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WITH PREJUDICE: SUPREME COURT ACTIVISM
AND POSSIBLE SOLUTIONS

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WEDNESDAY, JULY 22, 2015

United States Senate,
Committee on the Judiciary,
Subcommittee on Oversight, Agency Action,
Federal Rights and Federal Courts,
Washington, D.C.

The Committee met, pursuant to notice, at 1:53 P.m., in room SD-226, Dirksen Senate Office Building, Hon. Ted Cruz, Chairman of the Subcommittee, presiding.

Present: Senators Sessions, Whitehouse, and Coons.

1 OPENING STATEMENT OF HON. TED CRUZ, A U.S. SENATOR FROM
2 TEXAS, CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION,
3 FEDERAL RIGHTS AND FEDERAL COURTS, COMMITTEE ON THE
4 JUDICIARY

5
6 Senator Cruz. This hearing is called to order.
7 Welcome. I apologize that we were delayed somewhat in
8 getting started, but I thank each of the three distinguished
9 witnesses for joining us. I thank my colleague, the Ranking
10 Member for being here.

11 It is with deep disappointment that I convene this
12 hearing. I have long admired and even revered the United
13 States Supreme Court. I began my career as a law clerk for
14 Chief Justice William Rehnquist. I clerked alongside one of
15 our witnesses, Professor Eastman, and I spent over a decade
16 litigating before the United States Supreme Court both as
17 the Solicitor General of Texas representing the State of
18 Texas and as a lawyer in private practice representing a
19 variety of clients.

20 But much to my great disappointment, this past term the
21 court crossed a line, continued its long descent into
22 lawlessness to a level that I believe demands action. The
23 court today is not a body of jurists. It is not a body of
24 judges following the law, but rather it has declared itself
25 in effect a super legislature.

1 Justice Scalia powerfully wrote in dissent that the
2 decisions of the court this term are a fundamental threat to
3 our democracy, that five unelected lawyers have declared
4 themselves the rulers of 320 million Americans. We have
5 seen the court's imperial tendencies previously. In the
6 infamous case of *Dred Scott*, the case that helped
7 precipitate the Civil War, the court struck down a federal
8 law that banned slavery in the territories. Why? Because
9 the court declared that liberty includes the right to own
10 slaves. A horrific, contorted position with no support
11 whatsoever in the actual text of the United States
12 Constitution.

13 In *Lochner versus New York*, an activist court struck
14 down minimum wage laws, an action that from a policy
15 perspective may well have been good policy, and yet it was
16 once again a right found nowhere in the text of the United
17 States Constitution.

18 In more recent cases, most notably *Roe versus Wade*, the
19 court created another new right, the right to abortion that
20 has resulted in tens of millions of unborn children losing
21 their lives.

22 To anyone actually interpreting constitutional text,
23 none of these rights have any basis in the language of the
24 constitution that governs this nation. Indeed the right to
25 an abortion that these unelected lawyers invented in 1973

1 found its basis in and I quote, "penumbras formed by
2 emanations from other rights enumerated in the
3 constitution." That's a phrase only lawyers could love.
4 Penumbras formed by emanations.

5 Years later in reaffirming the right to abortion, a
6 case called Planned Parenthood versus Casey, Justice Kennedy
7 proclaimed that "at the heart of liberty is the right to
8 define one's own concept of existence, of meaning, of the
9 universe and of the mystery of human life." Unfortunately
10 in Justice Kennedy's ill fated attempt to define that sweet
11 mystery of life, the court determined that that trumps the
12 efforts of elected legislatures to protect actual human
13 lives.

14 Justice Kennedy's pop psychology has no basis in the
15 text or history of the constitution, and yet sadly it has
16 become the foundation for far too many of the court's
17 opinions. And I should note we are now witnessing the
18 shameful results of the court forcing its own unlimited
19 right of abortion onto the constitution.

20 Two undercover videos of Planned Parenthood show senior
21 Planned Parenthood officials callously, heartlessly
22 bargaining, haggling over price selling body parts of unborn
23 children. Sipping on wine, indeed one of those senior
24 officials described she hoped to sell enough body parts of
25 unborn children to buy herself a Lamborghini.

1 I will say this even to supporters of abortion rights.
2 I would encourage every American to watch those videos and
3 simply ask the question are those my values? It appears
4 that both of those senior Planned Parenthood officials have
5 confessed in video to multiple felonies. But that will be a
6 subject for another day and another hearing.

7 But those consequences are the direct consequences of
8 Justice Kennedy's sweet mystery of human life and each of
9 these unelected lawyers should recognize the fruits of their
10 legislating from the bench is we now have haggling and
11 bartering selling the body parts, the tiny body parts of
12 unborn children.

13 Just a few terms ago, the Supreme Court began rewriting
14 the text of Obamacare. It took the word penalty, brought
15 out an eraser, erased that word and decided the word instead
16 should be tax. It was a decision where the Justices were
17 not acting as umpires calling balls and strikes, but rather
18 they were putting on a partisan uniform, joining the team of
19 the Obama Administration and rewriting Obamacare.

20 In this term in King versus Burwell, those same
21 unelected judges put on those same Obama jerseys and rewrote
22 the statute, deciding that the phrase "established by a
23 state" means established by the federal government.

24 Now make no mistake, this was not law. This was not
25 judging. This was legislating, this was rewriting a statute

1 to meet a policy outcome that five unelected lawyers
2 supported. The very next day five unelected lawyers
3 declared that the marriage laws of all 50 states were now
4 somehow transformed into being unconstitutional, that now
5 somewhere in the constitution is a right to same sex
6 marriage.

7 Now the question of same sex marriage is a question on
8 which reasonable minds can differ. I am a strong supporter
9 of traditional marriage, of the union of one man and one
10 woman. But from the beginning of this country the question
11 of marriage has been a question for the states.

12 From the very first Congress through until a month ago
13 it was undisputed that state legislatures have the authority
14 to define marriage and define it as they always had as the
15 union of one man and one woman. The premise of the court's
16 decision is the rather ridiculous notion that the American
17 people when they ratified the 14th Amendment in 1868 were
18 somehow silently and unbeknownst to themselves striking down
19 the marriage laws of every state in the union and decreeing
20 same sex marriage.

21 That's not law, that's not judging. That's policy
22 making. And I would note although many commentators, many
23 in the media like to talk about how they assert the American
24 people agree with this decision. No court decision would
25 have been necessary if that were the case.

1 There is a reason why 40 states have passed laws and
2 constitutional amendments protecting traditional marriage,
3 because when the people have the opportunity to vote at the
4 ballot box, overwhelmingly the people have voted in support
5 of traditional marriage, even in bright blue California.
6 When the citizens of California voted on marriage, they
7 voted to preserve traditional marriage. The reason we
8 needed a lawsuit is precisely because the American people
9 when given the chance to vote have not voted for this and so
10 five unelected judges said to 320 million people, your views
11 on marriage do not matter. We will decree our views
12 instead.

13 If any of us believes in democracy, if any of us
14 believes in the constitution and rule of law, then whether
15 we agree or disagree with the policy outcomes in these
16 particular decisions, we should be horrified at the notion
17 that five unelected judges can seize for themselves the
18 policy making authority and take it from the American
19 people.

20 We did not establish philosopher kings in this country.
21 We did not establish a rule by unelected elites to seize
22 decision making authority from the American people. Indeed
23 that is the very definition of tyranny, hence this hearing
24 to discuss what options the American people have to reign in
25 judicial tyranny.

1 The framers of our constitution were well aware of this
2 threat. They wrote about it considerably in the federalist
3 papers and elsewhere, and there appears to be growing public
4 support for imposing real limits on the Supreme Court that
5 is disregarding the views of the American people.

6 In a recent Fox news poll, 72 percent of registered
7 voters agreed that Supreme Court Justices should only serve
8 for a limited time, and 62 percent think that Americans
9 should be able to vote Justices off the Supreme Court in
10 light of the lawlessness and judicial tyranny.

11 I support all of the above. I support every effort to
12 bring power back to "we the people" to restore democracy and
13 restore the constitution. I am open to reasonable proposals
14 on judicial term limits and I have publicly called for a
15 constitutional amendment subjecting Supreme Court Justices
16 to judicial retention elections. Twenty states follow this
17 practice and it has had some meaningful success, reigning in
18 the abuse of judicial power.

19 So long as Justices on the court insist on behaving
20 like politicians, acting like a political body and making
21 policy decisions rather than following the law, they should
22 not expect to be exempt from the authority of the voters who
23 disagree with their policy decisions.

24 I call for these reforms reluctantly and sadly as
25 someone who has spent much of his life in and around the

1 court. But it is the only reasoned response I believe to
2 Justices that have disregarded their oaths of office and
3 have declared that their policy views are somehow more
4 important, somehow more enlightened, somehow more valuable
5 than your views or my views or the views of any other
6 American citizen who has a right to go to the ballot box and
7 resolve the issues by the people.

8 I recognize my colleague, the Ranking Member, Senator
9 Coons.

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1 OPENING STATEMENT OF HON. CHRISTOPHER COONS, A U.S. SENATOR
2 FROM DELAWARE

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4 Senator Coons. Thank you, Mr. Chairman. I very much
5 look forward to the testimony of our three witnesses for
6 whom we have waited, so I will attempt to be brief if I can.

7 I welcome the opportunity to discuss the Supreme Court
8 and some of the cases it has decided in this term and the
9 past. The Supreme Court has from time to time endured
10 criticism that its work has become politicized and that the
11 decisions of the Justices mirror their presumed political
12 preferences rather than a consistent and transparent
13 judicial philosophy.

14 I myself have been critical of the Supreme Court in a
15 few decisions with which I have disagreed. For example, the
16 Citizens United case overturned precedent upholding the
17 McCain-Feingold campaign finance law just a few years
18 earlier. The Shelby County case invalidated key provisions
19 of the 1965 Voting Rights Act which had been upheld by
20 previous Supreme Court decisions and had just been
21 reauthorized by Congress unanimously, in fact by the Senate
22 seven years prior.

