**United States Senate Committee on the Judiciary**
**Hearing on the Nomination of Elena Kagan to the Supreme Court**

**Statement of Edward Whelan**

Thank you very much, Chairman Leahy and Senator Sessions, for inviting me to testify on the nomination of Elena Kagan to the Supreme Court.

I offer my views in my capacity as president of the Ethics and Public Policy Center and director of EPPC's program on The Constitution, the Courts, and the Culture. In that capacity, I have written and lectured widely on constitutional law and judicial nominations over the past five years, including on the Supreme Court nominations of John Roberts, Samuel Alito, Sonia Sotomayor, and, now, Elena Kagan. I also draw on my additional experience over the past two decades in matters relating to the Supreme Court and constitutional law: During the Court's October 1991 Term, I served as a law clerk to Justice Antonin Scalia. From 1992 to 1995, I worked for the Senate Judiciary Committee as a senior staffer to Senator Orrin Hatch (who was ranking member and then chairman during that period); I worked heavily on judicial nominations, including the Supreme Court nominations of Ruth Bader Ginsburg and Stephen Breyer. From 2001 to 2004, I served as principal deputy assistant attorney general in the Office of Legal Counsel in the U.S. Department of Justice.

My testimony has two parts. In the first part, I will outline why I believe that senators should vote against the Kagan nomination. In the second part, I will explore the claim that supposed "activism" of the Roberts Court provides a reason to support the Kagan nomination. As I will discuss, in my view any sober assessment of the current reality and future risk of judicial activism provides further compelling reason to vote against the Kagan nomination.

I

One good place to begin assessing the Kagan nomination is the notorious "empathy" standard that President Obama committed to employ in making his Supreme Court picks. It's important to recall that President Obama's empathy standard was not some casual aside. Then-Senator Obama—who, as we are so often reminded, taught constitutional law for years at the University of Chicago Law School—elaborated that standard in the carefully prepared Senate floor statement that he delivered in 2005 to explain why he was voting against the confirmation of John Roberts to be chief justice. As Senator Obama put it, the "truly difficult" cases "can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy." In those cases, he emphasized, "the critical ingredient is supplied by what is in the judge's heart."[1]

Then-Senator Obama repeated his empathy standard as he campaigned for president. For example, in a July 2007 speech,[2] he repeated his assertion that the resolution of difficult cases turns on "what is in the justice's heart," and he committed to select Supreme Court justices on that basis:

> We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old—and that's the criterion by which I'll be selecting my judges. All right?

[1] Senate Floor Statement of Senator Barack Obama, September 22, 2005.
[2] Remarks of Senator Obama at Planned Parenthood Action Fund Conference, Washington, D.C. July 17, 2007.

No, that's not "all right," as the American people have clearly recognized.[3] To be sure, empathy, properly understood, is a virtue that we Americans should strive to incorporate into our daily lives. Further, much of the debate in political life turns on competing conceptions of what a proper understanding of empathy is and on whether and how it should be pursued in public policy. But the traditional understanding of the judicial role is that judges, rather than indulging their own subjective senses of compassion, should be *dis*passionate. That traditional understanding is embedded in the statutory oath of office for federal judges, which requires federal judges to commit to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to "impartially discharge" their duties. (28 U.S.C. § 453.)

Indeed, the very existence of the power of judicial review in our constitutional system—that is, the judicial power to declare laws to be in violation of the Constitution—rests on a rejection of President Obama's empathy standard. As Alexander Hamilton explained in Federalist #78:

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.… The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it

[3] See, e.g., Raghavan Mayur, "Thumbs-Down on Obama's 'Empathy' Standard" (discussing IBD/TIPP poll), TIPP Online, June 12, 2009, available at http://www.tipponline.com/judiciary/thumbs-down-on-obamas-empathy-standard; Rasmussen Reports Toplines—Supreme Court (May 12-13, 2010), question 2, available at http://www.rasmussenreports.com/public_content/politics/toplines/pt_survey_toplines/may_2010/toplines_supreme_court_may_12_13_2010.

prove any thing, would prove that there ought to be no judges distinct from that body.

