NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

# THE NOMINATION OF SAMUEL ALITO: A WATERSHED MOMENT FOR WOMEN

## EXECUTIVE SUMMARY[1]

Samuel Alito's record demonstrates a judicial philosophy that places him on the far right of the ideological spectrum on critical legal issues. Legal scholars have gone so far as to say that he is one of the most conservative federal judges in the United States[2] and that there will be no one to his right on the Supreme Court if he joins it.[3] Among the issues on which Judge Alito's record is on the outer edge of the spectrum are those of particular importance to women. Based on an extensive review of the publicly available record, the Center has concluded that if Judge Alito is confirmed to the Supreme Court, core legal rights for women would be endangered, with profound and harmful consequences for women across the country and for decades to come.

For women in this country, the stakes could not be higher, nor the implications more profound. In recent years, the Supreme Court has decided cases affecting women's legal rights by narrow margins over vigorous dissents, often by votes of 5 to 4. Justice Sandra Day O'Connor, the first woman on the Supreme Court, has often cast the decisive vote in these cases. In a number of key cases, Justice O'Connor has parted company with the Court's most doctrinaire, conservative Justices, and if she is replaced by a Justice in their mold, critical women's rights are likely to be seriously weakened if not lost altogether.

Judge Alito's record makes clear that his approach to the law is dramatically different from that of Justice O'Connor. Indeed, taken as a whole, his publicly available record, both from his government service and on the Third Circuit, shows that placing Samuel Alito on the Supreme Court would be likely to shift the Court in a new and dangerous direction on core legal issues for women. It is no wonder that conservative voices have called the Alito nomination "an important moment in American history that has been decades in the making"[4] and "the moment conservatives have been waiting for."[5]

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[1] This is the Executive Summary of The National Women's Law Center's December 15, 2005 report. The full report is available at http://www.nwlc.org/pdf/NWLCAlitoReport12-15-05.pdf.

[2] Erwin Chemerinsky, Editorial, *Alito is Too Far Right for the High Court*, BLOOMBERG NEWS, Nov. 3, 2005, *available at* http://media.pfaw.org/pdf/Chemerinsky_11-03-05.pdf.

[3] *Today Show* (NBC television broadcast, Oct. 31, 2005) (interview with Jonathan Turley), *excerpts from transcript available at* http://thinkprogress.org/2005/10/31/alito-turley/.

[4] Ronald Brownstein, *Alito Nomination Ignites Costly Battle*, L.A. TIMES, Oct. 31, 2005 (statement of Tony Perkins, president of the Family Research Council), *available at* http://www.latimes.com/news/nationworld/nation/la-103105assess_lat,0,1366297,full.story?coll=la-home-headlines.

[5] Editorial, *A Supreme Nomination*, WASH. TIMES, Nov. 1, 2005, *available at* http://www.washtimes.com/op-ed/20051031-090107-3949r.htm.

The contrast with Justice O'Connor is stark. While Alito worked to undermine the right to choose, Justice O'Connor co-authored the Supreme Court's opinion in 1992 reaffirming the essential holding of *Roe v. Wade*[6] and later voted to strike down a law that made some abortions illegal without ensuring that women's health would be protected.[7] While Alito joined an organization that objected to women attending Princeton, worked to end affirmative action, and wrote opinions that raised the bar for victims of discrimination to succeed in court, Justice O'Connor not only broke the barrier to service by women on the Supreme Court, but also served as a voice and vote on the Court for strong protections against sex discrimination in education,[8] employment,[9] jury service,[10] and other areas of American life, and cast the decisive vote upholding affirmative action in higher education.[11] While Alito promoted an extreme version of "federalism," which would prevent Congress from enacting strong public protections in many areas critical to women including family and medical leave, Justice O'Connor voted to uphold a key provision of the Family and Medical Leave Act.[12]

Judge Alito's application for a Justice Department promotion in 1985, when he was serving in the Solicitor General's office, is particularly instructive on his legal philosophy in a number of areas, including several areas of central importance to women. In a statement supporting his application, he wrote:

> [I]t has been an honor and source of personal satisfaction for me to serve in the office of the Solicitor General during President Reagan's administration and to help to advance legal positions in which I personally believe very strongly. I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to an abortion.[13]

