Going to Hell in a Handbasket: Courts and Religion in America

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> [O]ften the news of American public schools is about plummeting SAT scores, gay and lesbian clubs, body piercing, robbery and sexual assaults of teachers and students, along with an infusion of radical anti-American and antiwar bias of the liberal teachers' popular culture. And sometimes we see news of other things that are more heartbreaking, such as the tragedies at Columbine, Jonesboro, Springfield, Paducah, Pearl and other places. And yes, we know where it all comes from (Robertson, 2004, 105).

Where "it" all seems to come from are the decisions American federal and state courts, in which, according to Robertson and other leaders of the New Christian Right, religion and morality have been banished from the schools and the public square. The American judiciary's abandonment of "Biblical Natural Law" beginning is the early 1960s is responsible for the rise of sexually transmitted diseases among the young, the decline of educational achievement, the erosion of family stability and the increase in the number of reported violent crimes (Barton, 2000, 242-246). The decisions of the federal courts are particularly alarming because they are the product of an unelected, unaccountable set of liberal elites in black robes. These decisions thwart the will of the representatives of the people thereby undermining the core principle of a republican form of government. From the floor of the United States Senate, Richard Shelby denounced "activist judges" who have "worked diligently to restrict our rights to express our religious beliefs under the guise of separation of church and state."[1] Every December Americans get to see for themselves the latest forays in the secular "War on Christmas," in which courts seems to be allied with the wrong side. For the New Christian Right the time is now to end the "judicial tyranny" (Traditional Values Coalition, 2005).

There is no standard definition of the "New Christian Right." This paper uses a definition based on Brown (2002, 2): a highly decentralized group of believers strongly rooted in conservative Christian evangelism. This group includes denominational and nondenominational evangelical churches. All members of the New Christian Right share the following core beliefs: "the inerrancy of the Bible, the divinity of Jesus Christ, the need for personal conversion" (i.e. being 'born again'), "and the necessity of religious activism or 'witnessing' to bring about the conversion of others" (Brown, 2002). Persons adhering to these

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[1] Shelby, R. (2006). "Constitution Restoration Act." Congressional Record: 6150.

beliefs were and still are referred to as "Fundamentalists." Today the term "Fundamentalist" for some has taken on a negative connotation. Here, the term "Evangelical" will be used in its place, except when "Fundamentalist" or "Fundamentalism" are the historically correct terms. The definition of "Christian Nationalism" is based on that of Goldberg (2006 ,6): an ideology based on the belief in the literal truth of the Bible, and which extrapolates from this belief a total program binding together religion and politics. The New Christian Right and Christian Nationalists have allied themselves strongly with the Republican Party in America.

This paper will begin by sketching just enough history of Protestant religious activism in the United State to provide some context for understanding the New Christian Right today. The paper will move to examine the New Christian Right's assault on the "least dangerous branch" of government in the United States.[2] The New Christian Right finds a number of areas in constitutional law particularly troublesome: personal autonomy (which includes issues such as the legal status of abortion and the protection of private, consensual adult sexual behavior) and equal protection (which includes recent decisions on the status of women, and gay persons and lesbians) and freedom of speech issues especially concerning the regulation of obscenity and indecency. It is impossible to review all of these legal issues in the course of this paper. Therefore, the paper will be limited to a look at only those court decisions that were based on the religion clauses of either the national or the states' constitutions. After all, the argument goes that the banishment of religion in public discourse and public school led the nation down its decadent path.[3] The objective here is to discover exactly what American courts of last resort doing to religion in the public life of America and to determine whether the criticisms directed at the courts are justified.

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[2] The phrase "least dangerous branch" is taken from Federalist No. 78: Hamilton, A. (1788). "Federalist No. 78." from http://thomas.loc.gov/home/histdox/fed_78.html.

[3] Barton (2005, 242-246) dates the "rejection of Biblical Natural Law" to 1962-1963. The year 1962 saw the Supreme Court's decision in (1962). Engel v. Vitale. U.S., Supreme Court. **370:** 421. eliminating the possibility of even a generic prayer in public schools (1963). Abington School District v. Schempp. U.S., Supreme Court. **374:** 203., which held Bible reading in public school in public schools also violated the First Amendment, was decided in 1963.

Religion in Conservative Politics

It is undisputed that Christian religion and the quest for religious freedom came to the New World with the first colonists from England.[4] These colonies first—and later the United States—experienced occasional outbreaks of religious fervor. The First Great Awakening began soon after a diphtheria epidemic swept the New England states in 1835. Contemporary medicine offered nothing to assuage the infected or contain the disease, contributing to the development of an "anti-rationalist reaction" (Shute 1976).[5] At the same time there was the perception that Protestant churches in America had fallen into complacency, "apathy… replaced self-sacrifice and zeal; worldliness and indifference had crept in to corrupt. if not destroy. the true essence of Christian faith."[6] The time had come for revival. Evangelical ministers and laymen preached the need for "true conversion," a "spiritual rebirth" and led their followers to a "new, more intense, more emotional religious experience."[7] What these new preachers lacked in formal theological training, they more than made up for in their passion. They gained their congregations at the expense of the graduates of the theology schools at Yale and Harvard who held a monopoly in the churches of New England (Schmotter 1979). Thus new Christian denominations grew up along side the traditional churches, with the concomitant competition for souls. As the excitement for the camp meetings and revivals diminished among the people, the First Great Awakening came to a close (Marty 1984).

