Testimony of Robert Alt
Before the United States Senate
Committee on the Judiciary
Hearing on the Nomination of Elena Kagan
To be an Associate Justice of the United States Supreme Court

My name is Robert Alt. I am a Senior Legal Fellow in and Deputy Director of the Center for Legal and Judicial Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

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

As these hearings opened, numerous members of this Committee lamented what was variously described as the judicial activism and pro-corporatism of the Roberts Court. Indeed, C-SPAN viewers could be excused if they mistakenly believed that they were watching "Classic" C-SPAN coverage of the confirmation hearings for John Roberts or Samuel Alito, given the references to those justices. Singled out for special condemnation by members of this Committee were the Roberts Court's decisions in *Citizens United v. FEC* and *Ledbetter v. Goodyear Tire & Rubber Co*.[1] The complaints raised closely tracked those of liberal activists, who issued reports which both highlighted their grievances and served as talking points on these cases and the Roberts Court in anticipation of the hearings.

The story of a conservative, activist, pro-corporatist Roberts Court may sound compelling at first blush, particularly with its repetition and regrettable distortion of the cases involved, but it is just a story—and a fictional one at that. This story applies a flawed definition of judicial activism, a deliberately skewed sample of the business decisions of the Roberts Court, and misrepresentations of key decisions of the Roberts Court. I will address each of these issues in turn, before concluding with my thoughts and concerns regarding the nomination of Elena Kagan.

Defining Activism Down

Judicial activism—real judicial activism—occurs when judges write subjective policy preferences into their legal decisions rather than apply the Constitution according to its original meaning or statutory law based on its plain text. Judicial activism may be either liberal or conservative; it is not a function of outcomes, but one of interpretation. Judicial activism does not necessarily involve striking down laws, but may occur when a judge applies his or her own policy preferences to uphold a statute or other government action which is clearly forbidden by the Constitution.[2]

[1] 558 U.S. ___, 130 S.Ct. 876 (2010); 550 U.S. 618 (2007).
[2] Ed Whelan refers to this as judicial passivism. While our nomenclature is different, the substance of our critique is, I believe, nearly identical.

Dissatisfied with this accepted definition, critics of the Roberts Court (and the Rehnquist Court before that) engaged in a concerted effort to redefine judicial activism downward. Under one formulation, judicial activism occurs any time that a statute is struck down.[3] While this may seem appealing given its seemingly objective, value-neutral approach, judicial activism has traditionally been understood as a term of reproach for judicial decisions which overreach proper judicial authority. However, the act of striking down clearly unconstitutional statutes is not only within proper judicial authority, but the failure to do so based upon policy preferences would itself fall into the traditional definition of activism. Accordingly, this definition distorts the traditional understanding of activism, and has been used in a concerted way to equate rightful acts of the Roberts Court with wrongful, genuinely activist acts of prior liberal courts.

In another popular version, judicial activism is all-but-meaningless—a term of derision that means little more than "I don't like the policy outcome of this decision." Both definitions of judicial activism are incorrect, and both are in full display in the recent criticisms of the Roberts Court, and its decisions in *Citizens United v. FEC* and *Ledbetter v. Goodyear Tire & Rubber Co*. In order to determine whether these cases are truly activist, it is necessary to carefully review the cases. When this is done free of distortions to the factual record and exaggerations of precedent, it is clear that the Court was not activist in these cases.

The "Pro-Corporatist" Distortion

The claim the Roberts Court is a pro-business or pro-corporatist court frequently turns on little more than a claim that the court has decided cases in favor of particular business parties, or has sided with businesses more than non-business parties in recent cases. At the outset, it is worth noting that neither of these claims, if true, says anything about whether the judgments are correct, or would support a claim for activism. Given the small and discretionary docket that the Supreme Court hears, there is no empirical reason to believe that the winners and losers as between any set of opposing interest groups should be evenly distributed.

The allegation that the Court is too pro-business became fashionable following Jeffrey Rosen's 2008 article, *Supreme Court Inc*.[4] Even at the time of this article, however, legal scholars questioned whether the evidence offered was sufficient to support the premise of a pro-business court.[5] For example, Rosen's observation that "the Roberts Court has heard seven [antitrust cases] in its first two terms — and all of them were decided in favor of the corporate defendants"

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[3] *See, e.g.*, Cass Sunstein, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 42-43 (2005). It is worth noting that this formulation is frequently utilized in a highly skewed fashion—one which focuses exclusively on striking down federal legislation in order to permit the argument made by Sunstein and others that the Rehnquist and Roberts courts are more activist than prior courts. Leaving aside the obvious error in ascribing what is well-understood to be a pejorative to what may be a positive act—e.g., correctly striking down clearly unconstitutional laws—such a formulation lacks any basis for failing to include the striking down of *state* laws—acts which, to borrow Sunstein's words, similarly would "preempt the democratic process." The key distinction seems to be that the inclusion of such acts would force the true radicals in academia and elsewhere to confront that tens-of-state-laws swept aside in numerous decisions by the Warren Court—data which would upset their thesis that conservative courts are more activist.

[4] Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAGAZINE, Mar. 16, 2008.

[5] *See, e.g.*, Eric Posner, *Is the Supreme Court Biased in Favor of Business*, SLATE (Mar. 17, 2008, 3:16 PM), *avail at* http://www.slate.com/blogs/blogs/convictions/archive/2008/03/17/is-the-supreme-court-biased-in-favor-of-business.aspx (last visited June 29, 2010).

seems much less impressive when you discover that five of those seven cases involved businesses suing other businesses.[6] So yes, a corporation won those cases, but another corporation *lost* those cases. Are we then to take it that the Roberts Court was simultaneously pro-business and anti-business? Similarly, the Rosen's assertion that "[o]f the 30 business cases [in the 2006-07 term], 22 were decided unanimously, or with only one or two dissenting voices" is hard to square with the claim that there has been any significant pro-corporatist shift in the Roberts Court. After all, most of the justices, including the most liberal justices, remained the same when Roberts and Alito joined the Court. The frequent unanimity and near unanimity, with supermajorities comprising justices of both ends of the ideological spectrum, suggests that rather than a pro-business bias motivating the outcome, that the Court ruled in favor of businesses because those parties' claims were simply meritorious. To suggest otherwise would require one to accept not only that the recent additions to the Court exercised pro-business activism, a claim that is not borne out by the facts, but that liberal Justices like Stevens, Ginsburg, Breyer, and Souter were frequently motivated by pro-business activist impulses.