The sound public reaction against President Obama's lawless empathy standard was so strong that Judge (now Justice) Sonia Sotomayor saw fit to emphatically repudiate that standard at her confirmation hearing last year, and President Obama himself has seemingly decided to avoid referring to it. But there's every reason to believe that the empathy standard continues to reflect President Obama's considered—but badly misguided—thinking about how Supreme Court justices should determine the meaning of the Constitution and federal laws in what he calls the "truly difficult" cases. And does anyone doubt that what President Obama calls the "truly difficult" cases are just those cases in which traditional interpretive methods don't generate the results that he deeply desires?

What is President Obama's empathy standard really about? As President Obama attempts to remake America into a European social democracy, it's not surprising that he wants justices who will ignore constitutional limits that stand in his way and who will invent new constitutional rights, on matters like same-sex marriage, that permanently entrench the agenda of the Left.

President Obama's empathy standard best explains why he would nominate, in Elena Kagan, someone who may well have less experience that bears on the work of a justice than any entering justice in the past five decades or more. What Ms. Kagan does offer President Obama (in addition to her formidable intellect) is a record, both in the Clinton White House and as Harvard law school dean, as a shrewd political operator who shares his leftist values and who will use her savvy to try to advance them. Further, her

occasional expressions of judicial philosophy over the years are entirely consistent with President Obama's empathy standard. Examples include her celebrating Justice Thurgood Marshall's view that the Supreme Court has freewheeling authority to (in her words) "safeguard the interests of people who had no other champion"; her bizarre acclaim for Israeli arch-activist Aharon Barak as "my judicial hero"; and her defense of judges who "try to mold and steer the law" to promote the "ethical values" and "social ends" that they favor.

Ms. Kagan has already shown that she will allow her ideological biases to warp her legal judgment. Consistent with her extremist rhetoric against Don't Ask, Don't Tell ("a profound wrong—a moral injustice of the first order"), Ms. Kagan escalated her battle against military recruiters when a federal court ruled in late 2004 that the Solomon Amendment was unconstitutional. Even though she recognized that the legal effect of the court's ruling had been blocked, she decided to bar the military recruiters from the law school's jobs office in (as she put it) the "hope … that the [Defense] Department would choose not to enforce its interpretation of the Solomon Amendment." She also signed her name to an amicus brief in the Supreme Court case (*Rumsfeld v. FAIR*) that offered a highly implausible reading of the Solomon Amendment that all the justices determined would have rendered it "largely meaningless." In sum, at a time of war, she elevated her ideological commitment on gay rights above what Congress, acting on the advice of military leaders, had determined best served the interests of national security, and she treated military recruiters worse than she treated the elite law firms that were donating their legal services to anti-American terrorists and suspected terrorists.

Ms. Kagan also appears to have indulged her ideological bias on gay rights as Solicitor General by undermining federal laws that she was duty-bound to defend. She failed to seek Supreme Court review of a rogue Ninth Circuit ruling (in *Witt v. Department of Air Force*) that threatened Don't Ask, Don't Tell and that subjected the military to burdensome litigation. And under her charge the Department of Justice filed a brief (in *Smelt v. United States*) that gratuitously *disavowed* the position that the Defense of Marriage Act "is rationally related to any legitimate government interests in procreation and child-bearing." As a law professor who is an ardent proponent of same-sex marriage wrote:

> *This new position is a gift to the gay-marriage movement, since it was not necessary to support the government's position*. It will be cited by litigants in state and federal litigation, and will no doubt make its way into judicial opinions. Indeed, some state court decisions have relied very heavily on procreation and child-rearing rationales to reject SSM [same-sex marriage] claims. *The DOJ is helping knock out a leg from under the opposition to gay marriage*.[4]

Overall, then, there is ample reason to believe that Elena Kagan embraces President Obama's lawless empathy standard and that she would use her position as a Supreme Court justice—quite possibly for the next 30 to 40 years—to indulge her leftist values instead of neutrally interpreting the law.