Among other things, he also said in his job application that he was a strong believer in "federalism" and cited his membership in an organization that was openly hostile to the admission of women and minorities to his alma mater, Princeton.[14] His record in the

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[6] Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) ("[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").
[7] Stenberg v. Carhart, 530 U.S. 914 (2000).
[8] Jackson v. Birmingham Bd. of Educ., __ U.S. __, 125 S.Ct. 1497 (2005); Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999); United States v. Virginia, 518 U.S. 515 (1996); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).
[9] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Harris v. Forklift Sys. Inc., 510 U.S. 17 (1993); Meritor Sav. Bank F.S.B. v. Vinson, 477 U.S. 57 (1986).
[10] J.E.B. v. Alabama *ex. rel.* T.B., 511 U.S. 127 (1994).
[11] Grutter v. Bollinger, 539 U.S. 306 (2003).
[12] Nevada v. Hibbs, 538 U.S. 721 (2003).
[13] Samuel A. Alito, Attachment to PPO Non-Career Appointment Form (Nov. 15, 1985) [hereinafter 1985 Job Application].
[14] *Id.*

Solicitor General's office confirms his contributions to the government's effort to undermine *Roe v. Wade* with the goal of reversing it altogether, as well as the government's attacks on affirmative action. In a subsequent position (after receiving the promotion he sought in 1985), he relied on policy considerations based on federalism to support a Presidential veto of consumer protection legislation.

Most recently, and extensively, his record on the Third Circuit confirms that he continues to hold strong legal views on issues he cited in 1985, but also demonstrates his willingness to use his position as a judge to serve the legal agenda he wrote about earlier.[15] Others have reached this conclusion as well. For example, based on its own review of Judge Alito's opinions on the Third Circuit, Knight Ridder concluded that "During his 15 years on the federal bench, Supreme Court nominee Samuel Alito has worked quietly but resolutely to weave a conservative legal agenda into the fabric of the nation's laws."[16]

The most troubling aspects of Alito's record on issues of particular importance to women are summarized below under three general headings: women's reproductive rights, Congress's power under federalism principles to protect the public, and legal protections against discrimination.

*Alito has rejected the constitutional right to choose and worked to overrule Roe v. Wade, supported dangerous limits on this fundamental right, and as a judge upheld such limits.* Judge Alito's record, both before he joined the bench and on the Third Circuit, makes it clear that he does not support a constitutional right to choose and that his elevation to the Supreme Court would endanger this fundamental right. Indeed, to what degree he supports a general constitutional right to privacy at all, especially one that extends beyond the narrow confines of contraceptive use by married couples, must be explored thoroughly in his confirmation hearing. But on the right to choose, his record could hardly be clearer:

- In June 1985, while in the Solicitor General's office, Alito volunteered to help write a brief in *Thornburgh v. American College of Obstetricians and Gynecologists*, [17] and wrote a 17-page memo offering his own strategy for using the government's brief in that case as an "opportunity to advance the goals of

[15] The Center has reviewed what it believes to be all of Judge Alito's published opinions on the Third Circuit that relate to women's legal rights, as well as some decisions of the Third Circuit in which he participated but did not write an opinion. It has not reviewed all of his unpublished opinions, which are generally not available in legal databases and were only recently produced to the Senate Judiciary Committee. The Center's review of the unpublished opinions is under way, but one troubling Alito dissent in a sexual harassment case has been identified already. *See* Pirolli v. World Flavors, Inc., No. 99-2043 (3d. Cir. June 11, 2001) (Alito, J., concurring in part and dissenting in part) (on file with NWLC).

[16] Stephen Henderson & Howard Mintz, *Alito's Record as a Judge Among Most Conservative*, SEATTLE TIMES, Dec. 5, 2005, *available at* http://seattletimes.nwsource.com/html/nationworld/2002665072_aalito05.html.

[17] Michael Kranish, *A Coauthor Says Alito Was Instrumental In Roe v. Wade Brief*, BOSTON GLOBE, Nov. 16, 2005 (quoting Albert Lauber, who served with Alito in the Solicitor General's office), *available at* http://www.boston.com/news/nation/washington/articles/2005/11/16/a_coauthor_says_alito_was_instrumental_in_roe_v_wade_brief/.

bringing about the eventual overruling of Roe v. Wade and, in the meantime, of mitigating its effects."[18] His memo argued in favor of upholding even the most burdensome, dangerous, and unsupportable barriers to abortion[19] – apparently what he meant by "mitigating" *Roe*'s effects.