The Second Great Awakening, which dates from *circa* 1780 to 1830, is seen as a "conservative assertion of a new mode of religious authority by ministers, fearful of losing their traditional role…in society, tried to tame the rising tide of democracy" as the United States expanded westward (Mathews 1969). It was also a reaction against some elements of the Enlightenment: its revolutionary character; its secularization; its emphasis on reason and science. The Awakening can also be viewed as an "organizing process that helped to give meaning and direction to people suffering in various degrees from the "social strain" of a nation undergoing profound change. For many scholars, the Second Great Awakening was also

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[4] This paper will not address the question of whether "this is a Christian Nation," as Justice Brewer believed in (1892). Church of The Holy Trinity v. United States. U.S., Supreme Court. **143:** 457.

[5] Shute (1976) is careful to note that the diphtheria epidemic should not be viewed as the cause of the First Great Awakening.

[6] Labaree, L. W. (1944). "The Conservative Attitude Toward the Great Awakening." The William and Mary Quarterly **1**(No. 4): 331-352. p.333

[7] Ibid. Labaree notes that emotionalism and appeals to emotion also mark later American religious revivals.

characterized by an unprecedented expansion of religious feeling in which the faithful were overwhelmed with "emotionalism and devout piety," and held "heart over reason." The itinerant preachers of this era instinctively understood elements of what would be called today social psychology. Their homiletic method emphasized first, the dire state of human affairs thereby inducing a state of intense mental agitation, which, the preacher claimed, could be quenched by penance and a return to God.[8]

The "social strain" on Americans accelerated by the end of the Second Great Awakening. The mid-to-late 19th Century brought new waves of immigration: first the Irish; and then non-English-speaking persons from Southern and Eastern Europe. The new immigrants added to religious diversity in the United States, making Catholics and Jews significant religious minorities. The Civil War had devastated the South and prompted revolutionary changes in government in the United States.[9] Newly emancipated slaves added to the an already complicated demographic mixture. Church membership grew during this period, not because of "benign competition" among various traditions competing for believers, but because of deep cleavages in American society (Blau 1993). Nativists were hostile to the new immigrants; racists despised the emancipated slaves[10]. Ethnic diversity was but one contributor to social strain. Cities grew, along with their particular problems. The nation's economy changed. Women made inroads into the male domain of politics (McGerr 1990). These factors caused many Americans to "search for a secure identity in the face of rapid socioeconomic and cultural changes; [the aftermath of the emancipation of slaves]; growing income gaps; changes in the status of women, the family, and sexual mores" (Keddie 1998).

Advances in the science of geology—notably Charles Lyell's *Principles of Geology*—and the ideas of Charles Darwin—articulated in *Origin of Species*--presented profound problems for any Christian subscribing to the tenet of the literal inerrancy of the Bible.[11] By the early1870s, many religious leaders had reconciled faith with science through the notion of "theistic

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[8] Mathews, D. G. (1969). "The Second Great Awakening as an Organizing Process, 1780-1830: An Hypothesis." American Quarterly, **21**(No. 1): 23-43.

[9] The revolution was three amendments to the Constitution, which put unprecedented restraints on the power of the states. See: (1866) Amendment XIII; (1868). Amendment XIV. (1870). Amendment XV.

[10] For a Nativist political response to the presence of the Irish in America and the development of private schools, see: Green, S. K. (1992). "The Blaine Amendment Reconsidered." American Journal of Legal History **65**: 38-69.

[11] For a good overview of the conflict between religion and science in American history, see: Numbers, R. L. (1985). "Science and Religion." Osiris, 2nd Series **1**(Historical Writing on American Science): 59-80.

evolution." God was indeed the origin of all that is; evolution described the process by which human beings, animals and plants came to be what they are today. The Biblical account of the Creation in Genesis is treated as figurative not literal (Marsden 1984). Darwin's second book, *The Descent of Man*, posed yet another and perhaps more disturbing problem for the faithful. Here, Darwin specifically argued against the idea of "special creation," the idea that human beings arose through a unique act of the deity, and are descended from a single pair, Adam and Eve. Darwin instead argued explicitly that human descended from lower forms of primates. The *Descent of Man,* more so *than Origin of Species,* put Darwin and evolution at odds with any literal reading of the Bible. The concept that there were monkeys swinging through the human family tree horrified those who believed that the Bible was revealed literal Truth.

