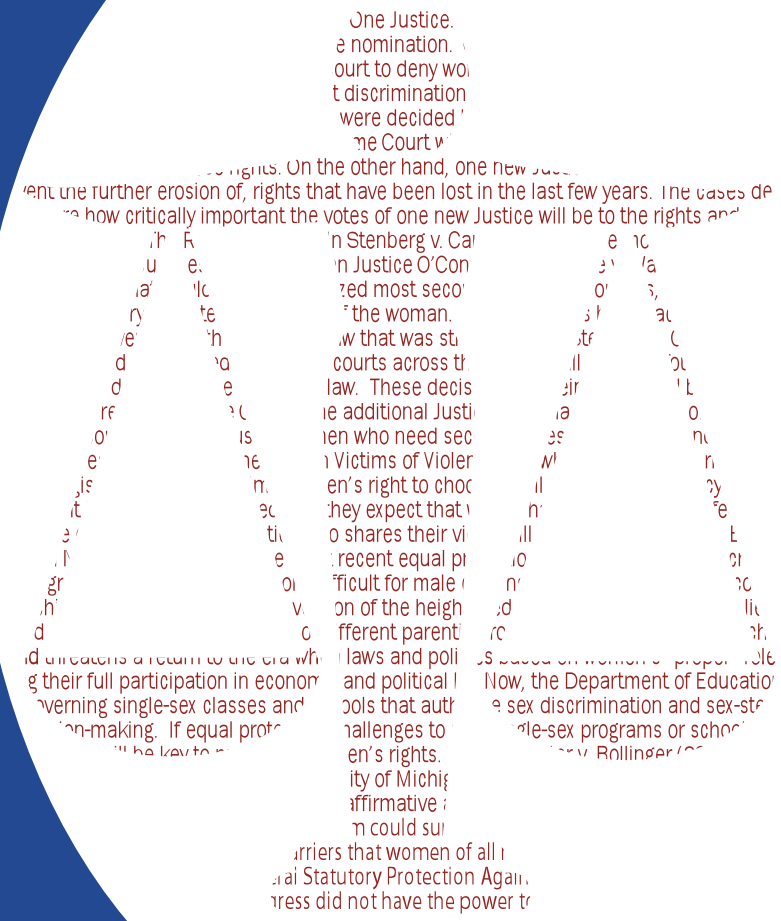
The Supreme Court and Women's Rights

Gathering Storm Clouds



National Women's Law Center

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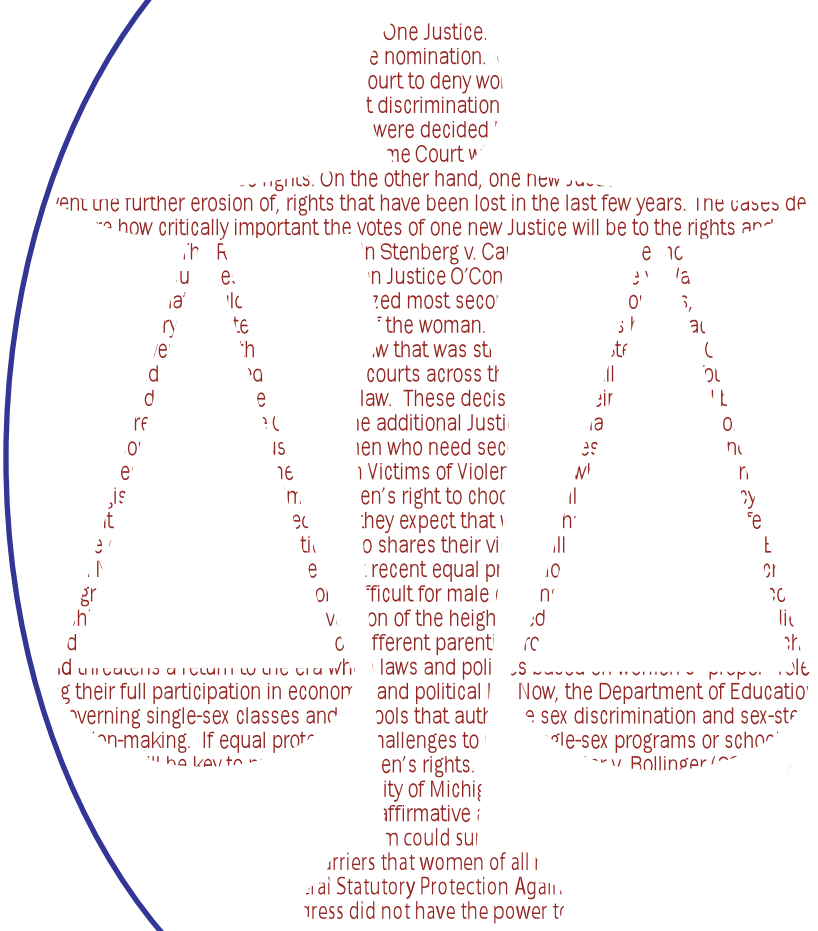

The National Women's Law Center is a nonprofit organization that has been working since 1972 to advance and protect women's legal rights. The Center focuses on major policy areas of importance to women and their families, including health and reproductive rights, employment, education, and family economic security.

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OVERVIEW

For the first time in many years, the Supreme Court has two new justices—Chief Justice John Roberts and Justice Samuel Alito. Their votes and opinions in the October 2005 term suggest that they will be as conservative as the critics of their confirmation warned and many of their supporters hoped. The decisions of the 2005 term also indicate that, with Justice O'Connor's retirement, Justice Kennedy will be the new swing vote on the Court, with Chief Justice Roberts and Justices Scalia, Thomas and Alito generally on one side, and Justices Stevens, Souter, Ginsburg and Breyer on the other.

But, Justice Kennedy has been far less supportive of women's rights than Justice O'Connor in crucial areas: the right to privacy, including the right to choose; the right to equal protection of the law; and the right to critical protection against discrimination in education, employment, health and other key areas affecting the lives of women. While the decisions of the 2005 term did not result in any dramatic changes, women's rights face gathering storm clouds with the new composition of the Court.

The Right to Privacy

The upcoming term will most likely shed light on Justice Kennedy's views on *Roe v. Wade*, and whether women's right to choose will be substantially curtailed by the newly constituted Court:

- In *Stenberg v. Carhart* (2000), the most recent case directly addressing the contours of the right to choose, Justice O'Connor applied *Roe v. Wade* in a 5-4 decision striking 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. Justice Kennedy dissented, discounting the medical evidence showing the necessity of the procedure for women's health. However, he strongly affirmed the right to privacy in his opinion in *Lawrence v. Texas* (2003), the case striking down the Texas law that criminalized private consensual sex between adults of the same sex.
- Shortly after Justice O'Connor retired, the Court agreed to review essentially the same issues addressed in *Stenberg* in two cases striking down the federal version of the Nebraska abortion ban, primarily because it lacks a health exception, *Carhart v. Gonzales* and *Planned Parenthood Federation of America v. Gonzales*, even though there was no split in the circuit courts of appeals. Last term, the Court avoided the hard questions in *Ayotte v. Planned Parenthood of Northern New England* (2006), which challenged the lack of a health exception in a parental consent law, presumably so that all the Justices could join Justice O'Connor in her last decision. This term, Justice Kennedy's vote is likely to be crucial in the Court's determination of whether women's health—and their right to choose—will be protected.

Equal Protection, Affirmative Action and Integration

Justice Kennedy's vote will also be key to the future enforcement of the Equal Protection Clause of the Constitution. His views have differed from those of Justice O'Connor in defining the standard of review for laws and practices that discriminate on the basis of sex, and in the remedies that can be employed under the Constitution to promote racial and—by extension—gender diversity. The 2006 term may reveal his views and the direction the Court takes concerning school desegregation:

- In *Nguyen v. INS* (2001), the most recent constitutional equal protection case involving sex discrimination, Justice Kennedy, over Justice

O'Connor's strong dissent, wrote a decision upholding immigration laws that make it more difficult for male citizens than female citizens to confer citizenship on their non-marital children. He 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 to uphold the discrimination. 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.

