THE SUPREME COURT AND WOMEN’S RIGHTS:
FUNDAMENTAL PROTECTIONS HANGING IN THE BALANCE

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INTRODUCTION..................................................................................................................i

I. FUNDAMENTAL CONSTITUTIONAL PROTECTIONS..............................................1

A. Four Justices Do Not Support Effective Constitutional Protection of a Woman’s Right to Choose........................................................................................................1

1. Roe v. Wade Could be Overruled Outright or in Effect.....................1

2. Abortion Could be Redefined to Encompass Some Contraceptives.........................................................................................................................4

3. Access to Women’s Health Clinics Could Lose Protection.........4

4. Pregnant Women’s Right to Privacy Could be Invaded.................5

B. Several Justices Do Not Accept the Current Equal Protection Standard Applying to Sex Discrimination, Which Has Opened Jobs, Education and Rights of Citizenship to Women.........................................................5

1. The Heightened Scrutiny Standard for Sex Discrimination Is Being Weakened....................................................................................................................5

2. The Threat to Affirmative Action Programs Remains ...............8

II. STATUTORY PROTECTIONS: As the Court Expands the Concept of Federalism, Congress’ Authority is Being Eroded and Key Federal Statutory Protections for Women Have Been Lost or Are in Place Only as a Result of Slim Majorities........................................................................................................10

A. Protections Against Employment Discrimination Have Been Weakened.........................................................................................................................11

1. The Right of State Employees to Sue Their Employers for Damages Has Been Limited.................................................................11

2. Employers Can Require Their Employees to Sign Arbitration Clauses Under Which They Surrender The Right to Sue Under Title VII and Other Civil Rights Laws........15
3. The Statute of Limitations Could Pose Serious Obstacles to Plaintiffs in Title VII Cases ......................................................16

4. The Award of Punitive Damages Under Title VII Could Become Almost Impossible.........................................................16

5. The Award of Attorneys’ Fees to Plaintiffs in Civil Rights Actions Has Been Limited..........................................................17

6. Sexual Harassment Under Title VII Could Become More Difficult to Prove ...........................................................................17

B. Protections Against Discrimination in Education Have Been Weakened..................................................................................18

1. Private Rights of Action Under Title IX May be Limited........18

2. Protection From Sexual Harassment Under Title IX Could be Further Weakened.................................................................19

3. The Award of Punitive Damages Under Title IX is Endangered.........................................................................................20

C. Protection of Women’s Health, Safety and Welfare Is More Difficult......................................................................................20

1. Congress’ Authority to Protect Women’s Rights Under the Commerce Clause Has Been Restricted.................................21

2. Federal Agencies’ Power to Implement Their Statutes Has Been Weakened .................................................................22

3. The Enforcement of Individual Rights Under 42 U.S.C §1983 is Being Cut Back..............................................................23

4. The Right to Representation to Protect Health and Welfare Could be in Danger ..............................................................24

CONCLUSION .................................................................................................................25
INTRODUCTION

One Justice.

One vacancy. One nomination. One confirmation.

That is all that it may take for our nation’s highest court to deny women the right to privacy and choice; to equal protection of the law; and to essential protection against discrimination in education, employment, health and elsewhere.

Key recent cases with an impact on women’s rights were decided by narrow, often one-vote margins, over vigorous dissents. Therefore, one new Justice on the U.S. Supreme Court who does not support women’s rights could mean dramatic erosion in protections for these rights. On the other hand, one new Justice who supports women’s rights could restore, or prevent the further erosion of, rights that have been lost in the last few years. The cases decided in the last few terms underscore how critically important the votes of one new Justice will be to the rights and well-being of American women and their families.

The Right to Privacy

In \textit{Stenberg v. Carhart} (2000), the most recent case directly concerning the right to choose, four Justices dissented when Justice O’Connor applied \textit{Roe v. Wade} to strike down a Nebraska “partial birth abortion” law that would have criminalized most second trimester abortions, and that had no exception for abortions that were necessary to protect the health of the woman.

Now, Congress has enacted the Partial-Birth Abortion Ban Act of 2003, a federal version of the Nebraska law that was struck down in \textit{Stenberg v. Carhart}. The new federal law was immediately challenged in three federal district courts across the country, all of which found it to be unconstitutional because it has the same defects as the Nebraska law. These decisions are being appealed by the Administration, and are likely to end up before the Supreme Court. One additional Justice who shares the views of the anti-choice Justices currently on the Court could be disastrous for women who need second trimester abortions and whose health is on the line. In addition, Congress has enacted the Unborn Victims of Violence Act, which elevates the rights of a fetus, and it is considering other legislation that would limit women’s right to choose at all stages of pregnancy. Ominously, the supporters of the recent legislation have stated that they expect that when challenges to the new federal laws reach the Supreme Court, one or more additional Justice who shares their views will have been appointed.
Equal Protection and Affirmative Action

In *Nguyen v. INS* (2001), the most recent equal protection case involving sex discrimination, the Court upheld, 5-4, immigration laws that make it more difficult for male citizens than female citizens to confer citizenship on their non-marital children. It used a weakened version of the heightened scrutiny standard that applies to such discriminatory laws, and relied on gender stereotypes of different parenting roles for men and women. Such reliance harms both sexes, and threatens a return to the era when laws and policies based on women’s “proper” roles were used to justify restricting their full participation in economic and political life.

Now, the Department of Education seeks to issue new regulations governing single-sex classes and schools that authorize sex discrimination and sex-stereotyping in future educational decision-making. If equal protection challenges to new single-sex programs or schools are brought, the composition of the Court will be key to protecting women’s rights.

In *Grutter v. Bollinger* (2003), the Court narrowly upheld the affirmative action program of the University of Michigan Law School by a 5-4 vote. The dissents show that there are two Justices who do not believe that any affirmative action program is constitutional, and two Justices for whom it is not clear that any affirmative action program could survive the strict scrutiny that the Court applies. Thus, the affirmative action that is key to removing the barriers that women of all races and ethnicities face in employment, education and other areas is still threatened.

Federal Statutory Protection Against Discrimination

In *Kimel v. Florida Board of Regents* (2000), the Court held, 5-4, that Congress did not have the power to allow state employees to sue for damages if their employer discriminated against them in violation of the Age Discrimination in Employment Act. The following year, in *Board of Trustees of University of Alabama v. Garrett* (2001), with the same 5-4 split, it extended that ruling and barred state employees who face discrimination from suing for damages for violations of Title I of the Americans with Disabilities Act. These decisions harm millions of women who are older or disabled, under the guise of protecting state sovereignty.

In *United States v. Morrison* (2000), the Court struck down, again with a 5-4 vote, a key provision in the Violence Against Women Act that would have allowed victims of rape and domestic violence to sue their attackers in federal court, trampling on Congress’ authority under the Commerce and the Equal Protection Clauses of the Constitution.
In *Hibbs v. Department of Human Resources* (2003), what seemed like a steam roller over state employees’ rights and Congressional authority slowed down. The Court held, 6-3, that state employees could sue for damages for violations of the provisions of the Family and Medical Leave Act that allow employees to use unpaid leave to take care of ill family members. It based its decision on the greater – but still limited - authority of Congress, under the Equal Protection clause of the Fourteenth Amendment, to address problems of sex discrimination as opposed to discrimination based on “non-suspect” classifications such as age and disability.

Last term, in *Tennessee v. Lane* (2004), the slowdown continued, but by a narrower vote than *Hibbs* and with a narrower decision. The Court examined the right to sue a state for damages for violations of Title II of the Americans with Disabilities Act, which bars exclusion from public services and programs because of a disability. Confronted by plaintiffs in wheelchairs who had been denied access to county courthouses without elevators, it upheld, 5-4, Congress’ authority to permit damages suits only for denial of access to the courts, where the constitutional right to due process of law is at stake. The Court left the issue open with regard to other services and programs.

*Hibbs* and *Lane* apply the restrictive standard for evaluating Congress’ authority to abrogate state sovereign immunity used in *Kimel* and *Garrett*. One new Justice who strongly believes in Congress’ authority to enact anti-discrimination legislation could mean the restoration of a Constitutionally-based standard and the restoration of the proper scope of Congress’ power. Conversely, Congress’ authority will be further eroded if a new Justice sides with the minority in *Lane*, and the majority in *Kimel* and *Garrett*.

In *Davis v. Monroe County Board of Education* (1999), the Court narrowly upheld the right to sue for student-against-student sexual harassment under Title IX. However, four dissenting Justices argued that schools should never be liable for such harassment, even when the school knew about harassment that is serious enough to interfere with a student’s education and the school showed deliberate indifference in failing to stop it. One additional Justice who shares the views of the dissenters could mean the end of real protection for students who are harassed by their peers.