23 Indeed leading scholars have said that this Supreme
24 Court after the transition from Justice O'Connor to Justice
25 Alito, the Roberts Court is the most conservative by some

1 estimates in history.

2 According to a 2009 article by 7th Circuit Judge
3 Richard Posner and William Landes, Justice Kennedy who is
4 the very center of this court would rank by their accounting
5 as the tenth most conservative Justice since 1937. Time and
6 time again whether in Second Amendment cases, consumer
7 protection cases when considering affirmative action,
8 reproductive rights, voting rights, campaign finance laws,
9 this current Supreme Court has reached conclusions advocated
10 by the political right, not by my party or those typically
11 on my side of the aisle.

12 It is therefore surprising many of my colleagues on the
13 Republican side have reacted so strongly to two cases in
14 which their advocates were unsuccessful. In the first case,
15 King versus Burwell, Republicans were seeking to strip away
16 tax credits that make health insurance affordable today for
17 7 million Americans.

18 Opponents of the Affordable Care Act have lost
19 repeatedly, first at the ballot box and then twice at the
20 Supreme Court, most recently by a 6-3 super majority
21 including the Chief Justice and Justice Kennedy who are
22 hardly routinely referred to as liberals.

23 The charge that this court is engaging in liberal
24 activism with the ACA is I think demonstrably false. The
25 reading adopted by the court is fully consistent with the

1 expressed will of Congress.

2 Although Justice Scalia did not join in the opinion,
3 the Chief Justice's textual analysis was very much
4 influenced by Justice Scalia. Excuse me, although Justice
5 Scalia didn't join in the opinion, Chief Justice Roberts'
6 textual analysis seemed to be notably influence by Justice
7 Scalia's jurisprudence.

8 He quoted him to say that the fundamental canon of
9 statutory construction that the words of a statute must be
10 read in their context and with a view to their place in the
11 overall statutory scheme is essential -- an essential
12 underpinning of the majority opinion.

13 To put it another way, Justices must interpret a law's
14 language within the context of what that law is trying to
15 accomplish.

16 Turning to the court's historic decision, affirming
17 marriage equality in Obergefell, the Republican assault on
18 marriage equality is out of step in my view with the country
19 and our values. Gay and lesbian Americans long shunned or
20 subjected to degrading treatment, inequality and criminal
21 penalties have over recent years become valued full members
22 of American society, yet pockets of animists do remain.

23 What the court decided in Obergefell was that marriage
24 is a fundamental right and that same sex couples though a
25 politically disadvantage minority have equal claim to it as

1 do their straight fellow citizens. In so doing I think the
2 court was upholding constitutional rights against
3 unjustified deprivation which is what courts and especially
4 the Supreme Court does best, the right Chair of the Supreme
5 Court when it did so for gun rights or for campaign spending
6 limits or even the religious right of a nonprofit
7 corporation.

8 In time I believe that bans on same sex marriage will
9 seem as backwards looking or out of step as bans on
10 interracial marriage are seen today. And I would invite my
11 colleagues to come and join the celebration of marriage
12 equality and the steady movement towards civil rights that
13 it represents.

14 I just want to conclude by making a comment about the
15 various reform proposals that have been introduced in
16 anticipation of or in response to the Supreme Court's
17 decisions this term.

18 We cannot decry judicial activism and create a
19 constitutional crisis every time that a big case comes out
20 against us. We are blessed in this country in my view with
21 the finest judiciary in the world, and for more than 200
22 years the Supreme Court has mediated disputes involving
23 estates, the political branches of the government, private
24 citizens, and I have disagreed with a number of its
25 decisions.

1 But the Supreme Court has been a vital arbiter of
2 political interests precisely because it is insulated from
3 the vagaries of politics and political interest. We should
4 therefore I think reflect long and hard and exercise some
5 humility on our own before upsetting that essential balance.
6 Thank you, Mr. Chair.

7 Senator Cruz. Thank you, Senator Coons. We will now
8 begin receiving witness testimony. Our first witness is Dr.
9 John Eastman. He is a Professor and the former Dean at the
10 Dale E. Fowler School of Law at Chapman University. He also
11 serves as the Director of the Center for Constitutional
12 Jurisprudence at the law school.

13 Dr. Eastman is a graduate of the University of Dallas,
14 he received his PhD in government from the Claremont
15 Graduate School and he received his law degree from the
16 University of Chicago School of Law.

17 He clerked with me for the Honorable Michael Luttig on
18 the Fourth Circuit and then for the Honorable Clarence
19 Thomas on the United States Supreme Court.

20 Our second witness is Professor Neil Siegel. He is the
21 David W. Ichel Professor of Law at Duke Law School where he
22 is the Co-Director of the Program in Public Law. Professor
23 Siegel graduated from Duke University, he has a Masters in
24 Economics from Duke University, a PhD in Jurisprudence and
25 Social Policy from the University of California Berkeley and

1 he earned his law degree from the Boalt Hall School of Law
2 at the University of California Berkeley.

3 It does not say this, but I have no doubt Professor
4 Siegel is celebrating a basketball championship this year.

5 Mr. Siegel. I emphatically agree.

6 Senator Cruz. Professor Siegel clerked for the
7 Honorable J. Harvie Wilkinson on the Fourth Circuit and the
8 Honorable Ruth Bader Ginsburg on the United States Supreme
9 Court.

10 Ed Whelan is the President of the Ethics and Public
11 Policy Center. As a regular contributor to National Review
12 Online's Bench Memos blog, he has been a leading commentator
13 on nominations to the Supreme Court and the lower court and
14 on issues of constitutional law.

15 Mr. Whelan has previously served as the Principal
16 Deputy Assistant Attorney General for the Office of Legal
17 Counsel. He graduated from Harvard College and he received
18 his law degree from the Harvard Law School.

19 Mr. Whelan clerked for the Honorable J. Clifford
20 Wallace on the Ninth Circuit and the Honorable Antonin
21 Scalia on the United States Supreme Court.

22 Professor Eastman?

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1 STATEMENT OF JOHN C. EASTMAN, FORMER DEAN, PROFESSOR, AND
2 DIRECTOR OF THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE,
3 DALE E. FOWLER SCHOOL OF LAW, CHAPMAN UNIVERSITY, ORANGE, CA
4

5 Mr. Eastman. Thank you, Chairman Cruz, ranking member
6 Coons and the other members of the committee both for
7 inviting me and also for holding this very important
8 hearing.

9 I have to begin by agreeing with Senator Coons that we
10 ought to take very seriously any proposed change to the
11 structure of our constitution and we ought not to do it for
12 light and transient reasons. A mere simple disagreement
13 with the outcomes of Supreme Court decisions in my view
14 would not suffice for the kind of things we are talking
15 about.

16 But I believe that there is something much more
17 significant going on here than mere disagreement with
18 particular outcomes in particular cases. I think we are
19 seeing a pattern of judicial refusal to follow the law of
20 the constitution in instead substituting their judgment for
21 others. For that of the people, for that of the Congress,
22 for that of the state legislatures.

23 You know, Alexander Hamilton in the very last of the
24 federalist papers reminded us that there may well be times
25 when their structure that they put together which was

1 otherwise brilliant in its geometry, that there may be what
2 he -- "feelings of inconveniences" that must allow us to
3 correct the mistakes which they may have inevitably fallen
4 into in their first trials and experiments.

5 One of those mistakes I believe is their mistaken
6 expectation that the judiciary would be the weakest branch.
7 It has instead become not only the strongest, but in my view
8 the most dangerous because it is unchecked in its authority.
9 The checks that the founders envisioned, the ability of the
10 executive not to give effect to an erroneous decision of the
11 court, an egregiously erroneous decision of the court or
12 more importantly, the power of this body combined with the
13 House of Representatives to impeach and remove from office a
14 judge who does not honor their oath of office.

15 Those checks that the founders built in the
16 constitution have proved in time to be ineffective, and that
17 means we are left with a judiciary that is unchecked. And I
18 think if you asked any of the founders that drafted the
19 constitution, they would recognize that any body of men and
20 women unchecked in their power would have a tendency to
21 grandize that power to themselves and abuse it, and I
22 believe that that is the situation we are faced with today.

23 The founders wanted the judiciary to be independent,
24 both to protect individual rights against the tyrannical
25 majority and also to ensure that the political branches

1 stayed within the confines of their delegated power in the
2 constitution.

3 But they did not believe that the judiciary should be
4 unchecked in all its effects. The precautions, Alexander
5 Hamilton wrote in Federalist 78, for judge's responsibility
6 are comprised in the article respecting impeachment. It
7 could not be any more clearer than that, that the
8 impeachment power was not designed simply to remove judges
9 who committed egregious criminal conduct on the bench, but
10 rather judges that failed to take seriously their oath of
11 office of public servants applying the constitution rather
12 than their own will in the exercise of their delegated
13 powers under the constitution.

14 It has not worked, partly because Thomas Jefferson
15 overplayed his hand in a political impeachment of Associate
16 Justice Chase way back in 1804. The pendulum though swung
17 too far the other direction and it has stayed there ever
18 since where we think that the impeachment check on the
19 judiciary they envisioned is not appropriate at all in
20 responding to a judicial aggressiveness.

21 A second thing that has crept into our politics that
22 they would not have envisioned is a misunderstanding of the
23 Supreme Court's decision in Marbury versus Madison which
24 established judicial review, but we have now taken it as
25 establishing judicial supremacy that when the judge's speak,

1 that now becomes the supreme law of the land rather than the
2 constitution that they are supposed to be interpreting.

3 That understanding of Marbury is actually contrary to
4 what John Marshall actually says in that case, and he
5 confronts this issue head on. He says the notion that the
6 Supreme Court can void an article of Congress, an act of
7 Congress, does not imply the superiority of the court to the
8 legislature. It rather implies a superiority of the
9 constitution and the people to both of those branches of
10 government. We have lost that understanding of the primacy
11 of the constitution.