The Evangelical response took the form of the Presbyterian General Assembly's 1910 list of "five fundamentals," which were seen as the "rock bottom of Protestant Christianity:" the miracles of Christ; His virgin birth; His bodily resurrection; His sacrifice upon the cross; and the Bible as the directly inspired word of God (Williams 1980). A very public confrontation between Darwinism and Fundamentalism came in the celebrated "Scopes Monkey Trial," in which Tennessee's anti-evolution law was challenged. As Williams (1980) describes it, the trial represented for Fundamentalists and Darwinists "an almost apocalyptic, archetypical confrontation."[12] Despite high hopes for a definite resolution of the Bible *versus* Darwin controversy, the outcome of the case was a disappointment for all concerned. Scopes' appeal to the Supreme Court of Tennessee resulted in a majority opinion in which the majority dismissed the constitutional challenges as "of little merit."[13] Nevertheless, Scopes' conviction was overturned. The state court of last resort found that the trial court had made a single, technical error because the judge, not the jury as required by law, fixed the amount of the fine.

The Scopes Monkey Trial did not result in a constitutional ruling by either the Tennessee supreme court or the United States Supreme Court. However, the outcome of that trial had some important effects for Evangelic Christians in American law and society.[14] Until the conclusion of the trial Evangelicals helped introduced 37 anti-evolution bills to state legislatures, of which three were adopted (Nelkin 1982). After Scopes, Evangelicals suspended their efforts to ban the

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[12] p. 164

[13] (1926). Scopes v. State. Tennessee, Supreme Court of Tennessee. **154:** 105. at p. 111.

teaching of evolution in public schools, but they enjoyed success on another front. Local school board members, who were either Evangelical Christians themselves or sympathetic to their concerns, managed to have evolution removed from or diluted in the textbooks selected for the public schools. This feat was accomplished by threatening to exclude biology textbooks that contained evolution from adoption by the school districts. No textbook publisher was willing to forfeit a large market, so science was given up instead. William Jennings Bryan had linked science to the moral decay of the Roaring Twenties. Science in general and evolution in particular were seen as encouraging the materialism, thereby laying the foundation for corruption. The Scopes trial demonstrated the desire of parents to control the education of their children. Why should a teacher be required to educate a child in a subject the parents believe is dangerous or inappropriate? Finally and unfortunately, evangelical Christians were rendered into caricatures . Science should not be determined by "the votes of shop girls and farm hands ignorant alike of science and of the foundation principles of our civil society" (Nelkin 1982).

The late 1920s saw the beginning of the use of electronic media—radio— by religious leaders. Evangelical Christians concluded early on that radio broadcasting was an effective means by which the word of God could be spread. Early religious radio broadcasts included representatives from outside the Protestant tradition. Michigan's Catholic radio priest, Father Charles Coughlin, started broadcasting in 1926 and at the height of his popularity he drew 4 million listeners. Even today religious radio broadcasting eclipses religious television programming.[15] Later decades saw Evangelic conservatives preoccupied first with the Depression and Prohibition; and then with World War II. The teaching of evolution did not become an issue until the United States revised its science curriculum so as to stay ahead of the advances achieved by the Soviet Union in science and technology.

The Supreme Court and the New Christian Right

The Supreme Court began to make decisions erecting a wall of separation between Church and State by the middle of the 20th Century. In 1940, the Court held that the religion clauses of the First Amendment limited actions taken by the states as well as the national government

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[14] Nelkin, D. (1982). "From Dayton to Little Rock: Creationism Evolves." Science, Technology, & Human Values, 7(40): 47-53.

(*Cantwell v. Connecticut*).[16] By 1948, the Court found that the practice of allowing public school students "released time" for religious instruction on campus violated the Establishment Clause of the First Amendment (*McCollum v. Board of Education*, (1948)) As public issues, these cases were overshadowed first by the Second World War, and subsequently by the Cold War and the threat of worldwide nuclear annihilation. The 1960s, with its drug experimentation, feminists, anti-war protestors and civil rights activists, presented a disturbing spectacle to the culturally conservative. Evangelicals and conservatives reacted to the "Summer of Love' much as they had to the *Descent of Man*. Additional decisions of the Warren Court and early Burger Court added to the alarm.[17] Beginning in 1954, the Supreme Court desegregated the public schools (*Brown v. Board of Education*) and later recognized that the federal judiciary had a number of powerful tools in its kit to enforce that constitutional requirement (*Swann v. Charlotte-Mecklenburg Board of Education* (1971). It held that the First Amendment protected some of the crudest forms of expression (*Cohen v. California(1971))* and tolerated books, magazines and films with very explicit sexual content (*Roth v. United States (1957)).* In two important free-speech cases (*Brandenburg v. Ohio (1968)*; *Hess v. Indiana (1973))* the Court ruled that the First Amendment fully protected all forms of advocacy of unlawful conduct. So long as a speaker stopped just short of inciting someone to do a specific criminal act—right here and right now—the speaker's words fell well within the shield of the guarantee of freedom of speech. The justices of the Warren Court era were extraordinarily protective of the constitutional rights of criminal defendants (e.g., *Miranda v. Arizona (1966)*; *Mapp v. Ohio (1961)*; *Gideon v. Wainwright (1963)*), giving some the strong impression that the Court was more concerned with coddling malefactors than with enforcing society's criminal laws.