[4] Dale Carpenter, "DOJ Boosts the Cause of SSM," Aug. 17, 2009, available at http://volokh.com/2009/08/17/doj-boosts-the-cause-of-ssm/.

II

In recent days and weeks, various supporters of Ms. Kagan's nomination, including a number of senators, have sought to bolster their position—and, one suspects, to distract attention from the nominee's manifest shortcomings—by flinging assertions that the Supreme Court under Chief Justice John Roberts has engaged in a pattern of conservative judicial "activism." I will explain in this part why I believe that these assertions are badly confused and why a sober assessment of the current reality and future risk of judicial activism provides further compelling reason to vote against the Kagan nomination.

A

The term "judicial activism" has many possible meanings. Some people on both sides of the partisan divide use the term and its cognates as an all-purpose epithet for any judicial decision whose result they don't like. So used, the term does not convey a judgment, or even a charge, that the decision is legally *wrong*. Insofar as any of the critics of the Roberts Court are using the term in that empty way, there is obviously little or no point in arguing with them.

In my judgment, the term "judicial activism" is best used, in the constitutional context, to allege one category of judicial error in interpreting the Constitution: the wrongful overriding (typically through the invention or expansion of supposed constitutional rights) of democratic enactments or of other policy choices made by other government officials. In this usage, the term succinctly conveys the charge that the courts have wrongfully invaded the realm of representative government, and it emphasizes the limits on the judicial role in a system of separated powers. This usage

necessarily presupposes that there is a *right* method (or at least a permissible set of methods) of judicial interpretation of the Constitution (how else could one charge that a ruling is wrong?), and it ultimately ought to invite explication of how that method wouldn't generate the ruling that is alleged to be activist.

"Judicial activism" is but one category of judicial error in constitutional cases. It is distinct from a second category, which I call "judicial passivism"—the wrongful failure to enforce constitutional rights. In distinguishing these two categories, I don't mean to imply that one category of error is worse than the other. The two categories are, however, qualitatively different in several respects. One difference is that errors of judicial passivism are correctible through the ordinary political processes: statutes can afford the protections that the Court wrongly denies. By contrast, errors of judicial activism usurp the political processes and are correctible only by extraordinary means: the Court's reversal of its erroneous precedent or constitutional amendment.

The term "judicial activism" has less resonance in the context of statutory rulings, precisely because judicial errors in statutory cases are correctible through the political processes. Nonetheless, the term can sensibly be used to identify judicial decisions that implausibly construe statutes.

Considerations of *stare decisis*, or adherence to precedent, are often confused (frequently deliberately, it would seem) with judicial restraint. But advocacy of judicial restraint and criticism of judicial activism focus first and foremost on the proper role of the courts in a representative government and in a system of separated powers. Judicial restraint is a necessary virtue for the courts because it works to keep courts within their proper bounds. *Stare decisis*, by contrast, is largely an intrajudicial doctrine. When the

Supreme Court addresses a question that it has addressed before, it accords a degree of respect, or deference, to its previous treatment of the question, partly from the presumption that the Court carefully addressed the question the first time, partly from the impracticability of addressing every question anew in every case.

*Stare decisis* may well have some interbranch implications in some cases, especially, say, where governmental institutions have been designed and maintained in reliance on previous Court rulings. But *stare decisis* considerations are at their weakest when a previous constitutional ruling by the Court has wrongly overridden the democratic processes. In such instances, a sound understanding of judicial restraint may well call for the Court to revisit its prior ruling. When judges override a legislative enactment, citizens have the right to demand that the judicial decision be right—and that a decision that usurps the political processes be overturned.