By the end of the last term, the media and academics increasingly acknowledged that the claim that Roberts Court was decidedly pro-business was meritless—as perhaps typified by the *Washington Post* headline: Court Defies Pro-Business Label.[7] A string of decisions negative to business interests fueled this conclusion, and made clear that the pro-business allegation was either premature, overblown, or both.

A non-comprehensive list of cases in which the Supreme Court ruled adversely to business interests includes notably:

- *Wyeth v. Levine*,[8] in which the Court held that plaintiffs may sue a drug manufacturer alleging inadequate warning of risk even when the warning label was approved as sufficient by the Food and Drug Administration.

- *Massachusetts v. EPA*,[9]in which the Court created a novel new rule for standing and opened the door for the EPA to regulate virtually every business (and non-business activity), including manufacturing, farming, and transportation, which produces carbon dioxide.

- *Federal Express v. Holowecki*,[10] in which the Court stretched the meaning of the word "charge" in order to allow an ADEA case to go forward where the plaintiff had not met the prerequisite of filing a formal charge with the EEOC as required by statute, but had filed an intake questionnaire.

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[6] *Id.*
[7] Robert Barnes, *Court Defies Pro-Business Label*, WASHINGTON POST, Mar. 8, 2009, *avail at* http://www.washingtonpost.com/wp-dyn/content/article/2009/03/07/AR2009030701596.html (). *See also* Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943 (2009).
[8] 555 U.S. ___, 129 S.Ct. 1187 (2009).
[9] 549 U.S. 497 (2007).
[10] 552 U.S. 389 (2008).

- *Altria v. Good,*[11] in which the Court found that the Federal Cigarette Labeling and Advertising Act did not preempt lawsuits against tobacco companies based upon alleged misrepresentation under a state act which prohibits deceptive trade practices.

- *Burlington Northern and Santa Fe Ry. Co. v. White,*[12] in which the Court provided an expansive definition of the grounds for Title VII retaliation claims.

To this list could easily be added numerous others, which I omit merely due to time constraints. And yet, as additional cases adverse to business interests rolled in, the "story" of the conservative, activist, pro-business Roberts Court continued unabated by liberal activists, and judging by these hearings, members of this Committee.

To further the conservative, pro-corporatist fiction, in addition to cherry-picking cases, critics of the Roberts Court have also assiduously avoided revealing the fact that liberal members of the Court have been the authors of some of the very cases of which they complain, and of some of the more pro-business cases that they conveniently omit. These cases include notably the Court's recent decision limiting the scope of the honest services fraud statute[13] in *Skilling v. U.S.*,[14] in which Ginsburg wrote the opinion of the Court, and which three liberal justices on the Court (Sotomayor, Stevens, and Breyer) would have gone further, and granted the former Enron executive fair trial relief; the limitation of punitive damages in maritime law in *Exxon Shipping Co. v. Baker* [15] (authored by Justice Souter); the *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*[16] decision (authored by Justice Ginsburg and joined by, *inter alia*, Justices Souter and Breyer), which raised the standard for pleading scienter in securities actions; and from the Rehnquist Court, *BMW v. Gore*[17]—an activist case finding a constitutional limitation on punitive damages in a decision authored by Stevens and joined by, *inter alia*, Souter and Breyer. Unless we are to believe that the most liberal members of the Court are in fact conservative, pro-business activists, this "story" quickly falls apart.

It is worth noting that the pro-corporatist myth is just a subspecies of the larger, "conservative activist" complaint leveled by some members of the Committee and liberal activists against the Court—a phenomenon which, so the story goes, has intensified since *Bush v. Gore*. But as my colleague Todd Gaziano has persuasively argued, this too is a myth belied by the regrettable facts of the Court's string of liberal decisions.[18] In areas including national security law, the death penalty, the constitutionality of life sentences without parole for violent juvenile offenders, and the use of foreign law, this Court simply cannot be meaningfully dubbed "conservative."

[11] 555 U.S. ___, 129 S.Ct. 538 (2008).
[12] 548 U.S. 53 (2006).
[13] It should be noted that given the broad application of this statute, its implications extend far beyond businesses.
[14] ___ U.S. ___, ___ S.Ct. ___, 2010 WL 2518587 (June 24, 2010).
[15] 554 U.S. ___, 128 S.Ct. 2605 (2008).
[16] 551 U.S. ___, 127 S. Ct. 2499 (2007).
[17] 517 U.S. 559 (1996).
[18] Todd Gaziano, *What Conservative Court?*, TOWNHALL 49 (July 2010).

Key Cases Misrepresented

Having addressed the sampling error of the larger label, it is necessary to address a few particular cases, which have been cited in these hearings as examples of pro-business activism on the part of the Roberts Court. Many of the cases that are discussed are ones of statutory construction. This is important first because the policy complaints that are raised by members of this Committee are frequently policies that Congress itself enacted—that is, if there is a pro-business culprit (which is often doubtful) it is not the Supreme Court, which in the cases listed in this Committee's bill of particulars is merely acting as a handmaiden, but Congress. For example, in *Ledbetter*, it is not the Court which wrote the statute of limitations, it was Congress, and the complaint levied is essentially that the Court should have ignored or rewritten the statute of limitations. And second, if Congress changes its mind about what the policy should be, or believes that the Court did not interpret its requirements appropriately, it can always change the law, as they did in the wake of *Ledbetter*.