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[15] The information in this paragraph was drawn from: Hadden, J. K. (2000). Religious Broadcasting, University of Virginia.

16 The original understanding of the Bill of Rights was that it requirements limited only the national government (1833). Barron v. Mayor and City Council of Baltimore. U.S., Supreme Court. 32: 243. By the beginning of the 20th Century the Supreme Court held that the Fourteenth Amendment's due process clause required that some rights and liberties contained in the Bill of Rights may also apply to the states (1908). Twining v. New Jersey. U.S., Supreme Court. 302: 319.

[17] The Warren Court, (the Supreme Court under the leadership of Chief Justice Earl Warren) dated from 1954 to 1971. The Burger Court dated from 1971 to 1986.; the Rehnquist Court from 1986 to 2005.

Both the Warren and early Burger Courts also made decisions on the religion clauses of the First Amendment.[18] In 1961, the justices determined that Maryland's oath of office, which required the office holder to declare a belief in God, was unconstitutional under the First Amendment's guarantee of the free exercise of religion (*Torasco v. Watkins*). The next year the Court found that the Establishment Clause prohibited the required recitation of a state-authored, nondenominational prayer at the start of the day in all public schools (*Engel v. Vitale*). State-required Bible-reading went the way of school prayer in (*Abington School District v. Schempp*) in 1963.

Members of the New Christian Right do not the carry membership cards of any particular organizations, thereby making it difficult to determine the number of participants in the movement. Michael Lienesch (1982, 2) put the number of conservative Christian evangelicals at 50 million, and the number of conservative allies from other religious traditions (Roman Catholics, Mormons and Orthodox Jews) at 30 million. A number factors contributed to the rise of the New Christian Right as the political force it is today.[19] Bruce (1998 478) argues that the core constituency—the shop girls and farm-hands of the Sun Belt and Bible Belt—felt increasingly pressured by forces they could not control. American public policy had become centralized, which had the effect of imposing cosmopolitan values on what had been insular and homogeneous communities. Bruce gives the excellent example of the Supreme Court's ruling in *Brown v. Board of Education*. A decree from nine men in Washington effectively ended (and rightfully so) a culture and a traditional way of life. The 1960s and 1970s witnessed the transformation of notions of the proper role for women in society (Keddie 1998). Women were given reproductive choice and opportunities for employment outside the home. As has been the case in American society, one reaction to social strain has been the revival of religion and morality, and a call for the return to traditional values.

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[18] The Warren Court is often held up as an exemplar of an "activist" Court run amok. School desegregation decisions in particular generated sometimes violent reactions in the South. Highway billboards carried the message "Impeach Earl Warren," as did automobile bumper stickers. Conservatives sometimes ignore the contributions of the Republican-dominated Burger Court. The reviled Roe v. Wade was a product of the Burger Court.

[19] Some scholars dispute the claim that the New Christian Right is or has been a significant influence on politics. (See for example: Lienesch, M. (1982). " Right-Wing Religion: Christian Conservatism as a Political Movement." Political Science Quarterly **97**(No. 3): 403-425. and Bruce, S. (1990). "Modernity and Fundamentalism: The New Christian Right in America." The British Journal of Sociology **41**(No. 4): 477-496.

There is no consensus date for the inception of the movement, but it is safe to say that the beginnings may be found in the 1970s though the early 1980s. Televangelists were essential messengers of political as well as religion instruction. This preliminary stage of the movement could not be labeled an overwhelming success. While movement leaders garnered followers and publicity with vituperative rhetoric, they failed to develop an organizational structure to turn followers into active citizens.[20] By the end of the 1980s, the late Reverend Jerry Falwell had shuttered his "Moral Majority" (Rozell 1996). The midterm congressional elections in 1994 resuscitated what could have been a moribund movement. Voters unhappy with the first two years of President Clinton's administration registered their disgust by giving control of both houses of Congress to the conservative Republican party. Here, then, was hope for a second chance. This time Christian conservative leaders developed a grassroots network of churches that preached the need for political action. And Christian conservatives began to infiltrate the lower tiers of the Republican leaders (Bruce 1998 p.480).[21] Evangelic "megachurches" began to function as well-oiled conservative political machines, and organizations such as the Family Research Council formed to create and maintain networks of evangelical leaders (Goldberg 2006).[22]

Court Decisions on Religion

Methodology

All cases in this data set were drawn from decisions of each state's court of last resort and the U.S. Supreme Court. The cases were identified with the LEXIS search: "free! w/5 religion w/30 constitution." No date delimiter was used; the search went as far back in time as the LEXIS database allowed. The state search yielded 764 appellate court decisions, of which less than half were decisions of the state court of last resort. Of those court of last resort decisions, 163 reached issues on either the Free Exercise or Establishment clauses under the U.S.