In recent years, some academics have attempted to neuter the term "judicial activism" by redefining it to mean any exercise of judicial review, *whether right or wrong*, that results in the invalidation of a statute or regulation. I'm reminded of the late, great William F. Buckley Jr.'s response to the leftist charge during the Cold War that the CIA and the KGB were engaged in morally equivalent acts of spycraft. As Buckley put it, that's like "saying that the man who pushes an old lady into the path of a hurtling bus is not to be distinguished from the man who pushes an old lady out of the path of a hurtling bus: on the grounds that, after all, in both cases someone is pushing old ladies around."[5] Likewise, the attempt to neuter the term "judicial activism" obscures the essential distinction between a right decision and a wrong one.

[5] William F. Buckley Jr., *Miles Gone By: A Literary Autobiography* (2004).

B

To paraphrase the old Smith Barney commercial, the term "liberal judicial activism" has acquired its stigma the old-fashioned way: it's earned it. Since the Warren Court's heyday in the 1960s, the Court has entrenched the Left's agenda, and usurped the realm of representative government, through a series of activist rulings on a broad range of matters, including: abortion, secularism, obscenity and pornography, gay rights, criminal law and procedure, national security, and the death penalty. These monuments of liberal judicial activism have deeply transformed American politics, institutions, and culture. (Whether various of those transformations have been for the better or for the worse is a matter for dispute, but few would contest the impact of the transformations.) They continue to dominate the legal landscape, and further work on them has taken place under what is conventionally called the Roberts Court, as the recent narrow liberal majorities in cases like *Boumediene v. Bush* (2008), *Hamdan v. Rumsfeld* (2006), *Kennedy v. Louisiana* (2008), and *Graham v. Florida* (2010) starkly illustrate.

Even worse, new edifices of leftist ambition are in the works: Elena Kagan, if confirmed, is an entirely predictable vote in favor of the invention of a federal constitutional right to same-sex marriage. Her vote might well provide the decisive fifth vote for that radical remaking of the central social institutions of marriage and the family—and for the associated stigmatizing as irrational bigots of all those Americans who understand the essence of marriage as the union of a man and a woman.
More broadly, Kagan would also predictably be the fifth and decisive vote in support of the Court's continuation of its unprincipled practice of selectively relying on foreign and international legal materials to alter the meaning of constitutional provisions. That

practice is just one part of a broader transnationalist agenda that would import and impose selected new norms of international law, displace the constitutional processes of representative government, and dilute cherished traditional constitutional rights (e.g., to speech and religious liberty).

C

Against this backdrop of the decades-long reality and ongoing threat of liberal judicial activist rulings, let's now examine some representative allegations of Roberts Court conservative activism.

1

I'll begin with a remarkable colloquy[6] among three Senate Democrats, all members of this Committee, that took place just last week on the Senate floor. In their prepared remarks, each of the three senators complained about the supposed conservative activism of the Roberts Court and used their complaint to frame the Kagan nomination. In extensive comments, each of the three senators offered what he regarded as a compelling example of that supposed conservative activism.

Senator Cardin gave as his example of "judicial activism" the Supreme Court's 2007 ruling in *Ledbetter v. Goodyear Tire & Rubber Co.* In that case, the Court ruled by a 5-4 vote that the time period for filing a charge of employment discrimination with the EEOC begins when the discriminatory act occurs. Among other things, it specifically rejected the petitioner's claim that subsequent non-discriminatory acts that entail adverse effects resulting from the past discrimination give rise to a new charging period. The majority explained in detail that its holding flowed directly from four Supreme Court precedents over the previous three decades.

[6] *Congressional Record* (June 22, 2010), S5220-S5223.