This term, the Court will hear *Jackson v. Birmingham Board of Education*, a case brought by a coach who lost his position when he complained about the discriminatory treatment of his high school girls’ basketball team. The Court will decide whether he has the right to sue under Title IX for redress for the retaliation he suffered. A decision that there is no such right could seriously erode Title IX.
Provision of Health Care

In *Gonzaga University v. Doe* (2002), the Court severely limited suits for violations of federal rights under 42 U.S.C. §1983, the statute that forms the basis for many federal court actions protecting these rights. The Supreme Court may soon be called upon to decide under what circumstances those who are denied services under the Medicaid program (the majority of whom are women), or challenge aspects of that program, may sue for redress. The composition of the Court will be crucial.

Last term, in *Aetna Health Inc. v. Davila* (2004), the Court held that patients cannot sue HMOs for damages under state law for refusing to cover treatment that a doctor deemed medically necessary. While the decision was unanimous because of earlier interpretations of the federal statute that regulates HMOs, two Justices urged the Court and Congress to heal the “gaping wound” left in patient’s rights. Challenges to any new law are bound to reach the Supreme Court.

One new Justice could mean that our nation’s highest Court will take away or severely restrict women’s access to abortion services and even to many contraceptive options that are deemed to be “abortifacients,” and take away protections against gender-based discrimination in employment, education and elsewhere. One new Justice could shift the composition of the Court, denying women’s most fundamental rights to privacy and equal protection, and dramatically altering women’s place in our society. One new Justice could make all the difference.
THE SUPREME COURT AND WOMEN’S RIGHTS:
FUNDAMENTAL PROTECTIONS HANGING IN THE BALANCE

For three decades, the Supreme Court’s interpretations of Constitutional principles and federal statutes have played a crucial role in protecting the rights of women to privacy, including the right to abortion, to equal protection of the laws, and to be free from discrimination in the workplace and in school. Recently, the Court has adopted new interpretations that cut back on fundamental protections for women. A new Justice will have a crucial impact on whether or not those cut backs continue.

Many of the Supreme Court’s recent key cases that affect women’s rights were decided by narrow margins and over strong dissents, whether they serve to protect those rights or to limit them. For example, in 2000, the Court found Nebraska’s attempt to ignore women’s health needs and criminalize most second trimester abortions to be unconstitutional, but only by a 5-4 vote. Now, Congress has enacted legislation to severely restrict a woman’s right to choose, including a federal version of Nebraska’s law that is already on its way to the Court. The vote of a new Justice will be critical. With regard to discrimination in the workplace, the Court recently handed down two 5-4 decisions denying state employees who had been discriminated against on the basis of age, and then on the basis of disability, the right to sue their employers for damages. Subsequently, it decided, 6-3, to protect state employee’s rights under the Family and Medical Leave Act (“FMLA”). This past term, it issued another decision protecting civil rights in a case involving the disabled and access to courts, but only by a one vote margin. Thus, the vote of one new Justice could halt additional limitations in this and other areas, or even restore and enhance civil rights. Alternatively, that one vote could further turn back the clock for women’s core legal rights.

This analysis highlights recent cases on key women’s rights protections that were decided by narrow margins. The opinions in these cases highlight how changes in the membership of the Supreme Court could have a major impact on women in the areas of the constitutional rights to privacy and equal protection, and the federal statutory protection of women’s rights in employment, education, and health, safety and welfare.

I. FUNDAMENTAL CONSTITUTIONAL PROTECTIONS

A. Four Justices Do Not Support Effective Constitutional Protection of a Woman’s Right to Choose

1. Roe v. Wade Could be Overruled Outright or in Effect. Over thirty years ago, in the landmark case of Roe v. Wade, 410 U.S.113 (1973), the Supreme Court held that the constitutional right to privacy from government intrusion into personal matters

National Women’s Law Center, September 2004
includes a woman’s fundamental right to choose to have an abortion. Nearly 20 years later, in Planned Parenthood of Southeast Pennsylvania v. Casey, 505 U.S. 833 (1992), three current members of the Court, Chief Justice Rehnquist and Justices Scalia and Thomas, bluntly stated: “We believe that Roe was wrongly decided, and that it can and should be overruled . . . .” Id. at 944 (emphasis added). They were in the minority in taking this position, but the majority of the Court cut back on the strength of Roe v. Wade’s protection of the right to choose by adopting a new, highly subjective “undue burden” test, which allows states to impose restrictions on abortion as long as they do not place an undue burden, or substantial obstacle, in the path of a woman who seeks to terminate her pregnancy.

The only Supreme Court case since Casey to apply the new undue burden test is Stenberg v. Carhart, 530 U.S. 914 (2000). In a sharply divided 5-4 decision, the Court struck down a Nebraska criminal law that banned “partial birth abortion” because the law’s definition of the unlawful procedure was so loose that it covered even the most commonly used procedure for abortions in the fourth month of pregnancy. In addition, the law had no exception that would allow these medically approved abortion procedures to be used when necessary for the protection of the health of the woman, as explicitly required under Roe and Casey.

Carhart made clear that there are now four Justices on the Court – Chief Justice Rehnquist and Justices Scalia, Thomas and Kennedy – who support either the explicit overruling or an evisceration of Roe v. Wade that is so severe that it would be overruled in effect. Justice Kennedy, unlike the other three who dissented, has not called for overruling Roe, but he has interpreted the nature of an “undue burden” so loosely that almost any restriction could meet his test, even ones as severe as those at issue in Carhart.

In Lawrence v. Texas, 539 U.S. 558 (2003), the recent decision striking down a Texas law that criminalized private consensual sex between adults of the same sex, Justice Kennedy, writing for the majority, strongly affirmed the right to privacy, quoting Casey to state that “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” Id. at 578 (quoting Casey, 505 U.S. at 847). However, this affirmation does not mean that Justice Kennedy has changed his views as to what constitutes an “undue burden” for a woman who wishes to terminate her pregnancy. Moreover, Justice Scalia’s dissenting opinion, which was joined by the Chief Justice and Justice Thomas, again expressed their contempt for Roe v. Wade. In a

1Justice Kennedy’s opinion was joined by Justices Stevens, Souter, Ginsburg and Breyer. Justice O’Connor filed an opinion concurring in the judgment, in which she stated that she would strike down the Texas law under the Equal Protection clause because there was no rational basis for treating sexual conduct between individuals of the same sex differently from the same conduct between individuals of the opposite sex.

National Women’s Law Center, September 2004
separate dissenting opinion, Justice Thomas flatly stated his belief that there is no constitutional right to privacy at all.

In the next couple of years, the Supreme Court is likely to be asked to rule on the Partial-Birth Abortion Act of 2003, a federal version of the Nebraska law that was narrowly struck down in *Carhart*. The new Act was immediately challenged in federal district courts in San Francisco, New York City and Lincoln, Nebraska, and all three courts have found it to be unconstitutional under *Carhart* because it lacks an exception for the health of the woman. *Carhart v. Ashcroft*, __ F. Supp. 2d __, 2004 WL 1969366 (D. Neb. Sept. 8, 2004); *Nat’l Abortion Federation v. Ashcroft*, __ F. Supp. 2d __, 2004 WL 1906165 (S.D.N.Y. Aug. 26, 2004); *Planned Parenthood Federation of America v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004). The San Francisco and Nebraska courts also found the law to be vague and overbroad. The Administration is appealing these decisions, and supporters of new restrictions have expressed their expectation that by the time the cases reach the Supreme Court, new justices will have been appointed who will grant review of them and uphold the prohibition. As they recognize, should the Court’s composition shift to include even one more Justice who does not support real constitutional protection of a woman’s right to choose, *Roe v. Wade* could be effectively overruled. Women could be left to face the most onerous and dangerous state and federal restrictions on abortion, and the pre-*Roe* days – when women’s health and even their lives were sacrificed – could return.

The Unborn Victims of Violence Act, enacted in 2004, was also intended to limit women’s right to choose, and its constitutionality is subject to Supreme Court review. It creates a separate criminal offense for harm to the “unborn child,” which it defines as “a member of the species homo sapiens, at any stage of development, who is carried in the womb,” and punishes this violation as if the offense had occurred to a person. This law conflicts with the legal principles underlying *Roe v. Wade* by recognizing a zygote, blastocyst, embryo or fetus as a “person” with the same legal rights as an individual who is living outside the womb, and could be used to undermine *Roe*’s principles by Justices who are hostile to the right to choose abortion.

In addition, Congress is considering using the “power of the purse” to restrict even further the availability of abortions, an effort that could also reach the Supreme Court. The federal refusal clause amendment to the FY 2005 Labor, Health and Human Services and Education Appropriations bill would deny funding to any federal agency or program, or a state or local government that requires health care providers to perform, fund or provide information about abortion-related services, even in cases of rape or medical emergency.

