Montgomery County, Apr. 21, 1995).

After visiting Judge Moore's courtroom and viewing his Ten Commandments display in its particular setting, the state judge held that this particular display, "hanging in the courtroom on the wall alone" behind Judge Moore's bench where it could be seen "from any position in the courtroom [and] more prominently from the jury box," was unconstitutional. Final Order, Alabama v. ACLU, No. CV-95-919-PR (Montgomery County Circuit Court, Feb. 10, 1997). The court found it "obvious that the sole purpose for the plaques hanging in the courtroom is such a fashion is 'purely religious.'" In fact, Judge Moore . . . has unequivocally stated that the plaques are not in the courtroom for a historical, judicial or education purpose, but rather, and clearly to promote religion." Id. at 2. The court ordered Moore to take down the display or incorporate it "in a larger display of non-religious and/or historical items." Id. at 2. The court responded to those who had asked it "to save the Ten Commandments" that

the Ten Commandments are not in peril. They are neither stained, tarnished nor thrashed. They may be displayed in every church, synagogue, temple, mosque, home and storefront. They may be displayed in cars, on lawns, and in corporate boardrooms. Where this precious gift cannot and should not be displayed as an obvious religious text or to promote religion is on government property (particularly in a courtroom).

Id. at 3.

Moore made it plain that he would not comply with the court's order to change his Ten Commandments display,<sup>60</sup> and then-Governor Fob James said that he would

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<sup>60</sup> See, e.g., Bill Poovey, "Judges Battle Over Courtroom Display of the Ten Commandments," Associated Press (Feb. 11, 1997).

“use the National Guard and state troopers to prevent their removal.” Jessica Saunders, “Judge: Ten Commandments Display Must Be Changed Or Removed,” Associated Press (Feb. 10, 1997).

Pryor defended Moore in every available forum. On the Today Show, Pryor was asked what was wrong with the state court’s suggestion that Moore “simply move those tablets to another wall in his courtroom, near some other historical objects, such as the Declaration of Independence . . .” Transcript, Today Show (Feb. 16, 1997). Pryor’s response was that “the Ten Commandments are special, and they deserve a special place on the wall in his courtroom.” *Id.* Pryor attempted to trivialize the genuine First Amendment issues at stake and ignored Supreme Court precedent by claiming that the ACLU was “asking one circuit judge to be the interior decorator of another judge’s courtroom.” *Id.*

Also on the Today Show, Pryor was reminded of Governor James’s threat to use the National Guard if necessary to preserve Judge Moore’s display and Judge Moore’s refusal to abide by the court’s order. Transcript, Today Show (Feb. 16, 1997). Pryor was asked, “Don’t those two positions conjure up images of — of Lester Maddox, George Wallace and — and Little Rock schools and tend to undermine respect for the — the rule of law?” *Id.* Disturbingly, Pryor did not respond by stating that of course a court’s order must be complied with unless and until overturned by a higher court. Instead, he replied that “George Wallace defended an immoral position. I think Judge James — Governor James and Judge Moore are on the right position in this case.” *Id.*

Pryor was also one of the speakers at a large rally held on April 12, 1997 at the state Capitol in Birmingham to support Moore, a rally sponsored by such groups as the Christian Coalition and American Family Association.<sup>61</sup> Reuters described the rally as follows:

[t]housands of people, including two of Alabama’s highest elected officials [Pryor and Governor James], protested the separation of church and state . . . condemning the Supreme Court for keeping religion out of public schools, courtrooms, and other government venues.

Amy Hetzner, “Thousands Rally Against U.S. Supreme Court in Alabama,” Reuters News (Apr. 12, 1997). Pryor and others reportedly used the occasion not only to support Moore’s unconstitutional practices but also to advance other aspects of their right-wing ideology: “While the rally’s invective was aimed mainly at the Supreme Court and the American Civil Liberties Union, its rhetoric at times veered into a condemnation of legal abortion and gay people.” *Id.* Pryor in particular “condemned the 1973 *Roe vs. Wade* Supreme Court decision that legalized abortion, telling his audience that he became a lawyer to fight the ACLU. ‘God has chosen, through his son Jesus Christ, this time and

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<sup>61</sup> “Rally Backs Judge’s Display of Ten Commandments,” *Dallas Morning News* (Apr. 13, 1997).

this place for all Christians . . . to save our country and save our courts,' he announced.”  
Id.

Moore rode his newfound fame to election as Chief Justice of Alabama in November 2000; his campaign referred to him as the “Ten Commandments Judge.”<sup>62</sup> The next summer, “during the night and without forewarning his fellow Supreme Court justices,”<sup>63</sup> but while being filmed by Coral Ridge Ministries, “an evangelical Christian media outreach organization,”<sup>64</sup> Moore installed a nearly three ton granite monument of the Ten Commandments in the rotunda of the Alabama State Judicial Building, which houses the state Supreme Court, the courts of appeals, and other state offices.<sup>65</sup> Designed by Moore himself, the monument, according to Moore, reflects “the sovereignty of God over the affairs of men.”<sup>66</sup> As a federal court subsequently found, “[b]y God, the Chief Justice specifically meant the Judeo-Christian God of the Holy Bible and not the God of any other religion.”<sup>67</sup>

Moore placed the monument “directly across from the main entrance to the Judicial Building . . . A person entering the Judicial Building through its main entrance, and looking across the large open area of the rotunda, will see the monument immediately. . . The Chief Justice chose to display the monument in this location so that visitors to the Alabama Supreme Court would see the monument. While not in its center, the monument is the centerpiece of the rotunda.” 229 F. Supp. 2d at 1294.

