

Judge Samuel Alito

What his appointment would mean to women and people of color, and why the YWCA USA is opposing his confirmation to the Supreme Court.

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On October 31, 2005, Judge Samuel Alito was nominated to the United States Supreme Court. At that time the YWCA USA began to investigate Alito's record and judicial philosophy hoping to gauge the effects of his potential confirmation on the lives and rights of women and people of color. As an organization founded to better the lives of women and with a long history working towards eliminating racism and empowering women the YWCA USA recognizes the importance of the Supreme Court. A 20-year campaign to fill the courts with very conservative judges has done severe damage to 50 years of civil rights progress. As a result a number of rights and laws protecting women, workers, people of color and the disabled have been rolled back, and more are at risk. Recently, courts have narrowed or struck down anti-discrimination laws, the Violence Against Women Act, a woman's legal right to choose, affirmative action programs, and other guarantees of equal opportunity.

The continued ability of Congress to protect our civil rights and fundamental freedoms is what is at stake in the fight over judicial nominations. United States Senators have the power to approve or oppose nominations for judicial appointments, including Supreme Court appointments. Thus, Senators have the power to protect our rights, including the right to be free from discrimination based on race, national origin, religion, gender, sexual orientation, or disability; the right to choose; and the right to equal opportunity in employment and education for all Americans. While many have fought for years to secure these rights, they are not secure without a federal judiciary ready to stand vigilant to protect them. Today, given the sharply divided makeup of the U.S. Supreme Court, a number of tremendously important civil rights and women's rights currently hang in the balance.

After careful review of his legal writings and philosophies, along with the recent testimony at his confirmation hearings, the YWCA USA is declaring its opposition to the confirmation of Judge Samuel Alito. Throughout its 147-year history the YWCA has stood up to protect the lives and rights of women. Only in extreme cases has this meant opposing a Supreme Court nominee, but **the potential damage to women, girls and their families is too great to ignore in the case of Judge Alito.** During his 15 years on the Third Circuit Court of Appeals, Judge Alito has ruled against family medical leave, women's right to privacy and employment rights for women and people of color. Similarly his judicial philosophies often come down on the opposite side of the rights of women and people of color. This is particularly troubling because Justice O'Connor is often the critical swing vote on issues of racial justice, civil rights, women's rights, and reproductive freedom. As a Supreme Court Justice with a lifetime appointment, Judge Alito would help shape the applications of laws and policies in the United States for decades to come.

Given the role that Justice O'Connor plays on the court, it is necessary to review Judge Alito not only on his merits but also in the context of whom he will be replacing on the bench. Justice O'Connor has added an important, independent and unique voice to the Supreme Court. As the first woman to sit on the nation's highest court, she has broken barriers for women not only by blazing a trail but also by providing a voice and a vote on the Court for all women. Indeed, time and again on those issues that affect civil rights, and women's rights, including reproductive freedoms, Justice O'Connor is often the deciding fifth vote. Numerous laws have been shaped and upheld by this 5 to 4 margin. Thus it is important to

evaluate not only if Judge Alito is qualified to sit on the Supreme Court, but also if he will protect and honor the legal and social legacy of the woman he would be replacing.

This document will take a closer look at Samuel Alito and the YWCA USA's mission and policy priorities behind the opposition of his confirmation.

Alito's record shows he would not protect the rights of women, girls and their families.

The YWCA USA is a women's membership movement nourished by its roots in the Christian faith and sustained by the richness of many beliefs and values. Strengthened by diversity, the YWCA draws together members who strive to create opportunities for women's growth, leadership, and power in order to attain a common vision: peace, justice, freedom, and dignity for all people. Throughout its history, the YWCA has been in the forefront of most major movements in the United States as a pioneer in race relations, labor union representation, and the empowerment of women.

The YWCA USA's beginning is rooted in assisting women in the workplace. In 1860 the YWCA opened the first boarding house for female students, teachers and factory workers in New York City as women moved from farms to cities in search of jobs and education. Since its beginning, the YWCA has advocated for better working conditions for women. As a key player in the labor movement the YWCA fought for 8-hour workdays, five day work weeks and the right for labor to organize. This tradition continues today as the YWCA USA worked to help pass the Family and Medical Leave Act (FMLA), advocates for increasing the minimum wage and strives to end workplace harassment and discrimination. The YWCA associations across the country continue to fight for the workplace and economic equality of women, offering non-traditional job training, providing career counseling and affordable child care for working parents.