Any restrictions that are upheld by the Supreme Court would become even more onerous if the Court endorsed a redefinition of abortion that would bar or restrict the use of certain forms of contraception. A Court with a new justice who is hostile to women’s

National Women’s Law Center, September 2004
right to choose could also fail to protect women's access to reproductive health clinics, and allow more state control over women who are pregnant.

2. Abortion Could be Redefined to Encompass Some Contraceptives. Before Justice Thomas was appointed, in Webster v. Reproductive Health Services, 492 U.S. 490 (1989), four members of the current Court – Chief Justice Rehnquist and Justices O'Connor, Scalia and Kennedy – endorsed the preamble to a Missouri law that defines human life to begin at conception, with conception defined as the time of fertilization. Since Justice Thomas' position – that there is no Constitutional right to privacy at all - is even more extreme than Justice Scalia's, there could well be a fifth member of the Court who shares this view. If life is defined to begin at fertilization, as two of the dissenters in Webster pointed out, some common forms of contraception, especially those that may prevent implantation of the fertilized ovum, could be swept into the abortion restrictions. 492 U.S. at 539, n.1 (Blackmun, J. dissenting), 563 (Stevens, J. dissenting).²

3. Access to Women's Health Clinics Could Lose Protection. In Hill v. Colorado, 530 U.S. 703 (2000), the Court voted 6-3 to uphold a Colorado statute that imposes limits on the actions of anti-choice activists bent on disrupting access to health facilities. Justices Scalia and Thomas, treating the case as part of their ongoing battle against the constitutional protection of abortion, would have elevated the activists' First Amendment rights over the right of health care patients and providers to gain access to these facilities.³

²The view that common forms of birth control are tantamount to abortion may seem extreme, but limiting access to contraceptives, especially emergency contraception that prevents implantation of a fertilized egg, is now a focus of many anti-choice advocates. They are urging pharmacists to refuse to provide emergency contraception and seeking to prohibit the distribution of the pills at state-supported colleges on that basis.

³A case originally filed in 1986 that was once viewed as key to protecting access to women’s health clinics was resolved against the clinics two terms ago. National Organization for Women v. Scheidler, 537 U.S. 393 (2003). However, as long as the Freedom of Access to Clinic Entrances Act of 1994 (“FACE”) is not weakened (see p. 21 infra), the decision should not have adverse consequences for women. In an 8-1 decision (Justice Stevens was the lone dissenter), the Court found in Scheidler that women’s groups and clinics were not entitled to relief under the Racketeer Influenced and Corrupt Organizations Act (“RICO”) for disruptive anti-abortion protests because the protesters’ actions, even if obstructive, did not meet the federal definition of extortion that was the basis of the underlying “racketeering” needed to support a RICO action. Justice Ginsburg pointed out in a concurring opinion that the enactment of FACE to deal with the problem of disruptive protests at health clinics meant that upholding the judgment in Scheidler would primarily impact other protesters. Id. at 411.

National Women's Law Center, September 2004
4. Pregnant Women’s Right to Privacy Could be Invaded. In Ferguson v. City of Charleston, 532 U.S. 67 (2001), the Court struck down, 6-3, the punitive, involuntary drug testing of pregnant women for cocaine. Based on the assumption that the women had not consented to the tests, and applying Fourth Amendment law applicable to warrantless searches, the Court’s majority found that the “special needs” argued in support of the drug testing program were outweighed by the women’s right to privacy: “While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs,” the program was created and implemented with police and prosecutors, and “the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal.” Id. at 83 (emphasis in original, footnotes omitted). Justices Scalia and Thomas, joined by the Chief Justice, would have upheld the drug testing program. While Justice Kennedy joined the majority in voting to invalidate involuntary drug testing of pregnant women, he stressed in a concurrence the “legitimacy of the State’s interest in fetal life and of the grave risk to the life and health of the fetus, and later the child, caused by cocaine ingestion,” thereby signaling his willingness to uphold a program so long as it does not involve “handcuffs, arrests, prosecutions, and police assistance” in its design and implementation. Id. at 89, 90.4

Thus, it is clear that there are already four Justices on the Court who do not support effective protection of a woman’s right to choose – three of whom have declared in no uncertain terms their readiness to overturn Roe v. Wade outright – and a fourth who is willing to allow the imposition of crushing burdens on the exercise of women’s constitutional right to privacy. Just a small shift on the Court could eviscerate this precious right for years to come.

B. Several Justices Do Not Accept the Current Equal Protection Standard Applying to Government-Based Sex Discrimination, Which Has Opened Jobs, Education and Rights of Citizenship to Women

1. The Heightened Scrutiny Standard for Sex Discrimination Is Being Weakened. Until its landmark decision over three decades ago in Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court accepted any “rational basis” as reason enough to uphold laws that discriminated against women, no matter how harmful, and no matter how much they were based on outmoded stereotypes. Since Reed, however, the Court has required that

4The case was sent back to the lower courts for determination of the question of whether or not the women had in fact consented to the drug tests. On remand, the Fourth Circuit held that they had not. 308 F.3d 380 (4th Cir. 2002), cert. denied, 539 U.S. 928 (2003).
laws and government policies that discriminate on the basis of sex must be justified under a “heightened scrutiny” or “intermediate” standard of review to determine whether they provide the equal protection of the law that is guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the Constitution. Under heightened scrutiny, discriminatory laws and policies must be supported by an “exceedingly persuasive justification” that is “substantially related to an important government objective” and cannot be based on stereotypes about gender roles. It is less rigorous than the “strict scrutiny” that is applied to discrimination based on race, ethnicity and national origin, which requires that a classification be narrowly tailored to further a compelling governmental interest, but more exacting than the “rational basis” test under which most government classifications are reviewed and approved.

Applying heightened scrutiny, the Court has struck down many laws and official policies that disadvantage women simply because they are women, including laws allowing men greater entitlements to government benefits than women, providing for a higher age of majority for males than females so that males were entitled to parental support for a longer period of time, and giving husbands exclusive authority over the community property of a married couple. More recently, in United States v. Virginia, 518 U.S. 515 (1996), the Court held that the exclusion of women from the all-male, state-run Virginia Military Institute was unconstitutional, and in J.E.B. v. Alabama, 511 U.S. 127 (1994), it invalidated the practice of using peremptory challenges to keep women off of juries solely because of their sex.

However, the current heightened scrutiny test, which has been so important in providing core constitutional protection against government sponsored sex discrimination, is in danger. Justice Scalia, the sole dissenter in VMI (Justice Thomas did not participate in the case), would end heightened scrutiny altogether if given the chance. In his dissent, he argued that since VMI had been all-male since its founding in 1839, it should be allowed to remain so. He complained that the Court was really applying a stricter standard of review than heightened scrutiny, and that, if it is to be reconsidered, the standard of review for sex-based classifications should be reduced to rational basis review. According to Justice Scalia, such review “certainly has a firmer foundation in our past jurisprudence . . . we routinely applied rational-basis review until the 1970’s, see, e.g., Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948).” 518 U.S. at 575. These cases, cited favorably by Justice Scalia, are the very cases cited by the majorities in VMI and J.E.B. as examples of how outdated the Supreme Court’s pre-Reed v. Reed decisions were. In Hoyt v. Florida, the Court upheld a law giving women an automatic exemption from jury service that had resulted in an all-male jury for a woman tried for the murder of her husband. It found that the differing treatment of men and women was reasonable since, “despite the enlightened emancipation of women from the restrictions and protections of bygone years,” they are “still regarded as the center of home and family life.” 368 U.S. at 61-62. Goesaert v. Cleary upheld a prohibition against women working as bartenders unless they were the wives or daughters of male
bar owners (even though they could work as waitresses where liquor was served) as a preventive measure against “moral and social problems” that might arise. 335 U.S. at 466.

In a concurring opinion in VMI, Chief Justice Rehnquist protested against requiring the state to “demonstrate an ‘exceedingly persuasive justification’ to support a gender-based classification” as adding “an element of uncertainty,” 518 U.S. at 559, even though this requirement had been part of the test for many years. See, e.g., Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982). He would look solely at whether a classification serves important governmental objectives and is substantially related to achievement of those objectives.

More recently, in a 5-4 decision in Tuan Anh Nguyen v. Immigration and Naturalization Service, 533 U.S. 53 (2001), the majority, without discussion, used Chief Justice Rehnquist’s weaker version of the heightened scrutiny standard to examine an equal protection challenge to a federal statute that imposes different requirements for the acquisition of citizenship for a child born outside the United States to unmarried parents only one of whom is a U.S. citizen, depending on whether the citizen parent is the mother or the father. Justice Kennedy wrote the opinion for the Court, which was joined by the Chief Justice and Justices Scalia, Thomas, and Stevens (who has not supported a weakened standard in other decisions). Justice O’Connor wrote a strong dissent, protesting that heightened scrutiny, which she defined to include the need for an “exceedingly persuasive justification” for sex discrimination, 533 U.S. at 74, had not been rigorously applied, and that even the majority conceded that “the goal of assuring a biological parent-child relationship” could have been achieved in a sex-neutral fashion. Id. at 81. She ended her dissent with a dire warning:

No one should mistake the majority’s analysis for a careful application of this Court’s equal protection jurisprudence concerning sex-based classifications. Today’s decision instead represents a deviation from a line of cases in which we have vigilantly applied heightened scrutiny to such classifications to determine whether a constitutional violation has occurred. I trust that the depth and vitality of these precedents will ensure that today’s error remains an aberration.