Weighing 5,280 pounds, Moore’s Ten Commandments monument is approximately three feet wide, three feet deep, and four feet tall. Id. “The top of the monument is carved as two tablets with rounded tops . . . The tablets are engraved with the Ten Commandments as excerpted from the Book of Exodus in the King James Bible. Due to the slope of the monument’s top and the religious appearance of the tablets, the tablets call to mind an open Bible resting on a lectern.” Id. at 1294-95. Below the Ten Commandments, on the sides of the monument, are quotations from secular sources referring to God, id., “edited so as to emphasize the importance of religion and the sovereignty of God in our society . . . .” Id. at 1303.

Once again, a lawsuit was filed by individual citizens asserting that Moore had violated the Establishment Clause. Once again, Pryor rushed to Moore’s defense, appointing three private lawyers as Deputy Attorneys General of Alabama to represent Moore. Stan Bailey, “Pryor Supports Moore Defense,” *Birmingham Daily News* (Nov. 3, 2001). Pryor told the media, “I look forward to providing a vigorous defense . . . .” Id.

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<sup>62</sup> See Glassroth v. Moore, 229 F. Supp. 2d 1290, 1294 (N.D. Ala. 2002), appeal pending.

<sup>63</sup> Eddie Curran, “Legal Fees in Commandments Case Could Reach \$1 Million,” *Mobile Register* (May 2, 2003).

<sup>64</sup> Glassroth v. Moore, 229 F. Supp. 2d at 1294.

<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Id.

The federal court disagreed completely with Pryor. In a ruling issued this past November, the court recognized, as did the Supreme Court in Stone v. Graham, that the Ten Commandments have secular aspects. However, looking at the facts of this particular case, the court found that Moore's Ten Commandments monument violated the Establishment Clause because Moore's "fundamental, if not sole, purpose in displaying the monument was non-secular" and "the monument's primary effect advances religion." Glassroth v. Moore, 229 F. Supp. 2d 1290, 1299 (M.D. Ala. 2002). Consistent with its recognition that the Ten Commandments have secular aspects, the court noted that it was not holding "that it is improper in all instances to display the Ten Commandments in government buildings . . ." 229 F. Supp. 2d at 1293.

In its ruling, the court noted the specific factual aspects of Moore's monument, as well as statements Moore had made confirming the religious purpose of the monument. For example, the court noted that Moore had emphasized that "the secular quotations were placed on the sides of the monument, rather than on its top, because these statements were the words of mere men and could not be placed on the same plane as the Word of God." 229 F. Supp. 2d at 1295. In fact, Moore rejected the request made by a state legislator that another monument be placed in the rotunda containing Martin Luther King, Jr.'s "I Have a Dream" speech, stating "'The placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments monument.'" 229 F. Supp. 2d at 1297.

The court found that "[n]o part of the monument itself, nor sign, nor other decoration in the rotunda, in any way emphasizes the potentially secular nature of the Commandments." Id. at 1303. "No other Ten Commandments display presents such an extreme case of religious acknowledgment, endorsement, and even proselytization." Id. at 1308. Moore appealed, and the Eleventh Circuit heard oral argument in the case on June 4, 2003.

More than 40 Alabama clergy and religious leaders, including clergy and leaders of various Christian denominations, joined members of the national religious community to file an amicus curiae brief in the Eleventh Circuit urging that court to uphold the district court's ruling. Brief of Amici Curiae Alabama Clergy, et al., Glassroth v. Moore, No. 02-16708-D, 02-16949-D (11<sup>th</sup> Cir.). As these amici explain, Moore's "display of the Ten Commandments in the State Judicial Building flouts the Establishment Clause's command to respect the freedom of conscience because it endorses the Judeo-Christian religious tradition to the exclusion of all others." Id. at 10.<sup>68</sup>

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<sup>68</sup> Even the Liberty Counsel, a religious right legal organization, has recognized the problems with Moore's monument, and hopes the case does not get to the Supreme Court. "The Montgomery monument, and Moore's actions, are too overtly religious, and as such, the case could damage the movement to present religious symbols in government buildings should the U.S. Supreme Court choose to consider it," a Liberty Counsel attorney told the press. "Pro-Moore Rally Planned," Associated Press (Dec. 15, 2002).



The brief filed in the Eleventh Circuit in support of Moore by one of the Alabama Deputy Attorneys General appointed by Pryor is astonishing in its arguments and in its failure to recognize settled Supreme Court precedent. See Brief for Appellant, Glassroth v. Moore, No. 02-16708-DD, 02-16949-DD (11<sup>th</sup> Cir.). For example, the brief makes the remarkable assertion that because Moore’s Ten Commandments monument is not a “law,” the Establishment Clause does not apply. Id. at 17, et seq. This is contrary to decades of Supreme Court precedent holding that the official practices and actions of government representatives must comply with the Establishment Clause. Perhaps most astonishing, the brief argues that because the “police power” is one of the powers reserved to the states by the Tenth Amendment, Moore had the right to install the Ten Commandments monument “to restore the moral foundation of law to the State of Alabama.” Id. at 48. The contention that the Establishment Clause has no application to state officials if they are acting in the name of “morality” has absolutely no basis in the Constitution or Supreme Court precedent and would destroy the separation of church and state insofar as state governments are concerned.

