

Previewing the Right Wing Playbook on the Kagan Confirmation Hearings

Right-wing activists & GOP senators signal political strategies:



- **Obama is Radical so Kagan is Radical so Obama is Radical**
- **Recycle Gross Distortions on “Empathy” to Attack “Understanding”**
- **Lie Big and Lie Often**
- **Use Confirmation Hearings to Court Anti-Government Tea Party Voters**

Who needs a nominee to declare war?

When Supreme Court Justice John Paul Stevens announced his retirement plans, far-right organizations and their GOP allies swung into action with a plan to make the confirmation process just one more part of their 2010 and 2012 political strategies. It didn't matter who the nominee would be, what mattered was using the process to push the GOP's campaign message that President Obama is a dangerous radical with no regard for the Constitution.

On April 9, National Review responded to the Stevens announcement by saying “The question for conservatives will not be whether but how to oppose Obama's nominee.” On April 12, pundit Ann Coulter argued that “a huge court battle is fantastic for Republicans.” A few days later, at the Religious Right's “Awakening” conference at Liberty University on April

15 and 16, right-wing legal activists argued for conservatives to declare war. Philip Juaregi described two goals: get President Obama to nominate someone more moderate than he might like, and portray that person, no matter who, as radical in order to punish purple- and red-state Democrats in 2010. After all, said Kelly Shackelford, “his moderate is still going to be dramatically left wing for us.”

The following week, on April 22, Curt Levey of the Committee for Justice told Republican National Committee members on a conference call that they should put up a fight against even the most moderate nominee. Here's an excerpt from the call, which was obtained by Talking Points Memo:

“Even if it's a nominee that we can't seriously stop, we can accomplish several things, and so a hard fight is worthwhile,” Levey implored. “Certainly it can be to the political advantage of Republicans...There's

everything to be gained from making the Supreme Court vacancy a campaign issue in 2010.

“There’s broader goals such as just distracting Obama from other items on his agenda,” Levey added. “The tougher the fight the less capital and time and resources and floor time in the Senate there is to spend on immigration and climate change, etc.”

Sen. Jeff Sessions, designated to lead the GOP attack, told Human Events that Obama sees judges as just another tool in advancing his political agenda and “sees the Constitution as an inconvenience...a handicap to achieving the agenda that he has.” When the Stevens retirement was announced, the Traditional Values Coalition confidently asserted that the president “will choose a radical ideologue who will push the Court to the left for decades to come.”

So even before the nomination of Elena Kagan was announced, it was clear that the right-wing strategy for dealing with the Supreme Court vacancy and confirmation was already shaping up: it would be grounded in cries of “radicalism” against President Obama and his nominee and in a political strategy to make the confirmation hearing a celebration of anti-government “tea party” ideology. Since the nomination of Kagan, other components of the right-wing strategy have also come into focus.

EVEN BEFORE THE NOMINATION OF ELENA KAGAN WAS ANNOUNCED, IT WAS CLEAR THAT THE RIGHT-WING STRATEGY FOR DEALING WITH THE SUPREME COURT VACANCY AND CONFIRMATION WAS ALREADY SHAPING UP.

POLITICAL STRATEGY 1: Obama is Radical so Kagan is Radical so Obama is Radical

The right-wing’s routine charges of “radicalism” have settled into a tight little rhetorical circle which leaves no room for actual facts or logic. Here’s how it goes: because Obama is dangerously radical, anybody he appoints to anything should be assumed to be radical. And the fact that he is appointing radicals just proves how radically radical he himself is.