Family & Medical Leave Act

The Family and Medical Leave Act (FMLA) is critically important to working families. It has allowed more mothers and fathers to spend precious time with new babies, fewer children have to face hospital stays alone, and more workers can care for themselves or a family member when illness strikes. Without the FMLA millions of workers would be forced to choose between their job and their health, or their job and caring for a loved one, such as a child or parent. This act has been a key step in the economic empowerment of women. The YWCA USA believes this is an important act not only for women as caretakers but also because the FMLA applies regardless of gender. It allows women to stay in the workforce and men can just as easily stay home in the role of caregiver.

Passed and signed into law in 1993, the FMLA provides eligible employees with 12 weeks of leave to handle family or medical emergencies. Scores of workers have gone to the courts to vindicate their FMLA rights and remedy FMLA violations by their employers. Conversely, employers have argued in court to limit the ability of employees to use the FMLA's protections. For example, some state employers have argued that state workers cannot sue their state for violating their FMLA rights, because the Constitution's 11th amendment gives states sovereign immunity – meaning that states are shielded from being sued in federal court except under certain circumstances.

The Constitution identifies specific sources of power under which Congress is authorized to enact laws, including those with provisions allowing states to be sued, notwithstanding the 11th amendment. One such source of power is the 14th amendment. Congress is empowered to pass laws to enforce the 14th amendment, which among other things prohibits states from denying persons equal protection under the

law. In keeping with this authority, Congress passed the FMLA, in part, to remedy longstanding gender-based discrimination and stereotypes about women and the workplace. The FMLA's mandate of 12 weeks of family or medical leave enables all workers – both male and female – to have access to the leave necessary to live up to their work and family obligations. Without such a requirement, too many employers could make arbitrary decisions about who is entitled to leave and who is not, based in part on gender-based stereotypes about “proper” caregiving and wage earning roles. Indeed, the legislative history of the FMLA makes clear that one of the most important goals of the law was to remedy discriminatory leave practices that often limited women’s job opportunities, and to challenge discriminatory attitudes about the abilities, productivity, and commitment of women workers.ⁱ Judge Alito wrote an opinion, in *Chittister v. Department of Community and Economic Development*, holding that state employees are not able to sue for damages to enforce their rights under FMLA. This decision was effectively reversed in a similar case dealing with family leave by a 6-3 Supreme Court majority.ⁱⁱ

In *Chittister v. Department of Community and Economic Development*, the Third Circuit considered whether a state employee could sue his state employer for removing him from his job after he took medical leave. The employee, David Chittister, requested sick leave from his employer, the Pennsylvania Department of Community and Economic Development (the Pennsylvania DCED). The leave was initially granted, and then during the 10th week of the leave, Mr. Chittister was terminated. Mr. Chittister filed a claim against the Pennsylvania DCED under the FMLA. The Pennsylvania DCED defended the case by arguing its 11th amendment sovereign immunity shielded it and other state employers from such lawsuits. In an opinion written by Judge Alito, the Third Circuit panel ruled that Congress did not have the power to subject states to suit for violating the FMLA’s medical leave provisions. He ruled that requiring employers to provide medical leave was not a proper remedy for gender discrimination, characterizing it as a disproportionate remedy when compared to the harm at issue. Specifically, Judge Alito concluded that 12 weeks of unpaid leave “[i]s so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”ⁱⁱⁱ Further, he also questioned whether there was sufficient evidence of gender discrimination to justify the creation of a 12-week leave requirement.

Importantly, the Supreme Court (including Justice O’Connor) reached a very different conclusion in a case that raised similar issues to those in *Chittister*. In *Nevada Dep’t of Human Resources v. Hibbs*, the Court considered whether a state worker could sue his state employer for violating the FMLA’s family leave requirements. In this case, the employee, William Hibbs, took leave to care for his ailing wife. Mr. Hibbs was terminated by his employer, the Nevada Department of Human Resources (Nevada DHR), and he filed a claim under the FMLA. Just as in *Chittister*, the Nevada DHR defended the case by arguing that its 11th amendment sovereign immunity shielded it from suit. In a 6-3 decision written by Chief Justice William Rehnquist, the Court concluded that the goal of remedying gender discrimination in employment was a sufficient reason to allow Congress to abrogate or dissolve states’ sovereign immunity. The Court found that Congress appropriately remedied gender discrimination by providing for up to 12 weeks of unpaid family leave, and that making a specific amount of leave available to both women and men helps dispel employer stereotypes about women’s domestic roles as primary caregivers.^{iv}

Judge Alito would force people to choose between their jobs and caring for themselves or a loved one in time of illness. If Judge Alito’s view limiting the protections of the FMLA were to become the law of the land it would hurt the lives of women, girls and their families.