12 The third thing that I think has changed our
13 understanding here is the dramatic change, transfer of power
14 from the states to the federal government following the
15 Civil War Amendment after the Civil War.

16 Salutary in its effect, it also had the unforeseen
17 consequence of transferring a tremendous amount of unchecked
18 power over the states to the judiciary. And so I propose in
19 addition to what Senator Cruz has offered as judicial
20 retention elections which is a way to restore some check on
21 the judiciary to the people directly, that the states ought
22 to have a role in checking the judiciary as well.

23 That transfer of power from the 14th Amendment and
24 others of the Civil War amendments have left the judiciary
25 unchecked with respect to questions of federalism. In fact,

1 quite the opposite. The collaboration of the political
2 branches in Washington and the court has left the states
3 completely out of the process in many instances.

4 So I propose that you look at, as a committee, giving
5 the states the ability by a majority of the states to
6 override an egregiously wrong threatened the federalism
7 decision of the Supreme Court.

8 And finally as we have seen that because the
9 impeachment power itself has proved ineffective, it is a
10 blunt instrument that perhaps we ought to be considering a
11 two-thirds vote of both bodies of the Congress to override
12 an egregiously erroneous decision of the Supreme Court.
13 That would correct a particular bad decision without having
14 to go through the final step of removing those particular
15 judges from office altogether.

16 I thank you again for inviting me to this hearing. I
17 look forward to your questions.

18 Senator Cruz. Thank you, Professor Eastman.

19 Professor Siegel?

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1 STATEMENT OF NEIL S. SIEGEL, DAVID W. ICHEL, PROFESSOR OF
2 LAW AND PROFESSOR OF POLITICAL SCIENCE, CO-DIRECTOR OF THE
3 PROGRAM IN PUBLIC LAW, DUKE UNIVERSITY SCHOOL OF LAW,
4 DURHAM, NC

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6 Mr. Siegel. Chairman Cruz, Ranking Member Coons and
7 Members of the subcommittee, thank you for inviting me to
8 testify today. I am honored to be here and I thank the
9 Chairman for mentioning the national championship of Duke's
10 men's basketball team.

11 It is appropriate, indeed vital for Americans in and
12 out of government to discuss, criticize and consider
13 proportionate responses to decisions of the Supreme Court
14 with which they disagree.

15 The Justices and the rest of us often disagree about
16 questions of legal interpretation. We always have. I
17 vigorously disagree with several important decisions of the
18 Roberts Court. Citizens United and Shelby County come
19 immediately to mind.

20 But in the wake of those decisions, it never crossed my
21 mind to attack judicial independence by advocating a
22 fundamental restructuring of the constitutional relationship
23 between Congress and the court. It never crossed my mind to
24 advocate jurisdiction stripping which is fraught with
25 constitutional difficulties and likely to prove short

1 sighted.

2 It never crossed my mind to call for retention
3 elections for the Justices. On the constitutional Richter
4 scale, retention elections are of a similar magnitude to
5 President Franklin Delano Roosevelt's infamous failed court
6 packing plan and may be even more harmful to judicial
7 independence.

8 Retention elections pose a continuous threat to unpack
9 a court if it renders unpopular decisions, including
10 decisions that protect the rights of unpopular minorities
11 whether secular or religious.

12 Given what is at stake in rewriting or potentially
13 violating Article 3 of our constitution, it is puzzling that
14 any of the court's recent decisions would elicit a call to
15 severely compromise judicial independence. Now the targets
16 are King against Burwell and Obergefell against Hodges, but
17 those rulings make the timing more curious because they were
18 decided not only reasonably, but correctly.

19 In King, a super majority of Justices sensibly read the
20 Affordable Care Act to allow taxpayers to obtain tax credits
21 which make health insurance affordable to them regardless of
22 whether they buy the insurance on a state health insurance
23 exchange or on a federal exchange.

24 The opinion of Chief Justice Roberts for a six Justice
25 majority is carefully constructed, respectful, evenhanded

1 and persuasively reasoned. What is more, the decision
2 returns the issue of the size of government in the field of
3 health care to the political arena where it belongs.

4 While the court's decision in Obergefell limited the
5 Democratic process at the state level, the court was
6 justified in doing so in light of the constitutional rights
7 at issue.

8 By the time of the decision, it had become evident that
9 state bans on same sex marriage violate the 14th Amendment
10 in several ways. For example, the court held in Obergefell
11 that such bans burdened the fundamental right to marry which
12 triggers strict scrutiny under both the due process and
13 equal protection clauses.

14 The court has long understood the right to marry as
15 more encompassing than what the institution of marriage
16 historically, traditionally and in some respects
17 unfortunately look like in America.

18 If the court had limited the right to only those
19 marriages that are deeply rooted in American history and
20 tradition, that it would not have been able to hold in
21 Loving against Virginia, that bans on interracial marriage
22 which go back to the days of slavery violate the fundamental
23 right to marry.

24 Writing for the court, in Obergefell Justice Kennedy
25 emphasized that all of the reasons why opposite sex marriage

1 is constitutional protected apply to same sex marriage.

2 By burdening the right to marry, state bans on same sex
3 marriage trigger the presumption of unconstitutionality.
4 States that ban same sex marriage could have overcome this
5 presumption only if they had been able to demonstrate that
6 excluding gay people from marriage is substantially related
7 to an actual and important state interest.

8 This means an interest that is other than something
9 made up for purposes of litigation and an interest that is
10 other than an expression of morale opposition to
11 homosexuality.

12 In years of litigation culminating in the Supreme
13 Court, able lawyers for the states that ban same sex
14 marriage proved unable to make this showing. I recognize
15 that the issue of same sex marriage is difficult for some
16 Americans, but even they should agree that the court's
17 decision in Obergefell should not be met with threats to the
18 independence of the Supreme Court.

19 At the very least, the court reached a reasonable
20 decision within the bounds of its accepted authority. My
21 own view is that the court's decision vindicates basic
22 constitutional principles of equal citizenship and personal
23 autonomy and in doing so will help bring an end to the pain
24 and humiliation that gay Americans and their families have
25 long endured.

1 With all respect, all due respect to the dissenting
2 opinion of Chief Justice Roberts in Obergefell, the
3 constitution had everything to do with it and it now seems
4 likely that the day will come when the lawfulness and
5 legitimacy of this decision will not be subject to much
6 professional or popular disagreement but will instead be
7 viewed as one of the finer hours in the court's history on
8 the long road to equal citizenship stature for all
9 Americans. Thank you.

10 Senator Cruz. Thank you, Professor. Mr. Whalen?

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1 STATEMENT OF ED WHALEN, PRESIDENT, ETHICS AND PUBLIC POLICY
2 CENTER, WASHINGTON, D.C.

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4 Mr. Whalen. Thank you.

5 Senator Cruz. Could you turn your microphone on,
6 please?

7 Mr. Whalen. Thank you very much, Senator Cruz. Thank
8 you to Senator Coons and the other Members of this
9 subcommittee for inviting me to testify.

10 Just last month, five Justices embraced the claim that
11 there is a constitutional right to marry a person of the
12 same sex. That is the same claim that a unanimous Supreme
13 Court with three of the most aggressive liberal judicial
14 activists ever dismissed as frivolous four decades ago.

15 To be sure of the public's position on issues related
16 to homosexuality has changed considerably over that period
17 and it is no surprise to see those changes reflected in
18 revised laws and policies. But the 14th Amendment did not
19 change. What happened I would submit is simple. Same sex
20 marriage rose high on the left's agenda, five Justices
21 decide that it was a good idea and they figured they had
22 ample political coverage to foist it on the American people.

23 But the constitutional question of Obergefell v.
24 Hodges was not whether it was a good idea to redefine
25 marriage to include same sex couples. It was instead

1 whether the court would foreclose the ability of the people
2 in each state to decide that important question of public
3 policy.

4 In denying American citizens their rightful authority
5 over that question, the court majority acted
6 unconstitutionally and displayed in the Chief Justice's
7 words, "an extravagant conception of judicial supremacy".

8 Some of the ordinary tools are available and necessary
9 to respond to some of the damage that Obergefell threatens.
10 In particular there is an urgent need to protect churches
11 and religious schools and charities from being severely
12 penalized, even driven out of operation merely because they
13 adhere to the same understanding of marriage that President
14 Obama professed to hold when he ran for President.

15 It is essential that Congress and the states enact
16 specific religious liberty protections along the lines of
17 the First Amendment Defense Act that is now pending in both
18 houses of Congress.

19 More broadly, the court's ruling in Obergefell shows,
20 as Justice Alito observes in dissent, that decades of
21 attempts to restrain the court's abuse of its authority have
22 failed and that there is a deep and perhaps irremediable
23 corruption of our legal culture's conception of
24 constitutional interpretation.

25 Obergefell is like Roe versus Wade, a particularly

1 egregious example of the broader problem of so-called living
2 constitutionalist decisions. The living constitution
3 euphemism is at bottom nothing more than an excuse for five
4 Justices to indulge and impose their own policy preferences
5 in the guise of discovering new constitutional rights.

6 As one scholar has put it, the living constitution is
7 really a zombie constitution, as the corpse of the real
8 constitution has been reanimated with the left's favorite
9 positions.

10 To use Alexander Hamilton's terms from *Federalist 78*,
11 these living constitutionalist Justices are exercising will,
12 not judgment. In doing so, they are undermining the very
13 ground on which judicial review of the constitutionality of
14 statutes is justified.

15 The widely accepted myth of judicial supremacy
16 compounds the problem. According to this myth, the
17 constitution means whatever five Supreme Court Justices
18 claim it means and all other governmental actors are duty
19 bound to abide by that supposed meaning.

