

TESTIMONY of VICTORIA F. NOURSE
Before the House Committee on Oversight and Reform
Rep. Carolyn B. Maloney

[Please note that this is a version of the oral testimony I will provide. Should the Committee seek further legal material to support these claims, I am happy to provide those items for inclusion in the record.]

Thank you for your invitation to testify. My name is Victoria Nourse, and I am the Ralph Whitworth Professor of Law at Georgetown. I am an expert in constitutional and statutory interpretation. I have worked as a lawyer in the White House, at the Department of Justice, and in the Senate as well as private practice.

* * *

I ask first year constitutional law students to read the constitution's text. Then I ask whether they can be fired from their jobs just because they are women--or men--for that matter. Eagerly, they search the constitution's text for any mention of sex discrimination and work¹ but are soon disappointed. They end up learning that many of the rights that women take for granted, like the right to work for a living without discrimination, are not specified in the constitution's text. Congress created those rights.² That means that those rights may be taken away by Congress and by the nine unelected men and women on the Supreme Court.

¹ The sole mention of sex is in the Nineteenth Amendment which provides women with the right to vote.

² The right to be free of sex discrimination in employment is provided by Title VII of the Civil Rights Act of 1964. 42 U.S.C. sec. 2000e. As many know, this provision was added in part to kill the bill and even some women opposed it. *See* WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION & INTERPRETATION 43 (2014) (discussing how liberal men and one democratic woman opposed the addition of "sex" to the Act).

Justice Scalia was quite candid about the text of the constitution and the Fourteenth Amendment which purports to apply “equal protection” of the law but, according to him, does not apply to women:

Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. . . . If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws.³

Justice Scalia told women to look to Congress, not the constitution, for their rights.

* * *

Recently, I watched the brave testimony of gymnasts Simone Biles, Aly Raisman, Maggie Nichols and others who testified before the Senate about their sexual assaults and why the federal government had done so little, how the law had failed them, how they were disbelieved and ignored. It was déjà vu in a sad sense. Thirty years earlier, in 1990, as a baby lawyer, I watched equally brave young women tell the Senate Judiciary Committee and its Chairman, then-Senator Joe Biden, that they had been sexually assaulted, and that the states’ legal system had assaulted them again, treating them as second-class citizens, unentitled to protection, the cause of their own victimization.

As I watched the brave young Olympians talk about how they were not protected by law, my mind turned to the constitution. I knew the deep reason for the federal government’s ambivalent response and that deep reason depended, in part, on the Supreme Court.⁴

³ This is reported in the [Atlantic Magazine](#), Max Fisher, *Scalia Says Women are Not Protected from Gender Discrimination* (Jan. 4, 2011), based on an interview with the *California Lawyer*. This position follows from the constitutional philosophy known as “originalism”—the idea that originally, the 14th Amendment was proposed after the Civil War to create equality between black and white men.

⁴ For a lengthier explication of this, see Victoria Nourse, *The Supreme Court Ruling that Stopped Larry Nassar’s Victims from Getting Justice*, Slate (Sept. 22, 2021) and Victoria Nourse, *A Case for the Equal Rights Amendment*, Ms. Magazine 26-30 (hard copy) (Fall 2021).

Let me explain: In 1994, Congress passed a bipartisan bill that might have helped many sexually assaulted and harassed women. The original Biden Violence Against Women Act included a civil rights remedy that allowed women to go to civil court to sue the Harvey Weinstens and Larry Nassars of the world and defend against gender assaults. Women did not need the FBI or the state police or prosecutors to believe them.⁵ They could seek their own remedy for damages and accountability for sexual assault and harassment. And it worked for six years.

But then, in 2000, the Supreme Court struck it down. In *United States v. Morrison*, the Court held that Congress had no power to enact a civil rights law about crime under either the commerce clause or the 14th amendment.⁶ This ruling reflected exactly what Justice Scalia said: women were not protected under the constitution from many forms of gender bias, including violent gender bias. But notice the constitutional bait and switch. Justice Scalia had told women go to Congress for their rights since the constitutional text does not protect them. But, in *Morrison*, the Court said that Congress had no constitutional power to give women any rights when it came to sexual assault or domestic violence.

Congress should repass the original Biden civil rights remedy for survivors of sexual assault and harassment. There is a technical constitutional fix that is fairly easy⁷ even if it risks incomplete coverage. I urge members of the House to do it; the Biden administration supports it.