Reproductive Rights

The right to privacy and reproductive freedom are cornerstones of women's equality, safety and health. The YWCA USA has been unwavering in its commitment to reproductive rights and freedoms of women for almost four decades. This "freedom of choice" position was adapted in 1967 at the YWCA National Convention following an extensive debate by the nearly 1,000 delegates from local associations all over the country. Because its mission is to empower women and eliminate racism, the YWCA is particularly concerned that low-income women and women of color are impacted disproportionately when limitations are placed on reproductive health services.

Alito's record on reproductive choice and freedom is very troubling for several reasons. One of which is the pivotal role that Justice O'Connor has taken time and again, being the critical vote protecting the right to privacy and reproductive freedom. If Judge Alito were confirmed, he has the potential to change the direction of the court and devastate the rights of women.

In the landmark case *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Judge Alito concluded that it was not an "undue burden" for a married woman seeking an abortion to have to notify her husband, a position that the Supreme Court later struck down.^v This case raises key questions about whether, if confirmed to a seat on the Supreme Court, Alito would vote to overturn *Roe v. Wade*. Alito's *Casey* opinion is troubling for two reasons. First, the notion that women should be required to notify their husbands about issues concerning their own body is outrageous. On this issue the Supreme Court majority, by an extremely close 5 to 4 margin, disagreed with Alito and the idea that it is not an undue burden on women. Justice O'Connor joined the plurality opinion upholding *Roe*'s principles and stated that the spousal notice requirement harkened back to the days when "a woman had no legal existence separate from her husband."^{vi} The opinion concluded that "[t]he women most affected by [the] law those who most reasonably fear[ed] the consequences of notifying their husbands that they [were] pregnant – [were] in the gravest danger."^{vii}

Indeed, this highlights the second reason the YWCA USA is troubled by Alito's opinion in the *Casey* case. Part of Alito's decision appears to rest on the fact that, according to him, those challenging the provision "failed to show even roughly how many of the women in this small group would actually be adversely affected by" the spousal notification provisions. Since the statute imposed no undue burden in his view, argued Alito, the regulation needed only to meet a lower level of scrutiny.^{viii} In other words because the law would only negatively impact a small portion of the population, they did not require the same level of protection under the law. This is a disturbing line of reasoning when in fact the women who would be harmed by this law are those most in need of its protection; women that fear their husband's reaction and potential retribution. This requirement for spousal notification would be yet another barrier for women to overcome. Additional burdens and service barriers can eliminate safe options for women forcing them into desperate situations. Through its work with women and girls the YWCA has found that it is often low-income women, women of color and young women who face the greatest barriers to receiving reproductive health services.

Furthering the YWCA USA's concerns, about whether Judge Alito would seek to strip away women's reproductive freedoms, are his own words. As a lawyer in the Reagan administration, Samuel Alito wrote, that he "personally believed" that "the Constitution does not protect a right to an abortion."^{ix} In addition, during his tenure with the Solicitor General's Office he was one of the chief engineers of a multi-tiered strategy to reverse *Roe v. Wade*. He advised that chipping away at *Roe v. Wade* by engaging in *Thornburgh v. American College of Obstetricians and Gynecologists*, which was going to be heard by the Supreme Court, would be a more valuable strategy than a "frontal assault" on *Roe* and the right to privacy

it guarantees. Alito wrote that an amicus brief in the *Thornburgh* case was an “opportunity to advance the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime of mitigating its effects.”^x While it is impossible to know for certain how Alito would rule in a particular case before the Supreme Court, these statements along with Judge Alito’s past opinions make it difficult to believe that he would effectively uphold the fundamental freedoms of women. The rights, health, and safety of women are too important to the YWCA USA to justify this risk.

Alito’s record shows that the advances that have been made in the area of civil rights would be threatened and even reversed if he is confirmed to the Supreme Court.

The Supreme Court has played a crucial role in protecting the civil rights of Americans, upholding their equal protection under the law. Yet, Samuel Alito’s record on civil rights raises a number of troubling questions about his commitment to strong enforcement of the nation’s laws intended to protect people from discrimination. In a number of instances, Judge Alito issued opinions that made it far more difficult for victims of discrimination to get to court and prove their cases. His decisions appear to be especially harsh in the areas of gender and race discrimination, where he has dissented from Third Circuit decisions and sought to make it much harder for victims of discrimination to prove their case. Again, this is an area where Justice O’Connor has often been the swing vote in protecting and advancing civil rights.

