Senator Al Franken
Eighth Annual American Constitution Society (ACS) National Convention
Gala Dinner Keynote Address
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Thank you, Judy, for that introduction, and for your work on behalf of working Americans.

Thank you to Caroline Fredrickson for your leadership and for inviting me to speak here tonight.

Thank you all for being here tonight, and for the good work you do to defend the Constitution and the American values it represents.

It is an honor to address this convention.

Speakers at past ACS gatherings have included Supreme Court Justices, Attorneys General, other cabinet secretaries, federal judges, and distinguished legal scholars.

So tonight I guess we'll finally get an answer to the question: "What do Stephen Breyer, Laurence Tribe, and Al Franken have in common?"

Other than: "They were all in the front row when the Dead played the Garden back in '71."

Tonight, we celebrate the rise of a new generation of progressive legal scholars and jurists.

Look to your left. Look to your right.

Odds are, at least one of the three of you will someday be filibustered by Senate Republicans.

Speaking of which, I'd like to give a special shout-out to all the filibustered nominees we have here with us tonight.

The Republican obstruction that is standing between you and the work you've agreed to do for your country is unacceptable. And we will continue to fight it.

In particular, I want to recognize Dawn Johnsen, who should be the head of the Office of Legal Counsel at the Department of Justice. What Republicans have done to keep you from doing that important job is reprehensible.

And I want to recognize Goodwin Liu, who should be sitting on the 9th Circuit Court of Appeals right now, and who deserves an up-or-down vote.

When I joined the Senate, I was thrown right into the fire as a member of the Judiciary Committee, where, by the way, I enthusiastically voted for Goodwin.

On my fifth day in office, I found myself taking part in the confirmation hearings for now-Justice Sonia Sotomayor.

Just like I am tonight, I was one of the few non-lawyers in the room, but I didn't mind.

You see, I did some research, and it turns out that most Minnesotans aren't lawyers, either.

But that doesn't mean they aren't directly affected every day by what happens on the Supreme Court, and in our legal system.

I don't think you need to be a lawyer to recognize that the Roberts Court has, consistently and intentionally, protected and promoted the interests of the powerful over those of individual Americans.

And you certainly don't need to be a lawyer to understand what that means for the working people who are losing their rights, one 5-4 decision at a time.

Tonight, I'd like to talk about how we got to this sad moment in American legal history – because it didn't happen by accident.

Conservative activists – led by the Federalist Society – have waged a remarkably successful battle to re-shape our legal discourse, and thus our legal system.

And they're not done yet.

I should acknowledge up front that this story is kind of a downer.

But there's good news: the ending has not yet been written. And I really believe that, if we pay attention to how things got so bad, we'll learn how to make them better.

Federalist Society members have long believed that, if you change the way you talk about the law, you can change the law.

They are right.

If you listen to the U.S. Senate talk about judicial nominees, you'd be forgiven for thinking that originalism was a time-honored American value, one of the things we fought the British to protect.

But ironically enough, originalism – like the designated hitter – only dates back a few decades.

Indeed, as Cass Sunstein has pointed out, it was Robert Bork who first popularized the notion that the Constitution should be interpreted according to what we believe was the "original understanding" of its authors.

Just to clarify: That's not Robert Bork the Founding Father. That's Robert Bork the 20th century conservative legal activist.

Originalism isn't a pillar of our Constitutional history. It's a talking point.

During his confirmation hearing, John Roberts broke out another conservative talking point. He said: "Judges are like umpires. Umpires don't make the rules; they apply them." And he promised: "I will remember that it's my job to call balls and strikes and not to pitch or bat."

How ridiculous. Judges are nothing like umpires.

You know who agrees that judges are nothing like umpires? The guy who came up with the umpire analogy in the first place.

In 1886, in *State v. Crittenden*, a Louisiana Supreme Court Justice ruled that "a trial is not a mere *lutte*" – *lutte* is a French term for a wrestling match, as this analogy dates back to when baseball was a just a cult phenomenon – "a trial is not a mere *lutte* between counsel, in which the judge sits merely as an umpire to decide disputes which may arise between them."

So, when it comes to this analogy, I guess I'm an originalist.

But this kind of bamboozlement is effective. You hear Senators of both parties rush to condemn judges who might "legislate from the bench."

