was an incredible act of class and compassion, an incredible display of perspective and sympathy. It was, appropriately enough, perfect.

In recent days, we have seen insurance companies try to avoid responsibility for denying health care to the sick. We have seen Wall Street executives try to avoid responsibility for millions of layoffs and millions more foreclosed homes. We have seen oil companies try to avoid responsibility for environmental disasters of historic proportions. We have seen too many fail to own up to their own mistakes or take responsibility for their own actions. But more than that, we have seen too many actively turn away when others have tried to hold them to account. In that context, what Jim Joyce did was as exceptional as the perfect game itself.

One call may be just one of hundreds that an umpiring crew makes each day. A single game may be just one of 162 each team will play each year. And even though baseball is the national pastime, it is merely that—a diversion. But in this episodes lies a lesson for athletes about sportsmanship, for adversaries about forgiveness, for Members of Congress and for our children about integrity, and for all of us about accountability.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. There will now be a period of morning business, with Senators permitted to speak for up to 10 minutes each.

UNANIMOUS CONSENT AGREEMENT—EXECUTIVE CALENDAR

Mr. REID. Mr. President, as in executive session, I ask unanimous consent that the debate time controlled today by Senator LEAHY with respect to Executive Calendar Nos. 730, 731, and 759 be divided as follows: 5 minutes each for Senators BOXER and MCCASKILL and the remaining 20 minutes under the control of Senator LEAHY.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I ask unanimous consent to speak for up to 45 minutes.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

SENATE'S ROLE IN SUPREME COURT NOMINATIONS

Mr. SPECTER. Mr. President, I have sought recognition to comment on the way in which the Senate discharges its constitutionally assigned responsibility to consent to the appointment of Justices to the Supreme Court of the United States.

With almost 30 years of experience, my thinking on this subject has evolved and changed. At the outset, I thought the President was entitled to considerable deference, providing the nominee was academically and professionally well qualified, under the principle that elections have consequences. With the composition of the Supreme Court a Presidential campaign issue, it has become acceptable for the President to make ideological selections. As the Supreme Court has become more and more of an ideological battleground, I have concluded that Senators, under the doctrine of separation of power, have equal standing to consider ideology.

For the most part, notwithstanding considerable efforts by Senators, the confirmation process has been sterile. Except for Judge Bork, whose extensive paper trail gave him little choice, nominees have danced a carefully orchestrated minuet, saying virtually nothing about ideology.

As I have noted in the past, nominees say only as much as they think they have to in order to be confirmed. When some nominees have given assurances about a generalized methodology, illustrated by Chief Justice Roberts and Justice Alito, their decisions have been markedly different. In commenting on those Justices, or citing critical professorial evaluations of their deviations, I do not do so to challenge their good faith. There is an obvious difference between testimony before the Judiciary Committee and deciding a case in controversy. But it is instructive to analyze nominees' answers for Senators to try to figure out how to get enough information on judicial ideology to cast an intelligent vote.

In seeking to determine where a nominee will go once confirmed, a great deal of emphasis is placed on the nominee's willingness to commit to, and in fact follow, stare decisis. If the nominee maintains that commitment, then there are established precedents to know where the nominee will go. But, as has frequently been the case, the assurances on following stare decisis have not been followed. I use the illustrations of Chief Justice Roberts and Justice Alito as two recent confirmation processes—in 2005 and 2006—as illustrative.

Chief Justice Roberts testified extensively about his purported fidelity to stare decisis. For example, during his confirmation hearing, he said:

I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough—and the Court has emphasized this on several occasions. It is not enough that you may think the prior decision was wrongfully decided. . . . I think one way to look at it is that the Casey decision itself, which applied the principle of stare decisis to Roe v. Wade, is itself a precedent of the Court, entitled to respect under principles of stare decisis.

He went on to say:

Well, I think people's personal views on this issue derive from a number of sources, and there's nothing in my personal views based on faith or other sources that would prevent me from applying the precedents of the Court faithfully under principles of stare decisis.

Less than a year later, Justice Alito was no less emphatic. He testified:

I think the doctrine of stare decisis is a very important doctrine. It's a fundamental part of our legal system, and it's the principle that courts in general should follow their past precedents. . . . It's important because it protects reliance interests and it's important because it reflects the view that courts should respect the judgment and the wisdom that are embodied in prior judicial decisions.

He went on to say:

There needs to be a special justification for overruling a prior precedent.

Of consequence, along with adhering to the principle of stare decisis, is the Justices' willingness to accept the findings of fact made by Congress through the extensive hearing processes in evaluating the sufficiency of a record to uphold the constitutionality of legislative enactments. Here again, Chief Justice Roberts and Justice Alito gave emphatic assurances that they would give deference to congressional findings of fact.

Chief Justice Roberts testified as follows:

The Court can't sit and hear witness after witness after witness in a particular area and develop a kind of a record. Courts can't make the policy judgments about what kind of legislation is necessary in light of the findings that are made. . . . We simply don't have the institutional expertise or the resources or the authority to engage in that type of a process. . . . The courts don't have it. Congress does. It's constitutional authority. It's not our job. It is your job. So the deference to Congressional findings in this area has a solid basis.

Chief Justice Roberts went on to say:

[A]s a judge, you may be beginning to transgress into the area of making a law . . . when you are in a position of reevaluating legislative findings, because that doesn't look like a judicial function.

But what happened in practice was very different, illustrated by the decision where the Chief Justice, in discussing McConnell v. Federal Election Commission, did not say whether McConnell was correctly decided. But the Chief Justice did acknowledge, as the Court emphasized in its decision, that the act was a product of an ''extraordinarily extensive [legislative] record. . . . My reading of the Court's opinion,'' said Chief Justice Roberts in his testimony, ''is that that was a case where the Court's decision was driven in large part by the record that had been compiled by Congress. . . . [T]he determination there was based . . . that the extensive record carried a lot of weight with the Justices.''

When the issue of campaign finance reform came up later before the Court,

Chief Justice Roberts took a very different view of the weight to be given to congressional findings of fact. On the issue of the deference to be given to congressional findings of fact, Justice Alito's testimony was equally emphatic. He testified as follows:

[The] judiciary is not equipped at all to make findings about what is going on in the real world, not this sort of legislative findings. And Congress, of course, is in the best position to do that. . . . Congress can have hearings and examine complex social issues, receive statistical data, hear testimony from experts, analyze that and synthesize that and reduce that to findings. . . . I have the greatest respect for [Congressional] findings. This is an area where Congress has the expertise and where the Congress has the opportunity to assemble facts and assess the facts. We on the appellate judiciary don't have that opportunity.

In practice, there was very material deviation by both Chief Justice Roberts and Justice Alito, when it came to evaluating legislation with the point being what deference would be given to congressional factfinding. The commentators have been very critical of both of the Justices. For example, Prof. Geoffrey Stone, the Edward H. Levi Distinguished Service Professor of Law at the University of Chicago Law School, had this to say, referring to the testimony just referred to, given by Chief Justice Roberts in his confirmation hearing. Professor Stone wrote that their records on the Court '' . . . speak much louder than their words to Congress.'' Their ''abandon[ment] of stare decisis'' in ''case after case'' has required Chief Justice Roberts to ''eat'' his words.

Professor Stone has written that the two Justices have:

. . . abandoned the principle of stare decisis in a particularly insidious manner, and their approach to precedent has been ''dishonest.''

A similar judgment was rendered by Prof. Ronald Dworkin of the New York University School of Law. Professor Dworkin said Chief Justice Roberts and Justice Alito, ''who . . . promised fidelity to the law'' during their confirmation hearings, have ''brazenly ignore[d] past decisions.''

None of the decisions of the Roberts Court speaks more directly to these issues than the case of Citizens United v. the Federal Election Commission. In that case, the Supreme Court overruled two decisions—McConnell v. Federal Election Commission, decided in 2003, where Justices had, just 7 years earlier, upheld section 203 against a facial challenge to constitutionality; and Austin v. Michigan Chamber of Commerce, a 1990 decision where the Supreme Court upheld the constitutionality of even a broader State statute regulating corporate campaign-related expenditures. Overruling Austin was especially significant because Congress had specifically relied on that decision in drafting the McCain-Feingold Act.

Justice Stevens said about that decision, in dissent, that ''pulling out the rug beneath Congress,'' in this manner, ''shows great disrespect for a coequal branch.''

Justice Stevens emphasized the deviation from the kinds of commitments which had been made to deference to congressional findings, noting that in that decision the Court, with the backing of Chief Justice Roberts and Justice Alito, can't decide the ''virtual mountain of evidence'' establishing the corrupting influence of corporate money on which Congress relied in drafting section 203.

So there you have a much heralded recent decision in Citizens United, which has put the campaign finance area upside down; really on its head. In the context of the extensive congressional hearings, the finding of the corrupting influence of money and politics, the forceful assurance given by those two Justices to have it so cavalierly set aside, is a factor which has to be taken into account in how we evaluate the testimony of the nominees.

Where, then, are Senators to look to try to make an evaluation of what is the judicial ideology of the nominee? I suggest there may be a way, looking into the earlier writings of the nominee, paying relatively little if any attention to the testimony on confirmation, to find out what the nominees believe, where they stand on the ideological spectrum.

Some indicators as to where Chief Justice Roberts stood can be gleaned from views he expressed on the remediation of racial discrimination while serving in a political capacity as a member of the Reagan administration, much earlier in his career. His views attracted a great deal of attention when he commented on the 1982 reauthorization of the Voting Rights Act. He then wrote more than two dozen documents urging the administration to reject a provision of the then-pending House bill that would have allowed plaintiffs to establish a violation of the act, not only by establishing that a voting practice was impermissibly motivated, but also by establishing that it had a discriminatory effect.