Employment Discrimination

Workplace discrimination based on gender, race or ethnicity can be both direct and subtle in its application. This can range from overt name-calling and harassment to people being denied interviews. It often keeps people from receiving equal pay, deserved promotions and upper level management positions. It can also lead to uncomfortable working environments, which may cause individuals physical, mental and emotional stress. These realities make it more difficult for victims of discrimination to earn livable wages and to provide financial and economic security for themselves and their families.

Women’s economic empowerment and racial justice are Hallmark programs of the YWCA, while each local association implements this program based on the unique needs of each community. For example, several local associations have employment centers to address the welfare to work needs of their clients by providing skill training, employment preparation (i.e. resume and interview assistance) and job placement. The YWCA USA strives to have a direct impact and create meaningful change with measurable results for women and people of color. At the national level, this means that the YWCA is working to foster public education and policies to end discrimination for women and people of color both in the workplace and beyond. For instance, the YWCA USA is an active member of the National Committee on Pay Equity, fighting to pass equal pay legislation in Congress.

The Civil Rights Act, first passed in 1965, was landmark legislation outlawing discrimination based on race, color, religion, sex, or national origin. Title VII of this important law outlaws discrimination in employment on the basis of race, national origin, gender, or religion. Title VII also prohibits retaliation against employees who oppose such unlawful discrimination. Furthermore, it provides that an individual can bring a private lawsuit seeking damages against employers who violate this law.^{xi} Although women and people of color have made significant strides in workplace equality, the protections provided under Title VII are still needed today, as they are still less likely to be found in upper management positions or earning equivalent salaries to their white male counterparts.^{xii}

Judge Alito’s record shows that he does not understand the realities of workplace discrimination. He has dissented in several cases, arguing that victims of discrimination must present substantially more

evidence before they would be entitled to bring their case to trial. In fact, Alito has ruled against three of every four people who claimed to have been victims of discrimination.^{xiii} In one such gender discrimination case, *Sheridan v. E.I. DuPont de Nemours*, Ms. Sheridan was a “Head Captain” in a hotel owned by DuPont. She sued for sex discrimination and other claims when DuPont failed to promote her to the higher position of “Manager of Restaurants.” DuPont asked the court to throw the case out without a trial, alleging that Sheridan had presented insufficient evidence to warrant a trial. The district court rejected DuPont’s motion and the case went to trial. While the various facts of this case and its procedural history are very complex, the main issue for the Third Circuit involved questions about how much evidence a person alleging discrimination must show in order to bring their case to trial. This issue is one on which the various circuit courts have been divided for some time despite at least two Supreme Court cases attempting to resolve the issue. The majority of the entire Third Circuit endorsed a standard that makes it easier for someone alleging discrimination to present sufficient evidence to bring their case to trial, a decision more or less in line with the majority of other Circuits. Alito however was the sole dissenter of this decision (10-1); arguing that he would, require victims of discrimination to present much more evidence before they would be entitled to take their case to trial. Were this position adopted more broadly, it would make it much more difficult for victims of discrimination to have their day in court and remedy these actions of prejudice.^{xiv}

In another employment discrimination case, this one dealing with race, Alito went even further than upping the level of evidence needed for a trial stating that even if discrimination occurred it may not be against the law. In *Bray v. Marriott Hotels*, Ms. Bray, an African-American woman, applied for a promotion but a white woman was hired for the job instead. Her employer, Marriott, did not follow its own guidelines for hiring and several of the key employees involved in the process gave conflicting statements about how the decision to hire the white woman was ultimately made. Bray sued, and the District Court ruled for Marriott, holding that Bray had not presented a strong enough case to go to trial. Bray appealed, and a divided three-judge panel of the Third Circuit overturned the district court, holding that Bray should be able to make her case to a jury. Alito dissented from the panel’s decision and would have thrown out Bray’s case. In his dissent, Alito made clear that he would have imposed an almost impossible evidentiary burden on victims of employment discrimination. In fact as noted by the majority opinion:

[Alito’s] position would immunize an employer from the reach of Title VII if the employer’s belief that it had selected the ‘best’ candidate, was the result of conscious racial bias. Thus the issue here, is not merely whether Marriott was seeking the ‘best’ candidate but whether a reasonable factfinder could conclude that Bray was not deemed the best because she is Black. Indeed, Title VII would be eviscerated if our analysis were to halt where the dissent suggests.^{xv}