Id. at 97. A change in the Court could ensure that Nguyen will not be an aberration, and that state and federal laws and policies based on stereotypes of women and men could be considered constitutional, whether the heightened scrutiny standard is explicitly abandoned or otherwise weakened.

Also in 2001, supporters of women’s rights averted — by one vote — a loss in a case that affects the rights of girls and women to equal treatment in athletics. Justice O’Connor joined Justice Souter’s majority opinion, along with Justices Stevens, Ginsburg

National Women’s Law Center, September 2004
and Breyer, in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). The Court held that a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools is engaged in state action, and therefore can be sued for constitutional violations as a government entity, including for the denial of equal opportunities for girls and women. Justice Thomas wrote the dissenting opinion, complaining that “the majority’s holding . . . not only extends state-action doctrine beyond its permissible limits but also encroaches upon the realm of individual freedom that the doctrine was meant to protect.” *Id.* at 305. The dissenters’ interest in giving groups that are “private” in name only the freedom to discriminate could easily prevail with a shift in the membership of the Court.

The constitutionality of single-sex education could be back before the Court in the next few years. The Department of Education has issued extremely problematic proposed rules governing single-sex classes and schools for all educational institutions that receive federal funds. Those rules, if finalized, would authorize sex discrimination and sex-stereotyping in educational decision-making. When discriminatory practices or institutions are challenged, a new Justice who does not support a strong heightened scrutiny standard as it has been articulated could mean the relegation of girls to programs based on stereotypes of their interests and abilities.

2. The Threat to Affirmative Action Programs Remains. Just as it is critically important to have strong constitutional standards in place that will invalidate sex-based discrimination by the government, it is essential to have constitutional standards in place that will permit the government to use affirmative action when it is necessary to dismantle discrimination or to promote diversity in our nation’s educational institutions and workplaces. Affirmative action programs have played a key role in opening up opportunities for women and minorities in employment, education, and other arenas, and, until all barriers are removed, they remain necessary.

Two terms ago, the Supreme Court affirmed the principle that our nation’s schools may take race into account in order to promote diversity on campus. It decided two cases involving race-based affirmative action in higher education that also have significant implications for sex-based affirmative action: *Grutter v. Bollinger*, 539 U.S. 306 (2003), which upheld, 5-4, the admissions policy of the University of Michigan Law School, and *Gratz v. Bollinger*, 539 U.S. 244 (2003), which invalidated, 6-3, the undergraduate admissions policy of the University of Michigan.

Justice O’Connor wrote a strong opinion in *Grutter*, joined by Justices Stevens, Souter, Ginsburg and Breyer, in which the Court definitively adopted an opinion written by Justice Powell the last time the Supreme Court looked at affirmative action in higher education in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In that opinion, which had been relied upon by many educational institutions, Justice Powell stated his view that a university’s “interest in diversity is compelling in the context of a

National Women’s Law Center, September 2004
university’s admissions program” in which “ethnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.” 438 U.S. at 314.

Relying on principles of academic freedom, the Court in Grutter deferred to the Law School’s belief “that [student body] diversity is essential to its educational mission,” and found the “compelling state interest” part of the strict scrutiny test to be satisfied. 539 U.S. at 328-29. In addition, even though the Law School seeks a “critical mass” of minority students, its admissions process was held to meet the “narrowly tailored” aspect of the strict scrutiny test because it insures individual consideration of all the ways in which each applicant would contribute to campus diversity, without making race or ethnicity the defining feature of the application. In dissent, Chief Justice Rehnquist, joined by Justices Kennedy, Scalia and Thomas, stated that the Law School’s program is not narrowly tailored, and that its goal of a “critical mass” is a “sham” to hide quotas. Id. at 347. Justices Scalia and Thomas also went further, stating in a separate dissent that all affirmative action programs are unconstitutional.

In Gratz, the case involving undergraduate admissions, Justice O’Connor joined the Justices who had dissented in Grutter. The Court found, in an opinion written by the Chief Justice, that the University of Michigan’s admissions policy is unlawful because it takes race into account through a point system, without providing for the individualized consideration deemed necessary to make a program sufficiently narrowly tailored to survive strict scrutiny. (The sixth vote against the undergraduate admissions process was by Justice Breyer, who concurred in the Court’s judgment in Gratz without joining in its opinion.)

With the decisions in the University of Michigan cases, affirmative action has survived. However, it is in grave danger, for there are two justices (Scalia and Thomas) who believe that affirmative action is always unconstitutional, and two justices (Rehnquist and Kennedy) for whom it is not clear that any affirmative action program could survive strict scrutiny. The end of such programs could have a serious impact on women of color, who have benefited from affirmative action in education. In addition, women of all races and ethnicities are still excluded from many traditionally all-male fields in academia, including science, engineering and mathematics. Accordingly, affirmative action programs are still critically needed to break down the persistent barriers to opportunity that women face.

Moreover, the application of the strict scrutiny standard in the employment and contracting context, where the deference given to academic freedom for educational institutions by the Court will not be available, remains unsettled. The Court recently had the opportunity to look at affirmative action in federal and local government contracting programs, but declined to do so. Adarand Constructors v. Slater, 228 F.3d 1147 (10th Cir. 2000), cert. dismissed, 534 U.S. 103 (2001) (federal program); Concrete Works of

National Women’s Law Center, September 2004
Colorado Inc. v. Denver, Colo., 321 F.3d 950 (10th Cir. 2003), cert. denied, 124 S.Ct. 556 (2003) (municipal program). Thus, the availability of affirmative action for minorities and women in the workplace, government contracting, or other areas where such action is still needed to open up opportunities for all, is very much open to question.

II. STATUTORY PROTECTIONS

As the Court Expands the Concept of Federalism, It is Eroding Congress’ Authority and Key Federal Statutory Protections for Women Have Been Lost or Are in Place Only as a Result of Slim Majorities

Historically, women and minorities have relied on the federal government for protection of their rights. Until recently, the Constitutional power of Congress to pass laws aimed at protecting civil rights under the Commerce and Equal Protection Clauses seemed secure. In addition, Congress’ power to override the states’ immunity from suit and extend federal protection against discrimination to state employees was not seriously questioned. Recently, however, in a series of cases often discussed under the rubric of “federalism,” the Court has weakened important federal laws that protect women’s rights by sharply curtailing the very authority of Congress to pass such laws. As an example of the harm to women from Congress’ loss of authority, in 2000, the Court struck down the provision of the Violence Against Women Act of 1994 (“VAWA”) that allowed victims of gender-motivated violence to sue their attackers in federal court, holding that this VAWA provision exceeded the authority of Congress to regulate interstate commerce or to implement constitutional equal protection. It also held that employees of state agencies and entities cannot sue their employers for damages under the Age Discrimination in Employment Act. A year later, it extended that ruling to the Americans with Disabilities Act. Two terms ago, in a significant victory for women’s rights, six members of the Court allowed Congress to exercise some authority to remedy sex discrimination, and kept full protection in place under the Family and Medical Leave Act (“FMLA”) for state employees who need time off to care for a sick family member. Last term, five justices allowed relief against states that deny access to their courts to the disabled. However, these are narrow decisions by a narrow majority that do not provide security for women’s rights, or even repair the damage that has already been done to state employees’ civil rights and women’s ability to protect themselves from gender-motivated violence.

Women’s rights are threatened not only by the Supreme Court’s weakening of Congress’ authority, but also by the Court’s increasingly narrow interpretations of the

5In Concrete Works, which upheld an affirmative action program, Justice Scalia, joined by the Chief Justice, dissented from the denial of review, complaining that the program had not been subjected to sufficiently rigorous strict scrutiny.
existing federal statutes that prohibit discrimination in the workplace and schools, and protect women’s health, safety and welfare. These interpretations have restricted the protections available to women under federal law, and left more and more women who experience discrimination and other threats to their well-being without effective remedies.

A. Protections Against Employment Discrimination Have Been Weakened

In the area of employment discrimination, recent decisions by the Supreme Court raise troubling questions about the future of the law on issues of great concern to women, particularly with regard to the right of state employees to recover damages from their employers for discrimination on the job, the right to sue in federal court and obtain strong remedies for discrimination, and sexual harassment.

