United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510–6275

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August 26, 2015

Dr. John C. Eastman
Henry Salvatori Professor of Law & Community Service
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Dear Dr. Eastman:

Thank you for your testimony at the Senate Committee on the Judiciary, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts hearing entitled "With Prejudice: Supreme Court Activism and Possible Solutions" on July 22, 2015. I appreciated you taking the time to appear before the Committee.

I have enclosed a copy of the unedited hearing transcript for you to review and make grammatical changes to your testimony, if needed. This is not the official hearing transcript and should not be copied or distributed under any circumstance.

Please mark any changes you may have directly on the transcript, flag the pages and return it to my office, to the attention of Jason Covey, Hearing Clerk, Senate Judiciary Committee, 224 Dirksen Senate Office Building, Washington, D.C., 20510 or by email to Jason_Covey@judiciary-rep.senate.gov. In order to complete the hearing record, please return this transcript with your changes as soon as possible and in no event later than **September 23, 2015.**

Again, thank you for your participation. If you have any questions, please contact Jason Covey at (202) 224-5225.

Sincerely,

Chuck Grassley

Charles E. Grassley
Chairman

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

estimates in history.

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

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

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

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

expressed will of Congress.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Siegel. I emphatically agree.

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

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

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

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

Professor Eastman?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator Cruz. Thank you, Professor Eastman.

Professor Siegel?

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

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

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

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

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

sighted.

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

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

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

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

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

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

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

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

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

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

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

is constitutional protected apply to same sex marriage.

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

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

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

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

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

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

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

Mr. Whalen. Thank you.

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

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

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

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

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

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

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

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

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

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

Obergefell is like Roe versus Wade, a particularly

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

at an unlimited delegation of authority to the courts.

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

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

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

conservative judicial activists on the court.

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

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

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

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

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

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

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

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

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

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

Federalist 78.

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

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

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

Mr. Siegel. Right.

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

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

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

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

Now, if they came --

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

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

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

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

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

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

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

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

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

review.

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

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

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

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

solve the problem.

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

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

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

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

Senator Cruz. Thank you very much. Senator Coons?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator Coons. Thank you, Professor.

Senator Cruz. Thank you. Senator Sessions?

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Whelan. On the withdrawal of jurisdictions specifically?

Senator Sessions. Yes. I would ask that first.

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

I will say that I think that the power --

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

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

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

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

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

Senator Sessions. You mean intellectually?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator Whitehouse. Another constitutional novelty?

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

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

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

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

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

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

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

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

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

either.

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

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

I think --

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

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

Senator Cruz. Thank you.

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

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

COMMITTEE INSERT/

[The article appears in the appendix.]

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

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

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

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

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

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

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

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

Mr. Eastman. Senator Cruz, yes.

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

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

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

Mr. Eastman. I agree with that.

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

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

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

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

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

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

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

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

The statute defined the individual mandate repeatedly

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Eastman. No, there is not.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In the slavery days, what about abolitionist judges?

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

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

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

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

The Brown court was courageous. It made a bet with

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And so --

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

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

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

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

Second Amendment from off the wall to on the wall.

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

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

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

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

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

Second Amendment from off the wall to on the wall.

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

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

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

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

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

Mr. Siegel. That would be my view.

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

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

/COMMITTEE INSERT

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

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

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

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

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

C O N T E N T S