At the same time, the Court in *Ledbetter* expressly left open the question "whether Title VII suits are amenable to a discovery rule"—whether, that is, in those instances in which the employee was not aware that she had been discriminated against when the discriminatory act occurred, the charging period would instead run from the time that she discovers that she has been discriminated against. (Slip op. at 23 n. 10.) As the Court noted, the petitioner did "not argue that such a rule would change the outcome in her case." (Id.) The obvious reason why she did not make that argument was that she had waited *more than five years* after she *learned* of the discrimination to file her EEOC charge—far longer than the 180-day charging period that applied under Title VII.[7]

Consider, by contrast, what Senator Cardin had to say about the Court's *Ledbetter* ruling:

> When Mrs. Ledbetter found out she was being discriminated against, she did the right thing: she brought a claim against her employer.…
>
> The Court said Mrs. Ledbetter had to file her case within 180 days after the beginning of the discrimination, and since she did not do that, her claim was barred by the statute of limitations. *This defies logic. How can a person bring a claim when they don't know they are being discriminated against?* It makes no sense.[8]

These comments by Senator Cardin—and the vehement denunciation of the Court with which he accompanied them—simply misread *Ledbetter*. Three years after the Court's ruling in *Ledbetter*, Senator Cardin evidently had the misunderstanding that the Court had rejected applying a discovery rule to the charging period in Title VII suits. He

[7] See Stuart Taylor Jr., "Does The Ledbetter Law Benefit Workers, Or Lawyers?," *National Journal*, Jan. 31, 2009.
[8] *Congressional Record* (June 22, 2010), S5220.

also evidently didn't understand that Mrs. Ledbetter had waited more than five years after she learned of the discrimination to file her EEOC charge (as his language gives the mistaken impression that she promptly filed).

*Ledbetter* has been a *cause célèbre* of the Left, as a result of this same elementary misunderstanding. As Stuart Taylor has written, "Obama and other Democrats were able to make the court's ruling against Ledbetter seem outrageous only by systematically distorting the undisputed facts."[9]

Next in the Senate colloquy was Senator Whitehouse, who, after embracing Senator Cardin's misunderstanding of *Ledbetter*, offered his own prime example of his contention that the Roberts Court supposedly favors corporations. His showcase ruling was the Court's 2008 decision in *Exxon Shipping v. Baker*.[10] In that case, the Court ruled by a 5-3 vote (with Justice Alito not participating) that a punitive damages award against Exxon in connection with the 1989 *Exxon Valdez* oil spill was excessive as a matter of maritime common law. The Court ruled that the $2.5 billion punitive damages award that the Ninth Circuit had allowed should instead be limited to the amount of compensatory damages ($507.5 million).

Senator Whitehouse's discussion of *Exxon Shipping v. Baker* suffers from a few unfortunate omissions. First, Senator Whitehouse does not disclose that the author of the majority opinion was the liberal Justice Souter. Second, he does not see fit to note that Justice Ginsburg, in dissent, described Justice Souter's opinion as "well stated and comprehensive" and acknowledged that the question in the case "is close."

[9] Stuart Taylor Jr., "The Myth of the Conservative Court," http://www.theatlantic.com/national/archive/2010/06/the-myth-of-the-conservative-court/58364/.
[10] *Congressional Record* (June 22, 2010), S5221.

Third, Senator Whitehouse leaves the impression that the Court's general review of punitive-damages awards divides the justices along ideological lines. But in fact Justices Scalia and Thomas are the strongest *opponents* of the position that the Constitution imposes general substantive limits upon punitive damages. (All the justices agreed in *Exxon Shipping v. Baker* that the Court's maritime jurisdiction gave it the authority to review the punitive-damages award in that case.)

Senator Whitehouse makes no mention of the fact that only a year before *Exxon Shipping v. Baker*, Justice Breyer (joined, among others, by Justice Souter) had written the majority opinion in *Philip Morris v. Williams* vacating a $79.5 million punitive damages award against Philip Morris in a case brought by the estate of a man whose death was caused by his smoking. Justice Stevens, while dissenting, reiterated that he was "firmly convinced" that the "Due Process Clause of the Fourteenth Amendment imposes both substantive and procedural constraints on the power of the States to impose punitive damages on tortfeasors." Justice Ginsburg, in a dissent that both Justices Scalia and Thomas joined, called Justice Breyer's ruling "unwarranted" and "inexplicable."