Citizens United[19]

In *Citizens United v. FEC*, the Supreme Court threw out the federal ban on independent political expenditures by corporations and unions because, by effectively limiting speech, such a ban violates the First Amendment. Liberal activists and the mainstream media were swift to attack the decision as bad policy. For example, one article about the case decries the fact that it has "opened the floodgates of unlimited corporate spending in federal elections."[20] Another discusses the terrible consequences of spending in elections by "the pharmaceutical companies, the insurance companies, Big Oil, or what President Eisenhower called the 'military-industrial complex.'"[21]

But these policy assessments are quite skewed. First, one would never know from reading these liberal critiques that the Court's decision applied equally to *labor unions* as well as corporations—a key omission which distorts the scope of the decision and the lack of even incidental favoritism for groups which could be characterized as favoring any particular political party. Perhaps relying on this mischaracterization and the public's lack of knowledge about the applicability of *Citizens United* to unions, liberals in Congress have proposed legislation in the form of the so-called DISCLOSE Act,[22] which purports to "correct" *Citizens United* by imposing significant new restrictions on corporations, while exempting unions from many of the act's more onerous, speech restrictive requirements.[23]

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[19] This analysis of the *Citizens United* and *Ledbetter* cases is execerpted from my and my colleague's prior work on the subject. *See* Robert D. Alt and Hans von Spakovsky, *The Liberal Mythology of an "Activist" Court: Citizens United and Ledbetter*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 54, June 15, 2010.

[20] Nan Aron, Roberts Court Protects the Powerful, POLITICO, (May 5, 2010, 5:10 AM), http://www.politico.com/news/stories/0510/36755.html.

[21] People for the American Way Foundation, THE RISE OF THE CORPORATE COURT: HOW THE SUPREME COURT IS PUTTING BUSINESS FIRST, 7 (2010).

[22] Democracy is Strengthened by Casting Light on Spending in Elections Act, S. 3295, H.R. 5175.

[23] For example, the Act will ban corporations with government contracts over a certain size from making any independent expenditures, while unions with contractual relationships with the government over collective bargaining terms for union members who are government employees can spend unlimited amounts on such expenditures. H.R. 5175m § 101(a). Corporations with more than 20 percent foreign shareholders will be banned from independent expenditures while unions with foreign members will not be affected. *Id*. at § 102(a).

Second, the depiction of multinational or "military industrial complex" corporations belies the actual facts of the case, and the genuine diversity of corporations whose free speech rights the Court vindicated. Just take the named party, Citizens United, a small, issue-oriented organization that will never be mistaken for, say, BP. Citizens United has an annual budget of only $12 million and most of its funds are donations from individuals.[24] It is a grass roots advocacy organization dedicated to reasserting "the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security." The organization's objective is "to restore the founding fathers' vision of a free nation, guided by the honesty, common sense, and good will of its citizens."[25]

By characterizing corporations exclusively as for-profit organizations, detractors fail to recognize that Americans tend to influence the political process by joining together with other like-minded individuals—something that the First Amendment, through its protection of associational rights, protects. Many times, these groups of like-minded people adopt corporate forms to take advantage of limited liability or tax advantages. Even the archetype of modern grassroots movements—the tea partiers—have adopted, through organizations like Tea Party Patriots, non-profit corporate operating structures. The fact that individuals who seek to influence the political process take a corporate form for the purposes of limited liability should not affect their ability to speak on issues of public concern. Indeed, the First Amendment does not permit government to restrict speech rights in exchange for adopting a corporate form. Were government able to do so, it could then restrict political speech of news agencies, which are almost universally corporations.

Leaving aside the misguided policy arguments made by opponents, the more serious criticism of the decision comes from those who claim that the five justices in the majority[26] were engaging in judicial activism. Specifically, these critics claim *Citizens United* is activist because the Court declared a federal statute unconstitutional and overturned prior precedent, *Austin v. Michigan State Chamber of Commerce*,[27] which had upheld a state ban on independent expenditures by a nonprofit trade association, and part of *McConnell v. FEC*,[28] which had upheld the "electioneering communications" provision of the Bipartisan Campaign Reform Act (a provision expanding the independent expenditure ban).

However, those criticisms ignore the fact that the *Austin* decision on independent expenditures and the part of the *McConnell* decision on electioneering communications were outliers in the Court's First Amendment jurisprudence. The majority's actions in *Citizens United* did not constitute judicial activism, but rather upheld basic First Amendment protections against unlawful encroachments by Congress. It is not judicial activism when a judge overturns two relatively recent decisions that were wrongly decided and that are in conflict with a long line of other precedents—particularly if the decision corrects constitutional errors. If this were not true,

[24]Citizens United v. Federal Election Commission, 558 U.S. ___, 130 S.Ct. 886, 887 (2010).
[25]Citizens United, http://www.citizensunited.org/about.aspx (last visited June 13, 2010).
[26]Chief Justice Roberts and Justices Kennedy, Alito, Thomas, and Scalia.
[27]494 U.S. 652 (1990).
[28]540 U.S. 93 (2003).

then the same critics of the *Citizens United* decision must believe that *Plessy v. Ferguson*[29] should still be the law of the land today and racial segregation should still be considered "constitutional" since under their slanted and sophomoric definition, the justices of the Supreme Court engaged in judicial "activism" in *Brown v. Board of Education*.[30] After all, the justices in *Brown* overturned *Plessy* and repudiated the "separate but equal" doctrine as unconstitutional—and arguably did so when they decided subsequent cases striking down similar policies by recalcitrant jurisdictions that acted contrary to *Brown* and its progeny.

The 100-Years-of-Precedent Distortion: Independent Expenditure Law Before *Austin*

The claims by some, including President Obama, that the Supreme Court's *Citizens United* decision overturned 100 years of precedent are simply untrue. While Congress implemented a statutory ban on direct corporate contributions to federal candidates in 1907, a ban that *Citizens United* did not disturb, it did not impose a ban on independent political expenditures by corporations and unions until 1947 when it passed the Labor Management Relations Act.[31] Congress overrode President Truman's veto of the Act even though he "warned that the expenditure ban was a 'dangerous intrusion on free speech.'"[32] The constitutionality of such a ban was not reviewed by the Supreme Court for almost three decades after its passage, although the Court expressed its doubts about the act in more than one case.