While any Supreme Court nominee would draw close scrutiny from across the legal and political spectrum, including someone

with Kagan’s widely acknowledged intellect and her academic and public service credentials, those who were ready to scream “radical” no matter what the facts might actually be have been screaming about Kagan’s alleged radicalism:

- Fox pundit Sean Hannity said “her background is strident radical left like the president’s.”
- Robert Knight of the Coral Ridge Ministries charged that the nomination was Obama’s “in your face” selection of a “radical lawyer.”
- FRC’s Perkins decried Kagan as an “ideological twin” to President Obama and said her “ultimate agenda” is “to reshape the court with a profoundly radical bent.”
- Focus on the Family’s Tom Minnery calls her nomination “a triumph for liberal ideology and judicial activism.”
- And this from the Traditional Values Coalition’s Andrea Sheldon Lafferty: “President Obama’s pick of Elena Kagan demonstrates his willingness to subvert the Constitution for his personal agenda and impose his leftist ideology on our nation for the next 30 to 40 years.”
- Vision America’s Rick Scarborough, in a piece called Elena Kagan and the War Against Christianity, calls her nomination “the latest step toward the moral abyss for America.” He calls Kagan “a doctrinaire radical leftist with a written disdain for the Constitution of the United States....”
- David McIntosh, co-founder of the Federalist Society, criticized Obama for nominating “an individual who has demonstrated a lack of adherence to the limits of the Constitution and a desire to utilize the court system to enact her beliefs of social engineering.

Those pushing the radical charges won’t hear anything else. Sean Hannity asked former Clinton advisor Dick Morris, “So is this just another Obama radical being elevated to the highest levels of our government?” But when Morris repeatedly told Hannity that Kagan had been a moderate-to-conservative voice in the Clinton administration, and predicted based on his experience working with her that she would be a moderate voice on the Court, Hannity would hear nothing of it, cutting Morris off to insist “no way.”

POLITICAL STRATEGY 2: Recycle Gross Distortions on “Empathy” to Attack “Understanding”

Before and during the confirmation process for Justice

Sonia Sotomayor, GOP Senators and their right-wing allies grossly distorted President Obama's remarks about empathy being a worthwhile trait for a judge. They said his praise for empathy meant that he wanted judges who would ignore the Constitution and laws and make decisions based only on their feelings, a ridiculous claim that utterly ignored President Obama's explicit statements to the contrary. Glenn Beck even warned that



GLENN BECK ATTACKED PRESIDENT OBAMA'S REMARKS ABOUT EMPATHY BEING A WORTHWHILE TRAIT FOR A JUDGE, EVEN SAYING IT ULTIMATELY LEADS TO GENOCIDE.

empathy is a dangerous thing that ultimately leads to genocide.

Now, Obama critics are making similarly nonsensical claims about the president's statement that it is important for a justice to understand how the law affects Americans' daily lives. On its face that doesn't seem like a highly controversial statement. But Sen. Sessions has denounced the idea that a judge should understand the impact of the law on average Americans as "dangerous" and somehow interprets it to be "a call on the courts to abandon the clearly recognized American standard that you find the facts honestly, and you apply it to the law fairly interpreted."

Not that right-wing activists and pundits have altogether abandoned empathy-bashing as a talking point. Writing about the Kagan nomination, the Wall Street Journal's editorial page said "Mr. Obama may also see in his nominee a reflection of his philosophy that judging cases should be guided as much by personal experience and 'empathy' as by the plain words of the Constitution."

POLITICAL STRATEGY 3: Lie Big and Lie Often

Right-wing leaders and pundits have proven themselves over and over to be adept practitioners of the Big Lie strategy, doggedly asserting as truth "facts" which are easily proven to be false. The theory behind the propaganda technique is that if people hear a lie often enough, they'll begin to believe it.

The Kagan-Hates-the-Military Lie

This is actually a number of interconnected lies that build on

each other, but all are based on Kagan's opposition to the "Don't Ask, Don't Tell" policy, which prevents openly gay and lesbian people from serving in the armed forces, and on false claims about Kagan's tenure as dean of Harvard Law School.

First, the true story: Before Kagan became dean, Harvard had a policy that prevented employers with discriminatory hiring practices, including the military, from using the Office of Career Services. Military recruiters still had access to students through a student group. But in 2002, the Air Force charged that the practice violated the Solomon Amendment, a 1996 law prohibiting federal funds for schools that prohibit or prevent military recruiting. Under the funding threat, Harvard allowed the use of the career services office by military recruiters. When Kagan became dean in 2003 she continued the policy.

