For Immediate Release
Date: July 13, 2018

Why Lip Service To Precedent Is Not Enough – Judges Nominated To The Supreme Court By Republican Presidents Told The Senate They Would "Follow The Law Of Judicial Precedent" Only To Overturn It, Harming Working Americans

REPUBLICAN-NOMINATED SUPREME COURT JUSTICES HAVE REPEATEDLY PROMISED DEFERENCE TO PRECEDENT IN THEIR CONFIRMATION HEARINGS

Justice Neil Gorsuch: "**All precedent of the United States Supreme Court deserves the respect of precedent, which is quite a lot. It's the anchor of the law,** it's the starting place for a judge, and the Chairman kindly held up my over-long book, right, and that's the law of precedent." [Confirmation Hearing before Senate Judiciary Committee via CQ, 3/21/17]

Justice Neil Gorsuch: "I will follow the law of judicial precedent in this and in every other area, Senator, it's my promise to you." [Confirmation Hearing before Senate Judiciary Committee via CQ, 3/22/17]

Justice Neil Gorsuch: "The way I look at it is, I don't come at these issues fresh. **It's not whether I agree or disagree with any particular precedent. That would be an act of hubris. Because a precedent, once it's decided, it carries far more weight than what I personally think."** [Confirmation Hearing before Senate Judiciary Committee via CQ, 3/22/17]

Chief Justice John Roberts: "I will follow the Supreme Court's precedents consistent with the principles of stare decisis." [Confirmation Hearing before Senate Judiciary Committee, 9/14/05]

Chief Justice John Roberts: "As a judge, I have no agenda. **I have a guide in the Constitution and the laws and the precedents of the court and those are what I would**

apply with an open mind, after fully and fairly considering the arguments and assessing the considered views of my colleagues on the bench. That's the way I would approach cases in that area, as in any other area." [Confirmation Hearing before Senate Judiciary Committee, 9/14/05]

Chief Justice John Roberts: "And I know that the responsibility of a judge confronting this issue is to decide the case according to the rule of law consistent with the precedents; not to take sides in a dispute as a matter of policy, but to decide it according to the law." [Confirmation Hearing before Senate Judiciary Committee, 9/14/05]

Justice Samuel Alito: "It is a strong principle. … And in general, courts follow precedents. They need a special—the Supreme Court needs a special justification for overruling a prior case." [Confirmation Hearing before Senate Judiciary Committee, 1/10/06]

Justice Samuel Alito: "Well, I agree that in every case in which there is a prior precedent, the first issue is the issue of stare decisis, and the presumption is that the Court will follow its prior precedents. There needs to be a special justification for overruling a prior precedent." [Confirmation Hearing before Senate Judiciary Committee, 1/10/06]

Justice Samuel Alito: "Stare decisis, which I was talking about earlier, is an important limitation on what the Supreme Court does. And although the Supreme Court has the power to overrule a prior precedent, it uses that power sparingly, and rightfully so. It should be limited in what it does." [Confirmation Hearing before Senate Judiciary Committee, 1/10/06]

Justice Clarence Thomas: "Senator, there is Justice Marshall's dissent in Payne v. Tennessee, I think is a very important admonition, and that is that **you cannot simply, because you have the votes, begin to change rules, to change precedent**." [Confirmation Hearing before Senate Judiciary Committee, 9/16/91]

Justice Clarence Thomas: "I think, though, that when you have a precedent that has been relied on in the development of subsequent Supreme Court law, it is not one that was simply there and has never been relied on by the Court, but I think that you would give significant weight to repeated use of that precedent and repeated reliance on that precedent." [Confirmation Hearing before Senate Judiciary Committee, 9/16/91]

BUT ONCE ON THE BENCH, CONSERVATIVE JUSTICES HAVE DONE THE EXACT OPPOSITE, OVERRULING PRECEDENT WITH NARROW MAJORITIES ALONG IDEOLOGICAL LINES

Citizens United v. Federal Election Commission (2010)

In a 5-4 decision, the Court unleashed the power of corporate interests in our elections by removing restrictions on corporate independent expenditures, overruling two legal precedents in the process.