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[20] Rozell and Wilcox (1996) argue that two additional factors contributed to the rapid demise of the movement. Intolerance alienated potential supporters such as conservative Catholics and Jews, and the leadership made little effort to broaden the appeal of the movement.

[21] These and other tactics are described in detail in Goldberg, M. (2006). Kingdom Coming: The Rise of Christian Nationalism. . New York, W.W. Norton & Company.

[22] Pages 57-61.

Constitution, the state's constitution or both. The search of U.S. Supreme Court decisions yielded 240 decisions, of which 98 were decided under the religion clauses. The large number of excluded cases is a result of a tendency on the part of judges to cite the First Amendment as a rhetorical flourish in a case about something else. Judge also are prone to cite the entire Amendment in cases not involving the religious clauses. Thus many decisions on free speech or assembly appeared in the initial LEXIS search.

Findings

American courts cannot, on their own initiative, choose whether, when and how to inject themselves into American public policy on the relationship between Church and State. Courts behave strictly as reactive and passive participants in governing. They need to wait for two real contesting parties to ask the court to decide between two conflicting claims. It is not as if courts go looking for trouble—they cannot. And litigants do indeed come to court. However, that does not mean that "our Black-Robed Masters" on the Supreme Court decide rafts of cases on the religion clauses in the Constitution, the outcomes of which go against religious interests. In 2006, a total of 259,541 civil and criminal cases were filed in the federal District Courts (Roberts 2007). Of that number, 66,618 decisions were appealed to the Circuit Courts of Appeal. Ultimately, 8,521 cases were brought before the Supreme Court for consideration for review.[23] Just 87 cases were argued before the Court that year, of which 82 "were disposed of" in 69 signed opinions. Of these signed opinions, just one (*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*) concerned religion. The Court ruled in favor of the Free Exercise Clause claim. There are myriad legal issues of national importance needing resolution by the Supreme Court. The Court cannot limit its attention to two clauses in the Constitution.

Comparative data for state court of last resorts are collected by the National Center for State Courts.[24] The results show that in 2004, 8,290,305 civil and criminal cases were filed in the major trial courts of the states. That same year, 190,307 cases were taken to the to the state intermediate courts of appeal; and the state courts of last resort entertained a total of 89,914 petitions for review. In simpler terms, just one percent of all civil and criminal cases in the states

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[23] This figure includes cases appealed from the court of last resort of the states. The Chief Justice's report uses date from 2006 for the Districts Courts and for the Circuit Courts of Appeal.; and data from 2005 for the Supreme Court.
[24] Schauffler, R. Y., R. LaFountain, S. Strickland & W. Raftery (2006). Examining the Work of State Courts, 2005:

reached the court of last resort. Constitutional cases on religion would constitute a small fraction of that number, since the bulk of state supreme court cases involve criminal appeals, tort actions and the interpretation of state statutes. And, unlike the United States Supreme Court, some state supreme courts are obligated by state law to accept certain kinds of appeals. Cases on separation of church and state cannot be the focus of state courts of last resort. Their mandatory jurisdiction and caseload prevent them from dedicating their institutional resources to seeking out appeals concerning religion.

Evangelic Christians are not the only ones to take constitutional issues on religion to the courts. Table 1 shows the various religions represented before the Supreme Court and state courts of last resort. Clearly, the Christian religion is the largest single groups of litigants for both the federal and state system. This simple fact makes it easy for Christians to claim that the courts' hostility is directed at them. Remember though, the courts initiated none of these cases. In every instance the lawsuit was commenced by an injured religious group or taxpayer who had the opportunity to frame the constitutional issues for the courts. The table also shows that state courts of last resort review cases concerning a greater variety of religions than the Supreme Court. There is a possible explanation for this observation. Having a case reviewed the nation's highest Court is never guaranteed; the Court has complete control of its own docket. One of the basic considerations for a grant of certiorari is whether or not the case presents an issue of national importance. Cases involving large denominations are more likely to have broader impact than cases involving unique practices of small sects.

A National Perspective from the Court Statistics Project, National Center for State Courts: 91.