Here's the part of the story the Right is lying about: In 2004, the Third Circuit Court of Appeals ruled that the Solomon Amendment violated the First Amendment. So for the 2005

RIGHT-WING LEADERS AND PUNDITS HAVE PROVEN THEMSELVES OVER AND OVER TO BE ADEPT PRACTITIONERS OF THE BIG LIE STRATEGY, DOGGEDLY ASSERTING AS TRUTH "FACTS" WHICH ARE EASILY PROVEN TO BE FALSE.

spring semester, Kagan reimposed the restrictions that Harvard had in place before 2002. Those restrictions only lasted for a semester before Kagan returned to the earlier policy under a renewed threat of a funding cut. Then the Supreme Court overturned the Third Circuit decision. Harvard is complying with the Court ruling.

The crucial fact about this history is that even for the one semester that recruiting restrictions – described by journalist Stuart Taylor as "inherited and largely symbolic" -- were in place, military recruiters continued to have access to students and classrooms. As Taylor notes, "However inconvenient her policy may have been for some, Kagan never sought to prevent military recruiters from using classrooms or other campus space to meet students."

But right-wing pundits and activists won't let that fact – nor the fact that Kagan has always obeyed federal court rulings -- get in the way of their lies, which are that Kagan kicked

the military off campus in a time of war and broke federal law in the process, proving that she is hostile to the military. Sen. James Inhofe charged that she “banned the US military from recruiting on campus.” Sean Hannity criticized Kagan for

YOU WON'T FIND MANY RIGHT-WING PUNDITS TALKING ABOUT KAGAN'S 2007 ADDRESS AT WEST POINT, WHERE SHE THANKED CADETS FOR PROTECTING AMERICANS' FREEDOM.

“throwing military recruiters ... off the college campus in the middle of a war in violation of federal law.”

Sen. Sessions recently charged that she “violated the law of the United States.” Sen. John McCain told Sean Hannity “I am still outraged” by Kagan’s supposedly blocking military recruiters, claiming “she was aiding and abetting violation of a law.” Meanwhile, Newt Gingrich called on Obama to withdraw her nomination over the issue:

The very fact that she led the effort which was repudiated unanimously by the Supreme Court, to block the American military from Harvard Law School. We’re in two wars and I see no reason why you would appoint an anti-military Supreme Court justice, or why the Senate would confirm an anti-military Supreme Court justice.

Those who make it sound like the Supreme Court personally rebuked Kagan are ignoring the fact that it was a federal appeals court, not Kagan or Harvard, that the Court overruled. And they are simply lying when they say she kicked the military off campus or denied students a chance to serve. In fact, she criticized Don’t Ask, Don’t Tell for preventing gay and lesbian law students from pursuing a “noble” and “honorable” career in the military.

You won’t find many right-wing pundits talking about Kagan’s 2007 address at West Point, where she thanked cadets for protecting Americans’ freedom and spoke about Article VI of the Constitution, which requires military officers to pledge their loyalty not to a leader but to the Constitution. Brigadier General Patrick Finnegan, dean of West Point’s academic board, recently told the Boston Globe that accusations that Kagan harbors anti-military bias are “ludicrous.”

For more debunking of the anti-military lie, see <http://mediamatters.org/research/201005110085>.

The Kagan-Hates-the-First-Amendment Lie

Another line of attack on Kagan is the claim that Kagan is hostile to the First Amendment and believes the federal government should have the power to ban books and political pamphlets it doesn’t like. It’s not true.

These claims are based on Solicitor General Kagan’s defense of campaign finance laws that the Supreme Court overturned in its recent corporations-are-people-too ruling in *Citizens United v. Federal Election Commission*. During the second round of oral arguments last September, Kagan responded to a question by saying that under campaign finance laws designed to limit corruption, the government could restrict corporate-funded electioneering pamphlets (pamphlets that call for the election or defeat of candidates). During an earlier round of oral argument, a deputy solicitor general said that corporate-funded campaign books including advocacy for or against a candidate could be restricted. In her argument, Kagan distanced herself from that argument, saying that books were not the target of the campaign finance law.