As Justice Kennedy's majority opinion in *Citizens United* points out, that question was in the background of a case considered in 1948 in which a labor union endorsed a congressional candidate in its weekly periodical. The Court did not reach the constitutional question because it held that the statute did not cover the publication, but it "stated that 'the gravest doubt would arise in our minds as to [the federal expenditure prohibition's] constitutionality' if it were construed to suppress that writing."[33] Four justices said they would have reached the constitutional question and held the expenditure ban unconstitutional, including staunch liberal Justices Hugo Black and William Douglas.

In two other later cases in 1957 and 1972, the Supreme Court refused to decide the constitutional issue, remanding one case on statutory grounds after which a jury promptly found the defendant not guilty of violating the statutory ban, and overturning another conviction under the ban again on statutory grounds without reaching the constitutional issue.[34] But in the 1957 case, three justices dissented, "arguing that the Court should have reached the constitutional question and the ban on independent expenditures was unconstitutional."[35] The dissenters included Chief Justice Earl Warren, probably the most renowned liberal justice of the last century.

The seminal decision on campaign finance reform is *Buckley v. Valeo*,[36] the case in which the Court considered various challenges to the Federal Election Campaign Act of 1971. In addition

[29]163 U.S. 537 (1896).
[30]347 U.S. 483 (1954).
[31]This ban is codified at 2 U.S.C. § 441b.
[32]*Citizens United*, 130 S.Ct. at 900 (citations omitted).
[33]*Id.* at 900–901 (citing United States v. Congress of Industrial Organizations, 335 U.S. 106, 121–122 (1948).
[34]United States v. Automobile Works, 352 U.S. 567 (1957); Pipefitters v. United States, 407 U.S. 385 (1972).
[35]*Citizens United*, 130 S.Ct. at 901.
[36]424 U.S. 1 (1976).

to placing limits on direct contributions to federal candidates, this legislation also enacted a new independent expenditure ban that applied to individuals as well as associations, partnerships, corporations, and unions. The ban prohibited spending more than $1,000 "relative to a clearly identified candidate…advocating the election or defeat of such candidate."[37] Although the Court upheld the limits on direct contributions because the governmental interest in the "prevention of corruption and the appearance of corruption" was sufficiently important, the Court threw out the limits on independent expenditures. As Justice Kennedy noted in *Citizens United*, the *Buckley* Court "explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that 'the independent expenditure ceiling…fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process,' [ ] because '[t]he absence of prearrangement and coordination…alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.'"[38] Only one justice dissented from this invalidation of independent expenditures limitations as a violation of the First Amendment.

The separate 1947 ban on all independent expenditures by corporations and unions codified in §441b was not considered by the Court in the *Buckley* decision because it was not challenged, but as Justice Kennedy correctly states, if it had been, "it could not have been squared with the reasoning and analysis of that precedent."[39] In fact, the *Buckley* case cited approvingly to the dissent authored by liberal Justice Douglas in the *Automobile Workers* decision from 1957.[40]

Only two years after the *Buckley* decision, the Court once again struck down an independent expenditure ban in *Bellotti v. First National Bank of Boston*.[41] In an opinion written by Justice Lewis Powell, the Court ruled that a Massachusetts statute prohibiting corporations from spending any funds to influence or affect voters' opinions on referenda issues violated the First Amendment. According to the Court, there was no support "for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation…In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."[42] In fact, *Bellotti* was just the latest decision from the Court recognizing that First Amendment protections extend to corporations—Justice Kennedy cites to 22 such cases in his majority opinion in *Citizens United*.[43] Ironically, some of these involved corporations like the New York Times Company that have condemned the majority for its affirmation of free speech rights for corporations in *Citizens United*.

The Break with the Constitution and Precedent: *Austin*

It was not until *Austin v. Michigan Chamber of Commerce*[44] in 1990 that five justices of the Supreme Court suddenly overrode the long string of prior precedents and upheld a Michigan ban

[37] *Buckley*, 424 U.S. at 44.
[38] *Citizens United*, 130 S.Ct. at 901–902 (citations omitted).
[39] *Id.* at 902.
[40] *Buckley*, 424 U.S. at 43.
[41] 435 U.S. 765 (1978).
[42] *Bellotti*, 435 U.S. at 784–785.
[43] *Citizens United*, 130 S.Ct. at 899–900.
[44] 494 U.S. 652 (1990).

on corporate independent expenditures that supported or opposed a candidate for state office, a crime punishable as a felony. As Justice Kennedy notes, the Court simply bypassed *Buckley* and *Bellotti* as if they did not exist, creating a new justification for limiting political speech: "preventing 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."[45] What the Court did in *Austin* satisfies the very definition of judicial activism—it ignored the plain language of the First Amendment that "Congress shall make no law…abridging the freedom of speech" and ignored decision after prior decision recognizing the First Amendment rights of corporations and invalidating other independent expenditure bans.