In addition to supporting Roy Moore’s efforts in Alabama, Pryor has used his office to file amicus curiae briefs in the Supreme Court in two different Ten Commandments cases arising in other states, urging the Court to hear appeals from decisions of the federal appellate courts that have barred public entities from maintaining religious displays of the Ten Commandments. Brief for the States of Alabama, et al. in Support of Petition for a Writ of Certiorari, City of Elkhart v. Books, No. 00-1407 (Apr. 12, 2001); Brief of the States of Texas, Alabama, et al. as Amici Curiae in Support of Petitioner, Russ v. Adland, No. 02-1241 (Mar. 27, 2003).<sup>69</sup> In each instance, the Court declined to hear the case, allowing the rulings to stand.<sup>70</sup>

The positions that Pryor has taken in these and other cases are not only extreme, but the language with which he argues them often trivializes the important concerns and legal rights of the litigants involved. For example, in City of Elkhart, which involved a Ten Commandments monument donated to a municipality in 1958 by the Fraternal Order of Eagles, hardly a historic artifact, Pryor’s amicus brief, filed on behalf of Alabama and several other states, claimed that there were “disturbing similarities” between the lawsuit seeking the monument’s removal and the Taliban’s destruction of the historic Buddha monuments in Afghanistan dating from the Third and Fifth Centuries.<sup>71</sup> Pryor’s News Release announcing the filing of his brief was even more shrill: “Just as these ancient statues of Buddha were declared to be ‘shrines of infidels’ and were demolished without regard to their historic and cultural value, so do plaintiffs in cases such as this seek to obliterate any artistic or historic representation with religious references. What happened in Afghanistan was a terrible waste, and I hope the Supreme Court will protect us from

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<sup>69</sup> The appellate decisions are Books v. City of Elkhart, 235 F.3d 292 (7<sup>th</sup> Cir. 2000); Adland v. Russ, 307 F.3d 471 (6<sup>th</sup> Cir. 2002).

<sup>70</sup> City of Elkhart v. Books, 532 U.S. 1058 (2001); Russ v. Adland, 2003 U.S. LEXIS 3264 (Apr. 28, 2003).

<sup>71</sup> Brief for the States of Alabama, et al. in Support of Petition for a Writ of Certiorari, City of Elkhart v. Books, at 2-3.

losing our own great monuments.”<sup>72</sup> Pryor urged the Court to hear the case “before the federal courts are drawn further into a campaign of secular iconoclasm to cleanse public buildings and grounds of religious references.” Alabama Amicus Brief in Elkhart, at 11 (emphasis omitted).

Someone who has such fixed and contemptuous views of other Americans who believe strongly in church-state separation and who find government promotion of sectarian beliefs problematic simply cannot be expected to have an open mind when cases raising these very same issues come before him as a judge.

## VI. PRYOR’S RECORD ON CRUEL AND UNUSUAL PUNISHMENT

- **Defending the “hitching post”**

In Hope v. Pelzer, 536 U.S. 730 (2002), Pryor vigorously defended Alabama’s practice of handcuffing prison inmates to hitching posts in the hot sun if they refused to work on chain gangs or otherwise disrupted them. In 1995, Alabama was the only state in the country that still used chain gangs and the only one that used the hitching post. 536 U.S. at 733. The post was a horizontal bar to which inmates were handcuffed “in a standing position and remain[ed] standing the entire time they [were] placed on the post.” 536 U.S. at 734. The plaintiff in this case, Larry Hope, charged that he had been handcuffed to a hitching post twice, one time for seven hours, during which he was shirtless “while the sun burned his skin. . . . During this 7-hour period, he was given water only once or twice and was given no bathroom breaks. At one point, a guard taunted Hope about his thirst. According to Hope’s affidavit: “[The guard] first gave water to some dogs, then brought the water cooler closer to me, removed its lid, and kicked the cooler over, spilling the water onto the ground.” 536 U.S. at 734-35.

Pryor’s brief contended that Mr. Hope had not been subjected to cruel and unusual punishment in violation of the Eighth Amendment. In fact, Pryor’s brief asserted that “the risks to Hope of pain, dehydration, sunburn, wrist injury, and harassment were hardly greater and perhaps even less than that faced by his fellow inmates who dutifully worked in the sun all day” on the chain gangs. Brief for the Respondent, Hope v. Pelzer, 2001 U.S. Briefs 309, \*22 (Mar. 25, 2002). Pryor contended that the use of the hitching post was justified because the Alabama Department of Corrections considered it to be “a cost-effective, safe and relatively pain-free way to impel inmates to work.” Id. at \*31. Pryor also argued that even if Hope’s Eighth Amendment rights had been violated, the prison officers named as defendants were immune from suit because they had not violated a “clearly established” right. Id.