He claimed the so-called ''effects test'' would establish a quota system in elections and, more disturbingly still in light of the extensive record of voting rights amassed by congressional committees, he said that ''there was no evidence of voting abuses nationwide.'' Hardly consistent with the factual record which had been amassed giving some indication as to this predilections at that time.

He then made the comment in a memorandum on the same subject: ''Something must be done to educate the Senators on the seriousness of this problem.'' Another example in the race discrimination context was a 1981 memorandum that Roberts wrote to the Attorney General questioning the legality of regulations promulgated by the Department of Labor to enforce Executive Order 11246.

Issued in 1965, that order requires private-sector employers to contract with the Federal Government to evaluate whether qualified minorities and women are underutilized in their workforce; that if so, to adopt roles to increase their representation by encouraging women and minorities to apply for positions. It does not require or authorize employers to give any racial or sex-based preference. In fact, its implementing regulations expressly prohibit such preferences.

Roberts then attacked the regulations on the ground that they conflicted with the color blindness principle of Title VII of the Civil Rights Act of 1964 and used ''quota-like concepts.'' In that context only the most extreme conservatives have questioned the legality of that Executive order.

Roberts, as a younger man, working in the Federal Government, wrote despairingly about ''so-called fundamental rights,'' including the right to privacy.

Similar traces may be found in examining Justice Alito's earlier writings. Among them was his characterization of Judge Bork as ''one of the most outstanding nominees of this century.''

Justice Alito shared Bork's antipathy, in particular, to the abortion right first recognized in Roe v. Wade. While Justice Alito was serving as assistant to Solicitor General Charles Fried in 1985, he took it upon himself to outline, in the words of Prof. Lawrence Tribe, ''a step-by-step process toward the ultimate goal of overruling Roe.''

That year, when applying for a position as Assistant Attorney General in the Office of Legal Counsel, Judge Alito unequivocally stated in his cover letter that the Constitution does not provide for a right to terminate a pregnancy.

Justice Alito's extrajudicial writings also evidence an expansive view of executive power. Among them, in 1989, was a speech defending Justice Scalia's lone dissent in Morrison v. Olson. There the Court upheld the constitutionality of the independent counsel law passed by Congress in the wake of Watergate.

Justice Scalia was the lone dissenter. He also expressed his agreement with the ''unitary'' executive theory around which Justice Scalia had framed that dissent. Justice Alito's conservative views were again evidenced in his support of the expansion of executive power at the expense of Congress reflected in the memorandum he wrote supporting the use of Presidential signing statements to advance a President's interpretation of a Federal statute. So that in seeking to make a determination of ideology, we have seen from the analysis, the extensive testimony of both Chief Justice Roberts and Justice Alito on two core issues—stare decisis and the deference to be afforded to congressional factfinding—a disregard of the platitudes of the generalizations of the methodology so emphatically testified to before the Judiciary Committee, and requiring a

search into their views as expressed in other contexts where there is not the motivation for Senate confirmation.

The kinds of answers given by other nominees require similar scrutiny. The Judiciary Committee, for example, should no longer tolerate the sort of answer which Justice Scalia gave during his confirmation hearing when I asked him whether Marbury v. Madison was settled precedent. One would think that that would be about the easiest kind of questions to answer.

In 1986, in the so-called courtesy hearing, I asked Justice Scalia, then Judge Scalia, about a bedrock case like Marbury v. Madison. As evidenced during the hearing, he refused to answer with a yes or no on the question. He acknowledged only that Marbury was a ''pillar of our system'' and then said:

Whether I would be likely to kick away Marbury v. Madison, given not only what I just said, but also what I have said concerning my respect for the principle of stare decisis, I think you will have to judge on the basis of my record as a judge in the Court of Appeals, in your judgment as to whether I am, I suppose on that issue, sufficiently intemperate or extreme.

In effect, he was saying that a nominee who kicks the legs out from under Marbury v. Madison should be considered ''intemperate or extreme,'' and hence presumably denied appointment to the Court. Yet he would not forthrightly rule out a possible overturning of Marbury v. Madison. And so went the balance of the testimony Justice Scalia gave in his confirmation hearing. It is my suggestion that that kind of response ought no longer to be tolerated. There is an abbreviation for Justice Scalia's testimony of the famous limitation of comment by someone arrested in a time of war to give only name, rank, and serial number. I think, by any fair standard, Justice Scalia would only give his name and rank, and we ought to be looking for something substantially more.

Nor can the committee, in my judgment, any longer accept a statement given by Justice Clarence Thomas in 1991 that he did not have an opinion as to whether Roe was properly decided, and, more remarkably still, could not recall ever having had a conversation about it.

In searching for some of the bedrock principles which I would suggest the Senators ought to look for in the confirmation process, I would enumerate five. First, I believe a nominee should accept that the 14th and 15th amendments confer substantial power on Congress to enforce their substantive provisions.

In the past 13 years since the case in the City of Boerne v. Flores, the Court has adopted a concept of proportionality and congruence, a standard which is impossible to understand, certainly impossible for Congress to know on our legislative findings and our legislative enactments as to what will satisfy the Supreme Court of the United States on what they may, at some later day, consider to be ''proportional and congruent.''

I suggest that Justice Breyer has the correct standard when he said the courts should ask no more than whether ''Congress could reasonably have concluded that a remedy is needed and that the remedy chosen constitutes an appropriate way to enforce the amendments.''

A second guiding principle I would suggest is, a nominee should accept that the Constitution, and in particular the due process clause of the 14th amendment, protects facets of individual liberty not yet recognized by the Court. The Court has repeatedly held, through the due process clause of the 14th amendment, the Constitution protects facets of liberty, a realm of personal liberty which the government may not enter, and in accordance with the shifting values of our society has expanded the reach of the due process clause.

A third principle which I suggest the Senate should adopt is a nominee should accept that liberty protected by the Constitution's due process clause includes the right to terminate a pregnancy before the point of viability. I recognize that abortion remains a divisive moral and social issue. But the constitutional status of abortion rights has been settled. The Court has declined the opportunity to overrule Roe v. Wade in nearly 40 cases. In Casey v. Planned Parenthood, three Republican nominees to the Court joined two other Justices in affirming Roe's central holding.

Even conservative Federal Judge Michael Luttig has characterized Casey as ''super stare decisis.'' Even some of Roe's most vociferous critics, including President Reagan's Solicitor General Charles Fried, who urged the Court in the 1980s to overturn the decision, and the late John Hart Ely, perhaps Roe's most prominent academic critic, have said that the Supreme Court should not at this late date overrule Roe.

The fourth principle which I suggest ought to be accepted is that a nominee should accept the equal protection clause of the 14th amendment does not prohibit narrowly tailored race-based measures, that is, does not mandate color blindness so long as the measures do not amount to quotas.

A fifth principle which I think ought to be a standard is that a nominee should accept the constitutionality of statutory restrictions on campaign contributions to candidates for office.

The statement which I have made is an abbreviation of a much more extended written statement, which I ask unanimous consent to have printed in the RECORD with these introductory remarks as I have just made them.

I make this explanation to give a reason why there is obviously some repetition between what I have said in abbreviated form and the full text of the statement.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

FLOOR STATEMENT ON CONFIRMATION OF SUPREME COURT NOMINEES

Mr. President, I have sought recognition to comment on the way in which the Senate discharges its constitutionally assigned responsibility to consent to the appointment of Justices to the Supreme Court.

With almost 30 years of experience, my thinking on this subject has evolved and changed. At the outset, I thought the President was entitled to considerable deference providing the nominee was academically and professionally well qualified. Under the principle that elections have consequences with the composition of the Supreme Court a presidential campaign issue, it has been accepted for the President to make ideological selections. As the Supreme Court has become more and more of an ideological battleground, I have concluded that Senators, under the doctrine of separation of power, have equal standing to consider ideology.

For the most part, notwithstanding considerable effort by Senators, the confirmation process has been sterile. Except for Judge Bork, whose extensive paper trail gave him little choice, nominees have danced a carefully orchestrated minuet, saying virtually nothing about ideology. Nominees say only as much as they think they have to in order to be confirmed. When some nominees have given assurances about a generalized methodology, illustrated by Chief Justice Roberts and Justice Alito, their decisions have been markedly different.

In commenting on those Justices or citing critical professorial evaluations of their deviations, I do not do so to challenge their good faith. There is an obvious difference between testimony before the Judiciary Committee and deciding a case in controversy. But it is instructive to analyze nominees answers for Senators to try to figure out how to get enough information on judicial ideology to cast an intelligent vote.

I. As a member of the Committee on the Judiciary since entering the Senate, I have participated in the confirmation hearings of eleven nominees to the Court (Sandra Day O'Connor, Antonin Scalia, Robert Bork, Anthony Kennedy, David Souter, Clarence Thomas Ruth Bader Ginsburg, Stephen Breyer, John Roberts, Samuel Alito, and Sonya Sotomayor) and the nomination of then-Associate Justice William Rehnquist to serve as Chief Justice. I chaired the confirmation hearings on two of these nominees, John Roberts and Samuel Alito.

I voted to confirm all but one of the nominees, Judge Robert Bork. His own testimony placed him well outside the judicial mainstream. Judge Bork made clear his view, for instance, that the Fourteenth Amendment's due process clause imposes no substantive limits on governmental actions that infringe upon fundamental rights to conduct one's intimate relations in private, to control one's reproduction, to choose one's spouse, and so forth. Not even Justice Scalia, who reads the due process clauses narrowly, has taken that position. Nor have the Court's newest conservative members, Chief Justice Roberts and Justice Alito.