20 This mistaken concept of judicial supremacy is often
21 confused with the sound and much lesser power of judicial
22 review. What Obergefell shows is there is no rewriting of
23 the constitution that is too absurd to be beyond the bounds
24 of the possible. If something matters to the left and there
25 are five or more living constitutionalist Justices on the

1 court, indeed Justices Ginsburg and Breyer illustrated the
2 point in another recent case in which after more than 20
3 years each on the court, they suddenly called into question
4 the constitutionality of the death penalty.

5 The list of possible living constitutionalist
6 innovations is endless. Voting rights for illegal aliens, a
7 right to taxpayer funding of abortion or sex change
8 operations, mandatory equalized spending for public school
9 districts, a right to a set level of welfare payments, a
10 right to have multiple spouses.

11 Other innovations might also severely impair existing
12 rights. For example, many on the left aim to remove First
13 Amendment protections for so-called hate speech, an
14 amorphous category that constantly expands to cover
15 statements the left does not like, such as criticism of
16 racial preferences.

17 One avenue that is available for working to thwart the
18 court's unconstitutional excesses is the election in 2016 of
19 a President who will aim to appoint sound Justices to the
20 court. I know Chairman Cruz agrees with me on that point.

21 But the court's extraordinary abuses also call for
22 consideration of extraordinary responses. Possible
23 responses include a range of constitutional amendments. For
24 example, to amend the amendment process itself, to override
25 specific rulings, to provide a means besides impeachment for

1 removing bad Justices and to impose term limits on Supreme
2 Court Justices. I will note that various voices on the left
3 have advocated several of these approaches.

4 None of these possible solutions of course would be
5 easy to adopt and careful consideration of their advantages
6 and disadvantages is required.

7 The challenge is great. With the present state of
8 affairs, the difficulty of the challenge is a poor excuse
9 for inaction. Thank you.

10 Senator Cruz. Thank you, Mr. Whelan, and I thank each
11 of the witnesses for your learned testimony.

12 Professor Eastman, I would ask you, briefly elaborate
13 on the idea you mentioned at the end of your testimony about
14 giving the states the ability to reign in judicial excess.

15 Mr. Eastman. Chairman Cruz, I think my point is that
16 with the massive transfer of power from the state to the
17 federal government that came in the wake of the Civil War
18 which had some salutary benefits, we for the first time put
19 in the constitution the protection of the Declaration of
20 Independence and alienable rights and applied it to the
21 state as well as to the federal government.

22 But it unmoored the courts. The impeachment check that
23 was designed as a check that exists in the Congress, the
24 states are not part of any check on the federal judiciary
25 whatsoever, and that transfer of power should not have come

1 at an unlimited delegation of authority to the courts.

2 And so allowing the states to get back in that game
3 when they are -- when their sovereignty is intruded upon by
4 egregiously erroneous decisions of the Supreme Court that
5 threaten the very nature of federalism, I think that the
6 constitution structure ought to give them a check, and the
7 one I proposed is a simple majority of the states that would
8 not be easy to accomplish on any issue. It would mean that
9 only truly egregious threats to state sovereignty would rise
10 to that level, but a simple majority of the states ought to
11 be able to override those kind of decisions of the Supreme
12 Court.

13 Senator Cruz. Thank you. Professor Siegel, you said
14 in your testimony, "The whole point of having a Supreme
15 Court is to enable it to exercise independent judgment."
16 Now I have to confess I have a different view of the Supreme
17 Court's role. I think the court's role is to apply the law
18 and not exercise independent judgment. I think that is the
19 essence of lawmaking.

20 So I would like to ask you, imagine a hypothetical in
21 which we had a President, let us say President Jeff
22 Sessions, and after eight years in the White House,
23 President Sessions had appointed a number of strong
24 conservatives to the court, and let us say he had made a
25 mistake and he had put what I would consider to be

1 conservative judicial activists on the court.

2 I want to ask you about a couple of decisions that a
3 conservative judicial activist might impose. Prior to Roe
4 versus Wade, abortion was a question that was left to the
5 states. Different states resolved the question of abortion
6 differently.

7 One could imagine a future Supreme Court speaking in
8 the same language of Justice Kennedy of the sweet mystery of
9 life that declares that every unborn child has a right to
10 life and therefore in every state it shall be illegal for
11 any abortion to occur in any circumstance whatsoever. That
12 is one possible decision.

13 Another example, the Fifth Amendment provides that we
14 shall not be required to testify against ourselves. Now as
15 a policy matter, you can make some pretty strong arguments
16 against that, that there would be nothing wrong with putting
17 an accused criminal on the stand asking did you kill so and
18 so, and if they so no, throwing them in jail.

19 Imagine an activist court that said we do not agree
20 with this and so from now on you have no more Fifth
21 Amendment right against self-incrimination.

22 A third example, there are many California
23 environmental laws that I think as a policy matter are
24 patently silly and hurt the citizens of California. Imagine
25 a Supreme Court that said we think they are patently silly

1 and within the emanations from penumbras, we declare they
2 are now struck down.

3 And the fourth example I will give you is school
4 choice. I am a passionate advocate for school choice. I
5 think it is the Civil Rights issue, the 21st Century. I
6 also believe in democracy. So I think the place to win on
7 school choice is in Congress and the state legislature's
8 convincing your fellow citizens.

9 But imagine the Sessions court decreed that every child
10 has a right to school choice, to vouchers to attend any
11 school. Now I would ask you, Professor Siegel, if a
12 subsequent court issued those rulings, would you consider
13 those rulings activist? Would you consider them legitimate?
14 And what should be the response to those rulings?

15 Mr. Siegel. Thank you. Thank you, Mr. Chairman.
16 When I used the term "independent judgment", what I mean is
17 the court's independent judgment about what the constitution
18 requires, not its independent judgment independent of the
19 constitution.

20 I think my framing of the issue as opposed to yours
21 presupposes what has existed in this country from the very
22 beginning which is robust disagreement about what the
23 constitution means. That is the question that Hamilton begs
24 in Federalist 78. That is the question that Marshall begs
25 in Marbury against Madison when he borrows from Hamilton's

1 Federalist 78.

2 We as a people have always disagreed about some basic
3 questions of federal constitutional law, and so when I talk
4 about independent judgment, I mean independent judgment
5 about what the constitution means, not what a majority of
6 states will do in response to a Supreme Court that would
7 decide a case like Brown, an intensely controversial case at
8 the time.

9 I could add to your list of hypotheticals other
10 decisions that you might think are correctly decided and way
11 outside the bounds. But Citizens United, Shelby County, I
12 could add to that list.

13 Senator Cruz. But let us stick with the hypothetical
14 that I gave you.

15 Mr. Siegel. Right.

16 Senator Cruz. Would you consider those decisions
17 activists? Would you consider them legitimate? And what
18 would the responses be that you would advocate?

19 Mr. Siegel. I would not use the term activist because
20 activist as it is used in current discourse means I very
21 strongly disagree with the decisions, and so I would say
22 that I very strongly disagree with the decisions.

23 I would not try and mask substance in process by
24 talking about activism. I would say that they are wrongly
25 decided and I would hope that future elections would correct

1 the mistakes through nomination and confirmation replacing
2 the Justices on the court.

3 Now, if they came --

4 Senator Cruz. Now, with respect at least when I use
5 the word activist, I do not mean decisions with which I
6 disagree. I mean decisions that are unfaithful to the law
7 and the constitution. I specifically gave you examples.
8 Every one of those instances may well be policies that as a
9 legislator I might vote for and might vote for
10 enthusiastically.

11 So those are opinions I might agree, but I am happy to
12 say those opinions, there would be a very good argument that
13 those were activist even though they are my policy
14 preferences, it is not the role of a judge to enforce its
15 policy preferences.

16 My time has expired, I want to ask one final question.
17 Mr. Whelan, can you share briefly to the committee your
18 understanding of the experience the states have had with
19 judicial retention elections? Have they been effective
20 reigning in judicial excess? And likewise I want to briefly
21 ask the panel its views on judicial term limits.

22 A number of folks have advocated that, including
23 Professor Erwin Chemerinsky, a known liberal law professor
24 and I would be interested on the panel's views on that
25 proposed check on the court.

1 Mr. Whelan. Happy to address this, Senator. I will
2 say my own impressions are anecdotal. It is not a matter
3 that I study carefully. As a native Californian, I am well
4 aware of the ejection of Rose Bird and two of her colleagues
5 in 1986 I believe.

6 I cannot say that that had any clear, long term impact
7 in improving the California Supreme Court if you look at
8 what it is now. Perhaps it could be worse, but I find that
9 difficult to imagine.

10 I do want to say though if I may, when Professor Siegel
11 refers to robust disagreement and methods of constitutional
12 interpretation or disagreement over what the constitution
13 means, of course he is right that there has been a robust
14 disagreement, but that phrase obscures a central question of
15 just when is it that judges have authority to override a
16 democratic enactment?

17 And what you see in Federalist 78 by Hamilton is a
18 statement that you need a clear conflict, I believe an
19 irreconcilable variance between the constitution and the
20 laws, and if the constitution has no determinant meaning
21 which of course is a living constitutionalist view, it can
22 mean all sorts of things. It can mean something from one
23 day to the next.

24 What that ought to mean taken seriously is that living
25 constitutionalists have undercut the very basis for judicial

1 review.

2 On these other constitutional amendments, I think there
3 is a considerable agreement across the ideological spectrum
4 that the constitution is too difficult to amend, that the
5 Article 5 process sets too high a standard. Some might say
6 it sets too difficult a standard for getting amendments
7 proposed in the first place, others would object to the
8 three-quarters threshold for approval, some would object to
9 both.

10 But I would think there ought to be real interest in
11 looking at that. I also note that the convention of the
12 states, which is a proposal basically a collection of
13 applications to Congress to force Congress to call for a
14 constitutional convention to propose amendments, not to
15 ratify them, to propose amendments is by some counts just I
16 think two or three states away from having enough to compel
17 Congress to act. That might be another avenue worth
18 pursuing.