- In *Grutter v. Bollinger* (2003), Justice O'Connor wrote the 5-4 decision upholding the affirmative action program of the University of Michigan Law School. Affirmative action is key to removing the barriers that women of all races and ethnicities face in employment, education and other areas. Justice Kennedy dissented.
- This term, the Court will hear *Parents Involved in Community Schools v. Seattle School District* and *Meredith v. Jefferson County Board of Education*, two cases in which the circuit courts upheld the constitutionality of policies adopted by public school systems to maintain racial integration in individual schools. The lower courts applied the standard set forth in *Grutter*. The Supreme Court, which had refused to hear a similar case while Justice O'Connor was still on the bench, agreed to review those cases after her retirement, even though there was no circuit split. Justice Kennedy's vote could determine what remedies will be available to school systems.

Federal Statutory Protection Against Discrimination

The 2006 term does not currently include any state sovereign immunity cases that affect women or any Title IX cases. However, in both these areas Justice Kennedy, unlike Justice O'Connor, has voted in close cases against protections for women. Thus, concerns are raised for the future. The Court will be hearing a Title VII case of particular importance to women, but, if last term is a guide, some employee rights could still be protected by a generous margin:

The denial of women's most fundamental rights to privacy and equal protection could dramatically turn back the progress that has been made in equalizing women's place in our society.

- In *Hibbs v. Department of Human Resources* (2003), the Court held, 6-3, with Justice O'Connor joining the majority, 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. Justice Kennedy wrote a dissent.
- In *Jackson v. Birmingham Board of Education* (2005), Justice O'Connor wrote the decision for a 5-4 Court, finding that there is a private right of action for retaliation under Title IX. She recognized that without such a remedy "Title IX's enforcement scheme would unravel." Justice Kennedy dissented.
- In *Davis v. Monroe County Board of Education* (1999), Justice O'Connor also wrote the decision for a 5-4 Court, holding that Title IX covers student-on-student sexual harassment. Justice

Kennedy wrote the dissent, arguing that schools should never be liable for this form of sexual harassment under Title IX, 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.

- Last term, the Court unanimously provided crucial protection for employees who face retaliation after they complain about discrimination on the job in *Burlington Northern v. White* (2006). This term, in *Ledbetter v. Goodyear Tire and Rubber Co.*, the Court will decide whether employees will have a remedy for continuing discrimination if the discriminatory decision—such as paying a woman less—was made before the statutory time period for filing suit.

Thus, the new composition of the Court could mean that women's access to abortion services, and even to many contraceptive options that are deemed by some to be "abortifacients," could be taken away or severely restricted in the coming years, and that protections against gender-based discrimination in employment, education and other spheres of life could be weakened or lost. The denial of women's most fundamental rights to privacy and equal protection could dramatically turn back the progress that has been made in equalizing women's place in our society.

INTRODUCTION

With new Justices on the Supreme Court for the first time in many years, the Court appears to be headed for a period of momentous change, with the portent of difficult days ahead for women's rights. The strength and vitality of the right to privacy, including the right to abortion, to equal protection of the law, and to be free from discrimination in the workplace and in school, are all at risk.

John Roberts was sworn in as Chief Justice just before the beginning of the October 2005 term, replacing Chief Justice William Rehnquist, for whom he once clerked. On January 31, 2006, Samuel Alito was sworn in for the seat vacated by Justice Sandra Day O'Connor. The earlier writings of both new Justices suggested that they would join the conservatives who often vote together on the Court—Justices Kennedy, Scalia and Thomas,[1] and the decisions issued during the 2005 Term support this prediction. During that term, Chief Justice Roberts voted with Justice Scalia in 88 % of the non-unanimous decisions, and Justice Alito voted with Justice Thomas in 84 % of such cases.[2]

It is especially significant that Justice Alito filled Justice O'Connor's seat. She was often the swing vote in critically important cases, particularly on issues involving women's rights. While she did not always rule to support legal rights of importance to women, she parted company with the Court's most conservative Justices in a number of key cases involving the right to choose, affirmative action, sex discrimination in the workplace and at school, and other critically important areas. Justice O'Connor was a strong voice and vote in decisions applying the Equal Protection Clause to strike down laws and government policies that discriminate on the basis of sex.

In contrast, the decisions of the 2005 term show that Justice Alito is not a centrist; he is firmly aligned with the conservatives. With the new line-up, it is Justice Kennedy who has become the swing vote. However, as such, he is less likely to cast his vote to protect women's rights than Justice O'Connor was. Indeed, in most of the 5-4 cases decided in the last few years in which she voted in support of those rights, Justice Kennedy voted to limit them. Justice Kennedy voted against affirmative action in the University of Michigan cases in 2003, and has voted on more than one occasion against the right to effective protection under Title IX of the Education Amendments of 1972, the law that bars discrimination on the basis of sex in educational programs that receive federal funds. Justice Kennedy joined Justice O'Connor in affirming Roe v. Wade in the Casey decision in 1992, but he parted ways with her in 2000, and was one of the four Justices who would have upheld Nebraska's criminal law banning "partial-birth abortion" even though it had no health protection for women. This term, the Court will decide the constitutionality of a national ban, and Justice Kennedy's vote will be key.

The 2005 term did include a unanimous decision providing important protection for employees who suffer retaliation for complaining about discrimination—a key win for women. But, Justice Alito wrote a concurring opinion to express his view that the rest of the Court had provided too much protection. Justice Alito also signaled his restricted view of civil rights in a decision for a 6-3 Court in a case under the Individuals with Disabilities Education Act that suggests an interest in limiting the scope of Congress' power under all the civil rights statutes that bar discrimination in federally funded programs and activities.

In an abortion case decided in the 2005 term, all the Justices joined Justice O'Connor in her last opinion, which decided the case on narrow grounds and postponed the hard questions about the future of *Roe v. Wade* until another day. Then, after Justice O'Connor's retirement, the Court hastened the arrival of that day by agreeing to review two cases striking down the

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federal Partial-Birth Abortion Ban Act, even though it raised virtually the same issues she had cast the deciding vote in resolving only six years before, and there was no split in the circuit courts of appeals. In addition, after rejecting a similar case while Justice O'Connor was still sitting, the Court decided to hear two cases upholding plans adopted by public school systems to maintain racial integration in individual schools—again with no circuit split.

This report highlights recent cases involving key women's rights protections, most of which were decided by narrow margins, with a focus on Justice Kennedy's role. The opinions in these cases show how the Supreme Court has 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. And, they show that at this time of transition on the Court, gathering storm clouds hang over these critical legal protections.

I. FUNDAMENTAL CONSTITUTIONAL PROTECTIONS

A. Effective Constitutional Protection of a Woman's Right to Choose is in Danger

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

Over 30 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 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), two current members of the Court, Justices Scalia and Thomas, and former Chief Justice Rehnquist 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. Justices O'Connor, Kennedy and Souter wrote the opinion of the Court.

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 written by Justice Breyer and joined by Justices Stevens, O'Connor, Souter and Ginsburg, the Court struck down a Nebraska criminal law that banned "partial birth abortion" because 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*, and thus imposed an undue burden. In addition, the law's definition of the unlawful procedure was so vague that it covered the most commonly used procedure for abortions in the second trimester.

Justice Kennedy joined the dissenters (former Chief Justice Rehnquist and Justices Scalia and Thomas). He was convinced that there was no medical need for the procedure that the Nebraska law purported to bar, and disagreed that the law also criminalized other procedures. Thus, while Justice Kennedy did not call for overruling *Roe*, he interpreted the nature of an "undue burden" very loosely.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down a Texas law that criminalized private consensual sex between adults of the same sex, Justice Kennedy, this

time writing for the majority, strongly affirmed the right to privacy, stating 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).[3] However, this affirmation does not mean that Justice Kennedy has changed his views about what constitutes an "undue burden" for a woman who seeks an abortion. Moreover, Justice Scalia's dissenting opinion, which was joined by the former Chief Justice and Justice Thomas, again expressed their contempt for *Roe v. Wade*. In a separate dissenting opinion, Justice Thomas flatly stated his belief that there is no constitutional right to privacy at all.