The end result is that people like Goodwin Liu – a brilliant, thoughtful, passionate young legal mind with a terrific life story and character references from the likes of Ken Starr – get tagged as dangerous radicals.

Look, say what you will about Ken Starr, but he's not the sort of guy who pals around with dangerous radicals.

Well. Not left-wing radicals.

The Federalist Society has changed the way we talk about judges – and the way we talk about justice.

Justice Souter once said: "The first lesson, simple as it is, is that whatever court we're in, whatever we are doing, at the end of our task some human being is going to be affected."

Conservatives would like us to forget this lesson.

They've distorted our constitutional discourse to make it sound like the Court's rulings don't matter to ordinary people, but only to the undeserving riff-raff at the margins of society.

So unless you want to get a late-term abortion, burn a flag in the town square, or get federal funding for your pornographic artwork, you really don't need to worry about what the Supreme Court is up to.

The ACLU has a long and proud history of defending the First Amendment, and while I haven't seen polling on this, I'd bet that most Americans are fairly pro-First Amendment. But, thanks to a generation of conservative activism, the ACLU is now best known as "those guys who hate Christmas."

By defining the terms of constitutional debate such that it doesn't involve the lives of ordinary people, conservatives have disconnected Americans from their legal system. And that leaves room for lots of shenanigans.

By controlling the conversation, the Federalist Society has moved the Supreme Court sharply to the right.

"Including myself," Justice Stevens said in an interview with the *New York Times*, "every judge who's been appointed to the court since Lewis Powell has been more conservative than his or her predecessor. Except maybe Justice Ginsburg. That's bound to have an effect on the court."

And, indeed, the Roberts Court has overturned two principles I believe are deeply ingrained in our Constitution, in our legal tradition, and in our American values.

First: Judicial restraint.

As I have noted repeatedly – and in an increasingly exasperated tone of voice – over the last few years, Justice Thomas has voted to overturn federal laws more often than Justice Stevens and Justice Breyer combined.

They haven't just been activists in their decisions, but also in their process.

In both *Citizens United* and *Gross*, the Court answered questions it wasn't asked, reaching beyond the scope of what they accepted for appeal to overturn federal laws the conservative wing didn't like.

I mean, I don't speak Latin. But unless *stare decisis* means "overturn stuff," then maybe it's time for conservatives to stop calling other people "dangerous radicals."

Second, and more importantly: They've overturned the principle that the law should be a place where ordinary people can turn for relief when wronged by the powerful.

At the front entrance to the Supreme Court building here in Washington, beneath the words "EQUAL JUSTICE UNDER LAW," there's a set of 1,300-pound bronze doors.

Countless Americans have flowed through those doors to see the place where that principle is protected.

Now those doors have been locked to the public. Things have changed.

Supreme Court jurisprudence involves weighing competing interests.

Most Americans are familiar with cases in which the Court has had to balance individual rights against some compelling state interest.

It's easy to feel disconnected from these cases. Even though the government has awesome power – enough to take away your freedom, or even your life – the degree to which that power is deemed to supersede your individual rights doesn't really enter into the daily lives of most Americans.

But there's more than one kind of power.

If you have a credit card, if you watch TV, if you file insurance claims, if you work – in other words, if you participate in American daily life at all – then you interact with corporations that are more powerful than you are.

The degree to which those corporations' rights are protected over yours, well, that's extremely relevant to your life.

And in case after case after case, the Roberts Court has put not just a thumb, but a fist, on the scale in favor of those corporations.

A fist with brass knuckles. Which weigh a lot. Because they're brass.

It's important to recognize that, for some conservative legal activists, this is the whole point. Do they want to undercut abortion and immigration and Miranda rights? Sure. But those are just cherries on the sundae.

What conservative legal activists are really interested in is this question: What individual rights are so basic and so important that they should be protected above a corporation's right to profit?

And their preferred answer is: None of them. Zero.

More than a century ago, in *Lochner*, the Court held that a state cannot intervene to protect the interests of an individual entering into a work relationship with an employer.

In other words, the Court held that employees should have to fend for themselves against the same powerful corporations they rely on for a paycheck.

Last month, Rand Paul, the Republican Senate candidate down in Kentucky, got into some hot water for suggesting that we really shouldn't have used the law to force private businesses to stop discriminating against African-Americans, that the market would have eventually handled it.

My question was: In what year would the market have gotten around to doing that? 1965? 1967? 1987? 1997?