Still more troubling were Judge Bork's extreme views on the constitutionality of racial discrimination. He went so far as to say that the Court wrongly decided Bolling v. Sharpe (1954), which held unconstitutional racial segregation in Washington, DC's public education system; and Shelly v. Kraemer (1948), which held unenforceable race-based restrictive covenants in residential housing. Both were unanimous decisions joined by conservative justices.

It was not his mere criticism of these and many other important decisions alone that led me to vote against Judge Bork. It was

the very real possibility that he would vote to overturn or resist the application of bedrock precedents of the Court. (Arlen Specter, Why I Voted Against Bork, New York Times, Oct. 9, 1987.) So objectionable was Judge Bork's judicial ideology that it drew rebukes even from some prominent Republicans. Among them was William Coleman, Jr., one of America's leading lawyers of the twentieth century, and along with Justice Scalia, a member of the Ford Administration.

My vote on Judge Bork proved the right decision. Judge Bork's post-hearing writings beginning with the The Tempting of America: The Political Seduction of the Law in 1988 left no doubt that his testimony was but a preview of the extremism he would have brought to the Court.

II. I have never demanded that a nominee satisfy an ideological litmus test whether liberal or conservative much less demanded that a nominee commit to reaching a particular certain outcome in any given case. What I have demanded is that a nominee, first, affirm his or her commitment to the doctrine of stare decisis (the policy of following precedent rather than interpreting constitutional and statutory provisions anew in each case, unless compelling reasons demand otherwise); and, second, pledge to honor the legislative powers the Constitution assigns to the Congress, especially its remedial powers to enforce the Fourteenth and Fifteenth Amendments.

Nominees committed to stare decisis and respectful of Congress' lawmaking powers are much less likely to indulge their ideological preferences whether left or right in interpreting the open-ended provisions of the Constitution and federal statutes to which very different meanings could be ascribed. They are, in short, less likely to become activists. Noted Court commentator Jeffrey Rosen made just that point soon before the Roberts confirmation hearing. He said that the best way to find out whether Chief Justice Roberts was a conservative activist (in the mold of Justices Scalia and Thomas) or a moderate, cautious, and restrained conservative (in the mold of Justice O'Connor) would be to explore Judge Roberts's view of precedents, which the lawyers call stare decisis, or let the decision stand. (In Search of John Roberts, The New York Times, July 21, 2005.)

That is why when I questioned Roberts and Alito in 2005 and 2006, respectively, I focused heavily on the issue of stare decisis. Several other Senators did as well. Both Chief Justice Roberts and Justice Alito provided extensive testimony on the subject. Their testimony warrants extensive quotation.

Chief Justice Roberts testified:

Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath. . . .

[T] importance of settled expectations in the application of stare decisis is a very important consideration.

I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough and the Court has emphasized this on several occasions. It is not enough that you may think the prior decision was wrongly decided.

Well, I think people's personal views on this issue derive from a number of sources, and there's nothing in my personal views based on faith or other sources that would prevent me from applying the precedents of the Court faithfully under principles of stare decisis.

I think one way to look at it is that the Casey decision [Casey v. Planned Parenthood of Southeastern Pennsylvania (1992)] itself, which applied the principles of stare decisis to Roe v. Wade [1973], is itself a precedent of the Court, entitled to respect under principles of stare decisis. And that would be the body of law that any judge confronting an issue in his care would begin with, not simply the decision in Roe v. Wade but its reaffirmation in the Casey decision. That is itself a precedent. It's a precedent on whether or not to revisit the Roe v. Wade precedent. And under principles of stare decisis, that would be where any judge considering the issue in this area would begin.

Testifying a year later, Justice Alito was no less emphatic. He testified:

I think the doctrine of stare decisis is a very important doctrine. It's a fundamental part of our legal system, and its the principle that courts in general should follow their past precedents, and its important for a variety of reasons. Its important because it limits the power of the judiciary. Its important because it protects reliance interests, and its important because it reflects the view of the courts should respect the judgments and the wisdom that are embodied in prior judicial decisions. It's not an inexorable command, but it's a general presumption that courts are going to follow prior precedents.

I agree that in every case in which there is a prior precedent, the first issue is the issue of stare decisis, and the presumption is that the Court will follow its prior precedents. There needs to be a special justification for overruling a prior precedent.

I don't want to leave the impression that stare decisis is an inexorable command because the Supreme Court has said that it is not, but it is a judgment that has to be based, taking into account all of the factors that are relevant and that are set out in the Supreme Court's cases.

It was not only the nominees themselves who testified that they would follow stare decisis. Numerous hearing witnesses made that claim on their behalf. One prominent practitioner before the Court (Maureen E. Mahoney) told the Committee that Chief Justice Roberts had the deepest respect for legal principles and legal precedent. Charles Fried, the conservative Solicitor General during the Reagan Administration, testified that he did not believe that Chief Justice Roberts would vote to overturn Roe v. Wade (1973). Commenting in 2007, federal circuit judge Diane Sykes wrote that Chief Justice Roberts's and his supporters hearing testimony portrayed a cautious judge who would be attentive to the discretion-limiting force of decisional rules and precedent (Of a Judiciary Nature: Observations on Chief Justice's First Opinions, 34 Pepperdine Law Review 1027 (2007)). In the case of Justice Alito, the late Edward Becker, the former Chief Judge of and Justice Alito's colleague on the Court of Appeals for the Third Circuit, a nationally acclaimed judicial centrist, testified that as circuit court judge Justice Alito scrupulously adhere[d] to precedent. A group of Third Circuit judges backed Judge Becker by speaking out in favor of Justice Alito's confirmation.

Numerous liberal commentators also noted Chief Justice Roberts's and Justice Alito's professed respect for precedent despite their apparent ideological conservatism. New York Times Court reporter Linda Greenhouse, for instance, noted that [b]oth Chief Justice John G. Roberts, Jr. and Justice Samuel Alito, Jr., assured their Senate questioners at their confirmation hearing that they . . . respected precedent (Precedents Begin to Fall for Roberts Court, The New York Times, July 21, 2007). Chief Justice Roberts's commitment to stare decisis even earned him the support of some noted liberal constitutional scholars. Among them was Laurence Tribe, the renowned professor of constitutional law at Harvard Law School, and Geoffrey Stone, the Edward H. Levi Distinguished Service Professor at the University of Chicago Law School. Professor Stone wrote in an op-ed that Chief Justice Roberts is too good of a lawyer, too good a craftsman, to embrace . . . a disingenuous approach to constitutional interpretation. Everything about him suggests a principled, pragmatic justice who will act cautiously and with a healthy respect for precedent (President Bush's Blink, Chicago Tribune, July 27, 2005, at 27). He noted in a subsequent law review article that [b]ased largely on Chief Justice Roberts's testimony on stare decisis, I publicly supported his confirmation. (The Roberts Court, Stare Decisis and the Future of Constitutional Law, 82 Tulane Law Review 1533 (2008).) Professor Cass Sunstein of Harvard Law School, who now heads the Obama Administration's Office of Information and Regulatory Affairs (OIRA), likewise supported Chief Justice Roberts's confirmation for this reason. (Minimalist Justice, The New Republic, Aug. 1, 2005 [check].) So, too, did Court commentator Jeffrey Rosen. (Jeffrey Rosen, In Search of John Roberts, The New York Times, July 21, 2005.)

In addition to stare decisis, the confirmation hearings also addressed what I bluntly referred to during the Roberts hearing as the denigration by the Court of Congressional authority. I noted several important cases in which the Court had disregarded legislative fact-findings made incidental to Congress's constitutionally assigned legislative powers.

The issue has taken on particular importance with respect to two of the civil rights amendments: the Fourteenth, which forbids a state from (among things) abridging the right of any person within its jurisdiction the equal protection of the laws, and the Fifteenth, which forbids the states and the federal government from denying any citizen the right to vote on account of race. Both amendments give Congress the power to enforce their prohibitions by appropriate legislation. Difficult questions have arisen as to the contours of Congress's powers under the Fourteenth and Fifteenth Amendments. This much, though, should be beyond debate: Congress alone has the institutional fact-finding capacity to investigate whether state practices result in systemic deprivations of the rights guaranteed by these amendments and, having found such deprivations, to fashion appropriate measures to remediate them.

Just as they did on the subject of stare decisis, both Chief Justice Roberts and Justice Alito gave the Committee assurances that they would defer to Congressional findings of fact that underlay the exercise of Congress's powers not only under the civil rights amendments but also the Commerce Clause. Chief Justice Roberts testified:

The reason that congressional fact finding and determination is important in these cases is because the courts recognize that they can't do that. Courts can't have, as you said, whatever it was, the 13 separate hearings before passing particular legislation. . . . [The Supreme] Court can't sit and hear witness after witness after witness in a particular area and develop that kind of a record. Courts can't make the policy judgments about what type of legislation is necessary in light of the findings that are made . . . We simply don't have the institutional expertise or the resources or the authority to engage in that type of a process. So that is sort of the basis for the deference to the

fact finding that is made. It's institutional competence. The courts don't have it. Congress does. It's constitutional authority. It's not our job. It is your job. So the deference to congressional findings in this area has a solid basis.

I appreciate very much the differences in institutional competence between the judiciary and the Congress when it comes to basic questions of fact finding, development of a record, and also the authority to make the policy decisions about how to act on the basis of a particular record. It's not just disagreement over a record. It's a question of whose job it is to make a determination based on the record . . . [A]s a judge, you may be beginning to transgress into the area of making a law . . . when you are in a position of re-evaluating legislative findings, because that doesn't look like a judicial function.