Sen. Minority Leader Mitch McConnell has called her arguments in the case “very troubling.” A Republican aide told *Roll Call*, a newspaper covering Congress, that her comments during oral argument amounted to an attack on the First Amendment:

“It is very hard to identify with the contention that the U.S. government could ban written words because of a disagreement with the author,” a GOP aide said. “Rarely do you have a view expressed by a nominee

THE BOOK-BANNING AND “FEDERALIST PAPER”-BANNING CHARGES ARE BOGUS OVERREACHES THAT REFLECT HOW FAR RIGHT-WING LEADERS ARE STRETCHING THE TRUTH TO MAKE A CASE AGAINST KAGAN’S CONFIRMATION.

that is a complete departure from a principle that quite literally was instrumental in the very foundation of this country.”

The right-wing *Washington Times* editorialized that Kagan’s argument would justify the banning of Thomas Paine’s “Common Sense” or the distribution of the “Federalist Papers.”

Others, including Rush Limbaugh, have repeated the same false claims.

These false attacks ignore basic facts:

- The issue in *Citizens United* case was not about whether or not the government agreed with the content of any publication, it was whether the government could restrict corporate spending to influence the outcome of campaigns. It's just not true to say she ever advocated for giving the government the power to ban writings based on the author's views.
- *Common Sense* and the *Federalist Papers* are not electioneering publications, were not funded by corporations to advocate for or against any candidates, and so would not even be relevant to this case. Nothing Kagan has said suggests that publications like *Common Sense* and the *Federalist Papers* would not be protected by the First Amendment.

The book-banning and "Federalist Paper"-banning charges are bogus overreaches that reflect how far right-wing leaders are stretching the truth to make a case against Kagan's confirmation.

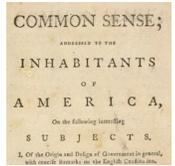
The Kagan-Hates-the-Second-Amendment Lie

The NRA, which opposed confirmation of Justice Sonia Sotomayor, has called Kagan "outside the mainstream" and has mobilized a chorus of right-wing voices, including Newt Gingrich, the Federalist Society, and members of Congress, to portray Kagan as an enemy of individual liberty and the Second Amendment based on the flimsiest evidence.

Rep. Mike Pence, who railed against Kagan at a speech to the NRA, told Human Events, "The last thing we need on the Supreme Court... is one more jurist who is not sympathetic to the individual, constitutional rights of the American people." Pence was making reference to a 1987 memo in which Kagan, as a clerk to Supreme Court Justice Thurgood Marshall, wrote that she was "not sympathetic" to a petitioner's claims that DC's gun law was unconstitutional. Kagan's position was firmly in line with the law and Supreme Court rulings at the time.

Others are complaining about a directive Kagan helped write during the Clinton administration that temporarily suspended the importation of some types of military assault rifles. As Think Progress's Wonk Room has explained, Kagan's critics on this issue are demanding that a nominee take a stance to the right of Antonin Scalia, who has written that the Second Amendment right to bear arms is not unlimited and that military-style weapons could be limited.

THE WASHINGTON TIMES SAID KAGAN'S NOMINATION WOULD JUSTIFY THE BANNING OF THOMAS PAINE'S "COMMON SENSE" AND THE "FEDERALIST PAPERS"



It's worth noting that in her confirmation hearings for her current solicitor general post, Kagan said she considered the Supreme Court's 2008 ruling in *Heller*, in which the court upheld an individual Second Amendment right to bear arms, to be settled law.

POLITICAL STRATEGY 4: Use Confirmation Hearings to Court Anti- Government Tea Party Voters

Republican officials are eager to court anti-government "Tea Party" activists to help the Party's electoral prospects in November. Republican senators are likely to be especially attuned to Tea Party concerns in the wake of Tea Party-supported senatorial candidate Rand Paul's May 18 primary thrashing of Sen. Mitch McConnell's favored candidate in Kentucky.

"She's a Socialist!"