In sum, fairly understood in context, the Court's ruling in *Exxon Shipping v. Baker* provides no support for Senator Whitehouse's insinuation that the conservative justices on the Roberts Court disfavor "punitive damages assessed through the jury" against corporations. That is an issue on which the divide on the Court clearly does not fall along more general ideological lines.

The third participant in this remarkable colloquy was Senator Franken. Senator Franken began his remarks by connecting a brutal gang rape of a military contractor employee in Iraq to the Supreme Court's 2001 decision in *Circuit City Stores v. Adams*:

> What happened to [the rape victim] in Iraq was bad enough, but because of the Supreme Court's decision in Circuit City Stores v. Adams, [her employer] had been able to force [her] to sign an employment contract that required her to arbitrate all job disputes rather than bringing them to a court of law.[11]

In *Circuit City*, the Court ruled 5 to 4 (with Justice O'Connor, among others, in the majority) that a provision of the Federal Arbitration Act excludes from the Act's coverage contracts of employment of transportation workers, but not other employment contracts. (The underlying complaint involved alleged employment discrimination.) Over a period of more than four decades, ten courts of appeals had previously addressed the same question. All but the Ninth Circuit reached the same conclusion as the Supreme Court. But you wouldn't know any of this from listening to Senator Franken's remarks, nor would you have any idea whether and why he believed that Justice O'Connor and her colleagues in the majority got it wrong as a matter of law. Instead, you'd be led to believe that the Court's decision was "about whether you have a right to a workplace where you won't get raped."

All of this was Senator Franken's wind-up for his condemnation of a ruling that the Supreme Court issued the day before his remarks, in *Rent-a-Center West v. Jackson*, No. 09-497 (June 21, 2010). The case involved an issue of federal law that Solicitor General Kagan evidently regarded as so unimportant that her office chose not to file a brief. The Court ruled by a 5-4 vote that under the Federal Arbitration Act, where an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, a party's challenge to the enforceability of the agreement as a whole is for the arbitrator to decide. I'll volunteer that I have no considered opinion

[11] *Congressional Record* (June 22, 2010), S5222.

whether the Court got it right in *Rent-a-Center West*, for I haven't spent more than a few minutes skimming through the 25 pages of dense argument and counterargument in an unfamiliar and complicated area of the law. But Senator Franken was ready the very next day with his assessment:

> Although Jackson signed an employment contract agreeing to arbitrate all employment claims, he also knew the contract was unfair, so he challenged it in court. But yesterday the Supreme Court sided with Rent-A-Center, ruling that an arbitrator, not a court, should decide whether an arbitration clause is valid. Let me say that again. The arbitrator gets to decide whether an arbitration clause is valid. Let me repeat that. The arbitrator gets to decide whether the arbitration clause is valid. That is just one step away from letting the corporation itself decide whether a contract is fair.[12]

Senator Franken evidently imagined that he was offering a legal argument that would somehow become compelling if only he just kept repeating it. But he utterly failed to address, much less grapple with, the statutory text and precedents on which the majority and dissent divide.

In sum, in this remarkable colloquy intended to set the stage for the Kagan hearing, three members of this committee have provided no substantial evidence in support of their contention that the Roberts Court has engaged in conservative judicial activism. Indeed, it's striking that none of their showcase rulings even involved the invalidation of a democratic enactment on *constitutional* grounds (and thus did not present even the risk of the special injury to the democratic processes that errors of constitutional activism involve).

[12] *Congressional Record* (June 22, 2010), S5222.

The Court's decision this past January in *Citizens United v. Federal Election Commission* is undoubtedly the most prominently alleged example of conservative judicial activism. In that case, the Court ruled, by a 5-4 margin, that a provision of the Bipartisan Campaign Reform Act of 2002 ("BCRA") that barred corporations and unions from making independent expenditures for defined "electioneering communications" violated the First Amendment. In so ruling, the Court overruled its 1990 holding in *Austin v. Michigan Chamber of Commerce* (and that portion of its 2003 ruling in *McConnell v. Federal Election Commission* that applied *Austin*).