Chief Justice Roberts also addressed the issue of legislative fact-finding when discussing the Court's decision in McConnell v. Federal Election Commission (2003). There the Court rejected a First Amendment facial challenge to a provision of the Bipartisan Campaign Reform Act (commonly known as McCain-Feingold Act) that bars corporations and labor unions from funding advertisements in support of or opposition to a candidate for federal office soon before an election. Although he would not say whether McConnell was correctly decided, Chief Justice Roberts did acknowledge, as the Court emphasized in its decision, that the Act was the product of an extraordinarily extensive [legislative] record. . . . My reading of the Court's opinion . . . is that that was a case where the Court's decision was driven in large part by the record that had been compiled by Congress. . . . [T]he determination there was based . . . that the extensive record carried a lot of weight with the Justices.

On the subject of legislative fact-finding, Justice Alito's testimony was in accord. Justice Alito testified:

I think that the judiciary should have great respect for findings of fact that are made by Congress. . . .

[The] judiciary is not equipped at all to make findings about what is going on in the real world, not this sort of legislative findings. And Congress, of course, is in the best position to do that.

Congress can have hearings and examine complex social issues, receive statistical data, hear testimony from experts, analyze that and synthesize that and reduce that to findings.

I have the greatest respect for [Congressional] findings. This is an area where Congress has the expertise and where Congress has the opportunity to assemble facts and to assess the facts. We on the appellate judiciary don't have that opportunity.

And when Congress makes findings on questions that have a bearing on the constitutionality of legislation, I think they are entitled to great respect.

III. The record of the newly constituted Roberts Court and, in particular, that of Chief Justice Roberts and Samuel Alito raises serious questions as to the adequacy of the prevailing standard for evaluating nominees to the Court. Although barely four years old, the Roberts Court has already amassed a record of conservative judicial activism that the country has not seen since the early New Deal era. This has manifested, most significantly, in the Court's willingness to overrule precedent and usurp the lawmaking powers of Congress in service of conservative political objectives.

Numerous commentators have highlighted the contradiction between Chief Justice Roberts's and Justice Alito's testimony, and their actions on the Court. Professor Stone, whose words in support of Chief Justice Roberts I just quoted, has written that their records on the Court speak much louder than their words to Congress. Their abandon[ment] of stare decisis in case after case has required Chief Justice Roberts to eat his words about commitment to precedent. (The Roberts Court, Stare Decisis, and the Future of Constitutional Law, 82 Tulane Law Review 1533 (2008).) Another prominent academic lawyer, Professor Ronald Dworkin of New York University Law School, has said that Justices Roberts and Alito had both declared their intention to respect precedent in their confirmation hearings, and no doubt they were reluctant to admit so soon how little those declarations were worth. (Quoted in Linda Greenhouse, Precedents Begin to Fall for Roberts Court, The New York Times, June 21, 2007). Professor Dworkin later said that Chief Justice Roberts and Justice Alito, who . . . promised fidelity to the law during their confirmation hearings, have brazenly ignore[d] past decisions (Justice Sotomayor: The Unjust Hearing, The New York Review of Books, Sept. 24, 2009). And Jeffrey Rosen of The New Republic recently asked in an article, and later in a hearing before the Judiciary Committee, whether the John Roberts who testified before the Senate was the same John Roberts who now sits on the Court (Roberts Versus Roberts: How Radical is the Chief Justice? The New Republic, Feb. 17, 2010).

No decision of the Roberts Court supports these assessments more powerfully than Citizens United v. Federal Election Commission (2010). A five-four majority of the Court struck down as facially unconstitutional section 203 of the Bipartisan Campaign Act of 2002 (commonly known as the McCain-Feingold Act), which prohibits corporations and unions from making independent campaign expenditures (independent because they are not coordinated with a campaign) to fund any broadcast, cable, or satellite communication that refers to a clearly identified candidate for federal office and is made within 30 days of a primary or 60 days of a general election. (Federal law leaves corporations free to finance television ads, during a campaign or otherwise, addressing whatever political issues they wish and to engage in express advocacy for or against a candidate in print or through other mediums of communication not covered by the statute. It also leaves them free to engage freely in political advocacy, as they often do, through PACs.)

The upshot is that election-related speech by corporations including foreign corporations now apparently enjoys the same constitutional protection as campaign-related speech by citizens. It is little wonder that even three-fourths of Republicans polled have expressed disagreement with the Court's decision.

The much-discussed rebuke of the Court by the President during the last state-of-the-union address was deserved. For the Court's decision did not merely reflect an erroneous, but reasonable, interpretation of the First Amendment. It reflected five Justices willingness to repudiate precedent, history, and Congressional findings to an extraordinary degree. To highlight: (1) The Court went out of its way to overrule two decisions: McConnell v. Federal Election Commission (2003), where six Justices (including most notably Chief Justice Roberts's and Justice Alito's predecessors, Chief Justice Rehnquist and Justice O'Connor) had just seven year earlier upheld section 203 against a facial challenge to its constitutionality, and Austin v. Michigan Chamber of Commerce (1990), where the Court upheld the constitutionality of even broader state statute regulating corporate campaign-related expenditures. Overruling Austin was especially significant because Congress specifically relied on that decision in drafting the McCain Feingold Act. Pulling out the rug beneath Congress in this manner, Justice Stevens noted in dissent, shows great disrespect for a coequal branch. (2) The Court eschewed a number of narrower grounds (both constitutional and statutory) for ruling in favor of the corporate litigant. (3) The Court, in Justice Stevens's words, rewr[ote] the law relating to campaign expenditures by for-profit corporations and unions (emphasis) by putting for-profit corporations on the same constitutional footing as individuals, media corporations, and nonprofit advocacy corporations, and made a dramatic break from our past by repudiating a century's history of federal regulation of corporate campaign activity. (4) And the Court, to quote Justice Stevens once more, cast aside the virtual mountain of evidence establishing the corrupting influence of corporate money on which Congress relied in drafting ' 203. Recall the words I quoted earlier of the Chief Justice during his confirmation hearing as to the extensive legislative record on which McConnell was based.

Citizens United is the most visible demonstration of Chief Justice Roberts' and Justice Alito's troubling disregard of precedent and usurpation of Congress' constitutionally assigned powers. It is not the only. Let me offer some additional examples first in cases interpreting the Constitution and then in cases interpreting federal statutes.

Especially troubling is Parents Involved in Community Schools v. Seattle School District No. 1 (2007). The Court struck down narrowly tailored race-conscious remedial plans adopted by two local boards designed to maintain racially integrated school districts. In his opinion for the Court, Chief Justice Roberts concluded that only upon establishing that it had intentionally discriminated in the assignment of students may a school district voluntary adopt such a plan that is to say, only when the Fourteenth Amendment's equal protection clause would actually require race-conscious remedial efforts. But as Justice Breyer emphasized in his dissenting opinion, a longstanding and unbroken line of legal authority tells us that the Equal Protection Clause [of the Fourteenth Amendment] permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it. The majority's disregard of that precedent, Justice Breyer wrote in dissent, threatens to substitute for present calm a disruptive round of race-related litigation, and . . . undermines Brown's promise of integrated . . . education that local communities have sought to make a reality. Justice Breyer pointedly asked: What has happened to stare decisis? [S]o extreme was Chief Justice Roberts position, New York Times Court reporter Linda Greenhouse has written, that concurring Justice Anthony Kennedy, himself a conservative on the equal protection clause, refused to sign it (Op-ed, The Chief Justice on the Spot, The New York Times, Jan. 9, 2009).

Hein v. Freedom from Religion Foundation, Inc., 127 S. Ct. 2553 (2007), written by Justice Alito, and Morse v. Frederick, 127 S. Ct. 1610 (2007), written by Chief Justice Roberts, present two additional examples in the area of constitutional law. Hein held that an individual taxpayer did not have standing to challenge the constitutionality of government expenditures to religious organizations under the Bush administration's faith-based initiatives program. That conclusion ran counter to a four-decade-old precedent holding that taxpayers have standing to challenge federal expenditures as violative of the

Establishment Clause (Flast v. Cohen (1968)). Justice Alito distinguished the precedent on the ground that it involved a program authorized by the legislative branch rather than the executive branch. But as Justice Souter explained in dissent, Justice Alito's distinction has no basis in either logic or precedent.

The second case, Morse, held that the suspension of high school students for displaying a banner across the street from their school that read BONG Hits 4 JESUS did not violate the First Amendment. That holding ran counter to another long-standing precedent, Tinker (1969), which held unconstitutional the discipline of a public-school student for engaging in First Amendment-protected speech unless it disrupts school activities. Chief Justice Roberts attempted to distinguish Tinker on the ground that the banner in the case before him could be read to encourage illegal drug use. That distinction is unpersuasive. The communicative display held protected in Tinker the wearing of an arm band protesting the Vietnam war might just as plausibly be interpreted to encourage illegal activity, i.e., draft dodging.

Nowhere has Chief Justice Roberts's and Justice Alito's disrespect for precedent manifested itself more consistently, perhaps, than in their statutory decisions favoring business and corporate interests over consumers, employees, and civil rights plaintiffs. During the Court's last Term alone, Chief Justice Roberts and Justice Alito voted in three five-to-four decisions to upend precedent in favor of business interests, twice ruling against civil rights claimants. The most recent such case upended the Court's unanimous 1974 decision in Alexander v. Gardner-Denver Co. (1974), which held that an employee cannot be compelled to arbitrate a statutory discrimination claim under a collectively bargained-for arbitration clause to which he did not consent. The Court held otherwise in 14 Penn Plaza, LLC v. Pyett (2009), thereby depriving many employees of their right to bring statutory discrimination claims in federal court. Rather than acknowledge that it was overruling Gardner-Denver, however, the Court cast that decision's holding in implausibly narrow terms. This prompted the dissenters to lament the Court's subversion of precedent to the policy favoring arbitration. Other examples are cataloged in the record of a 2008 Judiciary Committee hearing on the subject of decisions favoring big business. (Courting Big Business: the Supreme Court's Recent Decisions on Corporation Misconduct and Laws Regulating Corporations, Hearing Before the S. Comm. on the Judiciary, July 23, 2008.)