19 Senator Cruz. Any very, very quick reactions to the
20 judicial term limits?

21 Mr. Eastman. I will address the term limits. I do
22 not think that solves the problem. The problem is judge's
23 acting beyond the scope of their authority. A series of
24 judges who do that for 18 years and then leave and pass the
25 baton to another judge who would do the same thing does not

1 solve the problem.

2 There needs to be an institutional check on the
3 judiciary that remedies a violation of their oaths.

4 Mr. Siegel. I am happy to consider amendments as a
5 matter of good governance, as a matter of constitutional
6 design. I think it is a mistake to consider amendments in
7 response to one or two decisions that you disagree with.

8 Term limits I have thought about for a long time and I
9 have become persuaded as a matter of constitutional design.
10 I think they are a good idea. It is hard to find a
11 constitution around the world or in the states that has the
12 kind of life tenure that we have on the Supreme Court.

13 People are appointed in their 40s, they can stay there
14 until their 90s. I think nomination and confirmation is a
15 way in which we over time ensure democratic accountability.
16 That to me is the most common, appropriate way and I think
17 regular changeover on the court like an 18 year term might
18 be a very good idea and worth serious consideration.

19 Senator Cruz. Thank you very much. Senator Coons?

20 Senator Coons. I would like to thank the panel for
21 our conversation. I would like to turn to a particular
22 question that was raised by your testimony if I might, Mr.
23 Whelan.

24 Just help me understand legally what justifies a ban on
25 same sex marriage other than tradition?

1 Mr. Whelan. Well, your very term, Senator, "a ban on
2 same sex marriage" begs the question what marriage is. So
3 many of these things have been called bans on marriage are
4 simply definitions of marriage as a union of a man and a
5 woman.

6 And, you know, I could explain the consequences of
7 heterosexual intercourse to you if you would like. I do not
8 think we really need that here, but you look at what the
9 Chief Justice spells out in his dissent. That is the
10 conventional understanding that was accepted across the
11 ideological spectrum.

12 Left wing sociologists spelling out that marriage
13 exists in order to provide the best framework for raising
14 the children that are naturally generated by heterosexual
15 intercourse.

16 I emphasize my position is not that the constitution
17 entrenches my view on what marriage is. I believe that
18 this, unlike other matters, is a matter that has left the
19 democratic processes for revision and I might well lose out
20 in those democratic processes.

21 But the notion that the definition of marriage which
22 Justices Douglas and Brennan and Marshall saw as so clearly
23 permissible that they dismissed the appeal in Baker versus
24 Nelson. The notion of marriage that your democratic
25 colleagues, Patrick Leahy, Joe Biden, a couple Members of

1 this committee adopted when they voted for the Defense of
2 Marriage Act, the notion that that definition of marriage is
3 unconstitutional is something that no one -- anyone would
4 have considered an absurdity until the last few years.

5 What is happening then is this conflation of intensely
6 held policy views to which reasonable people are entitled to
7 have their views. Even unreasonable people are entitled to
8 have their policy views, absolutely. But the conflation of
9 those intensely held policy views with the constitution and
10 reading into the constitution things that it has never meant
11 and cannot possibly mean.

12 The point of my testimony is that if you take that
13 approach, there is nothing that is beyond the bounds of
14 living constitutionalism, absolutely nothing. And again,
15 what that means is that the very basis for judicial review,
16 the very basis for judges overriding democratic enactments
17 is undercut if the constitution itself has no determinant
18 meaning.

19 Senator Coons. Professor Siegel, any response to the
20 concept that we are now utterly without boundaries?

21 Mr. Siegel. I think it is appropriate to recall the
22 wisdom of Judge Bork and he said that judges and lawyers
23 live on the slippery slope of analogies. They are not
24 supposed to skid to the bottom, and so you could say well
25 now we have same sex marriage, what about five people? What

1 about 50? What about 100? Why just stick with people?
2 What about animals? Why not just animals? What about
3 vegetables? What about rocks? You can go on and on and I
4 think the response would be actually there are quite
5 principle distinctions between those sorts of marriages that
6 would survive heightened scrutiny by the court.

7 I believe Mr. Whelan put forth the procreation
8 rationale for limiting marriage to one man and one woman and
9 I think Justice Scalia very effectively explained why that
10 rationale does not work in his dissent in 2003 in Lawrence
11 against Texas. When you have so many opposite sex couples
12 who are not capable of procreating or do not want to
13 procreate, it seems like procreation is not an effective or
14 satisfactory rationale and I would add that you have now
15 many, many same sex couples who are procreating and are
16 raising families, and marriage provides the stability for
17 their children that the children of opposite sex marriages
18 enjoy.

19 Senator Coons. And Professor Siegel, if I might just
20 follow up on that point, I have been struck by some of the
21 similarities between Loving versus Virginia in '67 and how
22 it related to Brown versus Board in the understanding of how
23 the 14th Amendments Equal Protection Clause applies to
24 racial minorities and then how the rights of racial
25 minorities or people of different racial backgrounds to

1 marry each other sort of later came from that second
2 decision.

3 Obergefell follows 12 years after Lawrence versus Texas
4 which you referenced in passing. Lawrence prohibited states
5 from criminalizing intimacy between consenting adults of the
6 same sex.

7 What do you think are the connections between Brown and
8 Loving on the one hand and Lawrence and Obergefell on the
9 other?

10 Mr. Siegel. I think you see how constitutional law
11 works, that it is dynamic and unfolds over time. The
12 principles in Brown I do not think were clear at the time of
13 Brown, that interracial marriage was also on the hook and it
14 took more than a decade for the court to declare bans on
15 interracial marriage unconstitutional, not just under the
16 Equal Protection Clause, but under the Liberty Clause of the
17 14th Amendment.

18 And I think you see a similar incremental path with
19 respect to same sex marriage as you move from Loving to
20 Windsor and then from Windsor to Obergefell. And I really
21 think it is very difficult to distinguish Loving in terms of
22 its holding with respect to the fundamental right to marry.

23 Interracial marriage was banned from the very beginning
24 of this country. It goes back to slavery and the court said
25 that the fundamental right, the Liberty Clause of the

1 constitution protects the right to interracial marriage and
2 the conclusion that the country eventually drew, that the
3 country eventually drew was not that everything is up for
4 grabs, rather this vindicates the principles of Brown and I
5 think the same thing is true with respect to Obergefell.

6 Senator Coons. One last question if I might,
7 Professor. So Justice Kennedy did not explicitly adopt
8 heightened scrutiny for laws that discriminate based on LGBT
9 status.

10 In your view, what level of scrutiny applies and given
11 the comment you just gave about the liberty interests, are
12 we poking about penumbras here, or are we implementing one
13 of the fundamental values of our country as reflected in our
14 constitution?

15 Mr. Siegel. Right. So if we are talking about
16 discrimination based on sexual orientation, we are moving
17 from the Liberty Clause to the Equal Protection Clause. The
18 court has yet to expressly declare what the level of
19 scrutiny is when it is used in a technical legal language
20 that is the talk of rational basis review, but I believe in
21 my judgment and the judgment of many scholars of the court,
22 the court has in fact been applying some form of heightened
23 scrutiny.

24 In Lawrence, in Windsor, I think you see equality
25 reasoning that seems inconsistent with genuine deferential

1 rational basis review. My own judgment is that heightened
2 scrutiny ought to apply to discrimination based on sexual
3 orientation for many of the same reasons that discrimination
4 based on race and sex triggers heightened scrutiny, an
5 immutable characteristic that is irrelevant to the ability
6 of a person to participate in American society in a long,
7 very unfortunate history of discrimination and exclusion.

8 Senator Coons. Thank you, Professor.

9 Senator Cruz. Thank you. Senator Sessions?

10 Senator Sessions. Thank you, Mr. Chairman, and thank
11 you for having this hearing. I have always defended the
12 courts. I believe the strength of American democracy
13 depends on the rule of law.

14 I have practiced before federal judges 15 years and I
15 have tremendous respect for them. Day after day they follow
16 the law, did their duty. But when I see what is happening
17 at the Supreme Court level, it strikes me as a foreign
18 unhistorical approach to law. It is just breathtaking in
19 some of the things that has happened.

20 It recalls my freshman law school class when the
21 Professor I would say an activist advocate drew nine little
22 circles on the board, drew a big circle around it and then
23 circled five of the little circles and said the constitution
24 is what they say it is. That is all it is. That is an
25 extremely cynical view. That goes against the idea of

1 American democracy and American jurisprudence and I just
2 reject it out of hand.

3 So my good colleague, Senator Coons, is one of the best
4 people in this body, I have got to tell you. But he says
5 that the idea that homosexuals could not get married is out
6 of step with American values.

7 Well, who is he to say? People voted on that in state
8 after state, legislatures have voted on it in state after
9 state. Who decides this is out of step with American
10 values?

11 So you know, Mr. Siegel I believe you say you cannot
12 have a big case cry activism. That is true, and you cite
13 cases. I think Citizens United can very well be defended
14 under the First Amendment, I believe that Shelby County is
15 very well decided, but people could disagree with both of
16 them. Good people could disagree with both of them.

17 The Obamacare decision, I think it has some
18 justifications. I was disappointed in it, but lawyers have
19 a lot of thought and gave a lot of thought to it. But the
20 marriage case goes beyond what I consider to be the realm of
21 reality, and so the question arises, Mr. Chairman, as you
22 are raising, are we just now the subordinate branch?

23 As Justice Scalia said, there are nine lawyers, five of
24 them get to decide policy questions for America now? And
25 the great Congress has nothing to say about it? We are just

1 stuck and hope that we might win the next election? But
2 that will not be the only issue in the next election.

3 Perhaps another activist promoting present will win on
4 any number of issues. You are in a point where you seem to
5 me you are losing control of the country. You are losing
6 control of the separation of powers in the right order.

7 I just feel strongly. Personally I have tried not to
8 be an attacker of the court even when I have disagreed to
9 propose remedies. But I am beginning to wonder if that is
10 justified now.