- The Solicitor General's office did file a brief in *Thornburgh*, which Alito helped write.[20] It argued, as Alito recommended, that the Court should sustain a series of burdens on the right to choose. The Court rejected those arguments.[21] The brief also argued directly (instead of indirectly, as Alito had recommended) that *Roe v. Wade* be overturned. *Roe,* the government argued, "is so far flawed that this Court should overrule it and return the law to the condition in which it was before that case was decided."[22] It argued not only that *Roe* was wrongly decided, but that it did not deserve to be "sheltered" from "abandonment" by the principles of *stare decisis* (respect for precedent).[23] The Court did not address this argument in depth but did reaffirm *Roe v. Wade*.[24]

- As noted above, in his application for a promotion in the Reagan Administration a few months later, Alito wrote: "I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court . . . that the Constitution does not protect a right to an abortion."[25] This was plainly a reference to his role in the *Thornburgh* case.[26]

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[18] Memorandum from Samuel A. Alito, Assistant to the Solicitor General, to Charles Fried, Acting Solicitor General, re "Thornburgh v. American College of Obstetricians & Gynecologists No. 84-495; Diamond v. Charles, No. 84-1379," at 8 (June 3, 1985) [hereinafter Thornburgh Memo].

[19] For example, Alito argued in favor of reporting requirements that the Court later found to "go well beyond . . . health-related interests" and that would "raise the specter of public exposure and harassment of women" who chose to undergo an abortion, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 765-68 (1986); a second physician requirement without a medical emergency exception; and a requirement that insurers offer policies excluding abortion at lower cost than other policies – even though it had been stipulated that the actuarial cost of such policies might actually be higher. *See* Thornburgh Memo, *supra* note 19, at 8–16.

[20] Brief for the United States as Amicus Curiae in Support of Appellants, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495, 84-1379) [hereinafter Thornburgh Brief]; *see* Kranish, *supra* note 17 (saying, based on an interview with Alito's former colleague, that Alito had a "major role" in crafting the brief and was "instrumental" in drafting arguments for the brief).

[21] The Court struck down all of the abortion regulations before it. *Thornburgh*, 476 U.S. 747.

[22] Thornburgh Brief, *supra* note 20 (citation omitted).

[23] *Id.*

[24] *Thornburgh*, 476 U.S. at 759 ("Again today, we reaffirm the general principles laid down in *Roe* and in *Akron*.").

[25] 1985 Job Application, *supra* note 13.

[26] Judge Alito's apparent recent attempts to dismiss this statement are unpersuasive. For example, he reportedly claimed that it represented only his "personal" views. But the statements in his job application expressly referred to his views *on the law* – he referred to "legal positions" he was proud to advance, and the argument that "the Constitution does not protect a right to an abortion" is a quintessentially legal proposition. These were not expressions of personal views, such as whether he believes abortion is wrong – although his mother has been quoted as saying, "Of course he's opposed to abortion," so that may be true as well. Joseph Curl, *Bush Picks Alito for Supreme Court*, WASH. TIMES, Nov. 1, 2005, *available at* http://www.washingtontimes.com/national/20051101-121951-4730r.htm.

- Judge Alito's record on the Third Circuit reinforces the concerns raised by his earlier record. Unlike the other members of his court and the majority of the Supreme Court, Judge Alito, in *Planned Parenthood v. Casey*, would have upheld a requirement that a woman notify her husband before having an abortion (along with a range of other barriers to abortion).[27] Judge Alito's dissenting opinion in *Casey* is particularly telling because it is the only case in which, as a judge, he has squarely addressed the scope of the right to choose in a context in which there was no Supreme Court precedent directly on point to constrain him. The approach Judge Alito took in his dissent is one that would eviscerate *Roe* by upholding many dangerous government-imposed requirements, not only spousal notification. He focused on the women who would not be affected by the dangers of the requirement rather than those who would be hurt by it; he showed more concern for the husband's rights than for the liberty and bodily integrity of the woman; he discounted evidence of the harm the spousal notification requirement would cause to women; and he failed to recognize that requiring a teen to notify a parent is different from requiring a grown woman to notify her husband. On each of these points, a majority of his panel found ample guidance in previous Supreme Court precedents to approach the case in a way that would protect women.[28] And a majority of the Supreme Court – in an opinion co-authored by Justice O'Connor, whom Judge Alito has been named to replace – soundly rejected his analysis as well.[29]