Chief Justice Roberts, Concurring: "In conducting this balancing, we must keep in mind that stare decisis is not an end in itself. It is instead 'the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.' Vasquez v. Hillery , 474 U. S. 254, 265 (1986) . Its greatest purpose is to serve a constitutional ideal—the rule of law. It follows that **in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.**" [Concurring Opinion in Citizens United v. FEC, 1/21/10]

Janus v. AFSCME (2018)

Justice Gorsuch and his conservative colleagues overturned 41 years of precedent in a decision striking down "fair share" fees for unions, jeopardizing the future of unions and harming working families in the process.

NPR: "In a blow to organized labor, the U.S. Supreme Court ruled Wednesday that government workers who choose not to join a union cannot be charged for the cost of collective bargaining. The vote was a predictable 5-4. Justice Samuel Alito wrote the majority opinion with the court's conservatives joining him. … The decision reverses a 4-decades-old precedent and upends laws in 22 states. It also comes on the last day of this Supreme Court term, adding an exclamation point on the final sentence of a chapter that began with the appointment of conservative Justice Neil Gorsuch and saw conservative wins in decision after decision." [NPR, 6/27/18]

Leegin Creative Leather Products v. PSKS (2007)

The Court overturned a nearly century-old antitrust law in a case that made it easier for manufacturers to manipulate retail prices.

New York Times: "In an important antitrust ruling, the court voted 5 to 4 to overturn a 96-year-old precedent under which it was always illegal for a manufacturer and retailer to agree on minimum resale prices. The legality of price maintenance will now be judged case by case for its impact on competition. Justice Kennedy wrote the opinion in Leegin Creative Leather Products Inc. v. PSKS Inc., No. 06-480. The dissenters were Justices Breyer, Stevens, Souter and Ginsburg." [New York Times, 7/1/07]

Montejo v. Louisiana (2009)

Conservative justices weakened Sixth Amendment rights, nixing a rule that said police cannot question a defendant who is represented by counsel unless the defendant initiates the communication with police.

Washington Post: "The Supreme Court overturned a long-standing ruling yesterday that barred police from initiating questions unless a suspect's lawyer was present, a move that will make it easier for prosecutors to interrogate suspects. The high court, in a 5 to 4 decision, overturned the 1986 Michigan v. Jackson ruling, which said police may not initiate

questioning of a suspect who has a lawyer or has asked for one unless the attorney is present. The Jackson ruling applied even to suspects who agreed to talk to the authorities without their lawyers. The court's conservatives overturned that opinion, with Justice Antonin Scalia saying 'it was poorly reasoned.'" [AP via Washington Post, 5/27/09]

Justice Stevens, dissenting: "Today the Court properly concludes that the Louisiana Supreme Court's parsimonious reading of our decision in Michigan v. Jackson, 475 U. S. 625 (1986), is indefensible. Yet the Court does not reverse. Rather, on its own initiative and without any evidence that the longstanding Sixth Amendment protections established in Jackson have caused any harm to the workings of the criminal justice system, the Court rejects Jackson outright on the ground that it is 'untenable as a theoretical and doctrinal matter.' Ante, at 6. **That conclusion rests on a misinterpretation of Jackson's rationale and a gross undervaluation of the rule of stare decisis**." [Dissenting Opinion in Montejo v. Louisiana, 5/26/09]

District of Columbia v. Heller (2008)

Implicitly reversing nearly 70 years of precedent, the Supreme Court's conservative majority held for the first time that the Second Amendment guarantees an individual the right to possess a firearm "unconnected with militia service."

Justice Stevens, dissenting: "The view of the [Second] Amendment we took in [*United States v.*] *Miller* — that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons — is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption. … The opinion the Court announces today fails to identify any new evidence supporting the view that the Amendment was intended to limit the power of Congress to regulate civilian uses of weapons." [Dissenting Opinion in District of Columbia v. Heller, 6/26/08]

National Association of Home Builders v. Defenders of Wildlife (2007)

Departing from nearly three decades of precedent, the Supreme Court's conservatives adopted a narrow view of the Endangered Species Act, holding that its protections do not extend to certain actions by federal agencies such as transferring pollution permits from one agency to another.