11 Mr. Whelan, you have got the withdrawal of
12 jurisdictional, the apparent ability of Congress to withdraw
13 jurisdiction without a constitutional amendment. Do you
14 have any thoughts -- Mr. Eastman mentioned some. Do you
15 have any thoughts specifically that might be practical,
16 achievable and would in some sense at least send a message
17 to the courts that you are not omnipotent, you are just a
18 co-equal branch?

19 Mr. Whelan. On the withdrawal of jurisdictions
20 specifically?

21 Senator Sessions. Yes. I would ask that first.

22 Mr. Whelan. Well, that is a complicated area and
23 again, as others of these, it is going to require careful
24 consideration to make sure you are not doing anything that
25 has unforeseen, unintended consequences.

1 I will say that I think that the power --

2 Senator Sessions. As a practical matter it would be
3 hard to draft I guess.

4 Mr. Whelan. It could well be and it could end up
5 simply inviting state court judicial activism, but that said
6 I think Congress has this authority. It is worth exploring
7 and experimenting with.

8 I do not think it is any grand answer, but it is
9 possible, for example, that in the aftermath of Obergefell
10 Congress could rule that the federal courts have no
11 jurisdiction over any further marriage challenges. This
12 would be a challenge to the myth of judicial supremacy, to
13 the obligation in the eyes of the court for everyone to do
14 whatever the court says.

15 Of course what happens then is that courts will
16 probably strike down these limits on their jurisdiction and
17 you are going to end up ultimately with a fight over what is
18 Congress going to do when push comes to shove?

19 We live in this culture of judicial supremacy and of
20 living constitutionalism. That needs to be combated. If we
21 combat those myths and defeat them --

22 Senator Sessions. You mean intellectually?

23 Mr. Whelan. Intellectually, culturally in the law
24 schools which are the breeders of most of this nonsense. If
25 we do that, much of the problem begins to solve itself.

1 If you do not do that, it is very difficult for any of
2 these problems to get solved.

3 Senator Sessions. Well, Professor Von Holstein said
4 once the 11th Circuit, that if you respect the constitution,
5 you will enforce it as written. Thank you, Mr. Chairman.

6 Senator Cruz. Thank you, Senator Sessions. Senator
7 Whitehouse?

8 Senator Whitehouse. Thank you, Chairman. Professor
9 Siegel, it is interesting to me that we have had such a run
10 of five-person Supreme Court conservative decisions that
11 appear to have completely changed the legal landscape, and
12 it is not until the gay marriage decision comes that we
13 start having hearings from the other side about judicial
14 activism.

15 So let me run through just a few of them. The Heller
16 decision. Before the Heller decision, had there ever been
17 recognized an individual right to bear arms under the Second
18 Amendment?

19 Mr. Siegel. Not by the U.S. Supreme Court.

20 Senator Whitehouse. No. And indeed had not Supreme
21 Court Justices disparaged the very notion that there was
22 such a thing? I believe they actually used the same word we
23 used here, frivolous.

24 Mr. Siegel. Chief Justice Burger called it a fraud
25 perpetrated on the American people. I also believe Judge

1 Bork was at least earlier in his career skeptical about the
2 existence of such a right.

3 Senator Whitehouse. And then they took power in 5 to
4 and changed that. Citizens United, what was the history
5 of restrictions on corporate spending prior to Citizens
6 United?

7 Mr. Siegel. A long history of restrictions and the
8 Citizens United court was required to overrule two previous
9 decisions, McConnell and the Austin case in order to change
10 the law.

11 Senator Whitehouse. And in addition to ignore
12 enormous factual records that had been built up at various
13 times including in the earliest cases when the Senate took
14 notice that the malign influence of corporations and
15 politics was so obvious that on a bipartisan basis, you did
16 not even need to build a record on that. They just took
17 that as a given, correct?

18 Mr. Siegel. And I think the holding with respect to
19 corporations making unlimited expenditures from the general
20 Treasury funds is an important part of the case, but I think
21 a much more important part of the case is how the court
22 redesigned, refashioned the definition of corruption that
23 Congress can regulate.

24 It reduced regulable corruption to something akin to a
25 bribe. Quid pro quo corruption. The court held that

1 ingratiation access is not corruption, and that is why you
2 have the flood of spending now not just by corporations, but
3 by very, very wealthy individuals.

4 Senator Whitehouse. Another constitutional novelty?

5 Mr. Siegel. Yes. Yes, the baseline is pre-existing
6 constitutional law.

7 Senator Whitehouse. The Shelby County decision that
8 took out one section of the Voting Rights Act, that was an
9 act of Congress that under the 15th Amendment to the
10 constitution was actually specifically dedicated to Congress
11 as the implementing agency of government, correct?

12 Mr. Siegel. That is correct. Section 2 of the 15th
13 Amendment like Section 5 of the 14th Amendment, they use the
14 language of Congress shall have the power by appropriate
15 legislation to enforce the provisions of this article.

16 The language appropriate is drawn from Chief Justice
17 Marshall's opinion self-consciously in McCulloch against
18 Maryland, that is supposed to signal deference.

19 Senator Whitehouse. The other point that I wanted to
20 raise with you has to do with juries. It is a little bit
21 less of an immediate and sudden reversal of constitutional
22 and legal and cultural precedent, but it strikes me that in
23 a pattern of decisions, Twombly, Iqbal, Conception, Rent-A-
24 Center and more, the five conservative Justices of the
25 Supreme Court are gradually and systematically trying to

1 erode the institution of the civil jury which according at
2 least to Blackstone and to Tocqueville and other
3 knowledgeable observers of our history and of the
4 constitutional structure that we tried to develop were
5 actually an important part of our separation of power
6 structure.

7 People fought, bled and died to have civil juries in
8 the Revolutionary War and there has been a long corporate
9 campaign to say that juries are runaway juries, to say that
10 jury awards are reckless and this American institution is
11 almost vanishing.

12 The Chief Judge of the District Court in my home state
13 said that he had not done a civil jury trial in three years,
14 and it would seem to me that while it is not as abrupt as
15 the gay marriage decision, we have a court that in every
16 decision that it makes whittles and chips away at the
17 institution of the jury, whether it is to make it harder to
18 get in front of the jury with heightening pleading
19 standards, whether it is taking class actions and making
20 them harder to bring so that high volume but low dollar
21 frauds become something that you cannot get a remedy for.

22 There are a variety of tools that they seem to have
23 used. It strikes me that that is a bit of a constitutional
24 abhorration as well if you look back at the history and yet
25 there does not seem to be much complaining about that

1 either.

2 I have run out of time, so let me just let you answer
3 that. That was a longer question than I should have asked.

4 Mr. Siegel. Yeah, and I am less confident about
5 opining because that is starting to fall outside my area of
6 expertise. I can confirm that the court has made pleading
7 standards more difficult. I can confirm that the court has
8 made it more difficult to bring class actions than it was
9 before Justice Alito replaced Justice O'Connor.

10 I think --

11 Senator Whitehouse. And presumably you can confirm
12 that they have allowed corporate defendants to steer
13 plaintiffs towards arbitration?

14 Mr. Siegel. Yes. This is, I think it is fair to
15 characterize this court as a very pro-arbitration court,
16 enforcing arbitration agreements strictly according to their
17 terms and keeping potential plaintiffs out of federal court.

18 Senator Cruz. Thank you.

19 Senator Whitehouse. Mr. Chairman, may I ask
20 permission to add -- I wrote an article for the Harvard
21 Journal of -- Harvard Law and Policy Review and I would like
22 to ask unanimous consent that it be added as a --

23 Senator Cruz. I am not sure it helps the committee to
24 have publications that Harvard has issued, but nonetheless,
25 without objection we will allow it.

1 COMMITTEE INSERT/

2 [The article appears in the appendix.]

1 Senator Whitehouse. Well, Harvard has made the
2 occasional mistake.

3 Senator Cruz. You know, it is interesting listening
4 to some of my colleagues talk about activism, and there is
5 this notion of relativism. That activism simply means, as
6 Professor Siegel suggested, a decision with which you
7 disagree.

8 And that is an argument designed to diminish the very
9 notion of activism, because if it is a decision with which
10 you disagree, then there is no point in criticizing an
11 activist decision.

12 Activism has a very specific meaning. It is any time a
13 judge follows his or her policy preferences instead of the
14 law. It is not the role of a judge to impose his or her
15 policy preferences.

16 There is a marked difference between the decisions that
17 my friends and colleague, Senator Coons and Senator
18 Whitehouse focused on, and the decisions at issue from the
19 court this term.

20 Professor Eastman, there was reference made to the
21 Heller decision. I would like to ask you, is there any
22 textual provision of the United States Constitution that
23 protects the right of the people to keep and bear arms?

24 Mr. Eastman. There is, Mr. Chairman, the Second
25 Amendment.

1 Senator Cruz. The Second Amendment. So it would be
2 activism for a judge who agrees with gun control to refuse
3 to enforce the right of the people to keep and bear arms
4 that is explicitly protected in the constitution, is that
5 correct?

6 Mr. Eastman. Senator Cruz, yes.

7 Senator Cruz. There has also been repeated reference
8 to Citizens United. Is there a provision of the United
9 States constitution that says Congress shall make no law
10 abridging the freedom of speech?

11 Mr. Eastman. There is, Senator, the First Amendment.

12 Senator Cruz. And it would be activism therefore for
13 judges who happen to agree with campaign finance reform,
14 with muzzling citizens to keep incumbent politicians in
15 office to refuse to enforce the text of the First Amendment
16 of the constitution?

17 Mr. Eastman. I agree with that.

18 Senator Cruz. There was another example, Shelby
19 County. Now, is there a provision of the constitution that
20 protects equal protection and that was specifically passed
21 to prevent discrimination based on race following a bloody
22 Civil War in which 600,000 Americans spilled their blood to
23 expunge the original sin of slavery from this country?