The Court's Consistent Rejection of *Austin's* Logic

The Supreme Court's *Buckley* decision made it clear that the only basis for upholding campaign finance regulations is to prevent "corruption or the appearance of corruption" in the election process. This "exception" to the rule of free speech guaranteed by the First Amendment was applied by the Court in a series of cases after *Buckley*. While it is not clear that the mere *appearance* of corruption should be sufficient to prohibit core, First Amendment speech, the Court has time and again rejected other theories justifying campaign finance regulations such as "speech equalization." In *Buckley*, the government argued that it had an interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections" that justified limits on independent expenditures.[46] However, as the justices said in the *per curiam* opinion, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[47] This was upheld by the Court most recently in *Davis v. FEC*, in which the Court noted once again that preventing corruption or the appearance of corruption is the only legitimate and compelling governmental interest for restricting campaign finances and that the Court has continuously rejected equalizing the relative ability of different individuals and groups to influence elections as justification for a cap on independent expenditures.[48] Even in *McConnell*, the Court noted when assessing standing that there is no legal right to have the same resources to influence the electoral process.[49]

In 1985, the Court struck down a provision of the presidential public funding law that made it a criminal offense for a political committee to make an independent expenditure of more than $1,000 to further the election of a candidate receiving public financing.[50] In rejecting this ban on independent expenditures, the Court repudiated "the notion that the PACs' form or organization or method of solicitation diminishes their entitlement to First Amendment protection. The First Amendment freedom of association is squarely implicated in these cases."[51]

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[45] *Austin*, 494 U.S. at 660.
[46] *Buckley*, 424 U.S. at 48.
[47] *Id.* at 48-49.
[48] 128 S.Ct. 2759, 2773 (2008), citing Nixon v. Shrink Missouri Government, 528 U.S. 377, 428 (2000) and FEC v. National Conservative Political Action Commission, 470 U.S. 480, 496–497 (1985).
[49] *McConnell*, 540 U.S. at 227.
[50] *National Conservative Political Action Committee*, 470 U.S. 480.
[51] *Id.* at 494.

Justice Breyer wrote the opinion in *Colorado Republican Federal Campaign Committee v. FEC*[52] in 1996 that threw out state limitations on independent expenditures by political parties, noting that such expenditures fall "within the scope of the Court's precedents that extend First Amendment protection to independent expenditures."[53] When Justice Breyer authored the Court's opinion in *Randall v. Sorrell* in 2006 that struck down expenditure limitations imposed by Vermont on individuals running for office, he once again cited preventing corruption and its appearance as the primary justification for governmental restrictions. Breyer noted that the Court had "considered other governmental interests advanced in support of expenditure limitations. *It rejected each*."[54] Breyer pointed out, in contrast to his dissent in *Citizens United*, that over the past thirty years, "this Court has repeatedly adhered to *Buckley's* constraints, including those on expenditure limits" and cited to seven other opinions since *Buckley*.[55]

All of these decisions that struck down various federal and state attempts to limit independent expenditures by individuals, political parties, candidates, political action committees, and associations, make it very clear that the Court's decision in *Austin* was truly an outlier that conflicted with the Court's jurisprudence on independent expenditures. It was directly contrary to the leading and most significant precedent in this area—*Buckley v. Valeo*.

Restoring Established Precedent: *Citizens United*

As Justice Kennedy recognized in *Citizens United*, the Court was "confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them."[56] Yet in defending the independent expenditure ban, the Solicitor General, Elena Kagan, basically abandoned the only justification given by the five-member majority in the *Austin* case—the antidistortion rationale that the justices had created. As Justice Kennedy said, Kagan instead tried to claim that the ban was justified on an anticorruption rationale and a shareholder-protection interest, grounds that had never been used to justify the ban on independent expenditures. The problem, of course, with the anticorruption rationale, is that such a justification—if accepted by the Court—would allow the government to "prohibit a corporation from expressing political views in media beyond those presented here."[57]

Under the rationale advanced by those critics, the Supreme Court should have upheld this federal statute and thus the ability of the government, as conceded in oral arguments by the government, to ban books or pamphlets with a political message—a claim that crystalizes the radical, anti-free speech nature of the law. Indeed, given that media corporations are only statutorily exempted from this federal law, had the Supreme Court deviated from the well-established *Buckley* line of

[52]518 U.S. 604 (1996).
[53]*Id.* at 614.
[54]548 U.S. 230, 241 (2006) (emphasis added).
[55]*Id.* at 242.
[56]*Citizens United*, 130 S.Ct. at 903.
[57]*Id.* at 904. In addition to the independent expenditure ban, the electioneering communication provision of FECA was also at issue in this case, which prohibits corporations and labor union from making any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office even if there is no appeal to vote for or against the candidate that is made within 60 days of a general election or 30 days of a primary and that can be received by 50,000 or more persons. 2 U.S.C. § 434(f) (3).

cases and upheld the burdensome speech restrictions in the law, then consistent with the opinion, Congress at some future point could have eliminated the corporate media exemption, giving the government the authority to ban political speech by any media organization availing itself of a limited liability structure—from the *New York Times* to Fox News. Those who would seek to uphold the restrictions on non-media corporate speech while seeking broader protection for media corporations rest their claims on the argument that the press has a greater First Amendment right than individuals or associations, a view the Court has previously correctly rejected.[58]

The reasons for correcting the outlier error that is *Austin* are clear, and were articulated by the Court in *Citizens United.* First, the Court noted that precedent should be respected "unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error."[59] The *Austin* decision was poorly reasoned and "itself contravened this Court's earlier precedents in *Buckley* and *Bellotti*."[60] Second, the government did not even defend *Austin's* antidistortion rationale, and when a party does not defend "the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished."[61] Third, and most importantly, *Austin* relied on a faulty historical record of campaign finance laws and "abandoned First Amendment principles."[62]

The majority's opinion in *Citizens United* was not an act of judicial activism; it was an act of correction, overruling a twenty-year old case erroneously decided by five justices who clearly substituted their policy views on how elections should be conducted for the dictates of the First Amendment—contravening a long line of other precedents and the Constitution itself. Instead, the Court returned to the principles that had been established in prior decisions, particularly *Buckley* and *Bellotti*, that "the Government may not suppress political speech on the basis of the speaker's corporate identity."[63] As Chief Justice Roberts pointed out, the Court had "no way to avoid Citizens United's broader constitutional argument" because the applicable statute clearly applied to Citizens United and prohibited its actions.

