NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

THE SUPREME COURT: WHY IT MATTERS TO WOMEN

The Supreme Court's decisions have a direct impact on the lives of women and their families across the country every day. The Supreme Court decides cases involving legal issues of critical importance to women, including whether they have a constitutional right to privacy; how effective federal anti-discrimination protections will be designed to apply at work and at school; how stringently the constitutional guarantee of equal protection will be enforced to ensure that the government does not discriminate on the basis of sex; the scope of Congress' ability to enact health, safety and economic and social welfare legislation; and the extent to which individuals can enforce their rights in court. A number of these areas are discussed in more detail below.

***The constitutional right to privacy, including* Roe v. Wade*, is not secure*.** The Supreme Court has repeatedly recognized that the Constitution protects women from government intrusion into their most personal and private decisions. But even though staunch opponents of *Roe v. Wade*,[1] the 1973 decision that recognized that the constitutional right to privacy protects a woman's right to choose whether to have an abortion, have referred to that decision as "settled law," in 2007, five Justices on the Court overturned 30 years of constitutional law protecting women's health and put in jeopardy the fundamental freedom of individuals to make important life decisions. In *Gonzales v. Carhart* (2007),[2] both Chief Justice Roberts and Justice Alito joined the majority opinion that actually refused to reaffirm *Roe v. Wade*, leaving open the possibility of overruling it at a later date. Justices Scalia and Thomas have repeatedly stated, including in *Gonzales*, that *Roe v. Wade* should be overturned.[3] Thus, *Roe*, now severely weakened as its strong protections for women's health have been undone, is hanging by a thread.

- *What Lies Ahead:* States pass extreme limitations on a woman's ability to secure a safe and legal abortion every year, including direct challenges to *Roe v. Wade*. These laws give the Supreme Court the opportunity to overturn its own precedents. Decisions by federal courts of appeal reviewing challenges to abortion regulations under the new standards established in *Gonzales v. Carhart* are likely to come before the Supreme Court in the future.

- *What's at Stake in Future Supreme Court Nominations:* Justice Stevens has been a stalwart defender of a woman's constitutional right to decide whether to terminate a pregnancy. Were he to be replaced by someone less protective of this important right, women's constitutionally privacy rights could be narrowed.

Protections against discrimination in the workplace are at risk. Congress has passed a number of federal statutes that protect workers from discrimination in employment. These include Title VII of the Civil Rights Act of 1964, which bars discrimination on the basis of race, national origin, religion, or sex, including discrimination on the basis of pregnancy, in employment; the Age

[1] 410 U.S. 113 (1973).
[2] 550 U.S. 124 (2007).
[3] *See id.* (Thomas, J., dissenting, joined by Justice Scalia).

Discrimination in Employment Act; the Americans with Disabilities Act; and the Equal Pay Act, which requires employers to give men and women equal pay for equal work.

But slim majorities of the Court have been willing to upset settled interpretations and undermine the strong protections of these laws. For example, in 2007, in *Ledbetter v. Goodyear Tire & Rubber Co.*,[4] the Supreme Court, in a 5-4 decision, reversed the long-standing interpretation of Title VII that allowed victims of pay discrimination to challenge the discrimination as it continues over time. (The Court's decision was overturned by Congress, with the passage of the Lilly Ledbetter Fair Pay Act in January 2009). In addition, the Court's 2009 decision in *Gross v. FBL Financial Services*,[5] a case challenging age discrimination in employment, makes it exceedingly difficult for women who face both age and sex discrimination to assert both those claims. And, in *14 Penn Plaza LLC v. Pyett*,[6] the Court departed from its own long-standing precedent to hold in a 5-4 ruling that employees can lose their statutory right to bring a claim of discrimination in court under a collective-bargaining agreement that provides for arbitration of such claims. These decisions, like the decision in *Ledbetter*, weaken a woman's ability to enforce antidiscrimination statutes that are supposed to protect her on the job.

- *What Lies Ahead:* In 2001, the Court held (over Justice Stevens' dissent) that employees who are victims of discrimination could be required by their employers to submit their claims to arbitration and sign away their rights to sue under civil rights laws such as Title VII.[7] The Court is currently considering *Rent-A-Center v. Jackson*,[8] which presents the question of whether employees forced to sign unconscionable mandatory arbitration clauses can even have that claim heard by a court before being forced to arbitrate. In addition, the Ninth Circuit Court of Appeals recently ruled that the largest class action suit in U.S. history, in which plaintiffs claim that Wal-Mart discriminated against women in pay and promotions, can proceed.[9] Wal-Mart may appeal this decision to the Supreme Court this summer.