"Socialism" is one of the great rallying cries of the anti-Obama industry, from self-described "rodeo clown" Glenn Beck to Members of Congress. Newt Gingrich, who has called for Kagan's nomination to be withdrawn, is promoting his latest book which claims that "the secular socialist machine represents as great a threat to America as Nazi Germany or the Soviet Union once did."

For a crowd that has been screaming "socialism" since Obama's election, Kagan's college thesis on the political history of socialism in early 20th Century New York City is reason enough to claim that she too is a socialist. It can't be taken seriously.

In his typical fashion, Rush Limbaugh is only one of many making the charge:

...her one true love is socialism, her life partner, her soul mate. Socialism. That's my conclusion from having read this. She's all about social justice. Her passion isn't for the law. It's to equality of outcome as defined and determined by central government planners, and when I say "passion," I mean heavy breathing passion. I mean hot and bothered passion. Cold, cold sweat kind of passion. This woman, this is her life partner. This is where all of her love goes is to socialism. I don't care if she wants to spend her

REPUBLICAN OFFICIALS ARE EAGER TO COURT ANTI-GOVERNMENT "TEA PARTY" ACTIVISTS TO HELP THE PARTY'S ELECTORAL PROSPECTS IN NOVEMBER.

social time with male socialists or female socialists, I just know she prefers socialists over free market capitalists, which means her political orientation must be explored by the Senate.

Refighting Health Care Reform

Corporate astroturfers and GOP strategists first harnessed the anger of Tea Party activists in angry opposition to health care reform. So look for GOP senators to make the constitutionality of "Obamacare" a major issue in the confirmation process, as right-wing legal activist Curt Levey suggested on a strategy call with members of the Republican National Committee.

Celebrating the Tea Party Constitution

GOP Strategists are planning to make a political appeal to the "tea party" base by turning the confirmation hearings into a show of fealty to the movement's anti-federal-government passions. Here's Sen. Sessions:

"There is a growing sentiment among everyday Americans that Washington is ignoring the Constitution's limits on government power. People are rightly concerned by a breathtaking expansion of government, as well as an erosion of respect for the importance of individual rights and the roles of local officials and state legislatures. This 'Washington-knows-best' mentality is evident in all branches of government, but is especially troublesome in the judiciary, where unelected judges have twisted the words of our Constitution to advance their own political, economic, and social agendas.

...

"Our Founding Fathers intended the Court to serve as a neutral arbiter of disputes and to defend the public from the overreach of a distant ruling class in our nation's capital. When judges instead impose their own political and social views from the bench—as President Obama's empathy standard would permit—they undermine democratic government and threaten individual liberties. To protect these important institutions, and to restore the proper check on government overreach, we must ensure that any individual nominated to the Court is deeply committed to the words of the Constitution. It is in

this context that Ms. Kagan's nomination will be considered.

Robert Knight claims:

Mr. Obama's legal appointees to the courts and federal agencies comprise radicals who support an unlimited federal government, a "living Constitution," racial and sexual entitlement, contempt for American security, and the elevation of foreign opinion over that of American lawmakers. Miss Kagan fits right in.

Derivatives trader and Heartland Institute fellow Ross Kaminsky waves the banner of tea-party revolution in Human Events:

Obama and Kagan both fear the blowback against tyrannical and gigantic government which Thomas Jefferson predicted in a letter in 1789: "Whenever things get so far wrong as to attract their notice, the people, if well informed, may be relied on to set them to rights."

That issue is whether Kagan is likely to be honest when she swears to the oath of office which must be taken by all federal officials in support of the Constitution...In her limited litigation experience and in her so-far-discovered writings, Elena Kagan is batting .000 when it comes to protecting and defending the Constitution. And while her record is thin, it is dangerously consistent.

STRATEGIES THAT MAY OR MAY NOT PLAY A ROLE AT THE HEARINGS

Too Inexperienced?

Elena Kagan has held some of the top legal jobs in America, including her former position as dean of Harvard Law School and her current job as the Solicitor General, America's top lawyer. But Tony Perkins calls her "woefully inexperienced" and suggests that she "charmed her way into one of the most powerful positions in America..." The Judicial Crisis Network says she has "no prior experience that qualifies her for the Supreme Court."