The dissent clearly believed that Citizens United should lose the statutory and constitutional claims it was making in the case, yet those justices then bizarrely argued that "the majority should nonetheless latch on to one of [the narrower statutory or constitutional claims] in order to avoid reaching the broader constitutional question of whether *Austin* remains good law… It even suggests that the Court's failure to adopt one of these concededly meritless arguments is a sign that the majority is not 'serious about judicial restraint.'"[64] As the Chief Justice correctly observed, this argument is based on the false premise that avoiding deciding constitutional questions "somehow trumps our obligation faithfully to interpret the law."[65] Here, the majority

[58] *Austin*, 494 U.S. at 691.
[59] *Id.* at 911–912.
[60] *Id.* at 912.
[61] *Id.*
[62] *Id.*
[63] *Id.* at 913. Since the part of McConnell v. Federal Election Commission, 540 U.S. 93 (2003) that upheld the electioneering communication provision had relied on the antidistortion interest from *Austin*, the Court also overruled that portion of *McConnell.*
[64] *Citizens United*, 130 S.Ct. at 918–919 (Roberts, concurring).
[65] *Id.* at 919.

faithfully interpreted the constitutional protection in the First Amendment against the abridgement of that right by Congress—it would have constituted judicial activism to studiously ignore the First Amendment as the dissent urged and uphold an obviously unconstitutional federal statute.

Ledbetter

In *Ledbetter v. Goodyear Tire & Rubber Co.*,[66] the Supreme Court held that the discriminatory acts that triggered the time limit for filing a claim with the Equal Employment Opportunity Commission could only be discriminatory pay decisions, not later nondiscriminatory pay decisions that supposedly perpetuated the effects of the earlier discrimination. As another example of supposed judicial activism, one critic of the five-member majority's opinion written by Justice Alito claimed the Court had ruled against a "woman paid less than her male peers for 20 years" because she failed to file her suit "within 180 days of the first instance of discrimination" (a statutory requirement) and even "though she had no way of learning about the discrimination until years later,"[67] a patently false claim. Another report criticizing the "infamous" and "outrageous" decision of the majority, again falsely stated that Ledbetter was unaware of the discriminatory treatment and claimed that the majority was "twisting employment and labor law to serve corporate wrongdoers."[68]

Contrary to all of these criticisms, the majority's opinion in *Ledbetter* was a straight-forward application of the law passed by Congress governing discrimination claims. Ledbetter, a female employee of Goodyear Tire & Rubber Company, had filed a claim with the EEOC asserting that Goodyear had discriminated against her in her job evaluations because she was a woman, actions that resulted in her receiving lower pay. She then filed a lawsuit claiming violations of the Equal Pay Act and Title VII of the Civil Rights Act of 1964. The Equal Pay Act claim was dismissed but a jury found in favor of Ledbetter's Title VII claims.[69]

Title VII makes it unlawful to discriminate "against any individual with respect to his compensation…because of such individual's…sex."[70] Congress placed a statute of limitations in Title VII, requiring an employee to first file a charge with the EEOC within a specified period, either 180 or 300 days depending on the state, "after the alleged unlawful employment practice occurred."[71] If a claim is not filed with the EEOC within that time limit, no lawsuit can be filed.[72] In trying to determine whether Ledbetter filed her lawsuit in compliance with the applicable statutory time limit, the Court emphasized "the need to identify with care the specific employment practice that is at issue."[73]Under a disparate treatment claim such as was asserted by

[66]550 U.S. 618 (2007).
[67]Aron, *supra* note 19.
[68]People for the American Way Foundation, *supra* note 20.
[69]*Ledbetter*, 550 U.S. at 621–622.
[70]42 U.S.C. §2000e-2 (a) (1).
[71]*Id.* §2000e-5 (e) (1).
[72]*Id.* §2000e-5 (f) (1).
[73]*Ledbetter*, 550 U.S. at 624.

Ledbetter, prior precedent specified that the central element of the Court's analysis must be determining the discriminatory intent of the defendant.[74]

Ledbetter claimed her case was timely filed because she was issued discriminatory paychecks during the 180 days before her EEOC filing, and also pointed to a decision to deny her a raise that was made during that same time period. However, she did not claim that any of these occurrences were the result of *intentional* discriminatory treatment by Goodyear; instead, she claimed that "the paychecks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner prior to the EEOC charging period. Similarly, she maintains that the 1998 decision [to deny her a raise] was unlawful because it 'carried forward' the effects of prior, uncharged discrimination decisions."[75] In other words, Ledbetter was claiming that her lawsuit was timely even though the intentionally discriminatory treatment (her negative job evaluation) had occurred *before* the charging time period because the evaluation "had continuing effects during that period."[76] Under her view, every paycheck that gave a woman less pay would be a separate violation of Title VII, with a new statute of limitations beginning to run with each paycheck, "regardless of whether the paycheck simply implements a prior discriminatory decision made outside the limitations period."[77]

The problem with this view of the law was that it was contrary to the prior precedents of the Court, not that the five justices in the majority were engaging in judicial "activism" to "twist" the law in favor of a corporate defendant. In *United Air Lines, Inc. v. Evans*,[78] the Court rejected an almost identical claim because it was untimely. The plaintiff, Evans, was forced to resign because United refused to employ married flight attendants, but she did not file an EEOC claim. When she was later rehired, United refused to give her credit for her prior employment for purposes of seniority. Although Evans admitted she had not filed an EEOC claim based on the original, intentional discrimination that caused her resignation, she argued that United's refusal to give her credit for her prior service gave "present effect to [its] past illegal act and thereby perpetuated[d] the consequences of forbidden discrimination."[79] The Court rejected the claim as untimely in an opinion authored by none other than Justice Stevens:

> United was entitled to treat [Evans' termination] as lawful after respondent failed to file a charge of discrimination within the [relevant time period]. A discriminatory act which is not made the basis for a timely charge…is merely an unfortunate event in history which has no present legal consequences."[80]

As Justice Alito pointed out in the majority opinion in *Ledbetter*, "[i]t would be difficult to speak to the point more directly."[81]

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[74]*Id.* at 624 (citing Chardon v. Fernandez, 454 U.S. 6 (1981) (*per curiam*); Teamsters v. United States, 431 U.S. 324 (1977); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (Blackmun, J., joined by Brennan, and Marshall, JJ., concurring in part and concurring in judgment)).
[75]*Ledbetter*, 550 U.S. at 624–625.
[76]*Id.* at 625.
[77]*Id.* (citations omitted).
[78]431 U.S. 553 (1977).
[79]*Ledbetter*, 550 U.S. at 625.
[80]*United Air Lines*, 431 U.S. at 558.
[81]*Ledbetter*, 550 U.S. at 626.