The Supreme Court rejected both of Pryor’s arguments. According to the Court, “[d]espite the clear lack of an emergency situation, the respondents knowingly subjected [Hope] to a substantial risk of physical harm, to unnecessary pain caused by the

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<sup>72</sup> Bill Pryor, Attorney General, “Pryor Asks U.S. Supreme Court to Stop Removal of Ten Commandments From Indiana City Building,” News Release (April 13, 2001).

handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation. The use of the hitching post under these circumstances violated ‘the basic concept underlying the Eighth Amendment, [which] is nothing less than the dignity of man.’” 536 U.S. at 738 (citation omitted).<sup>73</sup> The Court further held that the prison officers were not immune from suit, explaining among other things that “[t]he obvious cruelty inherent in this practice should have provided [them] with some notice that their alleged conduct violated Hope’s constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity . . . .” *Id.* at 746 (emphasis added).

Pryor immediately criticized the Court’s ruling. Quoting from a dissent by Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia), Pryor assailed the Court for ruling based on “its own subjective views on appropriate methods of prison discipline.”<sup>74</sup>

- **Defending the use of the electric chair**

Pryor is an ardent supporter of the death penalty. While this is unremarkable in America today, Pryor has taken his support to extremes. For example, on behalf of Alabama and four other states, Pryor in 2002 filed an amicus curiae brief with the Supreme Court in Atkins v. Virginia in which he urged the Court not to adopt a per se constitutional rule prohibiting the execution of the mentally retarded. Brief of the States of Alabama et al. in Support of Respondent, Atkins v. Virginia, No. 00-8452, 2000 U.S. Briefs 8452 (Jan. 14, 2002). According to Pryor, there was no national consensus against executing the mentally retarded. Pryor urged the Court to allow the states “to continue exploring the issue of when mental retardation should be a factor negating a capital defendant’s actual responsibility and culpability as opposed to when it is, as it is in Atkins’s case, merely an attempt to avoid execution.” *Id.*, 2000 U.S. Briefs 8452, \*28 (emphasis added). The Court rejected these arguments and held that the 8<sup>th</sup> Amendment prohibits the execution of the mentally retarded, specifically noting that the Amendment “‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’” Atkins v. Virginia, 536 U.S. 304, 311-12 (2002).

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<sup>73</sup> The Court also noted that a report of the United States Department of Justice had found “Alabama’s systematic use of the hitching post to be improper corporal punishment.” 536 U.S. at 737.

<sup>74</sup> News Release, Statement of Attorney General Bill Pryor Regarding U.S. Supreme Court Ruling in Hope v. Pelzer (June 27, 2002), <[http://www.ago.state.al.us/news\\_template.cfm?Record\\_ID=683](http://www.ago.state.al.us/news_template.cfm?Record_ID=683)> (visited May 12, 2003). In a National Public Radio interview about the case on the day it was argued Pryor said, “[a]n Alabama prison is not a fun place. It is not a place where you want to return.” NPR: Morning Edition (Apr. 17, 2002).

In 2000, even as all but two other capital punishment states had moved to more “humane” alternatives to electrocution,<sup>75</sup> Pryor defended Alabama’s continued use of the electric chair. Early that year, the Supreme Court temporarily stayed the execution of an inmate in Alabama who was about to be electrocuted. The inmate had sought Supreme Court review of his claim that the use of the electric chair constituted cruel and unusual punishment in violation of the Eighth Amendment.<sup>76</sup> In the press, Pryor defended the use of the electric chair as “almost painless and instantaneous.”<sup>77</sup>

The possibility of Supreme Court review of the constitutionality of electrocution prompted Alabama legislators to introduce two different bills concerning the state’s method of execution, including one that would have made lethal injection the primary method of execution but would allow an inmate to choose the electric chair. This was similar to legislation that had been adopted by Florida a year earlier and that had ended litigation concerning that state’s use of the electric chair.<sup>78</sup> Pryor made clear that he supported the continued use of the electric chair and opposed a switch to lethal injection: “I do not believe that we should be bullied by the fear that the Supreme Court could rule against us. If the court really feels it’s so important for this issue to be decided, let’s give them a case. . . I do not support this state doing what the state of Florida did.”<sup>79</sup> Nevertheless, two years later, Alabama did pass legislation changing the primary means of execution to lethal injection.<sup>80</sup>

In October 2000, Pryor urged the Alabama State Bar Board of Bar Commissioners not to support a proposed moratorium on the death penalty in Alabama. Impugning the motives of those who have raised concerns about execution of the innocent, Pryor claimed that “the death penalty moratorium movement is headed by an

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<sup>75</sup> Ashley Estes, “Court Blocks Execution, May Review Use of Alabama Electric Chair,” Associated Press (Feb. 5, 2000).

<sup>76</sup> *Id.* The Court, with four justices disagreeing, subsequently declined to hear the case and lifted the stay of execution. In re Robert Lee Tarver, 528 U.S. 1152 (Feb. 22, 2000).

<sup>77</sup> Ashley Estes, “Court Blocks Execution, May Review Use of Alabama Electric Chair,” Associated Press (Feb. 5, 2000). In sharp contrast, the Georgia Supreme Court, in a 2001 ruling holding that electrocution is unconstitutional, stated that “death by electrocution involves more than the ‘mere extinguishment of life’ . . . and inflicts purposeless physical violence and needless mutilation that makes no measurable contribution to accepted goals of punishment. . . Accordingly, we hold that death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition against cruel and unusual punishment . . . .” Dawson v. State, 554 S.E.2d 137, 143-44 (Ga. 2001) (citations omitted).