1. The Right of State Employees to Sue Their Employers for Damages Has Been Limited. The current Supreme Court has adopted a particularly restrictive view of Congress’ authority under the Constitution to grant state employees the right to sue their employers for employment discrimination in federal court. In 2000, the Court held in a 5-4 decision, with Chief Justice Rehnquist and Justices Scalia, Thomas, Kennedy, and O’Connor in the majority, that even though Congress had clearly stated its intent to abrogate the states’ Eleventh Amendment immunity from being sued for damages under the federal Age Discrimination in Employment Act (“ADEA”), it did not have the authority to do so to implement the Equal Protection guarantee of the Fourteenth Amendment. Kimel v. Florida Board of Regents, 528 U.S. 62 (2000). Applying a test for such legislation that had recently been established, the Court found a lack of “congruence and proportionality” between the injury to be prevented or remedied by the ADEA and the means adopted by Congress. Kimel seriously weakens the protection accorded the many older women who face discrimination in the workplace.

This disturbing trend continued the following year when, with the same 5-4 split, the Supreme Court held that Congress lacked the authority to abrogate Eleventh Amendment immunity to permit employees’ suits for damages against the states under Title I of the Americans with Disabilities Act (“ADA”), although there was once again no dispute that it had unequivocally intended to do so. Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001). This case was brought by a nurse suffering

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6The Eleventh Amendment has been interpreted by the Court to bar suits in federal court by an individual against a state. Section 1 of the Fourteenth Amendment contains the Equal Protection Clause, which states that “No State shall make or enforce any law which shall . . . deny to any person . . . the equal protection of the laws.” Section 5 authorizes Congress “to enforce, by appropriate legislation” the provisions of the Amendment.
from breast cancer who was forced to give up her position after essential cancer treatment required her to take time off from work. In a dissenting opinion joined by Justices Stevens, Souter and Ginsburg, Justice Breyer protested that the majority had treated Congress like a lower court whose rulings it could freely disregard, and that the majority, “through its evidentiary demands, its non-deferential review, and its failure to distinguish between judicial and legislative constitutional competencies, improperly invades a power that the Constitution assigns to Congress.” Id. at 388-89.\(^7\)

The next term, in a new twist, the Court relied on the Eleventh Amendment to limit the authority of federal administrative agencies over the states. In an opinion written by Justice Thomas on behalf of the five-member majority that prevailed in *Kimel* and *Garrett*, the Court held that state sovereign immunity precluded the Federal Maritime Commission from hearing a private party’s charge that a state agency had violated federal law, even though the Eleventh Amendment refers only to the “Judicial power of the United States.” *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743 (2002). While this decision should not directly affect the administration of civil rights statutes, it “may undermine enforcement against state employers of many laws designed to protect worker health and safety.” Id. at 786 (Breyer, J. dissenting).

Two terms ago, Chief Justice Rehnquist and Justice O’Connor joined the dissenters in *Kimel* and *Garrett*, and, in a case of great importance for women’s rights, the Court held, 6-3, that Congress did have the authority under the Fourteenth Amendment to abrogate state immunity and allow state employees to sue for damages under the FMLA.\(^8\) *Hibbs v. Department of Human Resources*, 538 U.S. 721 (2003). In *Hibbs*, an employee of the Nevada Department of Human Resources needed leave to care for his wife, who had seriously injured her back in a car accident. He and his employer

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\(^7\)On a brighter note, while it limited their right to sue for damages, last term the Court implicitly affirmed state employees’ right to sue for injunctive relief if they face discrimination. In *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), Justice Scalia, writing on behalf of a unanimous Court, declined the invitation to limit the use of the *Ex parte Young* doctrine, under which individuals may seek injunctive relief against state officials who are alleged to violate federal law.

\(^8\)The FMLA requires large employers to give employees leave and reinstate them in their jobs if they need time off to care for a child, spouse or parent with a serious health condition or if they themselves become ill or disabled, including because of pregnancy. While the Supreme Court has not yet ruled on the issue, several circuits have held that state employees’ suits seeking damages for violation of their right to take leave for their own illness or disability are barred by the Eleventh Amendment. *Hibbs* involves only the FMLA provision allowing leave for taking care of others, and the lower courts have continued to issue rulings barring recovery in suits involving the “self-care” provision.
disagreed over whether he had exhausted his FMLA leave, and he was terminated when he did not report to work when he thought he was still entitled to leave.

The Chief Justice wrote the opinion for the Court, in which he stated that the “FMLA aims to protect the right to be free from gender-based discrimination in the workplace,” id. at 722, by removing “the pervasive sex-role stereotype that caring for family members is women’s work.” Id. at 731 (footnote omitted). While the restrictive “congruence and proportionality” test used in Kimel and Garrett for determining whether Congress has the authority to abrogate Eleventh Amendment immunity under the Equal Protection Clause was applied, because of the heightened scrutiny9 to which gender discrimination is subject, “it was easier for Congress to show a pattern of state constitutional violations” for which a remedy was appropriate than it was for the non-protected classes of age and disability that were at issue in the earlier cases. Id. at 736. The Court found that Congress had met this burden.

Congress was also found to have met its burden last term in Tennessee v. Lane, 124 S.Ct. 1978 (2004), which raised the question of whether Title II of the ADA, which bars exclusion from participation in, or the denial of the benefits of, a public entity’s services, programs or activities because of disability, validly abrogates the states’ sovereign immunity. Individuals who were confined to wheelchairs, George Lane, the defendant in a criminal case, and Beverly Jones, a court reporter, complained about their lack of access to county courthouses without elevators. The Court upheld their right to sue the state for damages, but by a narrow 5-4 majority and on narrow grounds. The Chief Justice rejoined the Justices who seek to limit Congress’ authority to end discrimination, while Justice O’Connor remained on the side of the Justices who had dissented in Kimel and Garrett. The decision was limited to the facts of the case, with the Court relying on the concept that the right of access to the courts that was at issue involved not only the right to be free from “irrational disability discrimination,” but also “other basic constitutional guarantees, infringements of which are subject to more searching judicial review,” including those protected by the Due Process Clause and the Confrontation Clause of the Sixth Amendment. Id. at 1988.10

9Consistent with his concurring opinion in VMI, see page 7, supra, the Chief Justice defined heightened scrutiny as requiring a gender-based classification to serve “important governmental objectives and be “substantially related to the achievement of those objectives,” 538 U.S. at 722, quoting VMI, 518 U.S. at 533, without requiring an “exceedingly persuasive justification” for the classification.

10The four members of the Court who dissented in Lane also endorse the new use of an old statute, the Tax Injunction Act (“TIA”), to limit the enforcement of Constitutional rights. The TIA, enacted in 1948, prohibits a federal court from enjoining “the assessment, levy or collection of any tax under State law.” Last term, in Hibbs v. Winn, 124 S.Ct. 2276 (2004), the State argued that the TIA barred the federal court from
Dissenting, Chief Justice Rehnquist, joined by Justices Kennedy and Thomas, stated that the Court’s decision could not be reconciled with Garrett, and that Congress should not be permitted to “usurp this Court’s responsibility to define the meaning of the Fourteenth Amendment.” Id. at 1998. Justice Scalia, writing his own dissent, concluded that since the “congruence and proportionality” standard had now been used to uphold full relief against the states under the FMLA and part of Title II of the ADA, that standard was no longer sufficient to control Congress, and Congress should be limited to enacting “prophylactic” measures only against race discrimination under the Fourteenth Amendment.\footnote{On the same day as Lane was decided, the Court issued two other opinions involving Congress’ authority vis-à-vis the states, which suggest that the dissenters in Tennessee v. Lane were less concerned about state sovereignty when federal protection of civil rights was not at issue. In Tennessee Student Assistance Corporation v. Hood, 124 S.Ct. 1905 (2004), the Court avoided the sovereign immunity question presented. It held, 7-2, that the special nature of bankruptcy proceedings means that a proceeding to determine whether a student loan can be discharged “is not a suit against the State for purposes of the Eleventh Amendment.” Id. at 1908. Justice Thomas, joined by Justice Scalia, would have held that Congress does not have the authority to abrogate state sovereign immunity under the Bankruptcy Act. In Sabri v. United States, 124 S.Ct. 1941 (2004), the Court rejected a challenge to Congress’ power, and unanimously upheld a federal statute that makes it a criminal offense to bribe a state, local or tribal official of an entity that receives federal funds as a valid exercise of Congressional authority under the Necessary and Proper Clause of Article I of the Constitution.}

Thus, only a narrow majority of the Supreme Court recognized Congress’ authority to require full enforcement even of the right of all to access to state courts. Moreover, to prevail, that majority had to accept the Court’s narrow view of Congressional power that forms the basis for the decisions weakening protections against age and disability discrimination by the states. A new justice who agrees with the dissenters in Tennessee v. Lane could tip the balance against finding that an Act of Congress can ever meet the “congruence and proportionality” test. A new justice who rejects that test, like the dissenters in Kimel and Garrett, could mean its demise and the restoration of rights to state employees.

