Senator Cruz Questions for the Record for Mr. Ed Whelan
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
"With Prejudice: Supreme Court Activism and Possible Solutions"
Wednesday, July 22, 2015

1. **How would you define judicial activism?**

   I would define *judicial activism* as the wrongful judicial invasion of the realm of representative government. In my preferred usage, the term identifies the mistaken overriding by judges of democratic enactments or other policy choices made by other government officials (typically through the invention of new constitutional "rights"). The central concern that the term and its counterpart *judicial restraint* signal is the proper bounds on the role of the courts in our system of separation of powers and representative government. (I would use the distinct term *judicial passivism* for the wrongful failure on the part of the courts to enforce constitutional rights.)

2. **Is the Court's decision in *Obergefell v. Hodges*, 576 U.S. __ (2015), an activist decision? If so, why?**

   Absolutely. For the reasons that the dissenters spell out and that I outline in my submitted testimony, the ruling in *Obergefell* is a brazenly lawless overriding of state laws that define marriage as the union of a man and a woman.

3. **Why is *Obergefell* an activist decision, but the Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and *Shelby County v. Holder*, 570 U.S. __ (2013), are not?**

   In my judgment, there is no plausible comparison between *Obergefell* and these other rulings. A full defense of that proposition would require a lengthy law-review article. I will instead limit myself here to a few observations.

   As Chairman Cruz noted at the hearing, the Second Amendment explicitly protects "the right of the people to keep and bear Arms." In *District of Columbia v. Heller*, the majority set forth an exhaustive originalist analysis that, consistent with academic commentary even from professors on the Left, ruled that the Second Amendment confers a personal right.

   In *Citizens United v. FEC*, the majority adopted the very First Amendment holding that the ACLU urged. According to Stanford law professor Kathleen Sullivan—who is often mentioned as a leading "progressive" candidate for a Supreme Court nomination—"*Citizens United* has been unjustly maligned as radically departing from settled free speech tradition." Kathleen Sullivan, "Two Concepts of Freedom of Speech," 124 Harv. L. Rev. 143, 176 (2010). Critics have unfairly attacked the ruling by misrepresenting the case it overruled (*Austin v. Michigan Chamber of Commerce* (1990)) as part of "a traditional legal view that stretched back as far as 1907" rather than as the legal outlier that even then-Solicitor General Elena Kagan recognized it to be; by failing to note that the *Citizens United* holding applies equally to unions and corporations; and by neglecting

the radical consequences of the First Amendment theory that the Obama administration advocated. As Chief Justice Roberts stated in his concurrence:

> The Government urges us in this case to uphold a direct prohibition on political speech. It asks us to embrace a theory of the First Amendment that would allow censorship not only of television and radio broadcasts, but of pamphlets, posters, the Internet, and virtually any other medium that corporations and unions might find useful in expressing their views on matters of public concern. Its theory, if accepted, would empower the Government to prohibit newspapers from running editorials or opinion pieces supporting or opposing candidates for office, so long as the newspapers were owned by corporations—as the major ones are.

In *Shelby County v. Holder*, the Court recognized that the preclearance requirement under section 5 of the Voting Rights Act of 1965—the requirement that states obtain federal permission before enacting any law relating to voting—was "a drastic departure from basic principles of federalism." Further, the application of that requirement only to some states under section 4's formula was "an equally dramatic departure from the principle that all States enjoy equal sovereignty." The Court held merely that dramatically changed circumstances rendered obsolete the justifications offered for the extraordinary section 4 formula.

4. **In the opinion for the Court in *Obergefell*, Justice Kennedy writes that the "identification and protection of fundamental rights" is the judiciary's responsibility and that courts must "exercise reasoned judgment" in identifying those rights. Maj. Op. at 10. Did the Court articulate any standards that should guide the "reasoned judgment" of courts?**

   None that I find intelligible.

5. **The Court also held that fundamental rights arise "from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." Maj. Op. at 19. Whose "better informed understanding" is the Court referring to?**

   It would appear that the members of the majority are referring to themselves and to those who share their view.

6. **Is there anything that would prevent a future court with "a better informed understanding" of constitutional imperatives than this Court from overruling the *Obergefell* decision?**

   There certainly shouldn't be.

7. The Court describes the "nature of marriage" as an "enduring bond" through which "two persons together can find other freedoms, such as expression, intimacy, and spirituality." Maj. Op. at 13. The Court then concludes that "[t]his is true for all persons, whatever their sexual orientation." *Id.* Is there anything in the Constitution about the "nature of marriage?"

The Constitution does not speak to what the nature of marriage is.

8. Is the Court's understanding of the "nature of marriage" consistent with the historical understanding of marriage as reflected in the law?

No. Indeed, even the majority concedes (even as it tries to explain away) that all of "this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners." As Chief Justice Roberts explains in his dissent:

> This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, A History of Marriage Systems 2 (1988); cf. M. Cicero, De Officiis 57 (W. Miller transl. 1913) ("For since the reproductive instinct is by nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common.").
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> The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

9. In his written testimony, Professor Siegel contends that it is "untenable to argue that states may permissibly exclude same-sex couples from the institution of marriage because states allow opposite-sex couples to marry only in order to solve the policy problem of accidental procreation by heterosexuals." What is your response?

In brief: Professor Siegel's contention rests on a misunderstanding of the nature of marriage and on a distortion of the justifications for governmental recognition of

marriage. As Chief Justice Roberts outlines in his dissent, sexual complementarity is intrinsic to the understanding of marriage that prevailed in all states at the time the Constitution was adopted, in all states at the time the Fourteenth Amendment was ratified, and in all states until very recently.

10. Are laws defining marriage as the union of one man and one woman analogous to laws prohibiting interracial marriage? Is the Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), distinguishable from *Obergefell*? If so, how?

Loving is easily distinguishable. For the reasons that Chief Justice Roberts outlines, sexual complementarity is intrinsic to marriage, properly understood. By contrast, anti-miscegenation laws imposed a restriction on marriage that is alien to its purpose and that conflicts with the central purpose of the Fourteenth Amendment.

11. Given the Court's understanding of marriage as an enduring bond for the purpose of finding other freedoms, "such as expression, intimacy, and spirituality," is there any principled basis evident in the Court's opinion to deny the benefits of marriage to groups of more than two persons?

No. As Chief Justice Roberts observes, "Although the majority randomly inserts the adjective 'two' in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not."

12. Is there anything else that you would like to add that has not been addressed here or at the hearing?

No. Thank you for the opportunity to testify before your subcommittee and for your leadership on this matter.