- *What's at Stake in Future Supreme Court Nominations:* Justice Stevens voted to secure many critical protections against sex discrimination, including sexual harassment, in the employment context during his tenure on the Court. He dissented in both *Gross* and *Pyett*, arguing that the majority's decision was inconsistent with its prior precedents. It is crucial that his replacement share his commitment to worker protections to prevent further limitations.

The Constitution's prohibition against sex discrimination by the government could be weakened. The Equal Protection Clause of the Fourteenth Amendment to the Constitution prohibits discrimination by the government, including on the basis of sex, in many spheres. The Court reviews official distinctions based on sex with "heightened scrutiny," and under this standard, has struck down numerous state and federal statutes and policies – including the exclusion of women

[4] 550 U.S. 618 (2007).
[5] 129 S.Ct. 2343 (2009).
[6] 129 S.Ct. 1456 (2009).
[7] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).
[8] 581 F.3d 912 (9th Cir. 2009), *cert. granted*, 78 USLW 3271 (U.S. Jan. 15, 2010) (No. 09-497).
[9] Dukes v. Wal-Mart Stores Inc., ___ F.3d ___, 2010 WL 1644259 (9th Cir. Apr. 26, 2010).

from juries through peremptory challenges[10] and the exclusion of women from the public Virginia Military Institute based on stereotypical assumptions that women could not succeed at the school.[11] Justices Scalia and Thomas take issue with applying heightened scrutiny to sex discrimination by the state, and in 2001, in *Nguyen v. INS*, [12] a 5-4 majority upheld federal immigration laws that make it more difficult for unmarried men than unmarried women to confer citizenship on their non-marital children.

- *What Lies Ahead:* Next Term, the Court will review a case, *Flores-Villar v. United States*,[13] which presents the question of how the Equal Protection Clause applies to another provision of immigration law that treats unmarried men and women differently in conferring citizenship on their children, and presents the opportunity to further weaken the Constitution's protections. In addition, several cases challenging laws barring same-sex marriage as unconstitutional (including on Equal Protection grounds) are currently being litigated and may well come before the Supreme Court.

- *What's at Stake in Future Supreme Court Nominations:* Justice Stevens joined the majority in *Nguyen* in 2001, which relied heavily on one of his earlier opinions, though Justices O'Connor and Souter joined the dissent. As a result, the strength of the constitutional standard protecting women against harmful gender stereotypes and sex-based classifications in the law in the future may turn on the vote of Justice Stevens' successor in *Flores-Villar*.

Efforts to increase equal opportunity and diversity in education are under attack. In 2003, the Court upheld the affirmative action program of the University of Michigan Law School by a 5-4 vote, with Justice O'Connor casting the deciding vote and writing the majority opinion.[14] After Justice O'Connor was replaced by Justice Alito, the Court in 2007 struck down efforts by two school districts to maintain racial integration in individual schools.[15] Although the majority importantly did not rule out the consideration of race in student assignment plans, the sharply divided decision limited the ability of schools to promote diversity in schools.

- *What Lies Ahead:* As universities and school districts develop admissions and other policies in the wake of the school integration decisions, court challenges to those policies are likely. For example, the University of Texas' admissions policy, which takes race into account in order to increase academic diversity, is currently under review in federal court (the Department of Justice has filed a brief supporting the admissions policy).[16]

- *What's at Stake in Future Supreme Court Nominations:* Justice Stevens joined the majority in the University of Michigan Law School case, and wrote a scathing dissent in the 2007 case. The views of his replacement on the application of these two precedents will shape the extent to which schools may as a practical matter promote diversity in their educational programs.

---

[10] J. E. B. v. Alabama ex rel. T. B., 511 U.S. 127 (1994)
[11] United States v. Virginia, 518 U.S. 515 (1996)
[12] 533 U.S. 53 (2001).
[13] 536 F.3d 990 (9th Cir. 2008), *cert. granted* 78 USLW 3537, 78 USLW 3546 (U.S. Mar 22, 2010) (No. 09-5801).
[14] Grutter v. Bollinger, 539 U.S. 306 (2003).
[15] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).
[16] Fisher v. Univ. of Texas at Austin, 645 F.Supp.2d 587 (W.D. Tex. 2009), *appeal docketed*, No. 09-50822 (5th Cir.).

Protections against sex discrimination in schools hang in the balance. Title IX of the Education Amendments of 1972 prohibits all forms of sex discrimination in educational programs that receive federal funds. Its impact has been broad and far-reaching, improving educational and career opportunities for students in school, providing protection against harassment, and tremendously increasing the number of women in high school and intercollegiate athletics. But many of its broad protections have been upheld by narrow majorities. For example, in 1999, with Justice O'Connor on the bench, only five Justices (including Justice Stevens) voted in *Davis v. Monroe County Bd. of Educ.* to hold that Title IX protects students who are sexually harassed by their peers.[17]

- *What Lies Ahead:* There is a risk that the important protections established in *Davis* may be eroded in the future. As with the earlier decisions overturned by *Gonzales v. Carhart* and *Citizens United v. Fed. Election Comm'n*,[18] Justice Kennedy wrote an impassioned dissent in *Davis*.

