

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. ¹ Indeed, Justices Ginsburg and Breyer illustrated the
2 point in another recent case in which ¹ 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 ¹ constitutionalist
6 innovations is endless. ¹ Voting rights for illegal aliens, a
7 right to taxpayer funding of abortion or sex ¹ 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 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 determinate meaning,
 21 which of course is a living constitutionalist view, it can
 22 mean all sorts of things. It can mean something different
 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 V 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
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 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 ^{that} 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} ~~descent~~. That is the
10 conventional understanding that was accepted across the
11 ideological spectrum.

12 Left-wing sociologists spelling ^{ed} 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 ^{been} ~~left~~ ^{to}
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 ^m 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 ^{policy} views. Even unreasonable people are entitled to
8 have their policy views, absolutely. But ^{what is happening is} 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 determinan^{te}
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 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 ^{with} 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 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 applause^{re} from the
2 academics, ~~they will~~^{for} be making it up in a more sophisticated
3 way.

4 ~~Maybe~~ 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 ~~descent~~^{discents}, 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