Last term, Justices Scalia and Thomas held their fire, and, along with the rest of the Court, including Chief Justice Roberts, joined Justice O'Connor in her last decision, *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006), the state's appeal of an order enjoining in its entirety New Hampshire's parental notification law because it lacks a health exception. The Court cited its precedents requiring that the woman's health be protected, but pointedly noted that it was not revisiting those precedents "today." *Id*. at 964. Instead, avoiding the core issues as new Justices joined the Court, the decision addressed only the proper remedy—whether the statute should be enjoined in its entirety or only in part. The case was remanded for a determination of legislative intent: "Would the [New Hampshire] legislature have preferred what is left of its statute to no statute at all?" *Id*. at 968.4

This term, the issue of the constitutional requirement to protect the health of the woman—one of *Roe*'s core principles—will be back before the reconstituted Supreme Court. Even though *Stenberg* is definitive precedent and there is no split in the circuits, it is reviewing two cases in which the Courts of Appeals for the Eighth and Ninth Circuits struck down the Partial-Birth Abortion Act of 2003 ("PBA"),[5] a federal version of the Nebraska law that was narrowly found to be unconstitutional in *Stenberg*.[6] In an effort to get around *Stenberg*, the PBA includes Congress' findings that what it defines as a "partial-birth abortion" is "never medically indicated to preserve the health of the mother" and a somewhat altered description of a "partial-birth abortion." PBA, §2(14)(O); §3. The courts of appeals (and the district court decisions from which the Administration appealed) rejected Congress' effort, and found the PBA to be unconstitutional because it lacks an exception for the health of the woman. The Ninth Circuit also found the law to be vague and overbroad because the definition of the banned procedure—like the definition in the state law that was struck down in *Stenberg*—encompassed other procedures. *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), Sup. Ct. No. 05-380; *Planned Parenthood Federation of America, Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), Sup. Ct. No. 05-1382.

The Administration is arguing that the PBA cases can be distinguished from *Stenberg*, primarily because of the findings made by Congress, to which it contends deference is due. It also argues that if the Court concludes that *Stenberg* governs, *Stenberg* should be overruled. Brief for the Petitioner, *Gonzales v. Carhart* (No. 05-380). Based on their prior opinions objecting to *Roe v. Wade* altogether, it is likely that Justices Scalia and Thomas will vote to uphold the PBA. While the new Chief Justice and Justice Alito did not state their views about *Roe v. Wade* at their confirmation hearings, given their prior writings and their alignment so far with Justices Scalia and Thomas, they could well join those Justices in upholding the ban.[7] Thus, Justice Kennedy's vote will be key.

If the PBA is upheld, the constitutional right recognized in *Roe v. Wade* will be dangerously eviscerated, and women will be left to face onerous and dangerous state and federal restrictions on abortion. Throughout the country, even in states that would prefer to protect women's health and not ban the procedure, some women who need an abortion after the first trimester will be denied the procedure that is safest for them. Furthermore,

Effective protection of a woman's right to choose is in grave danger.

because of the vagueness of the PBA, the already small number of physicians who perform second trimester abortions may not do so out of fear that a procedure may cross the blurred line of what some prosecutor considers criminal.

Moreover, additional challenges to *Roe v. Wade* are looming. In an effort to give the Supreme Court a vehicle for overturning *Roe*, South Dakota has enacted a law making every abortion a crime except when necessary to save the life of the mother.[8] That law is currently suspended pending a referendum on it that will be on the November 2006 ballot. If the proponents of the restrictive law prevail, the pre-*Roe* days—when women's health and even their lives were sacrificed—could return.

2. Abortion Could be Redefined to Encompass Some Contraceptives.

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. In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), former 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. Justice Thomas (who was appointed after *Webster* was decided), the new Chief Justice, and Justice Alito could well share 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 existing or new abortion restrictions. 492 U.S. at 539, n.1 (Blackmun, J. dissenting), 563 (Stevens, J. dissenting).

The view that common forms of birth control are tantamount to abortion may seem extreme, but limiting access to contraceptives, especially emergency contraception that some people think prevents implantation of a fertilized egg, is now a focus of many anti-choice advocates. A number of pharmacists across the country are refusing to fill prescriptions for birth control, including emergency contraception, based on their personal beliefs. Whether or not they should be allowed to do this is being debated in the states. National Women's Law Center, *Pharmacy Refusals 101*, Sept. 2006, *available at* http://www.nwlc.org/pdf/PharmacyRefusals101_09.14.06.pdf.

3. Access to Women's Health Clinics Could Lose Protection.

Last term, the Supreme Court ended a 20 year effort to use the Racketeer Influenced and Corrupt Organizations Act ("RICO") to prevent violent protests at women's health clinics. *Scheidler v. National Organization for Women*, 126 S. Ct. 1264 (2006).[9] In the Court's unanimous decision, Justice Breyer noted that the enactment of the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), a statute aimed directly at abortion clinic violence, suggested that Congress did not believe that such violence was covered by RICO. *Id*. at 1272. With the loss of the RICO remedy, it is crucial that FACE not be weakened.[10]

In addition to federal law, several states have passed statutes to protect access to women's health clinics. These laws could be jeopardized by the changes in the Supreme Court. For example, 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. Justice Kennedy wrote his own dissenting opinion, also arguing that the state law violates the First Amendment, and adding that the decision conflicts with the "essential reasoning" of *Casey* because it prevents protesters from handing women leaflets with information they could consider in making their moral decision about whether to have an abortion. Protests at clinics continue, and, if a challenge is heard by the new Court, the results could be different. *Id*. at 791.

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 former 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 openness to a program that does not involve "handcuffs, arrests, prosecutions, and police assistance" in its design and implementation. *Id*. at 89, 90.

Thus, effective protection of a woman's right to choose is in grave danger. Justices Scalia and Thomas have declared in no uncertain terms their readiness to overturn *Roe v. Wade* outright, and the two new Justices may well share their view. With Justice O'Connor no longer on the Court, Justice Kennedy will have to be persuaded not to allow the imposition of crushing burdens on the exercise of women's constitutional right to privacy

The current heightened scrutiny test, which has been so important in providing core constitutional protection against government sponsored sex discrimination, could be in jeopardy.

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 Could be in Jeopardy.

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 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)("*VMI*"), 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, could be in jeopardy. 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*, former 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 have looked solely at whether a classification serves important governmental objectives and is substantially related to achievement of those objectives.

In the Court's most recent sex-based equal protection case, *Tuan Anh Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53 (2001), Justice Kennedy wrote the decision for the 5-4 majority, and, without discussion, used former 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's opinion was joined by the former Chief Justice and Justices Scalia, Thomas, and Stevens (who has not supported a weakened standard in other

decisions). Former 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. If both Chief Justice Roberts and Justice Alito follow the former Chief Justice, there may no longer be five votes for a vigilant and consistent application of the heightened scrutiny standard. If they agree with Justice Scalia that rational basis review is more appropriate, Justice Kennedy's vote could be crucial in determining whether the heightened scrutiny standard is be abandoned, and whether federal laws and policies based on stereotypes of women and men may be considered constitutional.[11]

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. In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), the Court held that a statewide association that regulates 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, joined by the former Chief Justice and Justices Kennedy and Scalia, 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 prevail with the new Court.

When discriminatory practices or institutions are challenged, if the new Court does not support a strong heightened scrutiny standard, girls could be relegated to programs based on stereotypes of their interests and abilities.

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, if the new Court does not support a strong heightened scrutiny standard, girls could be relegated to programs based on stereotypes of their interests and abilities.

2. *Affirmative Action and School Desegregation Programs May be Endangered.*

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.

This term, even though there is no circuit split, the Supreme Court will hear two cases challenging policies adopted by public school systems to maintain racial integration in individual schools.

In highly publicized cases in 2003, 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 the opinion in *Grutter*, joined by Justices Stevens, Souter, Ginsburg and Breyer, in which the Court definitively adopted the position, originally set forth by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that a university's "interest in diversity is compelling in the context of a 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, former 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 former 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 may be threatened. If the two new Justices follow the former Chief Justice, it is not clear that any affirmative action program could survive strict scrutiny. If they agree with Justices Scalia and Thomas that affirmative action is always unconstitutional, Justice Kennedy's vote will be key to determining whether there is even an argument to be made.