\footnote{On the same day as Lane was decided, the Court issued two other opinions involving Congress’ authority vis-à-vis the states, which suggest that the dissenters in Tennessee v. Lane were less concerned about state sovereignty when federal protection of civil rights was not at issue. In Tennessee Student Assistance Corporation v. Hood, 124 S.Ct. 1905 (2004), the Court avoided the sovereign immunity question presented. It held, 7-2, that the special nature of bankruptcy proceedings means that a proceeding to determine whether a student loan can be discharged “is not a suit against the State for purposes of the Eleventh Amendment.” Id. at 1908. Justice Thomas, joined by Justice Scalia, would have held that Congress does not have the authority to abrogate state sovereign immunity under the Bankruptcy Act. In Sabri v. United States, 124 S.Ct. 1941 (2004), the Court rejected a challenge to Congress’ power, and unanimously upheld a federal statute that makes it a criminal offense to bribe a state, local or tribal official of an entity that receives federal funds as a valid exercise of Congressional authority under the Necessary and Proper Clause of Article I of the Constitution.}

National Women’s Law Center, September 2004
2. Employers Can Require Their Employees to Sign Arbitration Clauses Under Which They Surrender The Right to Sue Under Title VII and Other Civil Rights Laws. In addition to restricting Congress’ authority to protect state employees, the Supreme Court is limiting the reach of Title VII. In Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001), a 5-4 majority of the Court held that employers may require their employees to sign away their right to sue in federal court for discrimination in violation of federal and state civil rights laws, including Title VII, and be forced to have their claims heard in arbitration proceedings that lack the procedural protections, substantive rights, and effective remedies that these laws provide for victims of workplace discrimination. The issue before the Supreme Court was whether the Federal Arbitration Act covers employment contracts. Based solely on the text of that Act, five members of the Court – Justices Rehnquist, Scalia, Kennedy, Thomas, and O’Connor – held that it did. Dissenting, Justice Stevens protested that the majority was “playing ostrich to the substantial history behind the amendment,” id. at 128, and the fact that the statutory provision at issue clearly had been added to the legislation to ensure that the Arbitration Act would apply only to commercial disputes, not to employment contracts. He wrote that “the Court misuses its authority” when it ignores Congressional intent and refuses to look at legislative history: “When the Court simply ignores the interest of the unrepresented employee, it skews its interpretation with its own policy preferences.” Id. at 133. He went on to state that “A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court’s own views of how things should be, but it may also defeat the very purpose for which a provision was enacted. That is the sad result in this case.” Id.

The Court refused to extend the holding of Circuit City, but only by a 6-3 margin. In EEOC v. Waffle House, Inc., 534 U.S. 279 (2002), the issue was whether an arbitration agreement bars the EEOC from pursuing “victim-specific judicial relief, such as backpay, reinstatement, and damages,” along with injunctive relief, when it brings an enforcement action. Id. at 282. Justices Kennedy and O’Connor joined the Circuit City dissenters (Justices Stevens, Souter, Ginsburg and Breyer) to hold that the EEOC’s enforcement authority is not limited by an arbitration agreement between private parties. However, the dissent would have limited the agency’s authority, with Justice Thomas stating that “absent explicit statutory authorization to the contrary, I cannot agree that the EEOC may do on behalf of an employee that which an employee has agreed not to do for himself.” Id. at 298.

12Ironically, on remand, the Court of Appeals held that the arbitration clause the employee had been required to sign was unenforceable under California law because it was so one-sided in favor of the employer that it was unconscionable. Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir.), cert. denied, 535 U.S. 1112 (2002).
3. **The Statute of Limitations Could Pose Serious Obstacles to Plaintiffs in Title VII Cases.** Employees seeking redress in the courts under Title VII must comply with several procedural requirements, including time limitations. First, they must file a timely charge with the EEOC, which, depending on related state law, means that the charge must be filed within either 180 or 300 days from when the discrimination occurred. If the EEOC does not resolve their complaint, they may file suit after receiving a “right to sue” letter from the EEOC, but they must do so within a specified period of time. The Court recently interpreted both these time limitations narrowly.

In *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002), a 6-3 majority ruled that the time limits for filing a claim against a state in state court are not tolled if the plaintiff brings state law and federal law claims against the state in federal court, and the federal court dismisses the federal law claims. Justices Stevens, Souter and Breyer dissented. As a result of this decision, state employees seeking to sue their employers under both state and federal law either will have to file their lawsuits only in state court, or in both state and federal court in order to preserve their state law claims. *Raygor* therefore complicates and increases the costs of women’s access to the federal courts.

Subsequently, in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the Supreme Court examined the “continuing violation doctrine” to determine when the courts can consider discriminatory acts occurring before the statutory time period for filing a charge with the EEOC. A unanimous Court, in an opinion written by Justice Thomas, narrowly interpreted Title VII’s time limits for discrete claims, ruling that an employee bringing a lawsuit may not recover for any discrete discriminatory acts occurring before the time period within which the EEOC charge had to be filed. (Several circuits had previously allowed recovery for specific discriminatory acts occurring outside the statutory time period if those acts were sufficiently related to discriminatory acts falling within the period.) However, the Court held that earlier discriminatory acts could still be considered in hostile work environment claims. Ominously, four members of the Court (the Chief Justice and Justices Scalia, O’Connor and Kennedy) dissented from this portion of the majority opinion, believing that hostile work environment claims should also be limited. Thus, a shift on the Court has the potential to further restrict a plaintiff’s ability to present evidence of discriminatory employment actions.

4. **The Award of Punitive Damages Under Title VII Could Become Almost Impossible.** An employee’s ability to obtain punitive damages against an employer is an essential tool for obtaining relief that will not only compensate for the harm a woman has suffered due to discrimination, but will also create a meaningful incentive for the employer, as well as other employers who take note, both to stop and to prevent future discrimination. In 1999, the Supreme Court ruled that employees need not show that the employers’ conduct was “egregious,” in addition to showing that the conduct was taken with “malice” or in “reckless disregard” of the employee’s rights, in order to justify an

National Women’s Law Center, September 2004
award of punitive damages in a Title VII case. *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). Chief Justice Rehnquist, joined by Justice Thomas, dissented from the majority holding that a showing of malice or reckless disregard was sufficient, based on their belief that punitive damages should be reserved “only for the worst cases of intentional discrimination.” *Id.* at 547. Their views serve as a reminder to women that even this modest victory for women’s protection against employment discrimination may be at risk, depending on how the Court shifts in the coming years.

Of even more concern, however, in a separate part of the *Kolstad* decision, a slim five-member majority, consisting of Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy and Thomas, stated that an employer should not be held vicariously liable in punitive damages for its managerial employees’ discriminatory conduct where such conduct is contrary to the employer’s good-faith efforts to comply with Title VII, tempering the modest victory reflected in the first part of the *Kolstad* opinion. Chief Justice Rehnquist, again joined by Justice Thomas, wrote separately to voice his support for limiting the employer’s vicarious liability for punitive damages, because he supports a standard that would “place a significant limitation, and in many foreseeable cases a complete bar, on employer liability for punitive damages.” *Id.*

5. The Award of Attorneys’ Fees to Plaintiffs in Civil Rights Actions Has Been Limited. Title VII and many other civil rights laws entitle plaintiffs who prevail in litigation to recover their attorneys’ fees from the defendant, in order to ensure that victims of discrimination, who typically would not otherwise be able to afford counsel, will be able to vindicate the important public policy against discrimination – effectively serving as “private attorneys general.” But in a case with repercussions for plaintiffs in all civil rights litigation, the Court has limited the availability of attorneys’ fees for plaintiffs bringing suit under statutes that award attorneys’ fees to “prevailing parties.” *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001). Rejecting the position of nine Circuit Courts of Appeals, the Court held, again 5-4, that the term “prevailing party” means only a plaintiff who has won a litigated judgment on the merits or secured a court-endorsed settlement, not a plaintiff whose suit has otherwise triggered the precise relief she sought – for example, where the defendant has altered its conduct without being ordered to do so. In an opinion written by Justice Ginsburg, the dissenters stated their concern that the Court’s “constricted definition” will “impede access to court for the less well heeded, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general.” *Id.* at 622-23 (Ginsburg, J., dissenting).

National Women’s Law Center, September 2004
6. **Sexual Harassment Under Title VII Could Become More Difficult to Prove.** In 1998, the Supreme Court issued two decisions confirming not only that workplace sexual harassment violates Title VII of the Civil Rights Act of 1964, a principle established by the Supreme Court in 1986, but also that employers can be vicariously liable and thus subject to damages when a supervisor sexually harasses an employee, even if the employer was not aware of the harassment. *Faragher v. City of Boca Raton*, 524 U.S. 742 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998). Justices Thomas and Scalia dissented in both cases, contending that the plaintiff should have to prove that the employer was negligent in allowing the supervisor’s conduct to occur. If adopted, this negligence standard could leave many women without the recourse they currently have against their employer for sexual harassment committed on the job, even by high-level managers or supervisors. Moreover, the rule advocated by the dissenters would create no incentive for employers to institute effective policies designed to prevent, detect and end such sexual misbehavior. On the contrary, it would reward employers who succeed in remaining in the dark about their high-level employees’ misconduct.