- Judge Alito's opinions in other cases involving abortion do not allay the concerns raised by this record. Indeed, two cases raise additional concerns because in them, instead of joining the Third Circuit majority opinions striking down an unconstitutional abortion ban[30] and rejecting a wrongful death claim for a stillborn baby premised on the argument that a fetus is a "person" under the Fourteenth Amendment,[31] he wrote separate concurrences that avoided demonstrating agreement with the core tenets of *Roe v. Wade*.

- The conclusion that replacing Justice O'Connor with Judge Alito on the Court would be the death knell for meaningful protection for the right to choose is buttressed by the way far-right, anti-choice groups reacted to the nomination. These groups, which vehemently opposed the nomination of Harriet Miers as too much of an unknown, immediately expressed strong support for the Alito nomination in large measure because they believe he will totally undermine, if not overturn, *Roe v. Wade*. For example, Operation Rescue said of the nomination:

[27] Planned Parenthood v. Casey, 947 F.2d 682, 720 (3d Cir. 1991) (Alito, J., concurring in part and dissenting in part), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).
[28] *Casey*, 947 F.2d 682.
[29] Planned Parenthood v. Casey, 505 U.S. 833 (1992).
[30] Planned Parenthood v. Farmer, 220 F.3d 127 (3d Cir. 2000).
[31] Alexander v. Whitman, 114 F.3d 1392 (3d Cir. 1997), *cert. denied*, 522 U.S. 949 (1997).

"Roe's days are numbered. . . . We are trusting that we are now on the fast-track to derailing Roe v. Wade as the law of the land."[32]

*Alito has extreme views on the limits of Congress's power to protect the public and the ability of citizens to enforce federal statutory rights*. Alito's 1985 job application, Justice Department work, and Third Circuit record demonstrate that he is an extreme proponent of "federalist" views that severely limit the ability of Congress to address the public health, safety and welfare at the national level. Based on Alito's opinions in this area, one scholar listed him as one of the top four "Conservative Activists" on the Courts of Appeals, as distinguished from what he called the "Principled Conservatives."[33] Judge Alito also has shown a willingness to limit individual enforcement of important statutory rights to benefits that are critical for low-income women.

- In his 1985 job application, Alito specifically cited "federalism" as a philosophy he shared and hoped to advance, and noted his active participation in the Federalist Society. And as a Deputy Assistant Attorney General (the position he sought in the 1985 job application), carrying out his office's responsibility to review veto messages for form and legality,[34] Alito urged the President to veto a consumer protection law regulating odometer tampering on the ground that it "violates the principles of federalism supported by this Administration."[35] The draft veto message attached to his memo argued that as a policy matter, the issue was properly for the states to address, and noted, "After all, it is the states, and not the federal government, that are charged with protecting the health, safety and welfare of their citizens."[36]

- The "federalist" goal of narrowing federal authority is strikingly evident in Judge Alito's opinions on the Third Circuit. In *United States v. Rybar*,[37] he dissented from his court's decision upholding Congress's power, under the Commerce Clause, to regulate the possession and transfer of machine guns. His Third Circuit colleagues took him to task for failing to give appropriate deference to Congress as a coordinate branch of government, and noted that every other circuit court to

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[32] Press Release, Operation Rescue, Bush Nominates Alito: OR says, "Roe's Days Are Numbered" (Oct. 31, 2005) (quoting Operation Rescue President Troy Newman), *available at* http://www.operationrescue.org/?p=290.

[33] Jeffrey Rosen, *Evaluating Strict Constructionists: How to Judge*, NEW REPUBLIC ONLINE, Nov. 29, 2004, *available at* http://www.tnr.com/doc.mhtml?i=20041129&s=rosen112904.

[34] Memorandum from Samuel A. Alito Jr., Deputy Assistant Attorney General, Office of Legal Counsel, to Peter J. Wallison, Counsel to the President, re "Enrolled bill S. 475" (Oct. 27, 1985) (attaching proposed veto statement "pursuant to [the Office of Legal Counsel's] responsibility to review veto messages for form and legality").