During the Court's 2006 Term, Chief Justice Roberts and Justices Alito and Thomas joined the majority in two major cases (also decided by bare five-four majorities) overruling precedents so as to favor large corporate interests: Leegin Creative Leather Products, Inc. v. PSKS (2007), where the Court overturned a century-old precedent holding that vertical price-fixing agreement per-se violate the federal antitrust laws; and Ashcroft v. Iqbal (2009), where the Court, drawing on Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), changed the long-standing rules governing what a plaintiff must allege at the outset of his or her case in order to get into federal court. One reporter has noted that Iqbal gives corporate defendants a gift that keeps on giving. (Tony Mauro, Plaintiffs Groups Mount Effort to Undo Supreme Courts Iqbal Ruling, The National Law Journal, Sept. 21, 2009.)

It is not just that Chief Justice Roberts and Justice Alito have disregarded precedent. It is the matter in which they have done it by distinguishing it on unpersuasive grounds or outright ignoring it without forthrightly overruling it. Professor Stone has written that the two Justice have abandoned the principle of stare decisis in a particularly insidious manner and that their approach to precedent has been dishonest (Geoffrey Stone, The Roberts Court, Stare Decisis, and the Future of Constitutional Law, 82 Tulane Law Review 1533 (2008)). Another notes that [t]his may be a long-term characteristic of the Roberts Court, changing the law, even dramatically, but without expressly overruling precedent. But this may also be a short-term phenomena and reflective of the recent confirmation hearings of John Roberts and Samuel Alito. At both, there was considerable discussion of precedent and even super precedent. Perhaps with these confirmation discussions still fresh in mind, these Justices did not want to expressly overrule recent precedent. But as time passes, the hesitancy may disappear . . . . (Erwin Chemerinsky, Forward, Supreme Court Review, 43 Tulsa L. Rev. 627 (2008).)

Even fellow conservative Justices Scalia and Thomas have criticized Chief Justice Roberts and Justice Alito for the way in which they dispense with precedent without forthrightly overruling it. In Federal Election Commission v. Wisconsin Right to Life (2007), for instance, Justice Scalia went so far as to accuse Chief Justice Roberts and Justice Alito of practicing what he called faux judicial restraining by effectively overruling McConnell v. Federal Election Commission without expressly saying so.

Numerous distinguished academics have criticized the Roberts's Courts record with respect to stare decisis. Professor Stone has even said that Chief Justice Roberts's and Alito's conduct during the first term during which they both sat on the Court was the most disheartening judicial performances he has ever witnessed. (The Roberts Court, Stare Decisis, and the Future of Constitutional Law, 82 Tulane Law Review 1533 (2008).) Similarly, Professor Dworkin has charged Chief Justice Roberts and Justice Alito with leading a revolution Jacobin in its disdain for tradition and precedent, and said of their testimony before the Judiciary Committee that it was actually a coded script for the continuing subversion of the American constitution. (The Supreme Court Phalanx, New York Review of Books, Sept. 27, 2007, at 92.) And Dean Erwin Chemerinsky has noted the Roberts Court's pronounced willing[ness] to depart from prior rulings, even recent precedents. (Forward, Supreme Court Review, 43 Tulsa L. Rev. 627 (2008).)

As for the Roberts Court's denigration of Congressional power, its record is not as extensive as it is with respect to stare decisis, but it is troubling nonetheless. I have already discussed Citizens United, where the Court overturned a precedent (Austin v. Michigan Chamber of Commerce (1990)) on which Congress relied in drafting the McCain-Feingold Act and disregarded a record of legislative fact-finding establishing the corruption of our electoral system by the influx of independent corporate campaign-related expenditures. Two other cases support that assessment.

The first is Northwest Austin Municipal Utility District v. Holder (2009). At issue was the constitutionality of '5 of the Voting Rights Act of 1965. Section 5 prohibits changes in the election procedures of states with a history of racial discrimination in voting unless the Attorney General or a three judge district court determines that the change neither has the purpose nor will have the effect of denying or abriding the right to vote on account of race or color. Congress passed the Act under the express power conferred on it by article 2 of the Fifteenth Amendment to enforce the Amendments first section which prohibits racial discrimination in voting by appropriate legislation. Congress reauthorized the Act in 1970 (for five years), in 1975 (for seven years), in 1982 (for twenty-five years), and in 2006 (for another twenty five years). The Court upheld the first three extensions. At issue in Austin was whether the 2006 extension was supported by an adequate legislative record.

There was no question that it was. Writing for the Court in Northwest Austin, Chief Justice Roberts himself conceded that '2 of the Fifteenth Amendment empowers Congress, not the Court, to determine in the first instance what legislation is needed to enforce it and that Congress amassed a sizeable record [over ten months in 21 hearings] in support of its record to extend ['5s] preclearance requirements, a record the District Court determined document[ed] contemporary racial discrimination in covered states. Ultimately the Court avoided the constitutional question in Austin by deciding the case on a narrow statutory ground. But during oral argument in the case, Chief Justice Roberts made clear that he was disinclined to accept Congress' legislative finding as to the need for '5. He said that, in extending '5s so-called preclearance requirements, Congress was sweeping far more broadly than they need to, to address the intentional discrimination under the Fifteenth Amendment. Numerous Court commentators have suggested that it was only because Chief Justice Roberts could not muster a majority for striking down '5 that he agreed to decide the case on narrow statutory grounds. (E.g., Linda Greenhouse, Down the Memory Hole, The New York Times, Oct. 2, 2009.) It is difficult to resist that conclusion. There was no reason for four Justices to have granted certiorari in the case unless they wanted to strike down '5. The statutory issue the Court decided was unimportant.

Another example is Ashcroft v. Iqbal (2009). Building on its earlier decision in Bell Atlantic v. Twombly (2007), the Court there changed the long-standing rules of pleadings the rules governing what a plaintiff must allege in a complaint to have his case heard in federal court under the Federal Rules of Civil Procedure. Until Twombly and Iqbal, the Federal Rules required no more of a complaint than that it provide a short and plain statement of the claim, sufficient to give the defendant fair notice of what the plaintiffs claim is and the grounds upon which it rested. Conley v. Gibson (1957) (quoting Rule 8(a)(2)). A plaintiff was not required to plead the specific facts underlying his allegations. Only if a complaints allegations, accepted as true, failed to support a viable theory of relief that is, fail[ed] to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)) could the complaint be dismissed. That rule makes eminent sense: not until receiving a plaintiff's post-discovery evidentiary submission can the court evaluate the sufficiency of his factual allegations. Twombly jettisoned notice pleading by requiring that a complaint include sufficiently detailed factual allegations to render its key allegations plausible. Iqbal went a substantial distance beyond Twombly by requiring courts to draw on [their] judicial experience and common sense in effect, to indulge their subjective judgments without the benefit any evidence in evaluating a complaint's plausibility. No one yet knows the extent to which these new rules will limit Americans' access to the courts. But so far the signs especially in civil rights cases are not encouraging.

The significance of the two decisions, apart from whatever effect they may have on access to the federal courts, is that the Court end ran the Congressionally established

process for changing the rules of civil procedure. In the Rules Enabling Act of 1938, Congress delegated to the federal judiciary its power to promulgate procedural rules for cases in the federal courts, but not through the normal mechanism of case-by-case adjudication. Congress recognized that establishing procedural rules is not a judicial function; it is a legislative function. Therefore, Congress required that any proposed rule change be noticed and subjected to public comment (much as a proposed rule by a administrative agency is subjected to notice-and-comment rulemaking procedures), carefully reviewed by the relevant committees of the Judicial Conference in open proceedings that allows for public participation, and then approved by the Conference. The rule must then be presented to the Supreme Court for approval and, if approved, sent to Congress, which has six months to review and disapprove the rule. Twombly and especially Iqbal represent a brazen disregard for these Congressionally established procedures. No one should let the technical nature of the issues in these cases obscure that fact.

IV. Where does all this leave us? It is clear that we can no longer content ourselves with assurances from a nominee that he or she will respect precedent a promise all nominees now seem to employ, in Laurence Tribe's words, as a magic elixir [citation] and defer to the legitimate exercise of Congressional power (including legislative fact-finding). Chief Justice Roberts' and Justice Alito's performance on the Court demonstrate how little those promises tell us about how a nominee will decide particular cases once seated on the Court. Still less can we content ourselves with vague promises of the sort that we have heard repeatedly from nominees of both Democratic and Republican Presidents in the post-Bork era that they will decide cases according to the law, honor the rule of law, approach each case with an open mind, put aside personal policy preferences when donning their robes, and so on. None of these promises tells us anything meaningful about how a Justice will decide cases.

Nor will a nominees testimony about what interpretative methodologies he or she will employ in deciding cases or what role he or she envisions for judicial review in our system usually tell us much, if anything useful, about what sort of voting record he or she will have on the Court. As one academic who has carefully studied the confirmation hearing of every nominee beginning with Justice O'Connor in 1982 observes, most Supreme Court nominees say more or less the same thing when answering inquiries about the nominee's general approach to constitutional philosophy or interpretation. (Lori A. Ringhand, I'm Sorry, I Can't Answer That: Positive Scholarship and the Supreme Court Confirmation Process, University of Pennsylvania Journal of Constitutional Law 331 (2008).) Solicitor General Kagan made much the same point in 1995 when, in a law review article whose key arguments she still stands by, wrote that a nominee's statements of judicial philosophy may be so abstract as to leave uncertain, especially to the public, much about their real-world consequences. (Elena Kagan, Confirmation Messes, Old and New, University of Chicago Law Review, 62 University of Chicago Law Review 919, 935 (1995).)