	Supreme Court		State Court	
Religions	**Cases**	**WIN**	**Cases**	**WIN**
"Nudist Church	none		1	100.0%
"Society of Separationists"	none		1	100.0%
"Isolationists"	1	100.0%	none	
Amish	2	100.0%	3	
Any	38	52.6%	23	57.0%
Assembly of God	2	0.0%	none	
Atheist	1	0.0%	1	0.0%
Baptist	2	100.0%	8	38.0%
Black Muslim	1	0.0%	5	0.0%
Buddhist	2	50.0%	none	
Christian	none		3	33.0%
Christian Science	none		2	0.0%
Church of God	1	0.0%	none	
Church of Christ	none		2	50.0%
Congregational	none		2	50.0%
Eastern Orthodox	none		1	0.0%
Episcopalian	1	100.0%	none	
Evangelical Lutheran			2	0.0%
Hare Krishna	1	0.0%	1	100.0%
Humanists	1	100.0%	none	
I Am	1	100.0%	none	
Islam	1		1	100.0%
Jehovah's Witness	8	50.0%	17	59.0%

Judaism	1	0.0%	3	33.0%
Lutheran	none		1	100.0%
Methodist	none		2	100.0%
Mormon	2	50.0%	2	50.0%
Native America Church	3	0.0%	2	100.0%
Nondenominational Christian	9	77.8%	27	63.0%
None Specified	4	25.0%	12	58.0%
Orthodox Judaism	3	0.0%	3	66.0%
Pentecostal			1	100.0%
Presbyterian	1	50.0%	4	75.0%
Roman Catholic	4	50.0%	14	36.0%
Russian Orthodox	2	100.0%	1	0.0%
Salvation Army	none		1	100.0%
Santeria	1	100.0%	0	
Scientology	1	0.0%	0	
Serbian Orthodox	1	100.0%	0	
Seventh Day Adventist	2	100.0%	1	0.0%
Unification Church	1	100.0%	1	0.0%
Unitarian	1	0.0%	1	0.0%
United Churches of Religious Science	none		1	100.0%
United Methodist	none		1	0.0%
Universal Life	none		1	0.0%
Wicca	none		1	100.0%
Worldwide Church of God	none		1	100.0%
Grand Total	**98**	**54.0%**	**153**	**46.0%**

Table 1

Table 2 shows the general kinds of disputes implicating religion brought before state courts of last resort or the Supreme Court. There are significant differences between the two. State courts of last resort occasionally hear some frivolous cases that would never be entertained by the Supreme Court. Two examples will suffice. In one instance, the attorneys for a church never bothered to attend scheduling hearings. They failed to appear on at least three different occasions. Finally, the court scheduled a hearing for the first day available, which happened to be Good Friday. The unprepared attorneys with a short court date tried to buy time claiming that the Good Friday meeting offended the Free Exercise Clause. In another instance, a man who claimed he had some relationship with a church, was engaged in unadulterated quackery. He had no medical training but he claimed to be able to cure all sorts of ailments with electric light machines, magnets and so forth. When this mountebank was prosecuted for practicing medicine without a license, he claimed that his activities were protected by the Free Exercise Clause because his "treatment" involved some prayer. Such silliness would never be granted review by the United States Supreme Court.

	Supreme Court		State Courts	
	Cases	Win	Cases	Win
Child Custody	0		11	54.5%
Exemption	13	46.2%	30	70.0%
General Tax Issues	6	66.0%	7	28.6%
Government and Religion	13	69.2%	12	58.3%
Grants and Loans	0		1	100.0%
Higher Education	8	87.5%	8	62.5%
Intra-Church Disputes	5	80.0%	10	70.0%
Pledge/Oaths	3	33.0%	7	57.1%
Privilege	0		2	0.0%
Proselytizing	1	100.0%	11	45.5%
Public Displays	5	60.0%	3	66.0%
Public Education	26	57.7%	18	50.0%
Public Prayer	0		1	100.0%
Records; Record Keeping	0		1	100.0%
Religious Practices	5	20.0%	8	25.0%
Sabbath-Benefits	4	100.0%	2	50.0%
School Prayer	6	0.0%	4	25.0%
Sunday Closing	2	0.0%	1	0.0%
Zoning/Land Use	1	0.0%	15	80.0%
Grand Total	98	54.1%	163	46.0%

Table 2

State courts of last resort heard 11 child custody cases whereas the Supreme Court heard none. The child custody cases generally involve a divorce and the religion in which the children

will be raised, cases in which the state seeks to become parens patriae to override the refusal of the parents to seek medical treatment. These cases, while of utmost importance to the parties involved, do not present of matter of national importance for the Supreme Court. The courts of the states were faced with twice as many "intra-church disputes" as the federal High Court. These sad cases are most often the result of a congregation splitting into two factions, each claiming to be owner of the church property. Such disputes are governed by a clear rule. Courts may hear the disputes and decide them if these disputes can be decided by applying neutral principles of contract and property law. American secular courts cannot participate in any ecclesiastical matter or resolve any ecclesiastical dispute. Once the U.S. Supreme Court developed a clear rule that works to resolve these dispute, there is no need to revisit the issue.

State supreme courts hear a substantial number of cases on land use and zoning. These cases arise usually when a local ordinance limits the use of a church building (for example, by landmark laws) or when zoning board decisions prevent the expansion of church facilities. Other zoning cases arise when zoning ordinance forbid the construction of a church in a particular area or when a zoning board denies a church a special use permit to build.[25] State are likely to see less constitutional issues and more issues of statutory construction in the future. An increasing number of states now have "mini-RLUIPA's"[26] The clear standards under such statutes decidedly favor religious interests. These statutes offer an alternative—and more likely winning—approach to government actions affecting religion. And it's not as if religious interests have had a difficult time in this area. Exactly 80 percent of zoning and land use cases in state supreme courts have favored religion over government regulation.