⁵ On the persistence of this problem, see DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS (2021). When Harvey Weinstein’s survivors did try to sue for damages, they were forced in some cases to try a federal civil law that applied to gangsters, civil RICO; when that failed, some turned to sex trafficking laws, in effect making Weinstein a pimp and his survivors into prostitutes to gain damage recovery. State law fares little better as it still includes elements that do not protect women from sex stereotyping, such as comparative fault (meaning that the woman is responsible for her own assault). Should the committee seek evidence of this, I am happy to provide it for the record.

⁶ 529 U.S. 598 (2000). *Morrison* is not the only Supreme Court case expressing hostility to women’s rights in the violence arena. In *Castle Rock v. Gonzales*, 545 U.S. 748, 760-62 (2005) the Supreme Court, via an opinion written by Justice Scalia, ruled that a state domestic violence protective order and statute that required arrest did not in fact require arrest. It is one of the interesting facets of textualism that its practitioners often do not do as they say they do, they often pick and choose text. See William Eskridge & Victoria Nourse, *Textual Gerrymandering* (forthcoming 2022, NYU LAW REVIEW).

⁷ The constitutional “fix” requires adding a jurisdictional predicate that the facts in the case show a commercial effect. (Under the Supreme Court’s current jurisprudence, women’s rights tend to end at the end of commerce). Similar jurisdictional provisions have allowed Congress to pass hate crimes laws despite *Morrison*. Because this would require proof of a commercial connection, however, cases with an insufficient connection to commerce might not be covered. Then, too, some judges have recently expressed doubt that hate crimes laws survive *Morrison*. See, e.g., *United States v. Hill*, 927 F.3d 188, 218-20 (2019) (Agee, J. dissenting) (arguing that Congress does not have the power to enact hate crimes laws because of *Morrison*).

But the moral of my story is broader: we now have a Court of nine unelected men and women, six of whom idolize Justice Scalia. The six Justices who have publicly aligned themselves with Justice Scalia have a judicial philosophy that I have studied and written about at length. Some people call it “originalism,” but it is really better known as “textualism”: if something is not in the constitution’s text, it does not exist, and is excluded. The entire point of textualism, in my view, is to overturn precedent, because textualism is new, not old (it never existed when I went to law school). So even if there are 1970s-era judicial precedents that quasi-protect⁸ women, there is no guarantee under the current Trump-nominated Supreme Court that they will not be reversed.⁹

So, ladies: be afraid. Other than the 19th Amendment, which gave women the right to vote, women are not recognized in the constitution’s text. Without the Equal Rights Amendment (ERA) as a constitutional insurance policy, all of the things that women take for granted could simply go away with a vote of five men on the Supreme Court.

Unequal protection is not just a fantasy, it is a reality for too many women today. Each and every day that a woman is sexually assaulted or harassed in America is a day in which women are treated as objects of sexual gratification, their bodies for the use of others. Women of color and young women are disproportionately harmed; current harassment laws, under Title VII, for example do not apply to gig workers or women in caregiving or women who are independent contractors.¹⁰ Women live in an America in which unequal protection from such offenses is far too palpable.

It is no wonder that interest in the ERA has mushroomed in the #MeToo/Time’s Up era. Women are sick of laws that don’t equally protect them from this behavior. They know that the current Supreme Court is likely hostile to their rights. They deserve constitutional insurance. That

⁸ I use this term because constitutional protections for women are less than for other disadvantaged groups. Women are considered of “intermediate” constitutional status. See *United States v. Virginia*, 518 U.S. 515, 567-68 (1996) (Scalia, J. dissenting) (“We have no established criterion for “intermediate scrutiny” either, but essentially apply it when it seems like a good idea to load the dice.”).

⁹ For an example where the Supreme Court reversed a longstanding decades-old precedent based on reading of the text, see *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Scalia, J.).

¹⁰ Title VII only applies to businesses with 15 or more employees and to employees.

constitutional insurance policy is the Equal Rights Amendment. Congress should extend the deadline¹¹ with all deliberate speed.

¹¹ Congress has plenary power to extend the deadline. Lest there be a textual argument against this, see *HollyFrontier Cheyenne Refining v. Renewable Fuels Assoc.*, 141 S. Ct. 2172 (2021) (Gorsuch, J.) (reading the term “extension” to include an extension after a lapse in time).