This term, even though there is no circuit split, the Supreme Court will hear two cases challenging policies adopted by public school systems to maintain racial integration in individual schools. While neither case involves affirmative action, the courts below used the strict scrutiny standard as applied in *Grutter* and *Gratz*. One case involves a plan in Seattle that tries to mitigate the impact of segregated housing patterns with an "open choice" policy for the city's high schools. If too many students wish to attend one school, the school looks to several factors as a "tie-breaker" to choose the students. First, it looks at whether

a sibling attends the school. Second, it looks at the race of the applicant and the racial balance of the school, and third, it looks at how near the student lives to the school. *Parents Involved in Community Schools v. Seattle School District*, 426 F. 3d 1162 (9th Cir. 2005) (*en banc*), Sup. Ct. No. 05-908. The other case involves a plan adopted for the entire public school system in Louisville, Kentucky shortly after a 25 year-old court-supervised school desegregation plan was ended. With a complicated system of assignments based on student preferences, every school seeks a black student enrollment of between 15% and 50%. *Meredith v. Jefferson County Board of Education*, 416 F. 3d 513 (6th Cir. 2005), Sup. Ct. No. 05-915.[12] Thus, the school systems are seeking to further their obligation to desegregate under *Brown v. Board of Education*, 347 U.S. 483 (1954). Both plans were upheld by the respective courts of appeals, which found that they survived strict scrutiny. The new Court's interest in hearing these cases brings into question whether there is continued support for efforts to promote diversity and end discrimination in education.[13]

The end of affirmative action programs and school desegregation plans could have a serious impact on women of color, who have benefited from these programs and plans. In addition, women of all races and ethnicities continue to be excluded from many traditionally all-male fields in academia, including science, engineering and mathematics. And, fields where women predominate, such as nursing, suffer from the absence of men. *See, Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). Accordingly, affirmative action and diversity 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. In the last few years, the Court has declined the opportunity to look at affirmative action in federal and local government contracting programs. *Adarand Constructors v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. dismissed*, 534 U.S. 103 (2001) (federal program); *Concrete Works of Colorado Inc. v. Denver, Colo.*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027, 124 S. Ct. 556 (2003) (municipal program).[14] Thus, the availability of affirmative action for minorities and women in the workplace, government contracting, and other areas where such action is still needed to open up opportunities for all, is very much open to question.

Affirmative action and diversity programs are still critically needed to break down the persistent barriers to opportunity that women face.

II. STATUTORY PROTECTIONS

A. Women's Rights Have Been Cut Back under the New Federalism

Historically, women and minorities have relied on the federal government for protection of their rights. But, in the 1990's, a narrow majority of the Supreme Court began limiting Congress' power to pass laws aimed at protecting civil rights and health and safety protections under the Commerce and Equal Protection Clauses. In 1995, for the first time since 1936, the Court held that a statute exceeded Congress' power under the Commerce Clause. Following that 5-4 decision, which involved a law banning guns in schoolyards, in 2000 the Court struck down a statutory provision that gave victims of gender-motivated violence a federal remedy, holding that this provision exceeded the authority of Congress to regulate interstate commerce or to implement constitutional equal protection. Also in 2000, following a line of cases expanding state sovereignty, the Court held, 5-4, that because Congress had exceeded its authority to abrogate the states' sovereign immunity, employees of state agencies and

entities could not 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.

Not long thereafter, however, this "new federalism" movement appeared to reach some limits. In 2003, in a significant victory for women's rights, six members of the Court allowed Congress to exercise its authority to remedy sex discrimination by the states, 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. More recently, the Court has allowed suits for damages against states for disabled persons who are denied access to state courts, and, in some circumstances, for disabled prisoners. In 2005, the Court reasserted Congress' authority under the Commerce Clause, holding that its power to regulate interstate commerce overrode a California law allowing the medical use of marijuana. However, these more recent decisions do not repair the damage that has already been done to state employees' civil rights and women's ability to protect themselves from gender-motivated violence.

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

In 2000, a 5-4 majority of the Court—made up of former Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia and Thomas—struck down a crucial provision in the Violence Against Women Act of 1994 ("VAWA") that gave the victims of gender-based violence a right to sue their attackers in federal court in *United States v. Morrison*, 529 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. *Morrison* relied on the then recent decision in *United States v. Lopez*, 514 U.S. 549 (1995), in which it held, also 5-4, that a federal law barring the possession of a gun in a schoolyard exceeded Congress' authority under the Commerce Clause.

Justices Stevens, Souter, Ginsburg and Breyer joined in a scathing dissent in *Morrison*, 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.

Five years later, the dissenters in *Morrison*, joined by Justices Kennedy and Scalia, formed a majority and strongly reasserted Congress' authority under the Commerce Clause in *Gonzalez v. Raich*, 545 U.S. 1, 125 S. Ct. 2195 (2005), the "medical marijuana" case. The issue was whether the application of the federal Controlled Substances Act ("CSA") to the intrastate cultivation, possession and distribution of marijuana, which was allowed under the California medical use law, exceeded Congress' power under the Commerce Clause. The Court, with Justice Stevens writing the opinion, held that it did not: the "CSA is a valid exercise of federal power, even as applied to the troubling facts of this case." 125 S. Ct. at 2201. The decision also states that "the absence of particularized findings does not call

into question Congress' authority to legislate." *Id*. at 2208 (footnote omitted). Justice Scalia wrote a concurring opinion, in which he focused on Congress' authority under the "necessary and proper" clause of the Constitution to regulate intrastate commerce that affects interstate commerce. Thus, the new federalism of *Lopez* and *Morrison* was constrained,[15] and Congress' authority under the Commerce Clause was preserved. However, if Chief Justice Roberts and Justice Alito agree with the dissenters in *Raich* and a statute that does not clearly regulate economic activity is before the Court, the new federalism could be resurrected.[16]

The CSA was before the Court again last term in *Gonzales v. Oregon*, 126 S. Ct 904 (2006), the Oregon assisted suicide case. This time, the issue decided was not Congress' authority, but the authority of former Attorney General John Ashcroft to issue an Interpretive Rule that prohibited physicians from prescribing controlled substances in accord with the Oregon Death With Dignity Act. The Court held, 6-3, with Justice Kennedy writing the opinion (joined by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer), that Ashcroft had exceeded his authority and that his Interpretive Rule defining what constituted a "legitimate medical purpose" for prescription drugs was not entitled to deference. At the same time, citing *Raich*, the Court reaffirmed a broad view of Congress' power: "[e]ven though regulation of health and safety is 'primarily, and historically, a matter of local concern,'. . . there is no question that the Federal Government can set uniform national standards in these areas." 126 S. Ct. at 923 (citation omitted).[17] In a dissenting opinion joined by Chief Justice Roberts and Justice Thomas, Justice Scalia stated that "[t]he Court's decision today is perhaps driven by a feeling that the subject of assisted suicide is none of the Federal Government's business." But, since "the Federal Government has [long] used its enumerated powers for the purpose of protecting public morality. . . using the federal commerce power to prevent assisted suicide is unquestionably permissible." Id. at 939.[18]

With Justice Alito on the Court, who might well have voted with the dissenters, Justice Kennedy may be the key vote in determining what kind of "public morality" can be legislated at the federal level.

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Thus, the reassertion of Congress' power could have a dark underside. Justice Kennedy's statement about the federal government's authority to set uniform standards for the regulation of health and safety, and Justice Scalia's assertion of its power to protect "public morality" give rise to a concern that the Court will uphold a conservative Congress' use of its power to restrict women's rights, rather than protect them. In the PBA cases discussed above, for example, it is those who seek to limit women's constitutional right to choose who are defending a federal statute and arguing for deference to Congress' findings.

