Empower the States

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Overruling the Courts:
How We End the Reign of Liberal Judges in 2016

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About the Author
Andrew Thomas is a graduate of the University of Missouri and Harvard Law School. Thomas helped draft pioneering federal and state legislation that successfully curbed the power of activist liberal judges. Twice elected Maricopa County Attorney, the district attorney for metropolitan Phoenix, Arizona, Thomas ran one of the largest prosecutor’s offices in the country, successfully combating crime and illegal immigration. Syndicated columnist Michelle Malkin praised Thomas for withstanding, in response to these successes, “nightmarish abuse at the hands of the state’s liberal judicial and legal elite.” Thomas ran for governor of Arizona in 2014, receiving endorsements from many conservative leaders. A former Bradley fellow with the Heritage Foundation, Thomas is the author of four books, including *Clarence Thomas: A Biography*. He is currently a fellow with the Selous Foundation for Public Policy Research.

About the Selous Foundation
Providing leadership and conservative solutions for the 21st Century, the Selous Foundation for Public Policy Research (sfppr.org) is a Washington, DC-based think tank founded in 1985, whose mission is to formulate and promote public policies to advance traditional American values and benefits derived from our nation’s founding principles. Its Conservative-Online-Journalism platform, *SFPPR News & Analysis*, projects the foundation’s ‘grassroots interests’ and ‘Main Street views.’ The twin pillars of sovereignty and independence shape the foundation’s public policy outlook.
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Executive Summary
The U.S. Supreme Court’s recent ruling on same-sex marriage confirms, once again, that conservative efforts to end liberal judicial activism on major issues have failed. On matters that determine our quality of life and culture—immigration, criminal justice, abortion, marriage—the left enjoys clear mastery of the courts, and has for the last fifty years. To end this tyranny, Congress must use its power under Article III, section 2 of the Constitution to remove jurisdiction from the federal courts over these issues. This will allow the states and the people to decide these matters, restoring self-government on the issues that matter most.
Introduction

For the past half century, conservative political leaders have vowed to combat liberal judicial activism. These efforts, quite simply, have failed. Unelected liberal judges now effectively run America, making every ultimate policy decision—often in defiance of the will of the people. Unchecked liberal court rulings have subverted the Constitution, wreaking havoc on our national sovereignty and such bedrock institutions as the family and religious freedom. On the issues that determine our quality of life and culture—immigration, criminal justice, abortion, marriage—the left enjoys clear mastery of the courts and is seeking to mop up and fully implement their social agenda. Except for occasional “crumbs from the master’s table,” conservatives no longer can win in court on the issues that matter most.

To reverse this destructive trend and restore self-government, two things must happen. First, Congress must use its power under Article III, section 2 of the Constitution to remove jurisdiction from the federal courts over these issues. Second, conservative leaders and organizations must work together and insist that candidates for president and Congress in 2016 take a clear position on whether they support stripping the federal courts of this jurisdiction. Otherwise, candidates will continue to mislead conservative voters with often self-serving promises and tactics that, for a half century, have failed to turn the tide.

These jurisdiction-stripping measures would ensure, at a minimum, certain states can become “Faith and Family Zones.” There, people of faith may live in relative freedom from harassment until the courts and other institutions can be properly reformed.
An American Tyranny:
Why Our Government Is Election-Proof

Starting in the 1960s, liberal activists took over the federal courts and used them to assault and fundamentally change American society. Under the leadership of former California politician Earl Warren, the U.S. Supreme Court imposed on the nation sweeping liberal policies that lacked popular support. To accomplish this, the high court claimed it had discovered new constitutional “rights.” These “rights” were conferred on individuals hostile to the rule of law and traditional American values. They included criminals and prison inmates, illegal immigrants, flag-burners, and a motley group of liberal provocateurs at war with the social conventions that had protected civilization for millennia.