The hypocrisy of a number of GOP senators on this issue is on full display in their questioning of Kagan's experience in light of the decidedly different tune they sang when President George W. Bush nominated his legal advisor Harriet Miers. An Associated Press story, "GOP senators' shifting standards" cited a litany of Republican Senators' "concerns" over Kagan's "surprising" and "troubling" lack of judicial experience. The story contrasted comments from Sens. Sessions, John Cornyn,

John Thune, Richard Shelby, and Kay Bailey Hutchison praising Miers and dismissing criticism of her lack of judicial experience.

For Cornyn, Mier's lack of judicial experience was actually a plus: "I thought she would fill some very important gaps in the Supreme Court," he said in 2005. "Because right now you have people who've been federal judges, circuit judges most of their lives or academicians." But now Cornyn says "Most Americans believe that prior judicial experience is a necessary credential for a Supreme Court Justice."

If you believe Republican senators are immune to being ashamed or embarrassed at their hypocrisy, look for questions about Kagan's "inexperience."

Too Jewish?

It seems extremely unlikely that Republican senators will make Kagan's religion an issue, particularly given the Constitution's explicit prohibition on a religious test for serving in any public office, but it's worth noting that a couple of major right-wing figures are unhappy, one at the prospect of a Supreme Court without a Protestant justice, and one at the prospect of another Jewish Justice.

Bishop Harry Jackson, the most prominent African American leader of the Religious Right, is arguing strenuously that Kagan should be rejected simply because she is not a Protestant. A Court made up of Catholics and Jews is fundamentally unable to "create an atmosphere for true justice," says Jackson:

The nomination of Elena Kagan for Supreme Court should outrage evangelical Protestants. The reason is not simply her legal perspective, her lack of judicial experience, or her personal view of faith and religious liberties. Devout Christians of all denominations and

IF YOU BELIEVE REPUBLICAN SENATORS ARE IMMUNE TO BEING ASHAMED OR EMBARRASSED AT THEIR HYPOCRISY, LOOK FOR QUESTIONS ABOUT KAGAN'S "INEXPERIENCE."

... races are in danger of experiencing what blacks in the late 1960s and early 1970s called "institutional racism" or "institutional discrimination.".... the composition of America's highest court will determine our national spirit, values, and destiny. Therefore, the faith of the prospective judicial candidate matters.

Jackson concludes dramatically, "A failure to act at this critical

juncture will be tantamount to surrendering to the enemies of faith and personal freedom." People For the American Way has had difficulty tracking down Jackson's expressions of evangelical outrage when President George W. Bush appointed Catholics John Roberts and Samuel Alito to the high court.

GOP strategist, right-wing pundit, and conservative Catholic Patrick Buchanan is also very unhappy about the kind of justices that have been nominated by Democratic presidents:

Indeed, of the last seven justices nominated by Democrats JFK, LBJ, Bill Clinton and Barack Obama, one was black, Marshall; one was Puerto Rican, Sonia Sotomayor. The other five were Jews: Arthur Goldberg, Abe Fortas, Ruth Bader Ginsberg, Stephen Breyer and Elena Kagan.

Buchanan is particularly pointed regarding the Jewish Justices:

If Kagan is confirmed, Jews, who represent less than 2 percent of the U.S. population, will have 33 percent of the Supreme Court seats.

Is this the Democrats' idea of diversity?

...while leaders in the black community may be upset, the folks who look more like the real targets of liberal bias are white Protestants and Catholics, who still constitute well over half of the U.S. population.

Buchanan seems confused about the fact that that Catholics, who make up less than one-quarter of the U.S. population, make up 66 percent of the Court.

Too Unmarried?

Friends and associates of Kagan's have publicly said that, contrary to rumors circulated by bloggers and activists, Kagan is not a lesbian. That hasn't stopped several Religious Right leaders from declaring that being gay would by itself disqualify someone from serving and insisting that senators ask her directly about her sexual orientation.