2. *Congress' Authority to Provide Effective Relief Against States that Violate Civil Rights Has Been Limited.*

As part of the new federalism, the narrow majority of the Court that prevailed in *Lopez* held a year later in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that Congress could not abrogate the states' Eleventh Amendment immunity under the Commerce Clause of Article I of the Constitution.[19] Then, in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), the same 5-4 majority adopted a particularly restrictive view of Congress' authority to abrogate that immunity under the Fourteenth Amendment to the Constitution. It held that even though Congress had clearly stated its intent to abrogate the states' sovereign immunity and allow state employees to sue their employers for employment discrimination in federal court under the

federal Age Discrimination in Employment Act ("ADEA"), it did not have the authority to do so to implement the Equal Protection Clause.[20] 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 from breast cancer who lost 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.[21]

The following year, 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).

However, in 2003, former 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.[22] *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 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 former 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 728, by removing "the pervasive sex-role stereotype that caring for family members is women's work." *Id*. at 731. 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 scrutiny[23] 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. Justice Kennedy, in a dissent joined by Justices Scalia and Thomas, disagreed, stating that "[t]he Court is unable to show that States have engaged in a pattern of unlawful

conduct which warrants the remedy of opening state treasuries to private suits," and that the heightened scrutiny standard did not alleviate the burden of making this showing. *Id*. at 745, 755.

Congress was also found—again over Justice Kennedy's dissent—to have met its burden the following year in *Tennessee v. Lane*, 541 U.S. 509 (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 decision, written by Justice Stevens and joined by Justices O'Connor, Souter, Ginsburg and Breyer, 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 522-23.[24]

Dissenting, former 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 539. 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.

Last term, Justice Scalia wrote the decision for a unanimous Court in another case brought against a state under Title II of the ADA, this time by a disabled prisoner named Tony Goodman. *United States v. Georgia*, 126 S. Ct. 877 (2006). The decision removes any doubt that states can be sued for damages under a federal law that authorizes a remedy for a constitutional violation: "[w]hile the Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment, . . . no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions." *Id*. at 881 (emphasis in original). Thus, to the extent Goodman proved cruel and unusual punishment in violation of the Eighth Amendment (as applied to the States through the Fourteenth Amendment), the State was liable for damages under Title II. The case was remanded for the determination of which claims alleged Fourteenth Amendment violations, which claims alleged misconduct that violated Title II but not the Fourteenth Amendment, and whether Congress had validly abrogated sovereign immunity for the latter claims. Justice Stevens, joined by Justice Ginsburg, wrote a concurring opinion pointing out that on remand the court should look for violations not only of the Eighth Amendment, but also of other constitutional provisions.

In another case decided last term, the Court declined to follow its ruling in *Seminole Tribe*, and held that the Bankruptcy Clause of Article I of the Constitution allows Congress to authorize proceedings against the States. *Central Virginia Community College v. Katz*, 126 S. Ct 990 (2006). Justice Stevens wrote the opinion for the 5-4 majority (which included Justice O'Connor), in which he relied on the history of the Bankruptcy Clause to find that it was intended not only to grant legislative authority to Congress, but also "to authorize limited subordination of state sovereign

Justice Kennedy has voted to give the states' immunity from suits for damages for violations of federal statutes.

immunity in the bankruptcy arena." *Id*. at 996. He acknowledged that while *Seminole Tribe* "reflected an assumption" that its holding would apply to the Bankruptcy Clause, "[c]areful study and reflection have convinced us, however, that that assumption was erroneous." *Id*. Justice Thomas, joined by Chief Justice Roberts and Justices Scalia and Kennedy, dissented, protesting that Congress cannot abrogate the states' Eleventh Amendment immunity under any of its Article I powers.

While *Kimel* and *Garrett* have not been applied as broadly as feared in the last few years, the requirement imposed as part of the "new federalism"—that federal statutes abrogating state sovereign immunity must be "congruent and proportional" to the harm they seek to remedy—must be met. While Justice Kennedy was part of the unanimous *Goodman* Court that recognized the right to sue the states for "actual" violations of the Constitution, he has otherwise consistently voted to give the states immunity from suits for damages for violations of federal statutes. In addition, as shown by Chief Justice Roberts' dissent in the Bankruptcy Clause case, the new Justices may still seek to limit Congress' abrogation of state sovereign immunity. Thus, the future may not bode well for Congress' ability to provide effective protection against violations of civil rights by the states.

B. Protection Against Employment Discrimination Has Been Supported in some Aspects and Weakened in Others

In addition to the federalism issues, women's rights could be threatened by the Court's narrow interpretations of the existing federal statutes that prohibit discrimination in the workplace and schools, and protect women's health, safety and welfare. In recent years, the Court has issued several decisions that, often with close votes, have weakened employees' protections under Title VII of the Civil Rights Act of 1964, which bars discrimination on the basis of race, color, religion, sex and national origin by employers with 15 or more employees. For example, it upheld mandatory arbitration clauses in employment contracts, meaning 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. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). In a case with repercussions for plaintiffs in all civil rights litigation, the Court 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). The Court held, 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. The dissenters stated their concern that the Court's "constricted definition" will "impede access to court for the less well heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general." *Id*. at 622-23 (Ginsburg, J., dissenting).

In contrast, last term the Court issued a 9-0 decision in a Title VII case that offers important protection for civil rights in the workplace. *Burlington Northern v. White*, 126 S. Ct. 2405 (2006). But, whether other protections will be expanded or cut back in future cases remains an open question, which will be addressed in at least one case that will be heard this term.

1. *Employees who Suffer Retaliation Will be Protected Under Title VII.*

Burlington Northern, which was issued with the two new Justices on the bench, provides crucial legal protection for employees who are retaliated against after they complain about discrimination on the job. All but Justice Alito, who wrote a concurring opinion, rejected the railroad's and the Administration's argument for a far more limited protection against retaliation.[25] The plaintiff, Sheila White, was the only woman who worked in a railroad yard. After she complained about sexual harassment, she was ordered to perform more onerous duties, and was later suspended without pay for 37 days for alleged insubordination. The charges were subsequently thrown out, and she was reinstated with backpay. The railroad acknowledged that Ms. White had been retaliated against, but argued that the actions taken were not serious enough to warrant relief under Title VII's non-retaliation provision. The Court, with Justice Breyer writing the opinion, disagreed. Resolving a dispute among the circuit courts as to what standard should be applied, it held that an employee can recover damages if the employer's retaliatory actions are "materially adverse to a reasonable employee or job applicant", meaning that they must be "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id*. at 2409. The actions taken against Ms. White were found to meet that standard. The Court also concluded that the adverse actions taken need not be related to employment or occur at the workplace to be actionable. *Id*. In a finding particularly important to women, the Court stated that a factfinder would have to look at the "particular circumstances" of a case: "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." *Id*. at 2415.[26]

2. *The Statute of Limitations Could Pose Serious Obstacles for 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.

Whether protections for employees under Title VII will be expanded or cut back in future cases remains an open question

In *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the Supreme Court narrowly interpreted the "continuing violation doctrine," which allows the courts to consider certain discriminatory acts that occurred before the statutory time period for filing a charge with the EEOC. A unanimous Court, in an opinion written by Justice Thomas, ruled 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. Of concern, four members of the Court (the former 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.

This term, in a case of particular significance to women, the Supreme Court will examine how *Morgan* applies to a Title VII case alleging illegal pay discrimination when a lower paycheck was received during the statutory

time period, but the discriminatory pay decision was made earlier. *Ledbetter v. Goodyear Tire and Rubber Co.*, No. 05-1074. Lilly Ledbetter, who was one of only three women managers at a Goodyear plant, won a jury verdict on her sex discrimination claim, but the Court of Appeals for the Eleventh Circuit reversed the verdict, holding that her claim was barred by the statute of limitations. If its decision stands, victims of discrimination who did not initially know of pay disparities or were afraid to file a complaint will have no remedy against the continuing discrimination.

This term, the Supreme Court will decide whether victims of discrimination who did not initially know of pay disparities or were afraid to file a complaint will have a remedy against the continuing discrimination.