In addition to the troubling interpretation of Title VII, Alito’s dissent demonstrates skepticism about the legitimacy of discrimination claims. He closed his dissent with the following disturbing pronouncement:

I have no doubt that in the future we are going to get many more cases where an employer is choosing between competing candidates of roughly equal qualifications and the candidate who is not hired or promoted claims discrimination. I also have little doubt that most plaintiffs will be able to use the discovery process to find minor inconsistencies in terms of the employers having failed to follow its internal procedures to the letter. What we end up doing then is converting anti-discrimination law into a ‘conditions of employment’ law, because we are allowing disgruntled employees to impose the costs of trial on employers who, although they have not acted with the intent to discriminate, may have treated their employees unfairly. This represents an unwarranted extension of the anti-discrimination laws.^{xvi}

This preconceived notion that a percentage of discrimination cases are manufactured by disgruntled employees, rather than victims of discrimination shows a lack of sensitivity about the on-going national problem of discrimination in the workplace. Such a view in the legal system makes it even more difficult

for victims of discrimination seeking redress to have their claims taken seriously. In contrast to Judge Alito, 70% of Americans believe racism is a problem in the workplace today.^{xvii} This again illustrates that Samuel Alito is out of step with mainstream America in the area of discrimination.

Immigrants' Rights

Immigrants' Rights are an important foundation of American society, protecting the rights of individuals who are living and working in the United States regardless of their race, ethnicity or nationality. Since it began providing bilingual instruction, housing and skill training to immigrant women in 1909 the YWCA has been working to better the lives of women coming to the United States. Today, this includes offering job training, housing, health care, and culturally sensitive domestic violence assistance, as well as working nationally to eliminate harmful policies and stereotypes associated with immigrant populations. Until all people are treated equally in communities and under the law, society will continue to suffer the negative impacts of racism and prejudice.

Regrettably, Alito's record, as both a government lawyer and a federal judge, raises serious concerns about his views on immigrants' rights. For instance, in 1986 Alito wrote a letter in his capacity as Deputy Assistant Attorney General, to the Director of the Federal Bureau of Investigation (FBI), and offered a troubling interpretation of the constitutional protections properly afforded to immigrants. Despite a significant body of case law to the contrary, Alito suggested that nonresident immigrants have "no due process rights" under the Constitution and illegal immigrants in the United States have limited constitutional rights.^{xviii} This legal view has the potential to be detrimental to immigrants in the United States. As illustrated in the statement by conservative constitutional analyst Bruce Fein, "[Alito] seems to be saying that there is no constitutional constraints placed on U.S. officials in their treatment of nonresident aliens or illegal aliens. Could you shoot them? Could you torture them? . . . It's a very aggressive reading of cases that addressed much narrower issues."^{xix}

Judge Alito has written several opinions on limiting the legal rights of people whom are not citizens of the United States, often going against well-established standards under the law. For example, in *Lee v. Ashcroft*, a case involving a Korean couple's filing of false tax returns, the Lees had resided legally in the United States since the 1980s and had grown children who were United States citizens. For many years, they operated a dry cleaning business in Philadelphia. In May 1997, they pled guilty to three counts of filing false income tax returns. The court majority agreed with the Korean immigrant's claim that a conviction for filing a false tax return did not make Mr. Lee deportable. Judge Alito disagreed and in his dissenting opinion wrote extensively on what Congress *may* have *actually* intended to do. Indeed the majority asserts that Judge Alito's dissenting argument engages in "speculation" about what Congress intended, and that to do so is in contrast to the "well-recognized rules of statutory construction."^{xx} The idea that a judge would ignore the established legal meanings and create his own interpretation of the law is highly disturbing.

In another case, *Fatin v. INS*, an immigration case, Judge Alito showed a very narrow view of what constitutes persecution and a limited understanding of women's rights internationally. Parastoo Fatin, an Iranian woman studying in the United States, applied to the Immigration and Naturalization Service for political asylum and later to prevent her deportation. Fatin asserted that if she returned to Iran, she would be persecuted for her refusal to wear a chador, the traditional veil, and for her feminist beliefs. Fatin argued that she was a member of a very visible and specific subgroup, "Iranian women that refused to conform to the government's gender specific laws and social norms." The Board of Immigration Appeals denied Fatin asylum, stating that there was no evidence that she would be singled out for her beliefs or membership in a particular group given that the same restrictions and requirements applied to the entire population.^{xxi}

While acknowledging that an asylum claim could be based on a fear of gender-based persecution, Judge Alito denied Ms. Fatin's claim because he could not find a record of her testifying that "she would refuse to comply with the law regarding chador or any of the other gender specific laws or social norms." Alito concluded that Fatin had not shown how the "requirement of wearing a chador or of complying with Iran's other gender-specific laws would be so profoundly abhorrent that it could aptly be called persecution." ^{xxii}

These cases are but two examples of the numerous rulings in which Judge Alito has ruled against immigrants. Whether this is due to narrow interpretation of the law or the belief that immigrants have only limited rights in the United States, the YWCA USA feels that this restrictive view of individual rights hurts the nation's progress towards equality under the law.