Consider one interpretative methodology that, beginning with Robert Bork, has taken on special prominence in the confirmation process: original intent, sometimes called original meaning. Conservatives claim that only by interpreting the Constitution according to its original intent can judges avoid reading their personal ideological views into the Constitution. But as Christopher Eisgruber, the Provost of Princeton University and a former law professor at New York University School of Law, has observed in an important book, originalist accounts of constitutional meaning . . . reflect the ideological values of the judges who render them, no less than do other interpretations of the Constitution.

Original intent is not the exclusive province of conservatives. Both liberal and conservatives regularly appeal to original intent to justify their positions. One prominent liberal academic lawyer, paraphrasing another, claims that w[e] are all originalists now. (Laurence H. Tribe, Comment in Antonin Scalia, A Matter of Interpretation (1997), p. 67.) It is not surprising that during their confirmation hearings both Judge Bork and Justice Souter Republican nominees who, we later learned, shared very different judicial ideologies subscribed to original intent as an interpretative methodology. The problem is that liberals and conservatives reach competing conclusion as to what the original intent requires with respect to contested constitutional provisions. Sometimes even conservatives disagree among themselves about original intent in particular cases. Professor Eisgruber notes: The originalist Justice Antonin Scalia insists that the framers intended for the free speech clause to establish a principle that protects flag burning; the orignalist former judge . . . Robert Bork says that they did not. Scalia says that the framers did not intend the free exercise clause to provide religious believers with exemptions from generally applicable laws; the originalist scholar and federal judge Michael McConnell says that they did. John Paul Stevens and four other moderate-to-liberal justices say that the framers intended to provide term limits for federal legislators; four more conservative justices say that they did not. (The Next Justice (2007), p. 40.) Another of many more recent examples relates to gun rights. Two years ago in District of Columbia v. Heller (2008), the Supreme Court was presented with the question whether the Second Amendment guarantees an individual right to bear arms unconnected with service in a state militia. The Court's five conservative Justices answered definitively yes; the Court's four more liberal members answered definitively no. Both relied on the framers' original understanding of the Second Amendment to reach their conclusions. Here, as in many cases where original is invoked, to quote Professor Eisgruber again, the judges' conclusions about the framers wanted align with their own constitutional values.

One reason that neither originalism nor any other neutral interpretative approach will dictate the result in the difficult cases that come before the Court is that the Constitution's most contested provisions set forth general principles using abstract language. The First Amendment prohibits Congress from making a law that respecting an establishing of religion or abridging the freedom of speech. The Fifth and Fourteenth Amendments prohibit the federal government and the states, respectfully, from depriving any person of life, liberty, or property without due process of law. The Eighth Amendment prohibits the imposition of cruel and unusual punishment. And the Fourteenth Amendment prohibits the states from depriving any person within their jurisdiction the equal protection of the laws. Many statutes are similarly open-ended and no less demanding of judicial interpretation. Think, for instance, of the Sherman Antitrust Act, whose main provision declares only that [e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

What meaning a Justice gives to such open-ended provisions in particular cases will depend on a judge's ideology his or her understanding of what these provisions mean when applied to the types of governmental actions that regularly come before the Court. Consider, for example, the Fourteenth Amendment's equal protection clause, perhaps the most open-ended of the open-ended provisions to which I have referred. Does it forbid all (or nearly all) state action based on racial classifications? Does it, that is, always require the state to be color-blind? Or does it allow states to take race into account and sometimes even prefer a person over one race over a person of another in order to diminish inequality, promote diversity, render public institutions more representative of the population (and thereby more legitimate), or otherwise? The text of the equal protection clause cannot answer these questions. Nor, in many cases, can precedent. Only the judges ideology or, if you will, his or her understanding of the clause's purpose can.

The situation is no different when it comes to the interpretation of statutes. On the subject of affirmative action, consider Title VII of the Civil Rights Act of 1964's seemingly straightforward prohibition on employment discrimination because of race. Does this prohibition extend to every sort of differential treatment based on race, in which case affirmative action programs nearly always violate Title VII, or does it just extend to invidious forms of discrimination, in which case at least some carefully drawn affirmative action programs do not violate Title VII? The text of the statute does not answer these questions. Again, only a judge's views of what discrimination means can. That is why, more than forty five years after Title VII's enactment, the Justices have not reached a consensus as to the legality of affirmative action.

The inescapable conclusion I draw from all this that, in future confirmation hearings, the Senate should consider a nominee's substantive judicial ideology or, to use Solicitor General Kagan's words in the article to which I just referred, a nominee's constitutional views and commitments. (Elena Kagan, Confirmation Messes, Old and New, 62 University of Chicago Law Review 919, 942 (1995).) I say judicial rather than political ideology because a judge may hold subscribe to a judicial ideology that dictates substantive results he or she would not vote for if sitting as a legislator. A judge may, for instance, be opposed to affirmative action as a political matter but believe that the Constitution cuts a wide swath for Congress to pass raced-based remedial measures (as the framers of the Reconstruction Amendments may well have believed). Or a judge may believe legislatures should not ban abortions but that the constitution allows them to do so. Of course, there will often be substantial overlap between a judge's political and legal ideologies, and it may sometimes be difficult to distinguish between the two.

To those who say that it is inappropriate for the Senate, in discharging its advice and consent function, to consider ideology, I would remind them of an oft-reflected reality: presidents choose among candidates for nomination based on ideology. Christopher Eisgruber notes in The Next Justice that when people discuss Supreme Court nominations, they usually focus on the Senates role . . . Much less attention gets paid to the process by which presidents nominate justices. . . . However understandable this focus may be, it produces a distorted picture of how Supreme Court Justices get chosen. Handwringing polemics about [Senate] confirmation wars presuppose that presidents choose nominees on apolitical grounds and

that partisanship enters only at the confirmation stage. That is nonsense. Ideological and political considerations have always figured in presidential decisions about whom to nominate to the Court. If the President may consider a nominees ideology, why may not the Senate do so? Then-Senator Obama made just that point during his well-known floor statement on then-Judge Alitos nomination when he said that the Senates advice-and-consent function, like the Presidents nominating function, requires an examination of a judges philosophy, ideology, and record (January 26, 2006).

This raises two questions: First, to what substantive ideological principles should we be confident a nominee subscribes before confirming him or her? And second, how should the Senate ascertain a nominees position on these matters during a confirmation hearing?

As for the first question, I would be reluctant to suggest a definitive list. Many commentators have offered suggestions as to how the Senate should go about ascertaining a nominees judicial ideology, but few have offered any specific suggestions as to what that ideology should be, except to say that we should generally prefer ideological moderates. (E.g., Christopher Eisgruber, The Next Justice (2007).) The objective would be to identify certain important principles that are specific enough to tell us something about what outcomes a nominee is likely to reach in broad categories of cases, but not too specific as to require the nominee to prejudge the outcome of particular cases. Let me suggest a tentative list:

(1) A nominee should accept that the Fourteenth and Fifteenth Amendments confer substantial power on Congress to enforce their substantive provisions. Over the last fifteen years, considerable attention has been given to Congress's express power to enforce the Fourteenth and Fifteenth Amendment by appropriate legislation. The Court has significantly limited Congress's remedial powers under those amendments. The main issue in these cases is how much deference the Courts should accord Congress in deciding whether remediation is necessary and, if so, what remedies are appropriate. The Courts conservatives have accorded Congress virtually none. But the drafters of the Fourteenth and Fifteenth Amendment did not make the Court Congress's taskmaster. The Court should ask no more than whether, in Justice Breyer's words, Congress could reasonably have concluded that a remedy is needed and that the remedy chosen constitutes an appropriate way to enforce the amendments. (Board of Trustees of the University of Alabama v. Garrett (2001) (Breyer, J., dissenting).) The Senate should look askance at any nominee who does not share Justice Breyer's view.

(2) A nominee should accept that the Constitution and, in particular, the due process clause of the Fourteenth Amendment protects facets of individual liberty not yet recognized by the Court. The Court has held repeatedly that, through the due process clause of the Fourteenth Amendment, the Constitution protects facets of personal liberty a realm of personal liberty which the government may not enter (Casey v. Planned Parenthood of Southeastern Pennsylvania (1992)) not tethered to any of the rights expressly enumerated in the Constitution's other amendments. These rights include the right to terminate a pregnancy (Roe v. Wade (1973), Casey)), the right to marry (Loving v. Virginia (1967) (alternative holding)), and the right to enter into intimate personal relationships (Lawrence v. Texas (2003). No nominee since Robert Bork has taken the position that the due process clause is limited to procedure. Not even Justice Scalia has taken that position on the Court. Some Justices, though, have taken an unduly restrictive view of the liberty interests protected by the due process clause so restrictive as to drain it of any meaningful content. Justice Scalia, for instance, has demanded that a personal liberty interest not only be fundamental before it is given constitutional protection but also that it can be shown have been protected against government interference by other rules of the law when the Fourteenth Amendment was ratified. Justice Thomas may have an even more restrictive view. We should ask of nominees that they embrace the proposition that the due process clause protects facets of personal liberty whether involving privacy or otherwise not yet recognized by the Court. This is important because no one can predict what future government actions will infringe on facets of liberty yet unaddressed by the Court.