3. Protection Against Disparate Impact Discrimination on the Basis of Age Has Been Recognized.

In *Smith v. Jackson*, 548 U.S. 228 (2005), police officers filed suit under the Age Discrimination in Employment Act of 1967 (ADEA), challenging salary increases based on years of service that were in practice more generous to younger officers than to officers over 40. Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, held that the ADEA, like Title VII on which it was modeled, authorizes recovery in such disparate impact cases. In other words, older workers can challenge practices that are neutral on their face, and need not demonstrate that the employer intentionally discriminated against them. However, the Court further held that the ADEA provides for a broader defense for the employer than exists in Title VII cases: that "the differentiation is based on reasonable factors other than age." The employer's explanation for the differing increases—the need to make junior officers' salary competitive—was found to be reasonable, so that the City was entitled to judgment. Justice Scalia concurred in part, stating that the EEOC recognized disparate impact claims under the ADEA and "[t]his is an absolutely classic case for deference to agency interpretation." Justice O'Connor, joined by Justices Kennedy and Thomas, would not have allowed disparate impact claims under the ADEA.

C. Protection Against Discrimination in Education Under Title IX Could Be Weakened

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.

Two terms ago, the Court provided important protection for students, teachers and coaches, holding that Title IX provides a cause of action for those who are retaliated against for complaining about sex discrimination. However, Justice O'Connor provided the crucial vote in that case, and, without her, effective enforcement of Title IX could be in danger.

1. A Private Right of Action for Retaliation Under Title IX Was Recognized but other Rights Could be Limited.

A few years ago, the Court looked at disparate impact discrimination in a Title VI case, *Alexander v. Sandoval*, 532 U.S. 275 (2001). It ruled, 5-4, 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. Justice Scalia wrote the majority opinion, which was joined by the former Chief Justice and Justices O'Connor, Kennedy and Thomas. Some lower courts began applying *Sandoval* more broadly, to bar suits for other types of discrimination that are not explicitly mentioned in a statute. For example, relying on *Sandoval*, the Court of

Appeals for the Eleventh Circuit held that Roderick Jackson, a coach who was relieved of his coaching duties when he complained about the discriminatory treatment of his high school girls' basketball team, did not have a cause of action under Title IX to seek a remedy for the retaliation because the statute does not explicitly state that retaliation is one of the forms of discrimination that is prohibited. Fortunately, the Supreme Court reversed that decision, and held that there is such a cause of action for those who complain about discrimination—including "indirect" victims such as Coach Jackson, who was represented by the Center. *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). Justice O'Connor wrote the decision for the Court, in which she recognized that "if retaliation were not prohibited, Title IX's enforcement scheme would unravel." 544 U.S. at 180. However, the decision was 5-4, with the former Chief Justice, and Justices Kennedy, Scalia and Thomas dissenting. Whether the Court as currently constituted will be receptive to plaintiffs who raise related issues in future cases is now open to question.

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. *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998). Damages are available only if a school official had actual knowledge of the harassment and responded with deliberate indifference—a tough 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. The four dissenting Justices, Ginsburg, Souter, Breyer and Stevens, pointed out the unfairness of the result reached by the majority.

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 dissent by Justice Kennedy, joined by former Chief Justice Rehnquist and Justices Scalia and Thomas, 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, a school can never be held liable for student-on-student harassment. With the new Court, strong application of *Davis* to protect students in future cases may be in doubt.

3. The Scope of Title IX's Protections May be Limited.

Last term, the Court sent a strong signal that protection against discrimination under Title IX would not be limited because of certain restrictions that are applicable to statutes based on Congress' power under the Spending Clause of the Constitution.[27] In *Rumsfeld v. FAIR*, 126 S.Ct 1297 (2006), law schools challenged the Solomon Amendment, which provides that an entire university will lose federal funds if any part of the institution denies military recruiters access equal to that provided to other recruiters. The Solomon Amendment was enacted in response to law schools' restricting the access of military recruiters because the schools disagreed with the military's policy on homosexuals. Chief Justice Roberts wrote the decision for an 8-0 Court (Justice Alito did not participate), holding that the Amendment was a proper exercise of Congress' power "to provide for the common Defence," and did not violate the law schools' First Amendment rights. The Court stated that the deference due to Congress' exercise of its authority in the military sphere was not decreased because that authority was exercised indirectly through the Spending

Clause, and reiterated Congress' broad authority under that Clause.

However, a few months later, in *Arlington Central School District v. Murphy*, 126 S. Ct. 2455 (2006), Justice Alito, writing the opinion for a 6-3 Court, unnecessarily relied on limits on the Spending Clause power to hold that expert fees were not included in the "reasonable attorneys' fees as part of the costs" that could be awarded to parents who prevailed in Individuals with Disabilities Education Act ("IDEA") cases. Justice Alito cited statements in an earlier case that "legislation enacted pursuant to the spending power is much in the nature of a contract," and that any conditions on a State's acceptance of federal funds "must be set out 'unambiguously'". *Id*. at 2459, quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). The Court held that in spite of legislative history that showed that Congress intended to include expert witness fees, the IDEA did not provide the requisite "clear notice" to the states that they could be liable for those fees.[28] Justice Ginsburg concurred in the judgment, but protested the reliance on *Pennhurst* because the IDEA—like Title IX—was enacted pursuant to § 5 of the Fourteenth Amendment in addition to the Spending Clause, and, given the language of the statute and other decisions of the Court interpreting similar language about "costs", "no 'clear notice' prop" was necessary for the Court's decision. *Id*. at 2464. Justice Breyer, joined by Justices Stevens and Souter, dissented, based on the legislative history. The dissenters also rejected the majority's reliance on *Pennhurst*, stating that it does not suggest that "*every spending detail* of a Spending Clause statute [including remedies] must be spelled out with unusual clarity." *Id*. at 2470-71 (emphasis in original). They further denied that "contract-law principles apply to *all* issues" involving Spending Clause legislation. *Id*. (emphasis in original). Justice Alito's focus on a "clear notice" requirement could signal further efforts to restrict the full exercise of individual rights under Spending Clause statutes.

4. The Availability of Punitive Damages Under Title IX is at Stake.

The limiting effect of using contract law principles was demonstrated earlier in *Barnes v. Gorman*, 536 U.S. 181 (2002), in which the Court ruled, with a decision written by Justice Scalia, that punitive damages are not available to plaintiffs suing under Title VI because such damages are generally not awarded for breach of contract.[29] This decision could have severe consequences for women seeking redress under federal funding statutes, including Title IX, for egregious incidents of discrimination or harassment. Although all the Justices joined in the judgment, Justice Stevens, joined by Justices Ginsburg and Breyer, wrote separately to warn that—as subsequently shown by the IDEA case—"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 192-93.

D. Protection of Women's Health, Safety and Welfare Will be More Difficult

Even when the Court 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. In 2002, with Justice Kennedy as part of the majority, the Court also struck a blow to the right to seek relief at all 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. Federal Agencies' Power to Implement Statutory Protections Has Been Weakened.

In several cases, 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.

In addition, the Court has refused to defer to administrative decisions that protect employees' health and rights. In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), Justice Kennedy wrote the majority opinion, joined by the former Chief Justice and Justices Stevens, Scalia and Thomas, refusing to defer to the Secretary of Labor's judgment that an FMLA regulation that protected employees carried out the statutory mandate. The regulation had 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. It remains to be seen whether either of the new Justices will seek to uphold interpretations of the FMLA that strengthen its provisions.

The Supreme Court also refused to uphold an administrative action supporting employee 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.

2. *The Right of Individuals to Enforce Statutory Rights Under 42 U.S.C. § 1983 has been Cut Back.*

In 2002, the Court issued an opinion that 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.[30] In *Gonzaga University v. Doe*, 536 U.S. 273 (2002), 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.[31] Five of the Justices used the occasion, with an opinion written by former 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*.

Even when the Court 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.

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 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.

Two terms ago, the Court examined the relationship of the right to sue under § 1983 and other statutes. In *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), an individual challenging the city's denial of a permit for the building of an antenna tower sought injunctive relief under a provision of the Telecommunications Act of 1996 (TCA), and money damages and attorneys' fees under § 1983. The Court unanimously concluded that the TCA, which had specifically defined remedies, precluded an action under § 1983. However, with Justice Scalia writing the opinion, it rejected the Administration's argument that the availability of a private judicial remedy "conclusively establishes" Congress' intent to preclude § 1983 actions. Instead, there is only an "inference" that a statutory remedy is exclusive, which can be "overcome by textual indication, express or implicit, that the remedy is to complement, rather than supplant, § 1983." *Id*. at 122. Justice Breyer, joined by Justices O'Connor, Souter and Ginsburg, wrote a concurring opinion to "add that context, not just literal text" should be examined to determine Congress' intent. *Id*. at 127 (Breyer, J. concurring). Justice Stevens also wrote separately, to state that the presumption is that "Congress intended to preserve, rather than preclude, the availability of § 1983 as a remedy for the enforcement of federal statutory rights," and that legislative history, including Congressional silence, should be considered. *Id*. at 130 (Stevens, J. concurring).