Title VII of the 1964 Civil Rights Act deals with the workplace, because your rights at work are civil rights.

And without legal protection, workers would have no leverage to secure those basic rights: the right to organize and bargain for better wages, the right to a safe work environment, the right not to get fired because of who you are.

It's a nightmare for progressives, but a dream for powerful economic elites and their legal activist allies: a return to *Lochner*, to a system of corporate authoritarianism where business giants hold all the cards and workers have to hope that the market will someday provide them with basic rights.

Those elites are well on their way.

The Roberts Court has systematically dismantled the legal protections that help ordinary people find justice when wronged by the economically powerful.

In *Stoneridge*, it stripped shareholders of their ability to get their money back from the firms that helped defraud them.

In *Conkright*, it gave employers more leeway to deny workers their pension benefits.

In *Leegin*, it made it harder for small business owners to stop price fixing under the Sherman Act. Now, the burden is on them—small business owners—to show that price fixing will hurt competition.

In *Iqbal*, it made it harder for everybody to get their day in court.

In *Exxon*, it capped punitive damages resulting from the Exxon Valdez oil spill because, get this, having to own up to your mistakes creates "unpredictability" for corporations. Which, by the way, means that BP's liability may be capped because the Court doesn't want to cause an unpredictable impact on its future profitability.

In *Rapanos*, it cut huge swaths of wetlands out of the Clean Water Act. Wetlands that had been covered for 30 years.

You know what has a lot of wetlands? Minnesota. No, really. You know what else has a lot of wetlands? The Gulf Coast.

I could spend a long time talking about how these cases were wrongly decided. But I'm not an academic – and these aren't academic issues.

These decisions affect real people. They hurt real people.

Jamie Leigh Jones is a real person who went to work for KBR, then a Halliburton subsidiary. When she arrived in Iraq in July of 2005, she immediately complained to her supervisors about sexual harassment in her barracks, which housed over 400 men and only a handful of women.

KBR just mocked her. Then, four days after she got to Iraq, she was drugged and gang-raped by several of her co-workers. When she woke up, she struggled to the infirmary and had a doctor administer a rape kit, which KBR promptly lost.

Then, Jamie was locked in a shipping container under armed guard and prohibited from any contact with the outside world.

Because of the Court's decision in *Circuit City*, KBR had been able to force new employees like Jamie to sign a contract requiring that any future disputes be arbitrated in secret and not in open court.

So Jamie Leigh Jones spent four years fighting for her right just to get her day in court after her employer put her in a dangerous situation, ignored her concerns, and kept her hostage in a shipping container after she was gang-raped.

Lilly Ledbetter is a real person who worked as a manager at a Goodyear tire plant in Gadsden, Alabama. Towards the end of 20 years of service there, she noticed that her male co-workers had gotten more and better raises. By 1998, when she took early retirement, she was earning several hundred dollars less per month than her male counterparts. So she sued.

But the Court decided to give Goodyear maximum leeway to avoid responsibility for pay discrimination, thanks to the most unbelievable loophole you can imagine. The law requires that discrimination claims be brought within 180 days. The Court decided that this meant within 180 days – from the time Goodyear started discriminating against Lilly, not the most recent discriminatory check.

And Lilly lost out on a chance to recoup years of wage increases that were illegally withheld just because she's a woman.

Now, the judiciary is just one branch of our system. I was proud to pass legislation giving victims like Jamie Leigh Jones their day in court. And I was thrilled to see that the very first bill President Obama signed into law was the Lilly Ledbetter Fair Pay Act.

But even as it has closed the door on ordinary Americans looking for justice in the legal system, this Court has made it harder for the political system to address these injustices.

In *Citizens United*, the Roberts Court overstepped its procedural bounds so that it could graciously provide corporations with First Amendment rights and, by the way, open the door to foreign entities deciding our elections.

But, again, as bad a piece of jurisprudence as that decision was, even worse could be the ramifications it will have on the lives of real people.

Well into the 1960s, oil companies didn't want to stop putting lead in gasoline despite the fact that they knew how dangerous it was.

But Congress passed the Clean Air Act anyway. And the percentage of children with elevated levels of lead in their blood dropped 84 per cent over the next quarter century.

And around that same time, our car companies still didn't want to put seat belts in cars, even though they knew it would save lives.