The *United Air Lines* decision was simply one opinion out of a number of others that applied the same rule—that the intentional act of discrimination must occur within the relevant time period under Title VII and it is not sufficient that the later effects of that discrimination occur during the time period. The time in which to file with the EEOC begins to run from the date that the intentional discrimination occurs. In the majority's opinion, Justice Alito pointed to *Delaware State College v. Ricks*,[82] in which a college professor's claim was dismissed as untimely because he filed his claim after he was terminated, not when he was denied tenure, which was the act of intentional discrimination he was contesting. Justice Alito also noted *Lorance v. AT&T Technologies, Inc.*,[83] in which the claim of female union workers was dismissed as untimely because they filed their claim after they were laid off due to low seniority, not when the rules governing seniority were changed in the union contract, which was the specific act that the women were claiming was intentionally discriminatory. As Justice Alito wrote, the Court held in these prior cases "that the EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of this practice were felt."[84]

After the *Lorance* decision, Congress actually amended Title VII to cover the specific seniority problem in that case, allowing liability from an intentionally discriminatory seniority system both at the time of its adoption and at the time of its application.[85] But it did *not* amend the law to change the results of the *Delaware State College* or *United Air Lines* decisions. Critics of the *Ledbetter* decision apparently wanted the Court to overlook these prior precedents, the legislative history of the law, and the law's statutory text, in order to change the results of the case for a sympathetic plaintiff.

Ledbetters's attempt in her case to circumvent the intent requirement and the time limit imposed by Congress in the statute was "unsound." As Justice Alito noted, this would shift intent from one act (the act that consummates the discriminatory employment practice) to a later act that was not performed with bias or discriminatory motive. The effect of this shift would be to impose liability in the absence of the requisite intent."[86] It would also distort the integrated, multi-step enforcement process of Title VII. Furthermore, such a holding would have violated the Court's stated desire to be respectful of the legislative process that crafted this statute and "give effect to the statute as enacted."[87]

Ledbetter also claimed that another Supreme Court case required different treatment of a pay claim. *Bazemore v. Friday* involved employees of a state agency that originally segregated it's employees into "a white branch" and "a Negro branch," with the latter receiving less pay.[88] In 1965, the branches were combined but the disparate pay continued. After Title VII was amended in 1972 to cover public employees, the black employees sued over the dual pay disparity. The Court held that those claims were not time barred because the state agency had adopted a facially

[82]449 U.S. 250 (1980).
[83]490 U.S. 900 (1989). Justice Stevens also joined this opinion.
[84]*Ledbetter*, 550 U.S. at 627.
[85]42 U.S.C. § 2000e-5(e)(2). *See Ledbetter*, 550 U.S. at 627, n. 2.
[86]*Ledbetter*, 550 U.S. at 629.
[87]*Id.* at 630 (citations omitted).
[88]478 U.S. 385 (1986)(per curiam).

discriminatory pay structure that continued after 1972. Therefore, "the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees. An employer that adopts and intentionally retains such a pay structure can surely be regarded as intending to discriminate on the basis of race as long as the structure is used."[89]

But the situation in *Bazemore* was distinctly different than the situation in *Ledbetter*: "*Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is facially nondiscriminatory and neutrally applied. The fact that precharging period discrimination adversely affects the calculation of a neutral factor…that is used in determining future pay does not mean that each new paycheck constitutes a new violation and restarts the EEOC charging period."[90] There was no evidence (and no claim) that Goodyear had adopted its pay system in order to discriminate on the basis of sex, so the *Bazemore* rationale did not apply to the *Ledbetter* case.

The claims made by critics that Ledbetter did not know about the discrimination and that the limitation should have been stayed are also not in accord with the facts in that case. The Court noted in its decision that it was not addressing the discovery issue because Ledbetter did "*not* argue that such a rule would change the outcome in her case."[91] In other words, she made no claim that she did not know about the discrimination; in fact, her claims of sex discrimination "turned principally on the misconduct of a single Goodyear supervisor, who, Ledbetter testified, retaliated against her when she rejected his sexual advances during the early 1980's and did so again in the mid-1990's when he falsified deficiency reports about her work."[92] And in her deposition, she admitted that she was aware of the pay disparity of which she complained more than 5 years before she filed her claim. It is obvious that Ledbetter could not argue that the statute of limitations for filing an EEOC claim should be stayed because she clearly knew about the unwelcome sexual advances and the deficiency reports being filed by her supervisor. The fact that the supervisor who was accused of wrongdoing had died by the time this case went to trial also provides a good example of why statutes of limitation are important—if Ledbetter had filed her claim in accordance with the time limit in the statute, the supervisor's testimony would have been available to the EEOC and the courts. Such limitation periods put defendants on notice of claims and prevent stale claims from being brought at a time when witnesses are no longer available or documentary evidence has been destroyed under normal document retention policies.

Many of Ledbetter's arguments in this case were "policy arguments in favor of giving the alleged victims of pay discrimination more time before they are required to file a charge with the EEOC."[93] But those policy arguments were being made to the wrong branch of the federal government. It was Congress, not the Court, which chose a very short deadline for filing employment discrimination claims with the EEOC. Critics who did not like that short deadline

[89] *Id.* at 634.
[90] *Id.* at 637.
[91] *Id.* at 642, n. 10 (emphasis added).
[92] *Id.* at 632, n. 4.
[93] *Id.* at 642.

apparently wanted the Court to "twist" Title VII to write that deadline out of the statute. Because the majority refused to do so, but instead applied the statute as written, they are supposedly "activist" judges who were defying Congress in favor of a corporate defendant.