24 Mr. Eastman. Yes, Senator, Article 1 of the 14th
25 Amendment, Section 1.

1 Senator Cruz. And I would note Loving versus
2 Virginia, another decision striking down bans on interracial
3 marriage. There is that same provision of the constitution
4 that explicitly says government cannot discriminate based on
5 race and we fought a Civil War to pass that amendment, is
6 that correct?

7 Mr. Eastman. Well, it is the same equal protection
8 clause.

9 Senator Cruz. I would note another example that was
10 invoked just a moment ago by Professor Siegel where he said
11 this court is a "pro-arbitration court." I will be
12 perfectly honest, I do not give a flip whether this court as
13 a policy matter likes arbitration or does not like
14 arbitration.

15 Has the United States Congress passed a statute that
16 presses for arbitration as a means of resolving litigation?

17 Mr. Eastman. It did, and not only that, Senator, this
18 constitution has a specific clause prohibiting the states
19 from impairing the obligation of contracts, and if that
20 arbitration clause is part of a contract, it is
21 constitutionally protected.

22 Senator Cruz. Now let us flip to the other side, the
23 examples of activism we have talked about on the Obamacare
24 decision three years ago.

25 The statute defined the individual mandate repeatedly

1 as a penalty. President Obama went on national television
2 and told the American people, this is not a tax, and yet the
3 Supreme Court said we will change the word penalty into tax
4 and that will be the basis for upholding this legislation.
5 Is that correct, Professor Eastman?

6 Mr. Eastman. Senator, I think it was even worse than
7 that. The mechanism set up for political accountability in
8 this body in raising taxes requires that they originate in
9 the House of Representatives.

10 That bill did not. In fact, a bill that did originate
11 in the House of Representatives to propose Obamacare as a
12 tax failed to gain marked majority support precisely because
13 people were afraid of having to tell their constituents they
14 had just imposed a massive tax increase.

15 So what the Supreme Court did in that decision is
16 eliminate the actual political accountability that the
17 constitution envisioned.

18 Senator Cruz. Likewise in the most recent Obamacare
19 decision, the statute said that the individual mandate and
20 the subsidies and everything else applies to exchanges
21 established by the state.

22 Yet the court changed that to an exchange established
23 by the federal government for a policy outcome. Was that
24 policy outcome consistent with the text of the statute that
25 a judge is expected to apply?

1 Mr. Eastman. Not only not with the text of the
2 statute, but not with the text of the constitution. I was
3 surprised to hear Professor Siegel talk about the
4 constitution has always been disputed in its meaning, but
5 there are some things that are unambiguously clear.

6 Article 1, Section 9 for example that says no money
7 shall be drawn from the Treasury but in consequences of
8 appropriations made by law. That means when the Congress
9 says an appropriation for those subsidies shall only be for
10 health insurance purchased on exchanges established by the
11 state, there is no authorization for money to be drawn from
12 the Treasury to provide subsidies for any other type of
13 exchange, and yet the executive did that and the court
14 ratified that decision with its I believe not only unlawful
15 and unwarranted but unconstitutional decision.

16 Senator Cruz. Now, we have discussed a series of
17 decisions with which some members of this committee
18 disagree, whether it is Heller because they disagree with
19 the Second Amendment to the Bill of Rights, whether it is
20 Citizens United because they disagree with the First
21 Amendment to the Bill of Rights, whether it is Shelby County
22 because they disagree with the prohibition of discrimination
23 based on race in the 14th Amendment to the constitution.

24 I would ask in contrast Roe versus Wade a decision some
25 Members on this committee agree with. Is there one word

1 anywhere to be found in the United States constitution that
2 creates a right to abortion?

3 Mr. Eastman. No, Senator, there is not.

4 Senator Cruz. The Obergefell decision that some
5 Members of this committee support, is there one word
6 anywhere in the United States constitution that creates a
7 right to same sex marriage?

8 Mr. Eastman. No, there is not.

9 Senator Cruz. So we have a clear and simple metric
10 for judicial activism. If you are following the
11 constitution, it is not only not activist, it is honoring
12 your oath. If you are imposing your own policy preferences
13 in contravention of the text to the constitution, then it is
14 the essence of activism and it is the obligation of this
15 body to reign in such judicial tyranny.

16 Mr. Eastman. Senator, I agree with that. One of the
17 things I thought most interesting about Senator Whitehouse's
18 comments is how it proves the very issue of judicial
19 supremacy.

20 He did not resort to the First Amendment or the Second
21 Amendment and say Heller and Citizens United violated those.
22 What he did say that they violated prior decisions of the
23 Supreme Court. That establishes that the Supreme Court when
24 it speaks is now the constitution unto itself, that is the
25 very challenge of judicial supremacy that Mr. Whelan and I

1 are talking about here and that I think we need to address.

2 Senator Cruz. Thank you, Professor Eastman. Senator
3 Coons?

4 Senator Coons. If I might, Professor Siegel? Just
5 looking at the language within both of these cases. There
6 is some really striking disrespect shown to the majority
7 opinion in these two cases.

8 I could quote at length Justice Scalia's comments, one
9 about hiding his head in a bag, the other about the Supreme
10 Court having essentially put on the jerseys of the Obama
11 team if I could paraphrase from my colleague here.

12 Is the disrespect shown in the majority opinions in
13 these two cases usual and typical? And if not, what does it
14 say, excuse me, the disrespect in the minority opinions
15 towards the majority opinions, what does that say about the
16 current court and its direction?

17 Mr. Siegel. I think the language is unfortunate. I
18 think it is intemperate. I say this as someone who knows
19 Justice Scalia and likes Justice Scalia. He taught in our
20 Duke and Geneva program and I helped him and he was
21 absolutely wonderful. He taught a separation of powers
22 course and we had a great time debating various issues.

23 I think it is intemperate. I think it is -- I insist
24 when I teach these courses, I am teaching them now to my
25 students in D.C. that this is not how lawyers are supposed

1 to conduct themselves, saying that you would hide your head
2 in a bag rather than join this decision.

3 I also do not think it is the other Justices. I think
4 they occasionally get angry, they occasionally have some
5 sharp elbows, but that kind of language it seems to me to be
6 as more specific to Justice Scalia and I think the other
7 Justices have just decided they are not going to respond in-
8 kind and it is not just like Justice Scalia talks that way
9 to only certain of his colleagues.

10 He can really get into it with other colleagues.
11 Disagree, disagree vigorously, explain your reasons, but I
12 just do not think it is appropriate to tell the world really
13 and to perform for the world that you can disrespect so
14 personally the views of someone with whom you disagree.

15 Senator Coons. I support religious freedom and the
16 ability of people to express their beliefs free from penalty
17 or constraint, but some of the legislative proposals that
18 have been put forward that purport to defend religious
19 liberty against same sex marriage, one of the issues we have
20 talked about at length would in effect amount to a
21 statutorily protected right to discriminate against gay
22 people.

23 Could you talk about the protections that families
24 headed by same sex couples have a demonstrable need from
25 discrimination in the workplace when hiring and what some of

1 the consequences of the proposed legislation, not really the
2 subject of this hearing, but referenced by a number of my
3 colleagues? What sorts of impact that might have.

4 Mr. Siegel. Yes. I think it is a very important
5 question going forward. You have protections in federal law
6 for discrimination in the workplace and housing based on
7 race, based on sex, based on religion and going forward now
8 you can have same sex couples who have officially outed
9 themselves by availing themselves of their right to marry
10 and that I think can make them vulnerable to discrimination
11 in the workplace, to discrimination in abilities to obtain
12 housing, to be served in public accommodations.

13 I would hope not withstanding how much disagreement
14 there is over the issue of same sex marriage that we could
15 come to more of a consensus that discrimination on the basis
16 of sexual orientation in the workplace and housing is a
17 place we do not want to go to or continue in that -- the
18 federal government, that Congress should pass anti-
19 discrimination measures to prevent that from happening or
20 continuing to happen.

21 Senator Coons. Well, and I support those sorts of,
22 anti-discrimination measures I think there will be
23 legislation soon in this Congress to that effect.

24 Gay marriage is obviously an issue that touches on
25 deeply held convictions on both sides and even so I question

1 what authority lower courts and state officials have to
2 disregard a decision of the court. I am frankly struck to
3 see Mr. Whelan's invocation in his written testimony of
4 President Lincoln's disobedience of the Dred Scott as
5 precedent for local officials to deny same sex couples the
6 right to marry in contravention of what I believe to now be
7 controlling law.

8 So has there been any similar response to a Supreme
9 Court decision since Governor Wallace stood in the
10 schoolhouse door in order to prevent the integration of the
11 University of Alabama?

12 Mr. Siegel. I mean, massive resistance to Brown is
13 something that comes to my mind when I consider some of the
14 proposals that are on the table on the years with which
15 local officials resisted federal court orders to integrate
16 their schools to comply with the Brown decision.

17 And so I think it is a cause of concern when local
18 officials are invoking religious liberty not to perform
19 their public responsibilities. Having said that, I
20 understand, I think it is important to see the world from
21 their point of view and understand that they regard
22 themselves as being called on to enforce a deeply unjust
23 law, and the basic problem of what do you do when you think
24 the law is deeply unjust has a long history in this country.

25 In the slavery days, what about abolitionist judges?

1 Justice Scalia has said that if judges cannot in good faith
2 apply the death penalty, they should simply resign. And
3 there is force to what he is saying, but I also think that
4 is a little too forceful.

5 You can resign, you can recuse if that is a
6 possibility, but simply saying that I am not going to
7 perform my public responsibilities, we would not allow that
8 on the basis of race. I do not think we would allow that.
9 We certainly ought not to on the basis of sex, and so I am
10 concerned about allowing that on the basis of sexual
11 orientation.

12 Senator Coons. My last question about the proposals
13 for restraining judicial activism. Do you have confidence
14 that the Justices would have decided Brown versus Board the
15 way they did had they faced judicial recall elections?