Affirmative Action

The YWCA has worked toward diversity since its founding, bringing together women of all ages, racial, cultural, economic, social, and religious backgrounds to work toward a common goal of peace, justice, freedom and dignity. Affirmative action is a crucial tool in this historic struggle. By taking a strong position on affirmative action, the YWCA reaffirms its role as a leader in the movement to empower women and eliminate racism. Affirmative Action is a tool designed to expand job and educational opportunities to women and people of color to remedy past and present-day discrimination. Affirmative action tools include outreach, recruitment, training, and promotion to ensure that positive steps are taken to advance qualified women and people of color. The YWCA USA strives to provide the public and private sector on the benefits of diversity and the tools available for facilitating diversity. Through its Hallmark and local programs, the YWCA continues working to provide work, leadership and educational opportunities to women and people of color throughout the United States. It is therefore quite troubling that Samuel Alito touts his work as a lawyer in the Reagan administration opposing certain affirmative action programs as something he was "particularly proud" of. ^{xxiii}

One example of Alito's work against affirmative action during the Reagan administration is the case of *Local 28 of the Sheet Metal Workers' International Association v. EEOC*. Alito and the Solicitor General's office argued that it was illegal for courts to order remedies including affirmative action even in cases of intentional, on-going and "egregious racial discrimination." Alito signed a brief arguing the extraordinary theory that relief in Title VII cases could be granted only to "identifiable victims of discrimination," contradicting an earlier view of the Equal Employment Opportunity Council (EEOC) itself. ^{xxiv} The Supreme Court rejected Alito's argument, stating that affirmative action relief "may be ordered by a court as a remedy for past discrimination even though the beneficiaries may be non-victims." ^{xxv}

Furthermore, in the 1970s and 1980s Alito was a member of Concerned Alumni of Princeton (CAP), an organization that actively sought to limit the number of women and minorities accepted to the university. ^{xxvi} The co-founder of CAP, T. Harding Jones, illustrates the concerns of this extreme organization when in 1973 he wrote in CAP's magazine that:

Alumni were told with the adoption of coeducation that the goal would be 650 women by 1974, with no reduction in the 3200 man student body. Today however, there are 971 women, and 3088 men with more women scheduled to be added, toward a goal of forty percent women and minorities. . . . *The make-up of the Princeton student body has changed dramatically for the worse.* ^{xxvii}

In contrast, Justice O'Connor cast the decisive vote in *Grutter v. Bollinger*, upholding affirmative action in higher education. In this important opinion, she wrote that racial diversity was important in higher education because "classroom discussion is livelier, more spirited, and simply more enlightening and

interesting when the students have the greatest possible variety of backgrounds."^{xxviii} The YWCA USA agrees with Justice O'Connor's sentiment and feels that all levels of society would be enlightened by a more realistic reflection of the national makeup.

If Judge Alito's views on affirmative action were to replace Justice O'Connor's on the Supreme Court, institutes throughout the country would be harmed. Eliminating this important tool for promoting diversity would deny university, workplaces and other organizations the enlightenment provided by a greater variety of backgrounds.

One Person, One Vote and Equal Representation

Voting is the most important tool Americans have to influence the policies that affect every aspect of their daily lives. As an early supporter of women's suffrage, the YWCA USA has been working toward truly equal voting rights for almost a century. Until every eligible person in the United States is able to routinely, easily and successfully exercise his or her right to vote, our democracy will not be complete. Local YWCA associations work to educate members of their community about the importance of voting. For example, the YWCA of Lake County Illinois has its *Girls on the Move* program, which introduces high school girls to the legislative process and advocacy. The YWCA has worked on get out the vote campaigns, to educate and motivate parents to vote and consider candidates that support legislation that is good for children. Furthermore, at the national level the YWCA USA is working toward the reauthorization of the Voting Rights Act, one of the most important pieces of civil rights legislation.