[35] *Id.*

[36] Suggested Language for Presidential Veto Message for S. 475, Attachment to Memorandum from Samuel A. Alito Jr., *supra* note 34.

[37] United States v. Rybar, 103 F.3d 273, 286 (3d Cir. 1996) (Alito, J., dissenting), *cert. denied*, 522 U.S. 807 (1997).

review this law had upheld it. Indeed, Judge Alito's position has been repudiated by all of the nine circuit courts that have reviewed the law.[38]

- Judge Alito wrote an opinion in another case, *Chittister v. Department of Community and Economic Development*,[39] striking down a key provision of the Family and Medical Leave Act (FMLA) as outside of Congress's authority under the Fourteenth Amendment. A 6-3 majority of the Supreme Court, including even Justice Rehnquist, subsequently upheld another provision of the FMLA under that constitutional authority on the ground that the FMLA was enacted to address sex discrimination in the workplace.[40] Judge Alito gave short shrift to this argument.

- Judge Alito wrote an opinion in *Sabree v. Richman,*[41] involving the rights of developmentally disabled individuals to receive Medicaid services, strongly suggesting that if he were to join the Supreme Court, he would change currently binding precedent and move the law to limit, and potentially preclude, the ability of individuals to enforce rights created under the Spending Clause of the Constitution, such as Medicaid, public housing, child support enforcement, and public assistance – benefits and services that are especially important to low-income women.

*Alito has weakened anti-discrimination protections*. Judge Alito's record is troubling in several areas of the law central to addressing discrimination against women, especially in cases involving discrimination on the job.

- Alito's 1985 job application touts his membership in Concerned Alumni of Princeton (CAP), a group that was openly hostile to the admission of women and minorities to Princeton.[42] One of its members, in the group's magazine, fondly reminisced about the days when Princeton was "a body of men, relatively homogenous in interests and backgrounds."[43] Although other Princeton alumni,

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[38] United States v. Franklyn, 157 F.3d 90 (2d Cir. 1998), *cert. denied by* Gonzalez v. U.S., 525 U.S. 1027 (1998); United States v. Wright, 117 F.3d 1265 (11th Cir. 1997), *cert. denied*, 522 U.S. 1007 (1997); United States v. Kirk, 70 F.3d 791 (5th Cir. 1995), *aff'd by an equally divided court en banc*, 105 F.3d 997 (5th Cir. 1997), *and cert. denied*, 522 U.S. 808 (1997); United States v. Rybar, 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); United States v. Kenney, 91 F.3d 884 (7th Cir. 1996); United States v. Beuckelaere, 91 F.3d 781 (6th Cir. 1996); United States v. Rambo, 74 F.3d 948 (9th Cir. 1996), *cert. denied*, 519 U.S. 819 (1996); United States v. Wilks, 58 F.3d 1518 (10th Cir. 1995); United States v. Hale, 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993).

[39] Chittister v. Department of Cmty. & Econ. Dev., 226 F.3d 223 (3d Cir. 2000).

[40] Nevada v. Hibbs, 538 U.S. 721 (2003).

[41] Sabree v. Richman, 367 F.3d 180, 194 (3d Cir. 2004) (Alito, J., concurring).

[42] 1985 Job Application, *supra* note 13; David D. Kirkpatrick, *From Alito's Past, a Window on Conservatives at Princeton*, N.Y. TIMES, Nov. 27, 2005, at A1 (noting that CAP was founded "by alumni upset that Princeton had recently begun admitting women").

[43] Shelby Cullom Davis, *Preserving the Spirit of the Princeton Alumni Body*, PROSPECT, May 7, 1973, at 8.

including Senator Bill Frist, condemned CAP back in the 1970s,[44] Alito has never done so.