Converting the Supreme Court into what Justice Hugo Black called a “day-to-day constitutional convention,” activist justices remade the nation. They threw out state laws designed to stop illegal immigration, administer capital punishment, significantly limit or ban abortion, defend marriage, honor religious faith through governmental action, and protect the innocence of children from unrestrained “freedom of expression” in the mass media. These activist rulings, to paraphrase Justice Antonin Scalia, rewrote the “Constitution for a country I do not recognize.”

For example, thanks to federal court rulings, convicted murderers are allowed decades to appeal their sentences through state and, afterwards, federal courts. These delays effectively nullify capital punishment, which the American people support. The Supreme Court has invalidated state laws allowing juries to impose capital punishment on heinous criminals who, for example, rape children. Today, the death penalty is carried out only at the whim of judges, and is no longer an effective deterrent to murder or other grave crimes.
Likewise, the federal courts have knocked down state laws addressing the ongoing influx of illegal immigrants. Activist judges have overturned legislation which made it a crime for an illegal immigrant to enter a state. Other state laws targeting illegal immigration have met the same demise. This has happened even though the Framers of the Constitution expressly reserved for the states broad police powers allowing them to pass and enforce such laws—laws which defend the rule of law and basic American sovereignty.

Unelected federal judges, not elected officials, now have the final say on every national policy issue. This has made our government election-proof. Voting for president or members of Congress means little if federal judges, not elected officials, make the ultimate decisions on all public policies. As power has shifted to the federal courts, elections have become increasingly meaningless. Voter distrust of government has soared.

Moreover, the judiciary has become a firm bastion of liberalism. The courts have given America, for the past fifty years, a steady series of now-entrenched liberal court rulings. These have shattered the nation’s traditions, quality of life and culture. The courts steadfastly refuse to overturn these rulings. Except for occasional and very marginal victories, it is no longer possible for conservatives to win in court on the issues that matter most.
A Half Century of Failure
How did activist liberal judges accomplish this? Those who should have fought back against them did not. Failing to mount a successful counterattack were a succession of presidents and members of Congress—in particular, as a practical matter, the leaders of America’s conservative party, the Republican Party. Many of these leaders tried and meant well. Most, however, shunned the fight out of political self-interest. To avoid controversy and attacks from the liberal media and other allies of liberal judges, these leaders sacrificed the Constitution and self-government.

Misleading Campaign Promises and Ineffective Tactics
Every election cycle, Americans witness a disingenuous ritual. Republican candidates promise to fight the most recent batch of liberal court rulings with tactics proven, over the last fifty years, to be completely ineffective. The first stock promise: seeking to amend the Constitution. This is a political cop-out. The Framers deliberately made amending the Constitution an extremely difficult and unlikely process. This makes pledging to amend the Constitution a dodge, a high-sounding way to avoid seriously addressing activist court rulings.

Equally slippery is the second standard promise: passing more laws to challenge the offending rulings. New conservative laws, conservatives are told, will set up more cases and, eventually, victories in court. These laws are then litigated for many years, often a decade or longer. Any eventual gains from these cases are tardy and trifling. By then a whole new generation of Congressmen are in office, ready to try the same tactic before an often-forgetful conservative electorate. This political promise, in short, is the hackneyed political equivalent of Lucy pulling the football away from Charlie Brown again and again.

Despite decades of litigation, the core liberal court rulings remain untouched. For fifty years, federal judges have not reversed a single, major liberal precedent on a cultural issue. Conservative gains in court have been rare and extremely modest, while the left and its social agenda romp virtually unchallenged through the nation’s courthouses. Trumpeting these tiny and infrequent conservative “victories” are lawyers who earn income from these cases and allied politicians; their public declarations of victory often mislead conservatives into thinking they are winning the nation’s cultural battles when, in fact, they are being routed.
Finally, GOP presidential candidates offer the quadrennial chestnut of promising to appoint “strict-constructionist judges.” This tactic also has failed. The left makes confirmation of such candidates for judgeships a horrific and doubtful enterprise. Prospective judges who are honest and open enough to articulate right-of-center views prior to nomination are crucified by liberal media elites and pressure groups during the confirmation process. The savaging of the late Judge Robert Bork and Justice Clarence Thomas were clarion events in this regard. Indeed, the left knows how and when to fight: Had Bork been confirmed instead of his replacement, Anthony Kennedy, America would be a very different country today.