Justice Stevens, dissenting: "[The Court] erroneously concludes that the ESA contains an unmentioned exception for nondiscretionary agency action and that the statute's command to enjoin the completion of the Tellico Dam depended on the unmentioned fact that the TVA was attempting to perform a discretionary act. But both the text of the ESA and our opinion in [*Tennessee Valley Authority v.*] *Hill* compel the contrary determination that Congress intended the ESA to apply to 'all federal agencies' and to all 'actions authorized, funded, or carried out by them.'" [Dissenting Opinion in National Association of Home Builders v. Defenders of Wildlife, 6/25/07]

PAST SUPREME COURT NOMINEES HAVE BEEN CLEAR WHERE THEY STAND ON PREVIOUSLY DECIDED CASES, ANSWERING FAIR QUESTIONS WHEN ASKED DURING THEIR CONFIRMATION HEARINGS—AND JUDGE KAVANAUGH SHOULD DO THE SAME

Chief Justice John Roberts:
KOHL: "Judge, as we all know, the Griswold v. Connecticut case guarantees that there is a fundamental right to privacy in the Constitution as it applies to contraception. Do you agree with that decision and that there is a fundamental right to privacy as it relates to contraception? In your opinion, is that settled law?"
ROBERTS: "**I agree with the Griswold court's conclusion that marital privacy extends to contraception and availability of that.**" [Confirmation Hearing before Senate Judiciary Committee, 9/13/15]

Chief Justice John Roberts:
BIDEN: "Do you think there is a liberty right of privacy that extends to women in the Constitution?"
ROBERTS: "Certainly."
BIDEN: "In the 14th Amendment?"
ROBERTS: "Certainly." [Confirmation Hearing before Senate Judiciary Committee, 9/13/15]

Justice Anthony Kennedy:
KENNEDY: "I think Brown v. Board of Education was right when it was decided, and I think it would have been right if it had been decided 80 years before. I think Plessy v. Ferguson was wrong on the day it was decided." [Confirmation Hearing before Senate Judiciary Committee, 12/15/87]

Justice Ruth Bader Ginsburg:
GlNSBURG: "The argument was, it was her right to decide either way, her right to decide whether or not to bear a child."
BROWN: "In this case, am I correct in assuming that any restrictions from her employer to that option, or to that right, would be constrained by the equal protection clause?"
GlNSBURG: "Yes. In the Struck case, it was a woman's choice for childbirth, and the Government was inhibiting that choice. It came at the price of an unwanted discharge from service to her country. But you asked me about my thinking on equal protection versus individual autonomy. My answer is that both are implicated. **The decision whether or not to bear a child is central to a woman's life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices**."
…
BROWN: "So the rights are not equal in this regard, because the interests are not equal?"
GINSBURG: "**It is essential to woman's equality with man that she be the decision maker, that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex.** Consider in this connection the line of cases about procreation. The importance to an individual of the choice whether to beget or bear a child has been recognized at least since Skinner v. Oklahoma (1992). That

case involved a State law commanding sterilization for certain recidivists. Sterilization of a man was at issue in Skinner, but the importance of procreation to an individual's autonomy and dignity was appreciated, and that concern applies to men as well as women. **Abortion prohibition by the State, however, controls women and denies them full autonomy and full equality with men. That was the idea I tried to express in the lecture to which you referred.** The two strands—equality and autonomy—both figure in the full portrayal. Recall that Roe was decided in early days. Roe was not preceded by a string of women's rights cases. Only Reed v. Reed (1971) had been decided at the time of Roe. Understanding increased over the years. What seemed initially, as much a doctor's right to freely exercise his profession as a woman's right, has come to be understood more as a matter in which the woman is central." [Confirmation Hearing before Senate Judiciary Committee, 7/21/93]