- Judge Alito's opinions in employment discrimination cases raise significant concerns that, if confirmed to the Court, he would act to substantially limit effective enforcement of the federal anti-discrimination laws. In particular, in a number of Judge Alito's opinions in employment discrimination cases, he has found ways to make it harder for a plaintiff to prevail, or even to allow a jury to decide on his or her claims. These opinions resolve issues of fact that should be left to the jury; inappropriately discredit the plaintiff's evidence of discrimination and construe the evidence in a light favorable to the employer; fail to examine the totality of the plaintiff's evidence; and even bar the plaintiff from presenting evidence at all. For example:

    - In one sex discrimination case, *Sheridan v. E.I. DuPont De Nemours and Company*,[45] Judge Alito dissented from a decision joined by *all 10 of the other members of the Third Circuit* reversing the trial court that had refused to allow a jury verdict in the plaintiff's favor to stand because they found that she had cast sufficient doubt on her employer's stated, non-discriminatory reasons for its actions. In doing so, Judge Alito ignored applicable legal standards to urge overturning the jury verdict, inappropriately credited the employer's explanations for its actions, and, standing in for the jury, dismissed the value of the plaintiff's evidence undermining the employer's assertions.

    - In a race discrimination case in which Judge Alito dissented and again usurped the jury's role, *Bray v. Marriott Hotels*, the majority said that under his approach to the evidence, "Title VII [of the Civil Rights Act of 1964] would be eviscerated."[46]

- Judge Alito has a record of hostility to affirmative action. He stated in his 1985 job application that he was particularly proud of his contributions to the government's attacks on affirmative action, and he co-authored three briefs in the Solicitor General's office that constituted part of that attack. His record on this issue on the Third Circuit is limited, but he did join in one Third Circuit ruling striking down a school district's affirmative action plan.[47]

- Judge Alito's record on the Third Circuit on other sex discrimination issues raises concerns as well. He voted with the majority on the Third Circuit in a closely

[44] On an alumni panel in 1975, Senator Frist said CAP had "presented a distorted, narrow and hostile view of the university that cannot help but have misinformed and even alarmed many alumni." Kirkpatrick, *supra* note 42.
[45] Sheridan v. E.I. DuPont De Nemours & Co., 100 F.3d 1061, 1078 (3d Cir. 1996) (Alito, J., concurring in part and dissenting in part), *cert. denied*, 521 U.S. 1129 (1997).
[46] Bray v. Marriott Hotels, 110 F.3d 986, 993 (3d Cir. 1997) (Alito, J., dissenting).
[47] Taxman v. Bd. of Educ. of the Township of Piscataway, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117 (1997), *and dismissed*, 522 U.S. 1010 (1997) (by agreement of the parties).

divided *en banc* decision rejecting constitutional claims against a school district that failed to take action to stop repeated and extreme sexual harassment of two young female students – one of whom was hearing- and speech-impaired – by fellow students.[48] And in an immigration case, while acknowledging that an asylum claim could be based on a fear of gender-based persecution, he denied an asylum claim by an Iranian woman who asserted that if she returned to Iran she would be persecuted for her refusal to wear the traditional veil and for her feminist beliefs.[49] Judge Alito was not persuaded by the evidence that she would be willing to suffer severe consequences for non-compliance with Iranian customs, a conclusion that has been criticized by immigration experts as requiring a woman in such circumstances to show "unwilling martyrdom" that normally would not be required in an asylum case.[50]

- Judge Alito's publicly available record does not reveal his views on the constitutional protection against sex discrimination under the Equal Protection Clause of the Fourteenth Amendment. But in his 1985 job application he expressed support for at least some of the central legal tenets of the Reagan Administration, and the Justice Department under Attorney General Ed Meese favored the "originalist" approach to constitutional interpretation advocated by Robert Bork,[51] which would permit almost any gender-based distinctions in law or government policy. Judge Alito's views in this area must be carefully explored at his confirmation hearing.

This is a watershed moment for women's legal rights. With the retirement of Justice O'Connor, the Court will lose not only its first female Justice, but also the Justice whose vote often has been pivotal on issues critical to women. Judge Alito's record demonstrates that if he is confirmed to the Supreme Court, he is likely to eviscerate core rights that American women rely upon, and shift the Court in a dangerous and harmful direction.

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[48] D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992), *cert*. *denied*, 506 U.S. 1079 (1993).
[49] Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993).
[50] *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 391 n.724 (3d ed. 1999) ("[T]here is no reason women should have to show especially strong opposition – in effect, conscientious objection and unwilling martyrdom – in order to obtain protection.").
[51] *See, e.g.*, OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 3–7 (Feb. 19, 1988).