*Citizens United* clearly satisfies one of the two threshold tests for whether a ruling on a constitutional question may fairly be described as activist, as it involved the judicial invalidation of a democratic enactment. The second threshold test is whether it did so *wrongly*. That question is far too large for me to address here and turns on some difficult and contested issues of interpretive methodology, many of which are played out in the lengthy competing opinions in the case. For present purposes, I will instead limit myself to a few observations:

First, *Austin* was a highly dubious ruling whose actual rationale Elena Kagan, in her role as Solicitor General in *Citizens United*, declined to defend. Indeed, as election-law expert Rick Hasen, a *supporter* of the provision that was invalidated in *Citizens United*, complained last year, the government's brief essentially put the Court to the test of overruling *Austin* or of overruling "one of the central tenets" of the landmark ruling in *Buckley v. Valeo*:

> [T]he government does not even mention the central holding of *Austin*, much less defend it.…
>
> [I]t is no surprise that the government does not want to emphasize *Austin* anti-distortion. After all, … this equality rationale has already been undermined by the Court's recent opinion in *FEC v. Davis* …. But in passing on discussing the equality/anti-distortion rationale, the government puts a great deal of effort into an argument that only Justice Stevens has embraced (in his *Austin* concurrence): that the government can justify limits on corporate independent spending to prevent *quid pro quo* corruption of candidates. In other words, the argument that the government pushes here requires the Court to reject, at least in part, one of the central tenets of *Buckley*, that independent spending cannot be limited because the independent nature of the spending means it cannot corrupt candidates.…[13]

Chief Justice Roberts likewise observed in his concurring opinion in *Citizens United*:

> Finally and most importantly, the Government's own effort to defend *Austin*—or, more accurately, to defend something that is not quite *Austin*—underscores its weakness as a precedent of the Court. The Government concedes that *Austin* "is not the most lucid opinion," yet asks us to reaffirm its holding. But while invoking *stare decisis* to support this position, the Government never once even *mentions* the compelling interest that *Austin* relied upon in the first place: the need to diminish "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."

[13] http://electionlawblog.org/archives/014156.html.

> Instead of endorsing *Austin* on its own terms, the Government urges us to reaffirm *Austin*'s specific holding on the basis of two new and potentially expansive interests—the need to prevent actual or apparent *quid pro quo* corruption, and the need to protect corporate shareholders. Those interests may or may not support the *result* in *Austin*, but they were plainly not part of the *reasoning* on which *Austin* relied.[14]

Second, even if we *assume for the sake of argument* that *Citizens United* was wrongly decided and thus was an activist decision, the question would remain whether it would be sensible to describe it as an exercise of *conservative* judicial activism. It is true, of course, that the majority consisted of Justice Kennedy and the four justices routinely described as conservative. But the majority's robust First Amendment ruling applies to unions as well as to corporations. Moreover, the ACLU—not typically regarded as favoring conservative (or corporate) causes—had advocated that the Court strike down the BCRA provision. As it summarized its position in its amicus brief:

> The broad prohibition on "electioneering communications" set forth in § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) violates the First Amendment, and the limiting construction adopted by this Court in [*Federal Election Commission v. Wisconsin Right to Life*] is insufficient to save it. Accordingly, the Court should strike down § 203 as facially unconstitutional and overrule that portion of *McConnell* that holds otherwise.[15]

[14] Slip op. at 11-12 (citations omitted).

[15] Amicus Curiae Brief of the American Civil Liberties Union, *Citizens United v. Federal Election Commission*, No. 08-205, at 2 (citation omitted).