Last term, without examining the basis for the lawsuit or *Gonzaga*, a unanimous Court allowed the plaintiff to enforce a provision of the federal Medicaid law, and held that a lien asserted by a state Medicaid agency violated the federal law. *Arkansas Department of Health and Human Services v. Ahlborn*, 126 S. Ct 1752 (2006). The Court presumably heard the case under the preemption doctrine, invalidating a state law that is inconsistent with federal law under the Supremacy Clause. Heidi Ahlborn, a college student who was left brain damaged after a car accident, had settled her tort claim for $550,000, which was about one-sixth of the stipulated value of her damages. However, Medicaid assessed a lien on her settlement of $215,000, the full amount that it had paid for her medical expenses. The Court, in an opinion by Justice Stevens, rejected the state's and the Administration's interpretation of the law, and held that the state's recovering more than a proportional amount of those expenses (about $35,000) conflicted with the federal anti-lien provisions.

However, the lower courts are issuing conflicting decisions on whether to allow a 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*. It is difficult to predict the impact of *Ahlborn*, and whether the lower courts and the Supreme Court will find that other state laws and practices are preempted by federal law without analyzing *Gonzaga*, or whether *Gonzaga* will be used to deny those who need assistance—many of them women—their day in court.

3. *The Right of Individuals to Enforce Constitutional Rights Under 42 U.S.C. § 1983 has been Limited.*

Two terms ago, the Court held that a police department's failure to respond to a woman's repeated calls for enforcement of a restraining order against her estranged husband did not violate the Due Process Clause of the Fourteenth Amendment, leaving her no redress under § 1983. *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748 (2005). In spite of the "horrible facts"—the husband murdered their three children while police ignored the woman's calls—and a state law that made enforcement of restraining orders mandatory, the Court found, 7-2, that Jessica Gonzales had no constitutionally protected property interest in having the police enforce the order. Justices Stevens and Ginsburg dissented.[32]

That same year, the Court used *Rancho Palos* as a basis for vacating a court of appeals decision finding a violation of the Equal Protection Clause. In *Communities for Equity v.*

Michigan High School Athletic Ass'n ("MHSAA"), 377 F.3d 504 (6th Cir. 2004), a case in which the Center has been involved, the court of appeals held that a state high school athletics association's requiring only girls' teams to play outside the traditional season for a sport violated the girls' right to equal protection under the Constitution. The Sixth Circuit relied on *Brentwood*, discussed above, to find that the association could be sued under § 1983. MHSAA sought Supreme Court review of the case, arguing that the plaintiffs' sole remedy was under Title IX. The Supreme Court vacated the Sixth Circuit's decision, and ordered reconsideration under *Rancho Palos*. Fortunately, the Sixth Circuit declined to change its earlier ruling, and further found that MHSAA's policies violated Title IX and Michigan's civil rights law, as well as the Equal Protection Clause. 459 F. 3d 676 (6th Cir. 2006). Whether this ruling will be reviewed by the Supreme Court remains to be seen.

A further cut back in the right to redress under § 1983 for the denial of constitutional rights came last term, when Justice Kennedy wrote the decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), for a 5-4 Court that included the two new Justices. The case was reargued after Justice Alito was sworn in, meaning that the Court must have been split 4-4, and he was needed to cast the deciding vote. *Garcetti* holds that the First Amendment does not protect a government employee from being punished for speech made pursuant to the employee's official duties. The case involved a deputy district attorney who was retaliated against after he prepared a memorandum for his supervisors that described inaccuracies in an affidavit that was used to obtain a search warrant, and testified as a witness for the defense. In what is probably a harbinger of decisions to come, Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Under the decision, only employees who speak as citizens on matters of public interest are protected—and can sue under § 1983 for violation of their First Amendment rights. Otherwise, Justice Kennedy stated, the Court would be demanding "judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Id.* at 1961. Thus, while the Court has granted strong protection against retaliation for employees who complain about discrimination under Title VII, it has elevated states' rights over protection for public employees who speak honestly to their supervisors about other wrongdoing.

Because of recent Supreme Court rulings, the lower courts are issuing conflicting decisions on whether to allow a right of action to seek relief for state violations of the laws governing Medicaid and other federally funded assistance programs.

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), Justice Kennedy voted to uphold 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 former Chief Justice and Justices O'Connor, Scalia and Thomas dissented.

But, two years later, in another 5-4 decision, Justice Kennedy was one of the dissenters when 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 Iolta. 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." These cases show how, yet again, critical legal protection depended on Justice O'Connor. Thus, 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 could be limited in the future.

Despite hard-won gains in the last 35 years, those who value women's legal rights fear that they could find these rights more severely eroded in the years to come.

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. Even with Justice O'Connor often serving as the swing vote to secure these rights, the Court has already imposed some significant restrictions on them. Now, Justices Scalia and Thomas, who voted for the restrictions, are expected to be joined frequently by Chief Justice Roberts and Justice Alito. Justice Kennedy has become the swing vote, but he has voted for most of the restrictions. Therefore, despite hard-won gains in the last 35 years, those who value women's legal rights fear that they could find these rights more severely eroded in the years to come.

References

[1] National Women's Law Center, The Record of John Roberts on Critical Legal Rights for Women, available at http://www.nwlc.org/pdf/NWLCRobertsReport_FINAL_Aug2005.pdf (Roberts Report); National Women's Law Center, The Nomination of Samuel Alito: A Watershed Moment for Women, available at http://www.nwlc.org/pdf/NWLCAlitoReport12-15-05.pdf (Alito Report).

[2] *The Fragile Kennedy Court*, Editorial, N.Y. TIMES, July 7, 2006, at A16.

[3] Justice 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.

[4] In October 2005, shortly after John Roberts had become Chief Justice, the Court refused to block the transport of a female prisoner to an outside clinic for an abortion. Missouri had adopted a policy prohibiting such transport under a law barring the use of state money for abortions, but the federal district court had granted the prisoner's request that the Department of Corrections be ordered to take her to the clinic. Justice Thomas would have stopped the transport, but he referred the case to the full Court, which disagreed with his order. *Crawford v. Roe*, 126 S. Ct. 477 (2005) (*mem.*).

[5] The Second Circuit also found the PBA to be unconstitutional, but it remanded the case after *Ayotte* for a determination of the appropriate remedy. *Nat'l Abortion Federation v. Gonzales*, 437 F.3d 278 (2d Cir. 2006). The proceedings on remand are stayed pending the decision in the PBA cases before the Court.

[6] Congress has recently enacted other legislation to limit women's right to choose. The Unborn Victims of Violence Act, enacted in 2004, 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. Congress has also sought to use the "power of the purse" to restrict the availability of abortions by adding amendments to the FY 2005 and 2006 Labor, Health and Human Services and Education Appropriations bill that 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.

[7] *See*, Roberts Report at 7-13; Alito Report at 13-22.

[8] Although South Dakota is the only state that passed a ban, eleven other states considered similar bans in their 2006 legislative sessions. National Women's Law Center, Abortion Bans: Coming to a State Near You?, available at http://www.nwlc.org/pdf/AbortionBanFactsheet_09.26.06.pdf

[9] In 1994, the Court held that the case, which had been filed in 1986, could proceed under RICO even though the protesters did not have an economic motive. *National Organization for Women v. Scheidler*, 510 U.S. 249 (1994). After a trial, the court awarded damages and entered a nationwide injunction against the protesters. Then, in 2003, in an 8-1 decision (Justice Stevens was the lone dissenter), the Supreme Court found that women's groups and clinics were not entitled to relief under RICO because the protesters' actions, even if obstructive, did not meet the federal definition of extortion under the Hobbs Act (the basis of the underlying "racketeering" needed to support a RICO action) because no "property" had been wrongly obtained. *National Organization for Women v. Scheidler*, 537 U.S. 393 (2003). On remand, the Court of Appeals for the Seventh Circuit asked the district court to consider another basis for relief. Reviewing the Seventh Circuit decision, the Supreme Court has now ruled that the Hobbs Act only prohibits physical violence that is related to robbery or extortion, not any violence that affects interstate commerce, and ordered the entry of judgment against the National Organization for Women.