But Congress passed the Motor Vehicle Safety Act anyway. And by the year 2000, the fatality rate from car accidents had dropped 71 per cent.

Both laws passed just a couple of months before midterm elections.

Does anybody think either would have stood a chance if Standard Oil and GM had been able to spend millions of dollars in those campaigns?

In *Citizens United*, the Court didn't just abdicate its duty to subject efforts to impair our political process to strict scrutiny. It served as an accomplice to such an effort.

Not satisfied with giving corporations a leg up on individuals under the law, the Roberts Court is trying to prevent the American people from fighting back.

Bummed out yet? Well, we're finally in a good position to fight back.

It took the conservative legal movement decades to produce this activist Supreme Court. We're still in our first decade. But already the American Constitution Society has established itself as a major force in our legal system.

And while we often continue to struggle to get our nominees confirmed and our message heard, we have a President who understands that our legal system is broken when it favors the powerful over the powerless, and I know for a fact that I'm not the only Senator ready to take action.

So let's talk about what we can do.

Right now, I'm co-sponsoring legislation called the DISCLOSE Act that would force the heads of corporate-sponsored advocacy groups to appear in their ads, require corporations to tell their shareholders what they're spending political dollars on, prohibit corporations from using taxpayer dollars to tell taxpayers how to vote, and keep foreign-controlled corporations out of our elections.

It's a start.

But it's important to recognize that *Citizens United* is really the first major shot fired in a coming battle over information, a battle that extends beyond paid political advertising.

For instance, I'm very concerned about media consolidation. If we care about public debate, then it matters who runs our media companies.

The trend is towards vertical integration of the companies who produce the programs Americans rely on for information, and the companies who run the pipes through which Americans receive those programs.

Executives at both Comcast and NBC Universal swear that they're not interested in corporate control of programming. I used to work at NBC; I know better. And I'm very worried about this merger.

We should also be very worried about efforts to undermine the free flow of information on the Internet.

Right now, a blog loads just as quickly as a corporate webpage. An email from your mother comes through just as smoothly as a bill notification from your bank. An independent bookstore can process your order as quickly as Barnes and Noble.

But top telecommunications companies have declared their interest in offering "prioritized" Internet service for companies who can pay for it. This could lead to the creation of a high-speed lane for wealthy corporations and transform the Internet from an open playing field into yet another place where powerful economic elites have a bigger megaphone than the rest of us.

Some of the same people who were instrumental in the Federalist Society's effort to change our legal system are now working to help corporations increase their control over the flow of information.

If you control the flow of information, you can control the conversation around important issues. If you can control the conversation, you can change this country.

But we can't be satisfied with stopping conservatives and their corporate clients from controlling the narrative when it comes to our legal system.

We have to fight back with our own.

In our narrative, the legal system doesn't exist to help the powerful grow more powerful – it exists to guarantee that every American is entitled to justice.

In our narrative, we defend our individual rights and liberties against <u>corporate encroachment</u> just as fiercely as we defend them against <u>government overreach</u>.

In our narrative, judicial restraint actually <u>means</u> something – for starters, how about ruling only on the case you're presented?

In our narrative, even if those big bronze doors have to remain closed for security reasons, the door to our legal system should be open to everyone, because what happens in our legal system matters to everyone.

If you followed my career before I got to the Senate, you know that I'm a big believer in speaking truth to power, and in the power of telling the truth.

To legal scholars and lovers of our constitution, the truth about what's happened over the last 30 years is at the heart of our struggle to restore balance to our courts and wisdom to our laws.

But I gotta be honest with you: That's not why I'm here tonight. And I think you know that, or you would have invited a lawyer.

I'm here tonight because, for the people I represent in Minnesota and for regular working people all over the country, that truth is at the heart of their struggle, too.

Their struggle to earn a fair wage at a job that treats them well. Their struggle to live their lives free of corporate intrusions into their privacy. Their struggle to breathe clean air and drink clean water. Their struggle to find justice when they're wronged.

I know how important it is that our legal system support individuals in that struggle. And so do you. But most people don't. And we have to change that.

The American Constitution Society has a role to play in the national conversation around our Constitution and our laws. And not just within the walls of a debating society.

Ordinary Americans have to understand what's at stake for them in all this. And that means someone has to bring them into the debate.

It is my hope that you will. And it is my great honor to stand with you in that fight.

Thank you.

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