<sup>78</sup> Phillip Rawls, “AG, Governor Back Lethal Injection as Fallback,” Associated Press (Feb. 2, 2000).

<sup>79</sup> Ashley Estes, “Court Blocks Execution, May Review Use of Alabama Electric Chair,” Associated Press (Feb. 5, 2000) (emphasis added).

<sup>80</sup> Bob Johnson, “Governor Signs Law Changing to Lethal Injection,” Associated Press (Apr. 25, 2002).

activist minority with little concern for what is really going on in our criminal justice system.”<sup>81</sup>

## VII. OTHER CONCERNS

Other concerns about Pryor have been raised by his refusal to join the vast majority of his fellow state attorneys general in bringing suit against the tobacco companies, his open criticism of them for having done so and their criticism of him, and other aspects of his record that raise serious questions about his apparent support for big business interests versus the interests of ordinary citizens.

Although Pryor claimed that the lawsuits against the tobacco industry were not well-founded legally and were an abuse of the legal process,<sup>82</sup> the overwhelming majority of state attorneys general disagreed. This raises questions about whether Pryor, in concluding as he did that the tobacco companies should not be sued when so many other attorneys general disagreed, was exercising bad legal judgment or paying undue deference to corporate interests. It is certainly true that Pryor has portrayed himself publicly as a friend of corporate interests, has frequently spoken to business groups about what he calls the “lawsuit abuse” of his fellow attorneys general, and has urged the business establishment to support the election as attorneys general of others who share his views. In fact, he helped found the Republican Attorney Generals Association, a partisan group that expressly solicits financial contributions from corporations that could find themselves the subjects of lawsuits brought by state attorneys general.

As noted, Pryor was one of the few state attorneys general who refused to join his colleagues in bringing suit on behalf of his state against the tobacco industry to recover health care costs spent by the states in treating smoking-related illnesses.<sup>83</sup> Pryor not only refused to join this nationwide litigation, but he was also openly critical of what his colleagues were doing. In numerous public statements, Pryor criticized these lawsuits, saying that “[t]he tobacco issue, like so many other issues of public health, politics, and economics, does not belong in court.”<sup>84</sup> As Pryor himself stated in 2001, “[f]or the last

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<sup>81</sup> Bill Pryor, Attorney General of Alabama, Remarks to the Alabama State Bar Board of Bar Commissioners Regarding the Moratorium Issue (Oct. 27, 2000), <<http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=38>> (visited June 5, 2003).

<sup>82</sup> See, e.g., Bill Pryor, Attorney General of Alabama, “What Hath the MSA Wrought? The Consequences of the State Tobacco Litigation,” Mississippi Bar Litigation and General Practice Session Annual Meeting (July 13, 2001).

<sup>83</sup> See, e.g., “Alabama Would Get Less From National Settlement Than States That Sued and Settled Individually,” Associated Press (Oct. 17, 1998). As of Oct. 1998, Alabama was “among eight states that [had] refused to sue tobacco companies to recover tobacco-related health costs.” *Id.*

<sup>84</sup> “The Rule of Law and the Tobacco Settlement,” Remarks of Alabama Attorney General Bill Pryor before the Policy Forum of the Cato Institute (Aug. 5, 1997), <<http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=19>> (visited June 5, 2003).

five years, I have written and spoken widely on this subject, always in opposition to the lawsuits.” Bill Pryor, Attorney General of Alabama, “What Hath the MSA Wrought? The Consequences of the State Tobacco Litigation,” Mississippi Bar Litigation and General Practice Session Annual Meeting (July 13, 2001). Pryor expressly linked his refusal to join the tobacco litigation with his limited view of the role of the judiciary, his “majority rules” philosophy, and his perception that the courts have implemented “the liberal agenda” on such issues as “racial quotas, school prayer, abortion, and homosexual rights.”<sup>85</sup> According to Pryor, “[t]hose issues belong in Congress and the state legislatures. The same is true of tobacco.”<sup>86</sup>

A number of state attorneys general, including other Republican attorneys general, severely criticized Pryor. For example: “‘He’s been attorney general for about five minutes, and already he’s acted more poorly than any other attorney general,’ says Arizona Attorney General Grant Woods, the first Republican in that post to sue tobacco companies. ‘I truly believe Alabama would be better off with Richard Pryor.’” Kelly Greene, “Bill Pryor Hopes to Ride Court Crusade to the Top,” *Wall Street Journal* (May 21, 1997).

In August 1997, New York’s Attorney General, Dennis Vacco, a Republican, shared a platform with Pryor concerning the proposed national tobacco settlement. Pryor began by defending his decision not to sue the tobacco industry and repeating his then-familiar claim that the tobacco issue “does not belong in court.”<sup>87</sup> Vacco responded by explaining “this Republican’s perspective on public health and the need for the type of aggressive action that the attorneys general of this nation [took] . . . [T]his is a public health issue of national proportions, so we can’t rely exclusively on the domain of the respective state legislatures . . . [T]his is indeed a public health issue that required the collective aggressive efforts of the attorneys general to move the debate on this topic.” *Id.* (emphasis added).<sup>88</sup>

Mike Moore, Attorney General of Mississippi and the first attorney general to sue the tobacco companies, charged that “‘Bill Pryor was probably the biggest defender of tobacco companies of anyone I know. He did a better job of defending the tobacco companies than their own defense attorneys.’” Eric Fleischauer, “Pryor Called a Tobacco Sellout,” *Decatur Daily News Online* (Oct. 30, 2002). “‘We were telling him, ‘You’ve

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<sup>85</sup> Bill Pryor, “Litigators’ Smoke Screen,” *Wall Street Journal* (Apr. 7, 1997).