[10] See the discussion of FACE and the Commerce Clause at note 16, *infra*.

[11] The new Court has shown its willingness to depart from longstanding precedent in other contexts. For example, in a 5-4 decision in a Fourth Amendment case, the dissenters (Justices Stevens, Souter, Ginsburg and Breyer) suggested that the majority decision could mark the beginning of the end of the "exclusionary rule," under which evidence obtained in violation of constitutional rights is not admissible at trial. *Hudson v. Michigan*, 126 S. Ct. 2159 (2006). And, there is specific reason to be concerned about the views of Chief Justice Roberts with regard to equal protection. Memoranda he wrote when he was special assistant to the Attorney General argue against the use of a heightened scrutiny standard for sex discrimination. Roberts Report at 13-16.

[12] The Sixth Circuit affirmed in a one-paragraph opinion, *sub. nom. McFarland v. Jefferson County Public Schools*, upholding the "well-reasoned opinion of the district court," which is reported at 330 F. Supp. 2d 834 (W.D. KY 2004).

[13] Last term, while Justice O'Connor was sitting, the Court refused to hear a challenge to a race conscious plan for the public schools in Lynn, Massachusetts, which had been upheld by the Court of Appeals for the First Circuit. *Comfort v. Lynn School Committee*, 418 F.3d 1 (1st Cir. 2005) (*en banc*). Following the Court's decision to hear the Seattle and Louisville cases, the parents challenging the Lynn plan moved for permission to file a petition for rehearing, but their motion was denied. *Comfort v. Lynn School Committee*, No. 05-348 (July 31, 2006).

[14] In *Concrete Works*, which upheld an affirmative action program, Justice Scalia, joined by the former Chief Justice, dissented from the denial of review, complaining that the program had not been subjected to sufficiently rigorous strict scrutiny.

[15] *Morrison* was distinguished on the ground that the statutory provision at issue did not regulate economic activity. *Raich*, 125 S. Ct. at 2210.

[16] The majority decision in *Morrison* sparked challenges to the constitutional validity of other civil rights statutes enacted under the Commerce Clause that affect women, including 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. The federal courts of appeals have uniformly upheld FACE, and the Supreme Court has so far repeatedly refused to review those decisions—and will hopefully continue to do so.

[17] A case decided last term concerning federal regulation of wetlands had been viewed as a test of Congress' authority under the Commerce Clause, but it was decided on statutory grounds. *Rapanos v. United States*, 126 S. Ct. 2208 (2006). Ominously, Chief Justice Roberts and Justice Alito joined Justices Scalia and Thomas in arguing for a narrow interpretation of the Clean Water Act. Justice Kennedy joined them in ordering a remand, but took a broader view of the Act. The dissenters would have upheld the regulation of the properties at issue.

[18] Justice Scalia cited *Hoke v. United States*, 227 U.S. 308 (1913 (prohibiting the interstate transport of women for immoral purposes) and *Lottery Case*, 188 U.S. 321 (1903) (banning the interstate shipment of lottery tickets) in support of his statement.

[19] The Eleventh Amendment has been interpreted by the Court to bar suits in federal court by an individual against a state.

[20] 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.

[21] On a brighter note, while it limited their right to sue for damages, the Court has 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.

[22] 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. *Hibbs* involves only the FMLA provision allowing leave for taking care of others, and the lower courts have gone both ways as to whether 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.

[23] Consistent with his concurring opinion in *VMI*, see page 7, *supra*, the former 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.

[24] On another positive note that year, 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 Medicaid case could be enforced in federal court, overturning the decision below that the Eleventh Amendment barred enforcement of the decree.

[25] Justice Alito's refusal to join the rest of the Court in protecting employees who face retaliation was foreshadowed by his decisions when he was on the Court of Appeals for the Third Circuit, where he seldom ruled in favor of plaintiffs who alleged discrimination. Alito Report at 28-34.

[26] On another positive note, in a short *per curiam* decision, the Court rebuked the Eleventh Circuit Court of Appeals for holding that a plant manager's calling an African-American "boy" on some occasions was not in itself evidence of discriminatory intent, and that requiring a disparity in qualifications between a plaintiff and a person hired to be "so apparent as virtually to jump off the page and slap you in the face" was not an appropriate test. *Ash v. Tyson Foods Inc.*, 126 S.Ct 1195 (2006)

[27] Title IX was also enacted pursuant to § 5 of the Fourteenth Amendment, as a law that enforces the Equal Protection Clause.

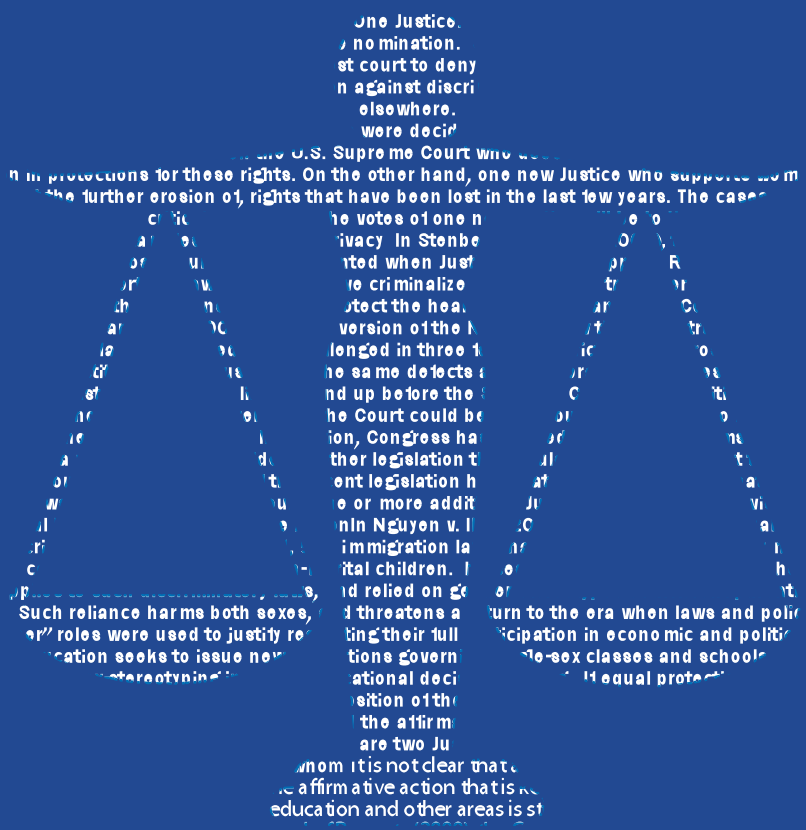
[28] Justices who seek to limit protection against discrimination could also be receptive to states' arguments that they are immune from suits for damages under Title IX and related statutes. See, e.g., *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161, 1171 (D.C. Cir. 2004) (dissenting opinion of Judge Sentelle endorsing this argument with regard to disability discrimination under Section 504 of the Rehabilitation Act).

[29] 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.

[30] 42 U.S.C. § 1983 provides a cause of action for the deprivation of federal rights "under color of" state law or practice.

[31] Although 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.

[32] In two criminal cases of importance to women that were decided together, Justice Scalia wrote the decision last term for a unanimous Court holding that statements made during a "911" call are admissible evidence even if the person who made the statements does not appear in court. *Davis v. Washington*, 126 S.Ct 2266 (2006). While Justice Scalia did not base the decision on concerns about domestic violence cases, use of the 911 calls has been important to prosecutors in those cases, where the victim is often afraid to appear. In the companion case, the Court held that a victim's statements to police when the emergency is over would not be admissible without the opportunity to cross-examine the witness.



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