Regardless, it is hard even to find potential conservative judges, no matter how diligently a president searches for them. Lawyers are overwhelmingly liberal. For this reason, the number of conservatives in this pool of potential judges is very small. Even when they can be found, attorneys with seemingly conservative credentials frequently “flip” after donning a black robe. To do otherwise requires them to withstand tremendous professional and personal pressures and enticement from liberal legal insiders, the media and fellow judges. Few are strong enough to do so.

“The Liberal Courts”
What Judge Robert Bork foresaw as the “political seduction of the law,” in a landmark book published when Barack Obama was a law student, has materialized. The left has thoroughly politicized the law and the courts. Conservatives cannot win there on the issues that matter most. Conservative leaders and voters must acknowledge this reality and act accordingly.

How did the left capture the courts? This takeover was inevitable once liberal activists took over academia. To be a lawyer, one must complete seven years of higher education, receiving both a bachelor’s degree and a juris doctor. This means undergoing seven years of indoctrination by committed liberal professors. Thirty years ago, the late Allan Bloom warned about the damaging effects of liberal bias in higher education. But this was a thorny problem to solve, and so it was ignored. Now, it has changed the country.
Liberal indoctrination in American higher education is well documented. Some 72 percent of college professors describe themselves as liberal. Only 15 percent call themselves conservative. Not surprisingly, a 2010 analysis by the Intercollegiate Studies Institute concluded that the more college degrees a person earns, the more liberal that person becomes. When Americans are asked, for instance, whether they believe public-school teachers should be allowed to lead a prayer in school, 57 percent of high-school graduates say yes. That number drops to 40 percent for college graduates, 30 percent for master’s degree holders, and only 17 percent for Ph.D.’s.

This dynamic is particularly stark in law school. Those who dissent from liberal positions during class discussions literally are hissed at and ridiculed. Professors tolerate and sometimes encourage this environment. The message is delivered. Few who graduate from law school are conservative.

The American Bar Association and other bar associations reflect and enforce these biases. Indeed, an attorney who publicly calls the judiciary politicized or liberal risks disbarment; ethical rules charge bar associations with targeting attorneys who, in their judgment, unfairly challenge the “integrity of the judiciary.” Lawyers who speak out also face professional ostracism and retaliation in more obvious ways, as the courts control the outcome of their cases and their livelihoods.

In short, conservatives must view the courts as they do the media. Both institutions have become firmly liberal. Occasional “crumbs” from either institution do not alter this reality. Conservatives should use the phrase “liberal courts” as frequently and reliably as they say “liberal media,” for the terms are equally true.

Indeed, there is an incestuous relationship between the liberal courts and the liberal media. Through generous rulings, the courts have all but shielded the media from libel suits. The media reciprocate by giving the courts “air cover,” reflexively defending them from conservative critiques by pounding those who dare articulate them. Hollywood benefits financially from liberal court rulings, and so leaders of the motion-picture industry do their part, as well. Movie producers uniformly offer films that depict judges as wise, fair and benevolent.
Reclaiming Self-Government

Congress has the power to end this tragic and ruinous state of affairs. That power resides in Article III of the Constitution.

Article III of the Constitution specifies that the U.S. Supreme Court has original jurisdiction only over disputes between states and cases in which foreign diplomats are a party. On any other issue, Congress can limit or eliminate entirely the jurisdiction of the high court and the other federal courts. In other words, the people’s elected representatives in Congress can roll back judicial abuses through a simple majority vote of both houses.

Article III, section 2 provides the Supreme Court “shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” This language expressly allows Congress to withdraw jurisdiction from the federal courts to uphold the will of the people.

Congress has done this in the past, though not on the controversial cultural issues where action is urgently needed today. The Supreme Court has repeatedly upheld past congressional restrictions of its jurisdiction. Indeed, the language of Article III is so clear and unambiguous that the high court has been obliged to concede such limitations despite its obvious conflict of interest in allowing its own powers to be curbed.