Last term, the Court recognized that an employer’s vicarious liability under Title VII extends to claims for constructive discharge if an employee can show that sexual harassment by her supervisors created an “abusive working environment [that] became so intolerable that her resignation qualified as a fitting response.” *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004). However, unless the employee “quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation,” the employer can defend itself by showing that it had an effective sexual harassment policy that the employee had unreasonably failed to pursue. *Id.* at 2347. Justice Thomas, the sole dissent, continued to press for a negligence standard, and would have upheld the dismissal of the employee’s case. *Id.* at 2358-59.

The full scope of the limitations on Congress’ ability to provide key protections for women in the workplace has yet to be defined. But, given the closely divided Court and the profound importance of basic questions of federal authority, this issue is one that will likely be greatly affected by the future composition of the Court.

**B. Protections Against Discrimination in Education Have Been Weakened**

1. **Private Rights of Action Under Title IX May be Limited.** Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in all educational programs that receive federal financial assistance. It is perhaps best known for the impact it has had in opening up opportunities for young women to compete in athletics, but it also prohibits sexual harassment and other forms of discrimination against girls and women in all facets of education. Title IX has the same general structure as Title VI of the Civil Rights Act of 1964, which prohibits race and national origin discrimination in federally funded programs. Recently, the Court issued a restrictive decision in a Title VI case, *Alexander v. Sandoval*, 532 U.S. 275 (2001), which some lower courts have applied to limit the availability of redress under Title IX. In *Sandoval,*
the Court ruled, 5-4 (with Justice Scalia writing the majority opinion that was joined by the Chief Justice and Justices O'Connor, Kennedy and Thomas), that individuals cannot go to court to seek redress against federally funded programs or policies that are neutral on their face but have the effect of discriminating against minorities, or, in other words, that have a “disparate impact” on minorities. Writing the dissenting opinion, Justice Stevens described the Court’s decision as “unfounded in our precedent and hostile to decades of settled expectations.” *Id.* at 294. That precedent established a private right of action under Titles VI and IX for “victims of the prohibited discrimination.” . . . Not some of the prohibited discrimination.” *Id.* at 297 (citation omitted). He also criticized the majority for adopting a “methodology that blinds itself to important evidence of congressional intent,” since at the time Title VI was enacted, Congress assumed that the courts would provide remedies that were necessary to effectuate its purpose. *Id.* at 313-14.\(^{13}\)

This term, the Supreme Court will review a decision interpreting *Sandoval* to mean that persons who are retaliated against for protesting sex discrimination under Title IX do not have a cause of action to seek a remedy for the retaliation. *Jackson v. Birmingham Board of Education*, 309 F.3d 1333 (11th Cir. 2002), cert. granted, 124 S.Ct. 2834 (2004). A decision against Roderick Jackson, who was relieved of his coaching duties when he complained about the discriminatory treatment of his high school girls’ basketball team, could seriously limit the effective enforcement of Title IX and related civil rights laws.

2. **Protection From Sexual Harassment Under Title IX Could be Further Weakened.** In 1998, also in a 5-4 decision, the Supreme Court severely limited the protections available under Title IX to students who have been sexually harassed by their teachers or other school employees, making the award of damages much more difficult to secure for students under Title IX than it is for employees under Title VII. Damages are available only if a school official had actual knowledge of the harassment and responded with deliberate indifference – a standard clearly unacceptable to a majority of the Court for Title VII. The standard now in place for Title IX encourages school officials to stay in the dark about harassment against students in their schools, though they cannot do so with respect to harassment of school employees. *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998). The four dissenting Justices, Ginsburg, Souter, Breyer and Stevens, pointed out the unfairness of the result reached by the majority.

\(^{13}\)Justices who seek to limit protection against discrimination could also be receptive to states’ arguments that they are immune from suits for damages under Title IX and related statutes that are based on Congress’ power under the Spending Clause as well as the Fourteenth Amendment. See, e.g., *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161, 1171 (D.C. Cir. 2004) (dissenting opinion of Judge Sentelle endorsing this argument with regard to disability discrimination under Section 504 of the Rehabilitation Act).
A year later, the Supreme Court held, by a slim 5-4 majority, that Title IX covered student-on-student sexual harassment. *Davis v. Monroe County Bd. of Education*, 526 U.S. 629 (1999). Even with the extremely stringent damages standard of *Gebser* in place for student-on-student sexual harassment, an impassioned four-member dissent by Justices Kennedy, Scalia, Thomas and Chief Justice Rehnquist 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 could have done to stop the offending conduct, the school could never be held liable for student-on-student harassment. The dissent underscores the risk that with even one shift on the Court, it could retreat from providing any protection at all to students in this key area.

3. **The Award of Punitive Damages Under Title IX is Endangered.** In *Barnes v. Gorman*, 536 U.S. 181 (2002), the Court ruled that punitive damages are not available to plaintiffs suing under Title VI.\(^{14}\) Justice Scalia, writing the Court’s decision, applied a contract law analogy to suits under Spending Clause legislation, and stated that punitive damages are generally not awarded for breach of contract. Although all the Justices joined in the judgment, Justice Stevens, joined by Justices Ginsburg and Breyer, wrote separately to warn that “the reasoning in the majority opinion has potentially far-reaching consequences that go well beyond the issues briefed and argued in this case.” *Id.* at 192, 193. This decision could have severe consequences for women seeking redress under federal funding statutes, including Title IX, for egregious incidents of discrimination or harassment.

**C. Protection of Women’s Health, Safety and Welfare is More Difficult**

Along with an increasingly narrow view of Congress’ power to authorize suits against state employers, the Supreme Court has taken a highly limited view of Congress’ authority to regulate under the Commerce Clause or to implement equal protection guarantees for women under the Fourteenth Amendment. Even when it leaves a statute intact, it has taken a narrow view of the authority granted by Congress to the agencies that administer the statutes, particularly when those agencies have acted to protect individual rights. Last term, the Court struck a further blow by limiting the scope of the key federal statute, 42 U.S.C. §1983, that forms the basis for many suits in federal court to protect women’s health and welfare.

1. **Congress’ Authority to Protect Women’s Rights Under the Commerce Clause Has Been Restricted.** In 2000, a 5-4 majority of the Court struck down a crucial provision in the Violence Against Women Act that gave the victims of gender-based violence a right to sue their attackers in federal court in *United States v. Morrison*, 529

\(^{14}\)While the plaintiff in *Barnes* sued under Section 202 of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, the remedies set forth in Title VI are available to redress violations of those statutes.
U.S. 598 (2000). The Court held that Congress lacked constitutional authority to enact this provision under either the Commerce Clause or its power to implement the Equal Protection guarantee of the Fourteenth Amendment, and ruled that remedies for violence against women lie exclusively in state courts. Justices Stevens, Souter, Ginsburg and Breyer joined in a scathing dissent, in which they harshly criticized the majority’s disregard of the “mountains” of legislative history – including four years of Congressional hearings and eight separate reports issued by Congress and its committees over the years leading to enactment of the law – supporting Congress’ finding that domestic violence affects interstate commerce by limiting women’s ability to participate in the national economy. The dissenters further faulted the majority for discounting the many state studies documenting gender bias in the state court systems, which formed a basis for the legislation under the Fourteenth Amendment’s Equal Protection Clause. They also pointedly noted that the states themselves (through the national association of State Attorneys General) had urged Congress to enact this federal remedy due to their own inability to address the problem adequately on a local level, and they commented that the majority’s decision had produced the “irony . . . that the States will be forced to enjoy the new federalism whether they want it or not.” Id. at 654.15

Along with removing a key protection from women who are the victims of gender-based violence, the majority decision in Morrison has sparked challenges to the constitutional validity of other civil rights statutes enacted under the Commerce Clause that affect women, including the Freedom of Access to Clinic Entrances Act of 1994 (“FACE”). FACE provides federal criminal penalties and civil remedies against those who use force, threats of force, or physical obstruction to interfere with or intimidate those who are seeking to obtain or provide reproductive health services. While the Supreme Court has so far repeatedly refused to review circuit decisions upholding the Act, that could change with a shifting Supreme Court.

2. Federal Agencies’ Power to Implement Their Statutes Has Been Weakened. In addition to narrowing the scope of Congress’ power to enact legislation, the Supreme Court has narrowed the reach of key health and safety statutes. In 2000, in a matter of increasing concern to women as more women and girls take up smoking, the Court held, 5-4, that the Food and Drug Administration could not regulate tobacco under its governing statute. Food and Drug Administration v. Brown & Williamson Tobacco Corporation, 529 U.S. 120 (2000). The dissenters advocated a broad interpretation of the statute’s basic purpose of protecting the public health.