(3) A nominee should accept that the liberty protected by the Constitutions due process clauses includes the right to terminate a pregnancy before the point of viability. I realize that abortion remains a divisive moral and social issue. But the constitutional status of abortion rights has been settled. The Court has declined the opportunity to overrule Roe v. Wade (1973) in nearly forty cases. In Casey v. Planned Parenthood (1992), three Republican nominees to the Court (Justices Kennedy, O'Connor, and Souter) joined two other Justices in affirming Roe's central holding. Even conservative federal judge Michael Luttig, a former clerk of Justice Scalia, has characterized Casey as super stare decisis. (Richmond Medical Center for Women v. Gilmore (4th Cir. 1998). Roe should now be taken off the table as a candidate for overruling, just as Brown v. Board of Education (1954), Griswald v. Connecticut (1965), and other bedrock precedents have been taken off the table by recent nominees to the Court (including Justice Alito) in their confirmation testimony. Even some of Roe's most vociferous critics including President Reagan's Solicitor General, Charles Fried, who urged the Court in the 1980s to overturn the decision, and the late John Hart Ely, perhaps Roe's most prominent academic critic, have said that the Supreme Court should not, at this late date, overrule Roe.

(4) A nominee should accept that the equal protection clause of the Fourteenth Amendment does not prohibit narrowly tailored race-based remedial measures that is, does not mandate color-blindness so long as they do not amount to quotas. Two of the Courts conservative Justices Scalia and Thomas have adopted the extreme and a historical interpretation of the equal protection clause that denies the government any ability to adopt any race-based preferences to remedy past discrimination, no matter how narrowly drawn. Neither Justice has justified this position, ironically, by reference to the views of the Fourteenth Amendment's framers. Their position is based, rather, on their nakedly political position that, in Justice Scalia's words, affirmative action reinforce[s] and preserve[s] . . . the way of thinking that produced race slavery, race privilege, and race hatred, and in Justice Thomas's words, that affirmative action undermine[s] the moral basis of the equal protection principle. (Adarand Constructors, Inc. v. Pena (1995).) Language in Chief Justice Roberts's opinion in Parents Involved in Community Schools v. Seattle School District No. 1 (2007) suggests that he may well share this strong antipathy to race-based remedies.

(5) A nominee should accept the constitutionality of statutory restrictions on campaign contributions to candidates for office. In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court upheld limits on contributions by individuals, even as it struck down a provision of federal law prohibiting independent expenditures in support of candidates for office. The Court accepted Congress finding that allowing large individual financial contributions threatens to corrupt the political process and undermine public confidence in it. Id. at 26. Buckley's holding on this point has been well-settled law for nearly 35 years.

Let me be clear about what we should not demand of nominees. We should not demand that they promise to reach particular outcomes in particular cases before the Court or likely to come before the Court, or even require that they to state their views on issues with so much specificity that we know how they will probably rule in particular cases. We should not demand, for instance, that a nominee promises to recognize a right to engage in assisted suicide, or to uphold ' 5 of the Voting Rights Act, or to recognize that a particular state regulation imposes an undue burden on the right to an abortion under Casey. Nor should we condition a nominees confirmation on passing a single-issue litmus test. We should not demand ideological purity of nominees. Some ideological diversity on the Court is a good thing.

The second question I have asked how do we ascertain a nominees judicial ideology? is more easily answered. I would first carefully evaluate the nominees pre-hearing record for clues to his or her ideology, much as the Presidents staff does. They may provide important clues about a nominees ideology, especially if the nominee has a limited judicial record on which to draw, as did Chief Justice Roberts, or, also like the Chief Justice, avoided writing law review articles of the sort condemned Robert Bork during his confirmation hearing.

Chief Justice Roberts's and Justices Justice Alito's statements before becoming lower court judges at least raised serious questions (admittedly with the benefit of some hindsight) as to whether they were conservative judicial ideologues. Let me offer some examples.

Most revealing in Chief Justice Roberts's record, perhaps, were the views he expressed on the remediation of racial discrimination while serving in a political capacity as a member of the Reagan administration. None attracted more attention than his views on the 1982 reauthorization of the Voting Rights Act. The Chief Justice wrote more than two dozen documents urging the administration to reject a provision of the then-pending House bill that would have allowed plaintiffs to establish a violation of the Act not only by establishing that a voting practice was impermissibly motivated, but also by establishing that it had a discriminatory effect. Roberts claimed that the so-called effects test would establish a quota system in elections and, more disturbingly still in light of the extensive record of voting-rights abuses amassed by Congressional committees, claimed that there was no evidence of voting abuses nationwide. In one memorandum, for instance, he wrote that something must be done to educate the Senators on the seriousness of this problem. Roberts's position did not prevail. Congress passed a reauthorization bill that included an effects test, and President Reagan signed into law. The law has worked well to prevent discrimination in voting. No one has seriously contended that the reauthorization established an electoral quota system.

Another example in the race discrimination context (this one not, unfortunately, raised at the confirmation hearing) was a 1981 memorandum that Roberts wrote to the Attorney General questioning the legality of regulations promulgated by the Department of Labor to enforce Executive Order 11246. Issued in 1965, that order requires private-

sector employers that contract with the federal government to evaluate whether qualified minorities and women are underutilized in their workforces and, if so, to adopt goals to increase their representation by encouraging women and minorities to apply for positions. It does not require or authorize employers to give any racial or sex-based preferences; in fact, its implementing regulations expressly forbid such preferences. Roberts attacked the regulations on the ground that they conflicted with the color-blindness principle of Title VII of the Civil Rights Act of 1964 and use quota-like concepts. Only the most hardened conservatives have questioned the legality of Executive Order 11246 in this manner.

That is not all. For example, Roberts wrote disparagingly about so-called fundamental rights (including the right to privacy) recognized by the courts, in his view, to arrogate power to themselves; questioned whether Congress had the authority to terminate an overseas military engagement by joint resolution without treading on the Presidents inherent executive powers; and, in one case involving alleged systemic gender discrimination at a prison, urged the Attorney General to reject the advice of the Civil Rights to intervene in the case because, among things, gender classifications should not receive any heightened constitutional scrutiny.

Justice Alito's extra-judicial statements while serving in the Reagan Administration were more even revealing than Chief Justice Roberts's. Among them was his characterization of Robert Bork as one of the most outstanding nominees of this century. Alito shared Borks antipathy, in particular, to the abortion right first recognized in Roe v. Wade (1973). While serving as an assistant to Solicitor General Charles Fried in 1985, Alito took it upon himself to outline, in the words of Professor Laurence Tribe, a step-by-step process toward the ultimate goal of overruling Roe. That same year, when applying for a position as the Assistant Attorney General in the Office of Legal Counsel, Judge Alito unequivocally stated in his cover letter the Constitution does not provide for the right to terminate a pregnancy.

Justice Alito's extra-judicial writings also evidenced an expansive view of executive power. Among them was 1989 speech defending Justice Scalias lone dissent in Morrison v. Olson (1988). There the Court upheld the constitutionality of the independent counsel law passed by Congress in the wake of Watergate. Justice Scalia was the lone dissenter. Justice Alito expressed his agreement with the unitary executive theory around which Justice Scalia framed his dissent. Alito did so again in 2000 during a speech to the Federalist Society. Justice Alito's support for the expansion of executive at the expense of Congressional power was also reflected in memoranda he wrote supporting the use of presidential signing statements to advance a presidents interpretation of a federal statute. Such statements, Justice Alito contended, could serve as part of a statute's legislative history to compete with floor statements, committee reports, and other expressions of Congressional intent. Professor Erwin Chemerinsky testified that Alitos objective was to shift power from the legislature . . . to the executive. Justice Alito's views on the subject surfaced soon after he was seated on the Court. In Hamdan v. Rumsfeld (2006), Justice Alito joined a dissenting opinion by Justice Scalia chiding the majority for relying on legislative history without also consulting President Bush's signing statement.

Another oft-neglected source of information about a nominees ideology that should be taken for granted are those made by the nominating Presidents. Presidents often promise the public to select candidates of particular ideological stripe. President George W. Bush, for instance, said that he would nominate Justices in the mold of Justices Scalia and Thomas. Maybe we should take presidents at their word. Presidents, after all, select nominees to the Court for ideological reason, and presidents, notes Christopher Eisgruber in The Next Justice, have numerous opportunities to gather information from Washington insiders about a potential nominee before nominating him or her information to which Senators are often not privy. Professor Eisgruber reports, for example, that Clarence Thomas told White House counsel C. Boyden Gray that he was opposed to affirmative action. That important piece of information did not surface during Justice Thomas's confirmation hearing. (Christopher L. Eisgruber, The Next Justice (Princeton, 2007), p. 146.) It is no surprise that Justice Thomas has turned out to be the Court's most unyielding opponent of affirmative action.

What, if any, weight should we give to a nominees own testimony? A few commentators have suggested that the Senate should return to the practice that prevailed before the mid-1950s and dispense with testimony from the nominee altogether. (E.g., Richard Brust, No More Kabuke Confirmations, ABA Journal, Oct. 2009.) They say that the nominees reveal nothing important about a nominee's judicial ideology. I have made that complaint myself. At the outset of the Roberts confirmation hearing, I said: It has been my judgment . . . that nominees answer about as many questions as they think they have to in order to be confirmed. It is a subtle minuet . . . Nominees of both parties do the dance. In fact Justice Sotomayor, whose nomination I supported, took the dance to a new level. She said repeatedly that her judicial philosophy was fidelity to the law. That told us nothing about Judge Sotomayor. It is unfathomable to think that any nominee no matter how liberal or conservative would testify that he or she would be unfaithful to the law.

I do not agree, however, that we should dispense with a nominee's testimony. It can be an important and, if the nominee has a limited paper record, critical source of information about the nominee's ideology. It is also important to allow nominees to explain whether positions imputed to her in fact reflected her views and, if so, whether they still do. Perhaps a position a nominee once took was really not his own, but instead his clients. Or perhaps a nominee has abandoned a once-held position. Nominees should be given the opportunity to explain their records. Senators can judge the sincerity of their testimony. Moreover, dispensing with a nominee's testimony would deprive members of the public of an important opportunity to evaluate the nominee while watching live on television.