<sup>86</sup> *Id.* (emphasis added).

<sup>87</sup> Transcript, The Cato Institute Sponsors a News Conference on the Tobacco Settlement (Aug. 5, 1997).

<sup>88</sup> Pryor’s exchange with Vacco was testy enough to be reported on by the Associated Press: “Attorney General Bill Pryor’s contention that the national tobacco litigation was started by liberal attorneys general drew fire from New York’s top prosecutor, a Republican like Pryor. New York Attorney General Dennis Vacco bristled at Pryor’s comment, saying the tobacco agreement is conservative because it is an example of states rising up to settle a nationwide health problem.” “Alabama AG’s Tobacco Views Clash With New York Prosecutor,” Associated Press (Aug. 6, 1997).

got to get in this thing; we can win this,” but he fought us every step,’ Moore said.” Id. Moore was particularly disturbed that a memo Pryor did “‘saying the cases were frivolous, saying that we could not win’ . . . ended up in the hands of the tobacco companies.” Id.

Pryor’s refusal to sue the tobacco industry caused divisiveness within his own state, as others in Alabama tried to bring suit when Pryor would not. For example, contending that “his office must approve all suits filed by state entities,” Pryor successfully moved to dismiss a lawsuit against the tobacco companies brought by the University of South Alabama, which operates a teaching hospital and was attempting to recover the millions of dollars it spent annually “treating poor people for tobacco-related illness . . .”<sup>89</sup> This prompted the University’s President to say, “I told him that Mr. Pryor you have three options: you can sue me in state court, you can sue me in federal court or you can put me in jail.”<sup>90</sup>

Don Siegelman, then-Lieutenant Governor of Alabama and a former Attorney General, fared no better when, without Pryor’s approval, he brought his own suit representing individual Alabama taxpayers. Phillip Rawls, “Judge Puts Future of Tobacco Lawsuit in Bill Pryor’s Hands,” Associated Press (Aug. 29, 1997). This suit too was dismissed because Pryor would not participate. “Judge Dismisses Tobacco Lawsuit Seeking Damages for Alabama Taxpayers,” Associated Press (Sept. 25, 1997); Jessica Saunders, “Judge Approves Alabama’s Participation in National Tobacco Settlement,” Associated Press (Mar. 3, 1999).<sup>91</sup>

Finally, in late 1998, then-Governor Fob James of Alabama filed suit against the major tobacco companies. Phillip Rawls, “James, Pryor in Legal Duel, \$2.9 Billion at Stake,” Associated Press (Nov. 13, 1998). According to the press, James was “tired of delays in the negotiations between attorneys general and tobacco companies aimed at reaching a new national tobacco settlement.” Id. This sparked a feud with Pryor, who immediately filed his own lawsuit “to make sure Alabama participates fully in the proposed national settlement.” Id. Pryor’s suit, however, was described as a breach of contract lawsuit, with Pryor claiming that in not suing the tobacco companies, he was relying on “behind-the-scenes promises from the tobacco industry that Alabama would get a financial deal comparable to that of any state that sued and won a settlement.”

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<sup>89</sup> Garry Mitchell, “University’s Lawyers Say AG Has No Authority To Block Liggett Suit,” Associated Press (May 9, 1997). See University of South Alabama v. American Tobacco Company, 1997 U.S. Dist. LEXIS 12379 (S.D. Ala. 1997), rev’d on other grounds, 168 F.3d 405 (11th Cir. 1999).

<sup>90</sup> Brian Cabell, “Alabama Attorney General Not Suing Tobacco Industry,” CNNfn: Before Hours (May 27, 1997).

<sup>91</sup> According to the press, three weeks after Pryor blocked Siegelman’s suit, seven tobacco lobbyists helped host a fundraiser for Pryor in Washington, D.C., and four of them made their own contributions to his campaign. See David Pace, “Tobacco Lobbyists Help Host Campaign Fund-raiser for Alabama Attorney General,” Associated Press (Oct. 21, 1997); Bill Poovey, “Pryor, Baker Say No Reason For Taxpayers to Know Yet About Tobacco Talks,” Associated Press (July 22, 1998).

“Pryor Says He Had Behind-the-Scenes Assurances from Tobacco Industry While Not Suing,” Associated Press (Nov. 14, 1998) (emphasis added). Pryor’s lawsuit asserted that, “based on the tobacco companies’ assurances, ‘The State of Alabama did forbear from instituting a lawsuit against the defendants.’” Id.