Reapportionment upholds the idea of one-person one vote and equal representation. This is important because reapportionment has historically been used to protect racial minorities from being under represented or their voting power being diluted. Until the early 1960s, many state legislators were elected by geographic area, rather than by population. The result was that a legislator representing a sparsely inhabited rural area had as much power as a representative of a much more heavily populated urban area. Then in the 1960s the Supreme Court, headed by Chief Justice Warren, decided several cases on reapportionment, which became some of the most widely accepted decisions on civil rights and equal representation. The most notable of the Warren Court reapportionment cases were *Baker v. Carr* in 1962 and *Reynolds v. Sims* in 1964. These cases required states to draw electoral districts with equal populations, preventing the creation of uneven districts that dilute the representation of minority voters.

Reapportionment and the idea of one-person one vote are paramount to continuing the progress this country has made in the area of civil rights. The idea that the Warren Court's cornerstone cases of civil rights could be frowned upon by a Justice sitting on the nation's highest court is deeply troubling. Yet, on his 1985 job application for the Reagan administration, Samuel Alito questioned the legitimacy of the reapportionment decisions of the Warren-led Supreme Court, historic cases that affirmed the idea of one-person one vote. In fact he wrote that he "developed a deep interest in constitutional law, motivated in large part by disagreement with the Warren Court decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment."^{xxix}

The real implications of Alito's disagreement with reapportionment can be seen in the case of *Jenkins v. Manning*. African American voters brought a voting rights suit against the Red Clay school district, contending that the district's at-large voting system improperly diluted the voting strength of people of color.^{xxx} The lower court found that although all of the criteria for proving such a claim, established by the Supreme Court in *Thornburg v. Gingles*^{xxxi}, were met, and even though there was evidence of racial polarization and that the lingering effects of discrimination could depress voter turnout, Section 2 of the Voting Rights Act had not been violated. Judge Alito joined a split decision affirming the lower court's ruling.^{xxxii}

Judge Rosenn (a Nixon appointee) vigorously dissented. He wrote that the majority had improperly “placed its imprimatur on a system which only by a series of flukes and anomalies has permitted any minority representation at all” contrary to Congress’ intent and had “overlooked the broad sweep of the Voting Rights Act.”^{xxxiii} Rosenn went on to point out that the court’s decision appeared to contradict a previous Third Circuit decision, in which the court had “repeatedly” emphasized the “rarity” of a case in which facts as in *Jenkins* are in violation of the Voting Rights Act.^{xxxiv} In other words, although all judicial tests of districting impropriety indicated that there was indeed a violation of the African American voters’ right to equal representation on the school board, Judge Alito believed that a series of unlikely one-time events, which allowed a few African American candidates to be elected, negated any acts of wrongdoing or problems with the district’s electoral process.

Both his statements and ruling on reapportionment show Alito’s limited understanding of the realities of racism in our society and the need for not just a single representative of color but rather the ability of a community to consistently elect a proportional number of desired representatives.

A note on the makeup of the Supreme Court

Judge Alito’s views are out of step with mainstream America and the justice system, as he is one of the most conservative Judges currently on a bench in the United States.^{xxxv} If confirmed to replace Sandra Day O’Connor – who has time and again cast the decisive vote to protect fundamental rights and freedoms - Alito will shift the Supreme Court in a dangerous direction for decades to come. In addition to negatively impacting the philosophical leaning of the court, the replacement of Justice O’Connor with Judge Alito would take the Supreme Court backwards in history, as it would actually become less diverse. Justice O’Connor broke barriers by becoming the first woman on the Supreme Court. She served as a voice and vote for strong protections against discrimination in education and employment, securing reproductive freedom and upholding many important rights for women and people of color. It would be an injustice not only to her legacy but also to the America people to take the Supreme Court backwards. As Justice O’Connor so eloquently stated in the *Grutter* opinion, “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.” Indeed this sentiment becomes even truer when looking at the nation’s highest court.