These charges simply cannot be supported by what happened in this case. The decision and its legislative aftermath actually demonstrate the best features of the U.S. constitutional system and the separation of powers designed and built into it by the Framers. The Supreme Court followed *stare decisis* and its own precedents and interpreted Title VII's statute of limitations as it was promulgated by Congress. Congress did not like the result and, listening to the policy (as opposed to legal) arguments made in this case, changed the law with the Lilly Ledbetter Fair Pay Act of 2009. This act amended the 180-day statute of limitations for filing a pay discrimination claim with the EEOC to make it clear that liability would accrue (and the time limit would begin to run) not just when the discriminatory employment practice occurs, but with respect to discriminatory compensation:

> [W]hen a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practices, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wage, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[94]

Following President Obama's unseemly (and inaccurate) attack on the Supreme Court's ruling in Citizens United during this year's State of the Union address, a chorus of liberals, including Obama's press secretary, congressional Democrats, and a number of liberal activist organizations, have mimicked the claim that the Supreme Court is controlled by "conservative activists." This most recent attack comes on the heels of similar criticism that has been made about the Court's ruling in the Ledbetter case.

But the facts of these cases and an examination of the legal analysis applied by the justices in their majority opinions show that there is no merit to any of these claims. These criticisms are actually evidence of the vulnerability to the charge of Left-wing activism that has been properly and correctly leveled against some liberal federal judges for refusing to follow the law and imposing their social and ideological views in the courtroom. By ascribing the "activist" label to conservative judges, liberals appear to be attempting to damage the public image of the Supreme Court and specific justices. These attacks are also clearly an attempt to propagate a moral equivalency with liberal judges who are, in actuality, activists. It is unfair to the justices on the Court who participated in these decisions and is a cynical and derisive tactic that injures the public's faith and confidence in the judicial system.

The Kagan Nomination

The key question for any nominee is how will they approach the judicial process—what is their judicial philosophy. There is a reason that critics of the Roberts Court have chosen the nomenclature of activism, for that term embodies precisely how a judge should *not* carry out their duties. What a judge should do is interpret the Constitution and the law as it is written, not

[94] 42 U.S.C. § 2000e-5(e)(3)(A).

as they would have written it, nor according to how foreign nations would interpret it. To do so, a judge must seek to apply the text according to its plain and original meaning. This is not easy. There are sometimes real disagreements. But originalism and textualism are truest to the enacted law, and these interpretive methodologies reduce the risk that the judge will simply use the interpretive process as pretext for asserting preferred policy biases as law.

With this as the framework, there are a number of issues in Kagan's record and hearings that are cause for concern. In the course of the hearings, Kagan has suggested that she would be open to consulting foreign law and virtually any other sources in interpreting text. In addition seemingly embracing the Supreme Court's illegitimate and regrettable "world opinion poll" usage of foreign law in the Eighth Amendment context, this suggests that Kagan has rejected textual and originalist approaches in favor of more pragmatic ones. While pragmatism may be fine in the legislative sphere, in the judicial context it is often a source of activism.

Another major issue of concern is Kagan's treatment of the military, and what that says about how she approaches the law. Kagan claimed in her response to questions from Senator Sessions that she thought that she had an obligation to return to Harvard's prior policy of restricting access for military recruiters to Harvard's career services office based upon the decision of the Third Circuit Court of Appeals striking down the Solomon Amendment. At best, this seems disingenuous; at worst, her answer suggests that she is willing to use the thinnest veneer of law—even law which she knows is not applicable (the Third Circuit's decision) in the face of law which she knew was applicable (the Solomon Amendment)—in order to impose her desired policy preference.

The Third Circuit decision had not taken effect—the mandate had not been issued—when she reinstituted Harvard's policy of denying military recruiters the full and equal access to which they were entitled under the Solomon Amendment. Additionally, the Third Circuit's ruling was stayed pending Supreme Court review, preventing it from interfering with the operation of the Solomon Amendment. Dean Kagan knew that Harvard's previous separate and unequal treatment of the military recruiters was deemed noncompliant by the DoD, which led her predecessor to reverse course and permit equal access in order to avoid loss of federal funds. Since there was no change in the law effectuated by the Third Circuit's stayed decision, there was no basis to return to a position she knew to be noncompliant.

But even if the mandate had issued or the case had not been stayed, the Third Circuit decision did not even cover Harvard. The federal government generally applies non-acquiescence to lower court opinions which are adverse to federal laws and policies, which is to say, they treat the decisions as only binding in the district or circuit in which the decisions are issued. In this case, that would mean that the Third Circuit opinion, were it ever given legal effect (which it was not), would apply only to schools in the Third Circuit. But Harvard is in the First Circuit, a fact which the dean of Harvard Law School undoubtedly knew.

Simply put, there was no duty for Dean Kagan to violate the law. She was still bound by the Solomon Amendment, but she used an inapplicable decision as an excuse to push her policy preferences. This use of non-binding law as cover is reminiscent of her Oxford thesis, in which she wrote that it is not "wrong or invalid" for judges to "mold and steer the law" in order to

"promote certain ethical values and achieve certain social ends." But she suggested that judges should give themselves cover in doing so: "No judge should hand down a decision that cannot plausibly be grounded in principles referable to an acceptable source of law. If, on the other hand, a court can justify a ruling in terms of legal principle, then that Court must make every effort to do so."

Accordingly, the military recruiting affair appears highly relevant to understanding how it is that Kagan approaches the law. It fits with a pattern dating back at least to her Oxford thesis of attempting to find legal window dressing to justify the imposition of policy preferences.

These issues, as well as her laudatory praise of activist judges like Aharon Barak, raise grave concerns about what kind of justice she would be. Before any Senator votes in favor of Justice Kagan, they need to be as certain as possible that she will be able to uphold her oath of office to "administer justice without respect to persons, and do equal right to the poor and to the rich," and not to rule based upon empathy, or personal policy preferences.

I welcome any questions you may have.