- *What's at Stake in Future Supreme Court Nominations:* From his opinion establishing a private right of action in *Cannon v. Univ. of Chicago*[19] to *Jackson v. Birmingham Sch. Bd.*,[20] where he joined the majority to hold that retaliation is a protected form of discrimination, Justice Stevens has played an important role in establishing strong interpretations of Title IX. It is critical that his replacement also share this commitment to broadly enforcing protections against sex discrimination in education.

Lawmakers' ability to protect the health and safety of the American people is on the line. Congress has the authority to protect public health and safety under, among other constitutional provisions, the Commerce Clause. Recently, and in many cases by 5-4 votes, the Court limited the constitutional authority of Congress to pass legislation addressing violence against women[21] or keeping schools free from the dangers of firearms.[22] The Court also, during this same period, interpreted the Eleventh Amendment to limit Congress' ability to give state employees the right to sue for damages for disability[23] or age discrimination.[24]

Beginning in 2003, however, this disturbing tide began to ebb. In *Nevada Dep't of Human Res. v. Hibbs*,[25] the Court held, 6-3, that Congress had the authority under the Fourteenth Amendment to allow state employees to sue for damages under the Family and Medical Leave Act. The next year, in *Tennessee v. Lane*,[26] the Court allowed individuals confined to wheelchairs to sue state governments for damages under Title II of the Americans with Disabilities Act when they couldn't access county courthouses without elevators. And in 2005, in *Gonzales v. Raich*,[27] Justice Stevens

[17] 526 U.S. 629 (1999).
[18] 558 U.S. ___ (2010).
[19] 441 U.S. 677 (1979).
[20] 544 U.S. 167 (2005).
[21] United States v. Morrison, 529 U.S. 598 (2000).
[22] United States v. Lopez, 514 U.S. 549 (1995).
[23] Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001).
[24] Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).
[25] 538 U.S. 721 (2003).
[26] 541 U.S. 509 (2004).
[27] 545 U.S. 1 (2005).

wrote a majority opinion upholding Congress' authority to regulate controlled substances under the Commerce Clause, which helped reaffirm a broad interpretation of Congress' authority to issue health and safety regulations.

- *What Lies Ahead:* It remains to be seen how Chief Justice Roberts and Justice Alito will vote on future challenges to Congress' Commerce Clause authority. In the near future, the Court may review challenges to the recently-enacted health care reform legislation on a number of grounds, including whether the legislation exceeds Congress' authority under the Commerce Clause.

- *What's at Stake in Future Supreme Court Nominations:* Justice Stevens consistently voted in support of robust congressional authority to enact important health and safety regulations and took a leading role in cases that limited state immunity -- including convincing Justice Kennedy and Justice Scalia to join his opinion in *Gonzales v. Raich*. The absence of his leadership abilities and consensus-building skills will be particularly significant in this line of cases.

The ability to enforce individual rights in court is at a crossroads. An important federal civil rights law, Section 1983 (42 U.S.C. § 1983), provides individuals with the ability to enforce their federal rights – including constitutional rights -- in court. This law allows individuals who believe that state and local governments violated their federally-protected rights to sue to protect their rights.

In 2002, the Court issued an opinion in *Gonzaga Univ. v. Doe*[28] that severely limits when an individual can sue for violations of federal rights under Section 1983. Five of the Justices used the occasion to broadly state their hostility to such individual suits unless Congress has "unambiguously" granted the right to sue. In 2005, in *Town of Castle Rock, Colorado v. Gonzales*,[29] the Court held that a woman had no redress in federal court under Section 1983 despite the fact that her children were murdered after her repeated calls for enforcement of a restraining order against her estranged husband were ignored by the police department.

- *What Lies Ahead:* Lower courts are issuing conflicting decisions on whether to allow a private right of action to seek relief for state violations of the laws governing Medicaid and other federally funded assistance programs based on their interpretation of *Gonzaga*.

- *What's at Stake in Future Supreme Court Nominations:* Justice Stevens has been a strong vote in favor of ensuring that individuals have the ability to enforce federal rights in court under Section 1983. He dissented in both *Gonzaga* and *Castle Rock*. With his retirement, one of the strongest voices for individuals to vindicate their federal rights is gone.

Many key legal protections upon which women have relied for many years are gravely at risk. It is critically important that Justice Stevens' replacement, and any future nominees to the Supreme Court, safeguard the constitutional and statutory protections upon which women have long relied.

[28] 536 U.S. 273 (2002).
[29] 545 U.S. 748 (2005).