The concern that Alito would overturn well-established legal principles and social achievement in the areas of women’s rights and civil rights, that the YWCA has worked to protect for almost 150 years, is too great to ignore. That is what his record indicates and furthermore, during his confirmation hearing he stated, “If I’m confirmed...I’ll be the same person I was on the Court of Appeals.”^{xxxvi} For these reasons, the YWCA USA feels that Judge Alito’s confirmation to the Supreme Court would negatively impact the lives of women and people of color and has therefore decided to oppose his nomination to the Supreme Court. **The YWCA USA urges the United States Senate to oppose the confirmation of Judge Samuel Alito.** Senators must stand up and protect the rights of the people they represent by voting AGAINST Alito’s lifetime appointment to the Supreme Court. The nation has come too far in the fight for equality and worked too hard to protect the rights of all individuals. If confirmed, Samuel Alito would reverse important gains that have been made in the areas of women’s rights and civil rights. This is not only bad for the country but it is disgraceful to the legacy of Justice O’Connor. The YWCA USA encourages the President to withdraw the nomination of Samuel Alito and find a nominee that is highly qualified with the background, experiences and heritage that reflect the diversity of America.

RESOURCES

For more information on Judge Alito please visit: <http://www.independentcourt.org/>

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- ⁱ U.S. Department of Labor. <http://www.dol.gov/esa/whd/fmla/>.
- ⁱⁱ Chittester v. Department of Community and Economic Development and Nevada Department of Human Resources v. Hibbs.
- ⁱⁱⁱ Chittester v. Department of Community and Economic Development, 226 F.3d at 229 (2000).
- ^{iv} Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003).
- ^v Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d.
- ^{vi} See Casey, 505 U.S. at 887-99 (Joint opinion by O'Connor, J., Kennedy, J., and Souter, J.).
- ^{vii} *Id.* at 883.
- ^{viii} Casey, 947 F.2d at 722 (Alito, J., concurring and dissenting).
- ^{ix} 1985 PPO Non-career appointment form of Samuel Alito Jr.
- ^x 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" at 8 (June 3, 1985).
- ^{xi} The U.S. Equal Employment Opportunity Commission. <http://www.eeoc.gov/policy/vii.html>.
- ^{xii} National Committee on Pay Equity. (2001) *The Wage Gap By Education*. <http://www.pay-equity.org/info-education.html>
- ^{xiii} Goldstein, A. & Chone, S. (January, 1 2006) "Alito, In and Out of the Mainstream" *Washington Post*.
- ^{xiv} Sheridan v. E.I. DuPont de Nemours and Co, 100 F.2d 1061 (3d Cir. 1996).
- ^{xv} Bray v. Marriott Hotels, 110 F.3d 986, 993 (3d Cir. 1997).
- ^{xvi} *Id.* at 1003.
- ^{xvii} National Conference for Community and Justice.
- ^{xviii} Letter to FBI Director William Webster regarding investigation techniques of the FBI from Samuel Alito (Jan. 10, 1986).
- ^{xix} Becker, J. & Goldstein, A. (Nov. 22, 2005). "'86 Alito Memo Argues Against Foreigners' Rights." *Washington Post*.
- ^{xx} Lee v. Ashcroft. 368 F.3d 225 n.11 (3d. Cir. 2004).
- ^{xxi} Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993).
- ^{xxii} *Id.* at 1243.
- ^{xxiii} 1985 PPO Non-career appointment form of Samuel Alito Jr.
- ^{xxiv} EEOC v. Local 28 of The Sheet Metal Workers International Association, 753 F.2d 1172, 1186 (2d Cir. 1985) *aff'd*, 478 U.S. 421 (1986).
- ^{xxv} *Id.* at 496 (O'Connor, J., concurring in part and dissenting in part). *See also id.* at 474-75 (plurality opinion); *id.* at 483 (Powell, J., concurring).
- ^{xxvi} 1985 PPO Non-career appointment form of Samuel Alito Jr. lists the Concerned Alumni of Princeton as one of the associations he is a member of.
- ^{xxvii} T. Harding Jones, (Feb. 26, 1973), "It Is Time . . . For Some Answers," *Prospect* at 5 (emphasis added).
- ^{xxviii} Grutter v. Bollinger, 539 U.S. 306, 328 (2003).
- ^{xxix} 1985 PPO Non-career appointment form of Samuel Alito Jr.
- ^{xxx} Jenkins v. Manning, 116 F.3d 685 (3d Cir. 1997).
- ^{xxxi} Thornburg v. Gingles, 478 U.S. 30 (1986).
- ^{xxxii} 116 F.3d 685 (3d Cir. 1997).
- ^{xxxiii} *Id.* at 701, 700.
- ^{xxxiv} *Id.* at 702.
- ^{xxxv} S. Henderson and H. Mintz, (Dec. 1, 2005) "Review of cases shows Alito to be staunch conservative," *Knight-Ridder Newspaper*. This was a comprehensive review of Alito's 311 published opinions.
- ^{xxxvi} Supreme Court Nominee Samuel Alito confirmation hearing. (1/11/06).