16 Mr. Siegel. It certainly worries me. It is very easy
17 in retrospect to look at Brown and say it was so obviously
18 right, it was inevitable. You had almost 100 southern
19 Congressmen signing the Southern Manifesto in response to
20 Brown, calling it lawless, calling it the equivalent of
21 activism, invoking the text and original understanding in
22 American history and a traditional authority of the states
23 to regulate the schools as well as the relations among the
24 races.

25 The Brown court was courageous. It made a bet with

1 constitutional destiny and it could have lost. It almost
2 lost. I do not know whether they would have had the courage
3 that they had if they were looking over their shoulders and
4 wondering about their jobs.

5 I hope they would, they might have, but I cannot say
6 with certainty that that is what would have happened.

7 Senator Coons. Brown was actually, as you know, the
8 combination of a variety of cases from several states. The
9 only one which was affirmed as having been correctly decided
10 below is a case from Delaware in which a Delaware judge had
11 ordered the integration of schools based on a case that came
12 from my hometown of 1,500 and I think he was an unusually
13 brave and unusually forward looking very young judge at the
14 time. And I do think that if the Supreme Court Justices or
15 frankly the judges of my home state had been subject to
16 recall elections, we would not have seen the progress that
17 we saw at the time. Thank you, Professor.

18 Senator Cruz. Thank you, Professor. I would note
19 that Brown versus Board of Education was a decision that was
20 in my judgment unequivocally correct and it was vindicating
21 the explicit text of the constitution just like each of the
22 decisions I went through with Professor Eastman.

23 I would also note that those southern members of
24 Congress who decried Brown as lawless because they disagreed
25 with it as policy members were all or virtually all

1 Democrats. They disagreed with it as a policy matter and so
2 they decried it and they wanted the court to ignore the text
3 of the constitution and continue discriminating based on
4 race. Senator Sessions?

5 Senator Sessions. I think that is correct. I think
6 Brown was a courageous decision, but it was certainly one
7 well-founded in the plain text of the constitution and it
8 reversed a lot of decisions incorrectly held previously.

9 And on the question of marriage, let us be clear. I am
10 not aware of any circumstance in which people could not
11 gather and have a same sex ceremony, declare themselves
12 married.

13 The question is whether or not the state recognizes it
14 for a position, for such things as passing on your social
15 security or other benefits that the state must recognize.
16 And drawing a bright line throughout history most states
17 have decided otherwise, decided you should not recognize it,
18 although some states were voting differently and changing
19 the law.

20 So we had a situation I think that was perfectly
21 harmonious with democracy. I do think the descents were
22 unusually strong. Scalia was I think clear, powerful and
23 correct. I mean, we have to make a decision in this world.
24 Are there such things as right and wrong, correct and
25 erroneous? Scalia was correct. The majority was erroneous.

1 There is no basis in the constitution for that ruling.
2 So we live in a real world and Mr. Whelan, I will ask you.
3 What did the Supreme Court say in the marriage decision that
4 would justify their ruling? How did they attempt to find
5 and what did they say?

6 Mr. Whelan. Well, I am not the best person to try to
7 paraphrase Justice Kennedy's pompous moralizing. What he
8 basically said is we have this fundamental right to marriage
9 which he concedes has always been a union of a man and a
10 woman, but he posited in a few paragraphs that are very
11 difficult as many Kennedy opinions are, to decipher, that
12 somehow the very reasons we have had marriage apply with
13 full force I think he says to same sex relationships.

14 I cannot make heads or tails of that, just as one can
15 study Planned Parenthood v Casey or Romer versus Evans for
16 years and not be able to discern what the actual rationale
17 is.

18 Senator Sessions. Well, just let me followup then.
19 Some people say that it was poorly written as you have
20 indicated. Is not the real problem there was no defense that
21 they could write to justify this if you show fidelity to the
22 constitutional order?

23 Mr. Whelan. I think that is absolutely right. You
24 have a lot of leftist academics who say right result, poorly
25 reasoned. And I am sure that, and another Justice might

1 have written something that would get more applauds from the
2 academics, they will be making it up in a more sophisticated
3 way.

4 Maybe it is a blessing in disguise that Justice Kennedy
5 wrote the opinion as ineptly as he did. I do want to say
6 when people talk about intemperate descents, intemperate,
7 the whole concept of what is intemperate has to be compared
8 to what?

9 And when you have here a decision that is overriding
10 the central social institution of American society, I do not
11 see how any level of disagreement with that could be fairly
12 criticized as intemperate.

13 Senator Sessions. Well, I think that is correct. In
14 my view, the majority committed an enormous constitutional
15 wrong, an enormous erosion of respect for law in America.
16 They did it and they deserve the harshest criticism. They
17 did it because they had ideological view that they wanted to
18 impose and they got five to agree and they did it and it is
19 not right and the American people have been diminished as a
20 result of it. The constitutional order has been diminished.

21 Mr. Chairman, you have brilliantly laid out what
22 activism is and I do not expect to win every case in the
23 Supreme Court and I do not expect to win every battle in
24 Congress, but I know what my powers are and what my powers
25 are not and judges who exceed their power on the theory that

1 nobody can stop us and they will always get away with it is
2 a dangerous thing. I just worry about it. Thank you for
3 the committee hearing and I do think we should continue this
4 discussion.

5 Senator Cruz. Thank you, Senator Sessions. Senator
6 Whitehouse?

7 Senator Whitehouse. Thank you, Chairman. I would
8 only add that I know and actually am very, very fond of
9 quite a number of Americans who are not at all diminished as
10 a result of the Obergefell decision. In fact, they would
11 argue that if there is such a word as undiminished, they
12 have just been undiminished by it.

13 The Chairman took Dr. Eastman through the private right
14 decision in Heller and pointed out that that was connected
15 textually to the Second Amendment to the constitution, as
16 were all of the previous decisions that it overruled
17 connected textually to the Second Amendment of the
18 constitution.

19 The campaign finance decision, Citizens United, they
20 agreed with textually connected to the First Amendment, as
21 were previous decisions that were overruled by Citizens
22 United.

23 Professor Siegel, was the Obergefell decision textually
24 connected to any part of the U.S. constitution? Or was it
25 just a whimsey of these five judges?

1 Mr. Siegel. I am staring at Section 1 of the 14th
2 Amendment and it talks about denying liberty without due
3 process of law. It also talks about not denying any person
4 within its jurisdiction the equal protection of the laws.

5 And so --

6 Senator Whitehouse. What part of equal is not at
7 issue in Obergefell.

8 Mr. Siegel. Equal and liberty. I think there are
9 two, actually three very strong rationales to explain why
10 bans on same sex marriage violate the constitution.

11 It is discrimination on the basis of sexual
12 orientation, it is discrimination on the basis of sex and it
13 is an unjustified infringement of the fundamental right to
14 marry, and so I think you have to say more than just
15 invoking different provisions of the constitution.

16 You have to do a lot of work to get from Congress shall
17 make no law abridging the freedom of speech to corporations
18 may make unlimited expenditures through their general
19 treasury funds to influence the outcomes of elections. You
20 have to do a lot of work to get from a well regulated
21 militia being necessary to the security of a free state, the
22 right of the people to keep and bear arms shall not be
23 infringed to the right in Heller, which is why it takes from
24 1791 to 2008 to get there. It actually takes 30 years of
25 social movement advocacy to take this understanding of the

1 Second Amendment from off the wall to on the wall.

2 The Heller court's reading effectively excises the
3 purpose clause. That purpose clause, that initial clause
4 tells you. It is a rare statement in the constitution about
5 what a particular provision is supposed to be doing, and it
6 focuses on the militia.

7 Now, lots of influential serious scholars have studied
8 the matter and defended the Heller court's decision. I
9 think that is within the range of reasonable disagreement.
10 I also think the Liberty Clause of the 5th and 14th
11 Amendment could be used to support the Heller decision.

12 In fact, I think Justice Alito's decision in McDonald
13 is better reasoned than Justice Scalia's in Heller because
14 of the history and tradition of firearm ownership. But with
15 respect to all these cases, you cannot just insight various
16 provisions of the text of the constitution and then say a
17 decision is correctly decided. You have to do what John
18 Marshall did.

19 Senator Whitehouse. Because in fact the previous
20 decisions that were overruled by these decisions cited the
21 very same textural provisions, correct?

22 Mr. Siegel. That is right. I mean, you are talking
23 about engaging judicial precedent, you are talking about
24 engaging historical practice, you are talking about not just
25 the text but the purpose of the text. You are talking about

1 the pre and post ratification history, you are talking about
2 implications of the constitutional structure.

3 This is the bread and butter work of constitutional law
4 as the Chairman knows very well given his distinguished
5 career.

6 Senator Whitehouse. And the elements that you have
7 just described in the practice of constitutional law recur
8 over and over and over and over and over again in the United
9 States Supreme Court precedent no matter what particular
10 provision of the constitution they are expounding?

11 Mr. Siegel. That would be my view.

12 Senator Whitehouse. Yes. All right. Thank you very
13 much.

14 Senator Cruz. Thank you, Senator Whitehouse. I would
15 note that Senator Hatch has submitted a written statement
16 that will be added to the record without objection.

17 /COMMITTEE INSERT

18 [The written statement of Senator Hatch appears in the
19 appendix.]

1 Senator Cruz. I want to thank each of the witnesses
2 who came here today and provided learned testimony. Thank
3 you. I would like to thank each of the Members of the
4 committee for the beneficial discussion.

5 Indeed we saw something that rarely occurs in the
6 United States Senate, which is actually debate. That is a
7 wonderful thing and I hope we see more of it.

8 We will be keeping the hearing record open for an
9 additional five business days which means the record will be
10 closed at the end of the business day on Wednesday, July
11 29th, 2015. Thank you to everyone. This hearing is now
12 adjourned.

13 [Whereupon, at 3:25 p.m., the Committee was adjourned.]

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