Where both the U.S. Supreme Court and state courts of last resort have been active is in education, and public prayer or religious displays. And, unfortunately for the religion interests involved, these decision do not go well. Every school prayer case that came before the Supreme

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[25] See Baker, R. K. (2007). Strangers on a Hill: Congress and the Court. New York, W.W. Norton & Co. for a good description on how local land use cases involving churches generated a congressional response favorable to religion.
[26] The Religious Land Use and Institutionalized Persons Act (42 USCS § 2000cc), which provides that, "General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution…" "Mini-RLUIPA" are state laws with similar provisions.

Court was lost. The Court is also very vigilant in maintaining a high wall of separation when states attempt to subsidize or support K-12 private schools. Public school prayer and private school support also do not fare very well in the courts of the state. Courts at the national and state levels appear to be uncomfortable with displays of religious symbols on public land. All three of these issues are the kind of court decisions likely to come to the attention and stick in the minds of the average citizens. Decisions of this sort make for very good publicity for organizers of the New Christian Right. What the New Christian Right ignores is that a large fraction of higher education are quite sympathetic to religion, with religious interests winning almost 88 percent of cases in the Supreme Court, and almost two-thirds of cases in state courts of last resort.

Why the Courts?

With the exception of a few issues, religious interests do rather well winning in court. And even if they do not win the court battle, they may win the political war. Congress has been attentive to the Court and some of its decisions affecting religion. And Congress has been responsive: Two recent acts of Congress (the Religious Freedom Restoration Act; the Religious Land Use and Institutionalized Persons Act) are addressed to issues in free exercise. If the courts are not downright hostile to religion and people of faith, why are they demonized?

The New Christian Right has met with success in electing candidates who seem supportive of their cause. The New Christian Right claims to have been the base for the election of President Ronald Reagan. There are prominent members of Congress allied with their cause, and, until 2006, Republicans controlled both houses of Congress. Conservative evangelicals has not ignored the state and local levels. In all probability success at the school board level exceeds the achievements in national elections. If the New Christian Right wants Christian Nationalism, the one absolute bar to the agenda is the Constitution and the courts that protect it.[27] Voters in most state elections have a direct say in the selection of the state judiciary: Partisan election of judges is still the most common form of formal judicial recruitment. Changing the state judiciaries can be possible with the right candidates, an aggressive campaign and enough support. State judges typically do not serve for life once chosen. Most state judges are subject to

voter scrutiny and choice at regular, usually eight year intervals. The federal courts are a very different story. All federal judges appointed under Article III of the Constitution are appointed by the President with advice and consent of the Senate. The best any interest group can hope for here is some say in the President's nomination and some influence in the confirmation process. Federal judges serve during good behavior, which means in practice they serve for life. Federal judges are shielded from public pressure—just as the framers designed—and that must be infuriating for those seeking major, immediate changes in constitutional government.

In a sense the outcomes of court decisions are relatively easy to report.[28] Courts pick winners and losers; they cannot attempt to find a middle ground between the two contesting parties. This characteristic of a court fits well within the understanding of evangelical Christians with a Manichean worldview. Courts have the duty to decide the cases that come before them. They cannot choose to table problems in the hopes that it will go away. Individual judges announce their decisions publicly and put their names to their opinion. For those wanting to know, the villains of the piece are apparent. Compare the situation of judges to members of Congress. Compromises are the stock in trade of the legislator. Tough issues can be kept from a vote in any number of ways. Members of Congress can explain away a bad vote: I did it for the party; I did it to support the President; I did it to prevent something worse from happening; I did it for you.

Many Americans are mystified by appellate courts. They may have conception of what happens at trial by watching any of the inevitable crime dramas on television, or by serving on a jury. Ask any American what goes on in an appellate court and you will probably not get any kind of coherent answer. A citizen not party to the dispute cannot participate in the appellate process. Participation is limited to legal professional: lawyers (among the most mistrusted professions in America) and judges. Such professionals do not speak English, they speak "legalese," sprinkled with a little fractured Latin and Norman French. Judges wear black robes and sit on raised benches before the regular people in the gallery. No outsider can see what exactly the judges are doing and how they go about doing it. The deliberations of the Supreme Court in conference are among the most carefully guarded secrets in American government. The

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[27] Some observers believe that the entire strategy is based on control of the judiciary. Goldberg, M. (2006). Kingdom Coming: The Rise of Christian Nationalism. . New York, W.W. Norton & Company.

whole package is odd, inaccessible, uncontrollable. Put together, it is no wonder that most people are at least suspicious of appellate courts.