In a string of rulings going back to right after the Civil War, the high court has acknowledged Congress holds this power under Article III. One justice recognizing this constitutional reality was Chief Justice John Marshall, whose opinions first asserted the Supreme Court’s right to strike down laws it deemed unconstitutional. Marshall observed that all federal judicial powers “are limited and regulated” by Congress.

In the Federalist Papers, written to persuade the earliest Americans to adopt the new Constitution, Alexander Hamilton echoed this understanding. He stated the courts were designed to be the “least dangerous” and “weakest” branch of government. The jurisdiction of the Supreme Court would be “confined to two classes, and those of a nature rarely to occur.” Likewise, federal appellate jurisdiction would exist only “with such exceptions and under such regulations as the Congress shall
make” (Hamilton’s emphasis). There would never be a “superiority of the judiciary to the legislative power,” meaning the courts could not overrule Congress and the people. Indeed, Hamilton noted Congress could impeach activist judges who engaged in “deliberate usurpation on the authority of the legislature.” Leading legal scholars and other observers have quoted Hamilton and other Framers in upholding Congress’s power to restrict the jurisdiction of the federal courts.

Congress should restrict jurisdiction in those areas of public policy where federal judges have engaged in repeated, substantial abuses of power to thwart the will of the people. Specifically, Congress should pass an act restricting federal-court jurisdiction so that henceforth, each state may:

✦ Make it a crime, prosecutable under state law, for an illegal immigrant to enter the state;
✦ Ban same-sex marriages and protect related religious freedom;
✦ Allow juries to impose the death penalty on criminals as determined by state law, and impose a two-year time limit for federal courts to rule on federal appeals of state capital cases; and
✦ Fully regulate or end abortion as the people of the state or their elected representatives deem fit.

This “Empower the States Act” will restore to the states and the people their rightful authority to govern themselves on key areas of public policy.

Returning these matters to the states is not a perfect solution. Because of the deep intellectual rot in the judiciary, many state courts are liberal. Yet state judges are closer to the people and more accountable because many are elected. Also, many state constitutions have a right of referendum, allowing the people to vote directly on these matters.
Conclusion: Empowering the States

In 2016, conservative voters cannot settle for the same evasions and self-serving rhetoric offered by presidential and congressional candidates for the past half century. They must insist that candidates agree explicitly that if elected, they will act to strip the federal courts of jurisdiction over these matters and end the reign of liberal judges. Fifty years of failure have proven nothing else will work.

To force candidates to address these issues forthrightly, conservative leaders, activists and voters must be dogged and focused. Republican politicians in particular routinely court conservative voters and rely upon them at election time, but try to avoid tackling these issues. They want to be spared the “air war” that erupts in the liberal media when conservative elected officials address a major social issue. As a result, Republican leaders typically settle for what former House Speaker Newt Gingrich memorably called “managing the decline” of the nation. This is a generous and artful way of accusing such leaders of political cowardice and dereliction of duty, terms that are just as true and fair.

Conservatives must demand more. The hour is very late.

The “Empower the States Act” will create “Faith and Family Zones,” states and blocs of like-minded states where people of faith can live without harassment. This is a realistic stopgap measure to protect these basic liberties until the courts and other institutions can be properly reformed.

To achieve this, conservatives cannot allow candidates to change the subject, talking instead of such easy and shopworn fare as cutting taxes or curbing the bureaucracy. Many news items compete for the voters’ attention. Yet the left shrewdly remains focused on controlling the courts because they know this is their source of ultimate power. In contrast, by losing such focus, conservatives have seen their civilization wrecked by liberal activist judges.

Only by pinning down candidates and holding them to their word on these issues can Americans realistically hope to end the left’s stranglehold on the courts. In the process, the electorate will have taken the surest path to a brighter national future.


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http://michellemalkin.com/2014/08/05/endorsements-august-gop-primary-season-2/