Alabama ultimately received approximately \$3 billion in the settlement with the tobacco companies. Eric Fleischauer, “Pryor Called a Tobacco Sellout,” *Decatur Daily News Online* (Oct. 30, 2002). The press reported that Alabama was getting less in the settlement than were states that had sued and settled individually. “Alabama Would Get Less From National Settlement Than States That Sued and Settled Individually,” Associated Press (Oct. 17, 1998). According to Mississippi Attorney General Mike Moore, Alabama’s \$3 billion was half the amount, per capita, that Mississippi received. Eric Fleischauer, “Pryor Called a Tobacco Sellout,” *Decatur Daily News Online* (Oct. 30, 2002). Moore told the press, “Pryor’s courting of tobacco companies cost Alabama billions.” Id.<sup>92</sup>

Pryor, an NRA member and opponent of gun control legislation,<sup>93</sup> has been as vocal a critic of government lawsuits against gun manufacturers as he was of the tobacco litigation, calling such lawsuits “litigation madness.”<sup>94</sup> He has exhorted the gun industry “to take these suits seriously; assemble the finest legal teams that you can afford; build a broad coalition to counterattack in the legislative arenas; and never, never surrender.”<sup>95</sup>

Pryor has used his opposition to government lawsuits against the tobacco and other industries to urge the election of more attorneys general who share his ideology,

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<sup>92</sup> In a 1998 speech, Senator Richard Shelby said that “he would have sued, if the decision had been his.” “Alabama Would Get Less From National Settlement Than States That Sued and Settled Individually,” Associated Press (Oct. 17, 1998).

<sup>93</sup> See Bill Pryor, Attorney General, “Pryor Received N.R.A. Institute’s Highest Honor,” News Release (May 21, 2001).

<sup>94</sup> Bill Pryor, “Trial Lawyers Target Rule of Law,” *Atlanta Journal Constitution* (Jan. 13, 1999).

<sup>95</sup> “‘The Smoking Gun’ – The Next Case of Lawsuit Abuse,” Address of Alabama Attorney General Bill Pryor to the American Shooting Sports Council, Annual Convention (Feb. 1, 1999). In 2001, Pryor received the NRA’s Harlon B. Carter Legislative Achievement Award, “the highest tribute conferred by the National Rifle Association’s Institute for Legislative Action.” News Release, Bill Pryor, Attorney General, May 21, 2001. In presenting Pryor with this award, the NRA stated: “General Pryor has launched a comprehensive program of Second Amendment advocacy . . . the reach of which has extended far beyond the borders of his own state. General Pryor has taken a leading role in fighting the frivolous municipal lawsuits against the firearm industry.” Id. Pryor’s release stated that “[i]n Alabama, Pryor helped draft and lobbied for passage of laws that provide the firearms industry immunity from municipal lawsuits, preempted local gun control ordinances, and repealed the two-day waiting period for handgun purchases.” Id.



specifically targeting his remarks to the business community. In a 1999 speech, Pryor stated,

the business community must be engaged heavily in the election process as it affects legal and judicial offices. Frankly, this need is the most important of all. . . [T]he recent tobacco and gun suits demonstrate the importance of state attorneys general elections. The recent formation by the Republican National Committee of the Republican Attorneys General Association, of which I am Treasurer, hopefully will help elect more conservative and free market oriented Attorneys General.<sup>96</sup>

The Republican Attorneys General Association (“RAGA”) was “conceived by” Pryor.<sup>97</sup> According to press accounts, two concerns have been raised about RAGA: the ethics of a state’s chief prosecutor soliciting funds from businesses that he or she could be suing, and the fact that corporate funds contributed to RAGA are untraceable because “[t]he money raised by RAGA flows through the Republican National Committee, where it is mingled with other funds and can then be given to state parties, to candidates, or to related issue-oriented campaigns. The public can’t follow who specifically gave to RAGA, or how that money was spent.”<sup>98</sup> According to one account:

Republican state attorneys general are soliciting large contributions from corporations that are embroiled in — or seeing to avert — lawsuits by states. . . Membership in RAGA costs anywhere from \$5,000 to \$25,000, with increasing levels of access to the attorneys general depending on the donation. . . [T]here is no way of knowing which companies have contributed to RAGA or how much. . . Several present and past attorneys general, Republican and Democrat, complain that RAGA puts attorneys general in the position of asking for money from potential or even actual defendants. . . Asked why he did not join the group, Pennsylvania Attorney General Mike Fisher said, “I’m a Republican and I try to keep politics out of my business as attorney general.” “We’re a family, and families can disagree,” Grant Woods, former Republican attorney general of Arizona, told the National Association of Attorneys General during a discussion about RAGA at its spring meeting here last week. “But don’t do this.”<sup>99</sup>

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<sup>96</sup> “Curbing the Abuses of Government Lawsuits Against Industries,” Presentation by Bill Pryor, Attorney General of Alabama, Civil Justice Reform Group Steering Committee (Dec. 8, 1999) (emphasis added), <<http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=16>> (visited June 5, 2003).

<sup>97</sup> George Lardner, Jr. and Susan Schmidt, “GOP Attorneys General Solicit Large Contributions From Corporations that Are Embroiled in Lawsuits,” *Washington Post* (Mar. 30, 2000).

<sup>98</sup> Robert Tanner, “Questions Raised as Power of Attorneys General Grows,” *Houston Chronicle* (July 22, 2001).