15This term, in what could be an interesting look at the Morrison majority’s views on states’ rights in a different context, the Court will review the grant of a preliminary injunction based on the finding that the application of the Controlled Substances Act to the intrastate cultivation, possession and distribution of marijuana for medical use is likely to exceed Congress’ power under the Commerce Clause. Ashcroft v. Raich, 352 F.3d 1222 (9th Cir. 2003), cert. granted, 124 S.Ct. 2909 (2004).
Another recent Supreme Court decision narrows federal authority, but broadens protection of women’s health. In *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), a 5-4 majority held that federal law that governs employee benefit plans, the Employee Retirement Income Security Act of 1974 (“ERISA”), does not preempt an Illinois statute that provides patients with the right to independent medical review of certain HMO coverage decisions. Justice Souter wrote the decision, joined by Justices Stevens, O’Connor, Ginsburg and Breyer. However, last term, the Court unanimously held that ERISA does preempt state causes of action for damages against managed-care health plans for failure to exercise ordinary care in making coverage decisions. *Aetna Health Inc. v. Davila*, 124 S.Ct. 2488 (2004). The plaintiffs in two consolidated cases had become seriously ill because one took a different medication and one left the hospital early because of coverage decisions. Justice Thomas, writing the Court’s opinion, coldly stated that “[u]pon the denial of benefits, [plaintiffs] could have paid for the treatment themselves and then sought reimbursement through an [ERISA] action, or sought a preliminary injunction.” *Id.* at 2497. Justice Ginsburg, joined by Justice Breyer, wrote a concurring opinion recognizing that the decision denying a damages remedy was required under existing precedent, but urging the Court and Congress to act to remedy the “host of situations in which persons adversely affected by ERISA—proscribed wrongdoing cannot gain make-whole relief.” *Id.* at 2503.

In addition, narrow majorities of the Court have recently refused to defer to administrative decisions that protect employees’ rights. In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), petitioner Tracy Ragsdale had taken seven months of unpaid sick leave while she underwent treatment for Hodgkin’s disease. Her employer did not notify her that 12 weeks of this absence would count as leave under the FMLA. Ragsdale was still unable to work at the end of the seven months, and requested more leave or permission to work part-time. Her employer denied the request and terminated her employment. Ragsdale sued for reinstatement, back pay, and other relief in federal district court, relying on a Department of Labor regulation that provided that if an employee takes medical leave that the employer does not designate as FMLA leave, that leave does not count against the employee’s FMLA entitlement. Affirming the lower court rulings against Ragsdale, the Supreme Court, split 5-4, refused to defer to the Secretary of Labor’s judgment that the regulation carried out the statutory mandate. Justice Kennedy wrote the majority opinion, joined by the Chief Justice and Justices Stevens, Scalia and Thomas. Justice O’Connor’s dissenting opinion recognized the importance of individualized notice to employees, and would have upheld the Secretary’s implementation of the FMLA.

The Supreme Court also refused to uphold an administrative action supporting individual rights in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). Again split 5-4, although this time with Justice O’Connor with the majority and Justice Stevens with the dissenters, the Court reversed a National Labor Relations Board decision that granted backpay to an undocumented worker who had been unlawfully discharged for union organizing activities. Ignoring the fact that the Attorney General, who is responsible for enforcing immigration law, was defending the Board, it found that the backpay remedy “trenches upon” immigration law that prohibits the employment of
undocumented aliens. *Id.* at 151. The dissent, written by Justice Breyer, strongly objected to the Court’s substituting its own views for those of the Board.

3. **The Enforcement of Individual Rights Under 42 U.S.C. §1983 is Being Cut Back.** In 2002, the Court issued an opinion that purports to clarify, but in fact severely limits, when an individual can sue for violations of federal rights under 42 U.S.C. §1983, the statute that forms the basis for many suits in federal court to protect women’s health and welfare.16 *Gonzaga University v. Doe*, 536 U.S. 273 (2002). In recent years, the Supreme Court has been limiting this right, but in an ambiguous manner. For example, in *Wilder v. Virginia Hospital*, 496 U.S. 498 (1990), it held that an individual could seek redress for a state violation of a provision of the Medicaid statute, while two years later in *Suter v. Artist M.* 503 U.S. 347 (1992), it held that an individual could not seek redress for a violation of a provision of a federal statute that required states to provide child welfare services. More recently, the Court held in *Blessing v. Freestone*, 520 U.S. 329 (1997), that an individual does not have an enforceable right to challenge a state’s failure to “substantially comply” with Title IV-D of the Social Security Act, which requires states to provide child support enforcement services to families. However, it left open the possibility that Title IV-D may give rise to some individually enforceable rights. *Blessing*, 520 U.S. at 346.

That possibility was significantly decreased in *Gonzaga*, in which a 7-2 majority held that the Family Educational Rights and Privacy Act of 1974 (“FERPA”), which bars an educational institution from receiving federal funds if it has a policy or practice permitting the release of education records to unauthorized persons, does not give an individual student the right to sue under § 1983 if a school discloses that student’s records without his or her consent.17 Five of the Justices used the occasion, with an opinion written by Chief Justice Rehnquist and joined by Justices O’Connor, Scalia, Kennedy and Thomas, to broadly state that “We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. . . . it is rights, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced under the authority of that section.” *Gonzaga*, 536 U.S. at 283 (emphasis in original). The opinion further states that “our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.” *Id.*

Justice Breyer, joined by Justice Souter, concurred in the holding that FERPA’s school record privacy provision was not individually enforceable, noting that it prohibited

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17Although Gonzaga is a private university, the Court assumed “without deciding that the relevant disclosures occurred under color of state law” because the disclosures were made “to state officials in connection with state-law teacher certification requirements.” 536 U.S. at 277, n.1.
funding institutions with a “policy or practice” of unauthorized release of records and did not create individual rights. However, the two Justices objected to the majority’s broad statements concerning § 1983 actions. Justices Stevens, joined by Justice Ginsburg, dissented, protesting that “the Court has eroded – if not eviscerated – the long-established principle of presumptive enforceability of rights under § 1983.” Id. at 302. The lower courts are issuing conflicting decisions on the effect of Gonzaga. As these decisions are appealed, if they reach a Court with more justices who are hostile to federal rights, that Court could preclude women from seeking relief for state violations of essential federally funded assistance programs, including Child Support, Medicaid, and Temporary Assistance for Needy Families.18

4. The Right to Representation to Protect Health and Welfare Could be in Danger. In Legal Services Corporation v. Velazquez, 531 U.S. 533 (2001), the Supreme Court narrowly upheld the right of legal services lawyers to fully represent their clients in welfare cases. In Velazquez, the Supreme Court struck down, by a narrow 5-4 margin, a statutory restriction on representation by recipients of federal funds that involved an effort to challenge existing welfare law. The Chief Justice and Justices O’Connor, Scalia and Thomas dissented.

Two terms ago, in another 5-4 decision, the Court narrowly rejected the efforts of a conservative legal group to end a major source of funding for legal services programs. Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003). The case involved a program that exists in all 50 states and the District of Columbia known as Interest on Lawyers’ Trust Accounts, or Iolita. Under these programs, client funds being held for a short term that are not sufficient to generate interest in a separate account are put in pooled accounts. The interest on the pooled accounts, which amounts to about $160 million per year nationwide, is given to legal services programs. In an opinion written by Justice Stevens and joined by Justices O’Connor, Souter, Ginsburg and Breyer, the Court held that since the clients would not have earned anything in a separate account, no property had been taken from them without just compensation. In the dissent, Justice Scalia complained that the Court had invented a new concept – the “Robin Hood Taking.”

Thus, the shift of only one vote could result in the severe limitation of the ability of poor women to obtain legal help in seeking the funds and services to which they believe they and their children are entitled under federal and state programs.

18On a positive note, last term, in Frew v. Hawkins, 540 U.S. 431 (2004), the Court unanimously held that a federal consent decree entered into by state officials in a § 1983 case under the Medicaid law could be enforced in federal court, overturning the decision below that the Eleventh Amendment barred enforcement of the decree. The decision is silent as to whether the § 1983 cause of action is still viable.

National Women’s Law Center, September 2004
CONCLUSION

As shown, the decisions of the Supreme Court have played a major role in protecting the rights of women in many aspects of their lives. While in some instances the current Court has already restricted these rights to a significant degree, in other key respects women’s rights are hanging by the thread of only one or two votes. Regardless of the exact margin of safety, which varies from issue to issue, there is no doubt that the threat is real and that despite hard-won gains in the last thirty years, just one change on the Court could mean that women will find their legal rights even more severely eroded in the years to come.