NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

President Trump's Promise That Supreme Court Nominee Judge Neil Gorsuch Is In the Mold of Justice Scalia Spells Trouble for Women

When President Trump nominated Judge Neil Gorsuch to fill the seat left vacant by the death of Justice Antonin Scalia, he promised to nominate a justice "in the mold" of Justice Scalia. That promise includes Justice Scalia's steadfast votes to overturn *Roe v. Wade*, and his repeated votes to limit women's protections against sex discrimination in the workplace, at school, and beyond.

Overturn *Roe v. Wade*

Justice Scalia strongly supported overturning Roe v. Wade *and consistently opposed protecting women's constitutional right to decide whether to have an abortion.* In *Webster v. Reproductive Health Services* (1989),[1] for example, Scalia wrote a concurring opinion lamenting the fact that the Court chose not to overturn *Roe* wholesale. Justice Scalia wrote that Justice O'Connor's assertion (in dissent) that a "fundamental rule of judicial restraint" required the Court to avoid reconsidering *Roe* "cannot be taken seriously," and stated, "It thus appears that the mansion of constitutionalized abortion law. . . must be disassembled doorjamb by doorjamb."[2] In *Planned Parenthood of Southeastern Pa. v. Casey* (1992), Scalia joined an opinion stating, "We believe that Roe was wrongly decided, and that it can and should be overruled. . . ."[3] In *Stenberg v. Carhart* (2000), Scalia stated that *Roe v. Wade* should be "assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* [a case approving the internment of Japanese Americans during World War II] and *Dred Scott* [a case in which the Court approved of slavery]."[4] Notably, these cases were overturned by later Supreme Court decisions. And in 2007, Justice Scalia joined a concurrence in *Gonzales v. Carhart*, which stated that "the Court's abortion jurisprudence . . . has no basis in the Constitution."[5]

Limit Constitutional and Statutory Protections for Women and Girls Against Sex Discrimination in the Workplace, at School, and Beyond

Despite the nation's history of official discrimination against women, Justice Scalia voted against heightened protection of women from government-sponsored sex discrimination under the Equal Protection Clause of the 14th Amendment, protections that have been well-established for over 40 years. His legal approach would have allowed federal programs to provide benefits to families in need because of a father's unemployment, but not those in need because of a mother's

[1] 492 U.S. 490, 537 (1989) (Scalia, J., concurring in part and concurring in the judgment).
[2] *Id.*
[3] 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting).
[4] 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).
[5] 550 U.S. 124, 170 (2007) (Thomas, J., concurring).

unemployment;[6] would have allowed payment of Social Security survivor benefits to depend on whether the surviving spouse was male or female;[7] would have allowed the military to deny benefits to female service members' families that it provided to male service members' families;[8] and would have allowed women to be purposefully excluded from juries[9] and barred from public higher educational institutions based on gender stereotypes.[10]

Justice Scalia supported severe limits on statutory protections against sex discrimination, including women's right to equal pay and promotions. In *Ledbetter v. Goodyear Tire* (2007),[11] Justice Scalia voted in a 5-4 case to reverse longstanding antidiscrimination law, holding that an employee cannot challenge ongoing pay discrimination if the first instance of the employer's discriminatory pay decision occurred more than 180 days prior to the employee's claim, even when the employee continues to receive paychecks that have been discriminatorily reduced. It was left to Congress to overturn the decision by passing the Lilly Ledbetter Fair Pay Act of 2009. Justice Scalia wrote the opinion in another 5-4 case, *Wal-Mart Stores, Inc. v. Dukes* (2011),[12] which erected significant barriers to employees' right to come together as a group to challenge companywide discrimination.[13] His opinion held that a group of women working at Wal-Mart stores across the country alleging company-wide sex discrimination in pay and promotions could not proceed as a class. And in *Young v. UPS* (2015), Justice Scalia wrote a dissent arguing that an employer did not discriminate on the basis of pregnancy when it denied pregnant workers accommodations provided to injured or disabled workers similar in their ability to work.[14]

In 1998, the Court issued two decisions confirming that employers can be liable when a supervisor sexually harasses an employee, even if the employer was not aware of the harassment.[15] Scalia joined dissents in both cases, advocating a standard that could leave many women without adequate recourse for sexual harassment on the job, even when committed by high-level managers or supervisors.[16] One year later in *Davis v. Monroe Country Board of Education* (1999),[17] the Court held that Title IX covers student-on-student sexual harassment. Scalia joined a dissent that took the position that no matter how severe the harassment, how much it interferes with the student's ability to learn, or how much the school knew about or