The perception of courts in the public mind often gets worse ever time the Supreme Court exercises judicial review, nullifying the actions taken by one of the elected branches of government. Charges of the Court undermining democratic government are brought each time judicial review occurs. What critics seem to assume is that the Supreme Court regularly wields this weapon and that the outcome is always hostile to religion. The assumption is wrong. Most cases heard by the Supreme Court involve statutory construction and administrative law; nullification of a law on constitutional grounds is rare. The Supreme Court has not be hostile to religion outside the areas of school prayer, Sunday closing laws and the protection of certain religious practices. Even including these issue areas in the calculus, religion wins more often than not in the Supreme Court.

On the other hand, religion does not fare as well in state courts of last resort, which is ironic given the fact that most state judges need to stand for reelection. With the major exceptions of claims of religious exemptions to statutory requirements; zoning and land use; the taking of oaths or pledges; and school prayer, religious interests tend to fare less well in the state courts. The relative obscurity of state courts to most people probably prevents these courts from being subject of public rage. Moreover, decisions of state court are not as useful as Supreme Court decisions in national organizing efforts.

Judges—especially Supreme Court justices—represent the secular elite to evangelical Christians who have since Scopes been treated as superstitious, undereducated rubes. A branch of government run by white, wealthy, well-educated secular humanists from the Northeast can be seen, or be made to be seen, as a threat. Leaders of the New Christian Right can easily translate this threat to people prone to status anxiety into an organizing principle for political action. There is some evidence to suggest that "threats to deeply held religious beliefs or values" are related to the likelihood of engaging in social protest (McVeigh 2001). If such threats are enough to triggered individuals to engage in a confrontational, non-traditional political tactics, then the same kind of threat should be at least enough for individuals to go out and vote.

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[28] The outcome may be easy to report, but the legal reasoning behind that outcome is not. Just as in sport, knowing the winner is often enough.

Demonizing the Supreme Court and the high courts of the state might be an effective strategy for garnering publicity, raising money or mobilizing conservative Christian voters. Yet leaders of the New Christian Right are not fools. They understand the role of the courts in American politics and the impact of constitutional decisions. These leaders know also that constitutional decision can help as well as hinder the agenda of the New Christian Right. The past 20 years have seen the development of conservative public interest law firms (Brown 2002).[29] The Center for Individual Rights is devoted to championing the conservative position in constitutional cases filed federal courts. This firm styles itself as the conservative counterpart to the American Civil Liberties Union. The Rutherford Institute is another public interest law firm with a conservative (and occasionally) libertarian agenda. First Amendment issues are high on its list of priorities. The American Center for Law and Justice devotes itself primarily to advancing conservative Christian causes through litigation and legal services. The ACLJ describes itself as protecting "God-given inalienable rights." Support for the ACLJ "is dependent upon God and the resources He provides through the time, talent, and gifts of people who share our concerns."[30]

With respect to religion, conservative Christian public interest law firms seek to rely on law to expand the Supreme Court's accommodation of religion in public life, which means winning cases. As the findings here suggest, religion wins half the time in state court of last resorts and the Supreme Court. Could the New Christian Right do better? Recent evidence suggests that is achievable by employing a new legal strategy. Religion cases and religious are divisive. A recent (2006) survey showed that 69% of respondents believed that "liberals are too secular;" 49% found conservative Christians "too assertive." When asked, "Which should have more influence on U.S. laws," 60% of white Evangelicals chose the Bible over the will of the people. That outcome should be compared to that responses of others to the same question: Mainline white Protestants (16%); Catholics (23%); and Secularists (7%). There is much more uniform public support for freedom of speech, at least in the abstract (Peffley 2001). When asked whether or not there should be free speech for all, usually 90% of Americans answer in the

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[29] This book contains a description of a large number of conservative Christian public interest law firms. For list of public interest law firms across the ideological spectrum, see: (2007). "Related Links." Retrieved June 6, 2007, from http://www.firstamendmentcenter.org/about.aspx?item=related_links.

[30] (2007). "The American Center for Law and Justice." Retrieved June 1, 2007, from http://www.aclj.org/About/Default.aspx?Section=9.

affirmative. Brown (2002) has found that conservative public interest law firms have been attempting to advance religious interests by arguing free speech as opposed to free exercise. Should this strategy succeed, the New Christian Right will continue to be able to attack the courts publicly for their hostility to religion, while actually using the courts to achieve the goal of accommodation of religion in public life.[31]

[31] The most recent example of conservative Christian support for freedom of speech, see (2007). Morse v. Frederick. Supreme Court Reporter., Supreme Court. **127:** 2618. The question here is whether the First Amendment protected a student's display of a sign reading "Bong Hits for Jesus" during a school field trip. Here, the Center for Individual Rights, the ACLJ and the Rutherford Institute joined the Feminists for Free Expression and the Lambda Legal Defense Fund in support the student against the school. The name of Jesus on the sign was the only thing related to religion in this pure freedom of speech case.

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