

THE SUPREME COURT: EVERY VOTE COUNTS

For three decades, the Supreme Court's interpretations of constitutional principles and federal statutes have played a vital role in protecting the rights of women to privacy, to equal protection of the laws, to basic health and safety, and to freedom from discrimination in the workplace and in school. But beginning in 2006, during the first full term after Chief Justice Roberts and Justice Alito were confirmed, the newly constituted Court handed down decisions that reversed decades of precedent and that dramatically cut back women's hard won legal rights. At this point in time, key legal protections upon which women have relied for many years are gravely at risk.

It is at this critical juncture that President Obama is faced with a vacancy on this most important court. Justice Souter, who recently announced that he will be retiring from the Court, generally stood on the side of legal protections of critical importance to women, and his vote often made the difference. Justice Souter's replacement will likely have a tremendous impact on women's legal rights for decades to come. To prevent longstanding legal protections from being further eroded, if not eliminated, now is the time to begin rebuilding a strong majority of Justices who respect the Constitution and our constitutional values of personal freedom and equal justice for all.

Why Every Vote on the Supreme Court Matters To Women

The constitutional right to privacy, including Roe v. Wade, is not secure. The Supreme Court has repeatedly recognized that the Constitution protects women from government intrusion into their most personal and private decisions. Even staunch opponents of *Roe v. Wade*, the 1973 decision that recognized that the constitutional right to privacy protects a woman's right to choose whether to have an abortion, refer to that decision as "settled law." But in 2007, in *Gonzales v. Carhart*, five Justices on the Court, including Chief Justice Roberts and Justice Alito, overturned 30 years of constitutional law protecting women's health and put in jeopardy the fundamental freedom of individuals to make important life decisions.¹ Both Chief Justice Roberts and Justice Alito refused to explicitly state that they would support upholding *Roe v. Wade* in this decision; and Justices Scalia and Thomas have repeatedly stated that *Roe v. Wade* should be overturned.² Thus, even a severely weakened *Roe*, without strong protections for women's health, is hanging by a thread.

The Court's decisions can have a dramatic impact on protections against sex discrimination in the workplace. Title VII of the Civil Rights Act of 1964 is a federal law that bars discrimination in employment, including discrimination on the basis of sex. In 2007, in *Ledbetter v. Goodyear Tire and Rubber Co.*,³ the Supreme Court, again in a 5-4 decision, reversed the long-standing interpretation of Title VII that allowed victims of pay discrimination to challenge the discrimination as it continues over time. Lilly Ledbetter, one of the few women supervisors in a

¹ 550 U.S. 124 (2007).

² See *id.* (Thomas, J., dissenting, joined by Justice Scalia).

³ 550 U.S. 618 (2007).

Goodyear tire plant, did not know until close to her retirement that she had been paid less than her male co-workers for close to 20 years. The decision, written by Justice Alito, held that even though she proved she was discriminated against, she had no remedy because she did not file her complaint with the EEOC within 180 days after receiving her first discriminatory paycheck. As Justice Ginsburg stated in her stinging dissent, joined by Justice Souter, this decision made it virtually impossible for women and others subjected to pay discrimination to effectively protect their rights. It ignored the realities of the workplace, in which employees typically do not know how much their coworkers are paid. This decision also overturned decades of precedent that applied in virtually every court in the country.⁴ (The Court's decision was recently overturned by Congress, with the passage of the Lilly Ledbetter Fair Pay Act).

Just last month, in *14 Penn Plaza LLC v. Pyett*,⁵ the Court diverged from its own long-standing precedent to hold in a 5-4 ruling that employees can lose their statutory right to bring a claim of discrimination in court under a collective-bargaining agreement that provides for arbitration of such claims. This decision, like the decision in *Ledbetter*, weakens employees' ability to seek relief under antidiscrimination statutes like Title VII.

Protections against sex discrimination in schools hang in the balance. Title IX of the Education Amendments of 1972 prohibits all forms of sex discrimination (including sexual harassment and unequal athletic opportunity) by educational institutions that receive federal funds. In 2005, with Sandra Day O'Connor on the bench, it was only by 5-4 that the Court ruled in *Jackson v. Birmingham Bd. of Ed.* that Title IX provides protection against retaliation for those who complain about discrimination.⁶ Justice Souter provided one of the five votes for the majority.

The Constitution's prohibition against sex discrimination by the government could be undermined. The Equal Protection Clause of the Fourteenth Amendment to the Constitution prohibits discrimination by the government, including on the basis of sex, in many spheres. The Court reviews official distinctions based on sex with "heightened scrutiny." But Justices Scalia and Thomas take issue with this principle. Justice Souter has applied it, but it is too soon to know where Justice Alito and Chief Justice Roberts stand. If a new Justice did not strongly support this well-established interpretation of the Equal Protection Clause, women could lose their protection against harmful gender stereotypes and sex-based classifications in the law.

Affirmative action is threatened, although still needed to ensure equal opportunity. The Court's closely divided decisions in recent years have raised questions about whether it will allow the use of affirmative action when necessary to dismantle discrimination or promote diversity in our nation's educational institutions and workplaces. While the Court upheld the affirmative action program of the University of Michigan Law School by a 5-4 vote, with Justice O'Connor casting the deciding vote and writing the majority opinion, in 2003,⁷ the Court in

⁴ For more information, visit the National Women's Law Center's Fair Pay Campaign at <http://www.nwlc.org/fairpay/>.

⁵ 556 U.S. ____ (2009).

⁶ 544 U.S. 167 (2005).

⁷ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

2007, in another 5-4 decision, struck down efforts by two school districts to maintain racial integration in individual schools.⁸ Justice Souter joined in the majority in the 2003 case, and demonstrated that he would have taken an even stronger position than Justice O'Connor with regard to admissions policies in higher education programs.⁹ He joined the dissent in the 2007 case.

Lawmakers' ability to protect the health and safety of the American people is on the line.

Congress has the authority to protect public health and safety under, among other constitutional provisions, the Commerce Clause. Recently, and in many cases by 5-4 votes, the Court limited the constitutional authority of Congress to pass legislation addressing violence against women¹⁰ or keeping schools free from the dangers of firearms;¹¹ and interpreted the Eleventh Amendment to limit Congress' ability to give state employees the right to sue for damages for disability¹² or age discrimination.¹³ In these cases, Justice Souter supported Congress' legal authority to enact this important legislation. In the near future, the Court may also review challenges to President Obama's initiatives, such as the American Recovery and Reinvestment Act, and upcoming initiatives such as health care reform.

Every year, the Supreme Court is confronted with cases involving legal issues of the utmost importance to women. Each Justice on the Supreme Court will have a profound, and lasting, impact on the women of this nation, and their families. Every vote counts when women's legal rights are at stake. It is critically important that Justice Souter's replacement, and any future nominees to the Supreme Court, respect the constitutional and statutory protections upon which women rely.

⁸ Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

⁹ Gratz v. Bollinger, 539 U.S. 244 (2003) (Souter, J., dissenting).

¹⁰ United States v. Morrison, 529 U.S. 598 (2000).

¹¹ United States v. Lopez, 514 U.S. 549 (1995).

¹² Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001).

¹³ Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).