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[6] Califano v. Westcott, 443 U.S. 76 (1979).
[7] Califano v. Goldfarb, 430 U.S. 199 (1977).
[8] Frontiero v. Richardson, 411 U.S. 677 (1973).
[9] J.E.B. v. Alabama ex rel T.B., 511 U.S. 127 (1994) (Scalia, J., dissenting).
[10] U.S. v. Virginia, 518 U.S. 515 (1996) (Scalia, J., dissenting).
[11] 550 U.S. 618 (2007).
[12] 564 U.S. 338 (2011).
[13] Wal-Mart v. Dukes: *New Hurdles – and a Significant Step Back – for Women Employees*, NAT'L WOMEN'S LAW CTR. http://nwlc.org/wp-content/uploads/2015/08/walmart_a_step_back_6.8.12.pdf.
[14] 575 U.S. __ (2015) (Scalia, J., dissenting).
[15] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
[16] 524 U.S. at (Thomas, J., dissenting); 524 U.S. at (Thomas, J., dissenting).
[17] 526 U.S. 629 (1999).

could have done to stop the offending conduct, the school could not be held liable for harassment of a student by another student.[18] And in *Vance v. Ball State University* (2013),[19] Justice Scalia joined the 5-4 majority decision that made it significantly more difficult to hold an employer liable for harassment by a lower-level supervisor.

Justice Scalia sought to limit Congress's ability under the Constitution to pass legislation to provide family and medical leave. The Family and Medical Leave Act (FMLA), by making male and female employees both eligible for 12 weeks of job-protected leave to care for newborns or sick family members, was designed to counter the longstanding stereotype that only women were responsible for providing this care. In *Nevada v. Hibbs* (2003), Scalia dissented from the majority's holding that Congress had the authority to require state employers to be liable for damages for violations of the FMLA, because of Congressional intent to address sex discrimination.[20] In a later case, he concurred in striking down the medical leave portion of the statute as applied to state governments.[21]

Justice Scalia opposed university efforts aimed at remedying discrimination on the basis of race or sex or enhancing diversity. In the landmark case *Grutter v. Bollinger* (2003), Scalia dissented from the majority's opinion, ridiculing the University of Michigan Law School's goal of achieving cross-racial understanding and preparing its students for a diverse workforce and society; Scalia wrote that these are not really "educational benefits" at all.[22] In *Fisher v. University of Texas* (2013), Justice Scalia wrote a one-paragraph concurrence reiterating his willingness to overrule *Grutter*, even though he noted that the plaintiff had not asked the Court to do so.[23] (The *Fisher* majority opinion sent the case back to the lower courts for further consideration.)

Justice Scalia was a vocal opponent of antidiscrimination protections for LGBTQ individuals. In *Romer v. Evans* (1996), Scalia dissented from the Court's invalidation of an amendment to the Colorado state constitution that barred any laws providing antidiscrimination protections to people on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships," stating that the amendment did not "disfavor homosexuals."[24] Scalia also dissented in *Lawrence v. Texas* (2003),[25] which held that state criminal sodomy laws violated the Constitution. In his dissent, he asserted that the Supreme Court was endorsing the "homosexual

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[18] 526 U.S. at 654 (Kennedy, J., dissenting).
[19] 570 U.S. __ (2013).
[20] 538 U.S. 721 (2003) (Scalia, J., dissenting).
[21] Coleman v. Court of Appeals of Md., 566 U.S. ___ (2012) (Scalia, J., concurring).
[22] 539 U.S. 306 (2003) (Scalia, J., concurring in part and dissenting in part).
[23] 570 U.S. __ (2013) (Scalia, J., concurring). Justice Scalia died before the Supreme Court considered *Fisher* a second time during its 2015–16 term.
[24] 517 U.S. 620, 653 (1996) (Scalia, J., dissenting).
[25] 539 U.S. 558 (2003)

agenda," which he defined as "the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct." [26] In *Obergefell v. Hodges* (2015), Justice Scalia wrote in dissent that the majority opinion deprived the people of the right to self-governance and that states should individually decide whether to make marriage equality legal.[27]

Conclusion

If confirmed, Judge Gorsuch, currently age 49, could serve on the Supreme Court for decades, perpetuating Justice Scalia's harmful legal approach on a whole host of constitutional and statutory protections of vital importance to women. The country needs justices on the Supreme Court who respect core constitutional values of liberty, equality, and justice for all. President Trump's promise to select a nominee in the mold of Justice Scalia, whose legal views and approach to interpreting the Constitution would eviscerate vital legal rights and protections for those who turn to the courts for fairness, most especially endangers women. With his nomination of Judge Neil Gorsuch, we should take President Trump at his word.

[26] 539 U.S. at 575 (Scalia, J., dissenting).
[27] 576 U.S. __ (2015) (Scalia, J., dissenting).