Instead, the Judiciary Committee should insist that a nominee actually provide meaningful testimony. Repetitiously reciting platitudes such as I will follow the law or apply the law to the facts or address each case on its merits or approach each case with an open mind can no longer do. They tell us nothing about a nominee's ideology or judicial philosophy. One type of question the Senate might make better use of is to ask the nominee for his opinion on cases already decided by the Court. As Robert Post of Yale Law School has argued, this sort of question, if answered, will reveal information about the nominee's ideology that vague questions about his or her approach to interpretation cannot. (Robert Post & Reval Siegel, Questioning Justice: Law and Politics in Judicial Confirmation Hearings, Yale L.J. (The Pocket Part), Jan. 2006.) Senators have asked that sort of question before, but often without adequate follow-up or without demanding answers. A nominee who answers such a question is no more guilty of prejudging a case that may come before the Court than a sitting Justice who decided the particular case in question. Recall that, during Justice Ginsburg's confirmation hearing, she testified that she believed that the Court reached the right result in Roe, although she disagreed with its reasoning, just as she had previously done in her academic writings. We need more testimony like that.

Whatever particular mode of questioning is employed, the important point is that, when the Senate cannot ascertain the nominee's judicial ideology from his or her pre-nomination record, the Senate must insist that the nominee be forthcoming with it. The Judiciary Committee should no longer tolerate the sort of answer Justice Scalia gave during his confirmation hearing when I asked him whether Marbury v. Madison, the 1803 case holding that the Court has the authority to pass on the constitutionality of a federal law, was a settled precedent not subject to reconsideration. Justice Scalia refused to answer with the yes or no my question deserved. He acknowledged only that Marbury was a pillar of our system and then said: Whether I would be likely to kick away Marbury v. Madison given not only what I just said but also what I have said concerning my respect for the principle of stare decisis, I think you will have to judge on the basis of my record as a judge in the court of appeals, and your judgment as to whether I am, I suppose, on that issue sufficiently intemperate or extreme. In effect, Justice Scalia was saying that a nominee who kicked the legs out from under Marbury should be considered intemperate or extreme and hence presumably denied appointment by the Senate and yet he would not forthrightly rule out the possibility of overturning Marbury. Nor can the Committee accept a statement like Clarence Thomas's in 1991 that he did not have an opinion as to whether Roe was properly decided and, more remarkably still, could not recall ever even having a conversation about it.

It is not just the nominees of Republican Presidents, of course, who have withheld their substantive views from the Judiciary Committee. Every nominee since Robert Bork has done so. In her 1995 law review article on the confirmation process, the current nominee to the Court, Elena Kagan, highlighted the testimony of President Clinton's two Supreme Court appointments, Justices Ginsburg and Breyer to show what was wrong with confirmation hearings. (Elena Kagan, Confirmation Messes, Old and New, University of Chicago Law Review, 62 University of Chicago Law Review 919, 935 (1995)). Justice Ginsburg refused to answer even as simple a question as to whether the Korean War was, in fact, a war, just as Justice Souter had done over a decade earlier. Justice Breyer, to quote Solicitor General Kagan, declined to answer not merely questions concerning pending cases, but questions relating in any way to any issue that the Supreme Court might one day face. And as I have already noted, Justice Sotomayor, whose confirmation I supported, was even less forthcoming with her views than her two immediate predecessors Chief Justice Roberts and Justice Alito. Numerous commentators supportive of her nomination share my assessment.

And of course, a nominee's testimony must not be the final word. A nominee's testimony should be evaluated, as Professor Laurence Tribe testified during the Alito confirmation hearing, not as though it were burned onto a blank CD to be evaluated on its own, but

against an extensive backdrop of the nominee's pre-hearing record.

Mr. SPECTER. I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. KYL. I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

BORDER SECURITY

Mr. KYL. Mr. President, I rise to speak on a subject that has certainly had a lot of press coverage, and that is the trip by the Arizona Governor to Washington to speak with the President about the immigration issue in Arizona, recent legislation that was passed, and what we can do to secure the border. Something caught my eye in the Congress Daily which I want to quote and discuss.

The article is entitled ''Arizona Gov. Pushes for Obama's Help.'' It was dated Thursday, June 3, and it talked about the meeting between the Governor and the President. It says they didn't appear to come to any agreements, and then it reads:

White House Press Secretary Robert Gibbs said that both sides expressed their viewpoints, with Obama stressing that border security must be coupled with comprehensive immigration reform.

Why is that? Why is securing the border being held hostage to comprehensive immigration reform? The President has a responsibility and we have a responsibility to enforce our laws. That includes securing our border. So why does the President insist we are not going to secure the border until we have comprehensive immigration reform?

The reality is, if we do secure the border, it will be easier for Congress to pass comprehensive reform, because people will then understand that the Federal Government is serious about securing the border. They don't believe that today. With articles such as this, why should they? In effect, the President is saying: We are not going to secure the border until we have comprehensive reform.

We don't need comprehensive reform to secure the border, and I submit we do need to secure the border for comprehensive immigration reform.

I have talked a lot on this floor—and so has Senator MCCAIN—about efforts to secure the border and the different segments of the border. In the State of Arizona, there are two segments. One is called the Yuma sector and the other is called the Tucson sector. The Yuma sector has basically been secured in terms of illegal immigration. There is still a lot of illegal drugs crossing in that sector. They are working on that. The Tucson sector is not secure in terms of illegal immigration or drug smuggling. In fact, about half of all illegal immigration comes through the Tucson sector.

Why is the Yuma sector pretty well secured and the Tucson sector not? There are a variety of reasons. First, the Yuma sector pretty much completed the fencing, particularly in the urban area there, the double fencing that has enabled the Border Patrol to apprehend illegal immigrants who try to cross. Secondly, there is an adequate number of Border Patrol agents. Third, in the Yuma sector, there is a program called Operation Streamline, the essence of which is, instead of catch and release, where illegal immigrants are apprehended and then returned to the border in a bus, these illegal immigrants are taken to court and provided a lawyer. But the reality is, almost all of them end up pleading to having crossed the border illegally, and they spend at least 2 weeks in jail. About 17 percent of the people are criminals. Obviously, they don't want to do this so they don't cross in that area anymore. The rest want to come work and make money so they can send it back to their families. They obviously can't do that while they are serving time in jail. The net result is that there is a big deterrent to crossing in the Yuma sector. If they cross there, they go to jail. So they cross somewhere else.

If we had a similar operation in other segments of the border, it appears to me we could go a long way toward having operational control of the border.

The reality is, we can secure the border. I know there are some on the other side who believe if we secured the border, then there would be less incentive for Republicans to support comprehensive immigration reform. Think of that. That is holding national security, border security, hostage to passing a bill in Congress. That should not be. We have a job to secure the border. We should do that irrespective of whether Congress then passes comprehensive reform.

I remind my colleagues that in 2007, I helped to draft, along with Senator Kennedy, the legislation we brought to the floor. Unfortunately, it was not successful. It was opposed by both Republicans and Democrats. It was supported by both Republicans and Democrats. In the end, it didn't have the votes to pass. The point is, there were many on our side of the aisle as well as the other side who were willing to draft and support legislation for comprehensive reform. It is not true to say that if we secure the border, many of us will, therefore, not have an incentive to support comprehensive reform.

The American people don't believe the Federal Government is serious about securing the border. They are not going to support comprehensive reform until they see some seriousness on the part of the Federal Government. When we hear comments such as those from Robert Gibbs, who says the President stressed that border security must be coupled with comprehensive immigration reform, I say the American people are apparently right. The Federal Government—at least the President—does not appear to be serious about enforcing the laws at the border and securing the border. Otherwise, he wouldn't couple that with a requirement that we have to pass comprehensive reform. We are not going to pass comprehensive reform this year for a variety of reasons. That is a fact. But that doesn't mean we can't secure the border. Indeed, we should.

JOB CREATION

Mr. KYL. Mr. President, I rise to speak about an editorial in the Wall Street Journal. I ask unanimous consent that this June 4 editorial titled ''Employers on Strike'' be printed in the RECORD at the conclusion of my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 1.)

Mr. KYL. It begins with this comment which caught my eye:

It's too bad we can't do the Census every year, because maybe the U.S. economy would then show some jobs growth.

That is pretty interesting. The reason is because of the news last week that was greeted with some degree of concern by folks on Wall Street and elsewhere. Despite the fact that we created a net total of 431,000 jobs in May, 411,000 of those were temporary Census hires. Yes, we created a lot of jobs by hiring temporary Census workers, but those are not private-sector, permanent jobs. That is what we should be doing.

This article notes that:

The private economy—that is, the wealth creation part, not the wealth redistribution part—gained only 41,000 jobs, down sharply from the encouraging 218,000 in April, and 158,000 in March.

The point being that these temporary Census jobs are not our ticket to economic recovery. These are temporary, government, and they do not add to the employment base that produces wealth.

It is interesting that those who supported the stimulus package, which cost $862 billion, said there was an economic factor here called the Keynesian multiplier effect, that somehow a dollar in government spending was supposed to produce a dollar and a half in economic output. This is truly the creation of something out of nothing or, more accurately, taking a dollar out of the private sector and somehow creating a dollar and a half worth of value. It turns out it didn't happen. It never does. This is very fuzzy thinking. We cannot take money out of the private sector and expect that it is going to somehow multiply an economic output or job creation factor, when the government spends the money. That is $862 billion that has been taken out of the productive private sector.

What happens? We either have to borrow it, which makes it harder for the