<sup>99</sup> George Lardner, Jr. and Susan Schmidt, “GOP Attorneys General Solicit Large

Republican Betty Montgomery, Attorney General of Ohio, initially joined RAGA but withdrew, saying that “I raised some questions about who we were raising money from. It wasn’t worth trying to sort out what the ethical land mines are.”<sup>100</sup> Republican Carla Stovall, Attorney General of Kansas, also refused to join RAGA, stating “It’s really not for any group of Republican attorneys general or Democratic attorneys general to dictate what Kansas or Colorado or anyplace else ought to have in play.”<sup>101</sup>

In terms of tracing the monies donated to RAGA, it has been written that

[i]t is impossible to know the full extent of the support that RAGA received from industries that face state lawsuits because RAGA does not disclose its donors. Instead, it directs individuals, PACs and corporations to make stealth contributions to RAGA in the name of the Republican National State Elections Committee (RNSEC). This much larger PAC does report its expenditures and contributions. But neither RNSEC nor RAGA will reveal which of the \$162 million in contributions that RNSEC received in the 2000 election cycle belong to RAGA. Phillip Morris and the National Rifle Association are two of the RNSEC’s top donors. Georgetown University election law specialist Roy Schotland has said that RAGA’s fundraising scheme is practically akin to money laundering.

Andrew Wheat, “Attorneys General for Sale?”, *Multinational Monitor*, Vol. 22, No. 6 (June 2001) (emphasis added).<sup>102</sup>

When Pryor was elected chair of RAGA in early 2001, he said he was “grateful for the confidence of my colleagues to lead this organization as we continue our agenda of . . . promoting the free market and limited government.”<sup>103</sup> Pryor himself has specifically solicited the business community for support. For example, in January 2002, he spoke before the U.S. Chamber of Commerce Committee and stated point blank that “I want to address this morning the indispensable role that the business community must play in the election of fair and pro-business state attorneys general.” Remarks of Attorney General Bill Pryor to the U.S. Chamber of Commerce Committee (Jan. 26, 2002) (emphasis added). “If you think that the office of state attorney general in your state is an unlikely source of mischief, think again. My warnings this morning are not based on speculation

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Contributions From Corporations that Are Embroiled in Lawsuits,” *Washington Post* (Mar. 30, 2000).

<sup>100</sup> “Montgomery Leaves Group for GOP Attorneys General,” *Columbus Dispatch* (Apr. 4, 2000).

<sup>101</sup> Robert Tanner, “Questions Raised as Power of Attorneys General Grows,” *Houston Chronicle* (July 22, 2001).

<sup>102</sup> <<http://www.multinationalmonitor.org/mm2001/01june/june01corp2.html>> (visited June 6, 2003).

<sup>103</sup> “A.G. Pryor Elected Chairman of Republic Attorneys General Association,” Associated Press (Mar. 8, 2001).

or conjecture. I know my colleagues. We meet regularly at conferences of the National Association of Attorneys General. We discuss our philosophies and agendas. Many of my colleagues are enemies of free enterprise.” *Id.*<sup>104</sup>

Although Pryor’s job as Attorney General is to protect the rights of all of Alabama’s citizens, he has shown a disturbing tendency to favor the interests of big business. Pryor’s record as a friend of big business and as a hostile, vocal critic of so many of his own fellow attorneys general on business-related issues raise serious concerns about how, if confirmed, he would rule with respect to the rights and interests of ordinary Americans.

## CONCLUSION

As this report demonstrates, William Pryor has endeavored throughout his career to push the law to conform to his extreme right wing ideology and legal views. Based on Pryor’s record, the *Atlanta Journal-Constitution* has concluded that Pryor’s nomination “is an affront to the basic premise that a candidate for the federal bench must exhibit respect for established constitutional principles and individual liberties. Pryor may be a good lawyer and a faithful Republican, but his lifelong extremism disqualifies him for a federal judgeship.” Editorial, “Right-wing Zealot is Unfit to Judge,” *Atlanta Journal-Constitution* (May 6, 2003) (emphasis added).

The federal courts of appeal play a critical role in our judicial system, second in importance only to the Supreme Court. Because the Supreme Court hears so few cases, the courts of appeal really are the courts of last resort for most Americans, giving a federal appellate judge considerable power to impose his or her own jurisprudential views in a particular case. And particularly because the Supreme Court hears so few cases, the protection of civil and constitutional rights by the judiciary depends in large measure on the appellate courts.

William Pryor’s record as documented in this report, including his extreme right wing ideology, does not support elevating him to a lifetime position on the Eleventh Circuit. Far from meeting the burden of demonstrating a record of commitment to “protecting the rights of ordinary Americans” and to “the progress made on civil rights, women’s rights and individual liberties,” Pryor has tried to turn back the clock on these significant matters. In testimony that Pryor gave before a subcommittee of the Senate Judiciary Committee in 1997, Pryor told the committee that “your role of advice and consent in judicial nominations cannot be overstated.”<sup>105</sup> We could not agree more. Ordinary Americans cannot afford to have William Pryor sitting in judgment on their rights and interests. The Senate Judiciary Committee should reject Pryor’s confirmation.

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<sup>104</sup> Pryor expressed the same sentiments to the American Tort Reform Association last year. Remarks of Attorney General Bill Pryor at the 2002 Annual Membership Meeting of the American Tort Reform Association (Mar. 14, 2002).

<sup>105</sup> “Judicial Activism: Assessing the Impact,” Testimony of Alabama Attorney General Bill Pryor before the U.S. Senate Judiciary Committee, Subcommittee on the Constitution, Federalism & Property Rights (July 15, 1997).