It's worth noting that during Kagan's confirmation as Solicitor General, she told senators that there is no federal constitutional right to same-sex marriage. But Brian Brown of National Organization for Marriage raced to oppose her, urgently telling his activists that "a vote for Elena Kagan will be a vote to impose same-sex marriage on all 50 states. Congress needs to know we won't stand for it!" After another anti-gay Religious Right group, the Alliance Defense Fund, gave a push to Brown's call for opposition, NOM announced that it had collected more than 100,000 signatures on petitions demanding Kagan's rejection by the Senate.

BRING IT ON: A HEARING ON THE ROLE OF THE COURT

If the right-wing wants a conversation about the role of the Court, the rest of us Americans should say, “bring it on.” Let’s do away with the lies and rhetorical charges of radicalism, and talk about what has happened to the Supreme Court and the constitutional rights and values it is supposed to protect.

Right-wing political strategists and their pundits have been telling Americans for years that their rights are threatened by “liberal judges” and “judicial activists.” But the evidence is clear that it is the Court’s conservative majority and a string of pro-corporate decisions that represent the real threat to individual Americans’ rights and interests.

The infamous *Citizens United* decision that overturned anti-corruption campaign finance laws and ruled that corporations have the same rights as citizens to influence elections, is only the latest ruling by a Court that has been chipping away at individuals’ rights and giving corporations greater power and greater freedom from accountability. But at least the ruling exposed the false claims that the Court’s conservative justices are guided by a principled “originalism.” The founders, with their deep skepticism of corporate power, would undoubtedly have considered the decision appalling.

The Roberts Court has exposed the false claims that conservatives are guided by “judicial restraint.” In *Citizens United* and other decisions, Chief Justice John Roberts and his conservative colleagues have twisted the law to reach outcomes they wanted, and stretched hard to make more expansive rulings than individual cases called for. It’s the opposite of judicial restraint.

Republican senators certainly can’t repeat the John Roberts’ confirmation hearing platitudes about just calling balls and strikes—in baseball terms, *Citizens United* was the equivalent of grabbing the bat and using it to beat the pitcher.

Meanwhile, legal scholars have been engaged in developing

IF THE RIGHT-WING WANTS A CONVERSATION ABOUT THE ROLE OF THE COURT, THE REST OF US AMERICANS SHOULD SAY, “BRING IT ON.”

serious scholarship about a judicial philosophy based on constitutional fidelity: keeping faith with the full text, history

and essential principles of the Constitution, a document that has been amended by generations of Americans to make sure that We the People means all the people, not just a privileged few, and certainly not just corporations.

The Constitution protects the rights and liberties of individuals, and it gives us a democratic process by which we can hold

THE ROBERTS COURT HAS EXPOSED THE FALSE CLAIMS THAT CONSERVATIVES ARE GUIDED BY “JUDICIAL RESTRAINT.”



powerful interests, including corporations, accountable for their actions. The Constitution doesn’t, it turns out, belong only to the handful of men who drafted it two hundred years ago. It belongs to us, and it’s still relevant to the unprecedented challenges we now face.

It’s time to start taking ownership of the law again, and the confirmation process for Solicitor General Elena Kagan’s nomination to the Supreme Court is a superb place to start. Progressives have an opportunity to frame the debate on our terms, and we need to take it. Senators need to ask questions about judicial philosophy and General Kagan needs to answer them. We need to know whether Elena Kagan will embrace a philosophy of constitutional fidelity as fervently as Justice Scalia has embraced originalism.

If we can wrest the conversation away from the far-right’s framing, we’ll be in the game for the first time in decades. The chance to change the conversation we have about the Court, the law, and the Constitution doesn’t come along often. All that progressives have to do is take it. ■



People For the American Way is dedicated to making the promise of America real for every American: Equality. Freedom of speech. Freedom of religion. The right to seek justice in a court of law. The right to cast a vote that counts. The American Way.

© Copyright 2010 People For the American Way.
All rights reserved.

People For the American Way
2000 M Street, NW, Suite 400
Washington, DC 20036
202-467-4999 or 800-326-7329

WWW.PFAW.ORG