Third, while *Citizens United* is evidently a convenient political target (at least when it is misrepresented), there is plenty of reason to doubt that the ruling will have a significant impact on spending on political campaigns (much less on our broader American institutions and culture). As campaign-finance expert (and former FEC chairman) Bradley Smith has explained:

> The 28 states that already allow corporate campaign expenditures for state races (including governor, state legislature and attorney general) are not awash in corporate political spending.…
>
> Even within the pre-Citizens United limits, corporate PACs had room to increase their direct contributions to candidates by 40 times the amount that they were already giving—and after that, they could have still used their PACs for more corporate spending on top of that. But they did not.
>
> Furthermore, under the law, a corporation can pay all of the legal, accounting, compliance and administrative costs of a PAC out of its general treasury. Yet in recent years just over half of all contributions to corporate PACs have been used to pay for these administrative expenses. If large corporations wanted to free up more PAC money for actual political expenses, before Citizens United they could have immediately freed up some $300 million simply by paying their PAC administrative costs from their general treasuries. They did not.
>
> In fact, in California, which allows unlimited corporate expenditures, the 10 largest reported funders of independent expenditure committees between 2001 and 2006 did not include a single corporation. Rather, the list consists of unions,

> Indian tribes and two individuals, the long-time business partner of one of the candidates, and the partner's daughter.
>
> After Citizens United, there will likely be a modest uptick in overall corporate spending, but mostly by small- and mid-sized corporations. The substantial costs of operating a PAC under complex legal rules, and the limits on the number of people eligible to contribute to the PAC, make PACs ineffective for most small- and mid-sized businesses. And because it takes time to organize and fund a PAC, companies that don't establish a PAC well in advance of an election are left out in the cold if they later choose to participate in the election. The upshot of this is that the court's decision is unlikely to benefit America's largest companies as much as smaller businesses.[16]

3

More general allegations that the Roberts Court engages in conservative judicial activism frequently involve a highly selective skewing of the evidence—drastically inflating the supposed importance of cases that fit (or that are distorted to fit) the desired narrative while simply ignoring those that don't. Thus, for example, in the midst of all the confused clamor about the *Ledbetter* decision, three important cases that the Court decided the following term in favor of the employee and against the employer received virtually no attention: *CBOCS West v. Humphries* (2008) (7-2 ruling that section 1981 encompasses retaliation claims); *Gomez-Perez v. Potter* (2008) (6-3 ruling, with majority opinion by Justice Alito, that ADEA prohibits retaliation against a federal employee who complains of age discrimination); *Meacham v. Knolls Atomic Power Laboratory* (2008)

[16] Bradley Smith, "The Case for Corporate Political Spending," *Wall Street Journal*, Feb. 27, 2010.

(largely unanimous opinion placing evidentiary burden on employer to establish exemption under ADEA). Similarly, the year before *Ledbetter*, the Court, in an important, and largely unanimous, opinion in *Burlington Northern & Santa Fe Railway v. White* (2006), expansively interpreted the anti-retaliation provision of Title VII. And in an important ruling just a few weeks ago, the Supreme Court, in an opinion by Justice Scalia, reversed the Seventh Circuit and ruled unanimously that a plaintiff who does not file a timely EEOC charge challenging the *adoption* of a practice may assert a disparate-impact claim in a timely charge challenging the employer's later *application* of that practice as long as he alleges each of the elements of a disparate-impact claim. See *Lewis v. City of Chicago*, No. 08-974 (May 24, 2010).

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It's entirely proper that Supreme Court decisions be subjected to careful scrutiny and, where appropriate, vigorous criticism. But as I have illustrated in this statement, so many of the criticisms of the Roberts Court for supposedly engaging in conservative judicial activism are of dismal quality and invite the suspicion that they are motivated by crude political considerations. Further, even if one indulges the assumption that some of those criticisms may have merit, the overall picture of instances of supposed conservative judicial activism pales into virtual nothingness in comparison to the decades-long reality and ongoing threat of liberal activist rulings.

In sum, anyone genuinely concerned about judicial activism has additional compelling reason to oppose the Kagan nomination.